A BUILDER'S DUTY OF CARE – WHEN SHOULD IT APPLY TO THE DIRECTORS AND EMPLOYEES OF COMPANIES INVOLVED IN THE CREATION OF DEFECTIVE BUILDINGS?

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Contents

Abstract

This thesis considers the issue of when a tortious duty of care to prevent economic loss should be imposed on the company directors and employees who stand behind the complex structure of companies and contracts involved in the creation of a defective building. Set against the background of the leaky building crisis, and what are (it is argued) unfair litigation outcomes, the thesis traverses the emergence and development of the principles that underpin liability for negligence and negligent misstatement in respect of defective buildings. A review of the cases confirms that the concepts of control and general reliance are the basis of New Zealand law in this area. There follows a discussion of the difficult relationship between company law principles and negligence principles, and the role of assumption of responsibility in the law of negligence and negligent misstatement, including a discussion of developments in the leaky building litigation. The thesis advanced is that, in respect of the creation of defective buildings, the approach to the issue of whether to impose a duty of care on company directors and employees would benefit from placing significant weight on the factor of de facto control of the inputs that dictate the outcome of a building project, and on the lower level factor of a direct or indirect financial interest in the outcome of the project.

It is argued that the approach to imposing a duty of care should be the same for directors and employees and in respect of statements and actions. In cases where the evidence establishes that the financial interest factor is not present, this should give rise to an inference that the company director or employee does not have control of the inputs that dictate the outcome of the project, so that no duty of care arises. This would enable a director or employee to exit litigation by way of an application for summary judgment. This is intended to discourage the practice of joining minor parties to litigation for the purpose of extracting a precautionary settlement. If control of the inputs that dictate the outcome of a project can be established by inference from the existence of the financial interest factor, or by the other evidence, then the two stage approach to the imposition of a duty of care would require a consideration of other factors that might negate the duty, such as the contractual matrix.

Word length

The text of this paper (including table of contents, footnotes and bibliography) comprises approximately 49616 words.

CHAPTER I - INTRODUCTION

I THE LEAKY BUILDING CRISIS

Leaky building syndrome emerged in New Zealand in the late 1990s, and describes weathertightness problems in buildings, prevalent in residential homes, townhouses, and apartments. The syndrome involves the failure of the external envelope of a building causing water ingress, and consequential damage to the building, most notoriously involving rotting timber framing.[1] The incidence of leaky building syndrome increased rapidly in the early 2000s, and was soon identified as the leaky building crisis. The word "crisis" is appropriate because there was systemic failure within the building industry.[2] Significant causes of leaky buildings include: the type of building systems and products used; shortcomings in building design; and shortcomings in the regulatory regime that governed the industry.

The syndrome primarily affects buildings constructed between 1994 and 2004, and it has been estimated that this includes between 22,000 and 89,000 homes, with a remediation cost estimated at NZ$11.3 billion.[3] The scale of the crisis is now widely understood. Analysis of the effects of the crisis on particular groups has focused on the most significantly affected parties, such as the government, councils and homeowners.

Buildings are usually constructed and acquired pursuant to contracts, often involving a complex web of contracts. The building industry is characterised by a large number of small firms.[4] Builders and developers commonly utilise limited liability companies to ameliorate risk.[5] The crisis has led to the insolvency of many participants in the construction industry, as a result of legal liability for remediation costs. The insolvency of significant construction companies, such as Mainzeal Property and Construction Limited, has been well publicised. The insolvency of the many smaller industry participants often goes unnoticed, except by those directly affected by the insolvency.

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1 *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 at [26] – [30] (CA).
2 At [31].
3 Price Waterhouse Coopers *Weathertightness – estimating the cost* (Department of Building and Housing, Wellington) July 2009 at 3.
4 Department of Building and Housing *Regulatory Impact Statement: Proposals and Options for Reform* (July 2010) at 3.
5 At 4.

The plight of directors and employees of companies involved in the construction of leaky buildings has received little attention.

II THE LEAKY BUILDING LITIGATION

The leaky building crisis has generated jurisprudence that has settled the law of New Zealand on many aspects of the law of negligence in respect of defective buildings, including the following:

- Building contractors, including subcontractors, owe a tortious duty of care to the first and subsequent owners of residential buildings,[6] whether those contractors are companies, individuals or partnerships. The position in respect of commercial buildings is not clear.[7]
- Councils owe a duty of care to the first and subsequent owners of residential and commercial buildings when exercising statutory functions related to the control of building.[8]
- Developers of residential buildings owe a non-delegable duty of care to the first and subsequent owners. The duty is to ensure that care is taken by others.[9]
- The duty of care in general negligence requires a contractor to exercise reasonable care and skill to achieve compliance with the Building Code, a performance based document pursuant to the Building Act 2004.[10]

The individuals (as opposed to corporates) who provide services in the construction industry do so under a wide array of legal arrangements, including as:

- head contractors, either as sole traders or in partnership;
- independent contractors under contracts for service, and "subcontractors" (in the conventional sense of the word);
- registered proprietors of the development land, and as "developers" (in the conventional sense of the word);
- directors of contracting companies;

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6 *Bowen v Paramount Builders (Hamilton) Limited* [1977] 1 NZLR 394 (CA) [*Bowen*].
7 *Blain v Evan Jones Construction Limited* [2013] NZCA 680 [*Blain*].
8 *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 [*Spencer on Byron*].
9 *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA) [*Mount Albert*].
10 *Spencer on Byron*, above n 8.

- employees under contracts of service.

Ascertaining the liability of an individual involved in construction requires an application of different legal principles, depending on which of the above arrangements was operating.

A significant area of uncertainty is the liability in tort of the directors and employees of companies involved in the construction of defective buildings. Between 2005 and 2015, the High Court of New Zealand produced more than thirty judgments on this issue. Despite that, the law remains uncertain. Setting the parameters of the builder's duty, and in particular determining upon whom it can be imposed, has proved difficult.

III THE RULE OF LIABILITY IN SOLIDUM

Most leaky building claims involve multiple defendants and third parties, sued on the basis that they are joint or concurrent tortfeasors. This requires an application of the rule of liability in solidum: joint or concurrent tortfeasors are each liable for the full amount of the plaintiff's loss.[11] The damage to a building caused by leaky building syndrome is indivisible, and those held to have negligently contributed to the causes are each liable for the plaintiff's entire loss.

The courts have the ability to apportion liability for damages amongst the defendants and third parties, including the right to order contributions between tortfeasors under s17(1)(c) of the Law Reform Act 1936. However, these apportionments are often distorted because of the high proportion of defendants who are insolvent or no longer exist, leading councils to argue that they have paid an increased and disproportionate share relevant to their level of fault.[12] Other solvent minor contributors are in a similar position.

This led to calls for reform of the in solidum rule by participants in the construction industry and councils, and to the New Zealand Law Commission's review of joint and several liability in 2012.[13] One alternative approach considered by the Law Commission was proportionate liability, which rests on the premise that a party's liability should be

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11 Stephen Todd "Multiple Tortfeasors and Contribution" in Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) 1279 at 1300.

12 Price Waterhouse Coopers *Weathertightness – estimating the cost*, above n 3, at 62.

13 Law Commission *Review of joint and several liability* (NZLC IP 32, Wellington, 2012).

based on their share of the responsibility or fault. After consultation, the Law Commission issued its final report in 2014, and recommended no change to the in solidum rule.[14] It is beyond the scope of this thesis to analyse or challenge the in solidum rule, which remains an important aspect of the law of negligence in New Zealand.

IV THE PRACTICAL PROBLEM

In some cases, the in solidum rule may visit disproportionate liability on those contractors that remain solvent. However that is a risk that can be appreciated and managed. The risk can be appreciated because those people and entities that choose to supply goods and services pursuant to a contract voluntarily assume contractual duties, which are usually co-extensive with the tortious duties imposed by law. The risk can be managed by the adoption of corporate and trust structures to shield assets from creditors, including successful plaintiffs in tort claims.

The individuals involved in the construction of buildings who are not contractors are in a different position. Some may be commercially sophisticated, standing behind the corporate and trust structures engaged in the construction project, remaining effectively immune to claims by utilising voluntary bankruptcy if necessary. The less sophisticated, such as the employees of a construction company, may unwittingly be subject to a tortious duty of care, and therefore unable to appreciate or manage the risk.

The insolvency of the more significant contributors to the construction of a defective building has a direct impact on the position of the unsophisticated employee. Owners often elect to sue only the liable council, relying on the in solidum rule. Claims against the directors and employees of companies involved in the construction of a building are now routinely resorted to by councils seeking contributions, rather than owners. The increased incidence of the allocation of damages to the liable council has caused councils to take an aggressive approach to joining in third parties to leaky building claims.

Leaky building claims are legally and factually complex. Litigation costs are high. The imposition of tortious duties of care on the various participants in the construction process depends on the application of several distinct bodies of case law, often including conflicting decisions. It is difficult to distill coherent general principles. Arguments regarding causation and relative contributions between parties are often dealt with late in

[14] Law Commission *Liability of multiple defendants* (NZLC R132, 2014).

the litigation process, and the answers are uncertain. Once a minor party is joined to the litigation, the prospect of the legal costs that will be incurred, and uncertainty over liability, allows the plaintiff or the party seeking a contribution the opportunity to extract a precautionary settlement. For an employee with limited resources, this can be life changing.

The practice of joining minor parties to litigation to extract a precautionary settlement could be discouraged if the test for the imposition of a duty of care on a director or employee of a company involved in the creation of a defective building was more precisely defined. The issue should be amenable to resolution by interlocutory applications for summary judgment or strike out, in cases where the facts can be ascertained and stated with sufficient certainty early in the litigation. As the law stands, that is not so. If the test for the imposition of a duty of care was stated more precisely and the relevant factors identified, that would assist directors and employees in the difficult task of assessing their risk of liability and options for settlement out of court.

V ECONOMIC LOSS

This area of the law raises difficult issues of legal principle, including where to set the limits on the recovery of economic loss in tort. The duty of care imposed on builders has as its genesis the rule of *Donoghue v Stevenson (Donoghue)*,[15] as stated by Lord Atkin:[16]

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

This famous passage has frequently been referred to as the neighbourhood principle, and also as the principle of reasonable foreseeability. The application of this principle in cases involving defective buildings took hold in the 1970s. The jurisprudence that has flowed from *Donoghue* includes the transmutation of this principle into a broader concept of proximity.

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15 *Donoghue v Stevenson* [1932] AC 562 (HL) [*Donoghue*].
16 At 580.

Donoghue was concerned with the manufacture of a defective chattel. The rule of *Donoghue* extends no further than injury to life or property (excluding the defective product itself).[17] Since *Donoghue*, the courts have imposed duties to take reasonable care to prevent pure economic loss. *Hedley Byrne & Co Limited v Heller & Partners Limited (Hedley Byrne)*[18] involved a negligent misstatement by a banker to an inquiring advertising agent, regarding the credit worthiness of a customer of the bank. The House of Lords found the defendant liable based on an assumption of responsibility by the maker of the statement, in circumstances where the maker of the statement knew that the recipient of the statement would rely on it. The existence of these circumstances was said to give rise to a special relationship. That reasoning has had a significant bearing on the defective building cases.

The recovery of economic loss is a difficult policy issue that vexed the courts in the early defective building cases. The case law reflects the conceptual difficulties that arise when Lord Atkin's neighbourhood principle is extended to the recovery of economic loss associated with defective buildings. This has required the courts to balance the desirability of providing a remedy where there has been negligence in fact, with the desirability of placing limits on the recovery of economic loss.

VI SOME KEY CONCEPTS

The jurisprudence in this area of the law draws heavily on three concepts: control, assumption of responsibility and reliance. Control and assumption of responsibility are focused on a defendant's conduct. Reliance is focused on a plaintiff's conduct.

These concepts have not been consistently defined or applied in the case law. Control can be focused on a task, or an outcome. Assumption of responsibility can be defined narrowly, requiring an actual assumption of responsibility, sometimes referred to as assumption of responsibility in the quasi-contractual sense; alternatively, it can be defined broadly, when it is deemed to exist. Reliance can be defined narrowly, requiring actual reasonable reliance by a plaintiff on a defendant; alternatively, it can be defined broadly, requiring only general reliance by a class of plaintiffs on a class of defendants.

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17 At 599.

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

VII THE ISSUE AND THE THESIS

When should a tortious duty of care to prevent economic loss be imposed on the directors and employees of companies involved in the creation of a defective building?

The thesis is that the answer should be based on the conventional two stage framework for analysing proximity and policy factors which support or negate the duty.[19] It is proposed that a duty of care be imposed on an individual who stands behind the complex structure of companies and contracts involved in the construction of a defective building only if that person has de facto control of the inputs that dictate the outcome of a building project. The corollary is that a company director or employee who does not have that control would effectively be immune to claims in negligence in respect of defective buildings.

The approach to imposing a duty of care on directors and employees should be the same, and an individual's status as a director or employee should not be determinative. The most significant factor in establishing control should be the existence of a direct or indirect financial interest in the outcome of a building project, in other words a profit motive. The absence of the financial interest factor would allow an inference that there is no de facto control of the inputs that dictate the outcome of a project, and therefore no duty of care. This inference could be displaced by evidence of other facts that establish that the control existed. Conversely, the existence of the financial interest factor would allow an inference that there is the requisite de facto control. This would allow the imposition of a duty unless the inference was displaced by other evidence, or the duty was precluded by the contractual matrix or other novel policy arguments.

It is important to note that this thesis is only concerned with economic loss arising from the negligent creation of defective buildings that must comply with the Building Code. None of the propositions advanced in this thesis would affect the liability of directors and employees for other torts committed during the construction process, such as damage to a person or property other than the defective building.

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[19] As confirmed in *North Shore City Council v Attorney General* [2012] NZSC 34, [2012] 3 NZLR 341 [*The Grange*].

VIII THE STRUCTURE OF THIS THESIS

To fully explore the issues raised by the current state of the law, it is necessary to analyse the legal principles and the concepts that have been applied in the development of tortious liability for the creation of defective buildings. These principles and concepts can then be applied to evaluate the law as it applies to the directors and employees of companies involved in the creation of defective buildings.

Chapter II discusses the emergence and development of a builder's duty of care in New Zealand prior to 2000. The divergent approaches of the major Commonwealth jurisdictions are briefly considered. Two key propositions are advanced. First, defective building cases involve claims for economic loss. The question of where to set the limits on the recovery of economic loss in tort requires a social value judgement, and there is no one correct answer. The second proposition is that the development of a duty of care in respect of defective buildings in New Zealand was based on the concepts of control of the construction process, and general reliance by a class of plaintiffs (building owners) on a class of defendants (builders and councils). It was not considered necessary for the New Zealand courts to resort to the concepts of assumption of responsibility and actual reliance from *Hedley Byrne*.

Chapter III analyses the defective building cases in New Zealand since 2000, focusing on claims against councils and building contractors. The analysis confirms the continued application of the two stage inquiry into proximity and policy factors that support or negate a duty. The cases establish that the underlying concepts of control and general reliance remain the basis of the duty of care, rather than assumption of responsibility and actual reliance. It is argued that any distinction between residential buildings and commercial buildings is no longer valid, and a duty of care should be imposed on a contractor unless the duty is inconsistent with the contractual matrix. The cases discussed confirm that the duty requires the exercise of reasonable care to achieve compliance with the Building Code.

Chapter IV analyses the non-delegable duty that has been imposed in New Zealand case law on a party that has legal control of the development of residential buildings undertaken for profit. The duty is to ensure that care is taken by others. It is argued that a non-delegable duty should not be imposed on a builder, or in respect of commercial property. Where the developer is a company, the cases establish that the directors do not owe a concurrent non-delegable duty. This chapter introduces the proposition that the

factors that support the imposition of a non-delegable duty on a development company, namely control and a profit motive, may also support the imposition of a conventional duty of care in general negligence on a director or employee of a development company.

Chapter V deals with the relationship between company law principles and tort law principles. It is argued that a building company's liability for a defective building is based on the company owing a primary duty of care, rather than secondary and vicarious liability for the conduct of the company's directors and employees. Breach can be established because that conduct is attributed to the company. The proposition advanced is that this does not result in the disattribution of the conduct from the director or employee, who may be a concurrent tortfeasor, depending on an application of the two stage inquiry. The role of the concepts of control and assumption of responsibility within the proximity inquiry is discussed, in light of the Court of Appeal's extension of assumption of responsibility reasoning to claims against directors. This discussion highlights the lack of clarity in the definition and application of these concepts in the case law prior to the leaky building crisis.

Chapter VI discusses the distinction between the elements of the torts of negligence and negligent misstatement, and what has become known as the elements of the tort approach based on this distinction. It is argued that whether a claim is for negligent misstatement or general negligence, the starting point is always a consideration of whether a duty of care should be imposed. The only point of distinction is the role of assumption of responsibility as a factor considered in the proximity inquiry. This chapter introduces the proposition that any distinction, in the context of the creation of defective buildings, is invalid. The key factors in the proximity inquiry should always be control and general reliance.

Chapter VII analyses the reasoning applied by the courts in leaky building claims in general negligence against the directors and employees of companies, revealing the difficulty that the courts of first instance have encountered when faced with two alternative conceptual grounds for liability: assumption of responsibility or control. The proposition advanced is that the courts of first instance have abandoned assumption of responsibility in claims of general negligence, preferring to base liability on control of a task; all that is required is the identification of negligent conduct by the director or employee. It is argued that this approach is wrong in principle, because the duty then rests on responsibility for a task and foreseeability alone. What is required is a

consideration of the relevant proximity and policy factors within the conventional two stage framework.

Chapter VIII analyses the reasoning applied by the courts in leaky building claims in negligent misstatement against the directors and employees of companies, where the concepts of assumption of responsibility and actual reliance from *Hedley Byrne* have continued to be applied. An alternative approach is discussed, based on treating negligent statements connected to building work as part of the building work, and therefore subject to the principles of general negligence.

Chapters IX and X develop the thesis that a duty of care should only be imposed on those company directors and employees who have de facto control of the inputs that dictate the outcome of a building project: It is argued that the key factor in determining control should be the existence of a direct or indirect financial interest in the outcome of a project.

Chapter IX discusses policy, including the context provided by the statutory scheme. It is proposed that, as a matter of policy, the builder's duty of care should not be expanded to encompass the blanket imposition of a duty of care on all individuals who undertake work. The preferable approach is to refine the existing approach to control, so that it is more discriminatory between those individuals who have control of outcomes, and those who do not.

Chapter X focuses on the factors of control and general reliance in the proximity inquiry, and discusses the relationship between the existence of an individual's financial interest in the outcome of a project, and control of the inputs that dictate the outcome of the project. The chapter proposes a definition of the financial interest factor, and that inferences could be drawn for or against the existence of a duty of care based on the absence or presence of the financial interest factor. It is argued that the availability of inferences would enable mere employees, who have no control over the inputs that dictate the outcome of a project, to avoid liability. Conversely, the individuals who have financial control of a development company, who are likely to be directors and shareholders, would likely be subject to a duty of care.

CHAPTER II - THE EMERGENCE AND DEVELOPMENT OF A BUILDER'S DUTY OF CARE

I INTRODUCTION

This thesis addresses the imposition of a builder's duty of care on the directors and employees of development and construction companies. The starting point is an analysis of the conceptual basis of a builders' duty of care. Once that conceptual basis is identified, then it can be applied in a consideration of whether the duty should be extended to the directors and employees of the development and construction companies involved in construction.

The case law on the imposition of a tortious duty of care in the context of defective buildings evolved from the 1970s. Over time, the approach of the courts in the United Kingdom, Australia, Canada and New Zealand diverged, with the Privy Council acknowledging that more than one approach is valid.[20]

This chapter discusses the seminal defective building cases prior to 2000. The focus is on the important developments of the tort. The cases selected for discussion are not exhaustive of the significant body of relevant case law. The cases discussed include judgments on the liability of builders and councils, there being a significant degree of assimilation in the principles.

Two key propositions are advanced. The first is that the decision to impose a duty to take reasonable care in the creation of a building to avoid economic loss to a building owner requires a social value judgement – a preference for either: the extension of tort remedies where other remedies prove deficient; or the primacy of contractual remedies to the exclusion of a tort remedy. Once that social value judgement is made, cogent legal reasoning can be assembled to support the value judgement. The second is that, in New Zealand, the value judgement was for the imposition of a duty of care on a builder, based on the builder's control of the construction process and general reliance by homeowners.

Some of the early cases included findings on the liability of company directors, and that aspect of the decisions is discussed in chapter V. The basis of the liability of directors

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

and employees became confused by the introduction into this area of the law of the *Hedley Byrne*[21] concepts of actual assumption of responsibility and actual reliance. Before it is possible to resolve this confusion, it is necessary to understand how it has arisen, and to confirm the basic principles that have continued to underpin a builder's duty in New Zealand, which is the purpose of chapters II to IV.

II THE EMERGENCE OF THE DUTY

A Dutton

In *Dutton v Bognor Regis United Building Co Limited (Dutton)*,[22] the United Kingdom Court of Appeal imposed a duty of care on a council, for negligent inspections of the foundations of a house, which became manifest when the house was owned by a subsequent purchaser. The Court accepted the proposition that the council could only be held liable for inspections if the builder was also liable for negligence in the construction of the house.

Lord Denning applied *Donoghue*.[23] He saw no distinction between chattels and real property, which led to his conclusion that a builder is liable for negligence in constructing a house which causes injury to a visitor.[24] He reviewed the statutory power that the council had exercised, holding that the control that the council had over the building of a house carried with it a duty to exercise reasonable care when exercising that power.[25] Lord Denning allowed recovery of the cost of repairs, because of what he considered to be an impossible distinction between injury to a person caused by a collapsing house, and the cost of repairing a house before it collapses to prevent that injury.[26] He held that the damage was not solely economic, because it was physical damage to the house.[27] However, over time it has come to be accepted that defective building claims are claims for economic loss. The "impossible distinction" was a powerful argument that would have been better engaged in support of a deliberate extension of *Donoghue*.

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21 Above n 18.
22 *Dutton v Bognor Regis United Building Co Limited* [1972] 1 QB 373, [1972] 1 All ER 462 (CA) [*Dutton*].
23 Above n 15.
24 *Dutton*, above n 22, at 471 and 472.
25 At 470, and per Sachs J at 482 and per Stamp LJ at 477, 489 and 490.
26 At 474.
27 Above.

B Bowen

In *Bowen*,[28] a subsequent purchaser of a house sought damages based on the cost of repairing latent defects in the foundations. The Court of Appeal determined the liability of a building company that had constructed the building pursuant to a contract. The existence of a contract between the company and the first owner of the land was of itself insufficient to negate a duty in tort.[29] Richmond P held that building contractors, architects and engineers are all subject to a duty to use reasonable care to prevent damage to persons whom they should reasonably expect to be affected by their work.[30] His reasoning closely followed Lord Denning's in *Dutton*. In effect, Richmond P extended *Donoghue* to cases of economic loss "directly and immediately connected" with damage to the building,[31] without acknowledging the extension of *Donoghue* as deliberate. His finding was based on the fallacy that the claim was not for economic loss.[32] This reasoning was supported by Woodhouse and Cooke JJ.[33]

III THE EXPANSION OF THE DUTY

A Anns – the Two Stage Test

In *Anns v Merton London Borough Council (Anns)*,[34] the House of Lords upheld the liability of a council to a subsequent owner of a flat, for negligent inspections of the foundations of the building, which caused latent defects. The council's statutory control of building was determinative. Consistent with the reasoning in *Dutton*, Lord Wilberforce considered that the builder would also be liable.[35]

Lord Wilberforce's speech is best known for his exposition of a two stage test for the imposition of a duty of care in negligence: stage one requiring a finding of proximity or neigbourhood which would give rise to a prima facie duty of care; and the second stage requiring an inquiry into matters of policy which might negate the duty.[36] The dichotomic approach was obscured by Lord Wilberforce's later reasoning, when he stated

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28 Above n 6.
29 At 407 per Richmond P and at 419 per Woodhouse J.
30 At 406.
31 At 411.
32 Above.
33 At 417 per Woodhouse J and at 423 per Cooke J.
34 *Anns v Merton London Borough Council* [1978] AC 728 (HL) [*Anns*].
35 At 758.
36 At 751.

that the council's duty was not based on the "neighbourhood" principle alone or upon the factual relationship of control over the inspections, and an essential factor was that the council was a public body discharging functions under statute.[37] Although the principle of reasonable foreseeability from *Donoghue* had begun to evolve into a broader principle of proximity, the factor of control remained central to the inquiry in defective building cases.

Lord Wilberforce noted that damages may include damages for personal injury and damage to other property,[38] which was a restatement of the principle in *Donoghue*. Drawing on the decision in *Bowen*, he stated that damages could include damage to the house itself, as a matter of "normal principle", classifying the damage as "physical damage",[39] without expressly identifying that this was an extension of *Donoghue*.

B The Emergence of a Non-delegable Duty

In a series of decisions from the late 1970s, a duty of care was imposed on development companies. The nature of the duty was notable in two respects: first, it was a primary duty imposed on the company without any requirement of a precursor duty owed by the company directors or employees for whom the company was vicariously liable; secondly, the nature of the duty evolved, so that the performance of the duty became non-delegable.

First, in *Batty v Metropolitan Property Realisations Limited* (*Batty*), [40] the United Kingdom Court of Appeal followed *Anns* and imposed a duty of care on a building company and a development company, in circumstances where a house was doomed from the outset because of the defective nature of the land upon which it was constructed. Megaw LJ found that no reasonable builder or developer would have erected a building upon the land, because shallow slips were evident.[41] There was a close relationship between the development company and the building company, which Megaw LJ described as "a co-operative effort".[42] This led to a finding of joint responsibility for the erection of the house.[43] The underlying concept was joint control of the project.

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37 At 753 and 754.
38 At 759.
39 Above.
40 *Batty v Metropolitan Property Realisations Limited* [1978] 2 All ER 445 [*Batty*].
41 At 452.
42 At 449.
43 At 456.

Then in *Callaghan v Robert Ronayne Limited* (*Callaghan*),[44] the Supreme Court of New Zealand (now known as the High Court) considered the defective construction of a residential flat, and allegations of breach of tortious duty by the development company and its directors.[45] The four directors of the development company were airline pilots. The development company engaged the sub-trades involved in constructing the house, but a contractor was not engaged to supervise construction. The development company argued that it had engaged independent contractors to do the work, relying on the well established general principle that an employer is not liable for acts of negligence on the part of an independent contractor. Speight J found that the development company had not divested itself of control of the work, and that supervision of the work remained with the company. He held that the development company was the "builder who erected the units",[46] so liability ensued on a conventional application of *Dutton* and *Bowen*, based on breaches of duty that were personal to the development company. Speight J found liability on an alternative basis. The development company was responsible for the negligence of the independent contractor because the development company could not delegate its obligation to comply with the permit, and the by-laws.[47] He made this finding despite noting that there was no precedent, and that previous cases imposing non-delegable duties involved personal injury.[48]

Finally, in *Mount Albert*,[49] the New Zealand Court of Appeal imposed liability on the development company, which had owned the land and contracted a partnership to build flats, which were constructed negligently. The partnership had purchased the building materials and engaged the required sub-contractors. Similar to the development company in *Callaghan*, the directors of the development company in *Mount Albert* had no background in construction. The development company in *Mount Albert* argued that the partnership engaged to construct the flats was an independent contractor, for whom the development company was not liable.[50] Cooke J held the development company liable on two grounds. The first was that there was a "relationship" between the development company and the building partnership, so that the development company was jointly liable, applying *Batty*.[51] However, Cooke J did not identify any act or omission by the development company which was negligent, whether that act or omission was carried out

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44 *Callaghan v Robert Ronayne Limited* (1979) 1 NZCPR 98 [*Callaghan*].
45 The liability of the directors is dealt with in chapter V.
46 *Callaghan*, above n 44, at 104 and 107.
47 Above.
48 Above.
49 Above n 9.
50 At 240.
51 Above.

jointly with the partnership, or otherwise.[52] Secondly, Cooke J imposed a non-delegable duty on the development company. He noted that it was not easy to state clear principles, and that in the absence of a general principle various cases must be dealt with individually. There was no authority directly on point, but despite that he held that the development company owed a duty to "see that proper care and skill are exercised in the building of the houses and that it cannot be avoided by delegation to an independent contractor."[53] Rather than being obliged to take care, the development company was required to ensure care was taken by others.

Three aspects of the reasoning in these cases is important when considering the position of company directors and employees: first, the company's duty was primary and not secondary, discussed further in chapter V; secondly, the non-delegable nature of the duty, discussed further in chapter IV; and thirdly, the concept that underpins the duty is the company's control over the outcome of the projects, discussed further in chapter X.

C The High-water Mark

The expansion of the tort peaked in the 1980s, as the major Commonwealth jurisdictions embraced the recovery of economic loss. For example, in *Junior Books Limited v Veitchi Co Limited (Junior Books)*,[54] the House of Lords upheld the liability of a subcontractor to the owner of a commercial building for defects of quality. In *City of Kamloops v Neilsen*,[55] the Supreme Court of Canada followed *Anns* and imposed a duty of care on a local authority in respect of negligent inspections of foundations of a house. Wilson J acknowledged the force of the local authority's argument that precedent precluded the recovery of pure economic loss.[56] His lengthy discussion of economic loss included indeterminacy as the rationale for the rule precluding recovery of economic loss, as expressed by Cardozo CJ in *Ultra Mares Corp v Touche*,[57] that to allow such recovery would expose defendants to liability for an indeterminate amount for an indeterminate time to an indeterminate class.[58] Wilson J held that the principle of indeterminacy was not engaged, because the class of plaintiffs was limited to the owners or occupiers of the property at the time that the damage becomes manifest.

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52 Above.
53 At 241.
54 *Junior Books Limited v Veitchi Co Limited* [1983] 1 AC 520 (HL) [*Junior Books*].
55 *City of Kamloops v Neilsen* [1984] 2 SCR 2 (SCC).
56 At 26.
57 *Ultra Mares Corp v Touche* 255 174 NE441 (NY 1931).
58 *City of Kamloops v Neilsen*, above n 55, at 28.

In *Stieller v Porirua City Council (Stieller)*,[59] the New Zealand Court of Appeal imposed a duty of care on the council in respect of economic loss associated with patent defects in a weatherboard house. Previous cases had involved latent defects. McMullin J reviewed the relevant provisions of the Local Government Act 1974 and the applicable by-laws, under which the council was operating, and held that the construction of houses with good materials in a workmanlike manner was a matter within the council's control.[60]

During the 1980s, it was acknowledged that the expansion of the tort was based on value judgements. Recovery of economic loss no longer raised a problem of principle, and control continued to dominate the proximity inquiry.

IV THE RETREAT FROM ANNS

A D & F Estates

In *D & F Estates Limited v Church Commissioners for England (D & F Estates)*,[61] the House of Lords reconsidered a builder's duty of care, in circumstances where the lessees and occupiers of flats sought to hold the builder liable for the negligence of a subcontractor that carried out interior plastering. The speeches of the Law Lords established a new paradigm for the imposition of a duty of care in English law. In contrast to *Anns*, where Lord Wilberforce had endeavoured to articulate a test of general application, *D & F Estates* signalled a return to an incremental approach, with reasoning based on whether the alleged duty fell within established principle, emanating from *Donoghue*.

Lord Bridge noted that the duty of care in *Donoghue* was based on the existence of danger of physical injury to persons or their property, other than the very property which gave rise to the danger.[62] He considered that if a building defect is discovered before any damage is done, then the loss to the owner who has to repair the structure to avoid a potential source of danger to third parties is purely economic.[63] He concluded that the builder was not liable under the principle of *Donoghue* or "any legitimate development of

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59 *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA) [*Stieller*].
60 At 94.
61 *D & F Estates Limited v Church Commissioners for England* [1989] AC 177 (HL) [*D & F Estates*].
62 At 202 and 203.
63 At 206.

that principle."[64] Lord Oliver's reasoning was similar, describing *Anns* as introducing a new type of product liability in relation to the construction of buildings, and an entirely novel concept of the tort of negligence.[65] The underlying rationale was a value judgement that this type of liability was a matter for contract. Lord Oliver and Lord Bridge considered themselves precluded by authority from a deliberate extension of *Donoghue* to the recovery of pure economic loss associated with building defects. The House of Lords was left to confront its prior decision in *Junior Books*, which had permitted exactly that. Lord Bridge referred to the "unique" relationship between the parties in *Junior Books*,[66] and Lord Oliver went a step further, suggesting that the unique relationship in *Junior Books* amounted to actual reliance within the principle of *Hedley Byrne*.[67]

B Murphy

The reasoning in *D & F Estates* was solidified by the House of Lords in *Murphy v Brentwood District Council* (*Murphy*),[68] another case involving a council's negligent inspection of house foundations. The Law Lords' again acknowledged that these cases involve the recovery of pure economic loss.[69] Lord Oliver described previous attempts to categorise the loss as physical damage as an attempt to attain consistency with *Donoghue*, and this categorisation obscured the true nature of the claim.[70] The Law Lords were unwilling to take *Anns* to its logical conclusion,[71] which was to accept *Anns* as establishing a new class of case permitting the recovery of economic loss. *Anns* was rejected as wrong in principle, and described by Lord Keith as "a remarkable example of judicial legislation."[72]

Again, the House of Lords was forced to deal with prior cases where economic loss had been awarded, such as *Pirelli General Cable Works Limited v Oscar Faber & Partners*[73] and *Junior Books*. One option was to declare these cases as wrongly decided. Instead, these decisions were reinterpreted as falling within the principle of *Hedley Byrne*,

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64 At 207.
65 At 211.
66 At 202.
67 At 215.
68 *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) [*Murphy*].
69 Per Lord Keith at 468; per Lord Bridge at 479; and per Lord Oliver at 485.
70 At 485.
71 At 474.
72 At 471.
73 *Pirelli General Cable Works Limited v Oscar Faber & Partners* [1983] 2 AC 1 (HL).

involving a "special relationship of proximity" which introduced "the *Hedley Byrne* principle of reliance", invoking the concept of actual reliance.[74]

C The Expansion of Hedley Byrne

The most significant aspect of *D & F Estates* and *Murphy* for future decisions in New Zealand was the introduction into defective building cases of the *Hedley Byrne* principles of assumption of responsibility, actual reliance and a special relationship. In chapter III, it is argued that this led to confusion in New Zealand law. The introduction of these principles to claims against company directors is discussed in chapter V. The ongoing relevance of the concepts of assumption of responsibility and actual reliance is one of the most important issues that arises in claims against the directors and employees of companies involved in the creation of a defective building. The issue is addressed in detail in chapters VI to X.

V THE SUBSEQUENT DIVERGENCE OF APPROACH WITHIN THE COMMONWEALTH

A The New Zealand Approach

1. "An Impossible Distinction"

Sir Robin Cooke reacted to *Murphy* with his well known extrajudicial article "An Impossible Distinction,"[75] which contains an erudite analysis of the true difference in approach between the House of Lords in *D & F Estates* and *Murphy,* and the judgments in *Dutton*, *Anns* and *Bowen*, which Cooke attributed to "a difference in value judgements".[76] Cooke viewed the recent approach of the House of Lords as one of "legal conservatism."[77] He considered that it was analytically open to the House of Lords to decline to extend the principle of *Donoghue* to building defect cases, but equally analytically open to take a more expansive approach, and he saw this as a "policy choice."[78] Cooke continued to favour the policy choice that he had made to expand the

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74 *Murphy*, above n 68, at 475.
75 Robin Cooke "An Impossible Distinction" (1991) 107 LQR 46.
76 At 49.
77 Above.
78 At 57.

tort in *Bowen*, based on Lord Denning's observation in *Dutton* that a distinction between liability for the cost of repairs to avoid injury, and liability for injury, is impossible.[79]

The New Zealand courts declined to follow *D & F Estates* and *Murphy*. The established builder's duty of care was undisturbed, and it remained founded on control. For example, in *Chase v De Groot* (*Chase*),[80] the defendant owned the subject land and engaged contractors to assist with construction of a house, and undertook some of the work himself, although having very little building experience.[81] The defendant then sold the house to the plaintiffs, who discovered defects in the building. Tipping J considered himself bound by *Stieller*. He accepted that the defendant was the person primarily responsible for building the defective foundations in question, and held him subject to a duty of care. The underlying rationale was that the defendant was in control of the building process.[82]

2. *Hamlin*

In *Hamlin*,[83] in the Court of Appeal, Cooke P imposed a duty of care on the council based on the "linked concepts of reliance and control", finding reliance because home-owners in New Zealand traditionally relied on local authorities to exercise reasonable care.[84] This introduced what has become known as general reliance; reliance by a class of plaintiffs on a class of defendants. So long as a plaintiff and a defendant fall within the recognised classes, actual reliance need not be proved.

Cooke P and Casey, Gault and Mackay JJ acknowledged that the claim was for economic loss.[85] Cooke P discussed the concepts of assumption of responsibility and reliance as justification for a tortious duty to take reasonable care to avoid causing economic loss, including the concepts of general community reliance and deemed assumption of responsibility, although not articulated by Cooke P in precisely those terms.[86] This

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79 At 56. For a critique of Cooke's reasoning, and *Bowen* generally, see Peter Watts "Managerial and worker liability for shortcomings in the building of leaky homes – an antediluvian perspective" in *The Leaky Building Crisis – Understanding the Issues* (Brookers, Wellington, 2011).

80 *Chase v De Groot* [1994] 1 NZLR 613 (HC) [*Chase*].

81 At 614.

82 See also *Gardiner v Howley* [1995] ANZ Conv R 520, where a duty of care was imposed on property owners based on control over the defective work.

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

84 At 519; this reasoning was supported by Casey J at 530 and Gault J at 534.

85 Per Cooke P at 519, per Casey J at 529, per Gault J at 533 and per Mackay J at 545.

86 At 519 and 520.

reflected the House of Lords' reasoning in *D & F Estates* and *Murphy*, and obfuscated the previously settled focus on control.

There is a broader theme in the President's judgment, which emanated from his 1991 article.[87] He saw little value in artificial distinctions between physical and economic loss,[88] stating that "formulae and doctrine do not provide the answers to new duty of care questions. In the end it is a matter of judicial judgment."[89]

Cooke P confirmed that *Bowen* applies to "house builders", although those words were not defined.[90] He left open the question of whether a duty should be imposed on subcontractors and suppliers, acknowledging that such a duty may not be demanded in industrial construction,[91] as opposed to residential construction.

Richardson J was influenced by "the social and governmental context", and his identification of some of the distinctive and longstanding features of the New Zealand housing scene during the 1970s and 1980s.[92] He considered that those social circumstances had influenced the New Zealand courts to "require of local authorities a duty of care…"[93] Richardson J acknowledged that this was "essentially a social value judgment".[94] He considered the scheme of the Building Act 1991, and the Building Industry Commission report that preceded it,[95] noting that the Act contained no limitations on the imposition of the duty.[96] Gault J also found this point compelling.[97]

The Privy Council upheld the Court of Appeal's decision.[98] Lord Lloyd acknowledged that the case involved the recovery of economic loss.[99] He assessed the duty in New Zealand law as being based on general reliance and control,[100] noting that there was nothing new in the concept of "reliance by house buyers generally as an element in the

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87 Cooke "An Impossible Distinction", above n 75.
88 *Hamlin*, above n 83, at 520 and 521.
89 At 523.
90 At 522.
91 At 520.
92 At 524.
93 At 527.
94 At 528.
95 Building Industry Commission Reform of Building Controls: Volume I *Report to the Minister of Internal Affairs* (Building Industry Commission, Wellington 1990).
96 *Hamlin*, above n 83, at 526 and 528.
97 At 534.
98 *Hamlin*, above n 20.
99 At 517.
100 At 516, 517 and 518.

imposition of a duty of care".[101] The case could not be viewed as falling within the principle of *Hedley Byrne*, which was based on assumption of responsibility and actual reliance.[102] In doing so, Lord Lloyd drew a plain distinction between the conceptual basis of New Zealand law on the recovery of economic loss linked to defective buildings, and the conceptual basis of English law. The latter was limited to the *Hedley Byrne* exception to the general rule that economic loss could not be recovered in a defective building case.

Lord Lloyd noted that the decision whether to hold a council liable for negligence was based at least in part on policy, and that explained the divergent views amongst different common law jurisdictions. He stated that there is no single correct answer, and the potential for different outcomes based on differing circumstances in the different jurisdictions was a strength of the common law.[103] Turning to New Zealand, the Privy Council's essential reasoning was that a number of the provisions of the Building Act 1991 envisaged that private law claims against local authorities would continue. If the New Zealand Parliament had chosen not to change a policy decision of the New Zealand Courts, then neither should the Privy Council.[104]

3. *Confusion Regarding Hedley Byrne*

After the Privy Council's decision in *Hamlin*, there was a difference between the conceptual basis of English law and New Zealand law in this context: it was unnecessary for New Zealand courts to resort to the *Hedley Byrne* principles of assumption of responsibility and actual reliance, because New Zealand law is based on control and general reliance. However, the difference was not always appreciated. For example, in *Body Corporate 114424 v Glossop Chan Partnership Architect Limited*,[105] Potter J's proximity inquiry focused on the concepts of actual assumption of responsibility and actual reliance, and was heavily influenced by *Hedley Byrne*. Potter J imposed a duty of care on an architect, but declined to impose a duty of care on a subcontractor. The construction had involved a complex chain of contracts typical of a large construction project, and Potter J considered that the chain of contracts was inconsistent with an

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[101] At 519.
[102] Above.
[103] At 519 and 521.
[104] At 522.
[105] *Body Corporate 114424 v Glossop Chan Partnership Architect Limited* HC Auckland, CP 612-93, 22 September 1997.

assumption of responsibility.[106] The decision is inconsistent with later decisions imposing a duty in similar situations, where Potter J's reasoning has not been followed.[107]

By contrast, in *Riddell v Porteous*,[108] the Court of Appeal applied *Hamlin*.[109] Blanchard J held that the owners for whom a defective building had been constructed did not play the role of head contractor or undertake the functions of a supervisor, and they were not liable.[110] The Court was directing its mind to the functions performed by the different parties involved in the construction process; the underlying concept was control. This foreshadowed the approach that has dominated in claims against company directors and employees, discussed in chapter VII.

B The Canadian Approach

In *Winnipeg Condominium Corporation Number 36 v Bird Construction Co Limited*,[111] the Supreme Court of Canada addressed the recovery of economic loss associated with defects in the exterior cladding of an apartment block, in a claim against a building contractor. La Forest J considered that a duty of care was required because of "compelling policy considerations."[112] Citing Sir Robin Cooke's article, "An Impossible Distinction",[113] La Forest J held that the underlying rationale for the duty is that a person who participates in the construction of a large and permanent structure, which has the capacity to cause serious damage to others, should be held to a reasonable standard of care.[114] Yet he felt constrained to limit the tort to dangerous defects, concluding that the duty was in relation to those defects that "posed a substantial danger to the health and safety of the occupants."[115]

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[106] At 8.
[107] For example, see *Chee v Stareast Investments Limited* HC Auckland, CIV: 2009-40-4-5255, 1 April 2010 at [117].
[108] *Riddell v Porteous* [1999] 1 NZLR 1 (CA).
[109] At 9.
[110] At 6.
[111] *Winnipeg Condominium Corporate Number 36 v Bird Construction Co Limited* [1995] 1 SCR 85 (SCC).
[112] At 103.
[113] Above n 75.
[114] Above n 111, at 103.
[115] At 105, 108 and 121.

C The Australian Approach

1. *Bryan*

In *Bryan v Maloney (Bryan)*,[116] the High Court of Australia dealt with a claim by a subsequent owner against the builder, in respect of latent defects in the foundations of a house. The joint judgment of Mason CJ, Deane and Gaudron JJ was strongly influenced by the House of Lords' reasoning in *Murphy*, even though *Murphy* was not followed. In particular, the plurality identified that the categories of case which allow recovery of economic loss are "special", commonly, but not necessarily, involving known reliance or the assumption of responsibility or a combination of the two.[117] The plurality considered that the "ordinary relationship" between the builder and the first owner was "characterised" by an assumption of responsibility and known reliance which commonly exist in the special categories of cases which allow recovery of pure economic loss.[118] The judges then extended this reasoning a step further, holding that despite the absence of direct contact between the builder and a subsequent owner, that relationship was "marked" by anassumption of responsibility and known reliance. This extension of *Hedley Byrne* reasoning to subsequent owners is problematic, because it rests on a finding of known actual reliance, which will often not be present, leading the plurality to refer to "likely reliance" by a subsequent purchaser.[119] Actual reliance became likely reliance. Although a duty of care was imposed, it was based on the *Hedley Byrne* principles, in contrast to the New Zealand approach, which focuses on control and general reliance.

2. *Woolcock*

The High Court revisited these issues in *Woolcock Street Investments Pty Limited v CDG Pty Limited (Woolcock*),[120] which involved a claim by a subsequent owner of a commercial building against the builder. In a joint judgment, Gleeson CJ, Gummow, Hayne and Haydon JJ held that there was no bright line between residential dwellings and other buildings.[121] The judges confirmed that damages for economic loss require more

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[116] *Bryan v Maloney* (1995) 182 CLR 609 (HCA) [*Bryan*].
[117] At 619.
[118] At 624.
[119] At 627.
[120] *Woolcock Street Investments Pty Limited v CDG Pty Limited* 205 (2004) 216 CLR 515 (HCA) [*Woolcock*].
[121] At 528 at [17].

than foreseeability alone,[122] noting the reference in other cases involving pure economic loss to notions of assumption of responsibility and known reliance.[123] The judges stated that the cases allowing economic loss might be explained by reference to the notion of vulnerability, but it was not necessary to lay down a general proposition about the importance of vulnerability, which was not present in *Woolcock*.[124] For McHugh J, vulnerability was the key issue;[125] the capacity of a person to protect against damage by means of contract was often decisive.[126] He did not consider a first owner or a subsequent purchaser of a commercial building to be vulnerable.[127]

The plurality's reasoning was based on a narrow reading of *Bryan*, holding that the builder's liability to the subsequent owner "depended upon equating the responsibilities which the builder owed to the first owner with those owed to a subsequent owner."[128] The judges considered that the anterior step was missing in *Woolcock* – there was no duty owed to the first owner. The first owner had asserted control over the work in question. The facts pointed against known reliance or an actual assumption of responsibility in respect of the first owner. If no duty of care was owed to the first owner, then on the authority of *Bryan*, no duty of care could be owed to the subsequent owner.[129]

The High Court of Australia has been conservative in imposing liability for economic loss, and will only do so where something more than foreseeability is present. An imposition of liability is likely to be rare, and based on known reliance and actual assumption of responsibility. Australian law has largely been brought into line with English law, with recovery of economic loss confined to cases that fall within the principles of *Hedley Byrne*.

VI CONCLUSIONS

Building defect cases involve the recovery of economic loss. In all of the major Commonwealth jurisdictions, the courts have grappled with the issue of where to set the limits on the recovery of economic loss in this context. Setting the limits, including in

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[122] At 529 at [21].
[123] At 531 at [24].
[124] At 531 at [24] and 533 at [31].
[125] At 548 at [80] – [85] and at 558 at [111].
[126] At 552 at [94] – [96] and at 558 at [110].
[127] At 559 at [112].
[128] At 527 at [15].
[129] At 531 at [25] – [27].

respect of claims against company directors and employees, requires a social value judgement.

By 2000, it was well established in New Zealand that builders of residential buildings owe a tortious duty of care to the first and subsequent owners of that property. It was accepted that liability extended to economic loss. The position in respect of commercial buildings was unclear.

The two stage approach of inquiring into proximity and policy factors, derived from *Anns*, remained valid in New Zealand as providing a framework for considering duty of care questions.[130] As such, it is not a true test, but rather an approach to identifying factors to be considered in making a social value judgement.

This area of the law has been shaped by the subjective preferences of different judges for either: the extension of tort remedies to fill lacuna in the remedies available to deserving plaintiffs; or for the primacy of contractual remedies, and the limitation of remedies to those bargained for or prescribed by Parliament.

The New Zealand judiciary supported the extension of tort remedies, and the underlying concepts engaged to justify the social value judgement were control of the construction process, and general reliance by a class of plaintiffs on a class of defendants. The extension of the duty to include the prevention of economic loss was considered to be controlled by the limitation of plaintiffs to the owner of a builder at the time that damage becomes manifest.

The emergence of the developer's non-delegable duty in the 1970s, with little analysis of the principles that underlie non-delegable duties generally, typified the expansive approach in New Zealand. This duty is discussed further in chapter IV.

The *Hedley Byrne* principles of assumption of responsibility and actual reliance were not the basis of a builder's duty of care in New Zealand, which was instead based on the *Hamlin* principles of control and general reliance. This approach was confirmed by the Supreme Court in a series of judgments post 2000, discussed in chapter III. The tension between the principles of *Hedley Byrne* and *Hamlin* remained, and this tension is the

[130] As confirmed in *South Pacific Manufacturing Co Limited v New Zealand Security Consultants & Investigations Limited* [1992] 2 NZLR 282 (CA) [*South Pacific*].

source of most of the confusion and incoherency in the law as it applies to company directors and employees, discussed in chapters V to VIII.

CHAPTER III - THE DEVELOPMENT OF THE PRINCIPLES IN NEW ZEALAND POST 2000

I INTRODUCTION

Post 2000, the High Court was inundated with claims by the owners of leaky homes, against various participants in the construction process. The appellate courts then faced the difficult issue of whether to impose a duty of care in respect of commercial buildings. In some cases, this produced strident arguments on behalf of councils to limit the application of *Hamlin*,[131] which ultimately failed in the Supreme Court. It is argued that there is no longer a valid distinction between residential and commercial buildings, and a tortious duty of care can be imposed on a building contractor unless the existence of that duty is inconsistent with the contractual matrix. Decisions from the Court of Appeal which are no longer good law due to subsequent decisions of the Supreme Court are not discussed.

There has been a change of emphasis by the Supreme Court regarding the significance of reliance as a factor that underpins the duty of care, and it is argued that this change of emphasis is unjustified. Any resort to *Hedley Byrne*[132] has continued to cause confusion, but this has occurred infrequently. The imposition of a duty of care in respect of defective buildings has largely been based on the linked concepts of control and general reliance from *Hamlin*. The application of these concepts to a wide variety of claims shows logical consistency, and forms the basis for the argument that is advanced in chapter X: control and general reliance should be the factors applied in the proximity inquiry in claims against company directors and employees.

This chapter focuses on the general principles applicable to defective building claims. Decisions on the non-delegable duty are discussed in chapter IV, and decisions on the liability of company directors and employees are discussed in chapters V to VIII. The rationale for considering the categories of decisions in this order is that the claims against directors and employees should be considered as a subset of the tort, and the subset should be considered based on a thorough understanding of the general principles.

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[131] Above n 20.
[132] Above n 18.

II ROLLS ROYCE

In *Rolls Royce New Zealand Limited v Carter Holt Harvey Limited (Rolls Royce)*,[133] the duty of care issue in a commercial context was before the Court of Appeal for the first time, by way of an application to strike out the plaintiff's pleading. The plaintiff, Carter Holt, sought to recover the cost of repairing defects in its substantial cogeneration plant from a subcontractor. The Court of Appeal's approach to the case was affected by the plaintiff's pleading, which alleged a duty to take reasonable care *to perform* a contract, when there is no such tortious duty.[134] The Court then considered whether there might be a duty of care *while performing* the contract, which is a different concept.

Glazebrook J began with a succinct summary of the two stage test for the imposition of a duty of care, based on a consideration of proximity and policy factors.[135] She confirmed that proximity is broader than foreseeability, and included within proximity a consideration of analogous cases and the statutory and contractual background, noting that this background could also raise policy issues.[136] She stated that the statutory context provided by the Building Act 1991 was neutral as to the existence of a duty of care.[137] Her reasoning focused on the contractual structure between sophisticated commercial parties, which pointed against a finding of proximity.[138] She considered the existence of the contracts between the parties, including a detailed examination of the particular terms of those contracts.[139] Glazebrook J discussed analogous cases involving commercial construction, holding that the focus is not so much on the label of "commercial property" but on the incidence of the contracts found in that setting.[140]

Glazebrook J described the need for commercial certainty as a policy factor against a duty of care, noting that commercial parties are entitled to expect that their negotiated risk allocation will not be disturbed by the courts.[141] Commercial parties are capable of

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[133] *Rolls Royce New Zealand Limited v Carter Holt Harvey Limited* [2005] 1 NZLR 324 (CA) [*Rolls Royce*].
[134] At 324 at [66].
[135] At 340 at [58].
[136] At 340 at [59] and at 342 at [64].
[137] At 353 at [115].
[138] At 350 at [103].
[139] At 351 at [107].
[140] At 342 at [72], at 354 at [119] and [120].
[141] At 353 at [118].

looking after their own interests.[142] Although she described these matters as policy arguments, they are in substance an extension of the argument that the contractual structure that existed between the sophisticated commercial parties precluded a tortious duty. She distinguished between proximity and policy arguments, but that distinction was unnecessary because the essence of the judgment was a value judgement as to whether tort law should intervene in comprehensive contractual arrangements. The arguments marshalled by Glazebrook J are compelling, and the result is congruous with the different outcomes in earlier decisions of the Court of Appeal, discussed in chapter II.

The plaintiff's pleading was struck out, but not without qualification. The Court expressly left open the possibility of a *Hedley Byrne* claim beyond negligent misstatement. The Court's discussion of *Hedley Byrne* detracts from the clarity of the reasoning based on the existence of the commercial contracts. The Court undertook an analysis of two conflicting English decisions, the House of Lords' decision in *Junior Books,*[143] and the Court of Appeal's decision in *Simaan General Contracting Co v Pilkington Glass Limited (No 2) (Simaan).*[144] Liability was imposed on a subcontractor in *Junior Books*, but denied against a subcontractor in *Simaan*. The Court considered these cases in the context of *Hedley Byrne* as providing an exception to the irrecoverability of economic loss, based on the existence of a special relationship and an assumption of responsibility.[145] The Court endeavoured to rationalise these decisions, and concluded that for a subcontractor to be liable, something more was needed than merely being a nominated skilled subcontractor and direct contact with the owner.[146] Glazebrook J stated that assumption of responsibility for a task cannot be sufficient in itself to found a duty.[147] The Court's discussion of assumption of responsibility in this context included distinguishing between a voluntary assumption of responsibility in circumstances akin to contract, and a deemed assumption of responsibility. Glazebrook J said: "Whether it is fair, just and reasonable to deem an assumption of responsibility and then a duty of care will depend on a combination of factors…"[148] In that statement, the "deeming" is conflated with the imposition of the duty.

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142 Above.
143 Above n 54.
144 *Simaan General Contracting Co v Pilkington Glass Limited (No 2)* [1988] QB 758 (CA) [*Simaan*].
145 *Rolls Royce*, above n 133, at 346 at [83].
146 At 347 at [90].
147 At 349 at [100].
148 At 349 at [99].

The Court's foray into a possible wider application of *Hedley Byrne* was unnecessary. Applying *Hamlin*, it was open to the Court to hold that there was no reliance, actual or general, given the contractual structure.

The plaintiff re-pleaded, and the amended pleading was again struck out by the Court of Appeal.[149] The Court's decision was given by Wilson J. Some, but not all, of the confusing aspects of the prior decision were allayed. The Court held that its prior statements regarding the availability of a cause of action based on *Hedley Byrne* were to be understood as confined to negligent misstatement.[150] At first blush, this appears to be at odds with Glazebrook J's prior decision, which was based on an argument available to the plaintiff that *Hedley Byrne* had a wider application, beyond negligent misstatement. However, this matter was clarified in Wilson J's judgment, when he noted that the Court agreed that a broader argument based on *Hedley Byrne* was not available.[151]

III THE EARLY LEAKY BUILDING CASES

The early leaky building cases, at least in so far as they involved claims against contractors, were based on an application of the principles settled by *Bowen*[152] and *Hamlin*; control and general reliance were the concepts engaged. *Dicks v Hobson Swan Construction Limited (in liquidation)* (*Dicks*)[153] was the first leaky building claim by a home owner against a council to succeed at trial. Baragwanath J also held the building contractor liable to the first owner, in tort and contract. He held that the tort cause of action consists in carelessly creating a defective house, rejecting the need for specific reliance by the home owner on builders. The concept of general reliance, from *Hamlin*, was sufficient.[154] By contrast, in *Pacific Independent Insurance Limited v Webber*,[155] Lang J held that general reliance did not arise in a claim by a subsequent purchaser against a company that inspected a cladding and issued a producer statement confirming compliance with the Building Code.

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149 *Carter Holt Harvey Limited v Rolls Royce New Zealand Limited* [2007] NZCA 495.
150 At [12].
151 At [27].
152 Above n 6.
153 *Dicks v Hobson Swan Construction Limited (in liquidation)* (2006) 7 NZCPR 881 (HC) [*Dicks*].
154 At 896, at [48].
155 *Pacific Independent Insurance Limited v Webber* HC Auckland, CIV: 2009-404-4168, 24 November 2010.

The contractor's duty, established by *Bowen*, was imposed on contractors providing services as project managers[156] and as subcontractors.[157] By contrast, in *Northern Clinic Medical & Surgical Centre Limited v P Kingston*,[158] the claim by a first owner of a commercial building against the subcontractor responsible for installing the exterior cladding was rejected. Keane J applied *Rolls Royce*, holding that the contractual structure and allocation of risk pointed away from proximity.[159] Although the reasoning did not focus on reliance, the findings support a conclusion that the particular contractual structure precluded a finding of general reliance.

IV SUNSET TERRACES

Given the tide of claims that confronted councils as a result of the leaking building crisis, it was inevitable that the extent of the duty owed by councils would ultimately be determined by the Supreme Court. In 2010, in *North Shore City Council v Body Corporate 188529* (*Sunset Terraces*)[160], the Supreme Court considered a council's liability in respect of defects in the construction of two residential apartment blocks. The council argued that *Hamlin* was wrongly decided, and that the council owed no duty of care under the Building Act 1991. The Court unanimously upheld *Hamlin* in respect of premises designed to be used as homes, but left the difficult issue of commercial property unresolved.

Tipping J gave judgment on behalf of himself, McGrath and Anderson JJ. There are two planks in Tipping J's reasoning. The first was based on community reliance on the state of the law that had existed for many years; that councils are subject to a duty of care when exercising their powers under the Building Act 1991. Tipping J described the relationship between law and social expectation as "symbiotic."[161] He observed that thousands of people must have relied upon the proposition that the 1991 Act had not affected the common law position, and it would be inappropriate to defeat that reliance

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[156] *Body Corporate 185960 v North Shore City Council* HC Auckland CIV: 2006-404-3535, 22 December 2008 [*Kilham Mews*]; *Auckland City Council v Grgicevich* HC Auckland, CIV: 2007-404-6712, 17 December 2010.

[157] *Body Corporate 183523 v Tony Tay & Associates Limited* HC Auckland CIV: 2004-404-4824, 30 March 2009 [*Tony Tay*].

[158] *Northern Clinic Medical & Surgical Centre Limited v P Kingston* HC Auckland, CIV: 2006-404-968, 3 December 2008.

[159] At [64] and [65].

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

[161] At 306 at [21].

and depart from the decision in *Hamlin*.[162] It is important to note that this concept is community reliance on a settled state of the law, distinct from the *Hamlin* concept of general community reliance by a class of plaintiffs on a class of defendants. The reasoning on social expectation has a similar theme to the Privy Council's reasoning in *Hamlin*, where the Privy Council was reluctant to overturn a council's duty where the New Zealand Parliament had elected not to do so in the 1991 Act.[163]

The second plank was an unequivocal endorsement of the reasoning in *Hamlin* and the seminal judgments that led to *Hamlin*, such as *Dutton*[164] and *Bowen*. Tipping J re-examined "the *Hamlin* principle",[165] holding that it was sound and supported by policy factors, and that there was no basis for limiting the principle to stand-alone modest dwellings. He confirmed that the distinction between physical damage and economic loss was not critical in New Zealand jurisprudence in determining whether a duty of care is owed.[166] The Court declined to limit the duty to single stand-alone modest dwellings, because that would be inconsistent with the rationale for a council's duty of care, which is based on control and general reliance.[167]

Tipping J confirmed that the relevant legislation is a highly material factor in determining whether and to what extent a duty of care should be imposed.[168]

V THE SUPREME COURT'S APPLICATION OF CONTROL AND RELIANCE

A The Grange

In *The Grange*,[169] the Supreme Court declined to impose a duty of care on the Building Industry Authority (BIA) in favour of the council. The BIA was a government agency created by the Building Act 1991 to advise government on matters relating to building control. The judgments of the majority confirmed the methodology to be applied when considering a novel duty of care question. Blanchard J gave judgment on behalf of himself and McGrath and William Young JJ, and his restatement of the staged approach to novel duty of care questions based on *Anns* provides welcome clarity. He described

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[162] At 307 at [23].
[163] Above n 104.
[164] Above n 22.
[165] *Sunset Terraces*, above n 160, at 307 at [26].
[166] At 308 at [30].
[167] At 312 at [48].
[168] At 311 at [40].
[169] Above n 19.

foreseeability and proximity as concerned with everything bearing upon the relationship between the parties, and policy as concerned with externalities – the effect on non-parties and on the structure of the law and on society generally.[170]

The reasoning of the majority focused on the particular statutory provisions in issue, and assessed the conventional factors considered in building cases, such as control and reliance. In his supporting judgment, Tipping J considered it significant that the BIA had no power to control the behaviour of councils, stating that the further removed a public body defendant is from the day to day physical control over the activity which directly caused the loss, the less likely it is that the courts will impose a duty of care. Physical control meant the ability in law to exert control over the loss causing activity.[171] Tipping J noted that the council was not a vulnerable person.[172]

The majority also held that the BIA did not owe a duty of care to the home owners, rejecting an argument that home owners placed general reliance on the BIA. Tipping J described an extension of the *Hamlin* reasoning to support a finding of general reliance by home owners on the BIA as "a step too far."[173]

B Spencer on Byron

In 2012, in *Spencer on Byron*,[174] the majority of the Supreme Court held that the duty of care owed by councils when performing their powers under the Building Act 1991 extended to all types of property, extinguishing any distinction between residential buildings and commercial buildings, at least in respect of the liability of councils. Referring to the recognised duty in residential cases, Tipping J suggested that the same "rubric of control" applies to other buildings, so a similar duty should be recognised unless there was good reason not to do so.

Tipping J considered that the existence of a duty in respect of commercial property was profoundly influenced by the terms of the Building Act 1991, which made no material distinction between residential and other premises.[175] The Act provided that private certifiers were to be liable in tort, and there was nothing in the Act, or in the law as it

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[170] At 403 at [156].
[171] At 409 at [177].
[172] At 410 at [180].
[173] At 423 at [234].
[174] *Spencer on Byron*, above n 8.
[175] At 317 at [29].

stood when the Act was passed, to suggest that a private certifier's liability was confined to residential premises. The provisions of the Act in question were ss57(2) and 90, which confirmed the nature of the liability of building certifiers and councils as tortious, rather than the extent of that liability. Even so, Tipping J reasoned that Parliament had expressly described a tortious duty and prohibited private certifiers from contracting out of it, and if Parliament had intended to confine the liability of private certifiers to residential premises, then one would have expected to see an express provision to that effect. There was none. He concluded that the Act was not meant to confine the liability of private certifiers to residential premises, and by parity of reasoning, councils were in the same position.[176] This reasoning was supported by Elias CJ, Chambers and McGrath JJ.[177]

Tipping J considered a range of other policy factors that supported the duty, including a number relating to economic efficiency. For example, it was economically more efficient for council to be liable, otherwise the first owner would need to engage a suitable professional and pay two sets of fees;[178] imposition of the duty was not likely to lead to excessive caution by council officers;[179] council insurance cover was available;[180] and loss spreading amongst ratepayers was a respectable function of tort law.[181]

One difficulty that the Court faced was dealing with what Cooke P had described in *Hamlin* as the linked concepts of control and reliance.[182] The factor of control presented no difficulty, because councils were exercising the same statutory powers in respect of commercial buildings and residential buildings. The control was the same in both cases. Finding general reliance by commercial property owners on councils presented a difficulty. Tipping, Chambers and McGrath JJ disposed of that by significantly de-emphasising the importance of reliance.

Tipping J described the "control aspect" as the most significant, stating that reliance is not always necessary in cases of negligence.[183] He described the factors of reliance and vulnerability as "less persuasive indicators" on the present issue.[184] This shift of focus to

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[176] At 318 at [30] and [31].
[177] Per Elias CJ at 315 at [18] and per Chambers J at 328 at [71], at 336 at [106] and at 343 at [143].
[178] At 318 at [23] and [33].
[179] At 321 at [48].
[180] At 322 at [50].
[181] At 322 at [52].
[182] Above n 84.
[183] *Spencer on Byron*, above n 8, at 318 at [34] – [35].
[184] At 319 at [38].

control alone enabled the judge to conclude that it was difficult to draw a convincing line between different types of building.[185] This ignored the importance placed on general reliance by all members of the Court of Appeal in *Hamlin*, as identified in William Young J's dissenting judgment in *Spencer on Byron*, where he forcefully argued that the *Hamlin* rule is based on the general reliance that is placed on councils by home buyers.[186]

Chambers J also emphasised the factor of control.[187] He stated that reliance has only a limited role to play in the tort of negligence, suggesting that the reliance found in *Hamlin* was reliance on the existing state of the law.[188] Chambers J did not acknowledge the concept of general community reliance on council inspections. He stated that a plaintiff does not have to prove reliance as an element of the tort of negligence,[189] and he eschewed general reliance as one of the important factors to be taken into account when deciding whether to impose a duty of care.

Tipping and Chambers JJ discounted vulnerability, which is not surprising, given the symbiosis between vulnerability and reliance. Tipping J described vulnerability as "problematic".[190] Chambers J was more strident, stating his view that vulnerability is not a factor in New Zealand law.[191] By ignoring reliance and vulnerability, the distinction between the owners of residential property and the owners of commercial property melted away. Fletcher argues that vulnerability, properly understood, ought to remain part of New Zealand negligence law.[192]

Tipping J accepted the general proposition that, where parties have contractually allocated risk, tort law should be slow to interfere. That proposition posed no difficulty in *Spencer on Byron*, because the council could not contract out of tort liability.[193]

The majority held that the Act prescribed an objective standard of care, which was compliance with the Building Code, which could not be varied by contractual bargain,

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185 At 319 at [36].
186 At 383 at [280] – [283] and at 389 at [299].
187 For example, at 329 at [75] and at 334 at [97].
188 At 356 at [199].
189 At 357 at [201].
190 At 319 at [38].
191 At 347 at [156], at 349 at [167] and at 356 at [197] and [198].
192 Scott Fletcher "Who are we trying to Protect? The Role of Vulnerability Analysis in New Zealand's law of Negligence" (2016) 47 VUWLR 19.
193 *Spencer on Byron*, above n 8, at 320 at [39] and [40].

and which did not amount to a warranty of quality. The duty in tort imposes no higher duty than compliance with the Building Code.[194]

VI DECISIONS SINCE SPENCER ON BYRON

A Blain

In *Blain*,[195] the Court of Appeal declined to strike out a claim against a construction company, based on the allegedly defective construction of an aquatic centre. Post *Spencer on Byron*, the Court described the law as it applies to builders of commercial property as unsettled, although noting that the reasoning in *Spencer on Byron* is limited to councils.[196] The Court acknowledged that there are strong policy arguments against recognising a builder's duty of care to its principal in relation to commercial buildings. The Court examined the terms of the construction contract, to determine whether the contract was inconsistent with the imposition of a tortious duty. The Court held that it was at least arguable that a tortious duty could co-exist with the terms of the contract, and that was an issue that would need to be resolved at trial.[197]

B Kwak v Park

In *Kwak v Park*,[198] Woolford J held that the issuer of a producer statement in respect of various waterproofing membranes owed a subsequent purchaser a duty of care in general negligence. In contrast to *Pacific Independent Insurance Limited v Webber*[199], Woolford J held that general reliance was sufficient; actual reliance was not necessary.[200]

C Carter Holt

In *Carter Holt Harvey Limited v Minister of Education* (*Carter Holt*),[201] the Supreme Court refused to strike out the Minister's claims against Carter Holt for negligence and negligent misstatement, in respect of Carter Holt's manufacture and sale of a cladding

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194 At 315 at [19] – [21] per Elias CJ; at 321 at [47] per Tipping J and at 355 at [193] per Chambers J.
195 Above n 7.
196 At [33] and [34].
197 At [63].
198 *Kwak v Park* [2016] NZHC 530.
199 Above n 155.
200 Above n 198, at [63] and [65].
201 *Carter Holt Harvey Limited v Minister of Education* [2016] NZSC 95 [*Carter Holt*].

product. The case required the Court to consider the limits of the duty recognised in *Spencer on Byron*.

The Court's unanimous judgment was given by O'Regan J, who undertook a conventional application of the two stage approach to the imposition of a duty of care, concluding that it was arguable that there was sufficient proximity to impose a duty of care, and no policy reasons not to do so, so both causes of action should proceed to trial.

O'Regan J did not consider that the contractual matrix was inconsistent with a finding of proximity, distinguishing *Rolls Royce*. *Rolls Royce* involved contracts specifically designed for the project, based on legal advice, and he referred to that type of contractual structure as a "carefully calibrated contractual regime".[202] The contracts in *Carter Holt* were the terms of supply between Carter Holt and the building supply merchants, and between those merchants and building contractors engaged by the Ministry. He considered that it was arguable that these contracts did not preclude a finding of proximity.[203]

O'Regan J noted that there was an absence of direct statutory obligations on the part of Carter Holt, so that one of the factors present in *Spencer on Byron* was missing, however he did not consider that to be significant. If a duty of care was imposed, it would arguably be no greater than the duty that Carter Holt was aware of, because the cladding was required to comply with the Building Code and the provisions of the 2004 Act that applied to building materials.[204]

The Court's approach to vulnerability differed from *Spencer on Byron*, where vulnerability was discounted as a factor.[205] O'Regan J explained vulnerability as requiring a consideration of the vulnerability of likely plaintiffs as a class, rather than the specific plaintiff in the case at hand.[206] He did not consider vulnerability to be a significant factor.[207]

O'Regan J's consideration of matters of policy largely overlapped with his proximity analysis. He considered that a policy argument that a tort remedy would be inconsistent

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[202] At [25] and [26].
[203] At [28].
[204] At [40].
[205] *Spencer on Byron*, above n 190 and n 191.
[206] *Carter Holt*, above n 201, at [54].
[207] At [55].

with contractual remedies was best left for trial.[208] He held that the Consumer Guarantees Act 1993 and the statutory regime of deemed warranties in Part 4A of the Building Act 2004 did not indicate Parliament's intention that these remedies should be a comprehensive regime to the exclusion of tortious remedies.[209] He did not see any distinction between financial loss and physical damage as determinative, drawing on health and safety considerations.[210]

The Court refused to strike out the claim of negligent misstatements in promotional material, acknowledging that the issue of actual reliance may arise, but that required a trial.[211]

Although the decision is an interlocutory one, it signals that the Supreme Court may be prepared to further expand the recovery of economic loss in New Zealand, to include economic loss associated with the negligent creation of products used in the construction of buildings.

VII CONCLUSIONS

The appellate decisions since 2000 have confirmed that the two stage inquiry into the existence of a duty of care, based on proximity and policy factors, is the approach in New Zealand. *Spencer on Byron* supports a powerful argument that there is no distinction between residential buildings and commercial buildings for claims in negligence against building contractors. This expansion of tort law is tempered by the principle confirmed in *Rolls Royce*: a tortious duty of care will not exist if the contractual matrix militates against it.

The New Zealand jurisprudence supports the imposition of a tortious duty of care in respect of defective buildings based on the concepts of control and general reliance. When the concepts of assumption of responsibility and actual reliance from *Hedley Byrne* were imported into the reasoning, it caused incoherency in the law.

General reliance is reliance by a class of plaintiffs on a class of defendants. In *Sunset Terraces* and *The Grange*, the Supreme Court's analysis of whether a duty of care should

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[208] At [60] and [61].
[209] At [41] and [62].
[210] At [66] and [69].
[211] At [85].

be imposed featured general reliance as a factor, consistent with *Hamlin*. In *Spencer on Byron*, the majority eschewed general reliance as an important factor to take into account, but that aspect of the Court's reasoning can be read as limited to claims against councils.

The Supreme Court has clarified that when a duty of care exists, the objective standard to be met is compliance with the Building Code, and no more. The duty requires the exercise of reasonable care to achieve compliance with the Building Code.[212]

[212] *Spencer on Byron*, above n 194.

CHAPTER IV - THE NON-DELEGABLE DUTY

I INTRODUCTION

It is a well established general rule that the employer of an independent contractor is not liable for the negligence of the independent contractor in the course of performance of the contract[213] (in this chapter, referred to as "the general rule"). Prior to the New Zealand Court of Appeal's decision in *Mount Albert,*[214] the exceptions to the general rule established in New Zealand did not include a category in respect of the construction of buildings. Cooke J acknowledged that his imposition of a non-delegable duty on the developer in *Mount Albert* was without precedent, and in an area of law where it is not easy to state clear principles.[215] In *Cashfield House v D&H Sinclair Limited* (*Cashfield House*),[216] Tipping J acknowledged the difficulties in identifying the exceptions to the general rule, because of the absence of any coherent theory to explain them.[217] Christudason and Netto, drawing on a wide range of academic comment on non-delegable duties, conclude that there is no general or underlying rationale.[218]

The non-delegable duty imposed in respect of the construction of residential buildings is relevant to the issue addressed in this thesis, which is the liability in negligence of the directors and employees of companies involved in the creation of a defective building, in two respects. First, the range of the existing tortious remedies is relevant when assessing whether further duties are required, and if so, the extent of those further duties. Secondly, the factors that support the non-delegable duty may also support a duty of a different nature imposed on directors and employees.

Control is the factor that justifies non-delegable duties. *Mount Albert* confirms that a non-delegable duty is owed by the party that has legal control of the development and sale of residential buildings for profit. Where that party is a company, a director who has legal control of the company does not owe a non-delegable duty.[219] This reasoning

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[213] *D & F Estates*, above n 61, at 208.
[214] Above n 9.
[215] At 241.
[216] *Cashfield House v D & H Sinclair Limited* [1995] 1NZLR 452 (HC) [*Cashfield House*].
[217] At 463.
[218] Alice Christudason and Anne Netto "Of Delegable and Non-Delegable Duties in the Construction Industry" (2000) 16 Const LJ 88 at 91.
[219] *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17 [*Taylor*].

applies a fortiori to company employees. It is contended that the non-delegable duty should not be extended beyond developers of residential buildings. The duty should not be imposed on builders, or in respect of commercial property.

It is argued, however, that the factors that support the developer's non-delegable duty, namely control and a profit motive, can also support the imposition of a conventional duty of care in general negligence on the directors and employees of a development company. Before considering the above matters, this chapter begins with a brief discussion of the principles applicable to non-delegable duties in general.

II NON-DELEGABLE DUTIES

In *Woodland v Essex County Council* (*Woodland*),[220] the United Kingdom Supreme Court reviewed the law on non-delegable duties of care, in the context of a claim against an education authority based on the negligence of an independent contractor engaged by that authority. Lord Sumption restated some of the foundation principles of the tort of negligence. Liability in tort depends upon proof of a personal breach of duty, with one true exception, vicarious liability.[221] The law of negligence is generally fault based; a defendant is personally liable only for the defendant's own negligent acts and omissions. The law does not, in the ordinary course, impose personal liability for what others do or fail to do.[222]

In the exceptional situations where a non-delegable duty is imposed, it is the discharge of the duty that is non-delegable.[223] As Tipping J noted in *Cashfield House*, performance of the duty can be delegated, but responsibility for that performance cannot.[224] Exceptionally, imposition of a non-delegable duty makes the defendant legally responsible for ensuring that independent contractors engaged by the defendant take reasonable care. As Jonathan Morgan comments, since it is impossible to ensure that contractors are never careless, the non-delegable duty in effect requires that the defendant

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[220] *Woodland v Essex County Council* [2013] UKSC 66, [2014] AC 537 [*Woodland*].
[221] At 572 at [3].
[222] At [5].
[223] John Murphy "The Liability of Common Law Non-Delegable duties" (2007) 30(1)UNSWLJ 86 at 89.
[224] Above n 216, at 461.

answer for any harm negligently caused by the independent contractor.[225] It is a form of strict liability. Although rare in tort, this type of duty is normal in contract.[226]

It is important to distinguish between the exceptional tortious liability for the acts of others that arises when the non-delegable duty is imposed, and the closely related personal tortious liability that can co-exist when an independent contractor is engaged: in this latter situation the principal remains under an ordinary duty to exercise reasonable care and skill in selecting and supervising the independent contractor;[227] and the principal may also remain under a duty to organise a safe system of work.[228]

III THE RELATIONSHIP BETWEEN NON-DELEGABLE DUTIES AND VICARIOUS LIABILITY

Vicarious liability in tort requires a relationship between the defendant and the wrongdoer, and a connection between that relationship and the wrongdoer's act or default, so that it is just that the defendant should be held legally responsible to the claimant for the consequences of the wrongdoer's conduct.[229]

In *Woodland*, the Court noted that the boundaries of vicarious liability have expanded to embrace tortfeasors who are not employees of the defendant, but who stand in a relationship which is sufficiently analogous to employment. The boundaries have not extended to include truly independent contractors.[230]

Vicarious liability is constrained by the need to find a prerequisite relationship between the primary tortfeasor and the defendant. By contrast, imposition of a non-delegable duty focuses on the relationship between the defendant and the victim of the tort.[231] The delegate of performance might be an agent, an independent contractor or a volunteer, and the status of the delegate should be immaterial if discharge of the defendant's duty is non-delegable.

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[225] Jonathan Morgan "Liability for Independent Contractors in Contract and Tort: duties to ensure that care is taken" (2015) 74 CLJ 109.

[226] Above; and see *Stevens v Bodribb Sawmilling Company Proprietary Limited* (1986) 160 CLR 16 (HCA) [*Stevens*], at 44.

[227] *Cashfield House*, above n 216 at 460.

[228] For example, see *Stevens*, above n 226 at 31.

[229] *Mohamud v WM Morrison Supermarkets* [2016] UKSC 11.

[230] *Woodland*, above n 220 at [3].

[231] David Neild "Vicarious Liability in The Employment Rationale" (2013) 44 VUWLR 707, at 708 and 723.

IV THE ESTABLISHED CATEGORIES OF NON-DELEGABLE DUTIES

In *Woodland*, the Court identified two broad categories of case in which a non-delegable duty has been held to arise: the first based on an antecedent relationship between the defendant and the claimant (the victim of the tort), giving rise to a personal duty to protect a particular class of persons against a particular class of risks (the protective custody exception); and secondly where the activity is "extra-hazardous" (the extra-hazardous exception).[232]

A Protective Custody

In *Woodland*, the Court discussed the established categories of non-delegable duty owed by employers to employees, and by hospitals to patients. The defining features of these cases include: an especially vulnerable claimant; an antecedent relationship between the claimant and defendant involving protective custody from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant; the claimant has no control over how the defendant chooses to perform the duty, and delegation by the defendant to a third party of a function which is an integral part of the duty.[233] The essential element is not control of the environment in which the claimant is injured, but control over the claimant for the purpose of performing a function for which the defendant has assumed a responsibility.[234]

B Extra-hazardous Activity

This exception has its genesis in nineteenth century cases concerned with a landowners duty to a neighbour in respect of the creation of a hazard on the land which might be expected to injure the neighbour, amounting to a private nuisance. For example, in *Dalton v Angus*,[235] Lord Blackburn held that the landowner could not "escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor."[236] In *Woodland*, Lord Sumption stated that the essential point about these early cases is that there was an antecedent relationship between the parties as neighbouring landowners, from which a positive duty independent of the wrongful act

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[232] Above n 220 at 573 at 6 and 7.
[233] At 576 at [12], and at 583 at [23] per Lord Sumption.
[234] At [24].
[235] *Dalton v Angus* (1881) 6 App Cas 740 (HL).
[236] At 829.

itself could be derived.[237] Lord Sumption expressed the view that the "extra-hazardous" decisions are founded on arbitrary distinctions between ordinary and extra-ordinary hazards, and if there is justification for a non-delegable duty it probably arises from a special policy for operations involving exceptional danger to the public.[238] The extra-hazardous cases are distinguishable from the protective custody cases, because the essential element of the extra-hazardous cases is control of the environment, rather than control over the claimant.[239]

V NON-DELEGABLE DUTIES IN CONSTRUCTION LAW

A Mount Albert

The developer's non-delegable duty established in *Mount Albert* is a discrete category of duty. Cooke J's reasoning was brief and without substantial discussion of the principles that underlie non-delegable duties generally. His value judgement was that a duty was warranted because: [240]

> In the instant type of case a development company acquires land, subdivides it, and has homes built on the lots for sale to members of the general public. The company's interest is primarily a business one. For that purpose it has buildings put up which are intended to house people for many years and it makes extensive and abiding changes in the landscape.

There are two key factors that are the basis of this non-delegable duty: legal control of the development process resulting in the creation of a house; and the development process is undertaken for the purpose of profit. The underlying rationale is that a non-delegable duty is justified to protect homeowners from companies engaged in building houses for profit.

The fact that a defendant has a profit motive cannot of itself be sufficient to justify a tortious duty of care. If that were so, tort law would penetrate all aspects of commercial life. Rather, the profit motive is part of a broader social value judgement: that those who profit from the development of houses ought to bear the risk of defective construction.

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[237] *Woodland*, above n 220, at 574 at [9].
[238] At 537 at [6].
[239] At 583 at [24].
[240] *Mount Albert*, above n 9, at 240.

B Morton

In *Morton v Douglas Homes Limited* (*Morton*),[241] the New Zealand High Court upheld the owners' claims against various parties involved in the creation of latent defects in the foundations of flats, including the company that developed and built the flats. The imposition of a duty on the directors of the company is considered in chapter V. The company had engaged an independent engineer, and an independent contractor to drive the piles. This called into question the liability of the company for the work of those independent contractors, and whether a non-delegable duty was breached. Hardie Boys J held that the builder's duty of care required the builder to observe the conditions of the building permit, and the by-laws, and to achieve an objective standard of safety and fitness.[242] Although he referred to a builder's duty, the duty imposed was a developer's non-delegable duty. He cited *Callaghan*[243] for the proposition that the duty to observe the permit and the by-laws was a non-delegable duty.[244] He applied *Mount Albert* and imposed a non-delegable duty, although noting that the Court in *Mount Albert* had found the principles difficult to discern.[245]

C Other Jurisdictions

Mount Albert has no support in the major Commonwealth jurisdictions. In *D & F Estates*,[246] the House of Lords unequivocally rejected the proposition that a main contractor in the building industry who contracts to erect an entire building is liable for the negligence of sub-contractors. Lord Bridge described the decision in *Mount Albert* as entirely admirable as a matter of social policy, but without legal principle.[247]

The position in Australia is similar. In *Zumpano v Montagnese*,[248] the Court of Appeal of Victoria declined to impose a non-delegable duty on a building contractor in respect of a sub-contractor's negligence. The Court could find no element in the relationship between the builder and the purchaser that made it appropriate to impose on the builder a special

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[241] *Morton v Douglas Homes Limited* [1984] 2 NZLR 548 (HC) [*Morton*].
[242] At 589 and 591.
[243] Above n 44.
[244] *Morton*, at 592.
[245] Above.
[246] Above n 61.
[247] At 210.
[248] *Zumpano v Montagnese* [1997] 2 VR 525 (CA).

responsibility or duty to ensure that the sub-contractor took reasonable care. The Court was not prepared to adopt the approach taken in *Mount Albert.*[249]

D Leaky Building Cases

The developer's non-delegable duty has become settled New Zealand law as a result of the leaky building litigation. In *Body Corporate 187820 v Auckland City Council*,[250] the High Court granted a defendant finance company's application for summary judgment. In an unusual arrangement, Trimac Finance made an advance to the developer of residential apartments, and title to the land was transferred to Trimac Finance as a form of security. The High Court reviewed *Callaghan*, *Morton* and *Mount Albert*, and held that there are two essential considerations which give rise to the developer's non-delegable duty of care: first, direct involvement or control in the building process; secondly, that the company is in the business of constructing dwellings for other people for profit.[251] Based on a consideration of the contract between Trimac Finance and the development company, the Court was satisfied that Trimac Finance's involvement in the project did not exhibit the two essential characteristics.[252]

In *Body Corporate 188273 v Leushcke Group Architects Limited* (*Leushcke*),[253] the High Court considered the liability of the director of a development company, including whether that director owed a personal non-delegable duty of care. The director was a party to a joint venture agreement with another director of the development company, and pursuant to that agreement the development company was the joint venture vehicle. Harrison J applied *Mount Albert*, noting that the word "developer" is not a term of art or a label of ready identification.[254] He described the developer as the party sitting at the centre of and directing the project, invariably for its own financial benefit.[255] The development company was the entity which assumed legal responsibility for, and controlled all aspects of, the development.[256] Only the company owed a non-delegable duty; the director did not. Harrison J's reasoning followed Cooke J's in *Mount Albert* – the factors that supported the duty were control and a profit motive.

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[249] At 544.
[250] *Body Corporate 187820 v Auckland City Council* (2005) 6 NZCPR 536 (HC).
[251] At 544 at [27].
[252] At 549 at [54].
[253] *Body Corporate 188273 v Leushcke Group Architects Limited* (2007) 78 NZCPR 914 (HC) [*Leushcke*].
[254] At 922 at [31].
[255] At 922 at [32].
[256] At 924 at [39].

In *Taylor*,[257] the Court of Appeal considered the liability of a director of a development company, including a claim that the director owed a non-delegable duty of care. The Court of Appeal cited *Mount Albert* with approval, but held that there is no authority which supports the proposition that a director of a development company owes a non-delegable duty of care.[258]

Numerous judgments of the High Court have applied the non-delegable duty from *Mount Albert*, as confirmed in *Leuschke* and *Taylor*, and the existence of the duty has never been questioned by the judiciary.[259] Brennan argues that the non-delegable duty is inconsistent with the principles from the protective custody cases and the extra-hazardous cases, leading him to propose that *Mount Albert* should no longer be followed.[260] However, this argument fails to take into account two principles that have been critical in the development of this area of the law of negligence in New Zealand. First, setting the limits on the recovery of economic loss is based on social value judgements. There is no one correct answer. The New Zealand Courts were able to set their own limits based on their own value judgments.[261] The value judgement that underpins the non-delegable duty is that it is just for a party that has legal control of the development of houses for profit to owe a non-delegable duty to the subsequent owners of those houses. Secondly, the Courts will strive to uphold a society's settled expectation of the law.[262] A compelling reason for upholding *Mount Albert* is the length of time that it has stood as good authority in New Zealand, and the extent to which it has been relied on in leaky building litigation, both in cases that have been determined and cases that have settled. This point is developed further in chapter IX.

However, Brennan's argument can be engaged to support the proposition that the non-delegable should not be extended any further; in particular it should not be imposed on builders or in respect of non-residential buildings. Several decisions have wrongly assumed that the non-delegable duty can be imposed on builders, rather than developers

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[257] Above n 219.
[258] At 31 at [37].
[259] See *Kilham* Mews above n 156; *Tony Tay* above n 157; Frost *v McLean* HC Wellington AP 184/01, 2 November 2001; *Spargo v* Franklin HC Tauranga CIV: 2010-470-91, 9 November 2011; Wong *v Weathertight Homes Tribunal* [2011] NZCCLR 5 (HC); *Keven Investments Limited v Montgomery* (2012) 14 NZCPR 321 (HC) and *Brichris Holdings Limited v Auckland Council* [2012] NZHC 2089.
[260] Sean Brennan "Local Authority Liability for Flooding: Where Should Loss Fall?" (2015) 46 VUWLR 85 at 104.
[261] *Hamlin*, above n 103 and 104.
[262] *Sunset Terraces*, above n 160.

who own the land and undertake the building project. In *Lee v Ryang,*[263] the High Court upheld the Weathertight Homes Tribunal's imposition of a non-delegable duty of care on Mr Lee, who was appointed by the owner to manage the construction process. Fogarty J noted that the property in question was owned by another person, who was the seller of the completed house to the complainants. Mr Lee accepted that he was the project manager, and Fogarty J found that he was in control of the site during construction. He accepted that the house was not being constructed for Mr Lee's financial benefit, in the sense of taking the profit, but still imposed a non-delegable duty of care on him. The decision cannot be justified on the basis of *Mount Albert*. Mr Lee did not own the site, he was not constructing the house to sell it for profit – he was not a developer. Mr Lee appealed, appearing in person. The Court of Appeal refused the appeal on a jurisdiction point. In an obiter comment, the Court stated that Fogarty J had applied settled law,[264] noting that Mr Lee did not advance any arguments touching on legal principle. The decision on the facts is not in accordance with the New Zealand authorities discussed above, which have settled the law and confined the non delegable duty to developers.

In *Carrington v Easton*,[265] Venning J held that the head builder of substantial renovations to a home was under a duty to the owner to ensure that the work complied with the Building Act 1991 and the plans and specifications, which was a non-delegable duty.[266] The imposition of a non-delegable duty to comply with the statute was contrary to the Supreme Court's confirmation in *Sunset Terraces* that the cause of action against a builder is in ordinary negligence.[267] The builder did not own the home or renovate it to sell it for a profit, so the criteria from *Mount Albert* were not met. The preferable course would have been to hold the builder liable for the builder's own negligence in supervising the subcontractors. The authorities do not support an extension of the non-delegable duty to builders that do not own the land, or undertake the development for profit.

VI CONCLUSIONS

Liability in negligence is fault based. As a general rule, an employer is not liable for the negligence of an independent contractor engaged by the employer. Non-delegable duties are an exception to the general rule. Discharge of the duty requires an employer to ensure that an independent contractor engaged by the employer takes reasonable care. There are

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263 *Lee v Ryang* HC Auckland CIV: 2011-404-2779, 28 September 2011.
264 *Lee v Ryang* [2012] NZCA 247 at [6].
265 *Carrington v Easton* [2013] NZHC 2023.
266 At [25] and at [80].
267 Above n 160, at 311 at [40].

two orthodox categories of non-delegable duties: first where the delegator has protective custody over a person and therefore control over that person and secondly, based on extra-hazardous activities, and the delegator's control of the environment.

Mount Albert does not fit within either of these categories, and created a new category of non-delegable duty in New Zealand, imposed on developers of residential property. A non-delegable duty is imposed on the party that has legal control of the development and sale of residential buildings for profit. The non-delegable duty should not be imposed on building contractors, or in respect of commercial buildings, because the criteria of legal control of the development of houses for profit, required on the authority of *Mount Albert*, are not met.

The developer will usually be a company. In *Taylor*, the Court of Appeal confirmed that the directors who have legal control of the development company do not owe a non-delegable duty, and this reasoning applies equally to employees. However, those directors and employees may owe a duty of care in general negligence. The next chapter will discuss the issue of when the directors and employees of companies involved in the creation of a defective building should owe a conventional duty of care. In chapter X it is argued that the factors of control and profit motive, which support the value judgement to impose on a developer a non-delegable duty of care, can also be engaged in a different context – to determine when a conventional duty of care in general negligence should be imposed on a director or employee.

CHAPTER V - COMPANIES AND TORTS – THE POSITION OF DIRECTORS AND EMPLOYEES

I INTRODUCTION

A company's liability in general negligence can arise in two ways: first for breach of a primary duty of care imposed on the company, when breach of the duty is established by attributing the acts and omissions of directors and employees to the company; and secondly by vicarious liability, which is a process by which liability is imposed on one party for the acts or omissions of others. This distinction between primary and secondary company liability has significant ramifications for the liability of company directors and employees.

If the tortious liability of a building company arises only because the company is vicariously liable for its directors and employees, then the liability is secondary, because the wrong of the director or employee is imputed to the company. As Todd points out, the director or employee remains potentially liable as the primary tortfeasor. It is the director or employee who is the wrongdoer.[268] The legal consequences go further than that. If the starting point is that the company owes no primary duty of care, then there is no basis for applying the two stage inquiry into proximity and policy factors to the relationship between the company and the plaintiff. The inquiry undertaken can only be in respect of the relationship between the primary wrongdoer, who is the director or employee, and the plaintiff.

Yet if the contracting company is held liable on the basis of *Bowen*,[269] and if the two stage inquiry has been applied to establish the company's liability, then the liability of the directors and employees who committed the actus reus must be axiomatic if vicarious liability is the basis of the company's liability. Therefore, in that case there is no place for a two stage inquiry into whether the director or employee owes a duty of care. The result must be that the directors and employees are liable for their negligent acts, and claims against directors and employees need only focus on breach and causation. This

[268] Stephen Todd "Vicarious Liability" in Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) 1205 at 1206 and 1207.
[269] Above n 6.

reasoning underlies Chambers J's minority judgment in *Taylor*,[270] discussed in chapter VII.

The first proposition advanced in this chapter is that the approach outlined above is not, and should not be, the law of New Zealand. Rather, the tortious liability of a building company should usually arise when a primary duty of care is imposed on the company, and breach arises because the acts or omissions of the company's directors or employees are attributed to the company. The early New Zealand building cases based the liability of building companies on attribution, and not vicarious liability. The New Zealand courts have taken a similar approach to a company's tortious liability in other contexts. English case law supports company liability based on both attribution and vicarious liability. When this body of law is considered as a whole, a compelling argument can be mounted that a building company's liability is based on attribution, and not vicarious liability. On that basis, a finding of company liability does not inevitably require a finding of primary tortious liability by a director or employee, for which the building company is then vicariously liable.

The second proposition advanced in this chapter is that the attribution of the acts of directors and employees to the company does not result in disattribution of the acts from the actor, which would negate the actor's personal liability. The imposition of a concurrent duty of care on a director or employee of a building company must be approached from first principles of the law of torts.

Finally, this chapter considers the two most common approaches to determining the liability of company directors and employees: the control test from *Morton*[271] and the concept of assumption of responsibility from *Trevor Ivory Limited v Anderson* (*Trevor Ivory*).[272]

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[270] Above n 219.
[271] Above n 241.
[272] *Trevor Ivory Limited v Anderson* [1992] 2 NZLR 517 (CA) [*Trevor Ivory*].

II THE RELEVANT PRINCIPLES

A The Purpose of Limited Liability

It is well understood that a company is a separate legal person.[273] As Smillie has noted, the original purpose behind the grant of limited liability was to limit the contractual liability of shareholders to creditors of the company in order to encourage investment in large capital projects.[274] Companies are creatures of statute. Companies legislation in New Zealand has never included provisions creating express immunity for directors or employees from tortious liability to third parties. [275]

B Directing a Tort

Long before the expansion of torts to include the recovery of pure economic loss, it was well established that a director of a company could be liable for the torts of other agents of the company, where the tort was directed or procured by the director.[276] Campbell has clarified that the "direct or procure" test is applied in circumstances where the director has not committed the tortious acts, but has procured another to commit them.[277] Where a director is alleged to have personally performed the tortious acts, then the issue of directing or procuring a wrongful act by others does not arise.[278]

C Agency and Vicarious Liability

Todd draws a distinction between the concept of agency in the law of contract, where an agent is a person who is engaged for the purpose of bringing his or her principal into contractual relations with third parties, and the concept of agency in the law of torts, the latter concept being broader, where an agent may simply be a person who is authorised to act on behalf of another.[279] Todd argues that expanding the meaning of agent for the purpose of vicarious liability, to include a person who is authorised to carry out an

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[273] *Salomon v Salomon & Co Limited* [1897] AC 22 (HL); *Lee v Lee's Air Farming Limited* [1961] NZLR 325 (PC) [*Lee*].

[274] John Smillie "Tort, Contract and the Limited Liability Company: Reflections on Trevor Ivory Limited v Anderson" (2008) 14 NZBLQ 96 at 98.

[275] Above.

[276] *Rainham Chemical Works Limited v Belvedere Fish Guano Co* [1921] 2 AC 465 (HL) [*Rainham Chemical Works*] and *Wah Tat Bank v Chan Cheng Kum* [1975] AC 507 (PC).

[277] Neil Campbell "Claims against Directors and Agents" [2003] NZLJ 109 at 111.

[278] *Standard Chartered Bank v Pakistan National Shipping Corp* [2002] UKHL 43; [2003] AC 959, per Lord Rodger at 972 at [36] and [38].

[279] Todd "Vicarious Liability", above n 268 at 1246.

activity on behalf of a principal, is likely to lead to incoherence in the law governing the distinction between employees and independent contractors. An employer company is liable for the torts of its employee where the employee's act or default has a sufficient connection with the employment relationship, referred to as the close connection test. An employer is not usually vicariously liable for the acts of an independent contractor.[280]

The courts have been prepared to treat directors as agents of the company, and to impose liability on a company for a director's acts based on vicarious liability. For example, in *Kuwait Asia Bank EC v National Mutual Life Nominees Limited*,[281] the Privy Council confirmed that a company was vicariously liable for the negligence of its directors in preparing certificates for finance purposes.

Watts contends that a company's liability for torts will usually arise by way of vicarious liability.[282] By contrast, Campbell states that where the defendant is a building company, the actions of the company's employees and agents will be attributed to the company, so that the company is the builder.[283] In this chapter it is argued that this latter position is the basis of a building company's duty in New Zealand law, amounting to a special rule of attribution.

D Attribution and Disattribution

The leaky building crisis has resulted in a significant number of claims against the directors of companies involved in the construction of leaky buildings, and a corresponding level of academic comment on the nature of the liability of directors. This commentary has discussed the foundation and scope of the identification doctrine, by which the acts of a company's directors and employees are attributed to the company. This has included argument on the issue of whether attribution must necessarily result in disattribution of those same acts from the director or employee, immunising the director or employee from tortious liability. The better view is that attribution of the acts of directors and employees to the company does not result in disattribution of the acts from the actor.

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[280] At 1247, and see chapter IV.
[281] *Kuwait Asia Bank EC v National Mutual Life Nominees Limited* [1990] 3 NZLR 513 (PC).
[282] Peter Watts "Trevor Ivory v Anderson: Reasoning from Outer Space" [2007] NZLJ 25 at 26.
[283] Neil Campbell "Leaking Homes, Leaking Companies?" [2000] CSLB 101 at 102.

Campbell points out that the identification doctrine was developed in circumstances in which the general rules of attribution, such as agency or vicarious liability, were not applicable. For example, a statute might indicate that it was intended to apply to companies, but without providing a rule of attribution by which the acts of a company's agents could be attributed to the company. Campbell says that to fill the gap, the courts developed the identification doctrine.[284] Watts says that attribution is an interpreter's device, being a type of implied term in the construction of statutes, contracts and other documents, and the concept does not apply to the application of the ordinary law of torts to companies.[285]

Grantham and Rickett argue that company law modifies the normal consequences of a director's actions, so that attribution of a director's actions, knowledge and intention to the company means that responsibility for any tortious conduct is not sheeted home to the director.[286] Campbell refers to this proposition as "disattribution heresy",[287] arguing that the cases that developed the identification doctrine were concerned with whether the company was liable for the illegal wrong, and in none of those cases was the agent's liability an issue, so the cases are not authority for the proposition that a finding of liability on the company's part excludes the agent's liability.[288] Grantham and Rickett accept that the identification doctrine does not expressly exclude the personal responsibility of the director. They argue that the exclusion is implied, and that the scope and operation of tort law is constrained by the principles of company law, so that the identification of the tortfeasor is a function of company law.[289]

Campbell argues that the liability of a company's agents in tort is not determined by the limited liability nature of the company, but by an application of orthodox principles of tort and agency law. He goes as far as to say that company law has nothing useful to say on the issue, and claims should be resolved by applying the established rules of the particular head of liability. To succeed, a plaintiff must prove every element of the cause of action against the corporate agent,[290] which has become known as the elements of the tort approach, discussed in chapter VI.

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[284] Above n 277 at 110; see also Neil Campbell "Directors Liabilities to Third Parties [1998] CSLB 34.
[285] Watts "Trevor Ivory v Anderson: Reasoning from Outer Space", above n 282; see also Peter Watts "The Company's Alter Ego – a Parvenu and Imposter in Private Law" [2000] NZ Law Review 137.
[286] Ross Grantham and Charles Rickett "Directors' 'Tortious' Liability: Contract, Tort or Company Law?" (1999) 62 MLR 133 at 138.
[287] Campbell "Claims against directors and agents", above n 277, at 110.
[288] Above.
[289] Ross Grantham and Charles Rickett "Company Directors' Liability for Torts" [2003] NZLJ 155 at 156.
[290] Campbell "Claims against Directors and Agents", above n 277, at 109.

The arguments assembled by Watts and Campbell are compelling. Their examination of the origin of the identification doctrine has confirmed the conceptual basis of attribution, and that as a matter of principle disattribution does not follow. Isac and Todd support that view.[291]

An examination of the case law confirms that attribution has usually been the basis of the liability of building companies in negligence. Disattribution is not axiomatic, and the concurrent liability of directors and employees depends on the application of general principles to determine whether a duty of care should be imposed.

E The Early New Zealand Building Cases

The early New Zealand building cases were consistent in imposing a primary duty of care on the company, with breach determined by attribution. In *Bowen*,[292] the Court of Appeal imposed a duty of care on a building company, Paramount Builders Limited, without considering the conceptual basis of that duty, in terms of the applicable principles of company law, the law of agency and vicarious liability. The tenor of the judgments is consistent with the imposition of a primary duty on the building company. Throughout the Court's judgments, the judges invariably spoke in terms of "Paramount's" duty and "Paramount's" breach.[293] There is no mention of vicarious liability. There was no claim made against the directors or employees. The question of whether the company was in breach of its primary duty was not considered by express reference to the attribution to the company of the acts and omissions of its directors and employees, but that must necessarily have been the basis of liability. The wrongdoer was the company, not its directors or employees.

In *Callaghan*,[294] the High Court held the development company liable. The High Court dismissed a claim against the four directors of the company. Speight J's reasoning was brief and expressed in terms of vicarious liability. However, his findings on the facts were consistent with attribution. He noted that where a company is vicariously liable for an employee, the employee can be personally liable, and he saw no reason why the same

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[291] Andre Isac and Stephen Todd "Directors Torts" Hawes (ed) *Commercial Law Essays: a New Zealand Collection* (2003) 30 at 45.
[292] Above n 6.
[293] At 397, 405, 415, 419 and 426.
[294] Above n 44.

principle should not apply to directors.[295] He cited *Rainham Chemical Works*[296] and then stated the proposition that to establish a director's personal liability proof is required that the director was the actual tortfeasor.[297] In doing so, Speight J may have misconstrued the significance of *Rainham Chemical Works*, which was a case involving the liability of directors for the torts of others. Speight J found that the directors of the company were not liable, because there was no proof of any individual acts of neglect, and no evidence of personal control or instruction of others.[298] Yet the company was held liable because it controlled and supervised the negligent work. The company had no employees, and the directors were held not liable, so the company's breach of the primary duty imposed on it can only have arisen because the collective omissions of the directors were attributed to the company. There was no basis for vicarious liability.

F Morton

In *Morton*,[299] the High Court took a similar approach to the liability of a development company, holding that the company was responsible for failing to arrange adequate supervision of the pile driver, which was a personal act of negligence by the company. Hardie Boys J undertook a detailed analysis of the claims against the directors of the company. He noted that a director's duty was not to be confused with the duty of the company.[300] This comment, and his consideration of whether directors independently owe a duty of care, are consistent with the company's duty being discrete and primary, and the company's breach of that primary duty arising by attribution to the company of the acts and omissions of the company's directors and employees. This is confirmed by the judge's findings on negligence. For example, the company was found liable for failing to drive additional piles, but the director involved in that aspect of construction was found not liable.[301]

Hardie Boys J stated that limited liability protects shareholders and not directors, and directors are responsible for their torts.[302] He stated that a director may be liable in negligence where the director owes a duty of care which arises by reason of the

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[295] At 109.
[296] Above n 276.
[297] *Callaghan*, above n 44, at 109.
[298] Above.
[299] Above n 241.
[300] At 595.
[301] At 591 and at 596.
[302] At 593.

relationship of proximity and neighbourhood existing between the director and the plaintiff.[303] After referring to the two stage test from *Anns*[304], Hardie Boys J said:[305]

> The relevance of the degree of control which a director has over the operations of the company is that it provides a test of whether or not his personal carelessness may be likely to cause damage to a third party so that he becomes subject to a duty of care. It is not the fact that he is a director that creates the control, but rather that the fact of control, however derived, may create the duty. There is therefore no essential difference in this respect between a director and a general manager or indeed a more humble employee of the company. Each is under a duty of care, both to those with whom he deals on the company's behalf and to those with whom the company deals in so far as that dealing is subject to his control.

Having already held the company liable, Hardie Boys J did not conclude that the directors must automatically be liable as the primary tortfeasors. The existence of a duty of care owed by the directors was a discrete issue.

This statement by Hardie Boys J cited above was not confined to the case in question, and it purported to lay down a general test for satisfaction of the element of proximity from *Anns*, in claims against company directors. However, the proximity inquiry cannot be reduced to a single test, and is concerned with everything bearing upon the relationship between the parties, not just control.[306] Hardie Boys J did not consider the relevant statutory framework, or any policy arguments that might have negated a duty of care. His focus on proximity, and his readiness to impose a duty, are not surprising given that the case was decided in 1985, during an expansionary era in tort law and before the retreat from *Anns*.[307] If a case similar to *Morton* came before the courts as a novel case today, with the benefit of the significant expositions on the proper approach to the imposition of a duty of care found in cases such as *Rolls Royce*[308] and *The Grange*,[309] then it would be reasonable to expect a more detailed examination of proximity and policy factors.

In the context used by Hardie Boys J, "control" means control of a dealing or task. The main difficulty with the degree of control "test" is that it often does no more than require

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[303] Above.
[304] Above n 34.
[305] *Morton*, above n 241, at 595.
[306] *The Grange*, above n 19 and n 170.
[307] Discussed in chapter II.
[308] Above n 133.
[309] Above n 19.

the courts to search for negligent conduct by a director. Once negligent conduct by a director is identified, then the "degree of control" over that conduct must be present. "Degree of control" is nothing more than a label applied once a person's negligent conduct is identified. Stripped of labels, Hardie Boys J's test is simply whether a director's personal carelessness is likely to cause damage to a third party. However, foreseeability alone is not sufficient to found a duty of care to prevent pure economic loss.[310]

The directors' liability in *Morton* was an extension of the limits of the permitted recovery in tort of pure economic loss associated with defective buildings, and the decision has had a significant influence on claims against directors in leaky building cases. These cases, discussed in chapter VII, show that the control test has been reduced to a simple search for negligent conduct. It is argued that this approach abrogates a proper inquiry into proximity. The duty has become based on foreseeability alone.

G Trevor Ivory

Trevor Ivory[311] is the high water mark of the jurisprudence absolving directors from liability for torts committed while acting on behalf of a company. The plaintiffs engaged a one-person company to give horticultural advice. The company's director gave negligent advice to the plaintiffs regarding use of a herbicide, which caused damage to the plaintiffs' crop. The Court of Appeal unanimously declined to impose a duty of care on the director. The decision has caused difficulties as a precedent because of the manner in which Cooke P and Hardie Boys J applied the principles from *Hedley Byrne*.[312] *Hedley Byrne* is authority for the imposition of a duty of care based on a special relationship between the maker of a statement and a person relying on the statement, based on an assumption of responsibility. The reasoning of Cooke P and Hardie Boys J extended the application of the concept of assumption of responsibility to claims in general negligence.

Cooke P cited *Lee v Lees Air Farming Limited*[313] and *Tesco Supermarkets Limited v Nattrass (Tesco Supermarkets)*[314] as authority for the proposition that a person may be identified with a corporation so as to be its embodiment or directing mind and will, and not merely its servant, representative, agent or delegate. Based on *Tesco Supermarkets*,

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[310] *Woolcock*, above n 120 and n 122; *Rolls Royce*, above n 133, n 134 and n 147.
[311] Above n 272.
[312] Above n 18.
[313] Above n 273.
[314] *Tesco Supermarkets Limited v Nattrass* [1972] AC 153 (HL) [*Tesco Supermarkets*].

he stated his view that if a person is identified with a company it is reasonable that prima facie the company should be the only liable party.[315]

Cooke P's reasons for denying a duty were in substance matters of policy. He considered previous cases where directors were held liable in a number of different situations, including: torts causing personal injury; deceit; and where the director procured or directed a tort by others.[316] He accepted that it was appropriate to impose duties on directors in respect of personal injuries, and for intentional torts. In respect of economic loss based on a personal duty of care, he stated that it was important to consider how far the duty would cut across established patterns of law. The object of the director in forming a limited liability company, encouraged by long established legislative policy, would be undermined by imposing personal liability.[317] This implied that it was Cooke P's view that the apposite legislative policy was that incorporation limited the liability of directors. There was, and never has been, any express statutory provision to that effect.

Cooke P said that it behoves the courts to avoid imposing on the owner of a one man company a personal duty of care which would erode limited liability and separate identity principles. He viewed the issue in terms of assumption of a duty of care, holding that it was not reasonable to say that the director had done so.[318] He considered that an assumption of responsibility would require something special.[319] The concept of assumption of responsibility applied by Cooke P was one of actual assumption of responsibility. Although the allegation against the director was that he had made a negligent misstatement, Cooke P's reasoning was not confined to cases of misstatement.

Hardie Boys J's starting point was that a company's liability in tort for the acts or omissions of a director is not necessarily vicarious. The existence of a director's duty of care was a matter of fact and degree, requiring a balancing of policy considerations. He stated that a director's liability for personal negligence does not run counter to the purposes and effect of incorporation, which affords no reason to protect directors from the consequences of their own acts and omissions. [320] This reasoning was consistent with his decision in *Morton*.

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[315] *Trevor Ivory*, above n 272 at 520.
[316] At 520 to 523.
[317] At 524.
[318] At 523.
[319] At 521.
[320] At 527.

However, Hardie Boys J made incongruous statements of principle. He noted that *Tesco Supermarkets* was concerned with the identification of the officers or servants of a company with the company for the purposes of a statutory offence by the company, but stated that the observations in that case were of general relevance.[321] He said that the basic premise is that the acts of a director are identified with the company, and that clear evidence is required to displace that with a finding that a director is personally liable. Hardie Boys J then proposed a test for the personal liability of a director or an employee based on assumption of responsibility, actual or imputed.[322]

The reasoning of Cooke P and Hardie Boys J is the source of the disattribution theory of directors immunity to tort liability, described by Watts as reasoning "from another planet".[323]

Cooke P and Hardie Boys J had to deal with Hardie Boys J's decision in *Morton*, and in particular his pronouncement in that case of the control test to satisfy proximity. Cooke P stated that Hardie Boys J's judgment in *Morton* was not intended to lay down a general rule, yet that was the plain meaning of the words used by Hardie Boys J in *Morton*, cited above.[324] The President attempted to reconcile *Morton* with *Trevor Ivory* by asserting that the particular facts of *Morton* gave rise to an assumption of responsibility in that case, confining *Morton* to its facts.

Hardie Boys J held that an assumption of responsibility could be imputed where a director or employee exercises particular control over a particular operation or activity. On this approach, an imputed assumption of responsibility is merely another label for imposition of a duty. To impute an assumption of responsibility, and impose a duty of care, all that is required is clear evidence that a director had control of a task. In effect, the test is satisfied by the identification of negligent conduct by the director, adding nothing to reasonable foreseeability. Hardie Boys J's express shift towards director immunity was undone by his attempt to reconcile his decision in *Morton*. In *Trevor Ivory*, Hardie Boys J did not consider the control that the director had over the advice given, holding that there was no assumption of responsibility. This implies a different approach for negligent misstatements, but he did not articulate that.

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[321] At 526.
[322] At 527.
[323] Watts "Trevor Ivory v Anderson: Reasoning from Outer Space", above n 282.
[324] Above n 305.

McGechan J's judgment was an orthodox application of the principles applicable to negligent misstatements, discerned from *Hedley Byrne*. He treated the existence of the company as part of the factual matrix, holding that a director of a one-person company was not to be regarded as automatically assuming tort responsibility for advice given on behalf of the company. The claim against the director failed on the facts, because there was no actual assumption of responsibility for the statement made. Watts considers McGechan J's approach to be sound.[325]

All three judges accepted that the company was liable for the negligent misstatements made by the director of the company. Given that the director who made the statements was not liable, there was no basis for vicarious liability, and no such finding. The company's liability can only have arisen by attribution, consistent with Hardie Boys J's statement that a company's liability does not necessarily rest on vicarious liability.

The support of Cooke P and Hardie Boys J for the application of assumption of responsibility to claims in general negligence is surprising, when compared to the judgments of the Court of Appeal in *South Pacific*,[326] a case decided in the same year. In that case, the Court considered whether private investigators engaged by insurers owed a duty of care to the insured, unanimously rejecting the duty. In at least one situation, the investigator was acting as a director of a licensed company. All members of the Court acknowledged that the alleged duty was novel, and would lead to the recovery of pure economic loss. The case presented an opportunity for the Court of Appeal to consider the approach to such cases following the House of Lords' retreat from *Anns*, in *Murphy*.[327] The Court confirmed that the two stage approach remained appropriate, and the approach of the Court is the basis for the current approach confirmed in *Rolls Royce*[328] and *The Grange*.[329] All five members of the Court discussed in detail the type and range of factors to be taken into account within the two stage framework. Significantly, assumption of responsibility received little attention, with only Richardson and Hardie Boys JJ expressly using those words.[330] Cooke P noted that the investigators had brought themselves into proximity with the insured. [331] He made no mention of the

[325] Watts "Trevor Ivory v Anderson: Reasoning from Outer Space", above n 282.
[326] Above n 130.
[327] Above n 68.
[328] Above n 133.
[329] Above n 19.
[330] *South Pacific*, above n 130, at 307 per Richardson J, and at 317 per Hardie Boys J.
[331] At 300.

concept of assumption of responsibility, despite giving judgment in *South Pacific* after *Trevor Ivory* was heard, and one month before judgment was given in *Trevor Ivory*.

There are two aspects of the reasoning in *Trevor Ivory* that require further consideration. The first, discussed immediately below, is the founding of a company's liability for negligence on a primary duty of care and attribution, rather than secondary and vicarious liability for the wrongs of others. The second is the extent to which an assumption of responsibility remains relevant for the imposition of a concurrent duty of care on a director in general negligence, or negligent misstatement, discussed in chapters VI, VII and VIII.

III ATTRIBUTION OR VICARIOUS LIABILITY – DEVELOPMENTS POST TREVOR IVORY

In *Brooks v New Zealand Guardian Trust Co Limited*,[332] the New Zealand Court of Appeal was required to consider the rule that the release of one joint tortfeasor releases all joint tortfeasors. It was necessary to determine whether the directors of a company were joint tortfeasors with the company, in the context of the negligent provision of directors' certificates as part of financing arrangements. Cooke P gave judgment for the Court, holding that the company and the directors were joint tortfeasors. He followed his reasoning in *Trevor Ivory*, holding that in most cases directors are not mere agents for whom the company is vicariously liable, but persons for whom the company is liable because their actions are treated as the very actions of the company itself. In some cases the director does not assume a personal duty, and the duty assumed is that of the company only. In those situations where a director is under a personal duty, the company and the director will inevitably be joint tortfeasors.[333]

On appeal to the Privy Council, the Court of Appeal's decision was upheld, but for different reasons.[334] Lord Keith delivered the judgment, and he approached the case based on agency principles and vicarious liability. He held that the directors were the company's agents, and they were acting in the course of their agency when they prepared the certificates, so the company was vicariously liable for the directors' breach of the duty of care that they owed personally.[335] Lord Keith noted that vicarious liability

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[332] *Brooks v New Zealand Guardian Trust Co Limited* [1994] 2 NZLR 134 (CA).
[333] At 140 and 141, per Cooke P.
[334] *New Zealand Guardian Trust Co. Limited v Brook*s [1995] 1 WLR 96 (PC).
[335] At 99.

frequently arises in the absence of any duty directly owed by the principal or employer, but he acknowledged that there are cases where the principal or employer does owe a duty of care to the person injured.[336] Lord Keith's reasoning does not preclude the imposition of a primary duty of care on a company, and attribution to establish breach.

In *Meridian Global Funds Management Asia Limited v Securities Commission* (*Meridian*),[337] the Privy Council considered the attribution of an employee's knowledge to a company in the context of securities legislation. Lord Hoffman drew a distinction between a company's primary rules of attribution, and supplementary general rules of attribution. The primary rules of attribution are found in a company's constitution, and as implied by company law. The general rules of attribution are the principles of agency. A company will appoint servants and agents whose acts, by a combination of the general principles of agency and the primary rules of attribution, count as the acts of the company.[338] Lord Hoffman held that the company's primary rules of attribution, together with the general principles of agency and vicarious liability, are usually sufficient to determine the company's rights and obligations. In exceptional cases, those rules and principles may not provide an answer. A rule of law may by implication exclude attribution based on the general principles of agency or vicarious liability. In those cases the Court must fashion a special rule of attribution for the particular substantive rule.[339] This reasoning was not limited to statutory rules.

Lord Hoffman's reasoning supports the proposition that a court can fashion a rule of attribution to deal with the situation where there is no primary duty of care owed by a company's directors and employees, yet there is a primary duty of care owed by the company. That proposition is supported by the House of Lord's unanimous decision in *Williams v Natural Life Health Foods Limited (Williams),*[340] a case involving negligent advice by the director of a franchisor to a franchisee. Lord Steyn noted that a director acts on behalf of the company, and whether the principal is a company or a natural person, someone acting on behalf may incur personal liability in tort, as well as imposing vicarious or attributed liability on the principal.[341] Although not stated in the reasons, there is a logical distinction that can be inferred from that statement: if the person acting

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[336] At 100.
[337] *Meridian Global Funds Management Asia Limited v Securities Commission* [1995] 2 AC 500 (PC) [*Meridian*].
[338] At 506.
[339] At 507.
[340] *Williams v Natural Life Health Foods Limited* [1998] 1 WLR 830 (HL) [*Williams*].
[341] At 835.

on behalf incurs personal liability then the principal is liable vicariously; if the person acting on behalf does not incur personal liability then the principal's liability is based on attribution. Lord Steyn held the company liable. That liability must have arisen by attribution, because the director was held not liable, so the company could not have been vicariously liable.

The reasoning of the Supreme Court of Canada in *London Drugs v Kuehne Limited & Nagel International Limited (London Drugs)*[342] provides further support. The case involved damage to property caused by company employees. The majority of the Court held that the employees owed a personal duty of care, and were liable. However, Iacobucci J noted that there are no blanket rules as to who is, and who is not, under a duty to exercise reasonable care, and that there may be cases where an employee will not owe a duty of care.[343] Again, the logical inference drawn from the Judge's reasoning is that in those situations where the company is liable, but not the company's employees, the company's liability must arise by attribution and not vicarious liability. In his dissenting judgment, La Forest J held that the employees did not owe a duty. He stated that the negligent act of the employee can be attributed to the company for the purpose of applying the vicarious liability regime, stating that it is generally immaterial in tort law whether the company is treated as liable because it has committed a tort, or whether it is vicariously liable for its employees.[344] Independent negligence by the company, where there is no director or employee who owes a personal duty of care for whom the company can be held vicariously liable, must arise by attribution. This is confirmed by the Supreme Court of Canada's decision in *Edgeworth Construction Limited v ND Lea & Associates* (*Edgeworth Construction*),[345] a case of negligent misstatement. The Court held that the plaintiff had a cause of action against the company, but not the company employees who made the statements. The company's liability cannot have been based on vicarious liability; it can only have arisen as a result of the company owing a primary duty of care, with breach arising by attribution to the company of the employees' negligent acts.

The issue arose in a different context in *Couch v Attorney-General*.[346] The plaintiff had been assaulted by a person on probation. The New Zealand Supreme Court refused to strike out the plaintiff's personal injury claim against the Probation Service for exemplary

[342] *London Drugs v Kuehne Limited & Nagel International Limited* [1992] 3 SCR 299 [*London Drugs*].
[343] At 408.
[344] At 357.
[345] *Edgeworth Construction Limited v ND Lea & Associates* [1993] 3 SCR 206 [*Edgeworth Construction*].
[346] *Couch v Attorney-General* (No 2) [2010] 3 NZLR 149 (SC).

damages. The claim alleged that the Probation Service owed a primary duty of care, in addition to being vicariously liable for the conduct of the probation officer responsible for supervising the offender. Tipping J noted the argument, based on the Crown Proceedings Act 1950, that Crown liability for torts must be vicarious.[347] The Court was not required to decide whether the Probation Service's liability could arise by attribution rather than vicariously. Blanchard J described the law on the topic as uncertain.[348]

IV CONCLUSIONS

In New Zealand law, company liability for the creation of a defective building has been based on the company owing a primary duty of care. In these cases, the company's liability is not vicarious, and liability requires attribution of the conduct of the directors and employees to the company. This does not require disattribution of the conduct from the director or employee.

The English cases, by contrast, suggest that a finding of secondary and vicarious liability of the company, based on the primary liability of the director or employee, is the correct starting point. That is not surprising, given that under English law building companies do not owe a tortious duty of care. The English courts have not had to grapple with these issues in the context of defective buildings. The approach of the English courts is consistent with the views of some academic commentators, such as Watts.[349] However, the reasoning in the English cases does not mandate that if a company is held liable then the company's directors and employees who committed the tortious acts must also be held liable in order to sustain vicarious liability. The cases do not preclude company liability being based on attribution in those situations where the company's directors and employees do not owe a personal duty of care.

The approach of the New Zealand courts has practical and theoretical advantages. From a practical perspective, defective buildings often have multiple complex causes, with numerous contributions from many individual directors and employees of a range of companies. It is often not possible to identify which person is responsible for each negligent act and omission. Imposition of a primary duty of care on the company means that the courts do not have to undertake an exhaustive inquiry into the negligent acts and omissions of each employee, in order to extrapolate findings of vicarious liability.

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[347] At 210 at [173].
[348] At 184 at [71].
[349] Watts "Trevor Ivory v Anderson: Reasoning from Outer Space", above n 282.

From a theoretical perspective, if a building company's liability can only be vicarious and secondary, and not primary liability by attribution, then the reasoning process must begin by determining whether each individual employee and director responsible for the negligent conduct owes a primary duty of care. Proximity and policy arguments could only be assessed based on the relationship between the employee or director and the victim of the tort. There would be no scope to consider proximity and policy from the company's perspective, because the company would only have secondary liability. That has never been the approach in New Zealand.

Once it is understood that a building company's liability arises because the company owes a primary duty of care, then the courts are free to determine whether directors and employees owe a concurrent primary duty of care, based on an application of the two stage framework from *Anns*, as refined in *Rolls Royce* and *The Grange*. In those cases where directors or employees are held to owe a concurrent duty of care, vicarious liability provides a means of establishing the company's liability. If a director or employee does not owe a concurrent duty of care, then a special rule of attribution arises.[350]

[350] *Meridian*, above n 337 – n339.

CHAPTER VI - THE ELEMENTS OF THE TORT AND ASSUMPTION OF RESPONSIBILITY

I INTRODUCTION

This thesis focuses on the liability of company directors and employees for negligent acts and statements in the course of the creation of defective buildings. Identifying the nature of the conceptual distinction between claims in general negligence and claims in negligent misstatement, and whether there ought to be any distinction at all, are difficult issues. It is beyond the scope of this thesis to fully analyse the distinction, or to seek to assimilate claims in negligent misstatement and claims in general negligence in all areas of New Zealand law. However, the issue will be dealt with in the context of the creation of defective buildings.

One of the issues is whether assumption of responsibility should have any role to play in general negligence or negligent misstatements that result in the creation of a defective building. This chapter briefly explores the historical distinction between general negligence and negligent misstatement prior to the leaky building litigation, and in particular whether these heads of liability are comprised of different elements. This theme is further discussed in chapters VII and VIII, which deal with the leaky building litigation.

In chapter VIII it is argued that any distinction between negligent misstatements and general negligence should be abandoned in the context of the creation of defective buildings. Statements made in relation to work performed should be dealt with on the same basis as other acts or omissions. The continued relevance of assumption of responsibility is then further explored in chapter X.

As discussed in chapter V, the decision of the majority of the Court of Appeal in *Trevor Ivory*[351] was premised on the extension of assumption of responsibility reasoning, derived from the negligent misstatement case of *Hedley Byrne*,[352] to all claims against the directors of companies, whether for general negligence or negligent misstatement. This

[351] Above n 272.
[352] Above n 18.

reasoning has been the subject of compelling academic criticism.[353] Campbell proposes an alternative "elements of the tort" approach.[354] This requires an emphasis on the elements of the cause of action pleaded against the corporate agent, because the cause of action itself will take proper account of the defendant's status as an agent.[355] An assumption of responsibility is only required if it is an element of the tort. On this basis, the result in *Trevor Ivory*, discussed in chapter V, can be rationalised as consistent with the elements of the tort approach. Watts argues that a negligent misstatement claim against a company agent requires the plaintiff to show that the agent gave advice on behalf of a disclosed principal but assumed personal responsibility.[356]

Whether a claim is for negligent misstatement or general negligence, the starting point is always whether a duty of care should be imposed. In both cases it is the existence of the duty of care that is the first element of the cause of action. The case law discussed in this chapter confirms that, before the leaky building litigation, assumption of responsibility remained a significant factor when the claim was for negligent misstatement, although the question of whether there existed a special relationship, based on assumption of responsibility for a statement and reasonable reliance, was considered to be part of the general inquiry into whether a duty of care existed. The role of assumption of responsibility in general negligence was uncertain.

Despite numerous judgments that have addressed assumption of responsibility, defining and applying the concept remains difficult. The attempts at defining the concept can be placed on a spectrum: at one extreme requiring an actual assumption of a quasi-contractual obligation; and at the other extreme being nothing more than a deemed state of affairs.

II THE CANADIAN APPROACH

Under Canadian law, assumption of responsibility appears to be an element of liability for negligent misstatement, but not for general negligence. In *London Drugs*,[357] a property damage case, assumption of responsibility did not feature in the reasoning of the majority of the Supreme Court. Iacobucci J imposed a duty of care in general negligence on company employees, for damage to property caused by the employees' negligence,

[353] For example, Watts "Trevor Ivory v Anderson: Reasoning from Outer Space", above n 282.
[354] Campbell "Claims against Directors and Agents", above n 277.
[355] At 109.
[356] Watts "Trevor Ivory v Anderson: Reasoning from Outer Space" above n 282, at 26.
[357] Above n 342.

based on an application of the principle of reasonable foreseeability from *Donoghue*.[358] McLaughlin J applied the two stage test from *Anns*,[359] declining to limit the duty to situations where there was specific reliance by a plaintiff on an employee defendant, because to do so would deprive a plaintiff of substantive and procedural rights, particularly the right to recover from the employee where the employer has insufficient insurance and no realisable assets.[360] The majority saw no need to resort to the *Hedley Byrne* principles of assumption of responsibility and actual reliance.

In *Edgeworth Construction*,[361] a case of negligent misstatement by company employees, the majority of the Supreme Court held that the employees did not owe a duty of care because there was no assumption of personal responsibility by the employees, and no reasonable reliance by the plaintiff on the employees.[362]

III THE POSITION IN THE UNITED KINGDOM

Since the retreat from *Anns*, the principles from *Hedley Byrne* have assumed greater importance in the United Kingdom as a means of setting the limits for the recovery of pure economic loss. Without the availability of the expansive two stage approach to imposing duties of care, the courts in the United Kingdom resorted to *Hedley Byrne*, expanding its application to services[363] and negligent acts.[364] In *Murphy*,[365] the House of Lords noted the possibility that in some circumstances the principles from *Hedley Byrne* might justify the imposition of a duty of care in respect of defective buildings. Gosnell has postulated that *Hedley Byrne* provides a test for pure economic loss, however caused.[366]

In the House of Lords' decision in *Williams*,[367] a negligent advice case, Lord Steyn confirmed the continued significance of the *Hedley Byrne* "principle" in English law, as the "rationalisation or technique" adopted to provide a remedy for the recovery of economic loss, noting that the principle had been extended to the negligent performance

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358 At 406, applying *Donoghue*, above n 15.
359 *Anns*, above n 34.
360 *London Drugs*, above n 342, at 461.
361 Above n 345.
362 At 212.
363 *Henderson v Merrett Syndicates Limited* [1995] 2 AC 145 (HL).
364 *White v Jones* [1995] 2 AC 207 (HL).
365 Above n 68.
366 Christopher Gosnell "The Personal Liability of Corporate Agents: Who Should Bare Pure Economic Losses?" (1997) U Toronto Fac L Rev 77at 82 and 86.
367 Above n 340.

of services.[368] He held that the test is whether the plaintiff could reasonably rely on an assumption of personal responsibility by the individual who performed the services on behalf of the company, commenting that the statement of principle by the Supreme Court of Canada in *Edgeworth*[369] was consistent with English Law.[370]

Lord Steyn confirmed that an objective test is applied when considering assumption of responsibility. The inquiry is whether the director, or a person on his or her behalf, conveyed directly or indirectly to the plaintiff that the director assumed personal responsibility.[371] In other words, did the director take on a quasi-contractual obligation towards the plaintiff. He cited McGechan J's judgment in *Trevor Ivory* as an example of a case that did not meet the test.[372] Lord Steyn rejected academic criticism of the principle of assumption of responsibility. He acknowledged that tort law has an essential "gap-filling role" in the law, and reiterated that a director of a contracting company may only be held liable where the evidence establishes that there was an assumption of personal liability and the necessary reliance, stating that there was nothing fictional about that species of liability in tort.[373]

In *Standard Chartered Bank v Pakistan National Shipping Corp,*[374] the House of Lords upheld a claim of deceit against a company director. Lord Hoffman held that the reasoning from *Hedley Byrne* and *Williams* did not apply to the tort of deceit. All elements of the tort of deceit were proved against the director.[375] Lord Hoffman did not disturb Lord Steyn's reasoning in *Williams*, noting that the decision was not based on company law, but on an application of the law of agency to the requirement of assumption of responsibility.[376]

The treatment of assumption of responsibility in English law was modified by the House of Lords in *Commissioner of Customs and Excise v Barclay*s *Bank (Barclays Bank),*[377] where a bank was held not to owe a duty of care to comply with the terms of a freezing order over a customer's account. Lord Bingham noted that the authorities disclosed three

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[368] At 834.
[369] *Edgeworth*, above n 345.
[370] *Williams*, above n 340, at 837.
[371] At 835.
[372] Above.
[373] At 837.
[374] Above n 278.
[375] At 968 at [21] and [22].
[376] At [23].
[377] *Commissioner of Customs and Excise v Barclay*s *Bank* [2006] UKHL 28, [2007] 1 AC 181 [*Barclays Bank*].

tests for deciding whether a defendant sued for pure economic loss owed a duty of care in tort: assumption of responsibility; the three fold test based on reasonable foreseeability, proximity, and whether it is fair just and reasonable to impose a duty; and the incremental test.[378] All five of the judges acknowledged the existence of the three fold test, with three of the judges confirming that it is the applicable test in the United Kingdom.[379]

The position common to all of the judges in *Barclays Bank* was that assumption of responsibility is a factor that might establish the necessary relationship of proximity, or satisfy the three fold test in general terms, but assumption of responsibility is not a threshold test. Lord Bingham described assumption of responsibility as a sufficient but not necessary condition of liability, and if present it may obviate the need for further enquiries.[380] Lord Hoffmann stated that the assumption of responsibility inquiry is to establish the necessary relationship of proximity, noting that assumption of responsibility has an important function in information cases. He described assumption of responsibility as a legal inference, not a simple question of fact, and noted that questions of fairness and policy still enter into it, and it is more useful to identify those.[381] Lord Rodger stated that assumption of responsibility is not a universal touchstone for the recovery of economic loss, and that it might be decisive in some cases but does not necessarily provide the answer.[382] Lord Mance referred to the three different tests for imposing a duty of care, suggesting that each involves a high level of abstraction, and that what matters in practice is the identification of low level factors.[383] He stated that assumption of responsibility tends to answer the three fold test, and the concept is particularly useful in conventional *Hedley Byrne* cases. However, he said that "if all that is meant by voluntary assumption of responsibility is the voluntary assumption of responsibility for a task, rather than of liability towards the defendant, then questions of foreseeability, proximity and fairness, reasonableness and justice may become very relevant."[384]

Watts considers that a voluntary and genuine assumption of responsibility is the foundation of liability for negligent statements.[385] Stace has reviewed recent scholarship

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[378] At 189 at [4].
[379] At 204 at [53] per Lord Rodger; at 209 at [71] per Lord Walker; at 216 at [93] per Lord Mance.
[380] At 189 at [4].
[381] At 198 at [35] and at 199 at [36].
[382] At 204 at [52].
[383] At 213 at [83].
[384] At 216 at [93].
[385] Peter Watts "Principals' Tortious Liability for Agents' Negligent Statements – Is "Authority Necessary?" (2012) 128 LQR 260.

since *Barclays Bank*, and she argues that assumption of responsibility is not an element of either the tort of negligence or negligent misstatement, in the sense of being a threshold test, but rather a part of the proximity inquiry.[386] *Barclays Bank* provides continued support for an emphasis on assumption of responsibility in cases of negligent misstatement and services, in the orthodox sense of *Hedley Byrne*. Where the defendant is a director, the English courts continue to require as a threshold requirement a finding of an assumption of responsibility in the quasi-contractual sense.[387]

In general terms, Canadian and English law is largely consistent: actual assumption of responsibility and specific reasonable reliance continue to remain significant factors for determining whether a duty of care exists in respect of negligent misstatements and services; the weight to be given to those factors in claims of general negligence is less clear. Other matters of policy and considerations of justice and fairness may assume more importance.

IV THE APPROACH IN NEW ZEALAND BEFORE THE LEAKY BUILDING LITIGATION

A General Negligence

Trevor Ivory led to confusion in the case law in New Zealand, and in subsequent decisions the courts did not clarify what they meant by assumption of responsibility, nor when it is a threshold requirement for establishing a duty of care in respect of acts or statements. In *Banfield v Johnson*,[388] the High Court refused to strike out a claim of general negligence against a director of a building company, in respect of the allegedly defective construction of motels. Thorp J cited Hardie Boys J's judgment in *Trevor Ivory*, noting that an assumption of responsibility could be imputed from the degree of control exercised by a director over particular activities.[389] There was no mention of any requirement, as a threshold or otherwise, for the director to have taken on a personal commitment. Proximity and control, and other matters indicating an assumption of liability, were fact specific and required a trial.[390]

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386 Victoria Stace "Directors' Liability in Negligence – Challenging the 'Elements of the Tort' Approach" (2016) 47 VUWLR 485.
387 For example, see *Sainsburys Supermarkets v Condek Holdings Limited* [2014] EWHC 2016.
388 *Banfield v Johnson* (1994) 7 NZCLC 260,496 (HC).
389 At 260,498.
390 Above.

In *Plypac Industries Limited v Marsh*,[391] the High Court struck out a claim in general negligence against the director of a company that supplied an industrial machine to the plaintiff, which was defective. The allegation against the director was that he was responsible for the company's failure to have in place effective professional indemnity insurance to cover the company's exposure to the plaintiff's claim. Master Venning cited *South Pacific*,[392] holding that the issue of proximity requires consideration of the reasonable foreseeability of harm if care is not taken, and also whether or not there has been an assumption of responsibility.[393] He cited *Trevor Ivory*, noting that special circumstances are required for a finding that a director of a one person company has assumed a personal duty of care.[394] He held that there was no assumption of responsibility on the facts, actual or imputed.[395]

In *Mahon v Crockett*,[396] the Court of Appeal cited *Trevor Ivory*, *Williams* and *London Drugs* for the proposition that for tortious liability generally, an officer or agent of a limited liability company is not personally liable unless there is an actual assumption of liability.[397]

B Negligent Misstatement

In *Price Waterhouse v Kwan*,[398] the Court of Appeal determined a claim of negligent misstatement by reference to the two stage framework for considering proximity and policy factors. However, the following year, in *RM Turton & Co Limited (in liquidation) v Kerslake & Partners*,[399] the Court of Appeal determined a claim of negligent misstatement by reference to the *Hedley Byrne* concepts of actual assumption of responsibility and actual reliance. This led to confusion regarding the correct approach, and the two decisions were criticised by Barker as inconsistent.[400]

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391 *Plypac Industries Limited v Marsh* (1998) 8 NZCLC 261,713 (HC).
392 *South Pacific*, above n 130.
393 *Plypac Industries v Marsh*, above n 391 at 261,716.
394 Above.
395 At 261,718.
396 *Mahon v Crockett* (1999) 8 NZCLC 262,043.
397 At 262,045 at [9] – [12].
398 *PriceWaterhouse v Kwan* [2000] 3 NZLR 39 (CA).
399 *RM Turton & Co Limited (in liquidation) v Kerslake & Partners* [2000] 3 NZLR 406 (CA).
400 Andrew Barker "Devining an Approach to the Duty of Care: The New Zealand Court of Appeal and Claims for Negligent Misstatement" (2001) 10 OtagoLR91; Andrew Barker "The Duty of Care and the Search for Certainty" [2003] NZLJ 44.

The issue returned to the Court of Appeal in *Attorney-General v Carter* (*Carter*).[401] Tipping J gave judgment for the Court, and he endeavoured to assimilate claims of negligent misstatement within the two stage frame work for claims of general negligence. He did so by treating the "interdependent concepts of assumption of responsibility and foreseeable and reasonable reliance" as factors taken into account in the proximity inquiry.[402] That generally accords with the position in the United Kingdom since *Barclays Bank*.[403]

Tipping J described assumption of responsibility as "the rationale for liability for negligent misstatement and the underpinning of the tort at the highest level of generality".[404] He distinguished between actual assumption of responsibility and deemed assumption of responsibility, equating an actual assumption of responsibility with a voluntary undertaking by the defendant to exercise reasonable care.[405] He stated that in most cases the assumption of responsibility will be deemed rather than voluntary.[406] He acknowledged that it can be said that deeming in this sense is simply another way of expressing whether it is fair just and reasonable to impose a duty of care.[407] Tipping J employed "deeming" in its broadest sense, as a legal outcome. This is different to Lord Steyn's approach in *Williams*, which requires the maker of the statement to convey directly or indirectly to the plaintiff that the maker of the statement assumes personal responsibility. Lord Steyn's approach requires an objective conclusion of fact, rather than deeming a legal outcome.

V CONCLUSIONS

The role of assumption of responsibility in New Zealand law was uncertain after *Trevor Ivory*; in particular, doubt existed whether assumption of responsibility is a pre-requisite for claims against company directors or employees in general negligence or negligent misstatement, or both. To compound matters, the concept was ill-defined. The courts were unable to settle on a definition of assumption of responsibility, to clarify whether an acceptance of a quasi-contractual obligation is necessary, or whether an assumption of responsibility can be inferred or deemed.

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401 *Attorney-General v Carter* [2003] 2 NZLR 160 (CA) [*Carter*].
402 At 168 at [22] and [31].
403 Above n 377.
404 *Carter*, above n 401, at 168 at [24].
405 At [25].
406 At [26].
407 At [24].

Carter clarified that the imposition of a duty of care, both for negligent acts and statements, is based on the two stage inquiry into proximity and policy factors. A distinction remained between claims of general negligence and claims of negligent misstatement, in respect of the factors that are applied during the proximity inquiry.

Academic focus on the "elements of the tort" laid the foundation for a distinction to develop in claims against directors in the leaky building litigation, between the role of assumption of responsibility in general negligence and negligent misstatement. As discussed in chapter VII, a major difficulty that emerged in claims of general negligence was uncertainty about whether an assumption of responsibility was required at all for general negligence, and if so, whether satisfaction of the control test from *Morton* was sufficient to find a deemed assumption of responsibility by a director. As discussed in chapter VIII, in claims of negligent misstatement the key factors in the proximity inquiry have been assumption of responsibility and actual reasonable reliance. This approach has perpetuated a conceptual distinction between general negligence and negligent misstatement. In chapter VIII, it is argued that this distinction is invalid in the context of the creation of defective buildings, irrespective of whether the claim is against a building company or its directors and employees.

CHAPTER VII - THE LEAKY BUILDING LITIGATION – CLAIMS IN GENERAL NEGLIGENCE AGAINST DIRECTORS AND EMPLOYEES

I INTRODUCTION

This chapter analyses the High Court's application of the principles of the law of general negligence in claims against the directors and employees of companies in the leaky building litigation, which has been inconsistent and at times incoherent. This is largely a result of the difficulty of reconciling *Morton* and *Trevor Ivory*. The Court of Appeal reviewed the law, in *Taylor*.[408] However, the majority of the Court deliberately refrained from restating the law.

It is possible to identify trends in the development of the High Court's approach, both before and after *Taylor*. The "elements of the tort" approach has predominated, usually engaged as justification for confining the concept of assumption of responsibility to cases of negligent misstatement, so that there is no requirement of an assumption of responsibility for general negligence.

In general negligence, the control test from *Morton*[409] has gained ascendency. The proposition advanced in this chapter is that the test has been reduced in its application to a simple search for negligent conduct by the defendant director or employee. Liability is based solely on responsibility for a task and reasonable foreseeability, which is wrong in principle. This approach overlooks a proper two stage inquiry into whether a duty of care exists, considering all proximity and policy factors.

Given the large number of cases, discussion is confined to the application of the legal principles, largely excluding an analysis of the facts. All of the cases involve leaky residential houses or apartments, and claims against directors or employees in general negligence, unless otherwise stated.

The first cases to reach the High Court did so by way of interlocutory applications by the directors of construction and development companies for defendant's summary judgment

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[408] Above n 219.
[409] Above n 241.

or orders striking out the claim. These interlocutory applications are referred to as "applications for summary judgment".

II THE EARLY CASES

In *Carter v Auckland City Council*,[410] Christiansen AJ declined the directors' application for summary judgment. He adopted the elements of the tort approach, and specifically Campbell's argument[411] that imposition of a duty of care on a builder does not require any assumption of responsibility by the builder to the ultimate home owner.[412] Christiansen AJ preferred the approach in *Morton*, holding that it is the fact of control, however derived, that underlies the duty of care owed by a person.[413] He held that the case was not suitable for summary judgment because it required an analysis of the directors' actions to determine if a breach of duty arose.[414] Christiansen AJ saw the proper inquiry as focused on whether the director did, or refrained from doing, things which may ultimately have led to the defects in the building.[415] His focus was on control of a task.

In *Body Corporate 187947 v EP Maddren & Sons Limited*,[416] the director's application for summary judgment was declined. Rodney Hansen J considered that he was bound by *Trevor Ivory*, and that the principle of assumption of responsibility is not restricted to cases of negligent advice.[417] However, he also applied *Morton*, and held that the facts of the case provided a foundation for an argument that the director's actions involved an assumption of responsibility, based on his direct involvement in the day to day workings of the company.[418] In other words, by undertaking a task the director was deemed to assume responsibility for it.

In *Drillien v Tubberty*,[419] the High Court considered itself bound by *Trevor Ivory*, as establishing personal assumption of responsibility as a requirement of a director's

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410 *Carter v Auckland City Council* HC Auckland, CIV: 2003-404-2192, 12 October 2004.
411 Campbell "Leaking Homes, Leaking Companies?", above n 283.
412 *Carter v Auckland City Council*, above n 410, at [38] and [39].
413 At [34].
414 At [43].
415 At [47].
416 *Body Corporate 187947 v EP Maddren & Sons Limited* HC Auckland, CIV: 2004-404-1149, 13 May 2005.
417 At [9] and [10].
418 At [17] and [18].
419 *Drillien v Tubberty* (2005) 6 NZCPR 470 (HC).

liability in respect of a variety of duties of care, including general negligence.[420] Faire AJ granted the director summary judgment, on the basis that *Morton* was distinguishable, because in the case before him there was no allegation of direct personal involvement by the defendant in the specific areas of work where complaint was made.[421] Faire AJ confirmed his approach to the law in *Body Corporate 209549 v Akita Construction Limited*.[422]

Dicks[423] included a claim against a director of a building company. The director had performed some of the physical building work. Baragwanath J stated that, in considering the director's personal liability, it does not matter whether the principal is liable vicariously or by attribution.[424] He identified a number of competing policy considerations: the public interest in upholding the separate legal identity of a company; the public interest in providing incentives against wrongful conduct and compensating those injured by it; the hierarchy or wrongs from wilful conduct to strict liability; and the law providing greater protection of people and property than merely economic interests.[425] Baragwanath J saw the case as finely balanced, and he elected to follow *Morton*, holding the director liable because he had personally performed the construction of the house and he was personally responsible for negligent omissions.[426] Despite reference to matters of policy, Baragwanath J's decision rested on control of a task.

In *Hartley v Balemi*,[427] Stevens J upheld the Weathertight Homes Tribunal's decision holding the director of a construction company liable. He confirmed that the two step process from *Rolls Royce*[428] was applicable.[429] He described *Trevor Ivory*[430] as the leading case, establishing a requirement of special circumstances to displace limited liability.[431] He viewed the requirement of an assumption of responsibility as part of the proximity inquiry.[432] He stated that the effect of *Trevor Ivory* on the control test from *Morton* was unclear. For leaky building claims, he was content to adopt the control test

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420 At 485 at [41] and at 486 at [42].
421 At [45].
422 *Body Corporate 209549 v Akita Construction Limited* HC Auckland, CIV: 2005-404-3080, 8 November 2006.
423 *Dicks*, above n 153.
424 At 894 at [37].
425 At 895 at [43].
426 At [62].
427 *Hartley v Balemi* HC Auckland , CIV: 2006-404-2589, 29 March 2007.
428 *Rolls Royce*, above n 133.
429 *Hartley v Balemi*, above n 427 at [80].
430 *Trevor Ivory*, above n 272.
431 *Hartley v Balemi*, above n 427 at [81].
432 At [82] and [83].

from *Morton* as the basis for the existence of a builder's duty of care.[433] Stevens J considered the degree of the director's personal involvement and actual control over the building process. He stated that his approach did not mean that the principal of a one person company will always be liable for his or her actions.[434] However, that proposition is not sustainable. A director of a one person company will inevitably have effective control over the company's operations and the actual building process. It is difficult to envisage a situation where a director of a one person building company would not be liable based on this approach to the control test, which requires no more than control of a task.

In *Leuschke*,[435] having rejected the claim that the director was subject to a non-delegable duty as a developer, Harrison J then considered whether the director was liable in general negligence. He stated that an individual who commits all the elements of the tort will be held liable, either solely or concurrently with the individual's principal, based on attribution.[436] He considered that the company structure and agency relationships may be relevant, depending on the tort in question.[437] For negligence, imposition of a duty was based on the two stage inquiry from *Rolls Royce*, with assumption of responsibility central to the proximity inquiry.[438] Harrison J described the concept of assumption of responsibility as the appropriate test for determining a director's personal liability, although adding that it is often satisfied where a director assumes control over a particular operation or activity,[439] which was a reference to *Morton*. Control of the development simpliciter was not enough to found liability, which required an assumption of a degree of personal responsibility for an item of work which was subsequently proved to be defective.[440] He considered whether the director's acts or omissions were directly linked to the nature of the defects or damage in question, drawing a distinction between tasks undertaken in preparation for the development, such as financial planning, and tasks undertaken in implementation of the development, which can be summarised as tasks associated with construction. He found no evidence that the director was involved in the actual building process, and the claim against the director failed.[441] There was no control of a task.

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[433] At [87] and [89].
[434] At [94].
[435] *Leuschke*, above n 253.
[436] At 927 at [52].
[437] At [53].
[438] At [55].
[439] Above.
[440] At 928 at [58] and at [61].
[441] At 929 at [67] and at 930 at [68] – [72].

In *Sunset Terraces* at first instance, in findings that were not appealed,[442] Venning J held liable a director of a development company and a director of a company that had recommended and supervised defective remedial work. He described *Trevor Ivory* as the leading authority, but expressed no enthusiasm for the reasoning. He stated that the question should be whether there has been an assumption of responsibility by the defendant for a task, rather than whether there has been an assumption of legal liability towards the plaintiff.[443] He considered that the position of directors and employees was the same,[444] stating that a director's liability arises because of a relationship of proximity, where a director undertakes operational acts.[445] He considered himself bound by *Trevor Ivory*,[446] and he held that the director of the development company had assumed responsibility based on the director's direct personal involvement in, and control over, construction.[447] He deemed an assumption of responsibility based on control of a task.

III ANALYSIS

In these early cases, the test was reduced to a search for negligent conduct by the director, despite a difference in view amongst the judiciary as to whether *Trevor Ivory* stood as authority for a requirement of an assumption of responsibility in claims of general negligence. The judgments show a reluctance to follow *Trevor Ivory*. Even in those cases where *Trevor Ivory* was acknowledged as the leading authority, the approach of the courts in applying the decision rendered it otiose; the concept applied was deemed assumption of responsibility, based on control of a task. The decisions all turned on whether the director's conduct had led to the defects. Stripped of labels, imposition of a duty was based solely on reasonable foreseeability. All that was required was assumption of responsibility for a task, which is contrary to the Court of Appeals statement in *Rolls Royce* that assumption of responsibility for the task cannot be sufficient in itself.[448]

Dicks[449] and *Leuschke*[450] provide further support for the proposition that a company's liability is based on the existence of a primary duty of care and attribution. This is

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442 *Body Corporate 189855 v North Shore City Council* HC Auckland, CIV: 2005-404-5561, 25 July 2008.
443 At [196].
444 At [198].
445 At [199].
446 At [200].
447 At [204] – [219].
448 *Rolls Royce*, above n 147.
449 Above n 153.
450 Above n 253.

consistent with the proposition advanced in chapter V, that this is the correct approach in New Zealand.

IV TAYLOR

In *Taylor*,[451] owners of leaky townhouses appealed against the High Court's decision to strike out a negligence claim against the director of the building company. The Court of Appeal sat as a court of five, because the owners wished to directly challenge *Trevor Ivory*. The Court eschewed its opportunity to restate the law, and to deal directly with the much criticised reasoning in *Trevor Ivory*, leaving the law no more certain than it was before. William Young P gave judgment on behalf of himself and Arnold J, and on the issue of the director's liability in negligence, Glazebrook and Ellen France JJ concurred. Chambers J gave a separate judgment, in which he advanced an alternative approach to the imposition of liability on the director for negligence.

The case was complicated by the plaintiffs' pleading of alternative causes of action against the director, including claims of negligence and negligent misstatement. Statements by the director in a promotional brochure, which amounted to assurances about the quality of the development to be undertaken, were pleaded as relevant to both causes of action. William Young P's judgment is ambiguous. Significant parts of the judgment are an endorsement of the elements of the tort approach, confining assumption of responsibility to cases of negligent misstatement. Yet other parts of the judgment provide continued support for *Trevor Ivory* and the application of assumption of responsibility to general negligence.

William Young P analysed *Trevor Ivory* and *Williams*,[452] identifying four overlapping rationales for those decisions: disattribution theory; the protection of limited liability of companies; tort liability of employees as inconsistent with the pattern of contractual relationships; and an assumption of personal responsibility as an element of the tort.[453] He then analysed those rationales, beginning by endorsing the academic rejection of disattribution theory, confirming that limited liability is not intended to provide company directors or employees with a general immunity from tortious liability.[454] He endorsed the elements of the tort approach under which a personal assumption of responsibility is

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[451] Above n 219.
[452] Above n 340.
[453] *Taylor*, above n 219, at 28 at [29].
[454] At [30] and at 29 at [31].

only required where assumption of responsibility is an element of tortious liability. He said that in those cases, considerable caution is required before concluding that an employee has assumed personal responsibility,[455] which suggests actual assumption of responsibility.

William Young P then made three further points regarding the elements of the tort approach:[456]

- The restricted approach to employee responsibility based on *Hedley Byrne* is not required in cases which involve the provision of services of a professional or skilled kind.
- *Trevor Ivory* and *Williams* have no application to cases in which assumption of responsibility is not an element of the tort, referring to *Standard Chartered Bank*,[457] which was a case of deceit.
- Damage to property does not require an assumption of responsibility, although he noted the difficulty in the distinction between pure economic loss and property damage.

Unfortunately, he stopped short of a finding on whether claims in general negligence against the directors of building companies are claims in which assumption of responsibility is an element of the tort. When combined with other aspects of his reasoning, this has caused uncertainty.

William Young P had begun his discussion of the relevant authorities with a statement that a plaintiff will usually have to show an assumption of personal responsibility by the defendant, akin to acceptance of a contractual obligation,[458] in other words, an actual assumption of responsibility. His discussion of the claim in question included a detailed analysis of whether the director had assumed personal responsibility, not only in the context of negligent misstatement, but also in respect of the claim in general negligence. He considered that an assumption of responsibility might have arisen by either: the assurances in the brochure; or the director's hands on role in the development.[459] He declined to endorse *Morton* as the test for finding an assumption of responsibility, noting

[455] At [32] and [33].
[456] At 30 at [34].
[457] Above n 278.
[458] *Taylor*, above n 219, at 23 at [16].
[459] At 32 at [39].

that Cooke P had distinguished *Morton* in *Trevor Ivory*.[460] Having said that, he then considered the control test, stating that there might have been such involvement by the director in the building operations as to give rise to an imputed assumption of responsibility.[461] These were matters for trial, so the claim was reinstated. Finally he stated that *Trevor Ivory* might not be the last word on the topic in New Zealand, although it was still open for the Courts to follow *Trevor Ivory*.[462] When his judgment is read as a whole, it is not authority for the proposition that assumption of responsibility has no application in claims of general negligence.

Chambers J agreed that the claim against the director was arguable, but for different reasons. He saw the case as a simple one requiring only a consideration of whether the director's acts or omissions were careless, and his conduct a contributory cause of the damage.[463] He considered that it should not make any difference whether the person was employed or not. The company's liability would be vicarious, and the director and the company would be joint tortfeasors.[464] Chambers J approved *Morton*, and he identified the logical conclusion of the reasoning: the primary tortfeasor is the natural person whose acts or omissions led to the harm in question.[465] In doing so he arrived at the only conclusion that can follow when it is assumed that the contracting company's liability can only be vicarious. However, as discussed in chapter V, this has not previously been the approach in New Zealand. If the correct starting point is that the company owes a primary duty of care, with breach established by attribution, then the reasoning of Chambers J founders.

Although Chambers J stated that the existence of a director's duty of care is an element of the tort,[466] his approach abrogated any inquiry into whether a duty of care exists. All that was required was a finding of negligent conduct. This approach is discussed in chapter IX, where it is argued that the approach is wrong in principle and should not be followed.

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[460] At [41].
[461] At [42].
[462] At 33 at [44] and at 46 at [96].
[463] At 51 at [124] and [125] and at 52 at [128] and at 54 at [143].
[464] At 51 at [125] and at 53 at [132].
[465] At 52 at [126], and at 53 at [132].
[466] At [133].

V HIGH COURT CASES POST TAYLOR

Despite the lack of clarity in *Taylor*, the overwhelming trend in subsequent cases at first instance in the High Court is the general acceptance of the elements of the tort approach, with assumption of responsibility largely confined to cases of negligent misstatement. *Trevor Ivory* continues to be cited, and assumption of responsibility discussed. If assumption of responsibility is applied to claims in general negligence, it is usually coupled with resort to *Morton* and the control test as the basis for establishing a deemed assumption of responsibility. The judgments have continued to focus on the director's conduct, and the two stage approach to the imposition of a duty of care has been reduced to an application of the principle of reasonable foreseeability.

In *Body Corporate 199348 v Nielsen* (*Nielsen*),[467] Heath J held the director liable, finding that there was an assumption of responsibility in terms of *Trevor Ivory*, based on an application of the control test from *Morton*. The director was in control of the building site, and assumed personal responsibility for its oversight.[468] Heath J linked the imposition of a duty to an assessment of a person's functions in the development process.[469] The essence of the negligent act in *Nielsen* was an omission to put in place adequate quality control measures, including supervision of construction. The building company was responsible for that failure, and the issue was whether the director was as well.[470] The director was not a qualified builder, and the judgment did not identify a particular act or omission by the director that contributed to the physical creation of the defects. An independent contractor had been engaged to provide carpenter's labour, and to have day to day responsibility for liaising with sub-contractors.[471] Heath J held that the director was the human being who had taken responsibility for giving the type of direction necessary to supervise the project, and on that basis he was a joint tortfeasor.[472] The reasoning was that the director was responsible for the company's failure to supervise because the director was in a general sense in control of the site.

The decision in *Tony Tay*[473] provides a contrast. Priestley J declined to impose a duty of care on the director of a substantial construction company, with approximately fifty

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[467] *Body Corporate 199348 v Nielsen* HC Auckland, CIV: 2004-404-3989, 3 December 2008 [*Nielsen*].
[468] At [76] and [78].
[469] At [67].
[470] At [57] and [63].
[471] At [54].
[472] At [68] and [76].
[473] Above n 157.

employees. It was alleged that the director had failed to arrange a system of quality control, instead relying on sub-trades to control quality. Priestley J considered that he was bound by *Trevor Ivory*, although he described the concept of assumption of responsibility as a fiction,[474] which presumably was a comment on the notion of deeming. He stated that there is no reason in principle for the immunity of company directors for their torts, citing Chambers J's approach in *Taylor*, focusing on identification of the natural person who is the primary tortfeasor.[475] Priestley J rejected the argument that the director was liable for the company's failure to arrange adequate oversight. There was no evidence that the director was actively engaged or involved in construction, including oversight, so the director was not a tortfeasor.[476] He distinguished *Nielsen* on the basis that the director in that case was responsible for co-ordinating sub trades and ensuring work was carried out in accordance with the plans and specifications, being on site for at least one or two hours per day.[477]

Priestley J confirmed his approach in *Auckland Christian Mandarin Church Trust Board v Canam Construction (1955) Limited* (*Mandarin Church*),[478] where he stated that conceptual difficulties flow from *Trevor Ivory*. He granted a director summary judgment on the basis that there was no evidence of direct personal involvement in the construction work.[479] Priestley J noted that in past successful claims against directors, the director usually had a financial interest in the project. However, he did not analyse the significance of that, or link the existence of a financial interest with control of the project. This theme is developed in chapter X.

In *Chee v Stareast Investments Limited*,[480] Wylie J disposed of an appeal from the Weathertight Homes Tribunal by remitting the case back, with guidance on the law. Regarding the liability of directors, he selectively applied *Taylor* as authority for the proposition that assumption of responsibility is not applicable to cases of general negligence.[481] He took the same approach in *Chen v Zhong*,[482] holding the director of the building company not liable. He held that assumption of responsibility is not an element

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474 At [100] and [101].
475 At [102] and [105].
476 At [146] – [150].
477 At [152].
478 *Auckland Christian Mandarin Church Trust Board v Canam Construction (1955) Limited* HC Auckland, CIV: 2008-404-8526, 25 June 2010 [*Mandarin Church*].
479 At [96] and [99].
480 *Chee v Stareast Investments Limited* HC Auckland, CIV: 2009-404-5255, 1 April 2010.
481 At [112].
482 *Chen v Zhong* HC Auckland, CIV: 2010-404-1995, 14 November 2011.

of the tort of negligence, so no finding of assumption of responsibility was required. In the alternative, he considered whether there was an assumption of responsibility, and found none. There was no evidence that the director was personally involved in construction.[483]

In *Spargo v Franklin*,[484] Potter J expressed her preference for the elements of the tort approach, which would confine assumption of responsibility to cases of negligent misstatement. She stated that the House of Lords had rejected disattribution theory, [485] citing *Williams*[486] and *Standard Chartered Bank*.[487] She expressed the view that, as a result of *Taylor*, it was now generally accepted that a director has no special status in tort and will be liable once the elements of the tort are made out. However, she noted that the majority in *Taylor* had still considered whether there was an assumption of responsibility for the negligent building work, so she could only tentatively conclude that a requirement of assumption of responsibility is relevant only where negligent misstatement is alleged.[488] Potter J held that *Morton* remains relevant, either as establishing proximity for general negligence in terms of *Hamlin*, or as indicative of an assumption of responsibility in terms of *Trevor Ivory*.[489] She found no evidence of direct personal involvement by the director, and therefore no basis for liability.

In *Conning v Martoni Limited*,[490] Doogue AJ declined a director's application for summary judgment. He adopted the elements of the tort approach, citing *Taylor* as authority for the proposition that assumption of responsibility is only considered where it is an element of the tort.[491] He applied the two stage approach, with stage one subsuming the control test and assumption of responsibility.[492] He stated that before the director could be found liable, it would have to be established that the director was sufficiently proximate to the plaintiffs, either based on acceptance of responsibility or direct intervention in the design or construction of the apartments.[493] These issues could not be resolved on an application for summary judgment. Despite reference to *Morton* and

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483 At [93] and [94].
484 *Spargo v Franklin*, above n 259.
485 At [78].
486 Above n 340.
487 Above n 278.
488 *Spargo v Franklin*, above n 259, at [83] and [85].
489 At [92].
490 *Conning v Martoni Limited* [2012] NZHC 401.
491 At [34].
492 At [38] and [39].
493 At [41] and [42].

Trevor Ivory, the test applied was more in line with Chambers J's approach in *Taylor*, and a search for negligent conduct.

In *Heritage Heights Limited v Sinclair Bros Limited* (*Heritage Heights*),[494] Fogarty J entered judgment against two directors of the development and construction companies. He noted that the directors had a stake in the success of the project.[495] He preferred the control "principle" from *Morton*, describing it as thrown into doubt by *Trevor Ivory*.[496] He cited extensively from *Morton*, and the judgment of Chambers J in *Taylor*, holding that he was not bound by the majority judgments in *Taylor*, and free to follow Chambers J. He held that *Trevor Ivory* could now be classified as a negligent misstatement case, and no assumption of responsibility was required to impose a builder's duty of care.[497] He found the directors liable because the directors' conduct caused the defects.[498]

VI ANALYSIS

The cases since *Taylor* demonstrate that the legal principles that should be applied to determine whether a director or employee of a building company owes a concurrent duty of care remain incoherent. Despite that, the consistent trend in the High Court has been the adoption of the elements of the tort approach, confining assumption of responsibility to claims of negligent misstatement. To achieve that, the High Court has drawn selectively from the judgments of the Court of Appeal in *Taylor*.

In those cases of general negligence where an assumption of responsibility has been required, it has been established by an application of the control test, which is satisfied by the identification of negligent conduct.[499] On the approach that has prevailed in the High Court, any director or employee who has any involvement in the construction process is likely to owe a duty of care, without any consideration of any other proximity or policy arguments for or against the duty. This is not in accordance with the two stage inquiry that still prevails in New Zealand.

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494 *Heritage Heights Limited v Sinclair Bros Limited* [2013] NZHC 905 [*Heritage Heights*].
495 At [28].
496 At [27].
497 At [49].
498 At [50].
499 In addition to the cases discussed in chapter VII, other cases taking this approach include *McNamara v Malcolm J Lusby Limited* HC Auckland, CIV: 2006-404-2967, 10 September 2009; *Mackfall v Beattie* HC Wellington, CIV: 2011-485-82, 22 December 2011; *Sayles v Adams* [2014] NZHC 1915; *Body Corporate 234950 v James Hardie New Zealand* [2013] NZHC 1744.

The High Court has continued to hold companies liable by imposing a primary duty of care, rather than secondary and vicarious liability for the acts of the company's directors and employees. In those cases where directors have avoided liability, this has not prevented a finding of company liability for the same conduct.[500]

VII A DIFFERENT APPROACH

In *Lake v Bacic*,[501] Asher J considered the liability of an employee of a development company, who was not a director. He did so by a conventional application of the two stage framework. His inquiry into proximity included a consideration of: the qualifications, experience and skill of the employee; any assumption of responsibility on the part of the employee; the degree of reliance of the claimant on the employee; the employee's ability to foresee loss in the event of negligence; and analogous cases.[502] He referred to Glazebrook J's discussion of deemed assumption of responsibility in *Rolls Royce*, noting that in construction cases an assumption of responsibility for the task cannot be sufficient in itself.[503] Asher J analysed the employee's skills, holding that they were of an organisational nature, rather than related to building workmanship. There was no evidence that the employee had assumed any responsibility for the quality of specific building work, which was left to others.[504] It was not foreseeable that the employee's functions would cause loss, and there was no specific reliance by the plaintiff.[505] The employee was not in control of the project,[506] and he had no equity interest in the project.[507] Asher J concluded that proximity was not established.

Asher J's approach to the imposition of a duty of care was a conventional application of the general approach to the imposition of a duty of care, confirmed in *Rolls Royce* and *The Grange*[508]. This approach should also be taken when considering the imposition of a duty of care on a director, although the range of factors to be considered in the proximity inquiry, and the weight given to each of those factors, may be different. This is discussed further in chapters IX and X.

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[500] For example, see *Tony Tay* above n 157; *Mandarin Church* above n 478; *Chen v Zhong* above n 482; *Spargo v Franklin* above n 259.

[501] *Lake v Bacic* HC Auckland, CIV: 2009-004-1625, 1 April 2010.

[502] At [30].

[503] At [31] and [32].

[504] At [33] and [34].

[505] At [36] and [37].

[506] At [39].

[507] At [40].

[508] Above n 19.

VIII STEPHENS V BARRON

In *Stephens v Barron*,[509] a case that did not involve a leaky building, directors of a company unsuccessfully applied for summary judgment. The company had been contracted to apply prophylactic insect spray inside a house, and the spray operation was conducted negligently. The work was carried out by an employee. The allegations against the directors were that the directors had failed in their supervision, instruction and training of the employee. The Court of Appeal held that the allegations could not be resolved on an interlocutory application, and required a trial. O'Regan P did not see the question of limited liability as significant, and if a duty was established, it would arise from the personal actions of the directors, not from their position as directors. Limited liability was to protect investors, not employees or directors.[510] The duty must be consistent with the contractual framework, but that required evidence at trial.[511] He noted the criticism of *Trevor Ivory* in *Taylor*, but he did not offer any further comment.[512] However, in his statement of the factual issues that needed to be determined, he mentioned the degree of control exercised by the directors, and made no mention of assumption of responsibility.[513] He concluded that the claim could not be described as a strong one, given formidable obstacles to imposing a duty on a director or employee, as opposed to the company, but he did not state what those obstacles were.[514] The reasoning provides no assistance in determining the correct approach in defective building cases.

IX CONCLUSIONS

The courts continue to base a building company's liability on the existence of a primary duty of care, on an orthodox application of *Bowen*.[515] That case remains authority for the proposition that building contractors owe a duty of care, whether those contractors are companies, individuals or partnerships. There is no need to identify directors or employees as primary tortfeasors in order to base the claim on vicarious liability. If a concurrent duty of care is imposed on the directors and employees, it is the result of an

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509 *Stephens v Barron* [2014] NZCA 82.
510 At [30] and [31].
511 At [32].
512 At [23].
513 At [24].
514 At [33].
515 Above n 6.

independent inquiry into whether a duty of care exists, based on the two stage framework confirmed in *Rolls Royce* and *The Grange*.

The principles to be applied in that inquiry remain incoherent. Prior to *Taylor*, the High Court decisions show that the judges were reluctant to follow *Trevor Ivory*. This led to a consistent pattern of paying no more than lip-service to *Trevor Ivory* and adoption of the control test from *Morton*. The Court of Appeal's judgment in *Taylor* failed to clarify the law. The majority's judgment left open the possibility that *Trevor Ivory* continues to apply to claims against directors in general negligence, requiring an assumption of responsibility. The judgment did not clarify whether assumption of responsibility means the quasi-contractual sense of the concept, or deemed assumption of responsibility based on control of a task.

Taylor did nothing to alter the High Court's favoured approach of applying the control test from *Morton*. This test has effectively been reduced to a simple search for negligent conduct by the director or employee. As applied by the High Court in the leaky building litigation, satisfaction of the control test requires no more than control of a task. This is contrary to the Court of Appeal's judgment in *Rolls Royce*, that assumption of responsibility for a task alone is not sufficient to found a duty of care.[516] The prevailing approach in the High Court makes no distinction between imposing a duty and identifying a breach; these two separate elements of the cause of action become conflated when identification of the breach is used to justify the imposition of the duty.

[516] Above n 147.

CHAPTER VIII - THE LEAKY BUILDING LITIGATION – CLAIMS IN NEGLIGENT MISSTATEMENT AGAINST DIRECTORS AND EMPLOYEES

I INTRODUCTION

This chapter discusses claims of negligent misstatement against company directors and employees post *Taylor*.[517] As the law stands, the two stage framework applies to claims of negligent misstatement and general negligence, and if a conceptual difference between the two claims exists, it is in respect of the factors that are applied within the two stage framework, particularly when considering proximity. For claims of general negligence in respect of defective buildings, proximity rests on the concepts of control and general reliance. However, the High Court has largely applied *Trevor Ivory*[518] to claims of negligent misstatement, including a requirement that for a director or employee to be liable there must be an actual assumption of responsibility by words or conduct, which is an assumption of responsibility in the quasi-contractual sense. The High Court has inadvertently moved away from *Carter*, which required only a deemed assumption of responsibility.[519] Actual reliance has remained a further pre-requisite.

Negligent misstatement has been treated as a discrete cause of action, distinct from general negligence which does not require findings of actual assumption of responsibility or actual reliance. Whether a distinction between general negligence and negligent misstatement is ever valid, and whether the law of negligence generally would benefit from a more consistent and coherent approach to acts and statements, are significant issues beyond the scope of this thesis. However, the issue can be disposed of in a straight forward way in the context of the creation of defective buildings.

Some of the cases that will be discussed in this chapter involved alternative claims of general negligence and negligent misstatement, based on the same facts. These cases demonstrate the difficulty of sustaining a distinction between negligent acts, and negligent statements that relate to those same acts, at least in the context of creating a defective building. This chapter discusses an alternative approach based on the reasoning in *Weaver v HML Nominees Limited* (*Weaver*),[520] where statements were treated as

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[517] Above n 219.
[518] Above n 272.
[519] *Carter*, above n 401.
[520] *Weaver v HML Nominees Limited* [2014] NZHC 2073 [*Weaver*].

general negligence. It is argued that statements made in relation to work performed in the creation of a defective building are indivisible from that work. To achieve consistency of logic and principle, the approach to imposing a duty of care in respect of the negligent work and the negligent statements should be the same.

II THE PRE-PURCHASE REPORT CASES

In *North Shore City Council v Wightman* (*Wightman*),[521] MacKenzie J declined to impose a duty of care on an employee of a company who provided a negligent pre-purchase inspection report. He drew a distinction between *Trevor Ivory*[522], which he described as a negligent advice case in which the existence of a duty of care is dependent on the assumption by the tortfeasor of responsibility, and *Morton*[523], which he described as a negligent construction case in which the duty of care was not dependent on any special relationship, or assumption of responsibility. He reasoned that in the latter type of case an employee will generally be liable for breach of a duty of care owed personally by the employee, on the basis of *Donoghue*.[524]

MacKenzie J held that for a finding of negligent misstatement by an employee it is not enough to establish that the employee carried out the work for which the employer assumed responsibility. There is a requirement to show circumstances on which the claimants could reasonably rely as an assumption of personal responsibility by the employee who performed the services on behalf of the employer.[525] He said that this is an objective test, requiring an actual assumption of responsibility by words or conduct, which is the quasi-contractual approach of Lord Steyn in *Williams.*[526]

In *Lockie v North Shore City Council* (*Lockie*),[527] Faire AJ took a similar approach, declining to impose a duty of care on an employee of a company who had provided a negligent pre-purchase report. The employee's liability in negligent misstatement required an assumption of responsibility.[528] He held that there was nothing to justify a

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[521] *North Shore City Council v Wightman* HC Auckland, CIV: 2010-404-3942, 30 November 2010 [*Wightman*].
[522] Above n 272.
[523] Above n 241.
[524] *Wightman*, above n 521, at [15] - [17], referring to *Donoghue*, above n 15.
[525] At [28].
[526] Above n 340.
[527] *Lockie v North Shore City Council* HC Auckland, CIV; 2007-404-6546, 6 July 2011 [*Lockie*].
[528] At [56].

belief on the part of the homeowner that the employee was undertaking a personal commitment, as opposed to the known company commitment.[529]

In *Bonney v Cottle*,[530] Bell AJ considered claims against the directors of a company that had prepared a report for the vendors of a residential property. The vendors in turn passed the report on to a purchaser prior to the sale transaction. He applied *Trevor Ivory* and *Williams*, taking the same approach as MacKenzie J in *Wightman*.[531] He noted that there had been no contact between the directors and the purchaser, and he held that the directors did not take on personal responsibility to the purchaser.[532]

The High Court's approach in all of these cases, which involved pre-purchase reports, can be described as a conventional application of the *Hedley Byrne*[533] principles applicable to cases of negligent misstatements, as confirmed in McGechan J's judgment in *Trevor Ivory* and the House of Lord's judgment in *Williams*.

III CASES INVOLVING STATEMENTS RELATED TO BUILDING WORK

A Derwin

Derwin v Wellington City Council (*Derwin*)[534] involved a claim against the director of a development company, based on his role in providing information to the council to procure a code compliance certificate, several years after construction had been completed. The director had no involvement in the actual construction of the house. The director was sued on the basis of negligent misstatements in a letter to the council, and also for breach of a duty of care in general negligence, allegedly owed to the owner, in respect of the director's investigations that led to the alleged misstatements. When considering the claim in negligence, Mallon J noted that *Taylor* has not resolved the controversy surrounding the potential liability of a director of a construction company.[535] She cited *Trevor Ivory* and *Williams*, and her comments on *Trevor Ivory* treat the case as one of negligent misstatement. Mallon J noted that in *Taylor* the Court of Appeal had

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529 At [58].
530 *Bonney v Cottle* HC Auckland, CIV: 2010-404-427, 24 November 2011.
531 At [26].
532 At [28].
533 Above n 18.
534 *Derwin v Wellington City Council* [2014] HC 341 [*Derwin*].
535 At [48].

applied assumption of responsibility to a claim of general negligence.[536] Mallon J held that the director's assumption of responsibility was limited to the particular representations that he made to the council, and did not extend to an assumption of responsibility to look for defects in the building.[537] Therefore, no duty of care in general negligence was established.

In relation to the claim in negligent misstatement, Mallon J stated that whether the director owed a personal duty of care depended on whether there was a special relationship between the director and the council, and that depended on an objective assessment of whether the director assumed responsibility for the various representations.[538] Her starting point in that analysis, relying on *Taylor*, was that by the incorporation of the company the director had made it clear that the company was legally responsible, and the council needed to overcome that.[539] The council failed on most of the specific allegations of negligent misstatements, because the director had not personally assumed responsibility for the statements, based on the language used in the letter. The director admitted that he had assumed personal responsibility for one specific statement because of the language used in the letter, but he was found not liable because there was no reasonable reliance by the council on that statement.[540]

Again, this was a conventional application of the *Hedley Byrne* principles applicable to cases of negligent misstatement, which sustained an arbitrary distinction between acts and words that led to the construction of a building that was certified to comply with the Building Code.

B Weaver – Assimilating the Approach to Statements and Acts

In *Weaver*,[541] Smith AJ declined an application for summary judgment by a company and its director. The company had given an opinion to the council that stone cladding, to be installed by others on a particular building, would meet the performance requirements of the Building Code. Smith AJ considered whether the opinion was subject to the general duty of care imposed on builders, or alternatively a claim in negligent misstatement.

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536 At [52].
537 At [54].
538 At [59].
539 At [66].
540 At [67], [78] and [86].
541 Above n 520.

Smith AJ noted that "building work" is defined broadly in the Building Act 2004 to include work connected with the construction of a building.[542] He referred to *GPE Holdings Limited v Tile N' Style* (*GPE Holdings*).[543] In that case, a representative of a distributor of building products had made representations about the products to a developer, to convince the developer to use the products in the construction of a particular building. Collins J had to decide whether the statements were "building work" and therefore subject to the ten year longstop limitation period prescribed in the Building Act. He reasoned that the words "in connection with" have a wide meaning, requiring merely a link or relationship between one thing and another. Collins J noted that for work to be connected with the construction of a particular building, the person performing the work must have that particular building in mind.[544] Conversely, if statements or opinions are of a general nature, and unrelated to a specific project, then those statements and opinions do not fall within the definition of "building work" in the 2004 Act. This point was confirmed by the Supreme Court in *The Grange*.[545] Collins J held that the representations fell within the definition of building work in the Act.

In *Weaver*, Smith AJ reasoned that it was arguable that when the company gave its opinion it owed the owners a duty of care in general negligence, without the need to establish specific reliance.[546] He stated a general rule that those involved in building work owe duties of care to future owners of the property in relation to which they carry out work, citing *Bowen*.[547] Regarding the claim in general negligence against the director alleged to be responsible for the opinion, he held that liability does not turn on an assumption of responsibility, adopting the approach of Chambers J in *Taylor*.[548] Smith AJ's reasoning, which treated the making of the statements as an act of general negligence, provides a basis for an assimilation of the approach to imposing a duty of care for negligent words and negligent acts, in the context of the creation of a particular defective building.

Smith AJ held that, in addition, any party who read and relied on the opinion would have a cause of action for negligent misstatement.[549] He considered whether the director was liable to the council in negligent misstatement, applying *Trevor Ivory* and *Williams*,

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[542] Above [68].
[543] *GPE Holdings Limited v Tile N' Style* [2014] NZHC 802.
[544] At [35].
[545] Above n 19, at 419 at [209] – [210].
[546] *Weaver*, above n 520, at [67] – [74].
[547] At [64].
[548] At [88].
[549] At [79].

holding that the issue of whether the director had assumed responsibility needed to be tested at trial. He considered that the facts of the case were distinguishable from *Wightman*[550] and *Lockie*[551], because: those cases involved claims against employees; in this case council had not chosen to deal with the company that provided the opinion; and the director was well known to council staff, and evidence might be produced at trial showing that the director knew and expected that the council would be placing particular reliance on his personal skills and experience.[552] This reasoning was unnecessary given his approach to general negligence. The case proceeded to trial against other parties, but the claims discussed here were discontinued before trial.

C Carroll

In his subsequent decision in *Carroll v Equus Industries Limited,*[553] Smith AJ refused to set aside a judgment obtained by default against a director of a company that had both carried out remedial plastering work, and provided a letter to the council containing an assurance that the products had been applied appropriately.

Smith AJ considered claims against the director for negligent misstatement, which in his view required an assumption of responsibility by the director. He stated that it is not enough to establish only that the defendant employee was the person who made the statement for which the employer has assumed responsibility. There must be circumstances on which the claimant could reasonably rely demonstrating an assumption of personal responsibility,[554] akin to acceptance of a contractual obligation.[555] He could see nothing in the letter in question which could be construed as such an assumption of responsibility by the director. He did not need to apply his reasoning from *Weaver,*[556] where he treated statements as "building work" subject to a duty of care in general negligence, because the judgment upheld was based on a claim of negligent misstatement.

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550 Above n 524.
551 Above n 527.
552 *Weaver*, above n 520, at [104].
553 *Carroll v Equus Industries Limited* [2015] NZHC 942.
554 At [151].
555 At [147].
556 Above n 520.

IV CONCLUSIONS

In cases of negligent misstatement against directors and employees, the High Court has continued to treat assumption of responsibility as an element of tortious liability, applying an objective test requiring an actual assumption of responsibility by words or conduct, following the reasoning of McGechan J in *Trevor Ivory*, the Canadian Supreme Court in *Edgeworth*,[557] and the House of Lords in *Williams*. The High Court decisions have placed no emphasis on the Court of Appeal's decision in *Carter*, which clarified that assumption of responsibility and actual reasonable reliance are factors taken into account in the proximity inquiry. More significantly, Tipping J's classification of deemed assumption of responsibility in *Carter* has not been followed, further adding to the confusion that remains regarding the definition of assumption of responsibility.

Beyond the definition of building work in the Building Act 2004, there is justification in principle for adopting a consistent approach to imposing a duty of care in respect of acts and statements that result in the creation of a particular defective building. The principles established in *Hedley Byrne* were a conservative approach to imposing a duty of care in respect of statements, to alleviate concerns with indeterminacy of claims based on words. That concern does not arise in respect of statements that contribute to the creation of a defective building, because the class of potential plaintiffs is limited to the successive owners of the building. It is illogical to draw a distinction between negligent work on the one hand, and a negligent statement made in relation to that work on the other hand, when both are a cause of the creation of a defective building. Statements made in connection with the construction of a particular building, irrespective of whether the maker of the statement also performs physical work in the construction of that building, should be treated as building work, subject to the law of general negligence. There should be no differentiation in the factors that are applied in the proximity inquiry.

The issue that then arises is the identification of the factors to apply in the proximity inquiry, and in particular, the role of assumption of responsibility, if any. This is discussed in chapter X, where it is argued that the builder's duty of care, based on control and general reliance, should apply.

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[557] Above n 345.

CHAPTER IX - POLICY

I INTRODUCTION AND RECAP

This thesis proposes that control of the outcome of a building project should be the key factor in the proximity inquiry into whether a director or employee of a company involved in the construction of a defective building owes a duty of care. The approach should be the same for acts and words, and directors and employees. In chapter X, it is proposed that those individuals who have de facto control of the inputs into a building project control the outcome, and those individuals will usually have a direct or indirect financial interest in the outcome of the project. These are the lower level factors that should be taken into account in the proximity inquiry.

This thesis builds on the following propositions advanced in chapters I to VIII:

- As the law stands, directors and employees of companies involved in the creation of defective buildings may be impressed with a tortious duty where a concurrent voluntary contractual duty has not already been undertaken. Unsophisticated employees may unwittingly be subject to this tortious duty of care (chapter I).
- Defective building cases involve claims for economic loss. Setting the limits on the recovery of economic loss in tort requires social value judgements; there is no one correct answer (chapter II).
- The historical development of a duty of care in respect of defective buildings was based on the concepts of control of the construction process, and general reliance by a class of plaintiffs (building owners) on a class of defendants (builders) (chapter II).
- A duty of care can be imposed on a contractor, whether a company or an individual, unless the duty is inconsistent with the contractual matrix, and there is no distinction in principle between residential buildings and commercial buildings (chapter III).
- The minimum standard of care required is the exercise of reasonable care to achieve compliance with the Building Code (chapter III).
- A developer's non-delegable duty of care is based on the developer's legal control of the development of residential buildings undertaken for profit. The profit motive that supports the imposition of this non-delegable duty can be used to

support the imposition of a conventional duty of care on a director or employee of that company (chapter IV).

- In New Zealand law, a building company's liability for a defective building is based on the company owing a primary duty of care. Breach can be established by attributing the conduct of the directors and employees to the company. In those cases where the directors and employees are held to owe a concurrent duty of care, vicarious liability provides an alternative means of establishing the company's liability (chapter V).
- Attribution does not result in disattribution of the conduct from the director or employee, who may be a concurrent tortfeasor (chapter V).
- In New Zealand law, assumption of responsibility has remained an important factor taken into account in claims of negligent misstatement, but as part of the proximity inquiry of the two stage framework. The law remains confused regarding whether an acceptance of a quasi-contractual obligation is necessary, and regarding the extent to which assumption of responsibility can be inferred or deemed (chapter VI).
- The courts of first instance have encountered difficulties in stating a test for imposing liability on directors and employees in general negligence, when faced with two alternative conceptual grounds for liability: assumption of responsibility or control (chapter VII).
- In practice, the courts of first instance have largely abandoned assumption of responsibility in claims of general negligence in respect of defective buildings, instead finding liability based on control of a task. In its application, the control test has been reduced to an unprincipled search for negligent conduct and an unqualified application of the principle of reasonable foreseeability (chapter VII).
- In cases of negligent misstatement, the High Court has continued to apply the *Hedley Byrne*[558] principles, requiring an actual assumption of responsibility and actual reliance to establish liability, maintaining a distinction between those claims and claims of general negligence (chapter VIII).
- It is possible to assimilate claims of negligent misstatement and claims of general negligence, in the context of defective buildings, by treating statements about work on a particular building as building work subject to the principles of general negligence (chapter VIII).

[558] Above n 18.

In defective building claims, the imposition of a duty of care on a director or employee of a company is based on a two stage inquiry into proximity and policy factors, as refined in *Rolls Royce*[559] and *The Grange*.[560] It is usual to consider proximity factors before policy. However, given that this thesis challenges the existing approach to proximity, matters of policy will be addressed first, in this chapter. The discussion begins with the statutory framework and the existing statutory and common law remedies. This is followed by a consideration of whether a duty is required at all, and if so, whether it should be a blanket duty imposed on all directors and employees.

II THE STATUTORY FRAMEWORK

A Introduction

The regulation of building work in New Zealand is governed by the Building Act 2004 ("the 2004 Act"). The first stated purpose of the 2004 Act is to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings.[561] The second purpose is to promote the accountability of owners, designers, builders and building consent authorities who have responsibilities for ensuring that building work complies with the Building Code.[562]

B The Prescriptive Regulatory System Prior to 1991

The 2004 Act was preceded by the Building Act 1991 ("the 1991 Act"). Prior to the 1991 Act, the regulatory scheme involved government departments administering provisions contained in over thirty Public Acts, and councils enforcing their own building bylaws.[563] This prescriptive regulatory system was abandoned with the passing of the 1991 Act, which followed a decade of comprehensive analysis and consultation on regulation of the building industry. This included the 1990 report from the Building Industry Commission,[564] which recommended a national system of building control, including the establishment of a building code. This report led to the 1991 Act and the Building Code. The code specified outcomes, and was performance based, rather than

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559 Above n 133.
560 Above n 19.
561 Building Act 2004, s3.
562 Above.
563 Don Hunn, Ian Bond and David Kernohan *Report of the Overview Group on the Weathertightness of Buildings to the Building Industry Authority* (31 October 2002), Addendum at 5.
564 Above n 95.

specifying precisely how work was to be done. The Building Industry Commission's report included a proposal for a compulsory home guarantee scheme operating independently of the 1991 Act and the Building Code. That proposal was never implemented.[565]

C The Failure of the 1991 Act

The leaky building crisis arose under the regulatory regime established by the 1991 Act. In response to the crisis, the Building Industry Authority established an Overview Group to report on the weathertightness of buildings. In a report released in October 2002, the Overview Group described the 1991 Act as a product of the laissez-faire philosophy that prevailed in the late 1980s, and as "light-handed".[566] The Overview Group considered existing consumer protection, noting that there was no industry wide warranty scheme for home purchasers, and commented that existing legal redress available to a homeowner was slow, difficult to access and expensive.[567] Despite that, the Overview Group considered that the 1991 Act was fundamentally sound, although deficient in a number of areas in relation to residential dwellings.[568]

D The 2004 Act as First Enacted

The Overview Group's report was the beginning of a process which culminated in the passing of the 2004 Act. The Select Committee report on the Building Bill 2003 described it as introducing a new framework for the regulation of building work, including regulating the inputs to building work while continuing to provide for performance based standards.[569] The Select Committee report noted that the Bill did not create any new civil liabilities for builders.[570]

The 2004 Act requires that all building work must comply with the Building Code, which prescribes functional requirements for buildings and the performance criteria with which buildings must comply in their intended use.[571] For most building work, owners are

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[565] *The Grange*, above n 19, at 391, at [113].
[566] Above n 563, at 4.
[567] At 8.
[568] At 9.
[569] Building Bill 2003 (78 – 2) (Explanatory note) at 1.
[570] At 2.
[571] ss16 and 17.

required to obtain a building consent, issued by a building consent authority,[572] which is invariably a council. When the building work is completed, the building consent authority must issue a code compliance certificate if satisfied on reasonable grounds that the building work complies with the building consent.[573] "Building work" is defined broadly, and means work for, or in connection with, the construction, alteration, demolition or removal of a building.[574]

The 2004 Act introduced the licensed building practitioner regime, providing that "restricted building work"[575] must be carried out or supervised by a licensed building practitioner.[576] A licensed building practitioner is a building practitioner holding a licence issued pursuant to the 2004 Act, and must be an individual person.[577] A licensed building practitioner was required to certify that restricted building work carried out or supervised by the practitioner complied with the building consent.[578]

The Select Committee had recorded its concern over civil liability potentially being extended to individual employees of companies.[579] The Select Committee recommended that a licensed building practitioner's certificate should not create any liability in relation to any matter to which the certificate relates, or give rise to any civil liability to the owner which would not otherwise exist without the certificate.[580] A clause to that effect was introduced following the Select Committee's report, and passed.[581]

If a licensed building practitioner breaches a statutory responsibility or duty, then the consequences are limited to disciplinary proceedings under part 4 of the 2004 Act. The Select Committee recommended a maximum fine for disciplinary breaches of $10,000, on the basis that it would be large enough to act as a deterrent, but not so large as to be unduly harsh to individual practitioners.[582]

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572 ss40 and 49.
573 s94.
574 s7.
575 Defined in s7 and determined by Order in Council.
576 s84.
577 s286.
578 Building Act 2004 s88.
579 Above n 569, at 18.
580 Above.
581 s88(4).
582 Above n 569, at 46.

As first enacted, the 2004 Act included warranties of quality implied into contracts for building work to household units, and contracts for the sale of household units by a residential property developer, enforceable by first and subsequent owners.[583]

E Amendment of the 2004 Act

In 2010, the Department of Building and Housing undertook a review of the 2004 Act, proposing options for reform.[584] One of the underlying themes of the review was that the 2004 Act engendered a heavy reliance on councils, which was misplaced because councils have only limited control over final building quality. The assertion was that this was causing councils to be unduly risk averse, and to over regulate, leading to an increase in the cost of building.[585] It was suggested that this led to market failure, and the misallocation of risks and responsibilities. One of the objectives of the proposed reforms was to ensure that building contractors were efficiently held to account.[586] Options were considered to rebalance risk and responsibility for residential buildings.[587]

The reform package proposed was described as providing a more balanced accountability model, including clearer building contracts, with the builder's contractual obligations backed by surety providers or a fidelity fund.[588] At the time, it was postulated that the proposals might lead courts to reinterpret the duty of care owed by councils.[589]

This policy approach led to the Building Amendment Act 2012 and the Building Amendment Act 2013. The 2012 amendments included a statement of the responsibilities of the various parties involved in construction. A builder is responsible for ensuring that building work carried out complies with the building consent and the plans and specifications to which the building consent relates.[590] "Builder" is defined as any person who carries out building work, whether in trade or not.[591] The 2004 Act does not include any corresponding definition of a developer's responsibilities. The

[583] ss396 and 398 (repealed).
[584] Above n 4.
[585] At 5.
[586] At 7.
[587] At 9.
[588] At 11.
[589] At 11.
[590] Building Act 2004 s14E.
[591] s14E(1).

responsibility for ensuring that building work complies with the building consent is also cast on the owner.[592] The developer will usually be the owner, but not always.

The builder's statutory responsibilities are interwoven with the responsibilities of others involved in the process. The person who prepares the plans and specifications is responsible for ensuring that they are sufficient to result in the building work complying with the Building Code.[593] The building consent authority is responsible for ensuring that an application for a building consent complies with the Building Code, and issuing the building consent.[594] A licensed building practitioner is responsible for ensuring that restricted building work is carried out or supervised in accordance with the 2004 Act.[595]

The 2004 Act does not include any direct remedy for a failure to discharge these responsibilities, which are stated to be for guidance only. In particular, the Act prescribes that these statutory responsibilities do not reflect the responsibilities of the parties under any other law or enactment or contract, and the statutory responsibilities are not intended to add to the existing responsibilities of the parties. [596]

The 2013 amendments included a refinement of the warranties of quality for building work that are implied into residential building contracts, and contracts for the on-sale of a household unit,[597] which is defined by reference to intended use for residential purposes.[598] The substance of the warranties did not change, however a range of statutory remedies was introduced, including an election between damages and repair.[599] The warranties are comprehensive, and include a requirement that the building work will be carried out with reasonable care and skill, and that the household unit will be fit for purpose.[600] The warranties can be enforced by subsequent owners of the property, even if not party to the original contract which included the implied warranty.[601]

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592 s14B.
593 s14D.
594 s14F.
595 s14E(3).
596 s14A.
597 s362H.
598 s7.
599 s362M.
600 s362I.
601 s362J.

F The Impact of the Statutory Scheme on Tortious Duties

The pattern of the legislative control of building work in New Zealand since 1991 is that Parliament has left it to the courts to resolve the extent of the common law duties owed by those who participate in the construction process. There is no tort of breach of statutory duty in respect of the Building Act; the cause of action is in general negligence.[602] Parliament has not interfered in the courts' imposition of a duty of care on councils. The statutory regime of implied warranties does not indicate a Parliamentary intention that these remedies should be a comprehensive regime to the exclusion of tortious remedies.[603]

It is significant that the statutory description of the responsibilities of those who participate in the construction process is subject to the express reservation that the statutory scheme does not enlarge the legal responsibilities determined by common law.[604] Similarly, the certification obligation imposed on licensed building practitioners is subject to an express exclusion of civil liability.[605]

The amendments to the 2004 Act, in 2012 and 2013, reflect a deliberate policy decision by Parliament to enhance the legal obligations of building contractors, but not employees of those contractors. As Robin Cooke commented extra-judicially, New Zealand courts should be disposed in matters of public policy to develop the common law on a course parallel with that chosen by Parliament.[606] Parliament's course has been to decline to expand the civil liability of company employees and directors.

III OTHER REMEDIES

A Other Statutory Remedies

Under s9 of the Fair Trading Act 1986, a person engaged in trade is prohibited from misleading or deceptive conduct. This will provide an effective remedy to the owners of a defective building in a wide array of circumstances with a core element of misrepresentation. The statutory cause of action overlaps significantly with the tortious duty in respect of statements, and is more favourable to plaintiffs in a number of respects.

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602 *Sunset Terraces*, above n 160, at 311 at [40].
603 *Carter Holt*, above n 201.
604 Above n 596.
605 Above n 581.
606 Cooke "An Impossible Distinction", above n 75, at 68.

For example, it may be easier to establish causation under the Fair Trading Act.[607] Under the Fair Trading Act, directors and employees of companies can be held liable for their own conduct.[608] The Fair Trading Act will often provide a superior route for redress.[609] A full exposition of these matters is beyond the scope of this thesis, and unnecessary for present purposes, because the existence of statutory protections does not preclude liability in tort.[610]

B The Range of Established Tort Remedies in Respect of Defective Buildings

Under New Zealand law, a building contractor's tortious duty of care is well established, and it is consistent with the implied warranties in the 2004 Act. The tortious duty extends to sub-contractors. The non-delegable duty imposed on the developers of residential buildings is consistent with the implied warranties in the 2004 Act.

Each additional tort remedy that has developed is a further extension of the limits of the permitted recovery of pure economic loss. The most significant development in recent times was the extension of a council's duty of care to include commercial property.[611] Most importantly, councils now effectively insure building owners against the risk that a building does not comply with the Building Code. Owners will usually have a remedy against the council for all of the loss, based on the in solidum rule. This is acknowledged by the Supreme Court as tort law achieving loss spreading amongst ratepayers.[612] It is immaterial whether councils are able to insure against this risk: in either case the financial burden of the risk, whether it be meeting claims or paying insurance premiums, is shared by ratepayers.

The Supreme Court's decision in *Spencer on Byron* can be viewed as a policy decision to spread the cost of the leaky building crisis amongst all building owners, who are the ratepayers. This filled a gap left by Parliament's unwillingness to enact any form of compulsory home guarantee scheme. Although loss spreading was only one aspect of the Court's reasoning, it is a social value judgement that forms the foundation of the decision.

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[607] *Red Eagle Corporation v Ellis* [2010] NZSC20; [2010] 2 NZLR 492 at [28] – [29].
[608] *Taylor*, above n 219.
[609] For example, see Whata J's comments in *Body Corporate 160361 v Yuen* [2015] NZHC 1803 at [197].
[610] C*arter Holt*, above n 201.
[611] *Spencer on Byron*, above n 8.
[612] Above.

IV IS A FURTHER DUTY NECESSARY AT ALL?

Given Parliament's decision not to expand employee liability, and the range of remedies already available to owners, it is arguably unnecessary to impose tortious duties beyond the ratio of *Bowen*,[613] which imposed the duty on contractors. Watts argues that the reasoning in *Bowen* is an unprincipled extension of *Donoghue*,[614] an argument that is consistent with the retreat from *Anns* discussed in chapter II, and that the defective nature of the reasoning strengthens the case for not extending it.[615]

The Supreme Court has shifted the risk of Building Code compliance to councils in respect of all buildings, which spreads the losses amongst ratepayers. A further social value judgement, restricting contributions to contracting parties, would be equally valid.

However, it is now unlikely that the subsequent extension of the duty to directors and employees discussed in chapters VII and VIII will be entirely reversed, and it is contended that there is a policy argument against doing that which should prevail, based on a public expectation that director and employees can be held liable in some circumstances, even if those circumstances are difficult to define. A duty has been imposed on directors and employees in numerous decisions of the High Court, discussed in chapters VII and VIII, as well as in a very significant number of decisions from the Weathertight Homes Tribunal. Statistics published by the Ministry of Business, Innovation & Employment confirm that as at October 2016, the Weathertight Service had resolved 2,258 leaky building claims, while 4,324 claim files were closed.[616] The majority of these claims will have been settled, either at mediation or in private negotiations. Often, this will have involved contributions from directors or employees, based on the public expectation that directors and employees can, but not necessarily will, be held liable in negligence. The Supreme Court has shown a preference for upholding social expectations of settled law.[617]

Even so, the law as it applies to the directors and employees of companies involved in the construction of defective buildings requires clarification, to provide for an approach that

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613 Above n 6.
614 Watts "Managerial and worker liability for shortcomings in the building of leaky homes – an antidiluvian perspective", above n 79.
615 Above.
616 Ministry of Business, Innovation & Employment website www.mbie.govt.nz/info-services/building-construction/weathertight-services/weathertight-homes/resolution-service-claims-statistics.
617 *Sunset Terraces*, above n 160 and n 162.

is more discriminatory between those individuals who have control of outcomes, and those who do not. This requires a rejection of the approach of Chambers J in *Taylor*, under which all individuals who participate in construction would be subject to a duty of care.

V REJECTION OF A BLANKET DUTY

As discussed in chapter VII, in claims of general negligence the control test from *Morton*[618] has gained ascendency over assumption of responsibility from *Trevor Ivory*[619], and in its application the test has been reduced to a simple search for negligent conduct by the director or employee. This approach focuses on breach and presumes a duty. This is consistent with the approach of Chambers J in *Taylor*, where he reasoned that the individual will always be the primary tortfeasor, and the only issues are whether the person was careless, and the careless conduct a contributory cause of the damage.[620]

This approach does have the advantage of simplicity. It would lead to consistency of outcomes in determining whether a duty is owed, and it is consistent with the purposes of the 2004 Act, particularly the promotion of the accountability of those involved in construction. It visits loss on all creators of defective buildings.

However, any advantages are outweighed by the unfairness of the results in practice. When a duty of care is imposed on all those who participate in a construction process that has resulted in poor outcomes, then any discrimination between the principal contributors and minor contributors can only occur when causation is considered, or when the contributions of joint and concurrent tortfeasors are fixed. Minor contributors are drawn into a complex litigation process, and incur significant process costs, even though their ultimate liability for damages may be non-existent or minimal. Further, if the litigation process results in a judgment for damages, that can result in losses falling on ill-informed and unsophisticated employees. These parties deserve protection.

The directors of construction and development companies are often commercially sophisticated, and well advised. They are more likely to have an appreciation of the risk of tortious liability before projects are undertaken, and often are able to implement measures to protect assets from creditors, such as the adoption of corporate and trust

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618 Above n 241.
619 Above n 272.
620 Above n 522.

structures to isolate risk. The well informed are often effectively immune to tortious claims. By contrast, many employees are unsophisticated, and have no appreciation of the risk of tortious liability that may be assumed when work is performed. Therefore, those employees are less likely to engage in asset protection. A single defective building claim can be enough to exhaust an individual's net wealth, even if the claim is settled out of court.

The unsophisticated employee will often have no control over the inputs to the project, such as design, selection of materials and proprietary building systems, and quality control systems such as on-site supervision. An employee delegated a specific task to perform, within the confines of the systems and processes selected by others who control the project, has little or no control over the final outcome. A specialist employee may be expected to exercise care and skill when performing a delegated task. However, even if there is a failure to do so the ultimate failure of a building to comply with the Building Code is more likely to be the result of a combination of complex causes and the failure of systems beyond the control of that employee.

Therefore, it is neither fair, just nor reasonable to automatically impose a duty of care on all individuals who participate in the construction process. A principled approach is required, so that the law can differentiate between those who ought to shoulder liability and those who should not. It is not appropriate to confine this differentiation to assessment of the issues of causation and contribution. By the time that these concepts are fully addressed in the litigation process an employee's legal fees can be significant. Further, issues of causation and contribution seldom have a clear cut answer. Faced with risk on those issues, an employee can be easily pressured into a precautionary settlement.

VI ANALYSIS AND CONCLUSIONS

The statutory scheme of the Building Act 2004, and the existence of other statutory remedies, can be viewed as supporting a restrictive approach to imposing a duty of care on company directors and employees. A valid alternative view is that these factors are neutral in the duty of care inquiry.

The approach of Chambers J in *Taylor*, requiring imposition of a duty based on responsibility for a task and reasonable foreseeability alone, is not the law of New Zealand. This approach would require a deliberate and further extension of the permitted

limits of the recovery of economic loss, which is neither necessary nor warranted, given the range of existing remedies.

A duty of care is the foundation of liability in negligence. It is the first element of the cause of action. It is the logical place to introduce a balancing exercise so that individuals are exposed to liability in only those cases where it is fair, just and reasonable.

The preferable course is the retention of the two stage inquiry into proximity and policy factors, with clarification of the underlying concepts and identification of the significant factors to take into account in the proximity inquiry. These factors should be applied consistently, both to actions and statements and to directors and employees. The underlying concepts to consider are assumption of responsibility, control and reliance, which are addressed in chapter X.

CHAPTER X – THE FACTORS THAT SHOULD DETERMINE PROXIMITY

I INTRODUCTION

The proposition advanced in this chapter is that de facto control of the outcome of a building project and general reliance should be the key concepts in the proximity inquiry into whether a director or employee of a company involved in the construction of a defective building owes a duty of care, both in respect of actions and statements. It is appropriate to engage these concepts when considering the liability of the creators of buildings, where indeterminacy is controlled by ownership of the building.

The discussion focuses on the identification of the factors to consider in determining whether the requisite control exists. The proposition advanced is that the existence of a direct or indirect financial interest in the outcome of a building project, in other words a profit motive, should be a significant factor taken into account. It is argued that this factor should allow the courts to draw inferences. The existence of the financial interest factor should allow the inference that sufficient control exists. This would allow the imposition of a duty of care unless other evidence displaced the inference, or other factors such as the contractual matrix or novel policy arguments militated against the duty. The absence of the financial interest factor should allow the inference that insufficient control exists, so that a duty of care should be denied unless the inference is displaced by other evidence establishing control.

Before discussing control, the chapter begins by considering the place of assumption of responsibility and reliance in the proximity inquiry.

II ASSUMPTION OF RESPONSIBILITY

Despite sustained academic criticism of the concept of assumption of responsibility, and the trend in the High Court leaky building judgments of paying no more than lip service to the concept, the appellate courts are yet to rule that it has no application to claims of general negligence in respect of defective buildings. If the concept does continue to apply to general negligence, then a difficulty arises in defining the concept, because of

the distinction between actual assumption of responsibility (in the quasi-contractual sense) and deemed assumption of responsibility.

"Deemed assumption of responsibility" is no more than an alternative label to "duty of care". It is a legal outcome based on judicial consideration of matters of fact. "Deeming" an assumption of responsibility adds nothing to the analysis required before a duty of care is imposed.

One option, advocated by Watts, is to engage assumption of responsibility in the quasi-contractual sense as the basis of liability.[621] Another option is to treat an actual assumption of responsibility by a defendant to a plaintiff as a subset of cases in which a duty of care will be imposed. In other words, a finding of an actual assumption of responsibility would be one means of establishing that it is fair, just and reasonable to impose a duty of care. An actual assumption of responsibility requires an undertaking akin to contract, although that can arise by words or conduct, viewed objectively.[622]

The problem is that an actual assumption of responsibility by a director or employee to an owner will seldom be found to exist, and is very unlikely in the case of subsequent purchasers. Further, requiring an actual assumption of responsibility is inconsistent with the origin of the tort, which was based on the perceived need to provide a remedy to subsequent purchasers. If an actual assumption of responsibility survives as a means of imposing a duty of care, the judiciary will continue to be tempted to dilute the concept, and to resort to finding assumptions of responsibility which do not exist in fact. "Deeming" will likely resurface, even if under a different label.

As a concept, assumption of responsibility has caused significant confusion in the jurisprudence associated with defective building claims. It is difficult to see how that troubled history can be effectively excised if the concept is retained. The law would benefit by abandoning the concept when considering claims in general negligence associated with defective buildings, in respect of both actions and statements, as proposed in chapter VIII.

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[621] Watts "Managerial and worker liability for shortcomings in the building of leaky homes – an antidiluvean perspective, above n 79; Peter Watts "Principals' Tortious Liability for Agents' Negligent Statements – Is "Authority Necessary?" (2012) 128 LQR 260.

[622] *Williams*, above n 340.

Those individuals likely to be held liable based on an actual assumption of responsibility are also likely to be found liable by other means. The test should be based on the concepts that have underpinned the development of tortious liability for defective buildings in New Zealand, which are reliance and control.

III RELIANCE

The reliance required of a plaintiff before a duty of care is imposed on a defendant can range from the narrow concept of actual reasonable reliance, to the broad concept of general reliance. For example, the former has been required for conventional claims of negligent misstatement, and the latter is required for claims in general negligence against councils.

In his dissenting judgment in *London Drugs*, La Forest J advocated a requirement of actual reasonable reliance on a company employee by a plaintiff, as a precondition to the employee's liability in general negligence.[623] He referred to notions of fairness, stating that where a plaintiff suffers injury pursuant to contractual relations with a company, the plaintiff can be considered to have chosen to deal with the company, and can fairly be regarded as relying on the performance by the company. The employees have no real opportunity to decline the risk.[624] The concept was expressed in simple terms as requiring reasonable reliance by a plaintiff on the employee's pocketbook.[625] La Forest J's approach has never been applied in New Zealand, however his comments on fairness can be applied with equal force when considering general reliance.

Where reliance by a building owner is required to establish a claim, general reliance has consistently been held to be sufficient. A requirement of actual reasonable reliance by an owner on a director or employee, like an actual assumption of responsibility, would be seldom satisfied, particularly by subsequent purchasers. If the duty of care imposed on the directors and employees of companies engaged in construction is to be logically consistent with the other established duties, then general reliance is sufficient.

This shifts the focus to a consideration of when it is fair, just and reasonable for a class of plaintiffs, building owners, to be held to generally rely on a class of defendants, the

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[623] Above n 342, at 383.
[624] At 348 and 351.
[625] At 387.

directors and employees of companies engaged in construction. Control provides the touchstone.

IV CONTROL

Control is focused on the wrongdoer, reliance is focused on the victim. Either concept can be used to confine the circumstances in which a duty of care is imposed. Control is the concept that is the cornerstone of the imposition of duties of care on those involved in the construction of buildings. It is the basis for the imposition of a non-delegable duty on developers. The Supreme Court has confirmed that it is the basis of a council's liability.[626] A party can have control of an outcome, or control of a task that contributes to an outcome.

A Control of a Task

An individual physically controls the tasks that the individual performs. If all that is required to attract a duty of care is control of a task, then the legal principle that justifies a duty is tautological. The factor of control will always be present. Imposition of a duty becomes conflated with a finding of a breach, because identification of the breach is used as the basis for imposing a duty. Nothing more is required than the identification of a negligent act or words. The test is reduced to mere reasonable foreseeability, which is wrong in principle, because proximity requires more than foreseeability alone.[627] As discussed in chapter VII, the control test becomes defunct. The judgments of the High Court that have accepted control of a task as sufficient to create a duty, discussed in chapter VII, are unprincipled. Assumption of responsibility for a task, in other words performance of a task, is of itself insufficient to found a duty of care.[628]

B Control of the Outcome

The policy and purpose of the Building Act 2004 is to ensure that buildings are constructed so that they meet the performance criteria of the Building Code. That is the desired outcome of a building project. Control of that outcome is the basis of a council's

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[626] *Spencer on Byron*, above n 8 and n 183.
[627] *Woolcock*, above n 122; *Barclays Bank*, above n 384 per Lord Mance; *Rolls Royce*, above n 134.
[628] *Rolls Royce*, above n 147.

duty and a developer's non-delegable duty. Robin Cooke's extra-judicial value judgement for the imposition of duties focused on the outcome of a building project:[629]

> He who puts into the community an apparently sound and durable structure, intended for use in all probability by a succession of persons, should be expected to take reasonable care that it is reasonably fit for that use and does not mislead.

Outcomes depend on inputs. The importance of the inputs to building work, and control over final building quality, is recognised in the explanatory note to the Building Bill 2003,[630] and the Department of Building and Housing's 2010 review of the 2004 Act.[631] The parties that control the inputs dictate the outcome of a building project.

The important inputs into construction projects include:

- The financial resources that are applied to the project.
- The selection of building products and contractors.
- The systems and processes engaged to achieve the intended outcome.

Most building projects are undertaken by companies, and the companies will have legal control over the inputs to the project. In most cases, companies will have legal control of whether a completed building will comply with the Building Code. However, the individuals behind the companies can have de facto control of the inputs, because of their ability to exercise rights conferred by contract or company law. Control in this sense has been described by the Supreme Court as meaning "physical" control; the ability in law to exert control over the loss causing activity.[632] The Supreme Court's use of the word "physical" carries the unintended connotation of physical activity. A better description is de facto control.

V REFINING THE CONTROL "TEST"

It is proposed that the common law should impose a duty of care on an individual, who stands behind the complex structure of companies and contracts involved in the construction of a defective building, only if that individual has de facto control over the

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629 Cooke "An Impossible Distinction", above n 75, at 70.
630 Above n 569 at 2.
631 Above n 4.
632 *The Grange*, above n 171.

outcome of the building project. The approach should be the same for directors and employees, although results may differ. The requisite degree of control of the outcome should depend on control of the inputs. Imposing a tortious duty of care on the individuals who control the inputs that dictate the outcome of a building project is consistent with the purpose of the 2004 Act. This approach requires the identification of the factors which will determine the existence of sufficient control over the inputs that dictate the outcome of a building project.

VI THE FINANCIAL INTEREST FACTOR

It is proposed that the existence of a direct or indirect financial interest in the outcome of a building project, in other words a profit motive, should be a significant factor taken into account in the proximity inquiry. After first discussing the nature of the financial interest factor, a proposal will be made regarding how the factor could be applied within the proximity inquiry.

A Defining the Financial Interest Factor

All of the inputs to a building project have one thing in common – they have a financial cost. Those costs impact on the profit achieved from the project. The individuals who stand to profit from a project will usually have invested money in the project, and those individuals will usually have control of the financial resources applied to the project, and make the decisions on the allocation of those resources. In the case of projects undertaken by companies, the individuals who have de facto control of the inputs are likely to have a direct or indirect interest in the financial outcome of the project.

It is proposed that the financial interest factor be defined as a direct or indirect financial interest in the outcome of a building project. This is underpinned by a social value judgement that those individuals who stand to profit from a project should share in the risk. This draws on the social value judgement of Cooke J in *Mount Albert*,[633] which emphasised the significance of the developer's profit in the reasoning for imposing a non-delegable duty on developers.

[633] Above n 9.

It is not possible to prescribe all of the circumstances which might amount to a direct or indirect financial interest in the outcome of a building project, but some generalisations are possible.

The obvious starting point is that a shareholding in the development company, which entails a right to share in the company's profit, would constitute a direct financial interest. An indirect interest might include a shareholding held by a trust or an entity related to or controlled by the individual. The determining consideration should be whether the individual has a right or ability to receive a share of the profit from the project, regardless of the legal mechanism engaged to achieve that. For example, a loan by an individual to a development company on conventional commercial terms would not alone satisfy the financial interest factor. However, a loan with "interest" indexed to profit might. Each case would turn on its own facts.

The financial interest factor would usually require a financial stake-holding in the development company. The focus should be on the developer's profit, because that is the profit that is linked to the quality and cost of the inputs that dictate the outcome of the project. The financial interest factor would be unlikely to be satisfied by a financial stake-holding in a company with a lesser role in the project, such as a head-contractor or sub-contractor, where the profit motive is likely to be limited to the usual contractor's margin on a construction contract.

The financial interest factor, as defined above, would never be present in the case of mere employees of any company. That is underpinned by a social value judgement that unsophisticated employees, who are not profiting from a project, ought not to share in the risks of that project. These individuals, whose only remuneration is a wage or salary, are unlikely to control the allocation of resources to a project, or the outcome.

B How the Financial Interest Factor Could be Applied

The practical problem identified in chapter I of this thesis is that under the current law, unsophisticated employees may be unwittingly subject to a tortious duty of care, and therefore unable to appreciate or manage the risk. The increased incidence of the allocation of damages to liable councils has caused councils to take an aggressive approach to joining in third parties to leaky building claims. This thesis proposes a change in the approach adopted by the courts to discourage the practice of joining minor parties to litigation to extract a precautionary settlement. To achieve that, the test for the

imposition of a duty of care on a director or employee of a company involved in the construction of a defective building must be more precisely defined, and amenable to resolution by interlocutory applications for summary judgment or strike out, in cases where the facts can be ascertained and stated with sufficient certainty early in the litigation.

To achieve that, it is not enough to identify the important factors to consider in the proximity inquiry, such as control over the outcome of a building project, control of the inputs, and the financial interest factor. It is necessary to consider how those factors should be weighed, particularly in the context of interlocutory applications for defendant's summary judgment, or interlocutory applications to strike out a pleading, both of which depend on settled facts or facts that can be determined by affidavit evidence alone.

The burden of proof is on the plaintiff alleging negligence, in respect of all elements of the cause of action, including the existence of a duty of care. Evidence to prove the existence of the financial interest factor may be available to a plaintiff before commencing a proceeding. If not, the evidence can be procured by the plaintiff during the discovery process. Relevant evidence regarding the existence or otherwise of the financial interest factor can be expected to be within the control of the defendant at the time that the proceeding is commenced. This raises the issue of the efficacy of inferences and presumptions that might be applied to evidence adduced by a defendant director or employee, in support of an application for summary judgment or strike out.

There is an important distinction between evidential presumptions and legal presumptions, although both rest on a conclusion that a presumed fact can be drawn from a proved fact. An evidential presumption arises when a presumed fact must be inferred in the absence of evidence to the contrary. A legal presumption occurs when the presumed fact must be inferred unless the trier of fact is persuaded of its counter. Only a legal presumption shifts the legal burden. Some evidential presumptions are no more than common sense inferences from proved facts.

The two stage inquiry should not be fettered by elevating the factor of control of the outcome of the building project to a legal test. The greatest strength of the two stage inquiry is that it provides sufficient flexibility to deal with unique circumstances which may arise in a particular case.

It is proposed that where the financial interest factor is established, it should allow a robust inference that the individual has de facto control of the inputs that dictate the outcome of the project. The existence of this control would not impose a duty in a positive sense. Rather, it would justify the imposition of a duty of care on the individual, unless other evidence displaces the inference, or the duty is precluded by the contractual matrix or novel policy arguments. For example, an employee of a development company who participates in an employees' shareholding or profit sharing scheme, or who holds an independent minority shareholding, might adduce evidence to show that those rights and interests did not lead to any influence over the inputs to the project, so that there is no basis for an inference of control of the inputs that dictate the outcome of the project.

Conversely, and perhaps more importantly, the absence of the financial interest factor should allow a robust inference that the individual does not have control of the inputs that dictate the outcome of the project. However, the inference could not be drawn if control of the inputs that dictate the outcome of the project is established by other evidence in a particular case. It is anticipated that these cases would be rare. If an individual can prove the absence of a financial interest in the project, then in most cases that individual would effectively be immune to a claim of negligence.

The legal burden would remain on the plaintiff. The practical outcome of the suggested approach is that the defendant would be under an onus to adduce evidence that the financial interest factor does not exist. This onus is sometimes referred to as a tactical burden. A "tactical burden"[634] exists in the context of causation of accidents under the accident compensation legislation in New Zealand.[635] This is also consistent with the evidential onus cast upon defendants when making applications for summary judgment.[636]

It is not proposed that an evidential presumption be created. Although the distinction between an evidential presumption and a recognised inference is a fine one, engaging the language of presumption runs the risk of fettering the flexibility of the proximity inquiry, and has no precedent in tort law.

The suggested approach is analogous to the modern approach to the application of the maxim of res ipsa loquitur. This maxim allows courts to draw an inference of negligence

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634 Matthew Downs (ed) *Cross on Evidence* (online looseleaf ed, Lexis Nexis) at 2.7.
635 *Accident Compensation Corporation v Ambrose* [2008] 1 NZLR 340 (CA) per Glazebrook J at [63].
636 *Australian Guarantee Corporation (NZ) Limited v McBeth* [1992] 3 NZLR 54 (CA).

from the mere fact that an event has happened. Although previously viewed as a rule of law, the maxim is now viewed as an inference, described by Todd as "an unexceptional principle of evidence".[637] Todd states that the court is not bound as a matter of law to draw the inference, and the court must evaluate the inference from the facts as seems appropriate in all the circumstances of the case.[638] It is proposed that the same approach be taken to inferences drawn from the financial interest factor.

Support for establishing categories of inference rather than presumptions can be found in the accident compensation context, where the ability of a person to continue to work can give rise to an inference that the person is not incapacitated, rather than a presumption.[639]

There are two important checks and balances inherent in the proposed approach. The first is that any inference for or against the existence of control of the outcome of the project could be displaced by other evidence. Secondly, even if control of the outcome of the project is established, a court would still be required to assess all other proximity and policy factors. This approach should provide sufficient flexibility to deal with the myriad of scenarios that might arise, and avoid arbitrary results. The law should develop analogically.

Drawing the proposed inferences would allow a court to make a factual conclusion about whether an individual has control of the outcome of the project, based on the existence or otherwise of the financial interest factor. The significant advantage of this approach is that employees could rely on an inference against control of the outcome of the project in support of an application for summary judgment, on the basis that no duty of care exists.

Although the approach to recognising a duty of care would be the same for directors and employees, recognising the financial interest factor is likely to lead to different outcomes. Employees usually have no financial interest in a project beyond receipt of salary or wages, which would not amount to a direct or indirect financial interest in the profit outcome of a building project. Any minor shareholding in a development company, or other right to share in the profit, might amount to a financial interest. However, that would not dictate a finding of control of the inputs that dictate the outcome of a project: other evidence might prove that this control did not in fact exist.

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637 Stephen Todd "Negligence: Breach of Duty" in Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington 2016) 419 at 448.

638 Above.

639 *Jones v Accident Compensation Corporation* [2013] NZHC 2458, [2014] NZAR 1 at [19].

Directors of closely held development companies usually have a significant financial stake in a project, and those directors would likely be subject to a duty of care. The position would be different for directors of larger development companies who are not shareholders, and directors of companies which perform work pursuant to contracts. Those directors are unlikely to have a direct or indirect financial interest in the profit outcome of a project, and they would benefit from an inference of insufficient control. However, in some cases control over the inputs that dictate the outcome of a project may nonetheless exist, and the inference could be rebutted and a duty of care established.

It is important to note that recognition of the financial interest factor and the inferences discussed above are matters that would relate to the existence of a duty, and not to breach, the standard of care or causation. If a duty was imposed on a director or employee, it would still be necessary to identify a negligent act or omission or statement by the individual that was a cause of the damage.

C Congruence With the Existing State of the Law

The proposed approach is based on a social value judgement that those who profit from the creation of buildings should share in the risk of the adverse financial consequences that result when a defective building is created. There is support in the existing law for consideration of a person's profit motive as a factor that supports the imposition of a duty. This was an aspect of the reasoning of Cooke P in *Mount Albert*, where the profit motive of developers was held to support the imposition of an exceptional non-delegable duty of care.[640] This factor was acknowledged in *Mandarin Church*[641], *Heritage Heights*[642] and *Lake v Bacic*.[643]

Although the rationale for imposing a duty on directors and employees would be consistent with the rationale for imposing a non-delegable duty on a development company, the substance of the duty in general negligence would remain unchanged: the duty is to exercise reasonable care to achieve compliance with the Building Code.[644] To avoid confusion, any statement of the standard of care should be devoid of the word "ensure", which should be confined to the non-delegable duty, which exceptionally

[640] Above n 240.
[641] Above n 478.
[642] Above n 494.
[643] Above n 501.
[644] *Spencer on Byron*, above n 194.

requires the defendant to ensure that care is taken by others. Directors of a development company do not owe a non-delegable duty.[645]

Although in some cases the duty of care might arise because of an individual's shareholding in a development company, this does not mean that there is an abrogation of the principles of company law, including the protection that limited liability affords to shareholders. The duty of care would render an individual responsible only for the individual's own tortious acts, not for the company's torts. The duty would arise because of the individual's de facto control over the inputs that dictate the outcome of the building project, not because the individual is a shareholder per se.

The company's position would be the same whether or not a duty is imposed on an individual: the company may still be in breach of its primary duty of care, because either that duty is non-delegable or the conduct of the directors and employees will be attributed to the company to establish negligence by the company.

Introducing the financial interest factor as the basis for inferences for and against control would produce results largely consistent with the results in the leaky building judgments that followed substantive hearings, discussed in chapters VII and VIII. For example, in respect of claims of general negligence:

- In *Dicks*,[646] *Sunset Terraces*[647] at first instance, *Nielsen*,[648] and *Heritage Heights*,[649] all cases where liability was imposed on a director of a development company, the financial interest factor appears to have been present based on a shareholding in the development company.
- In *Leuschke*,[650] *Tony Tay*,[651] *Spargo v Franklin*[652] and *Derwin*,[653] all cases in which liability in general negligence was not imposed on a director of a development company, it appears that the financial interest factor would have been present based on a shareholding in the development company. On the approach proposed in this thesis, the presence of this factor may have allowed the

[645] *Taylor*, above n 219.
[646] Above n 153.
[647] Above n 442.
[648] Above n 467.
[649] Above n 494.
[650] Above n 253.
[651] Above n 157.
[652] Above n 259.
[653] Above n 534.

inference of control of the outcome of the project and the imposition of a duty of care. However, the result on liability would have been the same because in each case there was no breach; the director had not committed a negligent act or omission which contributed to the defective construction.

- In *Chen v Zhong*,[654] a duty of care was not imposed on the director of a construction company (engaged to build only) because the director was not personally involved in construction. The financial interest factor would probably not have been satisfied, and the result would have been unchanged.
- In *Lake v Bacic*,[655] a case where the employee of a development company was held not to owe a duty of care, the absence of the financial interest factor was one of the reasons for denying a duty, although it was neither allocated the status proposed in this thesis, nor determinative of the outcome.
- In *Hartley v Balemi*,[656] where the director of a construction company (engaged to build only) was held to owe a duty, it is not clear whether the financial interest factor would have been satisfied. The director of the construction company was the son of the shareholders and directors of the development company, and the links between them were not explored in the judgment.
- In *Sunset Terraces*[657] at first instance, liability was imposed on a director of a company that carried out remedial work. The financial interest factor was probably not present, and the outcome might have been different under the approach proposed in this thesis: it would have been open to the Court to infer that the director did not have sufficient control over the inputs that dictated the outcome of the project to warrant the imposition of a duty of care.
- *Carroll v Equus Industries Limited*[658] might have been decided differently. A duty of care was imposed on a director of a construction company (engaged to build only), where the financial interest factor would probably not have been satisfied. However, a judgment was obtained by default and upheld on appeal, so any arguments available to the director were not advanced.

In this thesis it is proposed that the law applicable to negligent misstatements related to the construction of particular defective buildings should, as a matter of principle, be brought into line with the law applicable to other acts and omissions that result in the

[654] Above n 482.
[655] Above n 501.
[656] Above n 427.
[657] Above n 442.
[658] Above n 553.

same defective building. The factors taken into account in the proximity inquiry should be control and general reliance. This should be coupled with the recognition of the financial interest factor and the adoption of the inferences discussed above. A review of the negligent misstatement cases discussed in chapter VIII reveals that some of the outcomes might have been different under this approach:

- *Wightman*,[659] *Lockie*[660] and *Bonney v Cottle*[661] were all cases of negligent pre-purchase reports, and the changes proposed in this thesis would not apply - those cases are distinguishable from cases involving negligent misstatements related to building work that cause the creation of a defective building. Any further change to the law of negligent misstatement is beyond the scope of this thesis.
- In *Derwin*,[662] the director of the development company was held not liable for the alleged negligent statements. It is likely that the financial interest factor would have been present, based on the director's financial interest in the development company. On the approach proposed in this thesis, this would have enabled the Court to draw an inference that the director had sufficient control of the inputs that dictate the outcome of the project, and to impose a duty, subject to the director adducing evidence that control did not in fact exist.
- In *Weaver*,[663] the Court held that it was arguable that the director of the consultancy company that gave a negligent opinion on the efficacy of the cladding owed a duty of care. It appears that the financial interest factor would not have been present, and it is unlikely that the plaintiff could have established that the director did have control of the inputs that dictated the outcome of the project, given that the company had only a very limited role in the construction process. On the approach proposed in this thesis, the director may well have succeeded with an application for summary judgment.

The assimilation of principle in all claims in respect of the creation of defective buildings would not significantly alter the ultimate incidence of the cost of remediating defective buildings. The constriction of the available remedies against directors and employees will make no difference to building owners, who will nearly always have a commensurate remedy against the council and any solvent contractors. There may be cases where a

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659 Above n 521.
660 Above n 527.
661 Above n 530.
662 Above n 534.
663 Above n 520.

council's contribution would be adversely affected by the proposed change. However, when viewed from the perspective of ratepayers as a collective it is reasonable to speculate that this will be insignificant, and results will remain consistent with the loss spreading function identified by the Supreme Court in *Spencer on Byron*.[664]

Those who will be significantly affected by the proposed change are company employees and directors with no financial interest in building projects, other than the receipt of salary or wages for services provided. To return to the concept of general reliance, it is unreasonable to say that building owners generally rely on that class of individuals. It is reasonable to say that building owners generally rely on those individuals who control the inputs that dictate the outcome of a building project.

[664] Above n 8.

CHAPTER XI - CONCLUSION

Imposing a common law duty of care on the directors or employees of a company involved in the creation of a defective building is based on an expansion of the rule of *Donoghue*.[665] New Zealand law has already expanded that rule further in its application to defective buildings than the other major Commonwealth jurisdictions. As a matter of legal principle, there is no correct answer to whether the rule in *Donoghue* should be further expanded. It requires a social value judgement.

The value judgement that underlies this thesis is that it is unfair to impose a blanket duty of care on all company directors and employees who perform tasks in the construction process. That approach fails to discern between those individuals who have control of the inputs that dictate the outcome of a building project, and those individuals who merely perform delegated tasks within the complex construction process. In particular, it is unfair to impose a duty of care on employees, who receive compensation for the services that they provide, with no profit motive and no overall control of the outcome of a project. Conversely, those individuals who profit from the creation of buildings should share in the risk of the adverse financial consequences that result when a defective building is created, provided that those individuals have control of the inputs that dictate the outcome of the project.

In the context of the creation of defective buildings, any distinction between negligent acts and statements is unsustainable, and the principles applicable to negligent statements in this context should be brought into line with the principles applicable to general negligence causing defective buildings. These changes in the common law will require a change of direction at appellate level.

In respect of the creation of defective buildings, the law would benefit from an approach to the imposition of a duty of care on company directors and employees which places significant weight on the factor of de facto control of the inputs that dictate the outcome of a building project, and on the lower level factor of a direct or indirect financial interest in the outcome of the project. The approach to imposing a duty of care should be the same for directors and employees, although results would differ depending on the facts, including the existence of the financial interest factor.

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[665] Above n 15.

The existence of the financial interest factor is an issue that is capable of resolution on an interlocutory application, based on affidavit evidence. In cases where affidavit evidence establishes that the financial interest factor is not present, this should give rise to a rebuttable inference that the company director or employee did not have de facto control of the inputs that dictate the outcome of the project, so that no duty of care arises. This would enable a director or employee to exit litigation by way of an application for summary judgment. This should discourage the practice of joining minor parties to litigation for the purpose of extracting a precautionary settlement. If control of the inputs that dictate the outcome of a project can be established by inference from the existence of the financial interest factor, or by the other evidence, then the two stage approach to the imposition of a duty of care would continue to require a consideration of other factors that might negate the duty, such as the contractual matrix or novel policy factors.

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