

THE LIABILITY OF PUBLIC AUTHORITIES

Introduction

Over the past three years, there have been a number of significant decisions from the Court of Appeal concerning the liability of public authorities in negligence. In this section, I focus on the two most important of those decisions; *Body Corporate 200200*, and *Bella Vista Resort Limited v Western Bay of Plenty District Council*¹ ("**Bella Vista**")

The difficulties for a plaintiff in establishing that a public authority owes a private law duty of care are well known. Not only must a plaintiff satisfy the usual requirements of proximity, policy and fairness, but they must also deal with any additional obstacles raised by the legislation under which the public authority acted. Traditionally, Courts throughout the commonwealth have taken a conservative approach to such claims. Their primary objection is constitutional; on what basis can a Court impose additional private law obligations on an authority whose actions are authorised by statute? If the legislature has not thought it appropriate to grant that plaintiff a private law right of action for breach of their statutory responsibilities (the action for breach of statutory duty) how can the Courts?

Consistent with this concern, the focus of the Courts has been on finding an implied legislative intention as to the existence or otherwise of the duty of care, based on the nature of the power being exercised by the public authority. So for example, if the actions of the public authority involve the exercise of a discretion, or concern a matter of policy, then usually there can be no duty of care.² The public authority, in these situations, is said to have a "blanket immunity" from any private law action in negligence. It is only if the public authority's actions are not of this character, but of a more operational nature (e.g. involving the implementation of a policy or discretionary decision), that a duty of care can arise. Even then, the plaintiff would still need to satisfy the common law requirements for a duty of care.

New Zealand Courts have more recently taken a slightly different approach to these issues. They have shown little enthusiasm for developing large areas of blanket immunity for public authorities.³ On this approach, a public authority is only immune from a private law duty of care where the legislation itself, either expressly or by necessary implication, is inconsistent with such duty. Absent that situation, questions concerning the nature of the power that has been exercised, and whether it involved the exercise of a discretion or a matter of policy, are

¹ [2007] 3 NZLR 429

² *Anns v London Borough of Merton* [1978] AC 728 (HL); *Takaro Properties v Rowling* [1978] 2 NZLR 314 (CA); *X (Minors) v Bedfordshire CC* [1995] 2 AC 633 (HL).

³ See for example, *AG v Prince* [1998] 1 NZLR 262; *AG v Carter* [2003] 2 NZLR 160

simply factors to be considered within the overall *South Pacific* test. Generally, the legislation will raise policy factors to be considered at the second stage of that analysis.

The decisions in *Body Corporate 200200* and in *Bella Vista* involve important restatements of this approach. The decisions provide a useful basis for describing the general factors a Court will consider in imposing a duty of care on a public authority. However, they are also examples of what has become an increasingly conservative approach to the liability of public authorities. As I will discuss at the end of this section, the decision in *Couch* does suggest that this narrow approach to such liability may be about to change.

Body Corporate 200200

The most significant decision on the liability of public authorities over the past three years is the decision of the full bench of the Court of Appeal in *Body Corporate 200200*. In addition to the comments made by the Court in respect of situational duties, as discussed earlier, it is now probably the leading New Zealand authority on the liability of public authorities (at least until the decision in *Couch*).

The allegations of negligence against the BIA in that case concerned its approval of a particular method of construction, its approval of the building certifier, and its approval of certain insurance arrangements. Consistent with the approach to the liability of public authorities that had previously been taken in New Zealand, the Court analysed these alleged duties of care within the structure of the *South Pacific* test. In respect of the proximity issue, the Court described the issues that were relevant to that inquiry as follows (at para 37):

- “(a) *Whether the duties of care have been imposed in analogous situations;*
- (b) *The substantiality of the nexus between the defendant’s alleged negligence and the plaintiff’s loss (a factor which may to some extent overlap considerations of remoteness and causation);*
- (c) *General considerations of vulnerability on the part of the plaintiff and a potential burden on the defendant (or others similarly placed) of taking precautions against the risk in issue ...*

This necessarily raises the question whether the plaintiff (and others similarly placed) or the defendant (and others similarly placed) are better placed to take steps to avoid or minimise the risk; and

- (d) *The nature of the relevant risk. The Courts are most likely to find proximity where the underlying risk is associated with health, personal injury or death and more likely to do so where there is a risk of property damage than where the risk is purely economic. Of course, in building defect cases it is not always easy to distinguish between property and economic loss. Also relevant to the size of the class affected by the risk. The larger the class (and thus the more indeterminate the alleged duty), the less likely it is that a duty will be imposed.”*

This listing of the factors relevant to the proximity inquiry, together with the similar description by Glazebrook J in *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd*,⁴ remains the most comprehensive statement of the requirements of proximity.

The Court did not list the statutory context as a matter relevant to proximity. Instead, the statutory context was considered at the policy stage of the inquiry. The Court described the approach to policy issues as follows (para 38 ff):

“[38] In this case, the policy issues that arise are primarily associated with the particular statutory context in which the BIA operated and thus fall to be considered in terms of the principles which apply when an attempt is made to impose a duty of care on a public body.

[39] The primary policy issue that must be addressed is whether the imposition of a duty of care would be consistent with the terms and policies of the statute which governed the functions of the defendant. A duty of care will not be imposed if the effect would be inconsistent with the scheme and policy of the Act.

...

[41] Statutory functions that involve quasi-judicial or legislative powers are not appropriately the subject of duties of care ...

[42] The Courts are slower to impose duties of care in relation to omissions to act (non-feasance), as opposed to the positive exercise of statutory powers (misfeasance). As well, the more policy-oriented and less operational the power in question is, the less likely a duty is to be imposed (albeit that the policy/operational test is not always altogether easy to apply). The further removed the public body is

⁴ [2005] 1 NZLR 344.

from day-to-day physical all control over the activity which directly caused the loss, the less likely the Courts are to impose a duty of care.”

In respect of the result in the case, the Court found that there was no relationship of proximity between the BIA and the plaintiffs.

- (a) The Court viewed the relationship between the BIA and any particular homeowner as very limited. The inspection and certification process could have been carried out by any one of a number of consenting entities, and there was no necessary relationship between the particular certifier involved in this project and the BIA.
- (b) Within the structure of the whole construction and approval process, there were other parties with a more direct relationship to the plaintiffs that were more obvious sources of protection.
- (c) There was no particular vulnerability on the part of the plaintiff to actions of the BIA, as opposed to the actions of others within the building process.
- (d) The analogous cases were against such a duty of care.

The Court also held that the alleged duty of care could not be supported on policy grounds. The particular policy factors the Court relied on were as follows:

- (a) The Court took the view that a number of the functions carried out by the BIA were properly characterised as “quasi-legislative” or “quasi-judicial”. Such functions were usually “off limits in terms of imposing duties of care” (para 62). It is not entirely clear from the judgment exactly what functions of the BIA the Court had in mind. However, they appeared to include, not only the approval process for a certifier, but also decisions made by the BIA over how it responded to concerns over particular building methods.
- (b) The Court was also concerned with the practical effects of imposing a duty of care, and the potential for such a duty to interfere with the BIA’s primary obligation to properly regulate the building industry, and manage the approval of building certifiers. The Court was particularly concerned that the duty of care may make the BIA overly conservative in its exercise of those functions.
- (c) There were also concerns about a potentially inappropriate intrusion into policy matters, such as the allocation of resources by the responsible minister to the BIA,

and the balancing of the cost of the requirements the BIA may impose on the industry, and the benefits that may flow from those requirements. These were decisions for the BIA to make.

- (d) The alleged duty of care was contrary to the general thrust of the legislative scheme. The structure of that scheme did not suggest that the BIA should be providing what was effectively a guarantee to homeowners in respect of particular building practices used.

Bella Vista Resorts Ltd v WBPDC

The decision in *Body Corporate 200200* was followed by the important decision of the Court of Appeal in *Bella Vista*.

The plaintiff had applied for and been granted a resource consent on a non-notified basis. She subsequently applied for a variation to that consent, again on a non-notified basis following discussions with council planning officers. Her neighbours objected, and they were successful in having that consent set aside in subsequent judicial review proceedings. Rather than appealing the judicial review decision or applying for a new consent, the plaintiff brought proceedings against the council to recover losses she had suffered as a consequence of the incorrect issuing of a consent by the council. In general terms, her allegation was that the council owed a general duty to all persons who relied on a resource consent, even the person who applied for it.

Similar issues had come before the Court of Appeal on two separate occasions. In *Craig v East Coast Bays City Council*⁵ (“**Craig**”), the Court of Appeal had held that a council owed a duty of care to the neighbour of a person applying for a resource consent. In *Morrison v Upper Hutt City Council*⁶ (“**Morrison**”), however, a full bench of the Court of Appeal had refused to recognise a duty of care owed by a council to a party who acted on oral advice from a council representative that an application for resource consent would be granted.

Justice Robertson and Chambers J chose to distinguish *Craig* on its facts, and applied the decision in *Morrison*. In some respects, what underlies their finding is a proximity concern, and the fact that as between the council and the applicant for a consent, it was not appropriate for the council to carry the consequences of a consent being wrongly issued when it had been sought in those terms. However, the Court’s analysis of the duty of care

⁵ [1986] 1 NZLR 99.

⁶ [1998] 2 NZLR 331.

focused almost entirely on policy concerns. Those concerns echoed the ones relied on by the Court in the *Body Corporate 200200* case. In particular:

- (a) The council in issuing a resource consent was fulfilling a “quasi-judicial” function. As had been explained in *Body Corporate 200200*, such a function was not suitable for review within a private law negligence action.
- (b) They also referred to what they described as the “chilling effect” a duty of care would have in these situations if the council was not entitled to rely on what they were told by an applicant in their application for the consent.
- (c) The court was particularly concerned with “floodgates” arguments. If a duty of care was recognised in this case, then every consent issued by a council was potentially subject to subsequent review by a court, and the imposition of a private law negligence liability.
- (d) They also referred to the alternative remedies available to the plaintiffs, of judicial review of the consent decision, civil proceedings against its advisors, or reapplying for a consent.

William Young P, with some reluctance, also agreed to strike out the case. He did not accept that the case could be distinguished from the decision of the Court of Appeal in *Craig*, nor was he satisfied that the policy issues were as clear as presented by the other members of the Court (particularly the floodgates argument). However, in his view, *Morrison* had overruled *Craig*, and it was therefore the controlling authority. On an application of the principles of that case, the claim had to be struck out.

Discussion

The decisions in *Body Corporate 200200* and *Bella Vista* provide some reasonably clear direction from the Court of Appeal as to how the Courts should approach an alleged duty of care against a public authority in a situation not covered by previous authority. In particular, they outline the policy considerations the Court will consider in its analysis. The principles from those cases (and others over the last few years) can be summarised as follows:

- (a) If the alleged duty of care is inconsistent with the scheme and purpose of the legislation then there can be no duty of care. para 39;⁷ It appears that the standard

⁷ (*Gisborne DC v Port Gisborne Ltd*) [2007] NZLA 344 para 52).

of inconsistency here is quite high. Most likely this situation will only arise where the statute expressly, or by necessary implication, excludes the duty or care.

- (b) If there is no clear restriction on a private law duty of care, then the statutory context is considered within the general approach to novel duties of care as set out in *South Pacific*. Usually, considerations arising from the statutory context will be considered as part of the policy analysis at the second stage of that test.
- (c) A strong indicator against a duty of care will be if the power being exercised by the public authority could be characterised as “quasi-legislative” or “quasi-judicial”. I discuss this issue in greater detail below. I will suggest that what is really meant here is that it is unlikely that the court will recognise a duty of care if what is involved is the exercise of a *discretion* by the public authority.⁸
- (d) The policy/operational distinction is still important. The more policy-oriented the relevant power is, the less likely it will be subject to a duty of care.⁹
- (e) Courts are concerned with the practical implications of the suggested duty of care. The Courts will be less likely to recognise a duty of care where the duty of care is likely to promote a culture of cautious or defensive action by the public authority in carrying out its statutory functions.
- (f) This concern with the practical implications of the duty of care is also reflected in the heightened consideration given to the “floodgates” argument. The Courts are unlikely to recognise a duty of care if it raises the spectre of a potentially broad range of liability for the public authority.
- (g) The Court will consider the extent to which a remedy against the public authority is necessary. If the plaintiff has other remedies it can pursue (for example, appeal rights, or civil actions against others involved in the process) the Court will be less likely to impose a duty of care.

These factors are not particularly controversial. Most have featured in previous decisions. The two decisions are, however, an important and helpful collection and restatement of these principles.

⁸For an analysis of this issue by reference to a discretionary power, see *Ministry of Fisheries v Pranfield* [2008] NZCA 216.

⁹ See also *Gisborne DC v Port Gisborne Ltd* [2007] NZCA 344.

Probably the only controversial factor to emerge from these cases has been the idea of “quasi-legislative” or “quasi-judicial” powers. This is seen as a significant indicator against a duty of care in both *Body Corporate 200200* and *Bella Vista*.

It is not entirely clear what the Court means by either of these terms. The term “quasi-judicial” seems more naturally applied to proceedings and decisions that have a judicial character, such as the determination of some controversy, with representation by the parties affected, and a decision by an independent arbiter. The granting of a resource consent, or the approval of a particular company to act as a certifier, do not easily fit into that category.

Likewise, it is difficult to say that a council in issuing a consent, for example, is somehow acting in a legislative capacity. Clearly any decision by a public authority with a statutory power of decision has some legislative characteristic. That is the whole issue in making public authorities subject to a private law duty of care. But it is not clear what it adds to the analysis to describe what are essentially discretionary decisions on matters of policy as “quasi-legislative”. Making a decision by reference to some defined criteria such as the granting a resource consent, is exactly what statutory authorities given a power of decision do all the time.

What I suggest is really involved in both of these concepts are the old ideas of discretionary decisions in respect of policy matters. Clearly there are difficulties in imposing a duty of care over a public authority in respect of a matter that is within their discretion to decide. These difficulties have long been recognised. However, the New Zealand Courts have taken the view that this factor in itself does not create a “blanket immunity” from any private law action. It would be unfortunate if such a de facto immunity were to be introduced simply through the use of the pejorative terms of “quasi-judicial” and “quasi-legislative”.

Couch

The decision in *Couch* offers potentially a new perspective of the issue of liability of public authorities. The case was ultimately resolved at the proximity stage of the inquiry. However, the Court was also unanimous in refusing to strike out the claim at that stage, when the exact policy dimensions raised by the claim could not be known. To that extent, the case is something of a response to the ease with which the Court of Appeal felt able to strike out the claim in *Body Corporate 200200* and *Bella Vista* on broad policy arguments. Because claims of negligence against public authorities involve particular policy considerations, the scope for a successful strike out of such claims must now be greatly diminished.

The judgment of Elias CJ, however, also challenged the underlying reluctance in the cases to recognise a duty of care on a public authority. She made the point strongly that in many situations, the arguments in favour of liability of public authority were probably greater than those of an ordinary member of public (para 56 ff):

“[56] A duty of care in the exercise of statutory obligations and powers will often be more readily apparent than in the case of private actors.

...

[57] Those operating under statutory duties, as a probation service was in supervising Bell, are not entitled to be indifferent bystanders. In Stovin v Wise, Lord Hoffman, who delivered the leading speech for the majority, accepted that there is no “why pick on me” concern in such cases.

...

[58] In the present case, the probation service could not be a bystander. It was obliged to undertake the supervision which was its statutory duty.”

Again, it is too early to say whether *Couch* is going to herald a new, more expansionary approach to the liability of public authorities. Its most significant effect is likely to be in reducing the scope for successful strike out applications. That in itself is likely to lead to some expansion in liability. Whether the Courts will adopt Elias CJ’s more provocative suggestion that there is often greater scope for liability on public authorities than private individuals remains to be seen.