

TORT LAW UPDATE: 2008

DEVELOPMENTS IN THE APPROACH TO THE DUTY OF CARE:

Introduction

A theme we have touched on in the last two seminars has been the way that New Zealand Courts have formulated and structured their approach to the duty of care in novel fact situations. In our previous reviews, two themes have emerged:

- (a). The three stage test set out in *South Pacific Manufacturing Co Ltd v NZ Security Consultants and Investigations Ltd*¹ (“**South Pacific**”), which focuses the Court’s inquiry on questions of proximity, policy and “fairness”, has been accepted as a general approach to all claims involving a novel duty of care. In particular, it is now accepted as the correct approach in analysing claims for personal injury, negligent misstatement, and the negligence of public authorities.²
- (b). The increasingly conservative approach of the New Zealand Court of Appeal to any extension of negligence liability.

In terms of the first of these issues, and the form and structure of the Courts’ approach to a novel duty of care, practitioners may be pleased to know that nothing much has happened over the past two years to challenge the supremacy of the *South Pacific* test. It has been applied in almost all decisions on the duty of care in the High Court, the Court of Appeal and the Supreme Court.³ Instead, most of the important developments in this area have been in respect of the second of these themes, and the attitude of the Court of Appeal to any expansion of liability in negligence.

As the Courts have made clear on a number of occasions, the approach in *South Pacific* is not a normative statement of the circumstances in which a duty of care will arise. Rather, it is a formal structure within which a range of factors may be considered by the Court. As a consequence of this, the Courts have tremendous flexibility in how they deal with the duty question in any novel fact situation. Courts often view this flexibility as the great strength of

¹ [1992] 2 NZLR 282.

² *AG v Carter* [2003] 2 NZLR 160; *Rolls Royce NZ Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324.

³ It was expressly endorsed by the Supreme Court in *Couch v AG* [2008] NZSC 45 at para 78.

this approach. The criticism that is often made, however, is that this flexibility comes at the expense of certainty.

Regardless of whether you see this flexibility as a good or bad thing, it is undeniable that since the mid 1990's at least, the Court of Appeal has used the flexibility inherent in the *South Pacific* test to take an increasingly conservative approach to the expansion of liability in negligence.⁴ Because of the flexibility of the *South Pacific* approach, it is difficult point to anything more than a general informed impression in support of this conclusion. However, and as just one illustration of this point, we can look at the significant Court of Appeal decisions on the duty of care over the last 10 years, as reported in the New Zealand Law Reports. Over that period, there were 19 cases that were determined on the basis of a duty of care issue. Of those, 15 failed because the Court was not prepared to recognise the alleged duty of care.⁵ In two cases, a duty of care was recognised.⁶ In a further two cases, some formulations of the duty of care were recognised while others were not.⁷

Until recently, the Supreme Court has had little to say on this issue. Their decision in *Couch v Attorney General* [2008] NZSC 45 ("**Couch**") is the Court's first substantive discussion of the general approach to the duty of care in novel fact situations. The case raises the very real question of whether the conservative approach to the expansion of liability in negligence, an approach which has been such a feature of Court of Appeal decisions over the last 10 years, will continue, and whether the pendulum may be about to swing back in favour of plaintiffs. This case, and these questions, are the focus of this part of the seminar.

Attorney General v Body Corporate 200200

To understand the importance of the decision in *Couch*, it is necessary to briefly discuss some of the immediate context for that decision, and in particular, the decision of the full bench of the Court of Appeal in *Attorney General v Body Corporate 200200* ("**Body**

⁴ In *Bella Vista Resort Ltd v. Western Bay of Plenty DC* [2007] 3 NZLR (CA) 429, William Young P noted that over the last 20 years; "the tide has very much gone out on negligence claims" (para 70). Chambers J referred to a "sea change" in the approach of the commonwealth Courts (para 86).

⁵ *Brownie Wills v Shrimpton* [1998] 2 NZLR 320; *Morrison v Upper Hutt City Council* [1998] 2 NZLR 331; *Knox v Till* [1999] 2 NZLR 753; *Boyd Knight v Purdue* [1999] 2 NZLR 278; *B v AG* [1999] 2 NZLR 296 (overturned on appeal to the Privy Council); *R M Churton & Co v Kerslake & Pts* [2000] 3 NZLR 406; *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179; *Midland Metals Overseas Ltd v Christchurch Press Co Ltd* [2002] 2 NZLR 289; *Wellington District Law Society v Price Waterhouse* [2002] 2 NZLR 767; *AG v Carter* [2003] 2 NZLR 160; *NZ Meat Board v Paramount Exports Ltd* [2003] 1 NZLR 441 (overturned on appeal to the Privy Council); *Frost & Sutcliffe v Tuiara* [2004] 1 NZLR 782; *Attorney General v Body Corporate 200200* [2007] 1 NZLR 925; *AG v Hobson* [2007] 1 NZLR 374; *Bella Vista Resort Ltd v Western Bay of Plenty DC* [2007] 3 NZLR 429.

⁶ *Riddell v Porteous* [1999] 1 NZLR 1; *Price Waterhouse v. Kwan* [2000] 3 NZLR 39.

⁷ *AG v Prince* [1998] 1 NZLR 262; *Rolls Royce NZ Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324;

Corporate 200200).⁸ That case was the most recent and authoritative statement of the approach to the duty issue prior to *Couch*.

The *Body Corporate 200200* decision is familiar to most commercial litigators. It was part of the “leaky building” litigation that arose from the allegedly negligent construction of the Sacramento complex. One of the defendants in those proceedings was the Building Industry Authority (“**BIA**”), who was the regulator of the building industry at the relevant times. The plaintiff alleged a number of causes of action against the BIA, including its approval of the particular method of construction used in the affected buildings (face-fixed monolithic cladding), its approval of the building inspector who inspected the construction, and its approval of what turned out to be the inadequate insurance arrangements of the inspector.

The BIA applied to strike out the claims against it, and was successful in its application. We will return to the case when discussing the liability of public authorities. However, the importance of the decision in this context comes from the way in which the Court approached the issue of the duty of care, and in particular, its development of a concept described as a “situational duty of care”.

A “situational duty of care” involves the formulation of a duty by reference to what actually happened between the parties (i.e. the particular and specific chain of events that led to the damage now suffered by the plaintiff), rather than the more abstract question of the “over-arching” nature of the relationship between the parties, and whether that relationship is of a type which could support a duty of care. The Court describes it as involving a process of “backward reasoning”, whereby the plaintiff uses the circumstances of what actually happened between the parties as the basis for its argument in favour of a duty of care, rather than focusing first on the general nature of its relationship with the defendant.

In the context of this claim, an example of the “over-arching duty” was the question of whether the BIA had a general duty to warn the minister and participants within the building industry of potential issues relating to the health, safety and enjoyment of their homes. An example of the situational duty was the question of whether, regardless of this general duty to warn, there was a more specific duty that arose from concerns that were developing, and of which the BIA was aware, about the use of face-fixed monolithic cladding systems.

⁸ [2007] 1 NZLR 95.

Writing for the full court, William Young J described this approach (and its problems) as follows (para 43):

“In cases of this sort, it is customary for a plaintiff to focus on what is alleged to be the negligence of the defendant and to formulate the proposed duty of care by reference to that alleged negligence. Such a duty of care may fairly be described as situational. This approach, if adopted by the Court, is likely to favour a plaintiff; this is because it requires a primary focus on what is alleged to be the fault of the defendant and the limited nature of the asserted duty (with its narrow scope) is less likely than a more broadly expressed duty to engage counter veiling and policy arguments. This has been very much the argument of the body corporate in this case; identifying what it claims to have been the faults of the BIA and to then structure the assorted duties of care around those faults”.

Justice William Young did not suggest that an analysis of the potential duty of care by reference to a “situational” approach was always inappropriate. He recognised that it had often been used by the Courts. Rather, his concern was that on this approach, it was too easy to ignore the broader issues of policy that may be raised by the alleged duty. For that reason, he emphasised that if the alleged duty of care could be described as “situational”, then the Court should (para 46):

- (a). During the proximity phase of the inquiry, be careful to ensure that the narrow duty alleged can credibly be regarded as discreet from a broad (and untenable) duty of care in relation to the relevant statutory functions; and*
- (b). In assessing policy considerations, analyse carefully the implications, in terms of the scheme and structure of the relevant statute, of recognising even a situational duty.”*

This separation out of a concept of a “situational” duty, as opposed to the broader “over-arching” duty, was clearly intended to act as a limit on the expansion of the duty of care. In the Court’s view, analysing a situational duty of care purely in its own terms was likely to be a “plaintiff friendly” approach. The decision was a clear direction to the Courts to ensure their focus remained on the broader implications of recognising a duty of care in the case before them, rather than getting too caught up in the errors made in the particular case.

The conservative nature of this approach is also apparent when we consider how it would apply to a strike out application. A strike out application is a “defendant-friendly” procedure. The argument of the defendant always has the character that, no matter what actually happened in the particular case before the Court, the plaintiff’s claim could never succeed.

A “situational duty” is, by its very nature, less suited to a successful strike out application. With a situational duty of care, the duty is derived from the particular facts and circumstances arising between the parties, which are unlikely to be fully determined until after discovery and trial. However, once the focus of the Court shifts from the particular circumstances of the case to the more general principle represented by the claim, then the potentially greater scope for a strike out is more readily apparent. Requiring Courts to look to the over-arching duty, is commonly what the defendant is trying to persuade the Court to do in its strike out application.

The decision of the Court in *Body Corporate 200200*, and its reference to situational duties of care, has found some support in subsequent cases. It would be fair to say that most of the cases that have applied the approach have been decisions of the Court of Appeal itself.⁹ There have been comparatively few High Court decisions that have relied on this analysis in any determinative way.¹⁰ However, *Body Corporate 200200* decision was a unanimous decision of a full bench of the Court of Appeal. Its approach was reaffirmed in a number of subsequent cases. There is no doubt that the Court of Appeal intended it to be a decision of broad effect.

Couch v Attorney General

Against this background came the decision in *Couch*. *Couch* concerned the tragedy at the Panmure RSA where William Bell killed three of his fellow workers, and seriously wounded Ms Couch. At the time of the murders, he was on parole for previous convictions for aggravated robbery, and was under the supervision of the probation service. Ms Couch bought proceedings against the probation service for its failure to warn Mr Bell’s co-workers about the risks posed by an association with Mr Bell. While the claim sought compensatory and exemplary damages, the Supreme Court proceeded on the basis that the claim was for exemplary damages alone.

⁹ See for example, *Bella Vista Resort Ltd v Western Bay of Plenty DC* [2007] 3 NZLR 429.

¹⁰ As examples of the few High Court cases that have referred to the approach, see *White v AG* (HC, Wellington, 28/11/2007), Miller J; *Te Mata Properties Ltd v Hastings DC* (HC, Napier, 17/8/2007, Williams J); *Struthers v Patterson Co-Partners Architects Ltd* (HC, Auckland, 30 May 2007, Frater J), *Harbourcity Developments Ltd v Owen* (HC, Auckland, 30 March 2007, Frater J).

The Court of Appeal Decision

The decision of the Court of Appeal in *Couch* is a good illustration of the approach developed in the *Body Corporate 200200* case.¹¹ William Young P, in describing the approach to duty questions, reproduced in full his discussion of “situational duties” from *Body Corporate 200200*. Justice Chambers also expressly endorsed this approach, referred to the idea of “reasoning backwards from the alleged negligence” as leading to an “illegitimate reasoning process” (para 166).

This reliance on the distinction between a “situational” duty of care, and the over arching duty of care, was also apparent from the substance of the decision of the majority. For both William Young P and Chambers J, the claim of Ms Couch was analysed (and dismissed) by reference to whether there was a general duty on the probation service in how it managed parolees, which could be breached by a failure to warn employers and work mates of Mr Bell’s criminal propensities. Such a general duty was thought to be contrary to the Probation Service’s broader duties, and in particular its primary obligation to rehabilitate offenders. Put another way, regardless of whether or not there was a situational duty in this case, any claim must fail by reference to the over-arching duty that was alleged.

The Decision of the Supreme Court in *Couch*

The Supreme Court was unanimous in reinstating the claim by Ms Couch, as it related to the duty of care question, although the Court split two-three in its reasons. The decision of the Court could be summarised as follows:

- (a). The Court was unanimous in holding that Ms Couch may be able to establish at trial a sufficient relationship of proximity between herself and the probation service.
- (b). The majority opinion, delivered by Tipping J, held that a relationship of proximity would only exist if Ms Couch could show “either as an individual or as a member of an identifiable and sufficiently delineated class” that she was or should have been known by the defendants to be subject to a “special risk” of suffering damage of the kind she suffered (para 112). Such a special risk distinguished her position from the general risk faced by all members of the public. The majority was satisfied that she may be able to establish “special risk” at trial.

¹¹ *Hobson v AG* [2007] 1 NZLR 374.

- (c). The minority opinion, delivered by Elias CJ, held that Ms Couch may be able to establish a relationship of proximity regardless of whether she was able to show that she was exposed to any special risk. It may be sufficient that she was simply a member of the general public.
- (d). The Court was unanimous in holding that the policy reasons relevant to the existence or otherwise of a duty of care could not be properly formulated at the strike out stage, and without a full review of the relevant facts. It may turn out, following investigation of the facts, that the poor supervision of Mr Bell was a consequence of inadequate funding for the probation services, in which case it may be difficult to impose a duty of care. Equally, it could be that there was simply a series of administrative failures by the probation officer, which may properly be a basis for liability. These matters required to be investigated at trial.

Accordingly the Supreme Court allowed the question of duty to proceed to trial. They did not at that stage address the question of whether exemplary damages were available as a remedy, calling for further submissions and a hearing on the point.

The Minority Approach to the Duty Question

Leaving aside the particular result in the case, which involved a potentially significant extension of liability in negligence, the decision of the minority contained an important and significant discussion of the approach a court should take to analysing the duty of care in novel situations. More particularly, the minority decision rejected William Young P's idea of "situational" duties of care. Lying behind the minority approach appears to be a concern that the reaction of the Courts to the extremes of negligence liability, through the 1980's and early 1990's, may have been too severe, and that the time may have come for a more expansive approach to negligence liability.

- (a) The minority was not attracted to the development of any areas of "blanket immunity", within which a person would be free to act without regard to potential private law duties. They favoured a less restrictive, and more fact specific inquiry into the duty of care. The approach is essentially the exact opposite of that applied by the Court of Appeal in *Body Corporate 200200*. In the view of the minority, a "situational" analysis of the duty of care was likely to be the appropriate starting point in most cases.

- (b) The Court was very reluctant to deal with novel duty of care questions within a strike out application. (Para 32, 35-36):

[32] “It is often not easy to decide whether a duty of care not previously recognised by authority is owed to the plaintiff ...it may be unrealistic to expect that the pleadings and arguments to support a claim will always be adequate at an early stage of the proceedings. Caution in disposing of such cases on a summary basis is necessary both to prevent injustice to claimants, and to avoid skewing the law with confident propositions of legal principle or assumptions about policy considerations, undisciplined by facts.

[34] Proper and necessary limits to liability in negligence do not require blanket immunity through over- restriction of the circumstances in which a duty of care arises. There is particular risk of such over-restriction on summary consideration on strike out where policy considerations are said to preclude a duty of care. Policy considerations arise and overlap at all three inquiries in the claim for negligence: duty of care, breach and remoteness of loss ...

[35] Where liability for negligence is determined at trial, it should not much matter whether questions of policy are considered as going to duty of care or its breach. But on strike-out on a threshold question of duty of care, it may matter a great deal. The facts as eventually found may make it clear that the policy consideration was not engaged in what happened and is not a justification for a denial of responsibility.

[36]... If the policy of promoting the reintegration of parolees is examined in considering the question of breach at trial, no such blanket immunity will be imposed on the basis of hypothetical facts. It will come to be considered in the context of the actual supervision of Bell. It may well be that any deficiencies in his supervision arose not because of legitimate policies which outweigh the general policy of the law in providing redress, but through administrative blunder or professional error for which the Probation Service is properly liable.”

In their view, only “high level and generalised legal policies” relating to the duty of care would be suitable for strike out (para 43).

- (c) The Court also expressly rejected the criticism made by the Court of Appeal in the *Body Corporate 200200* case of “backward reasoning” (para 42):

“Although some may deprecate this as “backward reasoning”, it strikes us as largely inevitable when determining liability for harm carelessly caused.”

- (d) Another striking feature of the decision were the authorities referred to by the Court. There was barely any reference to the more modern authorities of the Court of Appeal on the duty of care, other than the concurring opinion of Gault J in *Wellington District Law Society v Price Waterhouse*,¹² a judgment which it has to be said has received little comment since it was delivered. There was, however, a great deal of discussion of cases such as *Donoghue v Stevenson*,¹³ *Anns v London and Merton Borough Council*,¹⁴ *Sutherland Shire Council v Hayman*,¹⁵ *Kamloops v Neilsen*¹⁶ and other foundational cases that heralded the start of the modern expansion of the duty of care. Indeed, the minority appears to view the approach in New Zealand as including simply an application of *Anns* (para 52).
- (e) The decision in the case itself is also clearly expansionary of liability. The basis on which the minority allowed the case to proceed was that it was possible that the probation service owed a general duty of care to members of the public in respect of reoffending by parolees under their supervision. It would clearly be a significant expansion of liability, if such a duty of care was established at trial.

It is undoubtedly the case that the minority judgment involved a rejection of the approach outlined by William Young J in the *Body Corporate 200200* case. It is also significant that the members of the majority said little to support that approach, and offered no comment on the broader discussion of these issues by the minority. Justice Tipping in particular is a judge who has delivered important opinions in a number of significant decisions on the duty of care while sitting in the Court of Appeal.¹⁷

It is impossible to know at this stage whether the decision in *Couch* is the dawn of a new era in negligence liability in New Zealand. Clearly there is more to be said by the Supreme Court on this issue. However, it is a clear indication that some members of the Court at least feel that the approach has become too restrictive. There are also some indications that members of the Court of Appeal have taken the decision in *Couch* to heart, at least in

¹² [2002] 2 NZLR 767.

¹³ [1932] AC 562 (HL).

¹⁴ [1978] AC 728 (HL).

¹⁵ [1985] 157 CLR 424 (HCA).

¹⁶ [1984] 2SCR2 (SCC).

¹⁷ See for example, *AG v Prince* [1998] 1 NZLR 262; *B v AG* [1999] 2 NZLR 296; *Brownie Wills v Shrimpton* [1998] 2 NZLR 320; *Price Waterhouse v Kwan* [2000] 3 NZLR 39; *AG v Carter* [2003] 2 NZLR 160.

respect of the approach to strike out applications.¹⁸ At present, the only case before the Supreme Court likely to raise duty of care issues of any significant is *New Zealand Exchange Ltd v BNZ* (SC13/2008). Argument was heard on that case on 7 July 2008, with the Court's decision reserved.

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*¹⁹ ("**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.²⁰ 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.

¹⁸ *Body Corporate 202254 v Taylor* [2008] (NZCA 317).

¹⁹ [2007] 3 NZLR 429

²⁰ *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).

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.²¹ 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 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);*

²¹ See for example, *AG v Prince* [1998] 1 NZLR 262; *AG v Carter* [2003] 2 NZLR 160

- (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*,²² 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.

...

²² [2005] 1 NZLR 344.

[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 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*²³ ("**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*

²³ [1986] 1 NZLR 99.

*Upper Hutt City Council*²⁴ (“*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 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.

²⁴ [1998] 2 NZLR 331.

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;²⁵ It appears that the standard 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.²⁶
- (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.²⁷
- (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

²⁵ (*Gisborne DC v Port Gisborne Ltd*) [2007] NZLA 344 para 52).

²⁶For an analysis of this issue by reference to a discretionary power, see *Ministry of Fisheries v Pranfield* [2008] NZCA 216.

²⁷ See also *Gisborne DC v Port Gisborne Ltd* [2007] NZCA 344.

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.

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.