

Reforming council liability in defective building cases

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INTRODUCTION

Building consent authorities (city and district councils) owe a duty of care in tort to owners of buildings constructed under their supervision and certification obligations. This is well-established in the case law. They are not responsible for ensuring, in fact, that building work complies with the building code. Rather, the duty is to exercise reasonable care in performing their relevant regulatory functions: granting building consents, inspecting building work, and issuing code compliance certificates.

Councils are not alone in this — at least not in theory. A duty of care has also been recognised on every other player in the construction of buildings. However, because liability in tort is 'joint and several' in New Zealand, each liable party is liable for the whole of the loss they have caused regardless of how many other parties are also liable or how small a part they may have played. While there are equitable and statutory rules that allow for apportionment of liability *between* jointly liable parties, the council is often the last party standing or solvent enough to make a meaningful contribution to a settlement or judgment sum.

The financial burden of joint and several liability has become increasingly problematic, with financial exposure for defective building work having ballooned since the duty was first recognised in the late 1970s. The first case involved defective foundations to a stand-alone dwelling. The damages awarded to the owner were \$10,000 and apportioned mostly to the builder. Stand-alone dwelling claims remain, but councils now also face major claims involving multi-unit and commercial developments. Damages sought in such claims are routinely in the mid to high double-digit millions and occasionally the triple-digit millions. There is nothing to indicate this will change either — if anything, the current trend is of claims that are higher in value, involving complex structural and fire defects. All a very long way away from where things started nearly 50 years ago.

New Zealand has a housing crisis and the Government's stated objectives include streamlining building consents as part of the solution. However, the massive potential liabilities that councils face naturally create a tendency toward conservatism and risk-aversion. Meeting what appear to be increasingly strict expectations from the courts regarding the lengths to which councils must go to reasonably discharge their regulatory functions can only increase cost and delays in the construction sector and may stifle innovation. In that context, this article considers the status of council liability and supports consideration of reform.

This article briefly reviews the Building Act 2004 and the role of councils in the building process before considering the development of the law of negligence so far as it relates to council liability. It then refers to previous instances where reform has been looked at but not made and considers reasons which support a need for reform now. Finally the article suggests New Zealand should reconsider moving from joint and several to proportionate liability and looks at the introduction of a statutory insurance scheme.

COUNCIL OBLIGATIONS UNDER THE BUILDING ACT

The Building Act's purposes are predominantly health and safety based.

The Act provides for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure (among other things) that people who use buildings can do so safely and without endangering their health, and escape from the building if it is on fire. The related purpose is to promote the accountability of owners, designers, builders, and building consent authorities for ensuring that building work complies with the building code (s 3).

The building code is performance based — that is, it sets out functional requirements and the performance criteria with which buildings must comply in their intended use, rather than *how* buildings must be designed and constructed (Building Regulations 1992, sch 1). The functional requirements and performance criteria are designed to ensure that buildings built in accordance with the code are durable, watertight and firesafe (among other things) (sch 1, ss B, C and E). All building work (work for, or in connection with, the construction, alteration, demolition, or removal of a building) must comply with the code and be carried out in accordance with a building consent (ss 17 and 40(1); but subject to s 41).

Councils are responsible for checking to ensure that an application for a building consent complies with the building code, checking that building work has been carried out in accordance with the building consent for that work, and issuing consents and certificates in accordance with the requirements of the Act (s 14F). Councils must grant a consent if the council is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application (s 49(1)). Owners must apply for a code compliance certificate after all building work to be carried out under a building consent granted to

that owner is completed (s 92). The council must issue the code compliance certificate if it is satisfied, on reasonable grounds, that the building work complies with the building consent (s 94).

Generally, councils satisfy themselves that an application for building consent complies with the building code by making their own assessment and, where they do not have the necessary in-house expertise, which is not unusual in relation to complex aspects of design, by relying on producer statements (opinions from experts generally engaged by the applicant). Similarly, they generally satisfy themselves that completed building work complies with the building consent through their own inspections of the works and in reliance on producer statements confirming that the works were carried out in accordance with the building consent.

EVER-EXPANDING LIABILITY ON LOCAL AUTHORITIES

In 1932, Lord Atkin famously declared that actors are liable for the foreseeable loss they cause to their 'neighbours'; that is the rule *Donoghue v Stevenson* ([1932] AC 562 (HL), [1932] All ER Rep 1) and the basis of the modern law of negligence. The loss in *Donoghue v Stevenson* was personal injury: Mrs Donoghue suffered severe gastroenteritis and shock from having consumed decomposed-snail-infused ginger beer. To limit indeterminate liability — that is unknown liability to unknown classes of persons — the neighbourhood principle did not extend to pure economic loss.

In 1972, the English Court of Appeal in *Dutton v Bognor Regis Urban District Council* ([1972] QB 373 (CA), [1972] 2 All ER 462) extended the *Donoghue v Stevenson* duty of care to local authorities for defective building work in cases where the defects posed a risk to the safety of the building users. In 1977, the House of Lords confirmed *Dutton* in *Anns v Merton London Borough Council*, noting "the inspector must realise that if the foundations are covered in without adequate depth or strength as required by the byelaws, injury to safety or health may be suffered by owners or occupiers of the house" ([1978] AC 728 (HL) at 758 per Lord Wilberforce). In response to the objection that the imposition of liability would establish "an endless, indeterminate class of potential plaintiffs", the Court held that an owner or occupier may only recover "when the state of the building is such that there is present or imminent danger to the health or safety of persons occupying it" (at 758 and 760).

The relevant authorities in New Zealand date back to the late 1970s, when the Court of Appeal issued its decision in *Bowen v Paramount Builder (Hamilton) Ltd* ([1977] 1 NZLR 394 (CA)) concerning liability (of a builder) to subsequent owners. Like *Anns*, it was a defective foundations case and Richmond P recognised that "a builder is liable for the negligent creation of a hidden defect which is a source of danger to third persons", including danger of "personal injury or injury to their property" (at 406 per Richmond P). His Honour went a short step further in finding that a cause of action arises when the defect "causes actual physical damage to the structure of the house" without reference to any health and safety implication (at 410). The Court of Appeal then recognised a duty of care on a council in New Zealand in *Mount Albert Borough Council v Johnson* ([1979] 2 NZLR 234 (CA)), another case involving defective foundations. Cooke J (with whom Somers J agreed) underscored the emphasis in *Anns* on the risk to the occupier's health and safety, and noted that a plaintiff can recover when the defect

results in physical damage (at 238–239). Richardson J focused on the manifestation of physical damage as "imminent danger to the health or safety of persons occupying the property ... could not, in the present case, have occurred any earlier than that" (at 244). The Court awarded \$10,000 in damages to the owner apportioned four-fifths to the builder and one-fifth to the Council (at 241 per Cooke J). In *Brown v Heathcote County Council*, the Court of Appeal later held that a council's liability extended to pure economic loss, reasoning that the building control functions are concerned "with the preservation of community building and living standards, property values and amenities" ([1986] 1 NZLR 76 (CA) at 80).

The seminal New Zealand decisions, however, were in *Invercargill City Council v Hamlin* ([1994] 3 NZLR 513 (CA)). The English Courts had gone in a different direction in 1990, when the House of Lords reversed *Anns* in *Murphy v Brentwood District Council* ([1978] AC 728 (HL)) (an 'about-face' under which a local authority in the United Kingdom could not be found liable in negligence to a subsequent purchaser unless there was a sufficient relationship of proximity between those two parties). In *Hamlin*, the Court of Appeal was asked to change the New Zealand common law and follow *Murphy*, but refused to do so primarily because of the reliance placed on council functions by purchasers in New Zealand (which it considered distinguished the situation in the UK). Richardson J discussed the relevant social and governmental context in depth, which Cooke P, and McKay and Casey JJ expressly adopted in their concurring judgments (at 519, 524–525, 530 and 546). The Privy Council then upheld the Court of Appeal and emphasised "the concept of reliance by house buyers generally as an element in the imposition of a duty of care" in New Zealand ([1996] 1 NZLR 513 (PC) at 519). The Council was found jointly liable with the builder for the \$53,550 to repair the foundations and resulting damage, however, the builder was insolvent by the time the case reached the Privy Council ([1993] 1 NZLR 374 (HC) at 384; and [1996] 1 NZLR 513 (PC) at 535).

The duty has since been reaffirmed in several leading cases, and applied to buildings regardless of type:

- In 2010, the Supreme Court upheld the Court of Appeal's decision extending liability in respect of residential complexes in *North Shore City Council v Body Corporate 188529* ([2010] NZSC 158, [2011] 2 NZLR 289) [*Sunset Terraces*].
- In 2012, the Supreme Court expanded the duty of care to the construction of commercial buildings in *Body Corporate No 207624 v North Shore City Council* ([2012] NZSC 83, [2013] 2 NZLR 297) [*Spencer on Byron*].

As noted earlier, councils are not in this alone. A duty of care has been recognised in relation to all players in relation to construction, including manufacturers of building products, designers, developers, builders, and others (*Cridge v Studorp* [2021] NZHC 2077 at [682]). However, liability in tort is 'joint and several' in New Zealand, meaning each liable party is liable for the whole of the loss they have caused regardless of their degree of fault or others' liability for the same loss. The allocation of loss between multiple wrongdoers who have caused the same damage is determined by the law of contribution in equity and under the Law Reform Act 1936. In essence, the court apportions liability between defendants

as is just and equitable having regard to their responsibility for the damage (s 17(2)). However, it should be emphasised that the defects are often discovered after many years have passed. The companies that worked on a project will often have been wound up following the project's completion or will have become insolvent. This means that time and again the council remains the only party that is solvent or able to make a meaningful contribution to a plaintiff's loss. Even where others may be available, plaintiffs will often choose to focus on the council, as a defendant with deep pockets, leaving it to the council to seek and recover contributions from the others who may have been at fault. It is also common for others involved in building work to limit (or purport to limit) their liability to councils. For example, producer statements — on which councils often must rely where they do not have the necessary in-house expertise to assess the compliance of a building consent application (or aspects of an application) with the building code — often contain a limitation of liability clause (see, for example, *Tauranga City Council v Harrison Grierson Holdings Ltd* [2024] NZHC 714).

Joint and several liability can be contrasted with proportionate liability — a system in which the court allocates or apportions a share of the total loss to any particular defendant (that is, not *between* defendants), according to its share of responsibility of fault. This means that an owner in a defective building claim, rather than the liable parties, bears the risk of less than full recovery because of missing or insolvent liable parties.

PREVIOUS CONSIDERATION OF REFORM

The New Zealand Law Commission has previously considered reform in this area.

In a 1998 report the Commission rejected calls for proportionate liability without qualification (Law Commission *Apportionment of Civil Liability* (NZLC R47, 1998)). It considered that fairness *among* defendants requires a consideration of the differing degrees of responsibility, but this is “irrelevant to the question of what as against the plaintiff is required to ensure fairness *to* defendants” (at [6]). It noted the complaint that joint and several liability imposes liability in excess of responsibility, but also that “the whole basis of the law of civil liability is that quantification is determined not by the degree of the defendant's fault but by the extent of the injury to the plaintiff” (at [7]). It was of the “firm view that no sufficiently compelling case for” change had been made (at [9]), and rejected the idea of “reducible liability” — a scheme that would permit the courts to “reduce the amount of the defendant's liability in such manner and for such reasons as they considered just” (at [10]). It considered what it termed the “plight of the ‘deep pockets’” but was unmoved, noting in connection with councils that it “is uncontroversial to observe that their liability for the civil consequences of negligent supervision of building and like activities is entirely the result of conscious judicial social engineering” but that a “statutory revisiting of this topic” would arguably be appropriate (at [15]).

The Commission's stance had softened somewhat toward councils when it next considered the issue in its 2014 report (Law Commission *Liability of Multiple Defendants* (NZLC R132, 2014), the report is discussed in more detail in Peter McRae and Juliet Bull “Joint and several liability” [2014] NZLJ 246). It noted the “great virtue” of joint and several liability is that a plaintiff will in theory receive full compen-

sation for its loss provided at least one liable defendant is present and solvent (at 3.4). However, it also noted the following relevant effect in relation to councils and the building industry (at 3.9):

A further effect of joint and several liability in the building industry is that local authorities are often the only solvent and available liable defendant, and are effectively acting as insurers for homeowners. This means that ratepayers are acting as insurers of last resort when a building fails as a result of wrongdoing by multiple insolvent wrongdoers. It must be doubtful that this arrangement is either efficient or fair.

Overall, the Commission recommended that joint and several liability should remain the normal rule for the liability of multiple defendants who have caused the same loss (at 3.33). It considered whether the building sector was a special case requiring proportionate liability and decided it was not (at 4.15 and 7.1–7.13). However, it considered that protection from excessive liability was justified, particularly given the risk that another “major liability event” similar to the leaky building crisis may emerge, and recommended a cap on council liability to provide it (at 7.33). Reasons given for treating councils differently to other classes of defendants included that they are not voluntary participants in a market seeking to make a profit, are unable to withdraw from providing services, and have limited opportunities to insure against potential liabilities (particularly when they stem from a major event with potential for uncollected shares) (at 7.33–7.36).

Under the system proposed by the Commission, joint and several liability would continue to operate for all parties, but up to a liability cap for councils (at 7.38). The cap would need to be “high enough so that the normal run of plaintiffs can expect to recover full compensation even where they have to look to the local authority for the share of another party, but not so high that it would offer authorities no effective relief in another major liability event” (at 7.39). It recommended \$300,000 for single dwellings and \$150,000 per unit in a multi-unit development capped at \$3 million per development (inclusive of interest and costs) (at 7.41). It noted that capped liability would make it practical for local authorities to obtain insurance if they wish and this was “perhaps the strongest justification” for the recommendation (at 7.45). It also recommended the continued development, for implementation if feasible, of a comprehensive residential building guarantee scheme (at 7.51). A general recommendation was also made that there should be discretion to grant relief from joint and several liability to defendants with minor or limited responsibility for the loss (at 5.1–5.32).

The government at the time requested the Ministry of Justice and the Ministry of Business, Innovation and Employment to consider and carry out further work on these recommendations (“Government Response to Law Commission Report *Liability of Multiple Defendants*” (10 December 2014)), but they were not enacted.

PART IV — REASONS SUPPORTING REFORMING COUNCIL LIABILITY NOW

Ballooning liability and other major liability events

Notably, the Commission's conclusion there should not be a separate proportionate liability system for the building sector was “bolstered” in its view by specific legislative changes

that had been made to reduce the leaky homes crisis (the introduction of the Building Act in 2004), as well as more general changes and improvements to building legislation and regulation in the preceding decade. It considered these would likely lessen the impact of joint and several liability on local authorities (at 7.13).

That has not been the experience in the decade since, however. Liability risk has ballooned as the reach of the duty of care has expanded. Councils now face claims relating to multi-unit and commercial developments. Indeed, so much has changed since the Commission published its 2014 report including, at least arguably, new major liability events rivaling the cost of the leaky building crisis or at least threatening to. Comparing major claims pre and post the 2014 report makes this clear:

- *Sunset Terraces* involved a unit title development in Auckland comprising 21 two-storey townhouses with untreated timber framing and monolithic cladding. The total losses claimed were approximately \$1.27 million for the cost of repairs, with professional and other fees yet to be quantified (at [3]). The High Court gave its decision in 2008, six years before the 2014 report. *Spencer on Byron* concerned a mixed-use, 23-story building in Auckland within which a hotel operated alongside apartments (at [2]). Following the Supreme Court's decision in October 2012, the plaintiffs updated their claim against the Council from \$19.4 million to \$23.2 million ([2013] NZHC 2052 at [15]).
- More recent claims eclipse these. In 2016, the St Lukes Garden claim — described then as New Zealand's biggest leaky building case by far — concerned a 280-unit complex in Auckland (Maria Slade "Largest ever leaky homes case launched against Auckland Council" *Stuff* (online ed, 9 June 2016)). The quantum in that claim was \$60 million, updated to over \$100 million before settlement. The claim in relation to Oakes Shores, an 84-unit apartment block in Queenstown was \$163 million when that was settled in 2022 (Debbie Jamieson "Leaky homes saga could cost each Queenstown ratepayer almost \$10,000 to fix" *Stuff* (online ed, 16 December 2022)). Gore Street Apartments in Auckland is another striking example. It went to trial for more than 20 weeks in 2022 and the damages sought by the plaintiffs in closing were just over \$157 million (and had been nearly \$200 million at one point). Most of that sum was comprised of the cost of remedial works for complex fire and structural defects (*Body Corporate 366567 v Auckland Council & Ors* [2024] NZHC 32 at [2]).

Changing social and regulatory context

At the same time that liability has ballooned and new major liability events have arguably emerged, the social and regulatory context that the Court of Appeal and Privy Council (in *Hamlin*) thought justified the direction taken by the New Zealand common law have at least arguably changed.

In the Court of Appeal, Richardson J identified what he called six "distinctive and long-standing features of the New Zealand housing scene" that reflected the social and governmental context in which the New Zealand courts had recognised and maintained recognition of the duty of care during the

1970s and 1980s. Those six features are no longer indicative of New Zealand society (*Hamlin* (CA) at 524–525 as summarised in *Sunset Terraces* [2010] NZCA 64, [2010] 3 NZLR 486 at [26]):

1. "The first was the high proportion of occupier-owned housing. Home ownership by people in all walks of life was the goal and to a large extent the reality." When *Hamlin* was decided, homeownership rates were at their highest: 73.8 per cent. This had fallen to 64.5% in 2018 (Statistics New Zealand "Housing in Aotearoa: 2020" (2020) at 10 and 28).
2. "The second was that much of the housing construction, including low cost housing, was undertaken by small-scale cottage builders for individual purchasers." Large construction companies have a greater presence in the market now, especially in multi-unit and commercial developments (Christel Yardley "Construction by the numbers: Industry booming but housers smaller, more costly" *Stuff* (online ed, New Zealand, 2 November 2022)).
3. "The third was the nature and extent of governmental support for private home building and home ownership." Government support for private home ownership has fallen, for example, Kiwi Build and the First Home Grant scheme were scrapped this year (2024) (Adam Pearse, Julia Gabel and Thomas Coughlan "PM Christopher Luxon announces Kāinga Ora changes, new board refresh, KiwiBuild to be scrapped" *New Zealand Herald* (online ed, New Zealand, 20 May 2024); and Chris Bishop "Government invests in 1,500 more social homes" (22 May 2024)).
4. "The fourth was the surge in house building construction in the buoyant economy of the 1950s and 1960s." Despite an ever-present need for more housing, consents for new homes declined for the fourth consecutive quarter in 2023 (see below) (Ministry of Business, Innovation and Employment *Building and Construction Sector Trends — Annual Report 2023* (2024) 16–17).
5. "The fifth was the wider central and local governmental support for private home building." There remains wider local and central government support for private home building, however, this may support reforming liability rather than maintaining it (see below).
6. "The sixth was that it has never been common practice for new house buyers ... to commission engineering or architectural examinations or surveys of the building or proposed building." A 2023 study by the Real Estate Authority suggests this has changed (Real Estate Authority "Annual Perceptions Report, 2023" (24 July 2023) at 34–35; and see Catherine Masters "Inspections in crisis: Buyers spending up to \$10,000 on 'worthless' building reports" *OneRoof* (online ed, New Zealand, 11 August 2024)):
 - a. 97 per cent reported obtaining some information before making an offer on a home;
 - b. 75 per cent obtained a (licensed or not) building inspector's or engineer's report;
 - c. only 41 per cent obtained a Land Information Memorandum; and
 - d. only 34 per cent obtained a council property file.

Liability is an impediment to development

In addition, councils are under increasing pressure to *efficiently* process building consent applications to facilitate construction work and ease the housing crisis. For example, the Government has announced that it will introduce new regulations to the Building Act 2004 which would require councils to submit timeframes for building consent applications, enable the use of building materials that have been certified overseas (for example, in Australia), and require councils to use remote inspections as the default approach.

While these changes will hopefully make building easier and cheaper, they elevate the risk of defective building work in circumstances where councils already face ballooning liability (against a backdrop of major building crises in New Zealand). There is an inherent tension between efficiently issuing building consents and code compliance certificates, and ensuring that a building consent application complies with the building code and that building work complies with a consent.

Aligning New Zealand's law with Australia's

Further, other jurisdictions have taken steps to limit the liability of territorial authorities in the construction process, including Australia. This section is intended to provide examples of how the issue has been addressed there rather a full review of the applicable laws. In summary, state governments intervened to ease territorial authority liability by each introducing three relevant measures: limiting the scope of the duty of care, shifting to proportionate liability, and introducing insurance schemes to protect consumers.

Limiting the scope of the duty of care

In *Bryan v Maloney*, the High Court of Australia (Australia's final appellate court) took a similar approach to the New Zealand Court of Appeal in *Hamlin* and declined to follow *Murphy* ((1995) 182 CLR 609 (HCA)). While Australian courts continue to recognise that territorial authorities may owe a duty of care, they have kept the scope of that duty limited in comparison to New Zealand's more extensive approach. Todd on Torts records that Australian plaintiffs may have a cause of action against a local authority where they can show that "the building is a dwellinghouse" and they were "vulnerable to the consequences of the builder's want of care" (Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [5.4.4]).

In addition, most states introduced a Civil Liability Act 2002 (Victoria incorporated the same enactments into the existing Wrongs Act 1958) which had a number of effects on the liabilities of public and other authorities, including local councils — for simplification purposes, we consider them as

one Act. Part 5 of the Act restricts the instances in which such authorities can be held liable in the exercise of their public functions. For example, ss 43 and 43A codifies the higher standard of review to establish a breach of statutory duty or special statutory power: the plaintiff must establish that the authority's act or omission was "so unreasonable that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions".

Shift to proportionate liability

The second measure is the shift to proportionate liability in cases where the loss claimed is purely economic. Defendants, including but not limited to local authorities, who are liable (in tort or contract) are liable only for the "proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss" regardless of whether the other persons who are also liable ("concurrent wrongdoers") are joined as parties to the claim or are solvent (Civil Liability Act 2002 (NSW), ss 34–35; Civil Liability Act 2003 (Qld), ss 30–31; and Wrongs Act 1958 (Vic), ss 24AH–24AI).

Introduction of insurance schemes

The third measure is the introduction of insurance schemes to protect purchasers from loss arising from latent defects. For example, New South Wales has a strata building bond and inspection scheme which requires all developers of new apartment buildings four storeys or higher to pay a bond equal to two per cent of the price paid or payable on all contracts for the building. The bond may be called on to repair any defects identified during the mandatory inspection process (and if the whole or part of the bond is not required, it is returned to the developer) (New South Wales Government "Strata Building Bond & Inspections Scheme" *Fair Trading* <www.fairtrading.nsw.gov.au/>). New South Wales is introducing a ten-

year defect insurance for apartment buildings to either replace or supplement the strata building bond. Under the new insurance scheme, developers would take out insurance before the apartment is occupied and if, during the following ten years a defect is discovered, the body corporate could draw on the insurance policy to have the defect repaired (New South Wales Government "Ten year defect insurance for apartment buildings" (3 October 2023) <www.nsw.gov.au/>).

RECOMMENDED REFORM

A wholesale rejection of the duties recognised *Hamlin*, *Sunset Terraces* and *Spencer on Byron* is not necessary or desirable. As Baragwanath J in the Court of Appeal and Elias CJ

The first reform that Parliament may want to consider is to clarify (and narrow) the circumstances in which councils will have breached their duty of care when issuing building consents, carrying out inspections and issuing code compliance certificates. Councils are being asked to grant consents in respect of increasingly complex structures with new and untested materials and with greater efficiency.

in the Supreme Court pointed out in *Sunset Terraces*, “New Zealand institutions have now had 15 years to adapt to *Hamlin*. It is preferable for the New Zealand courts to maintain their steady course” (*Sunset Terraces* (CA) at [51]; and *Sunset Terraces* (SC) at [6]). Those observations were made in 2011 and 2012 respectively. New Zealand institutions have now had 30 years to adapt to *Hamlin*. New Zealand would, however, benefit from introducing some variation of each of the Australian reforms discussed above. Reform in kind to what is suggested below would mitigate against the disproportionate burden that has settled on the shoulders of councils and that will continue if not increase as further major liability events continue to emerge.

The first reform that Parliament may want to consider is to clarify (and narrow) the circumstances in which councils will have breached their duty of care when issuing building consents, carrying out inspections and issuing code compliance certificates. Councils are being asked to grant consents in respect of increasingly complex structures with new and untested materials and with greater efficiency. Clarity would empower them to perform their functions efficiently. It would also assist lawyers and litigants in the back end if defects arise — clarity would lessen litigation risk and cost for both sides. We do not make a suggestion as to where Parliament should draw the line: that will require a careful analysis and input from the relevant stakeholders.

Secondly, Parliament should seriously consider introducing proportionate liability for the construction sector. While a wholesale shift to proportionate liability may not be appropriate for New Zealand, for the reasons explained by the Law Commission in its 1998 and 2014 reports, the second

report in particular acknowledged the particular circumstance of the building sector may warrant it. While it rejected implementing proportionate liability in the building sector only, a significant part of the justification for that decision has fallen away: the anticipated lessening of the impact of joint and several liability has not materialised — on the contrary, the impact has grown enormously. While proportionate liability increases the risk of owners not fully recovering their loss, that risk would be mitigated with a proportionate system backed by an insurance / warranty scheme (see below). Liability caps could also be considered, although such caps may be less flexible and require greater maintenance than proportionate liability. We do not think that revisiting a judicial discretion in respect of minor defendants would adequately address concerns.

The final reform would be to introduce some kind of insurance scheme. It is hard to argue with the Law Commission that plaintiffs — homeowners — should not be out of pocket as a result of reform to the defendants' liability (Law Commission *Liability of Multiple Defendants* (NZLC R132, 2014) at Chapter 5 and [7.46]). That is a risk created by proportionate liability. An insurance or warranty scheme would mean that defects can be remedied without the homeowners having to shoulder the burden of years of protracted litigation and lessen the risk of less than full recovery. The private insurance market may not be receptive to such a scheme: insurers do not currently insure against weathertightness risk and are beginning to charge a premium for structural and fire safety risk. While the optimal structure of such a scheme is beyond the scope of this article, a requirement for compulsory contributions from developers merits serious consideration. □

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Whatever approach the Court ultimately adopts to the test for manifest injustice in this context, its addition into three further provisions in the general sentencing process risks adding significant complexity to an already complex evaluative process.

To add to that complexity, the Sentencing (Reinstating Three Strikes) Amendment Bill that was introduced in June 2024 provides further definition of “manifestly unjust” in that context in the proposed new s 86T of the Sentencing Act 2002. That section would provide that a court must not determine a sentence would be manifestly unjust under those provisions merely because of the applicability of any one or more of the mitigating factors in s 9(2) or because it is disproportionate, unless it would be grossly disproportionate (for criticisms of this proposed section see, for example, New Zealand Law Society “Submission to the Justice Committee on the Sentencing (Reinstating Three Strikes) Amendment Bill” at [5.3]–[5.18]).

A further irregular feature of the proposed amendment is that it seeks to legislate restrictions to the second stage of a two-step sentencing process. That process is not presently mandated by the Act but was instead developed by the courts in line with the scheme of the legislation. The author notes that the proposed 40 per cent cap would not withstand developments in sentencing practice which altered this two-step approach.

This two-step approach, while now well-established in New Zealand, is not the only option available to courts. For example, a single stage approach labelled “instinctive synthesis” has been used in Australia in which all relevant matters are factored into the sentencing decision at one stage. The judge then makes a value judgment about the appropriate end sentence (Andrew Ashworth *Sentencing and Criminal Justice* (6th ed, Cambridge University Press, 2015) at 449 and *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [55]). A change to the settled approach does not appear to be on the horizon, but it is least worth noting that as the Supreme Court in *Berkland* recognised (echoing the earlier comments of the Court in *Hessell*) the Act does not dictate an overly prescriptive process. Therefore, it remains the case that development is possible in judicial sentencing practice if ad hoc amendments to the Act were to make the two-step approach unworkable.

CONCLUSION

Much remains uncertain about the Government's proposals to amend the Sentencing Act 2002 to further restrict judicial discretion. However, what is clear is that the proposals create real potential for tension between the new provisions and the legislative scheme as a whole and for conflict between the stated legislated aims for sterner sentences and the courts seeking to do justice in individual cases. □