Negligence, Negligent Misstatements and Leaky Buildings: Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council

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I INTRODUCTION

Another case about leaky buildings: *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* concerned a local council's liability in negligence for erroneously issuing a code compliance certificate.[1] Notably, the Supreme Court held local councils owe a duty in pure negligence to take reasonable care when issuing code compliance certificates. This duty exists even when there was no physical inspection or other 'operational blunder' by the local council. Therefore, even if the council's role in the construction process was limited to issuing a code compliance certificate, plaintiffs do not have to rely on a negligent misstatement claim. They will not have to establish actual reliance. However, because of this conclusion, the Supreme Court did not address the law of negligent misstatement. That area is left somewhat uncertain following two Court of Appeal decisions with prima facie divergent approaches.[2]

II THE FACTS

The Southland Indoor Leisure Centre Charitable Trust (the Trust) was established to plan, build and run the Southland Stadium. It hired an architect, engineer and builders for that purpose. Construction began in June 1999. Later that year, an inspector identified issues with the roof. Steel trusses in the roof over the community courts were sagging. There were other issues too.

The roof was repaired in early 2000 (the Remedial Work). The Invercargill City Council (the Council) did not inspect the Remedial Work. Instead, it relied on the engineer to inspect the work and certify the work was as required by the building consent. He did neither, and did not provide the required truss measurements. The Council later followed up, twice. There was no response.

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1 *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2017] NZSC 190, [2018] 1 NZLR 278.

2 *Carter Holt Harvey Ltd v Minister of Education* [2015] NZCA 321, (2015) 14 TCLR 106; and *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust* [2017] NZCA 68, [2017] 2 NZLR 650. See also Marcus Roberts "Negligent misstatements in the Court of Appeal" [2017] NZLJ 327.

On 20 November 2000, before receiving the documents and information it required, the Council issued a code compliance certificate for the Remedial Work. It was common ground this was negligent. The Council did not know whether the Remedial Work complied with the Building Code. The certificate had seemingly been issued by a trial clerk.

Unfortunately, the Remedial Work was defective. The roof leaked and moved considerably under wind loads. The Trust also became concerned the roof might collapse under snow. This had happened in Poland. There, several people died.

Accordingly, in April 2006, the Trust sought advice from an engineer about the roof structure and leaks. The engineer essentially advised the roof could support snow loads and was safe, but said it had to be visually inspected. Based on the advice, the Trust considered the roof complied with the Building Code and believed repairs had fixed the leaks. No visual inspection was undertaken.

On 18 September 2010, the roof collapsed under the weight of a snowstorm. Those present managed to escape unharmed. It was common ground, had the stadium been built as designed, it would have withstood the snowfall.

The Trust sued the Council in negligence and negligent misstatement. The Council pleaded claims relating to its actions prior to 19 November 2000 were time barred. The Trust accepted this. All was to turn on the negligent issue of the code compliance certificate on 20 November 2000.

III THE LOWER COURTS

The High Court

The Trust succeeded in the High Court.[3] Dunningham J applied *Body Corporate No 207624 v North Shore City Council [Spencer on Byron]*. There, the Supreme Court held local councils owe a duty of care in their inspection role, to original and subsequent building owners, regardless of the nature of the premises.[4] I note in that case the local council actually inspected the building.

Dunningham J considered that, according to *Spencer on Byron*, the Council owed the Trust a duty of care when it issued the code compliance certificate on 20 November 2000.[5] This duty was owed in pure negligence. The Judge then found the Council had breached its duty of care.[6] It had no information based on which it could reasonably conclude the work complied

3 *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2015] NZHC 1983.
4 *Body Corporate No 207624 v North Shore City Council [Spencer on Byron]* [2012] NZSC 83, [2013] 2 NZLR 297 at [22], [26] and [215]–[216].
5 *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* (HC), above n 3, at [96]–[99]. See also *Spencer on Byron*, above n 4.
6 At [123].

with the Building Code. The breach also caused the loss[7] and there was no contributory negligence.[8]

Dunningham J awarded the Trust $15,126,665.25. That reflected the agreed cost of rebuilding, less $750,000.00 for betterment.

The Court of Appeal

The Council succeeded in the Court of Appeal. The Court of Appeal distinguished *Spencer on Byron* and set aside the High Court judgment.[9] The Court unanimously agreed negligent misstatement was the only available cause of action. While the Court was divided as to whether a duty was owed in that regard, the Court unanimously considered the negligent misstatement cause failed for want of specific reliance.[10] All the Judges also agreed the Trust had been contributorily negligent.[11]

Miller J distinguished *Spencer on Byron* and held the claim must be in negligent misstatement because, among other things, no acts or omissions, such as inspections, were completed within the limitation period.[12] The Judge also distinguished *Spencer on Byron* on other bases, including the facts the Trust was a commissioning owner, the contractual matrix had allocated responsibility to the Trust, the Trust was not vulnerable and the case involved producer statements.[13]

Regarding the duty owed by the Council, Miller J held the Council owed a narrow duty of care, limited to checking that a suitably qualified person had provided adequate evidence that the consent conditions had been met.[14] In reaching that conclusion, the Judge considered it important the Trust knew through its agents that the Council could not certify by its own knowledge that the Remedial Work complied with the Building Code.[15]

Harrison and Cooper JJ held the Council did not owe a duty of care.[16] They considered the case was "conceptually unique" as the Trust sought to recover the full amount of its loss from the Council even though the Trust's "contractors were alone responsible for creating the defects".[17] They did not consider it would be fair to impose a duty where the Trust's contractors had caused the loss. The fact the Trust was a commissioning owner also distinguished the present case from others where a duty was owed.[18]

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7 At [148].
8 At [172].
9 *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust* (CA), above n 2, at [158].
10 At [111]–[117] and [199]–[207]
11 At [136]–[140] and [208]–[210].
12 At [71].
13 At [69]–[78].
14 At [98].
15 At [98].
16 At [197]–[198].
17 At [173].
18 At [190]–[191].

III THE SUPREME COURT

The Supreme Court granted leave in wide terms: whether the Court of Appeal was correct to reverse the judgment of Dunningham J.[19] There were two issues on appeal. First, whether the Court of Appeal was correct to distinguish *Spencer on Byron*. This question involved considering whether the claim based on the certificate of code compliance was actionable in pure negligence. Second, whether the Trust's actions amounted to contributory negligence.

The Majority: Elias CJ, O'Regan and Ellen France JJ

The Supreme Court allowed the appeal, in part.[20] The Trust succeeded, except with respect to contributory negligence. On that point, the Court of Appeal was upheld. Aside from that, Dunningham J's findings were reinstated. I summarise the decision in five points.

First, the Court explained the duty, set out in *Spencer on Byron*, owed by local councils extends to the issue of code compliance certificates.[21] No distinction should be drawn between issuing code compliance certificates and other functions, such as granting building consent or inspections.[22] These all involve the exercise of councils' regulatory role and are "directed at ensuring compliance with the statutory functions".[23] That is the source of the duty. The claim was, therefore, actionable in pure negligence. It did not matter that there was no physical inspection or other "operational blunder" within the limitation period.[24] Also, because the claim did not have to be in negligent misstatement, there was no need to prove specific reliance.[25]

Second, the Council's direct duty was not affected by the involvement of other professionals in the construction process.[26] The Court relied on its decision in *Sunset Terraces*, where Tipping J made the same point:[27]

> Fundamentally, the proposed distinction is not consistent with the rationale for the duty which councils owe, being essentially their power of control and the general reliance which is placed on their independent inspection role. The part played by other professionals should not absolve councils from liability; the proper way to reflect their involvement is to require them, if negligent in a relevant way, to bear an appropriate share of the responsibility for the ultimate loss.

19 *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2017] NZSC 81 at [1].
20 *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* (SC), above n 1, at [115].
21 At [51].
22 At [62].
23 At [64].
24 At [64].
25 At [63].
26 At [61].
27 *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 [*Sunset Terraces*] at [50].

Furthermore, as Elias CJ said in *Spencer on Byron*, the fact "there might be overlapping duties owed by different potential defendants was no answer to a claim based on loss caused by the Council's distinct fault".[28] The proper avenue to account for others' negligence is contributory negligence.

Therefore, contrary to the Court of Appeal's findings, the fact the Trust was a commissioning owner did not affect the duty owed by the Council. The Supreme Court said the legislative scheme did not draw a distinction on this basis.[29] The Council occupied the same regulatory role regardless of whether it was dealing with a commissioning owner.

Third, the Court made it clear vulnerability, or lack thereof, on the part of the building owner did not affect the duty owed by local councils.[30] It did not matter that original owners could protect themselves through contract. Miller J, in the Court of Appeal, said vulnerability was a relevant consideration, to be decided at trial by reference to the factual matrix.[31]

Fourth, the Court said the Council could not contract out of its obligations, except as was permitted by the Building Act 1991.[32] The Council had argued responsibility to comply with legislation was allocated to the Trust in the project agreement:[33]

> Mr Heaney relies in particular on cl 3.2 of the agreement under which the Trust "agrees that it will comply with all statutes, regulations and bylaws ... in carrying out [the] works". The clause continued that, "without limitation", the Trust shall ensure that it complies with the relevant health and safety legislation.

In dismissing this argument, the Supreme Court referred to Tipping J's judgment in *Spencer on Byron*.[34] There, Tipping J considered the duty would not undermine the relevant contractual relationships. Private certifiers could not limit or contract out of liability — the position was implicitly the same for councils. Those performing "functions under the Act or within the scope of the Act owed statutory duties not to breach the building code … to that extent there was no capacity for anyone involved to limit their liability by contract".[35]

Fifth, the Majority considered the Trust was contributorily negligent. The Trust should have followed through with the engineer's advice given in 2006 by asking the engineer to do an inspection.[36] The Majority explained the Trust should have done this because it was fundamentally concerned with safety.[37] The advice clearly raised safety concerns as the engineer had not inspected the trusses and welds — "there was therefore no reassurance from

28 *Spencer on Byron,* above n 4, at [9].
29 At [62].
30 At [86].
31 *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust* (CA), above n 2, at [75].
32 At [72].
33 At [71].
34 At [60].
35 *Spencer on Byron*, above n 4, at [39]–[40].
36 At [110].
37 At [111].

[him] in this respect".[38] The engineer's recommendations should also have been viewed in light of the ongoing issues.[39] The Majority said "against this background the Trust should have, at least, made some inquiry of its investigative team".[40] Accordingly, the Court concluded a 50 per cent reduction should be made for contributory negligence.

The Minority: William Young and Glazebrook JJ

William Young and Glazebrook JJ agreed with the Majority except as to contributory negligence.[41] The Minority concluded the Trust had not been contributorily negligent. This conclusion turned on the facts. The Minority considered it important the recommendations were made in the context of a safety concern triggered by leaks and flexing of the roof.[42] The advice from the engineer said the flexing was within design tolerances. So, when the leaks were stopped, the Trust's concerns were addressed. There was nothing else that could be reasonably seen as warranting investigation.[43]

IV COMMENTS

Implications for the Duty in *Spencer on Byron*

In *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council*, the Supreme Court made the scope of the duty in *Spencer on Byron* clear. The position is local councils, in exercising their statutory functions, owe a duty of care to original and subsequent building owners, regardless of the nature of the premises. The duty is not limited to councils' completion of inspections or other operational activities. Therefore, while the act of producing an incorrect certificate may technically be a misstatement, it was actionable in pure negligence because it involved an exercise of the Council's statutory function. This point warrants elaboration.

The Council was not simply making a statement. The certificate was the culmination of a process by which the Council had to be satisfied the Building Code had been complied with. In that regard, the Council exercised control over the building process. Ultimately, the duty is aimed at preventing the construction of leaky buildings. The Council should have taken actions to do that in the present case but failed to do so. The Supreme Court held this was sufficient to make the claim actionable in pure negligence. While

38 At [111].
39 At [111].
40 At [113].
41 At [118].
42 At [127].
43 At [127].

Miller J ultimately reached the opposite conclusion, the following observation is on point:[44]

> Perhaps courts might characterise a code compliance certificate as an act rather than a statement: it is a formal step supported by rights for information and of inspection, it may be a prerequisite to sale and some uses, and liability in negligence simpliciter may introduce no risk of indeterminacy.

This conclusion is consistent with *Spencer on Byron*. There, Elias CJ said the Legislature "adopted tortious liability as an element of the system of assurance of code compliance".[45] The Chief Justice elaborated:[46]

> Where the Council certifies for code compliance or has default responsibilities under the legislation, liability in negligence in respect of all building work so passed is wholly consistent with the legislation …The statutory context is consistent with the Council's liability for any carelessness in fulfilling its distinct part under the regime.

The result is also consistent with the Supreme Court's remarks in *Hotchin v New Zealand Guardian Trust Co Ltd*.[47] There, the Court observed "as against the local authority, the claim will be for breach of a duty of care associated with its inspection and certification functions".[48]

As to the risk of indeterminacy, Elias CJ made it clear in *Spencer on Byron* this was not a concern in relation to councils' liability for leaky buildings.[49] The duty is owed to owners of buildings constructed under the supervision and certification obligations of local councils.[50] Liability is confined to failure to meet the minimum standards of the Building Code.[51] The Chief Justice further said "wider floodgates concerns are met by a limitation period of 10 years".[52]

The duty in *Spencer on Byron* reaches further. Recently, in *Minister of Education v H Construction North Island Ltd*, Downs J surveyed the case law and relied on *Spencer on Byron* to conclude builders owed building owners a duty of care.[53] The same conclusion has been reached in other cases.[54]

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44 *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust* (CA), above n 2, at [73].
45 At [8].
46 At [17] and [19].
47 *Hotchin v New Zealand Guardian Trust Co Ltd* [2016] NZSC 24, [2016] 1 NZLR 906.
48 At [198].
49 *Spencer on Byron*, above n 4, at [19]. See also at [45] and [203].
50 At [19].
51 At [19].
52 At [19].
53 *Minister of Education v H Construction North Island Ltd (formerly Hawkins Construction North Island Ltd)* [2018] NZHC 871 at [35].
54 *Minister of Education v YQT Ltd* [2014] NZHC 2198; *Body Corporate 321655 v Albert Park Holdings Ltd (formerly Clearwater Construction Ltd) (in liq)* [2014] NZHC 2478; and *Minister of Education v Coastline Builders Ltd* [2015] NZHC 419.

Contracting out of the Duty of Care

As a result of *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council*, it is now abundantly clear a local council cannot contract out of its duty of care. The same might not be true in relation to others involved in construction. In *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust*, Miller J said:[55]

> As a matter of fact, people can and sometimes do enter into particular contracts that do not oblige a supplier or subcontractor to achieve code compliance, and this may not matter from a policy perspective so long as responsibility for code compliance is assigned to someone in the matrix, such as a head contractor or engineer.

In *Minister of Education v H Construction North Island Ltd*, the builder argued its responsibility for code compliance had been excluded by contract.[56] Downs J rejected that submission.[57] The contracts were silent as to tortious liability.[58] His Honour said:[59]

> In summary, the Stage I contract is silent on Hawkins' tortious liability. It could have been provided for, but was not. Nothing in the contract implies the parties intended to preclude a duty of care on the part of Hawkins vis-à-vis Building Code compliance.

The builder could have negotiated express exclusion but failed to do so. Rather, the contracts were largely standard form. Tortious liability was consistent with the responsibilities allocated to the builder under these contracts. Where others were negligent, they could bear an appropriate share of the loss.

Negligence or Negligent Misstatement?

Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council risks confusion on the part of litigants. When should a claim be in negligent misstatement and when should it be in negligence? In my view, the case does not purport to lay down any wider principle about when a claim should be in negligence opposed to negligent misstatement. Rather, it is a clarification, at most an incremental development, of the duty owed by local councils to building owners.

Misstatement cases outside of that context should be approached in the usual way. Where there is uncertainty as to the appropriate cause of action, it may help to determine where the breach occurred. In other words, how did the potential defendant fail to take reasonable care? If he or she was negligent in making the statement, the claim should be in negligent misstatement. Where

55 *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust*, above n 2, at [70].
56 *Minister of Education v H Construction North Island Ltd*, above n 53, at [43]–[55].
57 At [42].
58 At [43].
59 At [49].

the statement is the culmination of some other process such as an investigation, and the defendant was negligent in that underlying process, they may have owed a separate duty. A pure negligence claim may be appropriate in that regard. Sometimes they may have been negligent in both respects. Litigants could then pursue both claims.

The Elements of Negligent Misstatement

The Supreme Court's conclusion on the scope of *Spencer on Byron* removed the need for the negligent misstatement cause of action. Accordingly, the Court did not address the elements of negligent misstatement.

This leaves the law somewhat unclear, with prima facie divergent approaches from the Court of Appeal. In *Carter Holt Harvey Ltd v Minister of Education*, the Court stated the elements as:[60]

1. a false or misleading statement;
2. made in circumstances where a duty of care is owed to the plaintiff;
3. reasonable reliance on the statement by the plaintiff; and
4. resulting loss to the plaintiff.

However, in *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust*, Miller J outlined the elements as:[61]

1. proximity;
2. policy;
3. whether, having regard to (1) and (2), a duty is fair, just and reasonable; and
4. specific reliance and loss.

There is, of course, a further element: breach. The misstatement must have been made negligently. Harrison and Cooper JJ also seemingly adopted a different approach, starting with policy factors.[62]

In my view, it is likely New Zealand courts will continue to approach claims in negligent misstatement by reference to the ordinary framework for claims in negligence: duty of care, breach, causation and remoteness.[63] I proceed on that assumption. Specific considerations should, however, be adopted within each stage to account for the fact the claim is for a misstatement. This is because it is important to limit the scope of the tort, as it will usually concern economic loss. Care should be taken to avoid indeterminate and potentially disproportionate liability. I expand on each element below.

First, the plaintiff must establish that the defendant owed him or her a duty of care, to not make negligent misstatements. This should be a question

60 *Carter Holt Harvey Ltd v Minister of Education*, above n 2, at [112].

61 *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust* (CA), above n 2, at [85].

62 At [177]. See also Roberts, above n 2, at 330.

63 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [34]. There is academic debate surrounding whether a claim for a misstatement is in negligence at all. See Allan Beever "The Basis of the *Hedley Byrne* Action" in Kit Barker, Ross Grantham and Warren Swain (eds) *The Law of Misstatements* (Hart Publishing, Oxford, 2015) 83.

of whether the defendant assumed responsibility for his or her statement.[64] This could be characterised as the proximity analysis but the key factors ultimately relate to whether the defendant assumed responsibility for his or her statement. Incremental development of this approach may be appropriate depending on the facts of the case.[65] The United Kingdom Supreme Court has recently confirmed a defendant's "voluntary assumption of responsibility remains the foundation of this area of law".[66] This is consistent with Tipping J's statement in *Attorney-General v Carter* that an "[a]ssumption of responsibility can be viewed as the rationale for liability for negligent misstatement".[67] There, the Court of Appeal said the assumption will rarely be voluntary, preferring the term "deemed assumption of responsibility".[68] Respectfully, however, what the Court considered a voluntary assumption is perhaps better characterised as an express assumption.[69] Furthermore, in *Carter Holt Harvey Ltd v Minister of Education*, the Supreme Court defined the necessary relationship by reference to factors that will generally give rise to an assumption of responsibility.[70]

In rare cases, the defendant will expressly assume responsibility for his or her words. More frequently, it is the making of a statement in certain circumstances that will imply the defendant assumed responsibility for the statement.[71] The assumption is voluntary in the sense the statement had to be voluntarily made when reliance would be reasonable and was foreseeable. The defendant implicitly assumed responsibility where: (a) the plaintiff (individually or as a member of an identifiable class) could reasonably rely on the statement; and (b) the defendant ought to have foreseen the plaintiff (individually or as a member of an identifiable class) could rely on the statement. Although there may be overlap, these are distinct inquiries.[72] As Tipping J said in *North Shore City Council v Attorney-General*:[73]

> In a case involving an asserted liability for words it will seldom, if ever, be reasonable to impose a duty on the speaker or writer, unless that party ought reasonably to have foreseen that the other party would rely on what was said or left unsaid. Furthermore, any such reliance must itself have been reasonable.

The questions of reasonable and foreseeable reliance will be determined by reference to the facts and comparable cases. If the defendant did not know, and ought not to have known, the statement would be communicated to the

64 *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 [*The Grange*] at [188].
65 *Steel v NRAM Ltd (formerly NRAM plc)* [2018] UKSC 13, [2018] 1 WLR 1190 at [24].
66 *Banca Nazionale del Lavoro SPA v Playboy Club London Ltd* [2018] UKSC 43, [2018] 1 WLR 4041 at [7]. See also *Steel v NRAM Ltd (formerly NRAM plc)*, above n 65, at [24].
67 *Attorney-General v Carter* [2003] 2 NZLR 160 (CA) at [24].
68 At [23].
69 At [25]. The Court rephrased a voluntary assumption of responsibility as an undertaking to take reasonable care.
70 *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78 at [80].
71 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) at 529–530.
72 *Steel v NRAM Ltd (formerly NRAM plc)*, above n 65, at [24].
73 *The Grange*, above n 64, at [220].

plaintiff or an identifiable class to which the plaintiff belongs, reliance would not have been foreseeable. The United Kingdom Supreme Court recently held that, where a statement was passed on to a third party by the statement-recipient, for the statement-maker to have assumed responsibility to that third party, it must also have been part of the statement's known purpose that it should be communicated to and relied on by the third party.[74] Mere foreseeability of reliance would not be sufficient. Furthermore, generally it may not be reasonable to rely on a statement for a different purpose than for which it was made. Where the statement-maker disclaimed liability, it would not be reasonable to rely on the statement. Reliance might not have been foreseeable in such circumstances either.

Whether the plaintiff actually relied on the statement is a question that goes to causation.[75] Under the duty analysis, the concept of reliance should be concerned with whether the plaintiff, or an identifiable class to which they belong, could reasonably rely on the statement. The assessment is made at the time of the statement. That is when the duty is owed.[76] In other words, that is when the defendant is required to take care.

Courts will then likely turn to policy considerations and the overall question of whether it is fair, just and reasonable to recognise a duty of care. Factors such as indeterminate liability, likely behaviour of potential defendants, capacity to insure and consistency within the legal system are normally considered.[77] This part of the analysis, however, risks uncertainty because concepts such as fairness lack precision.[78] It should normally follow from the fact there was an assumption of responsibility that it is fair, just and reasonable to recognise a duty of care. This is the position the Court of Appeal adopted in *Attorney-General v Carter*:[79]

> If the defendant has, or is deemed to have, assumed responsibility to the plaintiff to be careful in what is said or written, thereby creating proximity, it will usually, subject to policy considerations, be fair, just and reasonable to hold the defendant liable for want of care. Assumption of responsibility can be viewed as the rationale for liability for negligent misstatement and the underpinning of the tort at the highest level of generality. Indeed it can be said that whether the defendant should in any situation be required to assume responsibility to the plaintiff for negligently caused loss is simply another way of expressing the conventional inquiry whether it is fair, just and reasonable to impose a duty of care.

Second, the defendant must have breached his or her duty of care. A false or misleading statement is not sufficient in and of itself.[80] Rather, in making the

74 *Banca Nazionale del Lavoro SPA v Playboy Club London Ltd*, above n 66, at [11].
75 See *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust* (CA), above n 2, at [85].
76 Roberts, above n 2, at 331.
77 *The Grange*, above n 64, at [160].
78 *Steel v NRAM Ltd (formerly NRAM plc)*, above n 65, at [22].
79 *Attorney-General v Carter*, above n 67, at [22].
80 *Mok v Bolderson* (2011) 13 TCLR 209 (HC) at [139]–[141].

statement, the defendant must have fallen below the standard of care. The standard of care is that of reasonableness.[81]

Third, causation must be established.[82] The question is whether the plaintiff has taken any action in reliance on the statement and suffered loss as a consequence.[83] As Tipping J said in *Spencer on Byron*, "in misstatement cases reliance is necessary before there can be causation".[84]

Fourth, the loss must not be too remote. The general test is the kind of loss suffered must have been reasonably foreseeable.[85] In negligence cases, remoteness requires the loss to fall within the scope of the duty of care.[86] The assumption of responsibility analysis entails questions of foreseeability of reliance and how the statement could reasonably be relied upon. It should be relatively straightforward to then determine whether the type of loss is that which the duty of care sought to prevent.

V CONCLUSION

Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council sends a clear signal to local councils to take reasonable care. The position is local councils, in exercising their statutory functions, owe a duty of care to original and subsequent building owners, regardless of the nature of the premises. This conclusion is consistent with the Supreme Court's earlier decisions with respect to leaky buildings. Wide-ranging tortious liability on the part of local councils now seems beyond question. At the very least, the clarity is to be welcomed. Beyond that, the law of negligent misstatement would benefit from appellate consideration and guidance in New Zealand, especially in light of recent decisions of the United Kingdom Supreme Court.

81 *Steel v Spence Consultants Ltd* [2017] NZHC 398, (2017) 18 NZCPR 540 at [100]–[105].
82 *Carter Holt Harvey Ltd v Minister of Education,* above n 2, at [117].
83 At [124].
84 *Spencer on Byron,* above n 4, at [34].
85 *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388 (PC); and *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* [1967] 1 AC 617 (PC) [*The Wagon Mound No 2*].
86 *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (HL) at 220; and *Reeves v Commissioner of Police of the Metropolis* [2001] 2 AC 360 (HL).