
Kids can't fly: The legal issues in children's falls from high-rise buildings

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The number of children falling from high-rise buildings in Sydney has risen sharply in recent years. Children's falls have been a global urban concern for decades. This article looks at the presence of children in strata schemes in Sydney, their numbers and family characteristics. It then considers the circumstances of children's falls and the legal ramifications and solutions. It canvasses legislative changes, as well as potential liability of owners corporations (bodies corporate) for injury suffered on common property.

INTRODUCTION

In 2007, the Children's Hospital at Westmead, Sydney's largest paediatric treatment centre, experienced a sharp rise in the number of children admitted with serious injuries as a result of falls from windows or balconies of apartments and houses. In response, the Centre for Trauma Care, Prevention, Education and Research and the Kids Health Promotion Unit at the hospital established a Working Party for the Prevention of Children Falling from Residential Buildings. The Working Party, made up of experts in medicine, law, planning, building and children's safety, held a symposium in 2010 and, in 2011, produced a final report which included recommendations for legislative change.¹ The hospital also began an ongoing education campaign, *Kids Can't Fly*, to increase public awareness of the risks that windows and balconies pose for young children.²

This article is an extension of research done for the Working Party. It examines the legal issues around children's falls in New South Wales, in particular those relating to strata schemes. Almost all apartment buildings in New South Wales are strata title subdivisions governed by the *Strata Schemes Management Act 1996* (NSW) and the *Strata Schemes (Freehold Development) Act 1973* (NSW).³ For decades, successive New South Wales State governments have pursued policies of urban consolidation⁴ and Sydney, like all Australian cities, is becoming increasingly dense in form.⁵ Densification of Sydney inevitably means more strata and community title⁶ schemes, which in turn will lead to more children living in high-rise buildings.

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¹ The Children's Hospital at Westmead, *Working Party for the Prevention of Children Falling from Residential Buildings Outcomes Report* (February 2011).

² *Kids Can't Fly: Window and Balcony Safety for Children*, <http://kidshealth.chw.edu.au/projects/falls-windows-and-balconies> viewed 20 April 2012.

³ There are a small number of company title buildings, concentrated in the inner east of Sydney, but most of Sydney's apartment stock was built after the introduction of the *Conveyancing (Strata Titles) Act 1961* (NSW). Many earlier built buildings have converted to strata title as well.

⁴ The former New South Wales State government's *Metropolitan Strategy* aimed to contain 60%-70% of new dwellings built in the next 25 years, within Sydney's existing footprint: New South Wales Department of Planning, *City of Cities: A Plan for Sydney's Future* (2005); Easthope H and Randolph B, "Governing the Compact City: The Challenges of Apartment Living in Sydney, Australia" (2009) 24(2) *Housing Studies* 243 at 244-246. The 2005 plan has now been superseded by the *Metropolitan Plan for Sydney 2036* (2010), and while the new Liberal State government is less averse to greenfields development, it still aims to locate 70% of new homes within Sydney's existing suburbs.

⁵ Multi-unit dwellings (flats, townhouses, terraces) in Sydney, Melbourne and Brisbane increased by 64% in the years 1981-2001: Randolph B, *Delivering the Compact City in Australia: Current Trends and Future Implications* (City Futures Research Centre, Research Paper 6, 2006) pp 12-13.

⁶ Community title is essentially flattened out strata title. It is used for low-rise master-planned estates with common facilities like pools, tennis courts and parks. It is the equivalent of a homeowner association in the United States, while strata title is the equivalent of United States condominiums: see Sherry C, "The New South Wales Strata and Community Titles Acts: A Case

This article looks first at the numbers and family characteristics of children living in strata schemes in Sydney. It then looks at the nature and rates of children's falls from buildings both in Sydney and overseas. The potential liability of bodies corporate or owners corporations⁷ for children's falls is then considered, followed by a discussion focused on a parent or carer's potential liability. Finally, the article briefly examines the power of owners corporations to regulate land use in ways that impact negatively on children's safety, which in turn raises more fundamental questions about the ability of citizens to regulate the lives of their neighbours in private communities.

PRESENCE OF CHILDREN IN STRATA SCHEMES

In Australia, there has been a long-standing antipathy to apartment living for families at government policy level, in relation to both public and private housing. From the turn of the 20th century, apartment dwelling was closely associated with the slums and tenements of Europe, social blights which Australian governments sought to avoid through the provision of family housing in garden suburbs.⁸ Children's wellbeing was at the forefront of the social reformers' minds. In 1908-1909 the Royal Commission for the Improvement of the City of Sydney and Its Suburbs heard evidence that "the flat system tended to destroy family life, and was not conducive to morality".⁹ Strickland Flats, the first large public housing apartments in Australia, built in 1914 and still standing on Cleveland Street, Chippendale in Sydney, were criticised as an option for working class families. JJC Bradfield, Chief Engineer for the Sydney Harbour Bridge and City Railway, said that while the flats were at least sanitary, "there are no gardens, no yards, and, as will be seen, the family washing is often dried by hanging on the balconies, or from the windows".¹⁰ He advocated for railways to the suburbs where "children [could] enjoy fresh air and sunlight in healthy surroundings", rather than having their playground confined to the gutter.¹¹

Social objection to apartment living for families persisted throughout the 20th century, with the vast majority of new apartments built in the pre- and post-WWII period being occupied by single people or childless couples. Flat living was associated with an alternative bohemian lifestyle far from family suburbia. Robin Slessor recalled that when his brother, famous Australian poet Kenneth Slessor, found a flat in Darlinghurst or Kings Cross in the 1920s, for their mother, "the idea of taking a flat was only one step away from announcing he was going to shack up with a prostitute".¹² Sydneysiders' vitriolic hatred of Harry Seidler's 1962 Blues Point Tower, the 1970s Green Bans on the high density redevelopment of Victoria Street, Potts Point and Kelly's Bush, Hunters Hill,¹³ and

Study of Legislatively Created High Rise and Master Planned Communities" (2009) 1(2) *International Journal of Law in the Built Environment* 130. Low-rise master-planned estates are governed by the *Community Land Development Act 1989* (NSW) and the *Community Land Management Act 1989* (NSW). There are often high-rise strata schemes within community title developments and they are governed by the strata legislation, in addition to the community title legislation. This article focuses on strata title as it is high-rise buildings that pose the greatest risk to children. For a discussion of the effect of community title on children's wellbeing see Sherry C, "The Legal Fundamentals of High Rise Buildings and Master Planned Estates: Ownership, Governance and Living in Multi-owned Housing with a Case Study on Children's Play" (2008) 16(1) *APLJ* 1.

⁷ While New South Wales formerly used the term "body corporate", it now uses the term "owners corporation" for the separate legal entity made up of all owners in a strata scheme. In all Australian States, bodies corporate are created automatically on the registration of a strata or community plan of subdivision: see Sherry (2008), n 6.

⁸ Butler-Bowdon C and Picket C, *Homes in the Sky: Apartment living in Australia* (Melbourne University Publishing, Melbourne, 2007) pp 1-28; Freestone R, *Model Communities: The Garden City Movement in Australia* (Nelson, Melbourne, 1989).

⁹ Mrs Dwyer of the Trades Hall Council, *First (Progress) Report: Slum Reclamation*, Government Printer, Melbourne, p 10 cited in Butler-Bowdon and Picket, n 8, p 4.

¹⁰ Butler-Bowdon and Picket, n 8, p 5.

¹¹ Butler-Bowdon and Picket, n 8, p 5.

¹² Quoted in Dutton G, *Kenneth Slessor: A Biography* (Viking, Melbourne, 1991) p 41, cited in Butler-Bowdon and Picket, n 8, p 8.

¹³ "Green bans" were decisions made by builders and labourers not to work on developments that were considered environmentally and socially undesirable; they were often high-rise. See Burgmann V and Burgmann M, "Green Bans

the contemporary Save Our Suburbs (SOS) movement, are all examples of a dislike of apartments and preference for low-rise suburbia that persists into the new millennium.¹⁴

Despite these sections of community sentiment, high-density housing in Australia increased by 35% between 1991 and 2001 and separate dwellings increased by only 18%. However, resistance to family apartment living has remained strong.¹⁵ In 2001, in Australia, 92% of couple families with children and 78% of one-parent families with children lived in separate dwellings.¹⁶ Increased supply in high-density housing has been absorbed by the rise of smaller households. In the same 10-year period between 1991 and 2001, there was a 43% increase in the number of lone-person households, a 37% increase in the number of lone-parent households, a 29% increase in the number of couple households without children and only a 1% increase in the number of couple households with children.¹⁷ As a result, despite increase in supply, high-density housing is still overwhelmingly occupied by single people or childless couples.

However, while a minority, there are children living in apartments in Australia and they fall roughly into two groups. The first and smallest group is made up of those children whose parents choose to live in higher density housing in order to be closer to employment and city centres.¹⁸ They may live in new developments where their parents are owners, rather than renters. These developments are overwhelmingly planned and built for singles and couples, with few apartments having more than two bedrooms and common facilities for children's play being limited.¹⁹ Interestingly, from the children's point of view, their small numbers are a problem per se. They have reported feeling socially isolated, like "aliens in their own neighbourhood".²⁰

The second group of children is made up of those whose parents live in apartments through lack of economic alternative, typically in the lowest echelons of the private rental market.²¹ This group is much more statistically significant. Research commissioned by the Australian Research Alliance for Children and Youth (ARACY) and conducted by CityFutures, University of New South Wales, revealed a telling picture of children living in private apartments in Sydney, Australia's largest and

Movement", *Dictionary of Sydney*, 2011, http://www.dictionaryofsydney.org/entry/green_bans_movement, viewed 3 February 2012; Sherry B, *Hunters Hill: Australia's Oldest Garden Suburb* (David Ell Press, Sydney, 1989) p 102.

¹⁴ Butler-Bowdon and Pickett, n 8, pp 12-22.

¹⁵ Parental antipathy to apartment living is apparently an international phenomenon, noted in Sweden, Switzerland, Czechoslovakia, Poland, France, Scotland, England, Italy, Germany, The Netherlands, Canada, South Africa and even Singapore: van Vliet W, "Families in Apartment Buildings: 'Sad Storey for Children'?" (1983) 15(2) *Environment and Behaviour* 211 at 217.

¹⁶ Australian Bureau of Statistics (ABS), 4102.0 *Australian Social Trends Housing Stock: Changes in Australian Housing*, 2003.

¹⁷ Australian Bureau of Statistics (ABS), 4102.0 *Australian Social Trends Housing Stock: Changes in Australian Housing*, 2003

¹⁸ Randolph B, *Children in the Compact City: Fairfield as a Suburban Case Study* (City Futures, Sydney, 2006).

¹⁹ See Whitzman C and Mizrachi D, "Vertical Living Kids: Creating Supportive High Rise Environments for Children in Melbourne, Australia" A Report to the Victorian Health Promotion Foundation (December 2009). This appears to be an international phenomenon. For example, Karsten provides an interesting account of Dutch parents who chose to live close to the centre of Amsterdam in new apartment developments. They are overwhelmingly older, professional parents, working in the socio-cultural sectors with strong attachment to work. They report that lack of facilities for children is a significant problem for them combining work and caring in the city: Karsten L, "Family Gentrifiers: Challenging the City as a Place Simultaneously to Build a Career and to Raise Children" (2003) 40(12) *Urban Studies* 2573.

²⁰ Whitzman and Mizrachi, n 19, p 53.

²¹ Many people in Australia, not just parents, live in apartments not by active choice, but because it is the only affordable housing they can obtain: Yates J, "The Rhetoric and Reality of Housing Choice: The Role of Urban Consolidation" (2001) 19(4) *Urban Policy and Research* 491. This article focuses on children in privately-owned housing, either rented or owner occupied. While there are significant issues affecting children living in public housing, these children are a small proportion of all Australian children. They are greatly outnumbered by children whose parents are owner-occupiers or renters in the private housing market. For example, while there are more sole-parent households than couple-parent households in public housing, there are three times as many sole-parent households in the private rental market as in public housing: Australian Bureau of Statistics, 10.22 Selected Household and Dwelling Characteristics (a) - 2007-08, 1301.0 - *Year Book Australia*, 2009-10. Further, unlike the United Kingdom, Australia has almost no large-scale, high-rise public housing estates, nor does it have an extensive social housing market.

most dense city, in 2001.²² Roughly one in 10 children in Sydney live in apartments, concentrated in the local government areas of Canterbury, Parramatta, Randwick, Rockdale and Fairfield. Within these local government areas, children in apartments are clustered around suburban town centres and railway lines, such as Bankstown, Campsie, Lakemba, Liverpool and Auburn. Children living in apartments tend to be young children, with 44% being under five, in contrast to 33% of all Sydney children.

The research revealed that, across Sydney, 35% of all children in flats live in very low income households on less than \$600 a week, while in some areas like Fairfield, Blacktown, Liverpool and Canterbury, this figure rises to 50%.²³ Children in apartments are overwhelmingly the children of migrants, with 73% having a reference person on the Census (parent or guardian) born overseas, in comparison to 42% of all children living in Sydney.²⁴ They are also overwhelmingly children of tenants, with 70% living in a rental property in contrast to 29% of all children.²⁵ In Australia, renting is associated with greater housing mobility so that children living in apartments are significantly more likely, than the general child population, to have moved, including from overseas, in the last five years.

Not surprisingly, children who live in apartments live in much smaller homes than children in freestanding houses. Almost 75% live in a home with two or fewer bedrooms, in stark contrast to the 87% of children generally who live in homes of three bedrooms or more.

Overall the research paints a clear picture of children who live in apartments in Sydney: they are likely to be young and the children of migrants, recently arrived in Australia, who can only afford to rent a relatively small apartment.

CHILDREN'S FALLS FROM HIGH-RISE BUILDINGS

Children's falls from high-rise buildings have been a well-documented cause for concern in urban areas around the world for the past 40 years. A New York City Department of Health study of child mortality due to falls from building heights found that falls represented 12% of all accidental deaths in the city between 1965 and 1969. Window falls were responsible for 123 deaths.²⁶ They occurred predominantly in the summer months in high-rise public housing. Twenty-three fatal falls occurred in the South Bronx in the summer of 1971 alone, with one precinct patrol man reporting that he had personally picked up nine dead children.²⁷

Not all falls are fatal and children suffer a range of serious injuries, including fractures, internal and brain injuries.²⁸ Owing to their different centre of balance from adults, children tend to topple head first, using their arms and hands to break their fall. In a United States study of 70 children's falls from one to three or more storeys, only 15 children suffered minor soft tissue trauma. Fifty-four per cent suffered head trauma and 33% skeletal trauma.²⁹ The likelihood of a child requiring life-long medical care and assistance following a fall is significant.

In response to the alarming numbers of falls in the 1960s and 1970s, New York initiated a *Kids Can't Fly* program. The program relied on intensive public education, including home visits,

²² Randolph, n 18.

²³ Randolph, n 18, p 13.

²⁴ Randolph, n 18, p 15.

²⁵ Randolph, n 18, p 16.

²⁶ Bergner L, Mayer S and Harris D, "Falls From Heights: A Childhood Epidemic in an Urban Age" (1971) 61(1) *American Journal of Public Health* 92

²⁷ Spiegel C and Lindaman F, "Children Can't Fly: A Program to Prevent Childhood Morbidity and Mortality from Window Falls" (1977) 67(12) *American Journal of Public Health* 1143.

²⁸ Smith M, Burrington J and Woolf A, "Injuries in Children Sustained in Free Falls: An Analysis of 66 Cases" (1975) 15(11) *Journal of Trauma* 987.

²⁹ Musemeche C, Bartel M, Cosentino C and Reynolds M, "Pediatric Falls from Heights" (1991) 31(10) *Journal of Trauma* 1347 at 1348.

distribution of multilingual posters and flyers at health clinics, schools, preschools, churches, supermarkets and welfare offices, as well as the provision of 16,000 free window guards by the city. In 1976, the Health Code was changed to require landlords to install window guards in all premises housing children under 10. Thirty years later those provisions remain in place.³⁰

The program was extremely effective with a 50% reduction in falls in the two-year period from 1973-1975 alone.³¹ Predominantly education-focused programs have been implemented in other cities in the United States, including Boston and Cincinnati. While education programs are important, they are potentially less effective than mandatory safety measures, as research demonstrates that the risk of paediatric injury associated with housing is independent of other risk factors.³² Window guards, like fire sprinklers, remedy inherent building risks, saving lives regardless of parenting skills, income or education. The introduction of mandatory window guards in New York raised the reduction in falls from 50% to 96%,³³ suggesting that mandatory provision of physical barriers is the most effective measure to save children's lives.

Concern about the dramatic increase in falls of children in Sydney in recent years led the Centre for Trauma Care, Prevention, Education and Research and the Kids Health Promotion Unit at The Children's Hospital at Westmead to form a working party on children's falls in 2009. In the period 1998-2006, on average, Westmead treated seven children a year who had fallen from windows. In 2007, the hospital treated 17. Balcony falls saw a similar change, increasing from an average of six, between 1998-2006, to a spike of 11 in 2007.³⁴ While Westmead is the largest children's hospital in the State, it does not treat all seriously injured children. The Sydney Children's Hospital, Randwick, and John Hunter Children's Hospital, Newcastle, are also large paediatric hospitals which treat children who have fallen from windows and balconies. Unfortunately, centralised records on children's falls are not maintained and thus it is difficult to know exactly how many children have fallen from windows and balconies in the Sydney metropolitan region.

The circumstances of Iman Akter Mostafa's fatal fall, on 18 October 2009, were typical of the kind of accident confronting doctors.³⁵ The three-year-old boy³⁶ was playing in a bedroom of an apartment in Kogarah, in the city's south east. Kogarah is situated within the local government area of Rockdale, the local government area of Sydney with the fourth largest number of children living in apartments, after Canterbury, Parramatta and Randwick.³⁷ While Iman was a visitor at the flat, the tenants had a three-year-old of their own and were expecting their second child. The two three-year-olds were playing in a tiny bedroom, barely wider than the single bed that was placed under the window. The aluminium sliding window opened roughly one metre and, despite the tenant's requests to his landlord, was not fitted with a lock. Like many other children, Iman fell through the flyscreen, 15 metres to the concrete below.

Iman's fatal accident illustrates a number of common features in children's falls. First and most obviously, the apartment buildings from which children fall are high. While most freestanding homes

³⁰ Window Guard Regulations of the City of New York 6-30-91 Chapter 12, <http://www.nyc.gov/html/doh/html/win/winbroc.shtml>, viewed 5 February 2012. Window guards are only mandatory for landlords to install, not owner-occupiers.

³¹ Spiegel and Lindaman, n 27 at 1145.

³² Shenassa E, Stubbendick A and Brown M, "Social Disparities in Housing and Related Pediatric Injury: A Multilevel Study" (2004) 94(4) *American Journal of Public Health* 633-639

³³ American Academy of Pediatrics, Committee on Injury and Poison Prevention, "Falls from Heights: Windows, Roofs, and Balconies" (2001) 107(5) *Pediatrics* 1188 at 1189.

³⁴ The Children's Hospital at Westmead, n 1, p 10.

³⁵ Ramachandran A, "Man Describes Horrific Moment when his Friends' Three-year-old Son Fell from Sydney Unit Window", *Sydney Morning Herald* (19 October 2009), <http://www.smh.com.au/national/man-describes-horrific-moment-when-his-friends-three-year-old-son-fell-from-sydney-unit-window-20091019-h3mr.html> viewed 3 February 2012.

³⁶ Most studies show that boys outnumber girls roughly 2:1 in sustaining injuries from falls: Monash University Accident Research Centre, *The Relationship Between Slips, Trips and Falls and the Design and Construction of Buildings*, Report No 281 (2008) p 33.

³⁷ Randolph, n 18, p 11.

only have a second or, at most, a third storey from which a child could fall, high-rise buildings may have more than 50 floors. The further the fall, the greater the likelihood of serious or fatal injury.³⁸ Second, when a child falls from an apartment building, they are unlikely to fall on anything other than concrete in the form of paths or driveways. Children who fall from freestanding homes may fall into garden beds or onto grass, which greatly reduces the severity of injuries.³⁹ Third, owing to the lack of play space around apartment blocks, in particular those dating from the 1960s and 1970s, as well as parents' inability to supervise children when several storeys up, children are more likely to be confined to bedrooms to play.⁴⁰ Fourth, children living in apartments overwhelmingly live in those with two or less bedrooms.⁴¹ Limited floor space means that furniture is often placed under windows allowing children to climb up to sill level and fall. Finally, many children, Iman included, fall through flyscreens in windows that can only be locked shut or left entirely open. No ordinary flyscreen can support a child's weight and, without a lock or limiting device,⁴² parents cannot partially open a window, locking it to an opening through which a child cannot fall.

The Children's Hospital's Working Party released an Outcomes Report in 2011.⁴³ The Report recommended a comprehensive hospital-based system to record building-related falls involving children, as well as education campaigns targeted at parents and industry, highlighting the dangers of windows and balconies. The Report recognised an important distinction between regulatory change for new buildings and retrofitting of existing buildings. The Building Code of Australia (BCA), which regulates new building and significant rebuilds in all States, does not generally require retrofitting of existing buildings. As a result, if the BCA were altered to require all windows above a particular height to have locks or guards, existing buildings would not need to comply.⁴⁴ Existing buildings, particularly older buildings, frequently have features such as climbable balustrades and insufficient sill heights, in addition to absent window locks and guards, which present significant risks to children.

The Outcomes Report considered a number of practical measures that can be taken by owners and occupiers to render windows and balconies in existing buildings safer for children. Arguably, the most important measure is ensuring that windows can be secured to an opening of not more than 10 centimetres to prevent a baby or toddler's head passing through the opening.⁴⁵ Windows can be fitted with locks or limiting devices, many of which are inexpensive and easy to install. Retrofitting balconies is more expensive, but the addition of Perspex panels, or wrapping shade sail cloth around the balustrade, can eliminate climbable elements and raise balustrade height.⁴⁶

Significantly, the Report recommended amendments to the *Strata Schemes Management Act* and the *Residential Tenancies Act 2010* (NSW), requiring owners corporations and/or landlords to retrofit windows more than three metres from the ground so that they can be locked to an opening of not more than 10 centimetres.⁴⁷

³⁸ Monash University Accident Research Centre, n 36, p 34; Smith, Burrington and Woolf, n 29.

³⁹ Monash University Accident Research Centre, n 36, p 34.

⁴⁰ Randolph, n 18, p 25. International research confirms that "easy parental supervision and easy access to the outdoor environment" are the two principal obstacles to children's play when they live in apartments: van Vliet, n 15 at 221.

⁴¹ 76.2% of children living in apartments in Sydney live in apartments with two or less bedrooms: Randolph, n 18, p 17.

⁴² A window limiting device is a mechanism that prevents a window opening further than a defined aperture.

⁴³ The Children's Hospital at Westmead, n 1.

⁴⁴ Monash University Accident Research Centre recommended that the Building Code of Australia should consider a provision for the installation of window guards at second storey height in all residential dwellings: n 36, p xv.

⁴⁵ This conforms with overseas practice and policy. In its policy statement on paediatric falls, the American Academy of Pediatrics' Committee on Injury and Poison Prevention recommended the installation of "locks on windows to prevent sliding windows not intended for egress from opening more than 4 in", which is roughly 10 centimetres, as well as the installation of operable window guards where fire regulations permit: American Academy of Pediatrics Committee on Injury and Poison Prevention "Falls From Heights: Windows, Roofs, and Balconies" (2001) 107(5) *Pediatrics* 1188, reaffirmed on 1 September 2007.

⁴⁶ The Children's Hospital at Westmead, n 1, pp 32-43.

⁴⁷ The Children's Hospital at Westmead, n 1, pp 49-53.

The rationale for this recommendation was that owners corporations and landlords already have a statutory responsibility for windows. Under ss 70-73 of the *Residential Tenancies Act*, a landlord must fit locks and other security devices. Case law on the obligation to provide locks has focused on landlords' liability for losses suffered by tenants from burglary.⁴⁸ The Report reasoned that:

If legislation can compel a landlord to protect a tenant's property, it may be reasonable for it to also compel a landlord to afford protection to a tenant's child by providing windows that are able to be made safe for children.⁴⁹

The Report also recognised that tenants with children are often new parents and/or new migrants who may not have been exposed to education campaigns on window safety. As long-term owners of premises, landlords have a greater opportunity both to be made aware of the risks and to remedy them.

In New South Wales, owners corporations in strata schemes have a strict statutory responsibility to maintain and repair common property under s 62 of the *Strata Schemes Management Act*.⁵⁰ Contrary to lay assumption, external windows and balconies are invariably drawn on strata plans as common property and thus are the responsibility of the owners corporation, not individual apartment owners.⁵¹ The obligation to maintain and repair under s 62 can include a requirement to add features to common property that were not originally included in the building.⁵² Further, safety is clearly an aspect of repair. While an owners corporation can decide not to repair some parts of common property (eg an obsolete air-conditioner), under s 62(3) it cannot so decide if this would compromise the safety of the building.⁵³ The Report noted an owners corporation's potential liability under s 62, or the common law, if someone is injured on common property. This issue is discussed in detail below. The Report recognised that well-run strata schemes were likely to address the risk of their own volition, while less well-run schemes may avoid the issue. The Report recommended that an obligation be imposed on all owners corporations to ensure that common property windows more than three metres from the ground are fitted with locks or window limiting devices.⁵⁴ Owners corporation responsibility for locks and limiting devices would obviate the need for landlords to act if their properties were part of a strata scheme.

In response to the Westmead Outcomes Report, as well as concerns expressed through community and industry consultation, the Building Codes Board of Australia announced changes to all windows in early childhood centres and habitable rooms in residential buildings. Windows must be fitted with a screen (presumably not a flyscreen) or have an opening of less than 125 millimetres. Balustrades more than two metres from the ground or floor below must have no, or reduced, climbable elements. The Board decided that while the cost associated with balustrade changes (though not window changes), were not small, the Board "weighed its responsibility for child safety as paramount".⁵⁵ The changes will come into force in 2013 and be effective in all States and Territories.

To date, there has been no legislative response to recommended changes to the *Strata Schemes Management Act* or the *Residential Tenancies Act*. Thus, the risks in existing buildings, to which the BCA does not generally apply, and which will constitute the greatest proportion of residential building stock for many years to come, remain.

⁴⁸ For example, *Verano & Crofts v Alibrandi (Tenancy)* [2006] NSWCTTT 232 (3 April 2006).

⁴⁹ *The Children's Hospital at Westmead*, n 1, p 50.

⁵⁰ The duty to repair is not to make reasonable efforts, it is absolute: *Seiwa Australia Pty Ltd v Owners Strata Plan 35042* [2006] NSWSC 1157, per Brereton J at [3]-[6]; *Ridis v Strata Plan 10308* (2005) 63 NSWLR 449; 1 STR (NSW) 205; [2005] NSWCA 246 per Hodgson JA at [5]; *Thoo v The Owners Strata Plan No 50276* [2011] NSWSC 657 per Slattery J at [53].

⁵¹ The boundaries of a strata lot in New South Wales are defined by the registered strata plan. Everything that falls outside a lot is common property: *Strata Schemes (Freehold Development) Act 1973* (NSW), ss 5, 8.

⁵² *Proprietors Strata Plan No 6522 v Furney* [1976] 1 NSWLR 412; *Lin v The Owners - Strata Plan No 50276* [2004] NSWSC 88.

⁵³ *Strata Schemes Management Act 1996* (NSW), s 62(3)(b).

⁵⁴ *The Children's Hospital at Westmead*, n 1, p 53.

⁵⁵ 20111222 Letter from Ivan Donaldson, General Manager, Australian Building Codes Board, to Stakeholders, 22 November 2011.

COULD AN OWNERS CORPORATION BE LIABLE FOR A CHILD'S FALL?

One of the greatest concerns for owners in strata schemes is liability for injury on common property. Liability can arise under s 62 of the *Strata Schemes Management Act* for failure to repair and/or under the common law, as the owners corporation is the "occupier" of common property.⁵⁶ Concern about liability is exacerbated by aging schemes and the perennial problem of inadequate maintenance of common property in many buildings.⁵⁷ While all owners corporations are required to maintain \$10 million of insurance cover for death or bodily injury for which they might be liable,⁵⁸ if insurance is insufficient or unavailable, individual owners are liable in proportion to their unit entitlements.⁵⁹ Industry professionals and strata lawyers have recently recognised the possibility that an owners corporation could be sued for more than \$10 million to meet the cost of care for a child who has fallen from a window or balcony.⁶⁰ Many strata owners are unaware that their building presents them with the risk of personal liability.

The leading New South Wales case on owners corporation liability for injury on common property is *Ridis v Strata Plan 10308* (2005) 63 NSWLR 449; 1 STR (NSW) 205; [2005] NSWCA 246. The claimant's arm had been seriously lacerated when he held it out to stop the entry door of his apartment block closing. The door had a large panel of annealed, not safety glass, which shattered upon impact with the claimant's hand. There was evidence that the door was unpredictable in the manner and speed of its closing. It was common ground that at the time the building was built, around 1939, there was no requirement for the door to contain safety glass and that when the Australian Standard was altered in 1973, the Standard was not applied retrospectively. As a result, there was no legal requirement for the owners corporation to replace the glass when it was not broken.⁶¹

The claimant argued that the owners corporation had breached its common law duty as an occupier of common property as a result of failing to comply with its obligation under s 62 of the *Strata Schemes Management Act* "to properly maintain and keep in a state of good and serviceable repair the common property". The claimant did not argue breach of s 62 as a separate cause of action. The primary judge found that there was no breach of s 62 as there was no evidence that the owners corporation was aware of any danger and there was no obligation for it to have regular inspections of common property over and above the general obligation to keep common property in repair.

On appeal, the majority of the court, Hodgson JA and McColl JA, agreed that there was no breach. Hodgson JA held that the obligation under s 62(1) and (2) was not simply to exercise reasonable skill and care to achieve the requirements of those subsections, but to actually achieve the requirements. The obligation was absolute. This meant that an owners corporation, acting reasonably, should have a system in place for monitoring the maintenance and repair of the common property. Further, the terms of s 62(3), which permitted owners corporations to resolve not to renew or repair parts of common property, but *not* if it would affect the safety of the building, meant that particular regard had to be had to safety issues associated with maintenance and repair. However, this did not

⁵⁶ An owners corporation is the occupier of common property by virtue of its management and control of the area: *Ridis v Strata Plan 10308* (2005) 63 NSWLR 449; 1 STR (NSW) 205; [2005] NSWCA 246, per McColl JA at [117].

⁵⁷ Easthope H, Randolph B and Judd S, *Managing Major Repairs in Residential Strata Developments in New South Wales*, (2009).

⁵⁸ *Strata Schemes Management Act 1996* (NSW), s 87(1)(b), (2).

⁵⁹ *Strata Schemes Management Act 1996* (NSW), s 227. See also *Strata Schemes (Freehold Development) Act 1973* (NSW), s 51(6), which grants the Supreme Court power to make orders in relation to people who may be liable to contribute to owners corporation debts in the event of termination of a scheme. *Body Corporate Strata Plan No 4303 v Albion Insurance Co Ltd* [1982] VR 699. See Ilkin A, *NSW Strata and Community Title Schemes Management and The Law* (Thomson, Lawbook Co, Sydney, 2007), pp 62-63, 263-264.

⁶⁰ Munro K, "Owners Face Big Bills Over Falls From Apartments", *Sydney Morning Herald* (25 January 2012), <http://smh.domain.com.au/real-estate-news/owners-face-big-bills-over-falls-from-apartments-20120124-1qft7.html> viewed 2 February 2012.

⁶¹ After the accident, the glass had been replaced with safety glass costing \$1,200 and the unbroken pane in the adjoining door had been covered with a film to make it shatter-proof, costing only \$300.

mean that the owners corporation had to periodically hire specialist experts to inspect every aspect of common property that could possibly give rise to safety issues.

Hodgson JA held that had the owners corporation been aware that the glass in the door could shatter into dangerous shards, then the exercise of reasonable care and skill would have required precautions to be taken. However, on the question of whether the owners corporation *should* have been aware of the risk, he held that on the balance of probabilities, ordinary, as opposed to specialist, inspections to monitor maintenance and repair would not have brought home the risk to the owners corporation. Thus, there was no breach of s 62.

McColl JA held that while it was open for the claimant to rely on a breach of s 62 as evidence of negligence, it was not conclusive. The common law duty to act reasonably in all circumstances was paramount. She said that the position of the owners corporation was more analogous to that of an individual homeowner than a public authority or commercial organisation as the only access it had to funds to discharge its s 62 duty was from levies on lot owners. As a result, a member of the public, for example, could not have the same expectation of maintenance and repair of common property as they would have of premises entered pursuant to contract or public lands.

McColl JA at [126] stated the law relevant to owners corporations as this:

The duty to take reasonable care requires the occupier to protect entrants from risks of injury which can be foreseen and avoided. The measure of the discharge of the duty is what a reasonable person would, in the circumstances, do by way of response to the foreseeable risk: *Hackshaw v Shaw* (at 663). Determining whether the duty has been breached turns upon the application of the “Shirt calculus” (*Wyong Shire Council v Shirt* [1980] HCA 12; (1980) 146 CLR 40) to “the probability of the risk occurring, the magnitude of the consequences – which may vary from small to extremely grave – and the cost or inconvenience of eliminating the risk ...”: *Western Suburbs Hospital v Currie* (1987) 9 NSWLR 511 at 521 per McHugh JA (as his Honour then was); applied *Phillis v Daly* at 67 per Samuels JA; see also at 71 per Mahoney JA; at 76 – 77 per McHugh JA.

McColl JA decided that the circumstances of the case were largely analogous to *Jones v Bartlett* (2000) 205 CLR 166; [2000] HCA 56, the leading High Court decision on a landlord’s common law liability for a tenant’s injury. In that case the adult son of tenants had been injured when he walked into an internal glass door. Like the door in *Ridis*, it had complied with Australian standards when built and new standards requiring safety glass were not retrospectively applied. The landlord was under no legal obligation to replace the door. The plaintiff in the case alleged that, despite this, the landlord had breached a statutory duty under the *Residential Tenancy Act 1987* (WA) to keep the premises in repair and was liable either at common law or under the *Occupiers’ Liability Act 1985* (WA) for failure to ensure the premises were free from risks that could be foreseen and avoided. The High Court rejected the contention that the door was in any way defective or a danger because it did not comply with current, non-binding Australian safety standards. Further, they refused to hold (McHugh J dissenting), that there was any statutory or common law obligation to engage experts to inspect the premises to see whether they fell short of current building standards or could be made safer.

McColl JA held that the same principles were applicable to s 62. She said that:

It is apparent from this analysis that subs 62(1) and (2) do not impose an obligation on the respondent to insert new glass in a door which, as in the present case, was relevantly operating as intended (and, therefore, did not require maintenance or repair) – let alone an obligation to procure experts to assess the premises to determine whether any of the materials of which the common property was constructed could be made safer.

Quoting *Jones v Bartlett*, per Gummow and Hayne JJ at [186], McColl JA at [187] said that the owners corporations’ obligations under s 62 were to be judged by whether an “ordinary person” in the owners corporation’s position “would or should have known that there was any risk; whether that person would or should have known of steps that could be taken in response to that risk; and the reasonableness of taking such steps”. Significantly, she said at [181] that:

There was no reason for the legislature, by the enactment of s 62, to impose upon individuals who take advantage of urban consolidation to live in properties governed by the *Management Act*, a burden of inspection and continually updating of the common property not borne by individuals who reside in freehold [sic] properties.

With all due respect to McColl JA, the legislature has done precisely that. Beyond the obligation to ensure that one's home does not present a foreseeable and avoidable risk to entrants, there is no strict statutory obligation on owners of non-strata or community title homes to repair and maintain them. If we so choose, we can let our gutters block up and paint peel off the walls. By virtue of s 62, owners of common property cannot.⁶² This is because the legislature has recognised that the nature of (often large-scale) community living necessitates maintenance and repair. While some owners do not care about peeling paint, others do, and the appropriate compromise is to do the maintenance to a reasonable standard. Further, continual disrepair in large apartment blocks becomes prohibitively expensive to fix. Without continual repair, later owners will face an inequitable burden of major repairs because minor ones were not paid for earlier, or the scheme will need to be demolished. This in turn raises difficult issues in relation to termination of strata schemes.⁶³ Finally, as some judges are beginning to acknowledge, the scale and nature of strata living presents particular risks to entrants and occupiers that it is not unreasonable for the owners corporation to address.

Tobias JA (dissenting) in *Ridis*, was one such judge. He recognised that the statutory duty to repair and the physical nature of a strata scheme were decisive factors in the case. He held that s 62(2) demanded renewal or replacement where "appropriate" and that this would include replacement of a fixture or fitting *even if it were not broken or patently defective*. At [55] he concluded that:

the obligations imposed upon the respondent by s 62(1) and (2) of the Act must be taken to have informed the standard of care reasonably required of it as an owners corporation with respect to its management and control of the use of the common property: s 61(1)(a). To discharge that standard of care the respondent was required to inspect from time to time the common property including its fixtures and fittings for the purpose of, inter alia, replacing any item thereof which it was appropriate to replace in the sense referred to above. The statutory regime, given the terms of s 62(3) in particular, required an owners corporation to be proactive and not, as the primary judge found the respondent to be in this case, merely reactive. It could not escape its statutory obligations by simply hiding its head in the sand.

He held that a decision not to replace the glass under s 62(3)(a) would obviously be impermissible under s 62(3)(b), as it would affect the safety of the building. At [58] he referred to the "obviously dangerous nature" of the glass and the "necessity as a matter of safety to replace them with safety glass in accordance with the Australian Standard current at the time of any such inspection". On the question of whether the owners corporation was or should have been aware of the danger, he opined at [61] that "a modicum of thought" during any inspection of the doors would have made an inspector aware that they were the original 1939 annealed glass doors which were dangerous when shattered.

Tobias JA's judgment is significant in this regard; he held that just because the doors complied with building standards at the time the building was built, and even though the new standards did not apply retrospectively, an owners corporation could still be in breach of s 62 for failing to update the common property.

⁶² *Strata Schemes Management Act 1996* (NSW), s 62, operates in conjunction with ss 75 and 76, which impose statutory obligations on owners corporations to estimate each year how much money will be needed to maintain, repair and replace common property and to levy individual owners accordingly. Section 75A requires schemes to have a 10-year plan for major anticipated expenditure. Of course, an obligation to levy does not correspond to owners actually paying. Further, despite the obligation to levy, in practice it is evident that many schemes under-estimate expenses or put off necessary repairs. While courts have acknowledged that owners corporations will not be liable for disrepair that they did not or could not know about (eg because the disrepair was inside an individually-owned apartment and the owners corporation was not informed), they have not been prepared to limit owner corporation liability on the basis that money was not available to pay for repairs. The obligation to repair goes hand in hand with the obligation to levy owners for that repair. An owner who cannot or will not pay levies can be sued for the money as a debt (*Strata Schemes Management Act 1996* (NSW), s 80) and eventually be made bankrupt. Ultimately, the proceeds of sale of any of their assets, including the apartment itself, would be used to discharge the debt.

⁶³ Sherry C, "Termination of Strata Schemes in New South Wales – Proposals for Reform" (2006) 13(3) APLJ 227.

Further, while a breach of s 62 did not necessarily lead to a conclusion of a breach of the common law duty of an occupier, applying the *Shirt* calculus⁶⁴ to the facts, a breach was established. Tobias JA held that a reasonable owners corporation would have foreseen that its failure to replace the glass panel involved a risk of injury. Although the probability of occurrence was not high, the seriousness of the injuries and the relatively minor expense of replacing the glass meant that a reasonable owners corporation's response would have been to replace. Tobias JA held at [69] that the mandatory requirement of s 62(2) and the emphasis on safety in s 62(3)(b), tilted the balancing exercise in the *Shirt* calculus in favour of the owners corporation needing to act.

Importantly, Tobias JA distinguished the High Court decision in *Jones v Bartlett* on these grounds. He held that the High Court was dealing with the internal door of a domestic dwelling, which was different to the front door of an apartment block where there was significant traffic. He noted at [74] that the Chief Justice in *Jones v Bartlett* had said that the Australian Standards did not require safety glass "unless, for some reason, the glass had to be replaced". Tobias JA held that in the current scenario there was such a reason: s 62(2) mandated the glass's replacement. He referred to McHugh J's dissenting judgement in *Jones v Bartlett*, where his Honour said at [110] that the Australian Standards are merely a guide, but cannot dictate the reasonable standards required in each case. Ultimately, Tobias JA concluded that the imposition of an absolute duty on the owners corporation in s 62(2), in conjunction with the emphasis on safety in s 62(3), meant that an owners corporation had to be proactive and thus had a higher standard of care than an ordinary occupier at general law.

The question of owners corporation liability for injury on common property that did not comply with non-binding safety standards was considered again in *Morgan v Owners Strata Plan 13937* [2006] NSWSC 1019. The plaintiff ran out the door of his unit block, tripping on carpet off-cuts which were holding open the front door and then slipping on the wet front steps. He injured his back badly. He alleged that the owners corporation had breached its duty of care to him, as defined either by the common law or s 5B of the *Civil Liability Act 2002* (NSW).

While Brereton J at [35] followed the majority in *Ridis*, stating that the owners corporation was more analogous to an individual homeowner than a public or commercial entity, he said:

Nonetheless, a body corporate does have a substantial degree of control of common areas, and the circumstance that in a home unit block there is a higher density of population, and thus of pedestrian traffic, than in an individual home, may require the taking of precautions, particularly in heavily used common areas, which would not be required of an ordinary homeowner.

Brereton J found that the presence of the cut-off carpet was not a breach of duty, but the failure to supply a non-mandatory slip resistant door mat was. He held at [43] that:

In the context of the *front entrance* of a *multi-unit residential building*, where the landing was located *at the top of a flight of five steps* and was known to be *exposed to rain*, and given the availability of such mats for only \$25, reasonable care for persons exiting the building required compliance with the Standard by provision of an external slip-resistant weatherproof doormat. While I accept that a body corporate need not rectify a building to comply with later non-mandatory standards that did not exist when it was built [*Ridis*], that was said in the context of the fabric of the building. *Ridis* does not mean that a body corporate can fail to implement obvious precautions which can easily be taken, just because they are expressed in a Standard published many years after construction of the building.

It is arguable that Brereton J's judgment in *Morgan* and Tobias JA's in *Ridis* are a more sensible line of authority, which may be adopted by courts in the future. Brereton and Tobias's approach would impose a higher standard of care on owners corporations than ordinary homeowners or landlords, a

⁶⁴ The "*Shirt* calculus" is the test that has been adopted by New South Wales courts for liability in negligence. The question is, would a reasonable person in the defendant's position have foreseen the risk and what would a reasonable person have done in response to that foreseeable risk?: *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48; [1980] HCA 12 per Mason J. See McDonald B, "The Impact of the Civil Liability Legislation on Fundamental Policies and Principles of the Common Law of Negligence" (2006) 14 TLJ 268.

perfectly rational response to the absolute duty in s 62 to keep common property in repair⁶⁵ and the high-density nature of strata schemes. More people move through common property than non-strata homes and the height of buildings means that there are risks such as large staircases, balustrades and self-closing doors, absent in most freestanding homes. A higher standard of care could result in an owners corporation being liable for failing to update common property, even if it were built in accordance with building standards of the time and there was no obligation to retrofit.

For our purposes, this raises the question: is it possible that an owners corporation might be liable for a child's fall from a common property window which had no lock or limiting device?⁶⁶ Without going into exhaustive detail, applying either the *Shirt* calculus⁶⁷ or s 5B of the *Civil Liability Act*,⁶⁸ it is certainly arguable. First, is the risk foreseeable? While an owners corporation would not necessarily know that there were children living in an apartment, it is foreseeable that there may be, and despite the fact that children are now a minority in our population, they are not yet so rare that it would not be entirely foreseeable that any apartment might have a young child as a visitor. Further, courts have long recognised that people should be taken to know that children are exploratory by nature and cannot judge risk as an adult would.⁶⁹ Finally, children's falls from apartments have received considerable media attention in recent years⁷⁰ and have been the subject of health⁷¹ and strata industry⁷² education campaigns. An owners corporation that is discharging its statutory duty of managing and maintaining a strata scheme would or should be aware that children had fallen from buildings and that the incidents were not freak accidents, but rather frequent enough to merit discussion and debate about solutions.

⁶⁵ See also *Seiwa Australia Pty Ltd v Owners Strata Plan 35042* [2006] NSWSC 1157, per Brereton J at [3]-[6]; *Thoo v Owners Strata Plan No. 50276* [2011] NSWSC 657 per Slattery J at [53].

⁶⁶ In *Gordon v Perignon* [2004] NSWSC 354 the plaintiffs, a mother and child, unsuccessfully sued the landlord and owners corporation after the child fell through a flyscreen. The essence of the action was that the landlord and owners corporation were negligent in failing to ensure that the flyscreens were safe; however, in this sense, the action was misconceived. No ordinary flyscreen is designed to support a child's weight. The question being addressed in this section of the article relates to locks or window limiting devices, not flyscreens.

⁶⁷ Ipp JA in *Waverley Council v Ferreira* [2005] NSWCA 418 said at [45] that: "The matters set out in s 5B(2) in substance, are a reiteration of Mason J's remarks in *Wyong Shire Council v Shirt* [1980] HCA 12; (1980) 146 CLR 40 at 47-48".

⁶⁸ Section 5B General principles (1) A person is not negligent in failing to take precautions against a risk of harm unless: (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and (b) the risk was not insignificant, and (c) in the circumstances, a reasonable person in the person's position would have taken those precautions. (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things): (a) the probability that the harm would occur if care were not taken, (b) the likely seriousness of the harm, (c) the burden of taking precautions to avoid the risk of harm, (d) the social utility of the activity that creates the risk of harm.

⁶⁹ See Ipp JA in *Waverley Council v Ferreira* [2005] NSWCA 418 at [72]-[73], citing *Cooke v Midland Great Western Railway of Ireland* (1909) AC 229, *Thompson v Bankstown Municipal Council* (1953) 87 CLR 619; [1953] HCA 5 and *Lynch v Nurdin* [1841] Eng R 52; (1841) 1 QB 29.

⁷⁰ Children's window falls are reported on at least a monthly basis in Sydney. The following is a small selection: Marcus C, "Girl, 5, Dies in Fall from Third-floor Unit Window", *Sydney Morning Herald* (15 February 2009), <http://www.smh.com.au/national/girl-5-dies-in-fall-from-third-floor-unit-window-20090214-87mk.html#ixzz1lMSCmkjI>, viewed 5 February 2012; Benson K, "Call for Locks and Barriers on All Windows", *Sydney Morning Herald* (19 December 2008), <http://www.smh.com.au/news/national/call-for-locks-and-barriers-on-all-windows/2008/12/18/1229189804502.html> viewed 5 February 2012; Munro K, "Parents Denied Safety Nets to Protect Kids in Apartments", *Sydney Morning Herald* (24 January 2012), <http://smh.domain.com.au/real-estate-news/parents-denied-safety-nets-to-protect-children-in-apartments-20120123-1qe3r.html> viewed 5 February 2012; Munro K, "Owners Face Big Bills Over Falls from Apartments", n 60; Boyd C, "New Rules to Protect Kids in High-rises", *Sydney Morning Herald* (3 February 2012), <http://smh.domain.com.au/blogs/talking-property/new-rules-to-protect-kids-in-highrises-20120131-1qqsk.html> viewed 5 February 2012.

⁷¹ *Kids Can't Fly* campaign, the Children's Hospital, Westmead, <http://kidshealth.chw.edu.au/projects/falls-windows-and-balconies> viewed 20 April 2012.

⁷² Strata Community Australia, "Ensuring your Apartment Complex is Safe", <http://www.stratacommunity.org.au/strata-living/ensuring-your-apartment-complex-child-safe> viewed 5 February 2012; Sherry C, "Current Legal Issues: Children's Window Falls and Fraud in Community and Strata Title Schemes" (Paper delivered at National Community Title Institute Convention, Sydney, 2010).

These factors also go to proving the criteria in s 5B(1)(b) of the *Civil Liability Act* that the risk of a child falling is not insignificant. It would be common knowledge that a minority of Sydney children live in apartments and yet reports of falls occur on at least a monthly basis. Falls are not a fanciful possibility. It would also be obvious that it is easy for a child, toddler or even a mobile baby to reach a window sill by climbing on furniture and even easier still for him or her to fall through the window if it were open more than 10 centimetres.⁷³

Finally, in deciding if a reasonable owners corporation would have taken precautions against the risk of harm, the seriousness of the injuries must be considered, as well as the burden of taking precautions. The seriousness of the injuries that children suffer when falling from apartments is extreme and the burden of taking precautions can be extraordinarily slight. As the Westmead Outcomes Report demonstrates,⁷⁴ windows can be retrofitted with inexpensive locks or window-limiting devices. Replacement of entire windows is not required, nor do aesthetics or ventilation need to be permanently altered. Locks can be used when young children are present and, otherwise, windows can be left open as occupants see fit. On balance, it would seem that the risk of an owners corporation being liable for a child's fall from a common property window is real.

Balconies present slightly different considerations in two ways. First, the burden of rendering balconies safe is greater than windows. If balustrades are climbable, they may need to be replaced, which in a large schemes will be expensive. The addition of Perspex panels is marginally cheaper but will not remove risk entirely. The safest option is the installation of strong netting specifically designed to prevent children or pets falling from windows and balconies, but it would not make sense to install this in all apartments, particularly if children are rarely present. Second, the question of parental responsibility is raised more squarely if a child falls from a balcony.

INDIVIDUAL PARENT OR LOT OWNER RESPONSIBILITY

In discussions of children's falls from windows and balconies, particularly online,⁷⁵ strata owners repeatedly raise the issue of parental responsibility. This is not surprising given the entirely justifiable assumption that parents are responsible for their children's safety.

On a practical level, it is certainly possible for a lot owner (who may be a parent) to remove the risk by installing locks, nets or guards themselves. While almost all residential schemes will have a standard by-law prohibiting the driving of screws through common property without owners corporation consent, any work that "prevents harm to children" is excepted.⁷⁶ As a result, an owner could install window locks or weight-bearing screens or nets to protect children, without owners corporation written permission. More extensive work, such as changing the windows altogether, installing guards or altering a balcony balustrade so that it is not climbable, would require owners corporation written permission, either under standard by-law 5 or, if it involved additions to common property, a by special resolution under s 65A of the *Strata Schemes Management Act*.⁷⁷

However, the ability of an individual lot owner to remove the risk will not necessarily reduce an owners corporation's liability. If successfully sued by a child, the owners corporation can only make a

⁷³ The court in *Waverley Council v Ferreira* [2005] NSWCA 418 had little difficulty concluding that it was foreseeable that boys would climb on to the roof of a community centre owned by the appellant Council and from there be likely to fall.

⁷⁴ The Children's Hospital at Westmead, n 1, pp 32-43.

⁷⁵ Munro K, "Parents Denied Safety Nets to Protect Kids in Apartments", n 70; Flat Chat forum, "Safety Nets on Windows or Balconies – Should They be Allowed?", <http://www.flat-chat.com.au/forum/common-property/safety-nets-in-windows-or-balconies-to-protect-children-from-falls-should-they-be-allowed> viewed 4 February 2012.

⁷⁶ Model by-laws are found in *Strata Schemes Management Act 1996* (NSW), Sch 1(5)(3)(c), and *Strata Schemes Management Act Regulation 2010* (NSW), Sch 2(5)(3)(c). The latter regulation is the newest form of the model by-law and includes a requirement that additions must not compromise fire safety. Updated model by-laws only apply to existing schemes if they are specifically adopted.

⁷⁷ *The Owners of Millpoint Strata Plan 11391* [2007] WASAT 9 (16 January 2007) is a Western Australian case illustrating the difficulties of enclosing balconies. The respondents had enclosed their balcony without strata corporation approval. They claimed, inter alia, that it was for the safety of their children. The tribunal did not accept this but said it was for better enjoyment of the living area and ordered the removal of alterations.

contribution claim⁷⁸ against the adult caring for the child if that person owed the child a legal, as opposed to moral, duty of care. If that person is the parent of the child (the typical scenario in most falls), they are *less* likely to owe the child a duty of care than if they are a friend or other carer.⁷⁹

The leading case is *Hahn v Conley* (1971) 126 CLR 276; [1971] HCA 56 in which the majority of the High Court refused to find a grandfather, who stood in loco parentis, negligent, when his three-year-old granddaughter was struck by a car. The accident occurred when she called to him from the other side of the road and he replied "I am over here". She then attempted to cross and was hit.

Barwick CJ said at 283-284 that:

[w]hilst in particular situations and because of their nature or elements, there will be a duty on the person into whose care the child has been placed and accepted to take reasonable care to protect the child against foreseeable danger, there is no general duty of care in that respect imposed by the law upon a parent simply because of the blood relationship. Also parents like strangers may become liable to the child if the child is led into danger by their actions.

There are three elements in this statement. First is that the law will impose a duty on a person such as a friend, teacher or carer who has been entrusted with responsibility for a child. *Doubleday v Kelly* [2005] NSWCA 151 is a good example, where a child successfully sued her friend's mother for injuries she sustained while trying to rollerskate on a trampoline early one morning. The second element is that there is no general duty of care imposed on parents for their own children, simply by virtue of being their parent: "[T]o have the sword of Damocles duty of care hanging over the parental head at all stages of the young child's life is a totally unwarranted burden which the law does not impose".⁸⁰ However, the final element of Mason J's statement in *Hahn* is that a parent may be liable if they lead their child into danger; that is, they do some positive act that places their child at foreseeable risk.

Some commentators have suggested that parents will not be liable for omissions, but only for commissions.⁸¹ However, Ipp JA in *St Mark's Orthodox Coptic College v Abraham* [2007] NSWCA 185 doubted this distinction. He said at [31] that the ratio of *Hahn* was simply that, "while the mere existence of a parent/child relationship does not bring about a duty of care on the part of a parent towards a child, the circumstances of a particular situation may give rise to such a duty". Those circumstances could include omitting to do something to protect a child. These comments were strictly obiter in *St Mark's Orthodox Coptic Church* as the father in that case had dropped his child at school when there was no teacher supervision, a positive act. While the court held that the father owed the child a duty of care, it was found that, in the circumstances, there was no breach. The unsupervised period was only 20 minutes, the child had been incited to act mischievously by other students, he had disobeyed his father's instructions and he had acted in a way to cause himself harm. In the circumstances the father acted reasonably.

Towart v Alder (1989) 52 SASR 373 applied these principles to a window fall. A five-year-old girl fell through the flyscreen of a first storey holiday apartment that her parents were renting from the appellants. The child had been playing with her brother in a bedroom which had a set of bunks pushed up against a large sliding window. She had been told by her parents not to get on the top bunk as they were worried she would fall from the bunk. She squeezed between the bunk and the wall, sat on the window sill and then slid on her bottom until she was next to the open window. Then, while attempting to pull herself onto the top bunk, she fell through the flyscreen, 4.5 metres to the ground below. Her actions stand as testimony to the fact that children do not have the developmental capacity to assess risks as adults do.

The lower court and the court on appeal both concluded that the appellant landlords were liable. King CJ, at 376, said that the appellants as occupiers, "had the responsibility and opportunity to

⁷⁸ *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), s 5(1)(c).

⁷⁹ Courts have found friends or neighbours liable for children's injuries when in their care: *Doubleday v Kelly* [2005] NSWCA 151; *Bye v Bates* (1989) 51 SASR 67.

⁸⁰ *Robertson v Swincer* (1989) 52 SASR 356 at 369 per Legoe J.

⁸¹ Yeo S, "Parental Liability in Negligence" (1998) 12 AJFL 150 at 150.

consider the state of the premises in relation to the safety of occupants including children". In relation to the appellants' cross-claim against the father, the court unanimously held that the father owed no duty of care in the circumstances. King CJ said:

even if the risk was foreseeable by the father, I would not be prepared to attribute to him a legal duty to exercise care in the supervision of the child to safeguard her from the risk of falling out of the window. This was not a case of exposing a child to the dangers of the highway. The opening of the window was an ordinary domestic incident. I think that to treat so common an incident as the occasion for a legal duty of care in supervision would "be an unwarranted intrusion of the law into family and domestic relationships": *Posthuma v Campbell* (1984) 37 SASR 321 per Jacobs J at 330.

King CJ explicitly stated that the father could not be expected to supervise the children every moment of the day and night in their temporary home. He had warned the child and no more could reasonably be expected of him.

Towart potentially falls into a specific category of holiday rentals. The landlord had placed the bunks under the window that the father, as a very short-term tenant, could not be expected to move. There was no discussion on appeal about locks or lack thereof on the window. It was the placement of furniture that was decisive. However, *Towart* makes it clear that the law is unlikely to find a parent liable for failing to supervise their child or for "ordinary domestic incidents" like opening a window. Thus, no matter what instinctive feeling we may have about parental supervision of children, if successfully sued, an owners corporation is unlikely to be able to cross-claim for contribution against a parent for a child's window fall.

Balcony falls may be different. If a child fell from a balcony, it is possible that a court may find that the real cause of the accident was the parents allowing the child to play unsupervised in an obviously dangerous area, not any failing on the part of the owners corporation in relation to the balustrade. While a court may not expect a parent to supervise a young child inside a home at all times, it may expect a parent to do so outside on a balcony. This would be a complete defence to any claim made against the owners corporation.⁸²

It goes without saying that while children may have their damages reduced by contributory negligence,⁸³ in the cohort of children most represented in falls, ie children under five, contributory negligence would be unarguable.⁸⁴ These children simply do not have the developmental capacity to be responsible for their own actions.

⁸² In *Gordon v Perignon* [2004] NSWSC 354 at [43], Master Malpass held that: "[t]his is a case where causation is clear. Maxine came to fall out of the window because she was allowed on to a bed positioned by Mrs Gordon adjacent to a window which had been opened by the latter and steps were not taken by the parents to prevent her from having access to that open window. She was allowed to get right up against the flyscreen and was left unrestrained. There was an obvious danger of which both parents were aware. In my view, the parents created the danger and their conduct was the cause of the accident." This case was not discussed in the section on window falls for three reasons. First, it was different from most window falls in that the child was actually in bed with her parents at the time the fall occurred. Few children fall in such circumstances. Second, the case was unwisely argued on the basis that the flyscreens should have supported the child, a misconception dismissed by the building expert who gave evidence in the case. Finally, it is difficult to imagine that, as a general rule, courts would find that parents had "created a danger", simply by opening a window, an ordinary domestic incident, in the course of their day. In contrast, it does seem possible that a court would conclude that parents had "created a danger" if they left their child unsupervised on a balcony, particularly if they had pushed pots or furniture up against the balustrade.

⁸³ The child in *St Mark's Orthodox Coptic College v Abraham* [2007] NSWCA 185 had his damages reduced by 10% on account of his contributory negligence. He was nine and fell from a second-floor balustrade.

⁸⁴ McTiernan ACJ said in *McHale v Watson* (1996) 115 CLR 199; [1966] HCA 13 at [7] that: "There is ample authority for the proposition that in cases dealing with alleged contributory negligence on the part of young children they are expected to exercise the degree of care one would expect, not of the average reasonable man, but of a child of the same age and experience". McTiernan ACJ referred to United States cases which placed babies and children "of tender years" in a category of children who were incapable of negligence. In *Doubleday v Kelly* [2005] NSWCA 151 the court found a child of seven could not be reasonably expected to appreciate the risks of trampolines. In *Waverley Council v Ferreira* [2005] NSWCA 418, the court had little difficulty concluding that a child of 12 was not contributorily negligent when he stood on a skylight.

OWNERS CORPORATION POWER TO PREVENT PARENTS INSTALLING PROTECTIVE DEVICES

In recent media discussions of children's falls, it came to light that some owners corporations were actively preventing parents from taking measures to protect their children from falls.⁸⁵ At their own expense, parents had acquired protective nets designed to attach to windows and balconies. The netting is apparently common in Argentina and Brazil, where many children live in apartments. Parents had asked strata managers or owners corporations if they could install the nets and had been denied permission on the grounds that they impaired the aesthetics of the building. While not necessarily representative of the owners corporations involved, many of the comments in online discussion of nets revealed an extraordinary antipathy to children in apartments.⁸⁶

If a building has model by-laws, owners should not need to ask owners corporation permission to attach nets to common property as they are for the safety of children. As discussed above, while the general rule in model by-laws is that written permission must be sought to attach anything to common property, child safety devices are an exception. Nets would qualify as such a device. Tenants would need to ask a landlord's permission to attach nets, but landlords cannot unreasonably refuse consent to minor additions.⁸⁷ Nets are easily removable without damage to property and could be considered minor.

However, what if model by-laws were never used or are subsequently altered? In New South Wales, with an appropriate vote, owners corporations can create by-laws for the "purpose of the control, management, administration, use or enjoyment of the lots or the lots and common property".⁸⁸ A by-law prohibiting owners attaching anything to common property, regardless of its purpose, would be valid. Owners corporations could prevent parents installing nets, even if parents paid for the nets and the nets might save a child's life. This highlights not only a fundamental problem with New South Wales strata legislation, but a much broader dilemma in private communities. What are the limits on private rule-making power in relation to land? What restrictions do we need to place on past owners, in particular developers, and subsequent majorities, to control land-use through statutory by-laws, rules or orthodox covenants? How can we protect minorities, and particularly vulnerable groups such as children, from land-use rules created by private citizens which may be inimical to their wellbeing?⁸⁹ This is an enormous debate that cannot be canvassed here,⁹⁰ but the ability to create a

⁸⁵ Munro K, "Parents Denied Safety Nets to Protect Kids in Apartments", n 70; Flat Chat forum, n 75.

⁸⁶ Comments included the following: "Why should it be the government that has to look after children? Why can't parents do it and find a safe place for their family to live? Mandatory netting is the most patently absurd measure I can think of. It removes all parental responsibility, it would be an eyesore on an already ugly city and you'd have older kids using them as play apparatus. i.e. You'd just be seeing dead 12 year-olds instead of dead toddlers" and "You idiot !!!!!!!!! What should be required by law is that, just for once, just for a few seconds, parents take some responsibility for their damn kids. Make your balconies safe so that your idiot children CAN'T climb over the edge. NOT MY PROBLEM": Munro K, "Parents Denied Safety Nets to Protect Kids in Apartments", n 70.

⁸⁷ *Residential Tenancies Act 2010* (NSW), s 66(2).

⁸⁸ *Strata Schemes Management Act 1996* (NSW), s 47, cf *Owners Corporation Act 2006* (Vic).

⁸⁹ Sherry (2008), n 6. The United States had significant problems with private community restrictions which banned children entirely. Many families with children struggled to find housing and eventually the federal government passed amendments to the *Fair Housing Act* in 1988 and 1995, outlawing age restrictions except for retirement communities: Napolitano N, "The Fair Housing Act Amendments and Age Restrictive Covenants in Condominiums and Cooperatives" (1999) 73 *St John's L Rev* 273. New South Wales pre-emptively avoided this problem by including as one of only three expressly prohibited by-laws, by-laws that exclude children. The other two relate to guide dogs and restrictions on transfer and leasing: *Strata Schemes Management Act 1996* (NSW), s 49.

⁹⁰ There is extensive literature in the United States on the rule-making power of homeowner associations and condominiums: Reichman U, "Toward a Unified Concept of Servitudes" (1981-1982) 55 *Cal L Rev* 1177; French S, "Towards a Modern Law of Servitudes: Reweaving the Ancient Strands" (1981-1982) 55 *Cal L Rev* 1261; Epstein R, "Notice and Freedom of Contract in the Law of Servitudes" (1981-1982) 55 *Cal L Rev* 1353; Rose R, "Servitudes, Security, and Assent: Some Comments on Professors French and Reichman" (1981-1982) 55 *Cal L Rev* 1403; Ellickson R, "Cities and Homeowner Associations" (1982) 130 *U Pa L Rev* 1519; Alexander G, "Dilemmas of Group Autonomy: Residential Associations and Community" (1989-1990) 75 *Cornell L Rev* 1; Alexander G, "The Publicness of Private Land Use Controls" (1999) 3 *The Edinburgh L Rev* 176; Alexander G, "Freedom, Coercion, and the Law of Servitudes" (1988) 73 *Cornell L Rev* 883; Sterk S, "Foresight and

valid, statutory by-law that might prohibit a safety measure that would save a child's life, demonstrates that inadequate attention has been paid to this issue in the proliferation of private communities.

CONCLUSION

High-rise strata schemes present real and significant risks to children's lives, as demonstrated by the number of children who have fallen from windows or balconies in Sydney in recent years. Arguably, this is partially a consequence of Australians' inexperience living in high-rise buildings, particularly with children. We are a nation that has traditionally enjoyed the luxury of freestanding homes on large blocks of land. However, this is a luxury we can no longer afford and we must address the social and physical challenges of our changing housing stock.

While successful litigation against an owners corporation for failing to provide locks or limiting devices on windows would no doubt motivate most strata schemes to address their own risk, this is a less than ideal solution. A preferable option would be the minor alteration to the *Strata Schemes Management Act* recommended by the Children's Hospital's Working Party on children's falls.⁹¹ Like pool fencing⁹² or smoke alarm⁹³ regulation, a mandatory provision is entirely appropriate when human life, particularly a child's life, is at stake. As owners corporations already have statutory responsibility for the maintenance of common property windows, requiring them to retrofit windows with inexpensive locks or limiting devices would not be unduly burdensome. Retrofitting of balconies is more complex and mandatory provisions may not be desirable. However, owners and occupiers with children should be encouraged to install safety netting on balconies and owners corporations should be disempowered to prohibit this.

Servitudes" (1987-1988) 73 Cornell L Rev 956; Natelson R, "Consent, Coercion, and 'Reasonableness' in Private Law: The Special Case of the Property Owners Association" (1990) 51 Ohio St LJ 41; McKenzie E, *Privatopia: Homeowner Associations and the Rise of Residential Private Government* (Yale University Press, New Haven, 1994); Nelson R, *Private Neighbourhoods and the Transformation of Local Government* (Urban Institute Press, Washington, DC, 2005); Korngold G, "Single Family Use Covenants: For Achieving A Balance Between Traditional Family Life and Individual Autonomy" (1989) 22 UC Davis L Rev 951; Comment, "The Wages of Living in Sin: Discrimination in Housing Against Unmarried Couples" (1992) 25 UC Davis L Rev 1055; Stolzenberg N, "The Return of the Repressed: Illiberal Groups in a Liberal State" (2001-2002) 12 J Contemp Legal Issues 879. In Australia the issue has been addressed by O'Connor P, "Covenants as Regulation" (2011) 1 Prop L Rev 145; Sherry (2008), n 6; Sherry C, "The Complexities of Multi-owned Property: Australian Strata and Community Title and United States Condominiums and Homeowner Associations" in Bennett Moses L, Edgeworth B, Sherry C (eds), *Property and Security: Selected Essays* (Thomson Reuters, Sydney, 2010).

⁹¹ The Children's Hospital at Westmead, n 1, p 53.

⁹² *Swimming Pools Act 1992* (NSW) and *Swimming Pools Regulation 2008* (NSW).

⁹³ *Environmental Planning and Assessment Act 1979* (NSW), s 146A, and *Environmental Planning and Assessment Regulation 2000* (NSW), Pt 9, Div 7A.