Are Pregnancy and Patient Autonomy Mutually Exclusive?

***St George's Healthcare NHS Trust v S, R v Collins and Others, ex parte S* [1998] 3 WLR 936.**

In *St George's Healthcare NHS Trust v S, R v Collins and others, ex parte S*,[1] the English Court of Appeal addresses health care issues of legal and ethical complexity. At the heart of the case is the principle of patient autonomy; more specifically, the right of a pregnant woman to consent to or refuse medical treatment, which may in turn endanger the life of her foetus. This principle also underpins the interpretation of relevant provisions of the Mental Health Act 1983 ("the Act").[2]

The Patient's Right to Self-Determination

In *R v Collins,* Judge LJ first acknowledges the long-established and fundamental principle of the autonomy of an adult of sound mind: "Even when his or her own life depends on receiving medical treatment, an adult of sound mind is entitled to refuse it".[3] He warns against making "even minor concessions" to this principle.[4]

The Court then examines the status of a foetus. With reference to earlier authority,[5] the Court concludes that a foetus is not an independent legal personality until born alive. Since an unborn child is "not a separate person from its mother",[6] its need for medical treatment must be subjugated to a mother's right to autonomy and bodily integrity.

Nevertheless, the Court recognises that a foetus is human and is accorded the law's protection in a number of different ways,[7] but that a woman's right to self-determination is not diminished "merely because her decision to exercise it may appear morally repugnant".[8] Thus, a mother's right to autonomy is granted supremacy over that of her unborn child's right to life. The Court warns against any erosion of this position.[9]

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1 [1998] 3 WLR 936.

2 This statute corresponds to the New Zealand Mental Health (Compulsory Assessment and Treatment) Act 1992.

3 Supra note 1 at 950.

4 In doing so, he reiterates Lord Reid's concern in S v McC [1972] AC 24, 43. "We have too often seen freedom disappear in other countries not only by coups d'état but by gradual erosion: and often it is the first step that counts. So it would be unwise to make even minor concessions."

5 *Paton v British Pregnancy Advisory Service Trustees* [1979] QB 276; *Re F* [1988] Fam 122; *Re MB* [1997] 2 FCR 541; *A-G's Reference* (No 3 of 1994) [1995] QB 581.

6 Supra note 1 at 957.

7 Ibid.

8 Ibid.

9 Ibid.

> How can a forced invasion of a competent adult's body against her will even for the most laudable of motives (the preservation of life) be ordered without irremediably damaging the principle of self-determination?

The Mental Health Act 1983

The second issue before the Court of Appeal in *R v Collins* concerned the interpretation of the relevant provisions of the Act. The Court stressed that the Act protects the principle of autonomy to the extent that a person is competent. As case law indicates, the nature of the relationship between the mental illness and the medical or surgical intervention has long been controversial.[10] However, in this case the Court categorically recognised[11] that the failure of the two doctors and the social worker was in not distinguishing S's need for treatment to save her foetus' life from a valid mental disorder. The reality was that S was admitted and detained in order to deal with her pregnancy, not for assessment and possible treatment of her depression. The Court held "for the purposes of s 2(2)(a), such detention must be related to or linked with mental disorder. Treatment for the effects of pregnancy does not provide the necessary warrant".[12] With regard to s 63, the Court held that treatment must be integral to the mental disorder in order to be lawful.[13] As it was, S received no treatment for mental disorder.

The Court also noted *obiter* that a person validly detained in accordance with the Act is not deprived of all autonomy:[14]

> A woman detained under the Act for mental disorder cannot be forced into medical procedures unconnected with her mental condition unless her capacity to consent to such treatment is diminished.

A person detained under the Act is subject to the usual requirements of competence and consent, the test of competence being outlined in *Re C.*[15]

In *R v Collins,* the Court found that S was competent; an unusual, bizarre, and even irrational thinking process which may be "contrary to the views of the overwhelming majority of the community at large" does not, in itself, constitute incompetence.[16] S's capacity to consent was therefore intact and her free will consequently infringed.

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10 *Norfolk & Norwich Healthcare (NHS) Trust v W* [1997] 1 FCR 269; *Rochdale Healthcare (NHS) Trust v C* [1997] 1 FCR 274.

11 In relation to s 2(2) of the Mental Health Act 1983.

12 Supra note 1 at 961.

13 Ibid.

14 Ibid 958.

15 [1994] 1 WLR 290. This was a case of refusal of medical treatment.

16 Supra note 1 at 957.

Conflicting Interests

Perhaps the most compelling argument against the supremacy of a competent adult's right of autonomy is that of the sanctity of life. The Court of Appeal identified the crux of the issue, asking "If human life is sacred, why is a mother entitled to refuse to undergo treatment if this would preserve the life of the foetus without damaging her own?".[17] Indeed, there are many cases which have opined what is effectively a consequentialist ethic, exalting "the unborn child's right to live", "the State's compelling interest in preserving the life of the foetus" and "the potentiality of human life".[18]

This argument gives primacy to the best interests of the foetus. In *Re S*,[19] Sir Stephen Brown P directly considered the best interests of the foetus when granting the declaration sought by the hospital to authorise a Caesarean section in order to protect the life of the unborn child, notwithstanding the patient's refusal to provide consent for the operation. President Sir Stephen Brown cited, in support of his decision, the statement made by Lord Donaldson MR in *Re T* that:[20]

> An adult patient who, like Miss T, suffers from no mental incapacity has an absolute right to choose whether to consent to medical treatment, to refuse it or to choose one rather than another of the treatments being offered. The only possible qualification is a case in which the choice may lead to the death of a viable foetus. That is not this case and, if and when it arises, the Courts will be faced with a novel problem of considerable legal and ethical complexity.

However, in the subsequent English case of *Re MB*,[21] the Court cited with approval *Paton v British Pregnancy Advisory Service Trustees* and *Re F (In Utero)*[22] effectively holding that the opinions of Lord Donaldson MR and of Sir Stephen Brown P were contrary to English law, and restated the current English position as follows:[23]

> The foetus up to the moment of birth does not have any separate interest capable of being taken into account when a Court has to consider an application for declaration in respect of a Caesarean section operation. The Court does not have the jurisdiction to declare that such a medical intervention is lawful to protect the interests of the unborn child even at the point of birth.

Thus, the Court held that in applying the best interests test, the interest of the pregnant woman alone, and not the interest of the foetus may be taken into

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17 Ibid 953.
18 Ibid.
19 [1993] Fam 123 (CA). This case involved the refusal of medical treatment by an adult.
20 *Re T* [1993] Fam 95, 102 (CA).
21 Supra note 5.
22 Ibid.
23 Supra note 5 at 437.

consideration. That is, a competent woman's refusal to consent cannot be usurped in the interests of the unborn child.

The American common law has determined that a pregnant woman's right to self-determination is almost absolute, the court possessing an inherent parental jurisdiction to protect the welfare of the child (*parens patriae*) which may be invoked in "truly exceptional" circumstances.[24] Such jurisdiction is polemic and difficult to define. At what point does a foetus acquire rights that are protectable within the *parens patriae* jurisdiction of the court – at conception or upon reaching viability? It also imposes a requirement on the pregnant woman to act at all times for the best interests of her unborn child or else the court will intervene.

This raises significant questions as to the physical ability of a court to compel medical treatment or, for example, confinement for the duration of the pregnancy (which violates the liberty of a person and her basic civil rights). It also leads to extremely difficult judgments as to the value of the two lives. Where the best interests of the foetus and the best interests of the mother come into conflict, it would be difficult, for example, to determine whose right to life should prevail. Indeed, the criminal and common law do not sanction the injury of another person, let alone the death of another person, to save a life.[25] Moreover, it is difficult to reconcile this extension of jurisdiction to protect the foetus in light of abortion law.

Assuming that the best interests of the mother must prevail, it becomes necessary to examine the considerations taken into account by a court where the patient is temporarily incompetent to make a valid treatment decision. In the case of *Re MB*,[26] the English Court of Appeal took into account not only the medical interests of the temporarily incompetent patient, but also the woman's psychological well-being. The Court determined that the mother desired her baby to be born alive and that she was in favour of the Caesarean section, subject only to her needle phobia. Psychiatric evidence indicated that Ms MB was likely to suffer long-term damage if her baby was born handicapped or died. In deciding a patient's best interests, a court must have regard to the patient's preferences rather than imposing its own value judgments. It is a difficult balancing act for the court. In this case, for example, it is arguable that the effect of forced treatment on a person suffering from such a phobia could be seriously detrimental to any further exposure to needles and treatment to overcome the phobia.

In *R v Collins*, the Court examined the legal status of a foetus. This analysis was necessary in order to determine whether a foetus is a sufficiently distinct entity with interests that the law should protect. It has been argued that the nature of the relationship between the pregnant woman and her foetus may fall within one of three models.[27]

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24 *Re AC* 573 A 2d 1235 (Ill App 1 Dist, 1990); *Re Baby Boy Doe v Mother Doe* 632 NE 2d 326 Ill App 1 Dist 1994).

25 *R v Dudley & Stephens* (1884) 14 QBD 273.

26 Supra note 5.

27 Seymour, "A Pregnant Woman's Decision to Decline Treatment: How Should the Law Respond?" [1994] 2 Journal of Law & Medicine 27.

The first model defines the foetus as part of the woman's body with no separate, independent existence. This analysis has been criticised by leading feminists, notably MacKinnon, who has asserted that: "[T]he foetus is not a body part .... No other body part gets up and walks away on its own eventually".[28] EW Kluge has also noted that: "[T]he foetus ... is not a biological part of the mother. It is both physiologically and genetically a distinct organism, having its own physiological integrity, genetic code, etc".[29] These arguments are cogent; a single entity model oversimplifies a complex relationship.

The next model to define the relationship, identified by John Seymour, propounds that the mother and foetus are separate entities, each with a full complement of rights. As Bennett has observed, the assertion that a foetus has an interest is quickly transformed first into a moral right and then into a legal right.[30]

This again leads to difficulty when there is a conflict between the rights of the foetus and those of the pregnant woman, one must win and the other must lose.[31] Thus, the foetal rights threaten and may in fact supersede women's autonomy.[32] This "two separate entities" analysis not only ignores the sense of connectedness and interdependence which pregnant women feel toward their unborn babies, but more problematically it undermines the rights of women, subjecting them to control, thus invoking the "best interests" argument.

The third model, promulgated by Seymour, considers the mother and foetus as two indivisibly linked entities. This recognises the possibility of "two sets of overlapping interests possessed by two entities which are peculiarly interdependent".[33] This results in two options: that a foetus' identifiable interests or rights may be protected by a third party;[34] or, alternatively, that such rights may be placed in control of the mother. Assuming the latter, the pregnant woman is empowered to determine not only how the interests of the foetus are to be protected, but also whether they will be protected. It was this latter model that the Court favoured in *R v Collins*.

Lord Justice Judge confirmed the increased personal responsibilities of a woman who is pregnant and the protection by law in a number of different ways of a viable foetus, but did not go into greater detail. However, it is clear that "questions as to the status of the foetus must follow, not precede, an examination of the rights of the woman within whose body and life the foetus exists".[35] Thus, a pregnant woman has the right to life, the right to personal autonomy and self-determination, the right to

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28 MacKinnon, "Reflections on Sex Equality Under Law" [1991] 100 Yale LJ 1281, 1314-1315.

29 Kluge, "When Caesarian Section Operations Imposed by a Court are Justified." [1988] 14 Journal of Medical Ethics 206, 208.

30 Bennett, "Pregnant Women and the Duty to Rescue: A Feminist Response to the Foetal Rights Debate" [1991] 9(1) Law in Context 70, 86.

31 Supra note 27 at 31.

32 Rowland, *Living Laboratories: Women in Reproductive Technologies* [1992] 123.

33 Supra note 27 at 34.

34 This is effectively the same as the second model.

35 Gallagher, "Fetus as Patient" in S Cohen & N Taub (eds) *Reproductive Laws for the 1990s* (1989) 187-188.

bodily integrity, and hence, the right to refuse to consent to medical treatment. This means that the state's ability to intervene in individuals' lives will diminish, and the corresponding respect for the pregnant woman's autonomy will attribute to her the human dignity she deserves. Indeed, if women could be obliged to undergo Caesarean sections in the name of the protection of the foetus, it would mean that the interests of the foetus would acquire a higher value than those of the pregnant woman; this is difficult to justify.

Furthermore, compulsory surgery or medical treatment would undermine the doctor/patient relationship, which is based on trust. If doctors were able to invoke the coercive machinery of the law, pregnant women may be deterred from obtaining medical advice which would, in turn, be even more dangerous for pregnant women and their babies.

It is also paternalistic to assume that doctors know what is in their patient's best interests. Paternalism has been imbued in medical ethics since Hippocratic times, and is justified on the premise that doctors are in a far better position to make decisions about the medical treatment of a patient because patients possess inferior medical knowledge. However, this ignores the reality that doctors are no better trained to make moral assessments than their patients.

Kantians (who believe that the principle of respect for autonomy is morally supreme) and some pluralist deontologists (who believe that adequate moral theory requires a variety of potentially conflicting moral principles, including that of respect of autonomy) argue that a patient's autonomy must be respected, "even if to do so will result in an obviously worse decision in terms of the patient's, family's, or, even, a particular society's happiness".[36] Even many Utilitarians agree that respect for people's autonomy is required if human welfare is to be maximised. It would seem, therefore, that the rejection of paternalism is self-evident where adult patients are capable of weighing alternatives in their best interests. Thus, the principle of respect for autonomy is morally important.

The law generally does not regard the rights of bodily integrity and autonomy as absolute. The most obvious examples are the statutory provisions for intimate searches without a suspect's consent and "self-defence" in criminal law. While these examples are somewhat removed from the medical cases at issue, they do suggest that there are circumstances when it is legal to infringe an individual's bodily integrity for the greater good of society. This is not to say that if S's child had been born alive, but required a kidney transplant in order to survive, society would support the forcible removal of a kidney from S to save her baby's life. However, there are conceivable examples where the protection of community values might override an individual's autonomy, such as forcibly taking a blood sample from a citizen with the only immunity to an epidemic threatening a population's survival. Such examples indicate that perhaps autonomy is not the absolute value it has been accorded in *R v Collins*, since there are circumstances where this may clearly be over-individualistic.

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[36] McHale, Fox & Murphy, *Health Care Law: Text and Materials* (1997) 85.

There are also circumstances where it is possible to question whether the principle of autonomy has been taken too far. The fact situation in *Re MB*, where the pregnant patient consented to a Caesarean section yet refused an injection and anaesthetic, is one example. There comes a point where the patient's autonomy challenges the ability of doctors to perform their duties in good faith. A patient's right to pick and choose his or her medical procedures must surely be restricted to an extent, otherwise doctors may be prevented from performing their jobs.

Another issue, which needs further examination, is that of a mother refusing necessary medical treatment. Should she only bear a moral responsibility, or should a legal liability also attach? For example, if a baby is born handicapped and the necessary causal connection between the mother's refusal of medical treatment and this disability can be established, should the child be entitled to sue the mother? Based on cases in the Commonwealth, judges appear unsupportive of an extension of liability to this situation as it would create an untenable position as far as family relationships are concerned. Perhaps the best way of overcoming this situation is to recommend that the woman be immune from legal action.

Moreover, the doctor's position once the pregnant woman has rejected the advised medical treatment needs to be clarified. If a doctor is unhappy with the woman's decision to refuse treatment and the inevitable implications that entails, should he or she be forced to continue as that patient's medic? Furthermore, the law should make it clear, by statutory provisions if necessary, that a patient's assertion of autonomy must contemporaneously relieve the doctor of any legal liability. Finally, the patient's right to autonomy must not extend so far as to entitle a patient to insist on the provision of treatment of which the doctor disapproves and which is "inconsistent with good medical practice".[37]

Conclusion

In *R v Collins,* the English Court of Appeal recognised the right of autonomy of a competent pregnant women to refuse medical treatment. The Court also highlighted the importance of the principle of autonomy even where a patient is detained under the relevant provisions of the Mental Health Act.

Nevertheless, perhaps the most necessary and influential change must come through a shift in social beliefs and values which appropriately accord protection of a pregnant woman's choices. This shift must recognise that a woman need not give birth to a healthy child at all costs, and that a woman in labour is not incompetent to make valid medical decisions.

Sarah Donald

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[37] Supra note 27 at 36.

Exemplary Damages for Breaches of Fiduciary and Statutory Duties

***W v Attorney-General* (1999) 18 FRNZ 91, Court of Appeal, Thomas, Tipping, Salmon JJ.**

This appeal concerns the principles relating to the application of the Limitation Act 1950 ("the Act"). The appeal was brought in respect of a claim for exemplary damages from the Attorney-General for breaches of fiduciary and statutory duties. The alleged breaches arose out of the failure of the Department of Social Welfare ("the DSW") to act on a complaint by W in 1970 that her foster father had sexually abused her. The appellant had filed an application for leave in the High Court to bring a claim under s 4(7) of the Act for bodily injury after the expiration of two years from the date on which the cause of action accrued. She contended that she neither made the link between the abuse and the resulting harm until April 1996, nor should she have reasonably done so any earlier. However, if it were found that the cause of action had arisen earlier, W argued that time did not run against her because she was under a disability. In the High Court, Greig J refused to grant leave and concluded that W was not under a "disability" for the purposes of s 4(7) of the Act. The Court of Appeal was, therefore, required to consider the "reasonable discoverability" test, whether the appellant suffered a disability for the purposes of s 24 of the Act, and what procedure should be adopted should W have leave to proceed pursuant to s 4(7) of the Act.

Factual Background

The appellant, W, was sexually abused by her foster father, Mr F, after being placed in foster care in June 1970. Despite three separate complaints to an officer of the DSW that Mr F was being "rude" to her, she alleges that the DSW took no notice and, as a result, the abuse continued. Her subsequent life followed a pattern of alcohol and drug abuse, criminal offending, psychological and emotional impairment and various psychiatric and personality disorders, which rendered her unable to function with the demands of daily life.

The facts are set out chronologically, recording specific incidents in the appellant's life when the issue of sexual abuse was raised. Notable incidents identified in Grieg J's judgment are the two periods when W received counselling: initially while in prison in 1984 and later in 1991 from a Catholic nun, Sister Dorothea. In 1984 she also made a claim to the Accident Compensation Commission ("ACC") for the abuse she suffered, but was unsuccessful. In 1990, W left her husband after he drunkenly attempted to touch one of their daughters because she believed sexual abuse to be "very wrong"; yet she still failed to make the connection of its effect on her. W then began writing a book in 1992 expressing her anger at the child welfare system and recounting her experiences as a child in foster care.

Throughout this period, W was unable to make the connection between the sexual abuse she suffered and its effect on her adult behaviour. However, in 1996, W read an article about another woman who had suffered sexual abuse in foster care and was issuing proceedings against the DSW, and she began to consider the possibility of a connection between her suffering and her subsequent behaviour. After contacting the woman in the article, W was referred to a solicitor who filed an application on her behalf in March 1997.

The High Court decision

The two major pieces of evidence before the Court were the psychiatric reports obtained on behalf of the Crown and the appellant. After lengthy interviews with W, the appellant's psychiatrist, Dr Aranui-Faed, concluded in her report that W suffered from two major currently active psychiatric disorders; post-traumatic stress disorder and borderline personality disorder. Both typically result from childhood sexual abuse. She also described the previous lack of knowledge, but now growing awareness, within the field of health care professionals of the link between sexual abuse of all kinds and its later effects on the personality and behaviour of the victim. The report stated that because W had been suffering numerous psychiatric disorders (being "under disability" for the purposes of s 24 of the Act) it was not suprising that she had not made the connection between the sexual abuse and her later problems before 1996.

In contrast, the Crown's psychiatrist, Dr Fernando, proposed that because W had gone to make an ACC claim for her abuse, it could be reasonably assumed that she must have made the link between her sexual abuse and her adult disabilities in 1984/85. He further concluded that W was not "under disability" which would have prevented her from commencing legal proceedings at least since 1985. This was despite the fact that due to logistical difficulties Dr Fernando had been unable to meet W personally, and thus based his report on a perusal of the affidavits of W and Dr Aranui-Faed, and various extracts from DSW records.

After discussing the questions of reasonable discoverability and disability separately, Greig J concluded that W had, or ought to have, realised the link between the abuse and her condition by 1991 at the latest. Furthermore, she was not suffering from disability that might have prevented the claim being made. In reaching his conclusion, Greig J applied the objective reasonable discoverability test expressed in *Invercargill City Council v Hamlin*,[1] a case involving latent defects in a building foundation. Where the issue involved undiscoverable damage, a cause of action arose when the material facts on which it was based were discovered, or could have been discovered by reasonable diligence. Justice Grieg relied on the various chronological incidents as having a cumulative effect, thereby rendering it impossible for the reasonable sexual abuse victim in the position of the plaintiff not to have realised the link between the abuse suffered and its effect on her. Accordingly, he declined to grant leave.

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[1] [1994] 3 NZLR 513, cited by Grieg J at 100.

Court of Appeal

The Court was unanimous in overturning Grieg J's decision and allowing the appeal. Brief concurring judgments were given by Salmon and Tipping JJ, but the notable judgment comes from Thomas J. His Honour challenged the applicability of the *Hamlin* reasonable discoverability test to sexual abuse cases,[2] and its overly mechanistic legal approach to the definition of disability in sexual abuse cases. He then launched a stinging attack on the lack of sensitivity and indifference exhibited by a male-dominated judiciary, calling for pause to question the relevance of the law in relation to contemporary knowledge and its fairness to women. Justice Thomas' judgment criticised three areas of Greig J's decision: the scant regard that was given to Dr Aranui-Faed's comprehensive report, the Judge's approach to the discoverability issue, and the readiness with which he saw fit to reach positive conclusions on the basis of untested evidence. Justice Thomas then discussed the issue of whether W had, or ought to have, made the link between the sexual abuse suffered as a child and her adult behaviour prior to 1996. His Honour concluded that W's inability to make the connection was entirely reasonable and consistent with empirical evidence regarding the experiences of child sexual abuse victims. Justice Thomas stated it was difficult to find any reason why W's story should be disbelieved or why she ought to have made the connection before she did.

Addressing the discoverability test, his Honour criticised Greig J's adoption of the hypothetical reasonable abuse victim in the position of the intended plaintiff. Such rigid adherence to the notion of the reasonable person essentially objectifies the intended plaintiff's subjective condition, assuming that a reasonable sexually abused person will behave in a certain way. His Honour asks, "how sensible is the notion of a reasonable sexually abused person?".[3] Justice Thomas argues that to expect a woman who has been sexually abused as a child to be reasonable in respect of matters relating to that abuse, is not only a contradiction in itself, but is "a grotesque invention of the law".[4] Reiterating his obiter comments in *R v H*,[5] Thomas J criticised the courts for a less than commendable record in determining the reasonableness of women's reactions to sexual violation. He argued that until judges are prepared to embrace contemporary knowledge and informed psychological and scientific instruction, their perception of what is reasonable behaviour from the victims of sexual abuse is likely to remain "divorced from reality".[6]

Accordingly, the Court reached the conclusion that in cases of sexual abuse a subjective approach is required. It then considered whether a subjective approach would contradict the policy reasons behind the Act; that of preventing defendants from facing ancient obligations and the specific objectives of limitation legislation,

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2 Ibid.
3 (1999) 18 FRNZ 91, 108.
4 Ibid.
5 [1997] 1 NZLR 673.
6 Supra at note 3 at 110.

namely the achievement of certainty, meeting minimal evidential requirements and diligence on the part of plaintiffs. Their Honours reached the conclusion that a subjective test in sexual abuse cases would not contravene these objectives.

With regard to the question of whether W was under a disability, Thomas J questioned why infancy and unsoundness of mind are the only circumstances that the Court is prepared to recognise as being covered by a disability. The wording of the Act, he states, does not require such construction and to do so runs the risk of unnecessarily straining the concept of disability. Once it is accepted that a woman who is incapable of instructing a solicitor to commence proceedings is under a disability, the Courts need not go further to compress her psychological condition into unsoundness of mind; it should be enough to establish that such a disablement exists.

In his concluding remarks, Thomas J expounded his frustration at the way in which a largely male-dominated judiciary continues to approach such issues involving women. In doing so, he highlighted the distortion of the incremental approach taken by the Courts in applying the same principle applicable to cracks in a building foundation to the psychopathology of women who have suffered childhood sexual abuse. His Honour asked the question:[7]

> Should it not be questioned whether it is an overly rigid adherence to the doctrine of precedent and an unduly mechanical or formalistic application of the methodology of judicial decision-making not to recognise an essentially novel situation calling for a sensitive and realistic response?

Both Salmon and Tipping JJ agreed with his Honour's conclusion that in cases such as the present, applications under s 4(7) of the Act should be determined without prejudice to issues of limitation, unless the intended claim is undoubtedly on its face statute-barred. The Court of Appeal unanimously concluded that as a matter of overall justice, the appeal should be granted allowing the appellant to bring her proceeding against the Attorney-General.

Implications of the Court of Appeal decision

This case is not only important for its guidance on the approach to be taken to limitation issues involving sexual abuse cases, but it also provides a valuable social commentary. The impact of this decision on the public law arena needs to be looked at in light of two previous sexual abuse cases: *B v AG*,[8] and *AG v Prince & Gardner*,[9] that involved claims of negligence and breach of a duty of care against the Crown. The Court of Appeal in *Prince & Gardner* considered claims for negligence and

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7 Ibid 115.

8 [1999] 2 NZLR 296.

9 [1998] 1 NZLR 262.

breach of fiduciary duty relating to alleged errors on the part of social workers carrying out the adoption process, which resulted in the plaintiff suffering an appalling childhood. The causes of action were in respect of two time periods: the first occurring in 1969, and the second in respect of a complaint laid in 1983. While the Court allowed the latter complaint to proceed to trial, powerful countervailing policy considerations militated against recognising a duty owed by those carrying out statutory functions pursuant to the Adoption Act 1955. More recently in *B v AG*, the Court of Appeal refused to allow the claims in negligence in respect of a DSW inquiry into the father's alleged sexual abuse of his daughters to proceed to trial, citing overriding policy considerations denying any duty. In both cases, a major concern was that to allow such claims to proceed to trial would require a court to consider issues of fault decades after alleged breaches occurred.

As the present decision has shown, however, such concerns and policy considerations should not prevent the claim proceeding. Instead, where leave is required and the affidavit evidence indicates a prima facie case, the better course is to grant leave without prejudice to the defendant's right to pursue the positive defence at trial. While the Court of Appeal has allowed the pursuance of such cases to be more than a mere possibility, the success of these claims can at present only be speculated upon. Certainly, if the judiciary is to take the comments of Thomas J to heart, a more informed and sensitive judiciary is likely to exercise a greater degree of perceptive hesitancy when dealing with issues involving such complex human problems.

Sarah Ford

The Impact of the Internet on Intellectual Property

***Oggi Advertising Limited v McKenzie* [1999] 1 NZLR 631, High Court, Baragwanath J.**
***New Zealand Post Limited v Leng* (1998) 8 TCLR 502, High Court, Williams J.**

It has become increasingly clear that the Internet is a huge presence in our lives. As at 25 August 1999, approximately 10.1 million domain names (the addresses used to find web sites) had been registered worldwide, with a growth rate of 927,000 new registrations per week.[1]

Presently, the legal impact of the Internet seems to focus on intellectual property issues, particularly trademark infringement. This occurs when a domain name incorporates someone else's trademark. Domain names and trademarks both identify a business. They enable consumers to locate goods and services from a particular origin by an easily remembered name or phrase. Trademarks and domain names come into conflict because they operate in two different systems. The trademark system allows multiple registrations of the same mark, in different geographical areas and in respect of different goods and services, while the domain name registration system means that each name must be unique.

New Zealand has had its share of contested domain name registrations. This is usually due to "cybersquatting". That is, registering a domain name with the intention of selling it to a trademark holder or their competitor for an inflated price. However, only a few have come before the courts, and all at an interim injunction level. There is yet to be a case before the courts where there were disputed rights to use the name. This would occur where two legitimate businesses, both with an identical trademark in respect of different services, wish to use that trademark as part of their domain name.

Oggi Advertising Limited v McKenzie[2]

This case was heard in the High Court at Auckland on 5 June 1998, before Baragwanath J. It involved an application by the plaintiff, Oggi, for an interim injunction preventing the defendant, McKenzie, from using the domain name in question. The plaintiff also named Domainz, the company which registers New Zealand domain names, and a computer consulting company retained by McKenzie, as defendants. No order was made against these defendants as Baragwanath J accepted that they had acted in good faith and were prepared to abide by any court order.

The defendant, supposedly on behalf of a "Mr Elliott Oggi", registered the domain name "www.oggi.co.nz". The site was disabled once the plaintiff contacted the

1 <http//:www.netnames.com.>
2 [1999] 1 NZLR 631.

defendant about it. However, the plaintiff managed to download the following before it was removed:[3]

OPEN YOUR EYES
$80 Million people can drive past
EVERY DAY
THE CHANGING FACE OF ADVERTISING

The plaintiff, a well-known company, asserted that it is the second largest outdoor advertising company in New Zealand. Oggi alleged that the defendant was engaging in passing off by taking advantage of the plaintiff's name and reputation. It also alleged that Oggi had a property right in the name, and was therefore entitled to have the property in the domain name assigned to it.

Justice Baragwanath acknowledged that territorial law applied to the Internet, or cyberspace, subject to the question of jurisdiction. His Honour also found that the five elements of passing off were *prima facie* established:[4]

1. "A misrepresentation": the Court found that there had been a misrepresentation in cyberspace and that the defendant and his web site were associated with the plaintiff.

2. "Made by a trader in the course of trade": the Court found that there was a business implication, as the defendant appeared to be attempting to attract custom through his web site. There were also allegations that the defendant offered to sell the web site to the plaintiff.

3. "To prospective customers or ultimate consumers of goods or services of the traders": here the Court found that New Zealand Internet users were prospective customers. In addition, there does seem to be an intention to divert advertising customers, given the nature of the web site.

4. "Calculated to injure the business or goodwill of another trader": the diversion or loss of business of the plaintiff is a foreseeable consequence of registering and using the domain name in the way the defendant did.

5. "Which causes, or is likely to cause, actual damage to that trader's business": the Court had no difficulty finding the plaintiff would probably suffer damage.

Justice Baragwanath did not go so far as to find a property right in the domain name, and expressed doubt that one existed. A passing off action is premised on the fact that it is not the mark itself that is damaged, but the business that lies behind it. In support of this preliminary view he quoted Lord Diplock in *Star Industrial Co Ltd v Yap Kwee Kor*:[5]

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3 Ibid 637.
4 Ibid 638.
5 [1976] FSR 256, 269 (PC).

> Goodwill, as the subject of proprietary rights, is incapable of subsisting by itself. It has no independent existence apart from the business to which it is attached.

Justice Baragwanath also found that there was jurisdiction for the New Zealand courts to hear, decide and enforce the case. The matter was dealt with shortly, and the Judge had no doubt as to jurisdiction. This was primarily because the defendant resided in New Zealand and the "conduct complained of and its consequences have a predominantly New Zealand nexus".[6]

New Zealand Post Limited v Leng[7]

In 1996 the defendant, Leng, registered the domain name "nzpost.com", and posted on his web site a number of pages relating to worldcall phone cards and pornographic and erotic material. The plaintiff, NZ Post, did not discover the web site until 1997, but was advised that they could not take legal action. It was not until 1998 that NZ Post brought the action, presumably based on the Oggi authority.

NZ Post claimed that Leng had committed the tort of passing off, and was also engaging in misleading or deceptive conduct in breach of s 9 of the Fair Trading Act 1986. NZ Post applied for an injunction to prevent the defendant using the words "NZ Post" as a domain name or part of such a name. Justice Williams had little difficulty in granting the injunction.

His Honour found that the elements of passing off had been established *prima facie*. Further, he noted that there was nothing to suggest that NZ Post did not have a legitimate and exclusive right to exploit the name both in New Zealand and overseas, and within its existing business and in areas into which it intended to expand. He also found that misleading and deceptive conduct, sufficient to breach the Fair Trading Act, was made out.

Justice Williams suggested that the real difficulties in this case were the issues of jurisdiction and enforcement. However, these did not appear to impose great difficulty at the interim level. The Court drew much assistance from *Panavision International, LP v Toeppen*[8] and *Marks & Spencer Plc v One in a Million Ltd*.[9]

Following the *One in a Million* case, the Judge found that the Court has jurisdiction to grant injunctive relief where there is a real possibility that the defendant is equipped with an instrument of fraud. The Judge accepted that if a name, because of its similarity to a trademark, would inherently lead to passing off it is likely to be an instrument of fraud.

Justice Williams also accepted academic comment that existing trademark and intellectual property laws could regulate Internet-based behaviour. His Honour cited

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6 Supra note 2 at 639.
7 (1998) 8 TCLR 502.
8 1998 US App LEXIS *7557 (Court of Appeals, 9th Circuit).
9 [1998] FSR 265.

Nicholas Russell's article, which commented on the *One in a Million* and *Oggi* cases:[10]

> The end result of these decisions is to arrive at the unsurprising conclusion that the Internet is not a legal blank slate. Rights cannot, and should not, be undermined simply by changing the medium; this would have the inevitable effect of curtailing the right of an owner to exploit his or her intellectual property to an extent which would reduce its value. The real challenge for intellectual property law in cyberspace is the irrelevance of physical geography.

As a result, the Court felt able to issue an injunction against Leng. The jurisdictional issue was easy to resolve, because like the *Oggi* case, the defendant resided in New Zealand and the harm to the plaintiff was caused in New Zealand. In this respect, the facts of the two cases were identical. The Judge went further and found that the elements for jurisdiction in Internet cases will be:

1. A web site;
2. conduct purposefully directed at the forum state;
3. knowledge that the plaintiff will be harmed in the forum state itself.

In this case these three elements were present, along with a defendant that resided in the forum state, which made the question of enforcement straightforward.[11] Justice Williams concluded that the defendant should be enjoined from using the name NZ Post in relation to any domain name or Internet service.

Comment

All of the New Zealand cases have so far centred on cybersquatting. The facts in both cases made the Judges' ultimate decision easy, as they involved one legitimate and one less than legitimate party. As a result, the fair outcome was reasonably clear. The real question is, how applicable will the reasoning from the easy cases be when a court is faced with a hard case?

What is meant by a hard case? The irrelevance of geographical boundaries creates a real challenge for intellectual property in cyberspace. The New Zealand courts have yet to be squarely confronted with this, as there have been no competing-rights cases. They arise when both parties to a dispute have an equal right to use a trademark. For example, who is entitled to the "apple.com" domain name - Apple Computers or the New York Apple Growers Association?[12]

Under the trademark system, these competing registrations could be accommodated by the geographical and registration class distinctions. On the Internet,

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[10] Supra note 7 at 514.

[11] For a discussion of jurisdiction issues see Bram van Melle, "IP Round-up: recent decisions from the Courts" (1999) NZIPJ 121.

[12] This example is taken from Cendali, Forssander & Turiello, Jr, "An Overview of Intellectual Property Issues Relating to the Internet" (1999) 89(3) TMR 485, 496.

only one can exist. The increasing importance of the Internet for business, coupled with the importance of a memorable domain name, means that competition for such domain names is likely to be fierce. The New Zealand courts will be confronted with it before long.

Both the *Oggi* and *NZ Post* decisions focused on the harm caused by having a misleading name. The Court focused on techniques for searching the Internet, which were said to be likely to lead consumers to the defendant's site, when they were attempting to access the plaintiff's site, thus resulting in passing off. This is known in the United States as "initial interest confusion".

As the Court noted in both the *Oggi* and *NZ Post* cases, there are two main ways to search the Internet. Web sites are usually located by either guessing a domain name, for example, a trademark followed by either ".com" or ".co.nz", or by using a search engine to perform a keyword search. Either way, the likelihood of being directed to an incorrect site is fairly high, resulting in initial interest confusion.

In the *NZ Post* case, it was held that:[13]

> The Court has little difficulty in concluding that the domain site nzpost.com is likely to be confused with nzpost.co by all but experienced users of the internet and that, notwithstanding the need for precise identity, information sought by inquirers using search engines and browsers may also lead them to nzpost.com and thus result in confusion.

How should the court determine who has the right to use a trade name when there are legitimate competing trademark rights involved? As the more experienced Internet searcher would know, it is often necessary to actually connect to, and view, a web site before determining whether it is the one the searcher is looking for. There is force in the argument that the court should look at the web site itself to determine if consumers would be misled or deceived.

In *Telecom Corporation of New Zealand v Yellow Web Limited*,[14] the Court found that consumers would probably be misled by the defendant's web site, "yellow web pages" and, as a result, would believe it was connected to Telecom's online "yellow pages" because of the colour and heading used. However, if a distinctive page had been used, it is likely that the possibility of confusion would have been small.

There are difficulties with this argument. The value of a memorable or easy to guess domain name is high. If a person has such a domain name, they may attract many people to their site who were looking for the plaintiff's site. Even if the site is well distinguished, or has a disclaimer, the plaintiff will probably lose business because some consumers will use the defendant's services instead. The plaintiff would also have to choose a less apt or memorable name.

These arguments are persuasive in cases where there is an inference that the defendant has acted in bad faith. However, when a party is using a name that they have a right to, the mere fact of initial interest confusion should not be enough to prevent them from using it. It would be difficult for a court to determine who has the

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[13] Supra note 7 at 508.

[14] High Court, Auckland, M316-SW99 9p, 14 April 1999, Potter J.

superior right in these cases. It may be best to look to the actual web site when determining issues such as passing off and fair trading breaches.

The other possibility is for parties to share a domain name. Thus, if an Internet user guessed "apple.com", they would be led to a page that enabled them to choose between all sites that had a legitimate right to use the word "apple" in their domain name by way of hyperlinks. It has been suggested that this would lead to difficulties because a small business could freeload on the exposure offered by a famous company who holds the same trademark. This could be ameliorated somewhat by giving some links more prominent placing on the directory page.

The appropriate legal response is not clear-cut in the competing-rights cases. It is for this reason that they are known as hard cases. The decisions in the New Zealand courts to date have not dealt with this adequately, and have suggested that initial interest confusion will be sufficient to sustain an action. When the court is confronted with a competing rights case, this existing line of case law will need to be closely re-examined.

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No Contributory Negligence in Australian Contract Cases

***Astley & Ors v Austrust Limited* [1999] HCA 6, 4 March 1999, High Court of Australia, Gleeson CJ, McHugh, Gummow, Hayne, Callinan JJ.**[1]

A recent decision of the High Court of Australia in *Astley & Ors v Austrust Limited*, delivered on 4 March 1999, will have significant practical implications for all professionals and service providers and the drafting of their retainers and contracts for service.

The case is important in Australia because it establishes there that contributory negligence is not available as a defence to a claim for breach of a contractual duty of care - unless specifically provided for in the contract.

The types of contracts affected by this decision include retainer letters and professional service contracts for professionals, such as lawyers, auditors, architects, engineers, valuers and insurance brokers, as well as contracts to perform work, such as building contracts and repair contracts. The decision will also be of interest to the insurers of the affected groups.

In this decision, the High Court has addressed the issue of concurrent claims against professionals in contract and in tort. A 4:1 majority held that although contributory negligence is available as a defence in a negligence claim - even where the loss sustained is the kind of loss against which the defendant should have protected the plaintiff - it is not available as a defence to a contractual claim.

The decision will mean that all service providers, particularly professionals, will need to review their retainers and service contracts and give serious consideration to deciding whether they will include clauses in their contracts limiting the obligations, rights and remedies of each party.

Factual Background

Austrust had carried on the business of a trustee company since 1910 (originally as Elder's Trustee and Executor Company Limited). In 1983, Austrust entered into a new field, acting as a trustee of trading trusts. After employing solicitors to review the trust documents, it took up an appointment as a trustee of the unit trust for a piggery in New South Wales. The venture, however, did not succeed, and in May 1985 the unit holders in the trust resolved to terminate it and the trust was wound up. The assets of the trust were insufficient to meet its liabilities, which exposed Austrust, as trustee, to extensive losses.

Austrust then sued its solicitors in the Supreme Court of South Australia for breach of contract and negligence in giving legal advice in relation to the trust. Austrust alleged that the solicitors did not advise on Austrust's liability to creditors of the

[1] Note: this commentary relies upon a copy of the case which is subject to formal revision prior to publication in the Commonwealth Law Reports.

trust, or the desirability of excluding such liability in the trust documents.

The issue of negligence, which turned on the terms of the solicitors' retainer, was decided against the solicitors. The Court accepted evidence from officers of Austrust to the effect that had they been informed by solicitors of the liability which was being undertaken. However, Austrust would have insisted upon an exclusion of its personal liability in the documents, or it would not have agreed to act as trustee of the trading trust.

The trial judge, therefore, considered that Austrust had been guilty of contributory negligence for its failure to determine the viability of the venture and reduced Austrust's damages by 50 percent.

This decision went on appeal to the Full Court of the Supreme Court of South Australia. The Full Court found that Austrust was not guilty of contributory negligence, and set aside the finding of the trial judge. The solicitors appealed to the High Court.

The Issues

(a) In a case of professional negligence, can a plaintiff be guilty of contributory negligence where the defendant has contractually agreed to protect the plaintiff from the very loss or damage which the plaintiff has suffered as a result of the defendant's breach of duty?

(b) When a defendant is liable concurrently in tort and in contract for breach of duty of care, can an award of damages for breach of contract be reduced under apportionment of liability legislation because of the contributory negligence of the plaintiff?

The Findings

The appeal was dismissed. Although the majority of the High Court considered that the Full Court had erred in finding that Austrust was not guilty of contributory negligence, Austrust had sued in contract as well as tort.

The High Court held that Austrust was entitled to recover for the *whole* of the damage that it suffered pursuant to the breach of contract, because damages awarded pursuant to a claim in contract cannot be reduced by reason of conduct that constitutes contributory negligence.

The Majority Judgment

The majority judgment of the High Court can be summarised into the following principles.[2]

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[2] Gleeson CJ, McHugh, Gummow & Hayne JJ (Callinan J dissenting).

(a) A plaintiff may sue a professional person for both breach of contract and for common law negligence, and where concurrent liability in tort and contract exists, the plaintiff has the right to assert the cause of action that appears to be the most advantageous to him in respect of any particular legal consequence.

(b) Contracts for services contain an implied promise to exercise reasonable care and skill in the performance of the relevant services. This implied contractual duty is not affected in any way by the parallel tortious duty to take reasonable care and skill.

(c) In a claim for negligence, a plaintiff may be guilty of contributory negligence, even where the defendant, in breach of its duty, has failed to protect the plaintiff from damage in respect of the very event which gave rise to the defendant's retainer.

(d) Contributory negligence by a plaintiff, that is, negligence which contributes to the damage, is not a defence in action for breach of contract.

(e) Apportionment legislation in each State, based on the United Kingdom Law Reform (Contributory Negligence) Act 1945, only applies to actions in tort, and not to an action for breach of contract.

(f) The majority considered that those decisions, which have applied apportionment legislation to breaches of contract, are wrong and should not be followed.

Obviously, the *Astley* decision does not change the law in New Zealand. However, the decision is interesting because the relevant wording in the Australian Wrongs Act 1936 is the same as the wording in our own Contributory Negligence Act 1947. The High Court of Australia, however, declined to adopt the New Zealand courts' interpretation of that wording. For example, the majority judges attacked the decision in *Rowe v Turner Hopkins & Partners*,[3] in which Prichard J held that the Contributory Negligence Act applies to a breach of contract where the breach gives rise to concurrent liability in tort and contract. The majority judges said:[4]

> The judgment of Prichard J ... appears to assume that the principal [sic] of apportionment is paramount and that the legislation was intended to require that damages be apportioned in all contract cases where a liability in tort also exists and where contributory negligence can be made out. This assumption is inconsistent with the history of the legislation whose purpose was to enable recovery of damages by plaintiffs in cases where their contributory negligence would have meant that they recovered nothing. The section was designed to increase the rights of plaintiffs, not reduce them.
>
> Furthermore, the assumption overlooks the fact that the damages awarded for the breach of contract may be different from those in tort because of the rules of remoteness or the terms of the contract. Nothing in the legislation gives any hint that it seeks to regulate awards of damages in contract cases. Moreover, the assumption that the two causes of action are effectively merged does not accord with the attitude of the courts in relation to

[3] [1980] 2 NZLR 550.

[4] *Astley & Ors v Austrust Limited* [1999] HCA 6 (4 March 1999) 17-19.

> the differences between bringing an action in both tort and contract. When a contract action is statute barred, for example, an action in tort may still be taken. Similarly, an action in contract for breach of a promise to take care may be maintainable against a defendant outside the jurisdiction when an action in tort could not be maintained.
>
> In our opinion, those decisions which have applied apportionment legislation [such as the Contributory Negligence Act] to breaches of contract are wrong and should not be followed in [Australia]. The interpretation of the legislation adopted by those courts, which have applied the legislation to contract claims, is strained, to say the least. It relies principally, if not exclusively, on the use of the term "negligence" and a definition of "fault". It ignores not only the context of that term and the definition itself but also the context provided by ... the principal substantive provision of the legislation. It also ignores the mischief which the legislation was intended to remedy.

The Consequences

The fact that contributory negligence cannot be raised as a defence to a contractual claim will lead to a different result in quantification of damages in contract and tort, with the plaintiff being able to pursue the most advantageous remedy. Plaintiffs already have the advantage that contributory negligence cannot be raised as a defence to a claim under the Trade Practices Act 1976 or Fair Trading Act 1984. The decision on which remedy to pursue will be influenced by applicable Limitation Act 1950 time-limits, rules of remoteness of damage and other issues on which the contract and tort differ.

From a defendant's point of view, although contributory negligence by a plaintiff is not a defence in an action for breach of contract, a plaintiff's conduct may still be used to defeat an action in contract. For example, a plaintiff's conduct, which could be equated with contributory negligence, could be used to show that there is no causal connection between the plaintiff's damage and the breach of contract. In practical terms, however, this may be difficult to prove, particularly in a situation where, as in this case, the cause of the plaintiff's loss is both due to its own acts or omissions and the defendant's breach of duty.

The High Court, however, has made it clear that it is open to parties to a contract to regulate their rights and obligations under the contract. The importance of this case is that the retainer is restored as the critical factor in regulating the provision of services. In preparing a retainer, serious consideration must be given to determining what limitations there should be on the obligations, rights and remedies of each party. Perhaps it is time to consider contractual clauses to provide for apportionment of damages according to the responsibility for damage on the basis of the respective faults of the parties. In the meantime, any change to the decision at law to allow damages to be apportioned in a contractual situation can only come about through changes to the relevant apportionment legislation in each state.

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