CASE NOTES

Marlborough District Council v Altimarloch Joint Venture Ltd

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I INTRODUCTION

The decision of the Supreme Court in *Marlborough District Council v Altimarloch Joint Venture Ltd* brings to an end lengthy proceedings concerning misrepresentation and negligent misstatement in the purchase of a farm.[1] The decision is perhaps most noteworthy for the Court's unanimous finding that a local authority owes a duty of care when issuing a Land Information Memorandum (LIM). Indeed, this decision will likely dictate a review of local authority practice in this area. Beyond this issue, the subsequent matters before the Court resulted in a divergence of views amongst the judges — a divergence worthy of further commentary.

II BACKGROUND

This dispute arose in 2004 when Altimarloch Joint Venture Ltd (the purchaser) agreed to purchase a farm in the Awatere Valley from the Moorhouses (the vendors), for $2.675 million. During negotiations, the purchaser was induced to enter the transaction by representations made on behalf of the vendors, and by the Council through a LIM. It was represented that the vendors would be able to transfer a resource consent to extract up to 1,500 cubic metres of water per day from a passing stream, thereby providing the necessary irrigation for the proposed viticulture development. The representations were false. The resource consent entitled the purchaser to only 750 cubic metres of water per day: half the quantity bargained for.

The purchaser brought an action against the Council for negligent misstatement (in respect of the LIM) and against the vendors for misrepresentation in accordance with s 6 of the Contractual Remedies Act 1979. The vendors joined the real estate agents and the solicitors to the action.

The purchaser was successful on both causes of action in the High Court and Court of Appeal,[2] and the estate agents and solicitors were required to indemnify the vendors. In the Court of Appeal, the quantum of damages for

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1 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726.

2 *Altimarloch Joint Venture Ltd v Moorhouse* HC Blenheim CIV-2005-406-91, 3 July 2008; *Altimarloch Joint Venture Ltd v Moorhouse* HC Blenheim CIV-2005-406-91, 23 March 2009; and *Vining Realty Group Ltd v Moorhouse* [2010] NZCA 104, (2010) 11 NZCPR 879.

the contractual action was set on a cost of cure basis, in line with achieving the "functional equivalent" to that which was promised.[3] This equivalence would arise by securing resource consent to extract a further 400 cubic metres of water per day and constructing a dam to store the outstanding amount. The costs of these measures were put at $1,055,907.16, an amount far in excess of the calculated $125,000 diminution in value from the price paid. This diminution represented the loss attributable to the Council's negligent misstatement (loss payable in part by the Council through a contribution order).

On appeal to the Supreme Court, the Council argued that no duty of care was owed to the purchaser and that, if it were, no loss could be attributed to the Council. The vendors argued that the measurement of damages on a cost of cure basis was inappropriate in the circumstances. Finally, the Council appealed against the contribution order, arguing that the principles of contribution do not apply as between two defendants liable in different causes of action.

III THE DUTY OF CARE — MORE GRIEF FOR LOCAL AUTHORITIES?

Although the Council argued that a duty of care was not owed in this situation, it was willing to concede the question of breach should this argument fail. The Court unanimously affirmed that local authorities do owe a duty of care when providing the mandatory information of a LIM in accordance with s 44A(2) of the Local Government Official Information and Meetings Act 1987 (the Act).[4]

The basis for this duty of care was most thoroughly considered in the judgment of Tipping J, who analysed this issue with reference to the now "conventional indicators" of proximity and policy.[5] In regard to the necessary proximity, his Honour acknowledged that the relationship between a local authority and a person seeking a LIM is akin to that created by contract: the eventual recipient of the LIM voluntarily requests the supply of that information in return for a moderate fee.[6] It was therefore considered uncontroversial to find an assumption of responsibility coupled with reasonable and foreseeable reliance — telling factors in establishing proximity.[7] Moreover, Tipping J was unimpressed with arguments advanced by the vendors' counsel that the territorial authority lacked proximity because it was unaware of the purpose for which the information was being requested.[8] Such arguments, if relevant

3 *Vining Realty Group Ltd*, above n 2, at [63].

4 At [8] per Elias CJ, [67] per Blanchard J, [87] and [98] per Tipping J, [181] per McGrath J and [234] per Anderson J.

5 At [85] per Tipping J. These indicators were presumably assessed in light of the ultimate consideration that it be "fair, just and reasonable" to impose a duty: see *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 305 per Richardson J.

6 At [86].

7 At [88].

8 At [89].

at all, were to be considered within the policy inquiry.

With respect to this secondary inquiry, Tipping J emphasised that s 44A(5) of the Act enabled those receiving a LIM to treat it as "sufficient evidence of the correctness" of the information contained within it.[9] This was argued to illustrate that the legislature intended Land Information Memoranda to encourage general reliance. In addition, Tipping J noted that the protections from civil and criminal liability offered by way of s 41 of the Act do not extend to the LIM requirements contained in pt 6.[10] Therefore, basic statutory interpretation suggested that the legislature envisaged some ability for actions to lie against local councils. Certainly, an alternative intention by Parliament would indicate a "most curious drafting technique".[11]

Beyond these legislative policy considerations, Tipping J acknowledged that the information contained within a LIM is commonly crucial to those who seek it.[12] This was consistent with his Honour's earlier observation in *North Shore City Council v Body Corporate 188529* (*Sunset Terraces*) that a prospective purchaser may be negligent in proceeding with a transaction without first requesting a LIM.[13] In light of these factors, Tipping J was comfortable in acknowledging a duty of care in respect of the information required by s 44A(2) of the Act. Beyond this, questions as to the existence of such a duty for the discretional inclusion of information (under s 44A(3) of the Act) remain an issue for another day.

IV DID THE COUNCIL CAUSE THE LOSS?

Having unanimously recognised the duty of care, the Court was then left to determine whether the negligent misstatement of the Council caused loss. A narrow majority of Blanchard, McGrath and Anderson JJ held that causation was established and the Council's appeal as to liability was accordingly dismissed.[14]

In his dissenting judgment, Tipping J observed that:[15]

> It is only to the extent that the purchaser is left with a shortfall in his claim for breach of contract that it can be said that the Council's negligence has caused the purchaser loss by reason of its inducing the purchaser to enter into that contract.

9 At [87] (at least to the extent that it was information that "shall" be included in accordance with s 44A(2) of the Local Government Official Information and Meetings Act 1987).

10 At [93].

11 At [97].

12 At [90].

13 *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 at [79] per Tipping J [*Sunset Terraces*], noted in *Marlborough District Council*, above n 1, at [90].

14 *Marlborough District Council*, above n 1, at [59].

15 At [106].

Given that the vendor's liability in contract (as settled by the expectation interest) would exceed, or at least equal, the diminution in value of the property, Tipping J reasoned that the Council's misstatement could not have caused the loss.[16] In support of this approach, his Honour highlighted the signal of Lord Nicholls in *Nykredit Mortgage Bank v Edward Erdman Group*,[17] that the overall outcome of a contractual transaction must be assessed before determining whether the negligence of a third party caused a contracting party loss.[18] Given this, it is remarkable that Tipping J remained unwilling to accept that he was giving contract general primacy over tort.[19]

The judgment of McGrath J, however, recognised that Tipping J was — at least in a practical sense — giving an unjustified priority to the contractual loss.[20] The majority had reservations about such an approach insofar as it would typically require the court to estimate the plaintiff's likely recovery by reference to another defendant's ability to satisfy a judgment.[21] There is undoubtedly merit to this concern. It is clear that even solvent defendants are susceptible to intermediate events that impact on their obligations, potentially creating the risk of under-recovery. Blanchard J noted how the Christchurch earthquakes have demonstrated that a defendant may come to lack full indemnity in light of an insurer's overall exposure to a crisis.[22] As such, it would seem wholly inappropriate to take into account the level of damages payable from a separate defendant during the process of calculating loss. In support of this reasoning, McGrath J cited the decision of *Eastgate Group Ltd v Lindsey Modern Group Inc*, which established that "actual diminution of loss should be taken into account but not the ability to claim damages against others".[23]

This author suggests that the majority reasoning is preferable. In reality, both representations induced entry into the contract and to assume otherwise, with an over-willingness to resolve the contractual relationship first, would be artificial. The fact that the transaction was conditional on the purchaser being satisfied with the LIM leaves open only one sensible inference: the statements contained in the LIM had an inducement effect and must therefore be taken to be an operative cause of the loss.

V COST OF CURE OR DIFFERENCE IN VALUE?

The Contractual Remedies Act 1979 affirms that damages for misrepresentation are awarded in the same manner and to the same extent

16 At [119].

17 *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627 (HL).

18 *Marlborough District Council*, above n 1, at [109]–[110].

19 See [108].

20 At [206]–[207].

21 At [72] per Blanchard J.

22 At [72].

23 *Eastgate Group Ltd v Lindsey Modern Group Inc* [2001] EWCA Civ 1446, [2002] 1 WLR 642; and *Marlborough District Council*, above n 1, at [204].

as if the representation were a term of the contract.[24] This inquiry must give effect to the parties' expectation interests, placing them in the position they would have been in had the contract been performed (or the representation been true).[25] Whilst acknowledging these guiding principles, the Supreme Court's attempt to restore the purchaser's expectation interest resulted in two divergent approaches to the measurement of contractual damages.

The majority of Blanchard, Tipping and McGrath JJ held that damages were to be set in accordance with the cost of cure calculation so as to ensure equivalent performance. Tipping J best canvassed the law in this area. He first cited the classic judgment of Oliver J in *Radford v De Froberville*,[26] suggesting that the inquiry into the expectation interest goes beyond merely financial considerations.[27] Indeed, where the subject matter of the contract is not readily substitutable (for instance, where there is no available market), his Honour argued that the measure of damages cannot simply resort to an economic comparison between the agreement and the performance tendered: it is the performance interest itself that must be recognised.[28] In this respect, Tipping J drew a useful parallel to circumstances where the subject matter dictates that specific performance, rather than damages, is the appropriate remedy.[29] The circumstances in this case were said to justify adherence to the performance interest.

Tipping J was then required to account for the authority of *Ruxley Electronic and Construction Ltd v Forsyth*,[30] which stands for the proposition that cost of cure damages are to be evoked only when it is reasonable to insist on such a course of action.[31] To that end, the proposal to build the dam was argued to be a reasonable response to the vendors' breach (despite the fact it greatly surpassed the compensatory measure). There was no evidence that the purchaser could achieve the benefit of the promised quantity of water (and thus proceed with the development) by any less expensive means.[32] In this respect, it was distinguishable from *Ruxley*, where the failure to build a pool to exact contractual specifications had not resulted in any tangible loss that could possibly justify the rebuilding of the pool.[33] Blanchard J also noted that the escalation in the dam's building costs during the course of proceedings was not attributable to the purchaser — it was a natural consequence of the vendors' decision to fight the case.[34] The Court of Appeal's decision on damages was therefore accepted and the vendors' appeal dismissed.

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24 Section 6(1)(a).

25 See *Robinson v Harman* (1848) 1 Exch 850 at 855, 154 ER 363 at 365.

26 *Radford v De Froberville* [1977] 1 WLR 1262 (Ch).

27 *Marlborough District Council*, above n 1, at [157].

28 At [158].

29 At [157].

30 *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (HL).

31 *Marlborough District Council*, above n 1, at [170].

32 At [171].

33 See [162].

34 At [66].

In her dissenting judgment, Elias CJ argued that the circumstances dictated that it would be inappropriate and unreasonable to depart from the orthodox method for measuring damages. The supposed "cure" was seen to fail to give effect to the performance interest because the "performance of the contract did not entail construction of a dam or even delivery of water".[35]

In citing the work of Professor Brian Coote, the Chief Justice acknowledged that damages are to align with the reasonable expectations of the parties.[36] This is consistent with Coote's broader view that the obligation to pay damages is a secondary obligation sourced in contract.[37] Importantly, Coote also suggests that the secondary obligation will typically ensure "the wherewithal to obtain alternative performance" unless the contract was formed with the intention to enable "merely a particular economic end result".[38] This understanding progresses us some way beyond the Holmesian conception of contract law — a conception that would afford the promisor the option to tender performance or pay damages.[39]

Having considered the justifications that warrant departure from a purely economic comparison, Elias CJ wished to distinguish between situations where the plaintiff, having stipulated for performance, could reasonably expect damages to enable that performance from those circumstances where damages would ensure only functional equivalence (as a "proxy" for that which was bargained for).[40] Her Honour concluded that the parties' expectations did not encompass alternative performance in the present case.[41] Nonetheless, this author suggests that, to the extent that the parties are taken to have intended to give effect to the performance interest itself, it would be unjust to prevent an equivalent outcome being achieved by virtue of a speculative appreciation of the parties' expectations. As a consequence of this stance, it is argued that the majority — in concluding that the cost of cure measure was not unreasonable in the circumstances — correctly decided the matter.

VI EQUITABLE CONTRIBUTION

The final issue on appeal concerned the Council's requirement to contribute in equity to the damages paid by the vendors. The Council disputed the Court of Appeal's contribution order for $62,500 (half the diminution in value), a sum reflecting equal culpability. This issue was pertinent on appeal as the statutory principles of contribution, found in s 17 of the Law Reform Act 1936, do not apply to situations in which the defendants are not all tortfeasors.

35 At [31].

36 At [42].

37 See generally Brian Coote *Contract as Assumption: Essays on a Theme* (Hart Publishing, Oxford, 2010).

38 Brian Coote "Contract Damages, *Ruxley*, and the Performance Interest" [1997] CLJ 537 at 541–542.

39 At 542.

40 At [42].

41 At [31].

Blanchard and Tipping JJ resolved that it would be misplaced to uphold a contribution order against the Council given the different bases on which liability and damages are assessed in the different causes of actions. That is to say, the circumstances would fail the test for coordinate liability, which requires liability "of the same nature and extent".[42] This position, together with the Chief Justice's acceptance that the Council had not caused loss, enabled the Supreme Court to uphold the Council's appeal against the order.

Despite accepting this outcome, Elias CJ supported the sentiments of McGrath J and the ability of the common law to adapt to "fresh circumstances" notwithstanding the Law Reform Act 1936.[43] McGrath J emphasised that equity's preference for substance over form must overcome any technical constraints that result from appealing to the differing causes of action.[44] His Honour accepted that if liability is to be of the same nature and to the same extent, then the circumstances must illustrate equal notions of culpability and causal significance amongst defendants' actions.[45] McGrath J deemed these factors to be evident and suggested that "[b]oth parties had a causative effect on the facts of this case; therefore, both parties should contribute."[46]

It would seem that the uncertainty (and potential unfairness) in this area of law demands further legislative attention. This would bring New Zealand into line with the United Kingdom, which enacted more comprehensive legislation on this issue through the Civil Liability (Contribution) Act 1978 (UK). This legislation ensures that regardless of the basis of the defendant's liability, contribution principles are to apply where parties are responsible for the "same damage".[47] This provides a more just and pragmatic outcome.

VII CONCLUSION

Although it is unfortunate that the purchaser and vendors became entangled in such a lengthy dispute, the case clearly marks out important legal issues. Beyond the recognition of the duty of care owed by councils when issuing a LIM, the case appears significant for two reasons. First, it accepts that contractual damages measured on a cost of cure basis may be available even in circumstances where the cost is vastly in excess of strict compensatory damages. The fact that the cure achieves only functionally equivalent performance is not determinative. Secondly, the ruling highlights the need for legislative development in the area of contribution so as to negate the current uncertainty and potential unfairness.

42 At [129].
43 At [58] per Elias CJ.
44 At [220].
45 At [221] and [224].
46 At [231].
47 Section 1(1).

Paki v Attorney-General: *He Piko, He Taniwha*

DAVID GREEN*

I INTRODUCTION

Waikato-taniwha-rau
He piko, he taniwha
He piko, he taniwha.[1]

This well-known whakataukī[2] describes the relationship between Waikato Māori and their river. The circumstances of this decision engage several interconnected issues such as customary title and the relationship between the Crown and Māori. That is to suggest that as this dispute winds its way through the judicial process, there is another question to address at every bend. The end of this journey is not yet in sight, but the wide-reaching implications of each decision should be kept in mind.

At the current bend in this litigious stream, *Paki v Attorney-General*,[3] the Supreme Court examined navigability of rivers under s 14 of the Coal-mines Act Amendment Act 1903. The Court decided, by majority, that the question of navigability depended on a "part of river" rather than a "whole river" approach. Applying this approach was a relatively straightforward question of fact.

While also expanding on what the Supreme Court held, the focus of this case note is on the consequences of this decision. First, it sets a precedent that can assist other Māori groups to reconsider their river rights. Secondly, this decision acknowledges the customary interests of Māori as regards their rivers pursuant to the second article of the Treaty of Waitangi/te Tiriti o Waitangi.

II FACTS

The plaintiffs were kaumātua of Ngāti Wairangi, Ngāti Moe, Ngāti Korotuohu, Ngāti Ha, Ngāti Hinekahu and Ngāti Rakau. They claimed, as representatives of the owners of several blocks of land abutting the Waikato River, that the Crown breached its fiduciary duty when failing to inform the Māori owners of the full extent of their undertaking to sell the land.[4]

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1 Waikato of a hundred taniwha/At every bend a taniwha can be found.

2 Māori proverb.

3 *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277.

4 At [5]. The description of the Crown duty as fiduciary in nature is discussed at the end of this case note.

However, there was an antecedent issue. If the river was "navigable" in 1903, s 14 of the Coal-mines Act Amendment Act 1903 would have deemed the bed to be, and to have always been, the Crown's property. The nature of the Crown–Māori undertaking would then have been irrelevant.[5] Therefore, the only issue the Supreme Court chose to consider in this case was that of navigability.[6]

III PROCEDURAL HISTORY

The High Court and Court of Appeal decided against the plaintiffs, holding that the navigability of the Waikato River should be judged based on the river as a whole.[7] This approach used the character of a substantial part of the river to describe its entire length.[8]

IV THE SUPREME COURT DECISION

The Supreme Court in a four-to-one majority overturned the Court of Appeal's decision.[9] It held that navigability was a question of fact to be judged based only on the particular part of the river in question.[10] The majority gave four key reasons why the navigability of a river should be addressed in part rather than as a whole.[11] They are sagacious:[12]

> [First] a "whole of river" assessment of navigability is inconsistent with the text of the legislation; [secondly] assessment of particular stretches is consistent with the common law context; [thirdly] the legislative history confirms the textual indications that the legislation sought to strike a balance between private and public interests which would be seriously disturbed by a "whole of river" assessment; [and fourthly] an interpretation which required the river as a whole to be classified as navigable or not would be highly inconvenient, suggesting that it could not have been envisaged and ought not to be adopted.

First, the text of the legislation indicates that a "whole river" approach is untenable. The definition of a navigable river is one that has a "sufficient

5 That provision was modified by s 261 of the Coal Mines Act 1979. Although now repealed, that provision survives by virtue of s 354 of the Resource Management Act 1991. The changes between the two versions of the coalmines legislation are of a pragmatic nature. See *Paki*, above n 3, at [38]–[40].

6 At [13]. The issue concerning the plaintiff's standing was abandoned.

7 *Paki v Attorney-General* [2009] 1 NZLR 72 (HC); and *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125.

8 *Paki*, above n 3, at [1]–[2].

9 William Young J dissenting.

10 At [2].

11 Elias CJ gave a judgment with Blanchard and Tipping JJ. McGrath J separately agreed on the conclusion.

12 At [56].

width and depth".[13] This can only be logically assessed at particular points of a river.[14] The legislation also envisaged a segmentation of ownership in riparian land because Crown grants to third parties were legislatively excluded from being deemed as Crown-owned.[15] As Elias CJ stated, "[t]he saving for Crown grants is consistent with navigability being focussed on navigability in fact in particular stretches of the river."[16]

Secondly, the common law does not support describing the river's navigability in totality. There was no authority considered which supported the Crown's contention that the proportion of a river that is in fact navigable should have a bearing on whether the river as a whole is described as navigable.[17] A river is navigable when it is in fact navigable. For example, where an obstruction can be overcome by portage, that section of the river wherein the obstruction lies can still be described as navigable.[18] Such an understanding is consistent with the idea that there is a public interest in rivers as navigable highways.[19]

The third point is that the legislative history supports the Supreme Court's approach to segmenting the navigability of rivers.[20] The balancing of public and private interests in rivers was of utmost concern at the time s 14 of the Coal-mines Act Amendment Act 1903 was enacted. If a river were to be considered navigable along its whole length then riparian owners at non-navigable points would lose their presumptive property rights. These owners would be treated differently because their land abutted a river that was navigable elsewhere, whilst owners whose land abutted a wholly non-navigable river would not have their property expropriated.[21] Such a distinction would be illogical.

Finally, a "whole of river" interpretation is inconvenient. It is uncertain because it applies the characteristics of one part of a river to another part that may not exhibit any of the same characteristics.[22] Thus the underlying purpose of identifying a river as navigable would be undermined.

These four reasons support a wider rationale that connects the question of navigability to the "purpose of navigability". That purpose is for the river to be a highway available for public use.[23] The legislation may refer to vehicles capable of use in shallow waters,[24] or for crossing rivers. Nevertheless, these more narrow purposes do not connect, at least in the majority's judgment,

13 Coal Mines Act 1979, s 261(1).
14 *Paki*, above n 3, at [57].
15 At [58].
16 At [58].
17 At [62].
18 At [70]. See also *R v Nikal* [1996] 1 SCR 1013.
19 At [65].
20 At [56].
21 At [68].
22 At [70].
23 At [71].
24 Coal Mines Act 1979, s 261(1): "boats, barges, punts, or rafts".

to the broad purpose of providing a public highway up and down the river.[25] Consistent with this perspective, recreational use[26] would not label that part of the river as navigable because there was no use for the "purposes of navigation".[27]

V CONSEQUENCES OF THE DECISION

While apparently narrow in ratio, this decision has wider implications. Two of the five grounds of appeal to the Supreme Court were dealt with separately to allow the polycentric nature of the navigability finding to run its course.[28] As Mai Chen has noted,[29] this decision means that hapū and iwi can now, through a particular finding of navigability, seek clarification of a legal or beneficial interest in their tupuna awa.[30]

However, the question of whether a constructive trust can be imposed in favour of the appellants has not been resolved yet.[31] Such ongoing uncertainty could have a lasting and significant impact on the Government's proposed mixed ownership model in relation to state-owned power companies that use rivers (such as Mighty River Power).[32] Not only could this decision affect the Government's agenda in this area, it could also influence the way settlements are negotiated with Māori groups. As Annette Sykes has noted, the co-management arrangements already in place for the Waikato River may have to be altered to reflect this decision.[33]

There is also uncertainty in the application of customary interests in rivers. In 1840, there could not have been a presumption of Crown ownership in Māori land because the second article of the Treaty guaranteed Māori customs and usages.[34] The Chief Justice stated:[35]

> No substantive rule that the Crown owned the beds of navigable waters therefore entered New Zealand law in 1840. And application of the common law presumption of riparian ownership to the middle of the flow could not arise until Maori customary interests were excluded (as by purchase or some taking authorised by statute).

25 At [72]–[73]. William Young J dissented on this point: at [172].

26 Such as the use of rowboats with no commercial purpose and no particular destination.

27 At [76].

28 *Paki v Attorney-General* [2011] NZSC Trans 5 at 115 per Elias CJ [*Transcript*].

29 Mai Chen "Ruling boost to Maori river claims" *The New Zealand Herald* (online ed, Auckland, 9 July 2012).

30 Ancestral river.

31 This question forms part of the subsequent grounds of appeal. See *Paki v Attorney-General* [2010] NZSC 88.

32 Chen, above n 29.

33 Waatea 603AM "Pouakani hapu wins mana over Waikato river reach" (27 June 2012) <www.waatea603am.co.nz>.

34 *Paki*, above n 3, at [18]. This is the line of reasoning advanced by the Chief Justice in *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA).

35 At [18].

Therefore, the uncertainty in this area is not assuaged. However, Māori claimants could be buoyed by Elias CJ's comments during the hearing, outlining the possibility of arguments based on customary title:[36]

> The appellants aren't running it but the same sort of argument might be entertained based on aboriginal title and the Coal Mines Act not being effective to constitute an expropriation but these appellants are running it on the basis of the Māori Land Court title.

Elias CJ also outlined her perspective on the value of Treaty jurisprudence:[37]

> I don't necessarily accept that the Treaty, which after all is mentioned in [the Supreme Court's] constitutive statute, is soft law and that its ambit is only within the Waitangi Tribunal processes[.]

These comments provide at least an indication that the customary title issue as regards rivers (and lakes) is unsettled and that there is a possibility of recognising hard law Treaty obligations. That is, of course, a substantive question for another day.

VI FUTURE LITIGATION AND THE CROWN–MĀORI RELATIONSHIP

In a wider sense, the circumstances of this decision have the potential to inform the relationship between the Crown and Māori. While not at issue in the Supreme Court decision, the fiduciary duty formed part of the discussion in the lower courts. In the Court of Appeal, Hammond J's comments are apposite:[38]

> [A fiduciary duty] implies superiority on the part of the Crown and inferiority on the part of Māori. This is quite at odds both with the historical fact of the Treaty of Waitangi, and what is said about it and the position of Māori today. This resort to a fiduciary principle carries an unfortunate and erroneous affirmation of a most public kind as to the inferior position of Māori. This is quite wrong.

It is quite wrong. Elsewhere, it has been suggested that vulnerability is not a precursor to a fiduciary relationship.[39] Yet that contention is advanced without considering the wider implications of the establishment of such a duty. The fiduciary duty is redolent of colonisation and not supportive of the mana

36 *Transcript*, above n 28, at 116. Note that these are just the Chief Justice's thoughts during a hearing and have no authority.

37 At 118.

38 *Paki* (CA), above n 7, at [103].

39 See, for example, the discussion in Ling Yan Pang "A Relational Duty of Good Faith: Reconceptualising the Crown–Māori Relationship" (2011) 17 Auckland U L Rev 249 at 256–257.

of Māori rangatira. Further, while it may be legally possible to establish a fiduciary duty between equal parties, it should be remembered that sometimes the law has unsavoury didactic consequences. That, as Hammond J alludes, is wholly unsatisfactory.

Again, these are questions for another day. But this author would urge those advocating Māori customary rights in future litigation relating to the *Paki* appellants, to consider carefully how their submissions reflect on the wider understanding of the Crown–Māori relationship. Respectfully, the judges of the Supreme Court should be careful not to define the complexities of the Crown–Māori relationship under the umbrella of one legal heading — whether that be fiduciary in character or otherwise. As Benedict Kingsbury states:[40]

> Institutions required to make decisions in hard cases will not have the comfort of simple prioritization but will have to acknowledge the competing pulls, respect the legitimacy and good faith of those subscribing to various positions, and do the best they can in the context as they understand it.

The implications of this Supreme Court decision continue to be navigated. As further court proceedings are contemplated, all parties should be aware of the choices to be made at each bend in the river.

40 Benedict Kingsbury "Competing Conceptual Approaches to Indigenous Group Issues in New Zealand Law" (2002) 52 UTLJ 101 at 134.

Allenby v H: *A Realignment with the Accident Compensation Scheme's Social Contract Roots?*

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I INTRODUCTION

In *Allenby v H*, the Supreme Court held that the accident compensation scheme covers pregnancy caused by failed sterilisation.[1] This ruling is significant in that it represents a reversal of the Court of Appeal's earlier decision in *Accident Compensation Corp v D*.[2] Of perhaps greater significance, the case represents a realignment with the visionary principles of the *Woodhouse Report*: the provision of comprehensive cover in return for the removal of the right to sue for personal injury.[3]

II FACTS AND PROCEDURAL HISTORY

The first respondent (H) underwent tubal ligation in January 2004. This operation failed to render her sterile. She became pregnant and gave birth by caesarean section in early 2005.

Her claim for damages in the High Court was met with a strikeout application by the surgeon who performed the operation (Allenby) and his employer (Counties Manukau District Health Board). Dr Allenby and the DHB claimed that there was no tenable cause of action as pregnancy by failed sterilisation was covered by the accident compensation scheme.

This question was removed directly to the Court of Appeal,[4] who declined to depart from its earlier decision in *ACC v D* that pregnancy was not a "personal injury" under the relevant legislation.[5] Therefore, the proper remedy for H was civil damages. Leave was granted to appeal to the Supreme Court.[6] This would determine whether H could maintain her damages claim or would be required to seek her entitlements under the accident compensation scheme.

Interestingly, H was neutral as to whether her remedy came in the form of civil damages or accident compensation.[7] However, the Accident Compensation Corporation, appearing as an interested party, argued that the decision in *ACC v D* was correct and should be confirmed.[8]

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1 *Allenby v H* [2012] NZSC 33.

2 *Accident Compensation Corp v D* [2008] NZCA 576.

3 *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Enquiry* (13 December 1967) at [4] [*Woodhouse Report*].

4 *Allenby v H* [2011] NZCA 251.

5 Injury Prevention, Rehabilitation, and Compensation Act 2001, s 26.

6 *Allenby v H* [2011] NZSC 71.

7 *Allenby v H*, above n 1, at [5].

8 At [5].

III THE PREVIOUS PRECEDENT (*ACC V D*)

The Court of Appeal's decision against cover for pregnancy in *ACC v D* was predicated on the finding that the expression "personal injury" connotes a need for harm or damage.[9] The fact that pregnancy is a non-pathological natural process meant that it could not be included in this phrase.[10] The Court in *ACC v D* further disagreed with the High Court Judge's conclusion as to the effect of the 1992 reforms.[11] In the Court's opinion, these had resulted in a more restrictive approach to compensation under the scheme.[12]

IV IN THE SUPREME COURT

The Issues

The Supreme Court was required to determine whether impregnation and the physical consequences of pregnancy (up to and including childbirth) caused by failed sterilisation amounted to "personal injury" under the Injury Prevention, Rehabilitation, and Compensation Act 2001 (the Act).[13] For the purposes of the appeal, the question was premised on the surgeon having been found negligent, although this had been neither established nor conceded.[14]

In holding that pregnancy was indeed covered, the Supreme Court focused on two interrelated questions:

- What effect did the 1992 reforms have on pre-1992 cover for pregnancy caused by rape?
- Was pregnancy a "personal injury by medical misadventure" under the Act?[15]

The interrelated nature of these questions arises due to the Corporation's reliance on *ACC v D*: namely, the finding that the 1992 reforms had significantly narrowed the acceptable interpretation of key legislative terms, thus doing away with an extended meaning of "personal injury" that would include a condition such as pregnancy.[16]

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9 *ACC v D*, above n 2, at [55].

10 At [55].

11 That is, the effect of the Accident Rehabilitation and Compensation Insurance Act 1992.

12 *ACC v D*, above n 2, at [62].

13 Sections 20(1)(b), (c) and 26(1). Now the Accident Compensation Act 2001.

14 *Allenby*, above n 1, at [12].

15 "Medical misadventure" was replaced by the expression "treatment injury" in 2005: Injury Prevention, Rehabilitation, and Compensation Amendment Act (No 2) 2005, s 13. This does not significantly affect the future applicability of this decision.

16 *Allenby*, above n 1, at [5] and [11].

The Decision

The Supreme Court's unanimous decision consists of three separate judgments. The judgments of Elias CJ and Blanchard J (who also wrote on behalf of McGrath and William Young JJ) focused on the central issue, while Tipping J largely devoted himself to addressing why any potential floodgates argument must fail.

In relation to the first issue, both Blanchard J and Elias CJ concluded that the 1992 reforms did not remove the explicit cover for pregnancy caused by rape,[17] as none of the parliamentary materials and reports at the time mentioned coverage for pregnancy.[18] They felt certain that "some explicit acknowledgement of the change" would have been required.[19]

For Blanchard J, the fact that coverage for pregnancy caused by rape had not been removed in 1992 was critical to his holding that pregnancy caused by failed sterilisation was also covered by the scheme. In line with the philosophy of the *Woodhouse Report* (that is, equal treatment for equal loss),[20] if pregnancy is covered as the physical consequence of an accident (rape), it must follow that the same physical consequence is covered when it occurs by a different cause, namely, medical misadventure.[21]

Nor did the 1992 reforms affect a change to the "expansive way" in which the key statutory terms had always been interpreted.[22] For instance, the fact that the medical misadventure provisions are an exception to the no fault policy behind the scheme led Blanchard J to conclude that "personal injury by medical misadventure" had an expansive meaning that was clearly intended to cover things "not ordinarily ... classed as physical injuries".[23] His Honour considered that this inference was reinforced by both s 33(3), which extends cover to situations where no treatment is given, and s 32(6), which represents an "even more unusual extension of the meaning of 'personal injury'" by extending cover to third parties who contract diseases or infections from those who have been misdiagnosed or mistreated.[24]

As to the second issue, their Honours were unequivocal that pregnancy does amount to a physical injury. This had been the sticking point for the Court of Appeal in *ACC v D*, which reasoned that — as a natural process

17 Pregnancy had been explicitly included as a type of "actual bodily harm", qualifying as a "personal injury" when arising out of the commission of certain criminal offences, in 1974: Accident Compensation Amendment Act 1974, s 6. This wording was superseded by the Accident Rehabilitation and Compensation Insurance Act 1992, which dropped all references to pregnancy and "actual bodily harm".

18 *Allenby*, above n 1, at [9] per Elias CJ and [68] per Blanchard J.

19 At [9] per Elias CJ.

20 *Woodhouse Report*, above n 3, at [4].

21 *Allenby*, above n 1, at [76].

22 At [68] per Blanchard J. See also [18] per Elias CJ.

23 At [62].

24 At [62]–[63].

necessary for the perpetuation of human life — pregnancy should not be regarded as either harm or damage because it did not have the negative connotations required by such terms.[25]

As far as the Supreme Court was concerned, however, the physical impact on the anatomy of the woman brought about by pregnancy was significant and "apt to cause a substantial degree of physical discomfort and, quite often, substantial pain and suffering".[26] Their Honours were persuaded by the fact that the provision in question specified that injuries such as "a strain or sprain" were to be covered. This suggested that the consequences of pregnancy, being of much greater significance and duration than these, were also to be covered.[27] Blanchard J further opined that if disease and infection caused by medical misadventure were explicitly classified as personal injuries under the Act,[28] then it did not involve any "greater stretching of the language to similarly include a pregnancy which has the same cause".[29]

Elias CJ's judgment can be seen as a necessary supplement to Blanchard J's in that she pays particular attention to the issue of why pregnancy, as a gradual process, is covered despite the scheme's general policy of exclusion for such processes.[30] In focusing on whether pregnancy falls into one of the exceptions,[31] she recognised the need for the gradual process injury to be causatively linked to personal injuries that have cover under the Act.[32] Injuries directly caused by accident or medical misadventure may be injuries that "constitute or set up" the gradual process,[33] as long as they are not themselves injuries "caused wholly or substantially by a gradual process, disease or infection".[34]

On this basis, Elias CJ concluded that the initial injury of impregnation is covered as coming within either s 20(2)(a) (in the case of accident (rape)) or s 20(2)(b) (in the case of medical misadventure).[35] The resulting physical consequences of impregnation are then covered by s 20(2)(g) as a gradual process *consequential* on physical injury. Pregnancy caused by medical misadventure may also be covered by s 20(2)(f) as a "gradual process ... that *is personal injury caused by medical misadventure suffered by the person*".[36] Her Honour further pointed out that there is no basis for holding that a gradual process, as that term is used in the Act, must be intrinsically harmful.[37]

In summary, the Supreme Court was unanimous that pregnancy is a

25 *ACC v D*, above n 2, at [55].
26 *Allenby*, above n 1, at [88] per Tipping J.
27 At [18] per Elias CJ and [88] per Tipping J.
28 Injury Prevention, Rehabilitation, and Compensation Act 2001, s 20(2)(f).
29 At [80].
30 Section 26(2).
31 Sections 26(2) and 20(2)(e)–(h).
32 *Allenby*, above n 1, at [21].
33 At [21].
34 At [21], citing s 26(2).
35 At [22].
36 At [23] (emphasis in original).
37 At [27].

personal injury covered by the scheme because it is a physical injury[38] to the body of the mother that comes within the exceptions to the gradual process exclusion.[39] For Blanchard J, the fact that coverage for pregnancy by rape was not removed in 1992 was also decisive. From this, it logically follows that pregnancy by failed sterilisation must also be covered: it is simply the same physical consequence by another cause, namely, medical misadventure.

V COMMENT

The Underlying Policy

To appreciate why the Supreme Court reached the opposite conclusion to the Court of Appeal in *ACC v D*, one must understand the underlying policy of the accident compensation scheme and the different ways in which each Court interpreted that policy. After all, both Courts looked at the same legislative history, yet each interpreted it in a different way.

The Court of Appeal's rationale for taking a restrictive approach to the interpretation of "personal injury" was the belief that the legislation set up an exhaustive scheme, with the 1992 reforms simply reflecting legislative awareness of this fact. The majority of Arnold and Ellen France JJ felt that, in light of the substantial cost increases incurred by the scheme, "it is plain that the 1992 legislation was intended to narrow cover and reduce the 'elasticity' of the previous regime".[40] In other words, fiscal reality required Parliament to draw the line somewhere. The fact that this line-drawing exercise inevitably resulted in oddities (such as here, where unwanted pregnancy would effectively be the only result of medical misadventure for which cover was not available) was an undesirable yet unavoidable consequence of the exhaustible nature of funding.[41]

By contrast, the Supreme Court's view of the effect of the 1992 reforms reflected its focus on the "social contract" philosophy behind the scheme: that is, comprehensive coverage in return for the removal of the right to sue for personal injury.[42] An inclusive approach to the interpretation of the Act is much more in line with this original policy. The odd gap created by the Court of Appeal in *ACC v D* had been regarded by many commentators as out of step with the social contract philosophy.[43] Yasmin Moinfar went so far as to suggest that its approach had "creat[ed] a class of persons who can not be covered by the ... scheme due to the nature of their 'personal injury'".[44]

38 Section 26(1)(b).

39 Sections 26(1)(b) and 20(2)(g) or (f).

40 *ACC v D*, above n 2, at [62] per Ellen France J.

41 At [69].

42 See *Woodhouse Report*, above n 3, at [4].

43 *Allenby*, above n 1, at [78]. See also Rosemary Tobin "Common Law Actions on the Margin" [2008] NZ L Rev 37 at 53.

44 Yasmin Moinfar "Pregnancy Following Failed Sterilisation under the Accident Compensation Scheme" (2010) 40 VUWLR 805 at 806.

There is no doubt that the Supreme Court's inclusive approach to interpretation is more in tune with the social contract philosophy and a better reflection of the "overall spirit" of the scheme.[45] Not only does it give comprehensive coverage for all types of medical misadventure, thus avoiding odd gaps, but it also protects surgeons carrying out sterilisation procedures from civil liability — the other key plank of the social contract.

Now that New Zealand's highest court has finally looked at this contentious issue, the ball is truly in Parliament's court to determine which policy line is the most appropriate.

Floodgates

As noted above, the Supreme Court was unanimous that the pre-1992 coverage for pregnancy by rape had not been removed and that there was still coverage under the Act as an "accident". Whilst Elias CJ preferred not to comment on the possibility that such a conclusion would lead to all accidental pregnancies being covered by the Act,[46] both Blanchard and Tipping JJ sought to counter this potential floodgates argument.

The first and most obvious point is that unwanted pregnancies caused by other accidents (such as a burst condom or unprotected sex) are neither rape nor medical misadventure. Clearly, the scope of the scheme has never gone beyond these two situations.[47] Their Honours went further, however, arguing that the definition of "accident"[48] does not extend to cover consensual sex.

As Tipping J put it, the distinguishing feature is "the absence or presence of true consent".[49] Although he conceded that this distinction "might appear dubious" given that the definition does not mention anything about consent, he justified his approach using s 6 of the Act.[50] This section relates to interpretation and states that the s 25 definition of "accident" applies "only if the context does not otherwise require".[51] Tipping J stated that the definition of "accident" cannot apply without adjustment in the "unusual and difficult context" of pregnancy, particularly when one considers that the "force involved is of a particular and unique kind".[52]

However, this justification is not without its problems. As Tipping J was forced to clarify, this use of consent to distinguish between particular applications of "force" does not extend to other situations, such as injuries resulting by accident in the consensual sporting context.[53] Given the risk of

45 *Allenby*, above n 1, at [78].
46 At [30].
47 At [82] and [90].
48 Injury Prevention, Rehabilitation, and Compensation Act, s 25(1).
49 *Allenby*, above n 1, at [92].
50 At [93].
51 At [93].
52 At [93].
53 At [94].

unintentionally subverting areas of accepted coverage, there is perhaps much to be said for Elias CJ's reluctance to comment on this particular aspect without the benefit of fuller argument.

On the other hand, there does need to be a sound basis for excluding other unwanted pregnancies, especially when one considers the no fault nature of the accident compensation scheme. Society already bears the cost of injuries caused by foolishness or carelessness, so why not this kind of "accident" too? Whilst Tipping J's reasoning may be a little technical, particularly with regard to the interpretation provision, it is a valid attempt to draw the line at a point acceptable to society.

VI CONCLUSION

The decision of the Supreme Court in *Allenby* is a welcome return to the social contract philosophy behind the accident compensation scheme. Doctors will not be required to purchase extra insurance (on top of ACC levies) for just this one type of procedure. Claimants are not excluded from cover simply because of the nature of the personal injury they suffer. Arbitrary distinctions are thus avoided. The odd gap created by the Court of Appeal in *ACC v D* has been tidied up.

The practical outcome for the respondent and other women suffering unwanted pregnancies from failed sterilisations in the future is less clear. Although the pathway to compensation has been clarified, such claimants must still persuade the Accident Compensation Corporation that the failure was due to negligence on the part of the surgeon. Just how difficult this will be remains to be seen.

Another positive aspect of the decision is the Supreme Court's recognition that the physical impacts of pregnancy are not to be brushed aside simply because they are a natural process. This aligns the compensation entitlements of New Zealand claimants with those available to common law claimants in other major jurisdictions.[54]

54 See *Cattanach v Melchior* [2003] HCA 38, (2003) 215 CLR 1; and *McFarlane v Tayside Health Board* [2000] 2 AC 59 (HL).