

## TORT LAW UPDATE: 2008

### DEVELOPMENTS IN THE APPROACH TO THE DUTY OF CARE:

#### Introduction

A theme we have touched on in the last two seminars has been the way that New Zealand Courts have formulated and structured their approach to the duty of care in novel fact situations. In our previous reviews, two themes have emerged:

- (a). The three stage test set out in *South Pacific Manufacturing Co Ltd v NZ Security Consultants and Investigations Ltd*<sup>1</sup> ("**South Pacific**"), which focuses the Court's inquiry on questions of proximity, policy and "fairness", has been accepted as a general approach to all claims involving a novel duty of care. In particular, it is now accepted as the correct approach in analysing claims for personal injury, negligent misstatement, and the negligence of public authorities.<sup>2</sup>
- (b). The increasingly conservative approach of the New Zealand Court of Appeal to any extension of negligence liability.

In terms of the first of these issues, and the form and structure of the Courts' approach to a novel duty of care, practitioners may be pleased to know that nothing much has happened over the past two years to challenge the supremacy of the *South Pacific* test. It has been applied in almost all decisions on the duty of care in the High Court, the Court of Appeal and the Supreme Court.<sup>3</sup> Instead, most of the important developments in this area have been in respect of the second of these themes, and the attitude of the Court of Appeal to any expansion of liability in negligence.

As the Courts have made clear on a number of occasions, the approach in *South Pacific* is not a normative statement of the circumstances in which a duty of care will arise. Rather, it is a formal structure within which a range of factors may be considered by the Court. As a consequence of this, the Courts have tremendous flexibility in how they deal with the duty question in any novel fact situation. Courts often view this flexibility as the great strength of

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<sup>1</sup> [1992] 2 NZLR 282.

<sup>2</sup> *AG v Carter* [2003] 2 NZLR 160; *Rolls Royce NZ Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324.

<sup>3</sup> It was expressly endorsed by the Supreme Court in *Couch v AG* [2008] NZSC 45 at para 78.

this approach. The criticism that is often made, however, is that this flexibility comes at the expense of certainty.

Regardless of whether you see this flexibility as a good or bad thing, it is undeniable that since the mid 1990's at least, the Court of Appeal has used the flexibility inherent in the *South Pacific* test to take an increasingly conservative approach to the expansion of liability in negligence.<sup>4</sup> Because of the flexibility of the *South Pacific* approach, it is difficult point to anything more than a general informed impression in support of this conclusion. However, and as just one illustration of this point, we can look at the significant Court of Appeal decisions on the duty of care over the last 10 years, as reported in the New Zealand Law Reports. Over that period, there were 19 cases that were determined on the basis of a duty of care issue. Of those, 15 failed because the Court was not prepared to recognise the alleged duty of care.<sup>5</sup> In two cases, a duty of care was recognised.<sup>6</sup> In a further two cases, some formulations of the duty of care were recognised while others were not.<sup>7</sup>

Until recently, the Supreme Court has had little to say on this issue. Their decision in *Couch v Attorney General* [2008] NZSC 45 ("**Couch**") is the Court's first substantive discussion of the general approach to the duty of care in novel fact situations. The case raises the very real question of whether the conservative approach to the expansion of liability in negligence, an approach which has been such a feature of Court of Appeal decisions over the last 10 years, will continue, and whether the pendulum may be about to swing back in favour of plaintiffs. This case, and these questions, are the focus of this part of the seminar.

### ***Attorney General v Body Corporate 200200***

To understand the importance of the decision in *Couch*, it is necessary to briefly discuss some of the immediate context for that decision, and in particular, the decision of the full bench of the Court of Appeal in *Attorney General v Body Corporate 200200* ("**Body**

<sup>4</sup> In *Bella Vista Resort Ltd v. Western Bay of Plenty DC* [2007] 3 NZLR (CA) 429, William Young P noted that over the last 20 years; "the tide has very much gone out on negligence claims" (para 70). Chambers J referred to a "sea change" in the approach of the commonwealth Courts (para 86).

<sup>5</sup> *Brownie Wills v Shrimpton* [1998] 2 NZLR 320; *Morrison v Upper Hutt City Council* [1998] 2 NZLR 331; *Knox v Till* [1999] 2 NZLR 753; *Boyd Knight v Purdue* [1999] 2 NZLR 278; *B v AG* [1999] 2 NZLR 296 (overturned on appeal to the Privy Council); *R M Churton & Co v Kerslake & Pts* [2000] 3 NZLR 406; *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179; *Midland Metals Overseas Ltd v Christchurch Press Co Ltd* [2002] 2 NZLR 289; *Wellington District Law Society v Price Waterhouse* [2002] 2 NZLR 767; *AG v Carter* [2003] 2 NZLR 160; *NZ Meat Board v Paramount Exports Ltd* [2003] 1 NZLR 441 (overturned on appeal to the Privy Council); *Frost & Sutcliffe v Tuiara* [2004] 1 NZLR 782; *Attorney General v Body Corporate 200200* [2007] 1 NZLR 925; *AG v Hobson* [2007] 1 NZLR 374; *Bella Vista Resort Ltd v Western Bay of Plenty DC* [2007] 3 NZLR 429.

<sup>6</sup> *Riddell v Porteous* [1999] 1 NZLR 1; *Price Waterhouse v. Kwan* [2000] 3 NZLR 39.

<sup>7</sup> *AG v Prince* [1998] 1 NZLR 262; *Rolls Royce NZ Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324;

*Corporate 200200*).<sup>8</sup> That case was the most recent and authoritative statement of the approach to the duty issue prior to *Couch*.

The *Body Corporate 200200* decision is familiar to most commercial litigators. It was part of the “leaky building” litigation that arose from the allegedly negligent construction of the Sacramento complex. One of the defendants in those proceedings was the Building Industry Authority (“**BIA**”), who was the regulator of the building industry at the relevant times. The plaintiff alleged a number of causes of action against the BIA, including its approval of the particular method of construction used in the affected buildings (face-fixed monolithic cladding), its approval of the building inspector who inspected the construction, and its approval of what turned out to be the inadequate insurance arrangements of the inspector.

The BIA applied to strike out the claims against it, and was successful in its application. We will return to the case when discussing the liability of public authorities. However, the importance of the decision in this context comes from the way in which the Court approached the issue of the duty of care, and in particular, its development of a concept described as a “situational duty of care”.

A “situational duty of care” involves the formulation of a duty by reference to what actually happened between the parties (i.e. the particular and specific chain of events that led to the damage now suffered by the plaintiff), rather than the more abstract question of the “over-arching” nature of the relationship between the parties, and whether that relationship is of a type which could support a duty of care. The Court describes it as involving a process of “backward reasoning”, whereby the plaintiff uses the circumstances of what actually happened between the parties as the basis for its argument in favour of a duty of care, rather than focusing first on the general nature of its relationship with the defendant.

In the context of this claim, an example of the “over-arching duty” was the question of whether the BIA had a general duty to warn the minister and participants within the building industry of potential issues relating to the health, safety and enjoyment of their homes. An example of the situational duty was the question of whether, regardless of this general duty to warn, there was a more specific duty that arose from concerns that were developing, and of which the BIA was aware, about the use of face-fixed monolithic cladding systems.

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<sup>8</sup> [2007] 1 NZLR 95.

Writing for the full court, William Young J described this approach (and its problems) as follows (para 43):

*“In cases of this sort, it is customary for a plaintiff to focus on what is alleged to be the negligence of the defendant and to formulate the proposed duty of care by reference to that alleged negligence. Such a duty of care may fairly be described as situational. This approach, if adopted by the Court, is likely to favour a plaintiff; this is because it requires a primary focus on what is alleged to be the fault of the defendant and the limited nature of the asserted duty (with its narrow scope) is less likely than a more broadly expressed duty to engage counter veiling and policy arguments. This has been very much the argument of the body corporate in this case; identifying what it claims to have been the faults of the BIA and to then structure the assorted duties of care around those faults”.*

Justice William Young did not suggest that an analysis of the potential duty of care by reference to a “situational” approach was always inappropriate. He recognised that it had often been used by the Courts. Rather, his concern was that on this approach, it was too easy to ignore the broader issues of policy that may be raised by the alleged duty. For that reason, he emphasised that if the alleged duty of care could be described as “situational”, then the Court should (para 46):

- (a). *During the proximity phase of the inquiry, be careful to ensure that the narrow duty alleged can credibly be regarded as discreet from a broad (and untenable) duty of care in relation to the relevant statutory functions; and*
- (b). *In assessing policy considerations, analyse carefully the implications, in terms of the scheme and structure of the relevant statute, of recognising even a situational duty.”*

This separation out of a concept of a “situational” duty, as opposed to the broader “over-arching” duty, was clearly intended to act as a limit on the expansion of the duty of care. In the Court’s view, analysing a situational duty of care purely in its own terms was likely to be a “plaintiff friendly” approach. The decision was a clear direction to the Courts to ensure their focus remained on the broader implications of recognising a duty of care in the case before them, rather than getting too caught up in the errors made in the particular case.

The conservative nature of this approach is also apparent when we consider how it would apply to a strike out application. A strike out application is a “defendant-friendly” procedure. The argument of the defendant always has the character that, no matter what actually happened in the particular case before the Court, the plaintiff’s claim could never succeed.

A “situational duty” is, by its very nature, less suited to a successful strike out application. With a situational duty of care, the duty is derived from the particular facts and circumstances arising between the parties, which are unlikely to be fully determined until after discovery and trial. However, once the focus of the Court shifts from the particular circumstances of the case to the more general principle represented by the claim, then the potentially greater scope for a strike out is more readily apparent. Requiring Courts to look to the over-arching duty, is commonly what the defendant is trying to persuade the Court to do in its strike out application.

The decision of the Court in *Body Corporate 200200*, and its reference to situational duties of care, has found some support in subsequent cases. It would be fair to say that most of the cases that have applied the approach have been decisions of the Court of Appeal itself.<sup>9</sup> There have been comparatively few High Court decisions that have relied on this analysis in any determinative way.<sup>10</sup> However, *Body Corporate 200200* decision was a unanimous decision of a full bench of the Court of Appeal. Its approach was reaffirmed in a number of subsequent cases. There is no doubt that the Court of Appeal intended it to be a decision of broad effect.

### ***Couch v Attorney General***

Against this background came the decision in *Couch*. *Couch* concerned the tragedy at the Panmure RSA where William Bell killed three of his fellow workers, and seriously wounded Ms Couch. At the time of the murders, he was on parole for previous convictions for aggravated robbery, and was under the supervision of the probation service. Ms Couch brought proceedings against the probation service for its failure to warn Mr Bell’s co-workers about the risks posed by an association with Mr Bell. While the claim sought compensatory and exemplary damages, the Supreme Court proceeded on the basis that the claim was for exemplary damages alone.

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<sup>9</sup> See for example, *Bella Vista Resort Ltd v Western Bay of Plenty DC* [2007] 3 NZLR 429.

<sup>10</sup> As examples of the few High Court cases that have referred to the approach, see *White v AG* (HC, Wellington, 28/11/2007), Miller J; *Te Mata Properties Ltd v Hastings DC* (HC, Napier, 17/8/2007, Williams J); *Struthers v Patterson Co-Partners Architects Ltd* (HC, Auckland, 30 May 2007, Frater J), *Harbourcity Developments Ltd v Owen* (HC, Auckland, 30 March 2007, Frater J).

## **The Court of Appeal Decision**

The decision of the Court of Appeal in *Couch* is a good illustration of the approach developed in the *Body Corporate 200200* case.<sup>11</sup> William Young P, in describing the approach to duty questions, reproduced in full his discussion of “situational duties” from *Body Corporate 200200*. Justice Chambers also expressly endorsed this approach, referred to the idea of “reasoning backwards from the alleged negligence” as leading to an “illegitimate reasoning process” (para 166).

This reliance on the distinction between a “situational” duty of care, and the over arching duty of care, was also apparent from the substance of the decision of the majority. For both William Young P and Chambers J, the claim of Ms Couch was analysed (and dismissed) by reference to whether there was a general duty on the probation service in how it managed parolees, which could be breached by a failure to warn employers and work mates of Mr Bell’s criminal propensities. Such a general duty was thought to be contrary to the Probation Service’s broader duties, and in particular its primary obligation to rehabilitate offenders. Put another way, regardless of whether or not there was a situational duty in this case, any claim must fail by reference to the over-arching duty that was alleged.

## **The Decision of the Supreme Court in *Couch***

The Supreme Court was unanimous in reinstating the claim by Ms Couch, as it related to the duty of care question, although the Court split two-three in its reasons. The decision of the Court could be summarised as follows:

- (a). The Court was unanimous in holding that Ms Couch may be able to establish at trial a sufficient relationship of proximity between herself and the probation service.
- (b). The majority opinion, delivered by Tipping J, held that a relationship of proximity would only exist if Ms Couch could show “either as an individual or as a member of an identifiable and sufficiently delineated class” that she was or should have been known by the defendants to be subject to a “special risk” of suffering damage of the kind she suffered (para 112). Such a special risk distinguished her position from the general risk faced by all members of the public. The majority was satisfied that she may be able to establish “special risk” at trial.

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<sup>11</sup> *Hobson v AG* [2007] 1 NZLR 374.

- (c). The minority opinion, delivered by Elias CJ, held that Ms Couch may be able to establish a relationship of proximity regardless of whether she was able to show that she was exposed to any special risk. It may be sufficient that she was simply a member of the general public.
- (d). The Court was unanimous in holding that the policy reasons relevant to the existence or otherwise of a duty of care could not be properly formulated at the strike out stage, and without a full review of the relevant facts. It may turn out, following investigation of the facts, that the poor supervision of Mr Bell was a consequence of inadequate funding for the probation services, in which case it may be difficult to impose a duty of care. Equally, it could be that there was simply a series of administrative failures by the probation officer, which may properly be a basis for liability. These matters required to be investigated at trial.

Accordingly the Supreme Court allowed the question of duty to proceed to trial. They did not at that stage address the question of whether exemplary damages were available as a remedy, calling for further submissions and a hearing on the point.

### **The Minority Approach to the Duty Question**

Leaving aside the particular result in the case, which involved a potentially significant extension of liability in negligence, the decision of the minority contained an important and significant discussion of the approach a court should take to analysing the duty of care in novel situations. More particularly, the minority decision rejected William Young P's idea of "situational" duties of care. Lying behind the minority approach appears to be a concern that the reaction of the Courts to the extremes of negligence liability, through the 1980's and early 1990's, may have been too severe, and that the time may have come for a more expansive approach to negligence liability.

- (a) The minority was not attracted to the development of any areas of "blanket immunity", within which a person would be free to act without regard to potential private law duties. They favoured a less restrictive, and more fact specific inquiry into the duty of care. The approach is essentially the exact opposite of that applied by the Court of Appeal in *Body Corporate 200200*. In the view of the minority, a "situational" analysis of the duty of care was likely to be the appropriate starting point in most cases.

- (b) The Court was very reluctant to deal with novel duty of care questions within a strike out application. (Para 32, 35-36):

*[32] “It is often not easy to decide whether a duty of care not previously recognised by authority is owed to the plaintiff ...it may be unrealistic to expect that the pleadings and arguments to support a claim will always be adequate at an early stage of the proceedings. Caution in disposing of such cases on a summary basis is necessary both to prevent injustice to claimants, and to avoid skewing the law with confident propositions of legal principle or assumptions about policy considerations, undisciplined by facts.*

*[34] Proper and necessary limits to liability in negligence do not require blanket immunity through over- restriction of the circumstances in which a duty of care arises. There is particular risk of such over-restriction on summary consideration on strike out where policy considerations are said to preclude a duty of care. Policy considerations arise and overlap at all three inquiries in the claim for negligence: duty of care, breach and remoteness of loss ...*

*[35] Where liability for negligence is determined at trial, it should not much matter whether questions of policy are considered as going to duty of care or its breach. But on strike-out on a threshold question of duty of care, it may matter a great deal. The facts as eventually found may make it clear that the policy consideration was not engaged in what happened and is not a justification for a denial of responsibility.*

*[36]... If the policy of promoting the reintegration of parolees is examined in considering the question of breach at trial, no such blanket immunity will be imposed on the basis of hypothetical facts. It will come to be considered in the context of the actual supervision of Bell. It may well be that any deficiencies in his supervision arose not because of legitimate policies which outweigh the general policy of the law in providing redress, but through administrative blunder or professional error for which the Probation Service is properly liable.”*

In their view, only “high level and generalised legal policies” relating to the duty of care would be suitable for strike out (para 43).

- (c) The Court also expressly rejected the criticism made by the Court of Appeal in the *Body Corporate 200200* case of “backward reasoning” (para 42):

“Although some may deprecate this as “backward reasoning”, it strikes us as largely inevitable when determining liability for harm carelessly caused.”

- (d) Another striking feature of the decision were the authorities referred to by the Court. There was barely any reference to the more modern authorities of the Court of Appeal on the duty of care, other than the concurring opinion of Gault J in *Wellington District Law Society v Price Waterhouse*,<sup>12</sup> a judgment which it has to be said has received little comment since it was delivered. There was, however, a great deal of discussion of cases such as *Donoghue v Stevenson*,<sup>13</sup> *Anns v London and Merton Borough Council*,<sup>14</sup> *Sutherland Shire Council v Hayman*,<sup>15</sup> *Kamloops v Neilsen*<sup>16</sup> and other foundational cases that heralded the start of the modern expansion of the duty of care. Indeed, the minority appears to view the approach in New Zealand as including simply an application of *Anns* (para 52).
- (e) The decision in the case itself is also clearly expansionary of liability. The basis on which the minority allowed the case to proceed was that it was possible that the probation service owed a general duty of care to members of the public in respect of reoffending by parolees under their supervision. It would clearly be a significant expansion of liability, if such a duty of care was established at trial.

It is undoubtedly the case that the minority judgment involved a rejection of the approach outlined by William Young J in the *Body Corporate 200200* case. It is also significant that the members of the majority said little to support that approach, and offered no comment on the broader discussion of these issues by the minority. Justice Tipping in particular is a judge who has delivered important opinions in a number of significant decisions on the duty of care while sitting in the Court of Appeal.<sup>17</sup>

It is impossible to know at this stage whether the decision in *Couch* is the dawn of a new era in negligence liability in New Zealand. Clearly there is more to be said by the Supreme Court on this issue. However, it is a clear indication that some members of the Court at least feel that the approach has become too restrictive. There are also some indications that members of the Court of Appeal have taken the decision in *Couch* to heart, at least in

<sup>12</sup> [2002] 2 NZLR 767.

<sup>13</sup> [1932] AC 562 (HL).

<sup>14</sup> [1978] AC 728 (HL).

<sup>15</sup> [1985] 157 CLR 424 (HCA).

<sup>16</sup> [1984] 2SCR2 (SCC).

<sup>17</sup> See for example, *AG v Prince* [1998] 1 NZLR 262; *B v AG* [1999] 2 NZLR 296; *Brownie Wills v Shrimpton* [1998] 2 NZLR 320; *Price Waterhouse v Kwan* [2000] 3 NZLR 39; *AG v Carter* [2003] 2 NZLR 160.

respect of the approach to strike out applications.<sup>18</sup> At present, the only case before the Supreme Court likely to raise duty of care issues of any significant is *New Zealand Exchange Ltd v BNZ* (SC13/2008). Argument was heard on that case on 7 July 2008, with the Court's decision reserved.

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<sup>18</sup> *Body Corporate 202254 v Taylor* [2008] (NZCA 317).