

1. INTRODUCTION

1.1 In 2003 we delivered a similar seminar, updating practitioners on significant recent developments in tort law. In my paper, I focussed on recent developments in the law of negligence.¹ This paper is intended to update practitioners on further developments in that area since the last seminar. There are three topics I want to address:

- (a) The general approach in New Zealand to determining the duty of care;
- (b) The relevance of contractual relationships in determining a duty of care; and
- (c) Damages for loss of chance.

1.2 The first two topics start with a consideration of the Court of Appeal decision in *Rolls-Royce New Zealand Ltd v Carter Holt Harvey* [2005] 1 NZLR 324 (“*Rolls-Royce*”). The last topic involves consideration of the decision of the Court of Appeal in *Benton v Miller & Poulgrain* [2005] 1 NZLR 66 (“*Benton v Miller*”).

2. THE DECISION IN ROLLS-ROYCE

The Facts

2.1 The facts of *Rolls-Royce* are complex, and only a general understanding of them is necessary for this seminar.

2.2 The case concerned the design and construction of an electricity generation plant at CHH’s Kinleath Mill. The primary fuel for the plant was to be wood waste from CHH’s mill. The plant would be operated by CHH, and the electricity generated sold to ECNZ.

2.3 The contractual arrangements for the construction of the plant were somewhat unusual. It was to be built by Rolls-Royce (“**RR**”). However, rather than contracting with RR directly, CHH and ECNZ entered into a contract under which ECNZ would procure the design, manufacture and construction of the plant (“**the co-generation contract**”), and ECNZ entered into a contract with RR for it to design, construct and commission the plant (“**the turnkey contract**”).

2.4 While there was no direct contractual relationship between CHH and RR, there was a close relationship between them for the purposes of construction (and also between the two sets of contracts). For example:

¹ See Fisher, Fisher and Barker, “Tort Law Update”, ADLS CLE programme, 18 November 2003.

- (a) The co-generation contract was entered into on the basis that RR was to be the subcontractor for the turnkey contract, and RR had already done some design and construction work on the plant before that contract was signed.
- (b) The co-generation contract made a number of explicit references to the turnkey contract.
- (c) CHH had some control over the construction process.
- (d) On commissioning of the plant, the benefit of all rights of ECNZ under the turnkey contract enured for the benefit of CHH, to the extent that they suffered any loss, and CHH could require ECNZ to take reasonable action to enforce those benefits on its behalf.
- (e) In certain circumstances, CHH was entitled to take an assignment of ECNZ's rights under the turnkey contract.

2.5 Both the co-generation and the turnkey contracts contained limitations of liability in respect of indirect losses.

2.6 Problems occurred during the construction and commissioning of the plant, and CHH and ECNZ entered into an amending agreement in an effort to address those issues. In summary, ECNZ was to use its best endeavours to procure RR to perform the turnkey contract and remedy any defects. CHH was also allowed to carry out certain work in the event of default, and charge that work back to ECNZ.

2.7 The amending agreement was apparently not sufficient to resolve all issues, and CHH filed proceedings in the High Court against ECNZ and RR. The claim against ECNZ was in contract and under the Fair Trading Act. The claim against RR was in negligence. RR applied to strike out that claim.² The basis for that application was that the alleged duty of care was inconsistent with the nature of the contractual arrangements between the parties.³

² There were ultimately two actions in negligence pleaded against RR. The first was as described above. The second was introduced after the initial strike out application, and alleged various negligent misstatements. RR accepted that it could not strike out this cause of action. There was also an application by ECNZ to strike out the claim for damages for losses against it, on the basis of limitation provisions in the contract as to the type of damages recoverable. The Court of Appeal was not prepared to determine that question on a strike out application.

³ This is often referred to as a "contractual matrix" or "contractual chain" argument. In that regard see the decisions in *Price Waterhouse v The Trustees, Executors & Agency Co of NZ Ltd* (2000) 6 NZBLC 103,012 (CA); *RM Turton & Co Ltd (In Liq) v Kerlake and Partners* [2000] 3 NZLR 406 (CA); *New Zealand Meat Board v Paramount Export Ltd* [2003] 1 NZLR 441 (CA).

The High Court decision

- 2.8 Both the master, and the High Court on review, rejected RR's application. The High Court was clearly not convinced that CHH's claim would ultimately succeed at trial. There were strong indications that the parties had always intended their liability to be governed by the contracts alone, and it was unlikely that a duty of care additional to those arrangements could arise. However, the parties had not expressly excluded the possibility of such a duty of care, and the Court could not discount the possibility that some facts would subsequently emerge at trial that supported such a duty of care.

The Court of Appeal decision

- 2.9 The appeal was allowed. The finding of the Court of Appeal will be described in some detail later. However, in general terms, the Court of Appeal found that while loss to CHH may have been foreseeable as a consequence of any negligence by RR, the relevant contractual matrix within which any duty of care arose precluded a relationship of proximity. In addition, in a situation of commercial parties with an equality of bargaining power, there are strong policy considerations in favour of holding them to their bargains. In these circumstances, it was not fair, just and reasonable to impose such a duty.

3. THE APPROACH TO THE DUTY OF CARE

Introduction

- 3.1 Perhaps the most significant aspect of the decision in *Rolls-Royce* is the analysis by the Court of the general approach to the duty of care.
- 3.2 New Zealand has (until recent times at least) been consistent in its application of the two stage test suggested by Richardson J in *South Pacific Manufacturing Co. Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282. That test is well known. It involves a two stage inquiry into questions of proximity and policy, in order to determine whether or not a duty of care would be "fair, just and reasonable" in the circumstances.
- 3.3 However, while New Zealand Courts have been consistent in their reference to the test in *South Pacific Manufacturing*, the generality of that test has lead to problems in its application. It is fundamentally a modified version of Lord Wilberforce's two-stage test in *Anns v London & Merton Borough Council* [1978] AC, and shares the tendency of

that test to expand liability in negligence, rather than to prescribe its limits.⁴ There have also been remarkably few attempts to describe the requirements at each step of the test and what is meant by the concepts of “proximity”, “policy” and “fair, just and reasonable”.⁵

- 3.4 Against that background, the discussion in *Rolls-Royce* of the approach in New Zealand to the duty question is to be welcomed. The Court provides a detailed and reasoned explanation of the test in *South Pacific Manufacturing*, and in particular, it sets out the requirements of what must now be seen as the primary inquiry into proximity. The discussion in the case should give practitioners much needed certainty in determining duty questions, particularly when dealing with commercial parties.

The *Rolls-Royce* approach

- 3.5 The approach of the Court can be summarised as follows:

- (a) The Court reaffirmed that the test for establishing a duty of care in New Zealand is the two stage test of *South Pacific Manufacturing* (para 58). The Court emphasised that the test is not a straight jacket, but rather a framework for analysis. No presumption arises from the stage at which any factor is considered. The important thing is that all relevant factors are considered (at para 64):

“[T]he important object is that all relevant factors are properly weighed, not the stage of the inquiry at which they are taken into account.”

- (b) Proximity is concerned with the nature of the relationship between the parties. The Court describes it as essentially an inquiry into the “morality” of imposing a duty of care (at para 60):

“The proximity inquiry can be seen as reflecting a balancing of the plaintiff’s moral claim to compensation for avoidable harm and the defendant’s moral claim to protection from undue restrictions on its freedom of action and from an undue burden of legal responsibility. That necessarily involves a consideration of how close the nexus is between the defendant’s alleged negligence and the plaintiff’s loss and the degree of harm to the plaintiff”.

- (c) The Court then comprehensively reviewed the factors that form part of the proximity inquiry. The Court referred to the following as being of particular significance:

⁴ See *Allied Finance v Haddow* [1983] NZLR 22 at 29 per Richardson J.

⁵ The notable exceptions are *Connel v Odum* [1993] 2 NZLR 257 (CA) and *Wilson & Horton Ltd v AG* [1997] 2 NZLR 513.

- (i) Reasonable foreseeability. This remains a necessary part of any duty of care. However, on its own, it is not a “sufficient” basis on which to impose a duty of care (para 59).
- (ii) The degree of analogy with other cases where a duty of care has been recognised (or rejected). This ensures a gradual, principled and cohesive development of the law (para 59).
- (iii) The “proportionality” of any proposed duty of care, both in terms of the burden it places on the defendant compared to the risk that their activity created, and the seriousness of the consequences to the defendant as opposed to their degree of fault.

- (iv) “Vulnerability”. The Court described “vulnerability” as (para 61):

“[W]hether a defendant with special skills has power over a vulnerable plaintiff”.

- (v) Whether there are other remedies available to the plaintiff. Referring to the work of Professor Todd, the Court described the focus of this factor as being (para 62):

“What steps a person could reasonably have taken to look after his or her interests and, in commercial cases, includes the consideration of bargaining power and market reality.”

- (vi) As has always been the case, the nature of a loss suffered by the plaintiff is of significance (para 63):

“The Courts have been less willing to impose a duty of cases of economic loss than where there is physical damage to property or, in jurisdictions other than New Zealand when its accident compensation regime, physical injury ... this is because claims for economic loss may result in mere transfer of wealth, so that one person’s loss is another’s gain, whereas harm to a person or property involves net loss to social wealth.”

- (vii) The statutory and contractual background will also be of significance in determining the relationship between the parties.⁶

- (d) The Court did not discuss in any detail the policy factors that may be taken into account. It described the policy inquiry as “concerned with the effect of the

⁶ For discussion of the significance of the statutory background, see the decision in *AG v Body Corporate No. 200200* (CA, 1 December 2005, CA 30/05).

recognition of a duty on other legal duties and, more generally on society” (at para 58). This description is itself, however, one of some significance. It reaffirms a principled division between proximity and policy factors, with the former being concerned with the relationship between the parties, and the later factors external to that relationship.

- (e) The Court did, however, refer to the following factors as being of importance in the policy inquiry:
 - (i) The need for commercial certainty;
 - (ii) Contractual and statutory considerations;
 - (iii) Consistency with developments in other jurisdictions;
 - (iv) Consistency with previous obiter statements by the Court.
- (f) As a final matter, the Court looks to whether or not such a duty of care would be fair, justice and reasonable, although it was not apparent whether any additional factors arose under this review.

Comment

- 3.6 The significance of this decision should not be underestimated. It is perhaps the most clearly reasoned expression by the Court of the test in *South Pacific Manufacturing*. It is not entirely consistent with the other recent Court of Appeal decisions,⁷ but the result in those decisions could easily be accommodated within the analysis suggested. It is a decision that is likely to become the leading New Zealand authority on the duty of care. It certainly appears to have been treated that way in subsequent decisions.⁸
- 3.7 There are however two particular comments I would like to make on the decision. The first concerns the explicit recognition by the Court of the “vulnerability” of the plaintiff as an important consideration in determining proximity. The vulnerability of the plaintiff has undoubtedly been an important feature in the modern development of the duty of care.⁹ The problem has been that this understandable desire to protect the vulnerable has not always been explicit in the Court’s decisions, and general principle has at

⁷ For example, *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA).

⁸ See for example, *The Favourite Ltd v Vavasour* (HC, Blenheim, 22 March 2005, Ellen France J); *Bella Vista Resort Ltd v Western BoP District Council* (HC, Tauranga, 23 August 2005, Simon France J); *McKinlay Hendry Ltd v Tonkin & Taylor Ltd* (CA, 9 December 2005).

⁹ See for example the line of authorities concerning residential building negligence. See also *Price Waterhouse v Kwan* [2000] 3 NZLR 39.

times appeared to become somewhat distorted in order to accommodate those concerns. An explicit recognition, and further development of this concept, will undoubtedly assist in the principled development of the law in this area.

3.8 Perhaps of more interest, however, are the comments made by the Court about the assumption of responsibility. There has been a great deal of discussion of this concept in the recent case law and academic writing.¹⁰ Together with questions of reliance, it has been the central inquiry negligent misstatement claims. The current trend has been to talk in terms of a “deemed” assumption of responsibility - i.e. in the circumstances of this case, the defendant will be *deemed* to have assumed responsibility to the plaintiff.¹¹ Understood in this way, it has never been clear what the concept adds to the proximity inquiry. What are the circumstances in which an assumption of responsibility will be deemed to arise?

3.9 The Court of Appeal has now confirmed that the concept of a “deemed” assumption of responsibility adds very little to the proximity inquiry. The Court confirmed that the circumstances in which an assumption of responsibility will be deemed are essentially those relevant to an inquiry into proximity (at para 99):

“Whether it is fair, just and reasonable to deem an assumption of responsibility then a duty of care will depend on a combination of factors, including the assumption of responsibility for the task, any vulnerability of the plaintiff, any special skill of the defendant, the need for deterrence and promotion of professional standards, lack of alternative means of protection and so on – that is essentially the matter discussed above [in the discussion concerning proximity]. Wider policy factors will also need to be taken into account.”

4. THE RELEVANCE OF CONTRACTS IN NEGLIGENCE CLAIMS

Introduction

4.1 The second point of significance addressed by the Court of Appeal in *Rolls-Royce* is the impact of voluntarily assumed contractual relations on the duty question (the “**contractual matrix**” argument).

4.2 This problem has never been easy. Courts have always accepted that parties are free to contract out of their duties in tort, at least in respect of claims for property damage or economic loss. The difficulty has been how to deal with plaintiffs who could have contracted for protection against the loss they suffered, but chose not to, or plaintiffs

¹⁰ See generally the review by Professor Coote, “Assumption of responsibility and pure economic loss in New Zealand” [2005] NZ Law Review 1.

¹¹ See *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA); *AG v Carter* [2003] 2 NZLR 160 (CA).

and defendants who have already addressed the loss suffered by the plaintiff in their contractual dealings.

- 4.3 Over the last 5 years, New Zealand courts have been developing a principle that, at least in respect of commercial parties, with equality in their bargaining power, the ordinary effect of a contractual matrix through which those parties are linked will take precedence over any common law duty of care. This principle has now received its most comprehensive discussion and confirmation in the decision in *Rolls-Royce*.

The decision in *Rolls-Royce*

- 4.4 The Court in *Rolls-Royce* made a number of important findings in respect of how a contractual matrix linking the parties can impact on any potential duty of care. In my view, the points of significance to emerge from the decision are as follows:

- (a) The Court accepted that a contractual matrix between the parties is a factor that goes towards the question of proximity rather than policy. This was a point on which there were conflicting authorities.¹² As a consequence, the Court made it clear that it was not appropriate to decide whether, absent the relevant contracts there was a duty of care, and to then decide whether those contracts negated that duty. Rather, the question was whether having considering all relevant factors including the contracts, there was a relationship of proximity. This undoubtedly increases the significance of the contractual matrix in determining duty questions.
- (b) The Court of Appeal confirmed that there is no such thing as a duty to take reasonable care to *perform* a contract. Where the defendant's allegedly negligent action was carried out pursuant to a contract, it can only ever owe a duty to take reasonable care in *performing* the contract (at para 66):

“There is no duty in tort to take reasonable care to perform a contract. At most, there is a duty to take reasonable care in or while performing the contract, which is quite a different concept. Carter Holt’s pleadings mainly assert the former. A duty formulated in such terms is essentially contractual in nature and therefore cannot be owed to one who is not a party to the contract.”

- (c) The Court saw this distinction (i.e. between a duty to perform a contract and a duty in performing the contract) as significant. It did not discuss in any detail the

¹² Compare *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA) with *Turton v Kerslake* [2000] 3 NZLR 405. The weight of authority was in fact heavily in favour of treating the contractual matrix as part of the policy inquiry. I discussed this point in our earlier seminar, *supra* at note 1.

nature of that distinction. However, the effect of the Court's comments appear to be that if your complaint is simply that the defendant did not do what they were required to do under a contract, then it is unlikely that they owed you a duty of care. At the very least, a plaintiff must show that the way in which the defendant carried out its obligations under the contract was itself negligent and caused it loss.

- (d) While the Court would no doubt object to phrases such as “a rebuttable presumption”, it is clear that where there is an equality of bargaining position between commercial parties, the Court will usually uphold the parties' common intentions as expressed in their contractual arrangements. It is apparent that this presumption is not easily displaced. The mere fact that ECNZ possessed special skill relative to CHH, or that there was contact between CHH and ECNZ during the design and construction of the plant was not sufficient to rebut this presumption. The implication in the judgment is that there would need to be some representation or conduct by the defendant that it accepted some additional liability to the plaintiff (i.e. a negligent misstatement claim).
- (e) As a matter of principle, it would seem that the contractual matrix must be *inconsistent* with the alleged duty of care. However, in a commercial context at least, the threshold of inconsistency appears to be reasonably low. In this case, the mere fact the plaintiff failed to bargain for the protection it now sought, appeared to be sufficient.
- (f) The question of inconsistency can also be approached by reference to the allocation of risk by the parties apparent from the contractual matrix. The High Court had refused to strike out the claim because the limitation clauses did not expressly refer to claims in tort. The Court of Appeal rejected such a narrow approach (at para 112):

“The important point, however, is not that the clauses contemplate tort liability but that they attempt to limit liability and that this allocation of risk was with the knowledge of Carter Holt.”

- (g) Instead of inconsistency, the relevance of the contractual matrix can also be approached by reference to estoppel-like principles (at para 110):

“The presence of a limitation clause in the contract between a head contractor and subcontractor signifies clearly, if known to the owner, the subcontractor's unwillingness to do the job otherwise and subject to the limitation. The owner's acquiescence can then be deemed an acceptance

of the terms under which alone the subcontractor is prepared to enter a relationship defining its duty to the owner.”

The decision in *McKinlay Hendry v Tonkin & Taylor*

- 4.5 The approach in *Rolls-Royce* was recently affirmed by the Court of Appeal in *McKinlay Hendry Ltd v Tonkin & Taylor*.
- 4.6 Tonkin & Taylor was asked to prepare a geotechnical report on a site for a proposed cool-store. The cool-store was to be built on reclaimed land. It carried out that report pursuant to a contract with a company called Centrepoint, who at that stage was intended to be the owner of the cool store. Unknown to Tonkin & Taylor, Centrepoint was later replaced as the intended owner by Kings Wharf.
- 4.7 The report by Tonkin & Taylor was addressed to Centrepoint and contained the following provision:
- “This report has been prepared solely for the benefit of you as our client with respect to a particular brief given to us, and data opinions contained in it may not be used in other contexts or for any other purpose without prior review and agreement.”
- 4.8 On the basis of Tonkin & Taylor’s report, and the quantity surveyor’s estimate of the cost of the ground improvements suggested (dynamic compaction), Kings Wharf signed a building contract with a company called Long for construction of the cool store.
- 4.9 It turned out that the proposed solution of dynamic compaction was not needed and the fixed price construction contract was therefore substantially higher than the likely costs of construction. Accordingly, Kings Wharf brought proceedings against Tonkin & Taylor on the basis of negligence (negligent misstatement) in the preparation of that report, seeking to recover what it viewed as the “windfall” to Long under the construction contract.
- 4.10 The Court found that Tonkin & Taylor had been negligent in the preparation of their report. The question was what impact, if any, did the exclusion clause and the general contractual relationship between the parties have on any duty of care that may have been owed to Kings Wharf as a subsequent owner/developer of the site.
- 4.11 The Court found that the clause was intended to restrict the use that could be made of the report, and necessarily excluded any reliance on the report by Kings Wharf. In

those circumstances, Tonkin & Taylor could only owe Kings Wharf a duty of care if (at para 32):

“[It] subsequently conducted itself in such a way as to make it reasonably foreseeable that a third party would rely on the report, contrary to the stated intention when the report was submitted.”

The Court found there was no such conduct here.

4.12 In any event, the Court also referred to the contractual arrangements between the parties, which clearly allocated responsibility for matters such as soil condition. Against this background of contractual rights, the Court, perhaps rather bluntly, described the position of the plaintiff, as follows (at para 44):

“The appellants were content to define their rights and obligations by contract. The way in which they chose to allocate the risk associated with the ground improvements turned out to be to their disadvantage. It was a risk they voluntarily assumed. In the circumstances, they must live with the consequences.”

Comment

4.13 These cases clearly establish the principle that where there are commercial parties within a contractual matrix, the way they have chosen to allocate their risks by contract will usually be upheld by the courts.

4.14 One additional comment I would like to make, however, concerns the continued existence of concurrent liability in contract in tort, where commercial parties have constructed a detailed contractual relationship between themselves. Concurrent liability in contract in tort has been emphatically accepted by our Court of Appeal in a number of recent decisions.¹³ However, those cases have largely concerned situations where the nature of the relationship between the parties has not been the subject of extensive negotiation recorded in a detailed contract, and where there have otherwise been clear indicators of a duty of care (in particular, a “vulnerable” plaintiff). Whether a plaintiff can establish the need for a concurrent duty of care independent of the contract, where there are sophisticated commercial parties, and in circumstances where there can be no duty owed to perform the contract, is debatable. Presumably, a desire to give those parties more favourable limitation provisions would not on its own be sufficient.

5. DAMAGES FOR LOSS OF CHANCE IN NEGLIGENCE

¹³ See for example *Price Waterhouse v Kwan* [2003] 3 NZLR 39 (CA); *Frost & Sutcliffe v Tuiara* [2004] 1 NZLR 782 (CA).

Introduction

- 5.1 Damages for loss of chance are a response to evidential uncertainty as to the occurrence of past events. Where plaintiffs are unable to show on the balance of probabilities what happened in the past, loss of chance damages allow them to seek damages according to the *probability* that the event or events occurred.
- 5.2 Loss of chance damages are controversial. They are a direct challenge to the usual 'all or nothing' approach to liability, which says that if you can show a more than 50% probability that an event or series of events occurred, you recover 100% of your loss, but if the probability is less than 50%, then you recover nothing. By contrast, under a loss of chance analysis, the plaintiff who shows only a 51% probability of an event occurring recovers only 51% of her claim, while a plaintiff who can only show a 49% probability of an event occurring still recovers 49% of their loss.
- 5.3 Regardless of this tension, damages for loss of chance are an accepted feature of the law of negligence in New Zealand (and indeed contract and equity). The key question is *when* are they available. Professor Todd in the text "The Law of Torts in New Zealand" has commented that "we still need to search for a principled answer" to this question (p. 1000). The Court of Appeal has attempted to provide such an answer in its decision in *Benton v Miller & Poulgrain* [2005] 1 NZLR 66 ("*Benton v Miller*").

The law in New Zealand before *Benton v Miller*

- 5.4 Prior to the decision in *Benton v Miller*, the leading Court of Appeal decisions concerning damages for loss of chance in negligence were *Takaro Properties Ltd v Rowling* [1986] 1 NZLR 22 (CA) ("*Takaro*") and *Martelli McKegg Wells & Cormack v Commbank International NV* (CA, 7 November 1996, CA75/96) ("*Martelli McKegg v Commbank*"). Those cases established that whether loss of chance damages were available was determined by reference to whether the fact at issue was an 'historic fact' or involved a 'hypothetical question'. In particular:
- (a) Where the question was one of 'historic fact' – i.e. what did happen, not what may have happened – the question was to be determined by reference to the balance of probabilities.
 - (b) Where the question was hypothetical – i.e. what would have happened, and not what actually happened – the question was to be determined by reference to the loss of chance analysis.

5.5 The approach is probably best illustrated by the decision of the Court of Appeal in *Martelli McKegg v Commbank*. In that case, the defendant firm of solicitors failed to advise the plaintiff of a potential illegality in a funding transaction they undertook with a third party. While the question of illegality was eventually resolved with the third party, the uncertainty surrounding that issue led to a delay in the appointment of receivers to the third party, which in turn led to a loss of trading profit during the period of delay. The uncertainty in that case was in determining when the plaintiff would have appointed receivers. The Court treated this as a hypothetical question, which should be determined using the loss of chance analysis.

“Where what is lost is a chance, however, that loss can be assessed even if less than 50 percent. A familiar example is the chance of success in litigation which has become impossible through failure to comply with a limitation period. In the present case, however, it was accepted that Commbank had been wrongfully deprived of the “chance” or opportunity of putting its receivers in place at an earlier date, and that that loss was of some value. The only remaining issue was quantification. The Judge has correctly observed this distinction.

Whether Commbank would have made its appointment before or after 7 April 1988 is not an issue of past fact, to be proved on balance of probabilities. It is a hypothetical question, the answer to which is not essential to the issues of causation or liability. It goes only to quantum.”

Benton v Miller & Poulgrain

5.6 Mr and Mrs Benton were married but held property in their separate names. In particular and prior to the arrangements at issue in the proceedings, Mrs Benton owned 71% of a property in Pauanui worth \$70,000, which was where the couple lived. Mr Benton owned 29% of that property, as well as a property in Auckland, also worth \$70,000.

5.7 In 1986, the Bentons undertook a number of property transactions, which gave rise to the litigation. The relevant part of those transactions was that Mr Benton sold his property in Auckland for \$70,000, and bought Mrs Benton’s interest in the property in Pauanui for \$49,700 (71% of \$70,000). Mr Poulgrain was a solicitor who acted for the Bentons on the property transactions, and did not advise them of the possibility that the Pauanui property was already the matrimonial home under the Matrimonial Property Act 1976.

5.8 The couple subsequently separated, and Mrs Benton brought proceedings in the Family Court seeking a half-share of the Pauanui property, on the basis that it was the matrimonial home. Mr Benton compromised that action with a payment of \$90,000 being 50 % of the current value of the property. He then claimed that amount from Mr

Poulgrain. During the course of the trial, it was accepted that Mr Poulgrain had been negligent in failing to advise Mr Benton of the effect of the Matrimonial Property Act. The issue was what loss was suffered by Mr Benton as a result of this negligence.

5.9 At first instance, Mr Benton argued that if had he been properly advised, he would have had Mrs Benton execute an agreement under s21 of the Matrimonial Property Act. Accordingly, he should recover the \$90,000 he had to pay to her in settlement of her matrimonial property claim. The court found that on the evidence, Mrs Benton would not have signed such an agreement, and so this claim failed. In the alternative, he argued that if she had refused to sign an agreement, he would not have entered into the property transactions, and so he should recover the \$49,700 he paid to her at that time. That claim was also rejected, as being unsupported by the evidence and otherwise speculative.

5.10 On appeal to the High Court, Heath J took another approach to the claim, based on a consideration of the scope of the duty of care owed by Mr Poulgrain. He held that on the evidence, if he had been properly advised, Mr Benton would not have entered into the property transactions. The effect of the property transactions were that he paid \$49,700 to acquire 21% of the Pauanui property which he already owned (ie he increased his entitlement from 29% to 50%). The court calculated the value of that interest at \$37,800.

5.11 The Court of Appeal ultimately resolved the case using an approach similar to that of Heath J. On that basis, the case was not determined by the application of a loss of chance analysis. However, the majority of Glazebrook and William Young J discussed in detail the potential impact of a loss of chance analysis, and the principles governing its application. It is this feature of the decision on which I want to focus.

5.12 The majority considered that the problem in this case was one of evidential uncertainty. There were two areas of uncertainty:

- (a) The parties' entitlements to the Pauanui property under the Matrimonial Property Act at the time of the property transactions; and
- (b) What would have happened if Mr and Mrs Benton had received proper advice from Mr Poulgrain.

5.13 The question of the entitlements of the parties to the Pauanui property was considered to be a matter of "historic fact". Consistent with the previous authorities, the court held

that this question was to be determined on the balance of probabilities. Having reviewed the evidence, the court was satisfied on the balance of probabilities that the Pauanui property was the matrimonial home at the time of the property transactions.

- 5.14 The difficulty in the case concerned what Mr and Mrs Benton would have done if they had been properly advised. This involved the asking of a “hypothetical question”. The issue was whether that question should be answered by reference to the balance of probabilities, or by reference to the loss of chance analysis. In respect of this question, the court held as follows:

“In cases which turn on how a plaintiff would have acted in the absence of a breach of duty, the all or nothing approach is usually (although not always: see Davies v Taylor) applicable. So if the plaintiff shows that it is more likely than not that he or she would have acted in a particular way, the Court acts on the assumption that this is the way the plaintiff would have acted. If this is not established, then the Court acts on the basis that the plaintiff would not have acted in the particular way.”

- 5.15 However, where the question was how Mrs Benton (a third party) would have acted, it was appropriate to apply the loss of chance principles.

- 5.16 In other words, loss of chance damages were not to be applied to hypothetical questions in general, but only to hypothetical questions concerning the actions of a third party.

- 5.17 Having described that principle, the court found (on the balance of probabilities) that Mr Benton would not have proceeded with the transactions without a matrimonial property agreement, and calculated damages on the basis of the detriment he suffered at the time of the property transactions (ie the difference between what he paid and what he actually received). It also found that there was a high likelihood (75%) that, if she was asked, Mrs Benton would have signed the matrimonial property agreement. In the end, the court took a composite approach, somewhere between these two alternatives, and awarded Mr Benton \$90,000, being the amount he eventually had to pay Mrs Benton.

- 5.18 There was a dissent as to the appropriate approach, although not as to final result. Hammond J believed that this was not a case involving loss of chance. The question instead was determining the scope of Mr Poulgrain’s duty of care. His duty was to advise Mr Benton that his title to the Pauanui property was subject to a matrimonial property claim. He did not do that, and as a result Mr Benton had to pay \$90,000 to obtain a clear title. That was the measure of his loss.

Comment

- 5.19 The decision in *Benton v Miller* represents an important development in the law in New Zealand relating to damages for loss of chance. In particular, it held that the loss of chance analysis does not apply to all 'hypothetical questions', but only those concerning how a third party would have acted. In this respect, the case is contrary to the decision of the Court of Appeal in *Martelli McKegg* (and possibly also *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA)). However, it already appears to be accepted as representing the 'new' approach of the court (see *Waitakere City Council v Ioane* (CA, 9 September 2004, CA21/03); *Scott v Wilson* (CA, 12 November 2004, CA15/04); *Edmonds v Scott* (HC, Wellington, 3 May 2005, Miller J, CIV 2000 – 485 - 000695); *Chirnside v Fay* [2005] 3 NZLR 689 (CA)).
- 5.20 I do want to make one comment on the decision. *Takaro* and *Martelli McKegg v Commbank* both suggested that the loss of chance analysis is appropriate when what is involved is the asking of a 'hypothetical question' as to what would have happened in the past. I think the Court of Appeal in *Benton v Miller* was right to recognise (implicitly) that this is too simple an analysis.¹⁴ There is nothing inherently objectionable in the asking, and answering, of a hypothetical question.
- 5.21 The Court of Appeal then suggested a refinement of the analysis in cases like *Takaro*, holding that the hypothetical question must relate to what a *third party* would have done.¹⁵ Again this must be correct, at least in terms that the uncertainty should not relate to what either a plaintiff or defendant might have done.¹⁶
- 5.22 The difficulty with the decision in *Benton v Miller* is that it assumed that because the loss of chance analysis cannot apply to hypothetical questions concerning the conduct of a plaintiff, it necessarily applies to all other hypothetical questions, and in particular questions relating to the conduct of a third party. I do not think that this conclusion necessarily follows.

¹⁴ This point was recently made by the House of Lords in its decision in *Gregg v Scott* [2005] 2 WLR 268 at 287 per Lord Hoffmann: "The fact that one cannot prove as a matter of necessary causation that someone would have done something is no reason why one should not prove that he was more likely than not to have done it."

¹⁵ This was derived from the decision of the English Court of Appeal *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 4 All ER 907. It was also consistent with William Young J's earlier decision as a High Court judge in *Aorangi Sheepskin Products Ltd v Purnell Creighton McGovern* (HC, Christchurch, 21 May 2002, CP 3/01).

¹⁶ *McWilliams v Sir William Arrol & Company* [1962] WLR 295; *Hotson v East Berkshire Area Health Board* [1987] AC 750; *Sew Hoy & Sons Ltd (In Rec & In Liq) v Coopers & Lybrand* [1986] 1 NZLR 392 (see also *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 (CA))

- 5.23 As I have said, there is no objection in principle to the asking and answering of hypothetical questions. The problem is that in some circumstances, the answer to that question is too speculative and that is why loss of chance damages are often appropriate for hypothetical questions. But this is not always the case, and *Benton v Miller* is a good illustration of this. The uncertainty in the case concerned whether or not Mrs Benton would have signed the matrimonial property agreement. This was a hypothetical question, but it was not one that was incapable of proof. Regardless of all the circumstantial evidence that suggested she would have signed the agreement (and which led the Court to conclude that there was a 75% chance of her doing so), she appears to have sat in the Court for the duration of the trial. Any uncertainty as to what she would have done could have been answered by simply asking her the question.
- 5.24 The point can be made by looking at the case another way. If Mr Benton had called Mrs Benton, and the evidence from both parties was that they would have signed the matrimonial agreement, on what basis could Mr Benton's award have been discounted? It would be as certain as any fact could be that the agreement would have been signed.
- 5.25 It is correct that the fact that a hypothetical question is involved is necessary before the court will use the loss of chance analysis, but the fact that it is a hypothetical question is not in itself sufficient for the use of that analysis. Hypothetical questions are simply an illustration of situations where the usual 'all or nothing' approach is not appropriate. They illustrate the situation where answering the 'but for' inquiry would be unreasonably speculative. It does not follow that all hypothetical questions involve unreasonable speculation.
- 5.26 This point, and what I suggest is the proper approach to the application of the loss of chance analysis, was set out in one of the original authorities on the point, *Kitchen v Royal Air Force Association* [1958] 1 WLR 563. The case concerned a failure by solicitors to bring proceedings within the relevant time limit.

"If, in this kind of action, it is plain that an action could have been brought, and if it had been brought that it must have succeeded, of course the answer is easy. The damaged plaintiff then would recover the full amount of the damages lost by the failure to bring the action originally. On the other hand, if it be made clear that the plaintiff never had a cause of action, that there was no case which the plaintiff could reasonably ever have formulated, then it is equally plain that the answer is that she can get nothing save nominal damages for the solicitors' negligence.

...

But the present case falls into neither one nor the other of the categories which I have mentioned. There may be cases where it would be quite impossible to try "the action within the 'action'" as Mr O'Connor asks. It may be that for one reason or another the action for negligence is not brought till, say twenty years after the event and in the process of time the material witnesses or many of them may have died or become quite out of reach for the purpose of being called to give evidence.

In my judgment, what the court has to do (assuming that the plaintiff has established negligence) in such a case as the present, is to determine what the plaintiff has by that negligence lost. The question is, has the plaintiff lost some right of value, some chose in action of reality and substance? In such a case, it may be that its value is not easy to determine, but it is the duty of the court to determine that value as best it can."