UPDATE
TORTS

# Kiwifruit and the Crown – Expanding regulator liability in *Strathboss*

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In a decision causing some angst for all regulators carrying out an operational role, in *Strathboss Kiwifruit Ltd v Attorney-General* [2018] NZHC 1559 Mallon J found that the then Ministry of Agriculture and Forestry (MAF) owed and breached a duty of care to kiwifruit orchardists in negligently allowing destructive Psa bacteria into New Zealand in 2010, thereby causing significant damage to North Island kiwifruit orchards.

The case is, of course, important on its own facts. It is a claim for hundreds of millions of dollars against the Crown (albeit with quantum yet to be established). It is also the first decision in which a class action has successfully been pursued to trial in New Zealand. But the real significance of the case lies in the court's rejection of traditional Crown arguments that proximity and policy factors tell against liability – leaving the door more open to claims against government departments, Crown entities and other regulators for negligent performance of operational functions carried out for the public good. Accordingly, this article focuses on Mallon J's duty of care analysis (itself nearly 100 pages of a nearly 500 page judgment) and possible implications for regulators.

## The Facts

In early November 2010, Psa bacteria, long known to damage kiwifruit vines, were detected in two kiwifruit orchards in Te Puke – the centre of New Zealand's highly concentrated kiwifruit industry. The bacteria spread rapidly, causing severe damage to orchardists. A number of them, as well as one post-harvest operator, sued the Crown for their losses.

On the plaintiffs' case, accepted as probable by Mallon J, Psa arrived in New Zealand in a consignment of anthers – being the part of the flower from which pollen is extracted. The anthers were imported from China by a small local company, Kiwi Pollen, with a view to subsequent artificial pollination of a number of orchards.

Unsurprisingly, given pocket depth, the plaintiffs' claim was against the Crown rather than Kiwi Pollen – centring on, firstly, at the pre-border stage, the decision to grant Kiwi Pollen the permit to import the anther consignment and, secondly, at the border stage, the inspection and risk-screening of the anthers on arrival in New Zealand.

The plaintiffs argued that MAF was negligent at both of those stages. In turn, stage 1 of the proceeding determined four questions:

- Did MAF owe a duty of care to the plaintiffs?
- Did it breach that duty?
- Did the anthers consignment cause the Psa outbreak?
- Was the Crown immune from liability?

Justice Mallon found that MAF did owe a duty of care to the orchardists (but not the post-harvest operator) and breached that duty at the pre-border stage by a series of "process errors … not following usual procedures, not being clear about the scope of a document to be relied on for determining whether risk goods should be permitted, and not adequately checking the context in which the document was to be relied upon". By way of example, MAF failed to carry out a required formal risk analysis which would have involved making inquiries about the pollen milling process. MAF thereby caused the orchardists' losses in circumstances where Crown immunities did not apply. At stage two the court will assess damages.

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## The Duty of Care

Laying the platform for her findings on duty, Mallon J painstakingly set out the developing principles of negligence theory and doctrine. She tells the origin story through *Donoghue v Stevenson, Dorset Yacht, Hedley Byrne* and *Anns* and numerous others. The reader senses the inevitability that, as a matter of first principle at least, her Honour

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will find that there simply must be Crown liability for the negligent performance of a statutory function under the Biosecurity Act 1993.

Then, shifting to the standard approach to considering novel duty of care questions, as confirmed by the Supreme Court in *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 (*The Grange*) (in which the court determined that the Crown, unlike councils, did not owe a duty in respect of leaky buildings), Mallon J adopted the two-stage framework considering, first, foreseeability and proximity, and, second, policy factors pointing for or against liability.

Foreseeability was not really an issue. As the plaintiffs claimed, given the known risks of Psa, "their loss was a plainly foreseeable consequence of MAF's negligence in the performance of its biosecurity obligations". Foreseeability in novel cases operates as a mere "screening mechanism, to exclude claims which must obviously fail" and the plaintiffs' claims passed this first hurdle.

The assessment of proximity permits the court to consider a range of factors:

> "Ultimately, however, it is a judgement on a sufficient connection between the plaintiff and defendant and on what is a fair, just and reasonable balance between the plaintiff's interest for compensation and the defendant's interests in protection from undue burden."
> – Mallon J.

In this way issues of proximity and policy tend to overlap. The former is focused, though, on the issue of whether it is fair, just and reasonable to impose liability in the specific case, whereas the latter considers the broader implications of the imposition of liability.

Ultimately, Mallon J found that a duty of care was owed to orchardists rather than post-harvest operators – being "those who have 'property rights' in the crop or vines which were infected with Psa3 or treated as though they were infected". By property rights, Mallon J intended "to cover all those who may have a sufficiently direct or closely associated interest in the vines or crop that the law will recognise". Central to Mallon J's findings on the orchardists' proximity was their relative vulnerability in so far as they had no *control* over the risk that harmed them and had to rely on MAF for protection. MAF, by contrast, "had responsibility for controlling that risk and had powers to control the entry of the risk goods into New Zealand (both pre-border and at the border)" – with the relevant risks being both "known" and "obvious".

## Relational ecomomic loss

In respect of the post-harvest operator, however, Mallon J characterised its loss as being due to "its business relationships with growers. That is relational economic loss." Essentially, although Mallon J was also alive to the common law's traditional preferential treatment of property over pure economic interests, the relationship between post-harvest operator and the Crown was "less close" than that between orchardist and Crown. In addition, her Honour appeared to be persuaded that the post-harvest operator was able to mitigate the financial consequences of adverse events through its contractual arrangements. This meant that it was more appropriate that it bear its losses than the New Zealand public through the Crown.

Of particular significance to regulators, though, was Mallon J's analysis of Crown arguments to the effect that it was different to other defendants.

As to proximity, and in addition to the central point regarding control as set out above:

- The Crown argued that if liability was imposed the court would be trespassing into the political, non-justiciable sphere. In *Couch v Attorney-General* [2008] NZSC 45 (*Couch (No 1)*) (in which a probation officer had allegedly negligently allowed a violent parolee to work in an RSA, where he killed three people and seriously injured Ms Couch) the Supreme Court distinguished between negligence resulting from policy matters ("high policy assessment") and operational matters ("administrative blunders"). If the former, the duty may be more readily precluded. The court rejected that the negligent conduct here concerned a policy matter – it was fundamentally operational. The Crown essentially claimed that the negligence was a resourcing issue, which was itself a policy decision. Justice Mallon disagreed: "While greater resourcing might assist in responding to the challenges of the scale of work, recognising the pleaded duty of care in this case makes no judgement on that."
- The Crown claimed that imposing a duty was inconsistent with the competing range of interests that must be balanced under the Biosecurity Act. The court rejected this argument finding that the duty

to carry out non-negligent risk assessments marches "hand-in-hand" with the Act's purpose of effectively managing the risks associated with the importation of risk goods.

- The Crown argued that this was an omissions case, and in cases of omissions courts are less willing to impose a duty against a regulatory authority. Justice Mallon, again, disagreed, describing the decision to grant the permit and clear the import as "positive actions".
- The Crown said that the compensation regime provided for under the Biosecurity Act was inconsistent with the imposition of liability. Justice Mallon clarified that the question was "whether the statute excludes a private law remedy". Her Honour found that it did not.

Justice Mallon adopted a similar stance on the various policy arguments raised by the Crown. The Crown claimed that if a duty was found here, it may also apply in a number of other cases, which may give rise to an indeterminate and disproportionate liability. Justice Mallon gave these claims short shrift. Negligence liability, she said, has controlling mechanisms to limit liability, including proximity, the requirement to be negligent, proof of loss, and remoteness of damages. In respect of the claim that the cost was disproportionate to the negligent conduct that occurred, Justice Mallon considered that this was not a problem specific to the issue at hand:

> "However a moment's inattention when driving a car can cause the loss of lives. A match dropped in the wrong place may cause an explosion with significant property damage and consequential financial losses resulting. Carelessness in reading a map when navigating a boat loaded with oil and other cargo may cause significant environmental damage. In other words, concerns about magnitude of the consequences relative to the activity undertaking are not unique to biosecurity."

## Crown immunity

Justice Mallon found that the Crown was not immune from liability in this case. The court had to consider the interpretation of the State Sector Act 1988 and the Crown Proceedings Act 1950 prior to their amendments and so the court's findings on this may not have much implication in the future. Those amendments made clear that the immunity from liability for Crown servants did not make the Crown also immune from liability. We note that this was a case of vicarious liability. The court did not need to address whether the Crown was directly liable for MAF's systemic or collective negligence.

## Potential impact on regulators

To an extent, this decision makes plain what was already established by the Supreme Court in *Couch (No 1)*: that the Crown will be held responsible for its mistakes, and should, in principle, be treated no differently to anyone else. However, the facts of *Couch,* unlike *Strathboss*, were remote from day-to-day regulatory operational activities. As highlighted by the Crown's case, there are potentially wide ramifications arising from the imposition of a duty of care in *Strathboss*. The Crown argued that liability should not be imposed because it may result in expanded liability in a number of other cases. Now, to paraphrase the Crown, the floodgates have been opened.

It is true that liability should only be found when negligence can be established. However, as we all know, the mere existence of a duty, along with possibilities about what a court might find, can lead to litigiousness on the part of bullish plaintiffs, a settlement mindset on the part of skittish defendants, and defensive practises. Further, as is inevitable, mistakes by regulators will be made – whether by themselves or as part of a collective systemic failure. While councils being liable for leaky buildings is now an established part of the New Zealand legal psyche, it seems that leaky building cases are not so *sui generis* after all.

Absent a successful appeal (one has been lodged), it will be interesting to observe how the Crown looks to responds to the risk of creeping regulator exposure. A retreat from the regulatory sphere would obviously be unattractive and hoping for total funding of all regulator requirements to minimise risk would be naïve optimism. Accordingly, while there has previously been a degree of mandarin hostility to the idea that the Crown should exclude its own liability, it seems possible that Mallon J's judgment may create a softening of that former distaste. ■

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