IN THE COURT OF APPEAL OF NEW ZEALAND

CA570/2007
[2008] NZCA 531

BETWEEN	KIMBERLY BIRKENFELD Appellant
AND	ANTHONY BRUCE KENDALL First Respondent
AND	YACHTING NEW ZEALAND INCORPORATED Second Respondent

Hearing: 5 November 2008

Court: Robertson, Arnold and Baragwanath JJ

Counsel: K Birkenfeld in person
N S Gedye for First Respondent
N A Beadle for Second Respondent

Judgment: 4 December 2008 at 11.30am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay each respondent costs for a standard appeal on a band A basis.

REASONS

BARAGWANATH AND ARNOLD JJ

(Given by Baragwanath J)

Introduction

[1] The appellant, Ms Birkenfeld, sustained grave injuries in a maritime collision between her windsurfer and a powerboat owned by the second respondent, Yachting New Zealand Incorporated, and driven by the first respondent Mr Kendall. Appearing in person, she appeals against a judgment of the High Court delivered by Randerson J, in a claim for damages against both respondents. The judgment ordered a permanent stay of the proceedings on the ground that the limitation provisions of the Maritime Transport Act 1994, which enact the Convention on Limitation of Liability for Maritime Claims 1976, limit the sum which the respondents could be ordered to pay and that they have arranged to pay Ms Birkenfeld the maximum sum she could claim in any proceeding.

[2] Ms Birkenfeld contends:

(a) The offer deals only with quantum and does not justify stay of that part of her proceeding which alleges negligence on the part of the first respondent Mr Kendall;

(b) The respondents wrongly failed to make discovery and that alone requires that the case return to the High Court; and

(c) An order of that Court staying the proceeding, on the different ground that she was ordered to provide $50,000 security for costs and has failed to do so, should be disregarded because she has no means to meet it.

[3] The respondents dispute each contention.

Context of appeal

[4] Ms Birkenfeld and Mr Kendall are both former Olympic windsurfers. On 8 August 2002, Ms Birkenfeld was on her windsurfer in the Saronikos Gulf west of Glyfada, Greece awaiting the start of a pre-Olympic race. Mr Kendall, as coach of the New Zealand windsurfing team, was driving Yachting New Zealand's rigid inflatable boat (RIB). The weather was clear and a north-westerly wind was blowing at about 20 knots. The parties differ as to how the collision occurred. Mr Kendall says that Ms Birkenfeld was travelling at about 20 knots and ran into the back of the RIB as he turned to try to avoid her. Ms Birkenfeld says that Mr Kendall ran her down from behind when she was stationary with her sail in the water. What is clear is that Ms Birkenfeld suffered grave injuries and her life was transformed.

[5] The back of Ms Birkenfeld's head and neck was deeply and extensively lacerated, her skull was fractured, and her brain and spine were damaged. She was rendered unconscious and but for her rescue by Mr Kendall she would have drowned. She underwent emergency surgery to remove bone fragments from the skull fracture and was in a coma for a month. She has been rendered an incomplete paraplegic with loss of feeling and functional movement in the upper and lower portions of her body, has suffered and will continue to suffer from physical and vocational impairment, and has speech and language dysfunctions. She suffers from persistent neuropathic pain. She has undergone and will continue to undergo painful and exhausting medical procedures. She has sustained great distress and loss in personal and economic as well as physical terms.

[6] Because the New Zealand accident compensation legislation has no application to this accident, Ms Birkenfeld issued proceedings at common law against Mr Kendall and Yachting New Zealand claiming $15m general damages together with special damages, costs and "such further or other relief as the Court thinks just." She pleaded that her injuries were caused by negligence on the part of Mr Kendall in breach of a duty owed to her for which, she claimed, Yachting New Zealand was vicariously liable. Both defendants denied liability.

[7] In a judgment reported at [2007] 1 NZLR 596 this Court determined that the defendants were entitled to a decree of limitation of liability under s 85 of the Maritime Transport Act to a sum fixed by reference to the weight of the RIB. That figure was calculated as $NZ560,099.64 as at 13 November 2006. On that day Yachting New Zealand tendered to Ms Birkenfeld that sum together with interest at 7.5 per cent assessed in terms of s 87 of the Judicature Act 1908 plus scale costs and disbursements, a total of $NZ734,003. The letter of offer contained an undertaking on behalf of Vero Marine Insurance Limited to pay that sum together with such further sum for interest as might be ordered subject to a total limit of $US500,000.

[8] On 27 September 2007 Randerson J determined that, because both defendants were entitled to take advantage of the limitation decree and the full amount of the limitation fund had been tendered, the proceeding should be permanently stayed. The terms of the stay were that Ms Birkenfeld should within six weeks elect whether to accept that fund with interest, less costs ordered against her, and if she did not the total sum should be paid to Public Trust to hold the fund on her behalf. We understand that such fund has been created.

[9] The central issue on appeal is whether Ms Birkenfeld is entitled to a trial to determine whether the collision was due to negligence on the part of Mr Kendall; or whether the High Court was right to order a permanent stay of proceedings.

Proceedings in the High Court

[10] Ms Birkenfeld filed proceedings against the respondents and a third defendant, International Sailing Federation Limited, on 6 August 2004. The proceedings against the third defendant, were discontinued in August 2005. Yachting New Zealand made its application for a decree limiting liability in separate proceedings and on 22 July 2005 the High Court determined that its liability was limited as discussed above at [7].

Security for costs

[11] The three defendants, then including International Sailing Federation Limited, applied in November 2004 and February 2005 for security for costs on the grounds that Ms Birkenfeld is resident overseas. Ms Birkenfeld filed a notice of opposition to the application by International Sailing Federation Limited. The grounds of objection were that Ms Birkenfeld was unable to give security because of conduct by Mr Kendall; and that any order for costs could be readily enforced in Florida. No notice of opposition was initially filed against the respondents' applications. It is possible that the omission in relation to the other applications resulted from difficulties in the relationship between Ms Birkenfeld and her New Zealand lawyer, Mr Chapman, who on 1 April 2005 was granted an order that he cease to be solicitor on record for Ms Birkenfeld.

[12] On 3 November 2005, Ms Birkenfeld applied to the Court for a determination of the amount of security that would be required, on the basis that she could not decide whether or not to oppose the application without knowing that figure.

[13] On 20 December 2005 Ms Birkenfeld filed three documents. The first was a notice of opposition to the applications for security for costs. It stated that she agreed to pay security for costs subject to the Court's instituting a "non-discriminatory costs scheme". There followed a "Notice of Interlocutory Application to Adjudicate Non-discriminatory Costs Scheme when Injured Party is Non-Resident" by which she requested an order that, if the defendants were successful, their legal costs should be paid by legal aid or the Accident Compensation Corporation. Finally, Ms Birkenfeld filed an affidavit in which she stated that her monthly income was US$1,227, but expressed optimism that if security for costs were ordered she would be able to raise sufficient funds to pay it within six months.

[14] The proceedings were considered by MacKenzie J in a judgment of 21 March 2006. He concluded that it was not appropriate to make the order Ms Birkenfeld requested as it would fetter the discretion of the trial Judge to award costs. He ordered that she provide security of $50,000 within three months. In making the

order, the Judge relied on Ms Birkenfeld's affidavit that she would be able to pay security, and had already raised a significant sum to cover litigation expenses.

[15] In late 2006, the defendants filed an application for an order that the limitation funds be disbursed and the proceedings stayed. Ms Birkenfeld filed a notice of opposition and applied to have the application struck out. In a supporting affidavit she stated:

> I swore to the High Court that if ordered to pay security I would, because I hope that I would be able to raise the substantial amount of money ordered. Because I am a determined, optimistic person with a positive attitude, I hoped I could succeed. I was able to raise funds to continue to this day, but I do not have $50,000 to pay security for costs. Because of the loans I have amassed in order to keep my claim alive in the New Zealand Courts, my net worth is negative. My disability income amounts to about US$2000 per month.

Discovery

[16] Rule 294 of the High Court Rules states that if discovery of documents is appropriate for a proceeding on the standard track, the Court must make a discovery order. Such order must be made at the first case management conference unless there is good reason for making the order later. No such order was made at the first case management conference on 31 October 2004, where it appears to have been overlooked, or at any later stage. Ms Birkenfeld submits that there has therefore been a fundamental failure of due process and that the case must be sent back to the High Court for discovery to be ordered.

[17] The issue was first raised by Ms Birkenfeld in a memorandum of 25 February 2007 entitled "Application for Directions: Why has the Court not ordered discovery under High Court Rules r 294?". She filed a similar application on 13 March 2007. In her supporting "Memorandum of points and authorities" (31 May 2007) Ms Birkenfeld summarised her argument:

> A contentious proceeding is precluded from reaching adjudication on the merits without discovery when evidence is in the hands of opposing parties. The plaintiff seeks to have her case heard on the merits. Therefore, she asks why the Court has not yet ordered the start of discovery.

[18] The respondents opposed the application on the grounds that the action had been stayed pending the payment of security for costs, and the application for stay and disbursement of the limitation fund was not dependent on discovery, and would obviate the need for it.

The order for stay

[19] The proceedings came before Randerson J in June 2007. The applications that were on foot were:

(a) An application by Yachting New Zealand for an order that the limitation fund be distributed and the proceedings stayed;

(b) An application by Mr Kendall for a permanent stay of proceedings;

(c) An application by Ms Birkenfeld for an order striking out Mr Kendall's application; and

(d) An application by Ms Birkenfeld for orders as to discovery.

[20] Randerson J's judgment of 27 September 2007 permanently staying the proceedings against both of the respondents gave Ms Birkenfeld six weeks to decide whether to accept the limitation fund. On his analysis it was not necessary to give directions as to discovery.

[21] Having recorded the determination that the quantum of damages recovery was confined to the amount of the limitation fund, Randerson J stated:

> [24] … I accept Mr Beadle's submission [for Yachting New Zealand] that no good purpose would be served by permitting this proceeding to continue when one of the defendants to it has offered to pay to the plaintiff the maximum amount she could lawfully recover if the claim were successful. That would be wasteful of the Court's resources. While I fully understand Ms Birkenfeld's wish that there be a determination by the Court of responsibility for the collision, it cannot be overlooked that this is, in essence, a claim for damages. Yachting New Zealand is properly entitled to rely on the limitation of liability and has offered to pay the sum so calculated to Ms Birkenfeld in full, along with interest and costs.

> [25] For the purposes of this application, Yachting New Zealand accepts Ms Birkenfeld's allegations against it in terms of her amended statement of claim of 10 May 2005. Yachting New Zealand has said it recognises that her claim greatly exceeds the amount of the limitation of liability and, in making the settlement offer, accepts the commercial realities and risks of continuing to a hearing on the merits. It is not for the Court to make any judgment on the reasons said to justify Yachting New Zealand's offer. It is enough to observe that it amounts to the maximum sum Ms Birkenfeld could lawfully recover in the proceedings.
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> [26] I conclude that, in the circumstances of this case, it would be an abuse of process to permit Ms Birkenfeld to proceed further with her claim against Yachting New Zealand. I therefore intend to make an order for permanent stay of the proceedings at least in relation to Yachting New Zealand. In reaching this conclusion, I have not found it necessary to determine the effect of Ms Birkenfeld's failure to pay the amount ordered for security for costs but, self-evidently, this would constitute a further ground supporting a stay.

[22] He held that Mr Kendall was also entitled to take advantage of the provision of the limitation fund by Yachting New Zealand.

[23] He further held that, because of his conclusion that Ms Birkenfeld had been offered all to which she was entitled, there was no live issue in the proceeding and thus no basis for discovery to be ordered against either defendant.

Appellant's submissions

[24] Ms Birkenfeld accepted that quantum has been determined by the decision of this Court, which the Supreme Court has denied her leave to challenge on further appeal. But she submitted that, since the acceptance by Yachting New Zealand of her allegations as to negligence was only for the purposes of the limitation application, those allegations remains for determination. She further submitted that:

(a) Implicit in her pleading is a claim for a declaration that she is entitled to a liability finding from the High Court;

(b) The case should return to the High Court for amendment to be made to include such pleading if that is required, and for the case to continue; and

(c) Because no discovery order was made, and discovery has not been provided by the respondents, she is entitled in any event to an order returning the case to the High Court.

Discussion

[25] A self-represented party can present difficulty for the Court. Nothing can be done about the fact that it is likely the case will be presented less competently than by a professional advocate.

[26] But where there is a legal point inherent in the case that the lay litigant has brought, it is open to the Court to give it its legal label and consider its consequences.

[27] Here Ms Birkenfeld's essential complaint is against the Judge's finding:

> [24] … I accept Mr Beadle's submission that no good purpose would be served by permitting this proceeding to continue when one of the defendants to it has offered to pay to the plaintiff the maximum amount she could lawfully recover if the claim were successful.

[28] Her written submissions state:

> The … judgment of Randerson J declares that a High Court proceeding is to be dismissed without determination of cause of a catastrophic accident between a New Zealander driving a motor boat, and a United States Olympic committee athlete sitting on her windsurfing board. … . The life-altering accident happened before the start of a race shortly before the start of the 2002 Pre-Olympic Test Event in Athens, Greece. The former US Olympic hopeful athlete has not been able to walk independently since that accident more than six years ago.
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> After the accident, which had no independent witnesses, the New Zealander returned home. The American athlete meanwhile, spent more than a month in coma, over 2 months in 4 hospitals on 2 continents and had to be medically evacuated from Greece to the United States. For six years, she has been unable to walk without assistance.
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> It is she who appeals the judgment that the Pre-Olympic boating accident proceeding be dismissed without determination of what caused the accident. She seeks to prevent what happened to her from happening to another sailor. She appeals the September 27, 2007 *Birkenfeld v Kendall and Yachting New Zealand Incorporated* judgment for these policy, human rights and black-letter law reasons:

- Contradiction of government policy and public interest in preventing accidents;

- Contradiction of litigants' right to clear his name from unlawful attack on honour and reputation in contentious proceedings, and

- Breach of natural justice which blocked a timely discovery order under High Court Rules r 294 for discovery of evidence of what caused the accident and proper joinder of parties to the proceeding.

[29] What Ms Birkenfeld now claims is a decision that she is entitled to have her trial continue to have determined whether, as she contends, the accident and her grave injuries were caused by negligence on the part of Mr Kendall.

[30] The issue would have been clearly identified had Ms Birkenfeld given notice that the "further or other relief" she claims included a declaration to that effect. Because that was not done before the High Court or in her notice of appeal it was, unsurprisingly, not addressed either by Randerson J or by counsel for the respondents in this Court.

[31] Had such a point arisen after trial this Court would have been reluctant to entertain it because it is a topic on which evidence might have been led. But here there has been no trial. The position is analogous to that of an application to strike out a pleading. As *Couch v Attorney-General* [2008] NZSC 45 shows, leave to amend may be granted in such a case even following appeal to the Supreme Court.

[32] A majority of this Court therefore advised during oral argument that the issue might properly be raised for consideration. A Minute was later issued offering the respondents the opportunity to file further submissions restricted to:

(a) The possibility of there being implicit in the proceeding before the Court, an application for a declaration on liability; and

(b) If so, whether within the total statutory framework (including the limitation provision) and other surrounding circumstances, the appellant has an arguable case.

The respondents have responded that they do not wish to make further submissions.

[33] There are two essential points. One is whether a declaration was inherent in the pleading; and if not whether we should grant Ms Birkenfeld's request to refer the case back to the High Court for her to seek leave to amend. (She elected not to make such application to this Court.) The other is on the merits: whether the declaratory relief sought would be available.

[34] Because we are satisfied that such relief would not be available the procedural point does not require determination. But had we favoured Ms Birkenfeld's argument on the merits we would not have declined to entertain it for procedural reasons.

[35] The Declaratory Judgments Act 1908 states:

> **2 Declaratory judgments**
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> No action or proceeding in the [High Court] shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the said Court may make binding declarations of right, whether any consequential relief is or could be claimed or not.

[36] In *Re Chase* [1989] 1 NZLR 325 (CA) Cooke P stated at 332:

> As to jurisdiction, s 2 of the Declaratory Judgments Act is amply wide and in my view should not be restricted by interpretation: provided always that it is read together with s 10, which expressly states that the declaratory jurisdiction is discretionary "and the said Court may, on any grounds which it deems sufficient, refuse or give or make any such judgment or order". Section 2, while modeled on an English Rule of Court … had direct statutory force in New Zealand. There is even less reason for whittling it down here than might arguably apply to the English Rule.

[37] Likewise in England, after some initial reluctance, it now appears that it is not necessary for a separate cause of action to exist in order for an action to be brought for summary judgment. In *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL) Lord Diplock said at 501:

> The early controversies as to whether a party applying for declaratory relief must have a subsisting cause of action or a right to some other relief can now be forgotten. It is clearly established that he need not. Relief in the form of a declaration of right is generally superfluous for a plaintiff who has a subsisting cause of action. … But the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else.

[38] Zamir & Woolf *The Declaratory Judgment* (3ed 2002) states at 45:

> Declaratory jurisdiction may be described as follows: within the limits of their general jurisdiction and subject to any express statutory provision to the contrary the courts have a discretion to grant declarations upon any matter whatsoever. In *Imperial Tobacco Ltd v Attorney-General* [[1981] AC 718 at 750] Lord Lane said: "Anyone is on principle entitled to apply to the Court for a declaration as to their rights unless statutorily prohibited expressly or by necessary implication." The courts' powers, however, are subject to the general limits which exist on the courts' jurisdiction.

[39] It is clear that a declaration is available as a remedy in a tort action. In *The Anatomy of Tort Law* (1997) Peter Cane states at 102:

> … a court may award a declaration in a tort action. In one sense, a declaration is not a "remedy" or a "sanction" because all it does is to state what the legal rights and obligations of the parties are ... . An analogous remedy available in tort law which relates to the past is nominal damages (say, 1p). The effect of this remedy is to acknowledge (or declare) that the defendant has committed a tort against the plaintiff …

[40] In *Street on Torts* (12ed 2007) by John Murphy (an editor of *Clerk & Lindsell on Torts*) it is stated at 4:

> But compensation is not tort's only concern, and monetary damages are not the only available remedy. Torts are also designed to protect fundamental human interests. Here, 'interests' may be defined as the kinds of claims, wants or desires that people seek to satisfy in life, and which a civilized society ought to recognise as theirs as of right. Tort therefore serves to determine which of the many human (and related) interests are so fundamental that the law should impose duties upon us all that are designed primarily to protect those interests and, secondarily, to provide a remedy when those interests are wrongfully violated by others.

[41] But the courts will be reluctant to declare upon hypothetical issues. As Lord Dunedin said in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 448 (HL):

> The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought.

[42] Zamir and Woolf discuss the issue at 160 and following:

> This decision illustrates that where a dispute exists which justifies the institution of declaratory proceedings, the subsequent withdrawal of the defence and admission of the claimant's right will not necessarily

> retrospectively deprive the claimant of his right to a declaration on the grounds that the issue is now theoretical. If a declaration will still serve some purpose, then the court will be favourably disposed to granting declaratory relief. If, however, the declaration would serve no purpose the court might well take the view that it was unreasonable for the claimant to continue with the action and in these circumstances refuse to grant declaratory relief.
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> (At 160.)
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> …
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> If it can be shown that a declaration would not serve any practical purpose, this will weigh heavily in the scales against the grant of declaratory relief. If, on the other hand, as is pointed out in the preceding three paragraphs, the grant of declaratory relief will be likely to achieve a useful objective, the court will be favourably disposed to granting relief. The question of whether or not any useful purpose would be served by granting declaratory relief is therefore of prime importance in determining how discretion should be exercised.
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> (At 163.)
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> …
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> The court may also be prepared to grant declaratory relief, even though the dispute between the parties has terminated, if the declaration will still serve some useful purpose. Thus in a case where a covenant in restraint of trade had expired before the hearing of an appeal, the employers were granted a declaration since they still had an interest in knowing whether their covenant was enforceable against other employees.
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> (At 176. Footnote omitted.)
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> …
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> In deciding the utility of the declaration claimed, the court should weigh the usefulness of the declaration for the claimant as against the inconvenience and embarrassment it may cause to the defendant. If a declaration would appear, on the one hand, to be of little benefit to the claimant and, on the other to be a cause of hardship to the defendant, it may be refused.
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> (At 177.)

[43] Here there is an unresolved dispute of very real moment to Ms Birkenfeld. Were it not for the statutory limitation provision we would be minded to refer the case back to the High Court to exercise discretion under s 2 of the Declaratory Judgments Act, weighing her interests against the cost and other burdens upon the respondents of trial of such an issue. But we are satisfied that to do so would infringe the policy of Part IV of the Maritime Transport Act and the 1976 Convention.

[44] The essential question is whether tender of the maximum claimable under the limitation provisions of the Maritime Transport Act requires a negligence claim to be struck out or stayed on the ground that no element of it remains. We find it unnecessary to determine whether any other type of negligence claim could be struck out on such basis.

[45] Limitation of liability is well known in the law as an encouragement to enterprise. The right of company shareholders to limited liability is premised upon the public interest to engage in the risk-taking inherent in business. That is why the long title to the Companies Act 1993 states as among its purposes:

> To reaffirm the value of the company as a means of achieving economic and social benefits through the aggregation of capital for productive purposes, the spreading of economic risk, and the taking of business risks

[46] Such policy is of particular relevance in marine cases. In *Tasman Orient Line CV v Alliance Group Ltd* [2004] 1 NZLR 650 (HC) (against which an appeal to this Court has been argued) Williams J cited texts which explain the reasons underlying the limitation regime:

> [26] Limitation of liability in maritime claims has a lengthy history, though a history not without controversy. Meeson, Admiralty Jurisdiction and Practice (2nd ed, 2000) para 8-001, p 241 says that *the "rationale for such a concept is the public policy in encouraging shipping and trade which overrides the competing public policy in compensating the victims of wrongdoing"* while Toh, Admiralty Law and Practice (1998) p 407 puts it in the following terms:
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> > "The limitation of liability of carriers and shipowners is a necessary facet of maritime commerce. The commonly cited, though not the only, justification is that *by capping liability at a certain sum, the spectre of unlimited exposure is removed for carriers and shipowners, as well as their insurers, which in turn translates into lower freight rates for cargo interests, for whom insurance is the answer for any loss or damage in excess of the limits of liability*."
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> (Emphasis added.)

[47] A major theme of Ms Birkenfeld's argument is that, apart altogether from her claim to compensation, there is a public interest that the cause of the accident should be determined definitively in order to provide lessons for the future.

[48] That submission must be seen in context. First, the Maritime Transport Act, as well as providing for limitation of liability, contains an elaborate code for recording and notifying accidents. Given her reference in submissions to s 31 of the Act we understand the appellant to concede that the Act applies. Section 31 obliges the master of any New Zealand ship that is involved in a mishap that results in serious harm to a person to notify the mishap as soon as practicable to Maritime New Zealand. Its functions include the promotion of maritime safety beyond New Zealand in accordance with New Zealand's international obligations (s 431(b)). It has the further function of investigating and reviewing maritime transport accidents (s 431(j)). By s 57 the Director of Maritime New Zealand may investigate the mishap. By s 60 he must notify the Transport Accident Investigation Commission of any act involving a New Zealand ship where a person is seriously harmed. If that Commission believes that the circumstances of the accident are likely to have significant implications for transport safety or may allow the Commission to establish findings which may increase transport safety it is required to investigate the accident (Transport Accident Investigation Act 1990, s 13(1)(b)). Even if, as the appellant says, the accident here was not reported, that cannot affect the analysis. It is the existence of the system that is important, not whether it was invoked in a particular instance.

[49] A further factor is the cost and burden of litigation, of which we take judicial notice. In New Zealand it was one of the considerations underlying the Accident Compensation regime (Royal Commission of Inquiry *Compensation for Personal Injury in New Zealand* (1976) at 52 – 59 (the Woodhouse Report)). The Injury Prevention, Rehabilitation, and Compensation Act 2001 states:

> **317 Proceedings for personal injury**
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> (1) No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of—
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> (a) personal injury covered by this Act; or
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> (b) personal injury covered by the former Acts.

[50] Ms Birkenfeld sensibly accepted that New Zealand public policy would not countenance the reimposition of the costs of trial of personal injury cases brought by

injured persons wishing to secure a declaration that (for example) a motorist or employer had breached a duty of care.

[51] In *Naysmith v Accident Compensation Corporation* [2006] 1 NZLR 40 (HC) it was noted that New Zealand is not the only jurisdiction where claims for damages for personal injuries are excluded for reasons of competing public policy:

> [58] … provision of health and rehabilitation can be effected otherwise than via a cause of action for damages. In England, where the common law regime for damages for personal injury remains, the House of Lords has had little difficulty in upholding a statutory policy to exclude a right to claim damages where an alternative scheme of compensation by way of pension had been established. In *Matthews v Ministry of Defence* [2003] 1 AC 1163, where the Crown Proceedings Act 1947 had exempted the Crown from liability in tort for injuries suffered by members of the armed forces, the plaintiff claimed infringement of art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. That provides that:
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> > In the determination of his civil rights . . . everyone is entitled to a fair and public hearing . . . by an independent tribunal established by law.
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> (Compare to like effect s 25(a) of the New Zealand Bill of Rights Act 1990 which, however, like art 14 of the International Covenant on Civil and Political Rights, deals with criminal proceedings. Civil proceedings are embraced by the common law presumption of access to the Courts: Legislation Advisory Committee Guidelines, ch 3: http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_3.html).
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> [59] The plaintiff argued that a finding that he had no such right was incompatible with the article. In rejecting his claim Lord Hoffmann stated at paras 25 – 26:
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> > "25 . . . Article 6 is concerned with standards of justice, the separation of powers and the rule of law. It would seem to have little to do with whether or not one should have an action in tort. That is a matter of national policy. Some countries, like New Zealand, do not believe in actions in tort for personal injuries. Some have more restricted no-fault schemes . . .. The question whether a common law action for damages is the most sensible way of providing compensation for accident is controversial and Professor Atiyah's *The Damages Lottery* (1977) demonstrates that the existing system is expensive and in many respects unfair.
> >
> > 26 I start, therefore, with a predisposition to think that whether the appellant should have an action in tort or a no-fault entitlement has nothing to do with human rights."

[52] When one considers the international nature of the shipping trade to which the policy of the limitation provisions is directed, the policy argument that costs of

trial of proceedings for declaration should not be imposed on a defendant who has succeeded in a limitation application and tendered the amount of the limitation fund is of obvious importance. There is to be contrasted the case where a limitation application fails because of the "actual fault or privity" of the shipowner, who will be held liable for the full amount of the loss caused to the other vessel. An example is *The Lady Gwendolen* [1965] P 294 (CA) where the shipowners, the Guinness company of Dublin, set such tight schedules as led the master of their vessel to habitually navigate through the fog of the Irish Sea at high speeds. The distinction between cases where actual fault or privity existed on the part of the shipowner, and the present case where its liability has been limited, underlines the present point.

[53] A further consideration is Ms Birkenfeld's concern about her reputation. The law protects reputation interests in various ways, including the tort of defamation and the evolving cause of action for breach of privacy. But this Court has been reluctant to develop a cause of action in negligence for that purpose, as to do so would cut across the proper scope of other causes of action: see for example *Balfour v Attorney-General* [1991] 1 NZLR 519 (CA).

[54] Just as the court will exercise care when deciding whether to develop a cause of action in negligence (see *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA)), so in construing legislation it will look across the spectrum of the law to discern whether the development or continuation of a common law cause of action is consistent with the proper evolution of a regime that overall is just, rational and balanced.

[55] Here we are satisfied that, Parliament having established both the limitation regime and a system for the investigation of mishaps, including means for experts to establish findings which may increase transport safety, it is neither necessary nor desirable for the judiciary by exercise of discretion under the Declaratory Judgments Act to impose a parallel system of investigation by lay judges which is not required for the purpose of compensation for injury. Nor does the claim of injury to reputation justify that course.

[56] It follows that Ms Birkenfeld's major claim fails. There can in these circumstances be no justification for ordering the case to return to the High Court for purposes of discovery, which is now unnecessary.

[57] We add that it is not necessary for us to consider the respondents' cross-appeal, inviting us to treat the failure to provide security for costs as further grounds for permanent stay. It is sufficient to note that the respondents did not seriously challenge the affidavit evidence of the appellant that as a result of her disability she is without means; no case was cited where a meritorious plaintiff without means was debarred from access to justice.

Decision

[58] The appeal is dismissed with costs to the respondents on a standard appeal on a band A basis.

ROBERTSON J

[59] I agree that the appeal must be dismissed with the costs consequences contained in the judgment of Baragwanath J.

[60] I write separately as I am unable to embrace some of the issues discussed which are not essential for those outcomes, particularly comments on points which were not part of the proceeding in the High Court or before us.

[61] One of the more challenging tasks for any Court is to ensure that those who are unrepresented are not disadvantaged.

[62] Ms Birkenfeld has become well versed in the operation of the New Zealand Courts and had clear views as to how she wants to deal with her litigation.

[63] Despite strenuous endeavours by a member of the Court during the appeal hearing to persuade her to change her approach, she was unwilling to contemplate doing so.

[64] As important as protecting unrepresented litigants is ensuring that those who do have legal representation are not placed in a disadvantaged position because the Court appears to be preoccupied with the unrepresented litigant.

[65] In this case, the earlier determination of this Court on the limitation point, meant that the judgment of Randerson J was inevitable.

[66] What might have happened if there had not been a limitation provision is speculative. None of the litigants had to consider such a theoretical possibility. Naturally they did not present their cases with that in mind nor provide argument on a matter which was not an issue. I am unwilling to express views on hypothetical matters which are not relevant to the appeal which is before the Court.

[67] Similarly I reserve judgment on the question of what might have been the consequences of what have been described as 'procedural issues'.

[68] Rules have been developed over centuries to ensure that everybody before a Court knows exactly what they have to answer and to ensure that all are provided at the appropriate times with an opportunity to challenge all contentions. I find it unhelpful to discuss in a vacuum issues which have never been on the table, which the parties have not had an opportunity to confront, and in respect of which the Court has no proper evidential foundation.

[69] One can have sympathy for Ms Birkenfeld's current predicament, but the other parties before the Court are entitled to an independent and objective adjudication as well.

[70] The respondents were not required to consider whether the failure to comply with the order to provide security for costs needed reconsideration. They were entitled to rely on the fact that there was a court order which had not been varied or

abrogated, but which had not been complied with. I refrain from comment on the outcome if there had been a proper challenge to its validity.

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