

**VIKTORIYA PASHORINA-NICHOLS**

***CLARK v MACOURT:***  
**PROPER COMPENSATION OR A ONE MILLION**  
**DOLLAR WINDFALL?**

**Submitted for the LLB (Honours) Degree**

**Faculty of Law**  
**Victoria University of Wellington**

**2014**

## *Table of Contents*

<b>ABSTRACT.....</b>	<b>3</b>
<b>I INTRODUCTION.....</b>	<b>4</b>
<b>II FACTS.....</b>	<b>5</b>
<b>III PROCEDURAL HISTORY .....</b>	<b>8</b>
A June 2010 – NSWSC.....	8
B October – November 2011 – NSWSC.....	9
C December 2012 – NSWCA.....	10
<b>IV A NOTE ON THE REGULATORY SCHEME.....</b>	<b>11</b>
<b>V THE COMPENSATORY PRINCIPLE.....</b>	<b>12</b>
A Recent Case Law.....	12
B Correct Measure .....	14
C HCA Majority Decision.....	15
D Dissenting Judgment .....	16
E Robert Stevens’ Rights Model .....	18
F Criticism of Robert Stevens .....	19
G Conclusion on the Compensatory Principle.....	22
<b>VI THE LAW ON MITIGATION.....</b>	<b>23</b>
A The Three Rules .....	23
B Avoided Loss .....	23
C Andrew Dyson and Adam Kramer .....	26
D HCA Majority Judgments.....	28
<b>VII CONCLUSION ON CLARK V MACCART .....</b>	<b>31</b>
<b>VIII BIBLIOGRAPHY.....</b>	<b>33</b>
Word count .....	37

### ***Abstract***

*Pacta sunt servanda is a fundamental legal principle, which states that agreements must be kept. Thus, various wrongs, including breaches of contracts, entitle one to the most common remedy at common law: an award of damages. The basic principles that govern the assessment of contract damages are taught to students in every Law School. However, the application of those principles is not always easy because careful attention has to be paid to the individual circumstances of each case.*

*The conclusion that the courts must strive to achieve is compensation of claimants for the actual loss sustained, in order to place them in the same position they would have been in if the contract had been performed. This paper argues that in a recent decision of the High Court of Australia in Clark v Macourt, the claimant was put in a position superior to that she would have been in if the contract had been performed. It summarises and questions the various parts of the decision to show that the million-dollar award over compensated the claimant.*

**Key Words:** Breach of warranty — Compensatory principle — Contract damages — Date of assessment — Mitigation

## *I Introduction*

This paper examines the decision of the High Court of Australia (HCA) in *Clark v Macourt*, which was delivered on the 18 December 2013.<sup>1</sup> The subject matter of the case was described as having a “peculiar” or “unusual” nature, being a stock of frozen donor sperm.<sup>2</sup> Macourt was ordered to pay \$1,246,025.01 for a breach of warranty by his fertility clinic. The contract price was a mere \$386,950.91.

In summary, the case is about first principles that govern the award of damages in breach of contract cases. In particular, there are two approaches that have emerged from the case. On one hand, the primary judge’s approach gained support from the majority in the HCA,<sup>3</sup> and on the other hand, the approach of the New South Wales Court of Appeal (NSWCA) gained some, but not full, support from the dissenting judge in the HCA.<sup>4</sup>

The main suggestion of the paper is that the *Clark v Macourt* majority decision should not be followed if a similar case arises in New Zealand or any other jurisdiction. It is agreed by many, if not all, that the compensatory principle is the ruling principle in breach of contract damages cases, yet its application has caused much judicial disagreement.<sup>5</sup> Arguably, *Clark v Macourt* is another case where the compensatory principle was applied incorrectly. More specifically, the HCA majority failed to apply the law on mitigation correctly. As a result, Clark was placed in a position superior to that which she would have been in had the contract been performed. Thus, it is suggested that the approach of the NSWCA, despite some difficulties of its own, is the better approach to follow in a similar fact scenario.

---

<sup>1</sup> *Clark v Macourt* [2013] HCA 56, (2013) 304 ALR 220 [*Clark* HCA].

<sup>2</sup> At [68] per Gageler J dissenting and [75] per Keane J.

<sup>3</sup> *St George Fertility Centre Pty Ltd v Clark* [2011] NSWSC 1276 [*Clark* NSWSC].

<sup>4</sup> *Macourt v Clark* [2012] NSWCA 367 [*Clark* NSWCA].

<sup>5</sup> See David Winterton “Money awards substituting for performance” (2012) 3 LMCLQ 446 at 447.

## *II Facts*

The story begins in early 2002 when the appellant, Clark, entered into a Deed with St George Fertility Centre (the vendor), whereby she agreed to purchase various assets for her own clinic. Macourt, being the only director and controller of St George, was the guarantor under the Deed. Both parties were registered medical practitioners who specialised in Assisted Reproductive Technology (ART) practices, also known as artificial insemination in layman's terms.<sup>6</sup> One of the most important assets acquired under the Deed was frozen donated sperm — the subject matter of litigation.

Shortly after opening her clinic, Clark acquired sperm from donors and from various other suppliers such as Westmead Fertility Centre, Queensland Fertility Group and Cryos. Once Clark purchased the various assets under the Deed, the vendor delivered 3,513 straws of sperm along with the other assets. St George provided a warranty that “the consents, screenings tests ... and identification ... of donors of Sperm ... have been conducted in compliance with the [regulatory] guidelines”.<sup>7</sup> The purchase price for all of the assets under the Deed was to be calculated and paid in three annual instalments as stated in cl 2a:<sup>8</sup>

In respect of each of the calendar years 2002, 2003 and 2004, 15% of the amount by which the purchaser's gross fee income exceeds 105%, 110% and 115% respectively of the fee income of the purchaser for the calendar year 2001.

As established at 8 April 2005, the purchase price that Clark had to pay was \$386,950.91. Up until 2005, Clark had only used 504 of the vendor's straws because a large number of the straws delivered had to be discarded. Clark explained that the primary reason for the destruction of sperm was the paucity of records provided by the vendor, making the remaining sperm unsafe to be used in treatment.<sup>9</sup>

---

<sup>6</sup> *Clark NSWCA*, above n 4, at [24].

<sup>7</sup> *Clark HCA*, above n 1, at [83].

<sup>8</sup> At [43] and [80].

<sup>9</sup> *Clark NSWSC*, above n 3, at [28].

Another critical event happened in 2005. There was a change to the Reproductive Technology Accreditation Committee (RTAC) Guidelines of the Fertility Society of Australia, which introduced a number of new requirements.<sup>10</sup> This change had caused Clark to purchase the only ethically suitable replacement sperm from Xytex, an American company, because her usual suppliers' sperm was no longer suitable once the new RTAC Guidelines had been issued.

Also, as a result, Clark charged her patients an amount no greater than the amount she herself spent to acquire the donated sperm. Ethically, practitioners were prohibited from making profits when using sperm for treatment purposes. Clark's patient fee covered *most* of the cost and expense to her in acquiring the replacement sperm because Clark claimed there was always a "buffer" between the real costs to her and those she passed on to her patients.<sup>11</sup> The meaning of this is taken to be that if the overall cost to Clark was A, she charged her patient price B ( $A > B$ ) to ensure there was always a difference. Clark never wished to be viewed as making profits when using sperm in treatment, as that would have been unethical<sup>12</sup> and later illegal as codified in a statute.<sup>13</sup>

In March 2006, St George Fertility Centre issued proceedings against Clark for the outstanding purchase price amount of \$219,950.91 under the Deed. In September 2008, Clark filed a counter-claim seeking damages from the vendor and Macourt for breach of various warranties, but mainly the suitability of donor sperm supplied by St George. It is important to reproduce the appellant's pleadings, as it might have influenced the majority's decision:<sup>14</sup>

---

<sup>10</sup> Australian Health Ethics Committee *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research* (National Health and Medical Research Council, September 2004); and *Clark* NSWSC, above n 3, at [41] and [50].

<sup>11</sup> *Clark* NSWCA, above n 4, at [39].

<sup>12</sup> At [38].

<sup>13</sup> At [38] and [39]; and Human Cloning for Reproduction and Other Prohibited Practices Act 2003 (NSW), s 16.

<sup>14</sup> *Clark* HCA, above n 1, at [32] (emphasis added).

the damages ... are in the nature of compensation which, so far as possible gives her the benefit of her bargain under the Deed by giving her, so far as money is capable of doing so, *something equivalent to the value of the worthless Sperm* delivered to her, as opposed to damages to compensate her specifically for her outlay to Xytex (the amount actually paid and payable to Xytex being no more than evidence of an appropriate measure of damages).

There are three points to note in regards to Clark's claim. First, if literally read Clark asked the court to make an award of \$0 because the value of the worthless Sperm would have realised nothing. Secondly, the Australian courts did not read the claim literally and instead the majority's focus was to equate the damages amount to the cost of compliant replacement sperm. Thirdly, because of the wording of the claim and because of the court's focus, the claim for damages was limited to the *acquisition* of compliant replacement sperm.<sup>15</sup> It should be borne in mind that once sperm is acquired there are many other storage and treatment costs that are incurred by the medical practitioner.<sup>16</sup> However, Clark did not quantify these costs and thus, "they did not form part of her claim for damages".<sup>17</sup>

By the time of the hearing before the primary judge in 2011, Clark acquired 1,546 straws of replacement sperm from Xytex. Clark charged her patients a fee of \$800 taking into account the replacement sperm purchase price "and the cost of the additional laboratory and clinical time necessary to manage Xytex donor sperm".<sup>18</sup> At the time of the trial, the fee increased to \$930 per straw to cover the increases in Xytex price. There was expert evidence that:<sup>19</sup>

Even at the lowest charge to patients (being \$800 per straw) [Clark] would have recovered ... \$467,333 more than the amount she paid [to Xytex for 1,546 straws]. It was not suggested that in so doing Dr Clark was making a profit, for the last

---

<sup>15</sup> See *Clark* NSWCA, above n 4, at [41].

<sup>16</sup> See generally at [26] and [27].

<sup>17</sup> At [41].

<sup>18</sup> At [33].

<sup>19</sup> At [80].

mentioned amount would have been expended by Dr Clark in storing and treating the Xytex sperm in her facility.

### *III Procedural History*

#### *A June 2010 — NSWSC*

In the NSW Supreme Court (NSWSC), Macready AsJ held that St George and Macourt, as the guarantor, were liable for breach of various warranties.<sup>20</sup> This was based primarily on an admission made by Macourt that ““sperm donor records were not maintained in each case as required””.<sup>21</sup> Note that the *records* were not maintained as required, but it does not follow that St George did not conduct its practices in the manner that was compliant with the guidelines at the relevant time. Some of the passages in the later NSWSC judgment suggest that there is no evidence to prove that St George *failed* to conduct its practice in compliance with the guidelines; the evidence simply established that the records it passed to Clark were inaccurate.<sup>22</sup> In other words, it is very likely that St George did comply with the RTAC Guidelines and it never breached its warranty.

It is true, however, to say that St George breached an express clause of the contract when it failed to give patient records to Clark, which should have included “details ... and sufficient information to allow identification in accordance with RTAC Guidelines”.<sup>23</sup> Nonetheless, Macready AsJ’s decision on the vendor’s breach of warranty and Macourt’s liability was the accepted norm that persisted throughout the later judgments.

---

<sup>20</sup> *Clark* HCA, above n 1, at [5].

<sup>21</sup> At [87].

<sup>22</sup> See *Clark* NSWSC, above n 3, at [38], [53] and [63].

<sup>23</sup> *Clark* HCA, above n 1, at [84].



*B October–November 2011 — NSWSC*

Gzell J assessed the damages for the breach of warranty striving to compensate Clark for the vendor's failure to deliver compliant straws.<sup>24</sup> His Honour calculated how much, as at the date the contract was breached — date of delivery in 2002 — Clark would have had to pay to Xytex for the straws.<sup>25</sup> Thus, the formula used by the Judge was a hypothetical purchase from Xytex less a hypothetical sale of the defective sperm that would have realised nothing.<sup>26</sup>

His Honour only accounted for 1,996 straws of sperm because Clark admitted that in her normal course of practice she would have only expected to use 2,500 straws of sperm delivered and she had actually used up 504.<sup>27</sup> Gzell J used the figures of September 2005 when Clark made her first purchase of 30 Xytex straws at \$15,334.46, which was then calculated to be \$1,020,252.70 for 1,996 straws.<sup>28</sup> Accounting for the fact that Xytex price might have been less in 2002, Gzell J in a “robust fashion” simply allowed for the interest to be added starting 29 September 2005; so no interest for the intervening three and a half years.<sup>29</sup> Thus the overall amount awarded, including interest, was \$1,246,025.01.<sup>30</sup> It should be noted that Gzell J rejected Macourt's arguments, put forward by his counsel, on Clark's mitigation of the loss and betterment of Xytex stock.<sup>31</sup>

After this decision, Macourt alone appealed to the NSWCA because St George had gone into liquidation.<sup>32</sup>

---

<sup>24</sup> *Clark* NSWSC, above n 3, at [48].

<sup>25</sup> At [108].

<sup>26</sup> *Clark* HCA, above n 1, at [51] and [52].

<sup>27</sup> *Clark* NSWSC, above n 3, at [47] and [48].

<sup>28</sup> At [108]–[111].

<sup>29</sup> At [111].

<sup>30</sup> *Clark* HCA, above n 1, at [88].

<sup>31</sup> *Clark* NSWSC, above n 3, at [21] and [82].

<sup>32</sup> *Clark* HCA, above n 1, at [78].

*C December 2012 — NSWCA*

In the NSWCA decision, the Court made clear that the contract was for the sale of a business as opposed to the sale of goods.<sup>33</sup> An interesting point made was that it was impossible to find the specific cost of St George sperm because of the way the purchase price formula was stated in the Deed.<sup>34</sup> Accordingly, it was “patently clear that [Clark] could not ethically have charged her patients for the supply of such [St George] sperm” as she acquired under the contract.<sup>35</sup>

Furthermore, the Court found that up to the date of trial Clark had *mitigated* her prima facie loss, Xytex replacement sperm cost, by charging her patients a fee covering that cost.<sup>36</sup> Clark achieved mitigation to “the maximum extent allowed by the legal and ethical constraints under which she operated”.<sup>37</sup> Therefore, Clark was only entitled to damages for that part of the overall replacement cost incurred that was not covered by her patients up to the date of trial, together with a capitalised value amount for that part of the overall cost that it could be expected Clark might not be able to recoup for the remaining number of straws she was still left to replace.<sup>38</sup>

Thus, by allowing the appeal, Clark was awarded no damages because the replacement cost for 1,546 straws from Xytex was recouped and it was assumed that the replacement cost would continue on being recouped from her patients as Clark continues on sourcing the remaining straws from Xytex ( $1,996 - 1,546 = 450$ ).<sup>39</sup>

---

<sup>33</sup> Clark NSWCA, above n 4, at [42]–[49].

<sup>34</sup> At [66].

<sup>35</sup> At [126].

<sup>36</sup> At [112], [127] and [132].

<sup>37</sup> At [127].

<sup>38</sup> At [128]–[130].

<sup>39</sup> At [128]–[133].

#### *IV A Note on the Regulatory Scheme*

At the time of the Deed, both Clark and Macourt were bound by ethical guidelines on ART introduced by the National Health and Medical Research Council in 1996.<sup>40</sup> Some of the ethically unacceptable practices were to trade commercially in gametes or embryos and to pay donors an amount above their reasonable expenses.<sup>41</sup> It is also important to note that a Commonwealth statute prohibited commercial trading of gametes or embryos,<sup>42</sup> and this was also enacted in a NSW statute in 2003.<sup>43</sup> Thus, when using donor sperm in treatment, a medical practitioner could not profit from it but was allowed to charge a fee that covered the acquisition and related costs.<sup>44</sup>

It will be recalled that Clark admitted there was always a buffer between the real costs to her and those she passed on to her patients. However, the NSWCA made clear that Clark did not seek any damages for this difference, which must have included the extra expenses incurred by her for the storage and treatment of frozen donated sperm (ie related costs).<sup>45</sup>

The amended RTAC Guidelines of 2005 introduced inter alia: a maximum family rule;<sup>46</sup> made it a requirement that “sperm donors had to consent to being identified by any children conceived by the use of their donor sperm”;<sup>47</sup> and added provisions regarding counselling and consents.<sup>48</sup>

---

<sup>40</sup> At [24]; and National Health and Medical Research Council *Ethical guidelines on assisted reproductive technology* (1996).

<sup>41</sup> *Clark HCA*, above n 1, at [42].

<sup>42</sup> Prohibition of Human Cloning for Reproduction Act 2002 (Cth), s 21.

<sup>43</sup> At [122]; and Human Cloning for Reproduction Act, s 16.

<sup>44</sup> At [33] and [69].

<sup>45</sup> *Clark NSWCA*, above n 4, at [26], [27] and [41].

<sup>46</sup> *Clark NSWSC*, above n 3, at [34].

<sup>47</sup> At [41].

<sup>48</sup> At [56].

## V *The Compensatory Principle*

The most important principle that should always be reflected in each and every damages award for a breach of contract is the compensatory principle. Parke B in *Robinson v Harman* enunciated that:<sup>49</sup>

The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

The High Court of Australia has repeatedly affirmed this on various occasions.<sup>50</sup> The aim is to substitute the expected performance of a contract with a monetary award — claimant’s expectation interest — because that performance was lost due to the breach.<sup>51</sup> This award can also be described as expectation damages, which protects the expectation interest of the claimant.<sup>52</sup>

### A *Recent Case Law*

In *The Golden Victory*, all members of the House of Lords agreed that the compensatory principle is the ruling principle of contract law damages, despite having a split of 3:2 as to the final result in the decision.<sup>53</sup> For instance, Lord Bingham stated that “[the principle] has been enunciated and applied times without number and is not in doubt”,<sup>54</sup>

---

<sup>49</sup> *Robinson v Harman* (1848) 1 Exch 850 at 855, 154 ER 363 at 365.

<sup>50</sup> N Seddon, R Bigwood and M Ellinghaus *Cheshire & Fifoot Law of Contract* (10th ed, Lexis Nexis, NSW, 2012) at 23.6, n 17; and see eg *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80 and *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [13].

<sup>51</sup> Jeannie Paterson, Andrew Robertson and Peter Heffey *Principles of Contract Law* (2nd ed, Lawbook Co, Sydney, 2005) at 412; and see David McLauchlan “Some Issues in the Assessment of Expectation Damages” [2007] NZ Law Review 563 at 564.

<sup>52</sup> Seddon, Bigwood and Ellinghaus, above n 50, at 23.6; and Paterson, Robertson and Heffey, above n 51, at 412 and 425.

<sup>53</sup> *Golden Strait Corp v Nippon Yusen Kubishika Kaisha* [2007] UKHL 12, [2007] 2 WLR 691 [*The Golden Victory*].

<sup>54</sup> At [9].

and Lord Scott stated that “[t]he fundamental principle governing the quantum of damages for breach of contract is long established and not in dispute.”<sup>55</sup> The majority’s underlying point was that “to ignore intervening events which have reduced [the] loss would lead to over-compensation”.<sup>56</sup>

In *The Glory Wealth*,<sup>57</sup> where the facts of the case were distinguishable from *The Golden Victory*,<sup>58</sup> Teare J said:<sup>59</sup>

Since the court is dealing with a question concerning the assessment of damages, and since there has been no clear decision of an appellate court which is binding on the court and pursuant to which the application of the contractual principles regarding an accepted repudiation has led to an award of damages which puts the innocent party in a *better position* than he would have been in had the contract been performed, I have concluded that the court should follow the compensatory principle endorsed by the House of Lords in *The Golden Victory*.

All judges in *Clark v Macourt*, including those in the lower courts, agreed with the compensatory principle, and most mentioned its corollary: an award of damages should not place the plaintiff in a position superior to that which he or she would have occupied had the contract been performed.<sup>60</sup> However, the problem in *Clark v Macourt* was, as Hayne J stated, the application of the ruling principle to the facts.<sup>61</sup> As stated by David

---

<sup>55</sup> At [29].

<sup>56</sup> Robert Stevens “Damages and the Right to Performance: A Golden Victory or Not?” in Jason W Neyers, Richard Brnaugh and Stephen GA Pitel (eds) *Exploring Contract Law* (Hart Publishing, Oxford, 2009) 171 at 196.

<sup>57</sup> *Flame SA v Glory Wealth Shipping Pte Ltd* [2013] EWHC 3153 (Comm), [2014] 2 WLR 1405 [*The Glory Wealth*].

<sup>58</sup> At [81].

<sup>59</sup> At [84] (emphasis added).

<sup>60</sup> *Clark HCA*, above n 1, at [7] per Hayne J, [26]–[27] per Crennan and Bell JJ, [60] per Gageler J dissenting, and [106] per Keane J; *Clark NSWCA*, above n 4, at [99] per Tobias AJA; *Clark NSWSC*, above n 3, at [2] and [11] per Gzell J; and see generally *Wertheim v Chicoutimi Pulp Co* [1911] AC 301 (PC) at 308 per Lord Atkinson.

<sup>61</sup> *Clark HCA*, above n 1, at [8].

McLauchlan, the “implementation [of the general principle] often provokes much judicial disagreement”.<sup>62</sup>

### *B Correct Measure*

In order to give effect to the compensatory principle, various formulae have been concocted to put the plaintiff in the same position as if the expected performance had been rendered. The focus in this paper is solely on damages for defective goods because as a result of the breach of warranty by Macourt, the delivered straws of sperm were defective.

It must be noted that there has to be actual loss suffered as a result of the breach, otherwise the claimant is only entitled to receive nominal damages.<sup>63</sup> One way to distinguish between the types of loss is as follows: *direct loss* is the obvious loss of value of the promised performance calculated using the measure explained below, while *consequential loss* represents the loss that ensues as a consequence of the breach — for instance, loss of profits or further expenses incurred by the claimant.<sup>64</sup>

Normally, expectation damages for the direct loss suffered are calculated on a difference in value basis.<sup>65</sup> To achieve a proper award of compensatory damages, it is best to separate out the claimant’s actual position and its promised position and then calculate the difference between the two.<sup>66</sup> In other words, the victim expected to receive goods at X value — expected position — but ended up receiving defective goods at the lower Y

---

<sup>62</sup> McLauchlan, above n 51, at 565.

<sup>63</sup> Seddon, Bigwood and Ellinghaus, above n 50, at 23.1; Lindy Willmott and others *Contract Law* (4th ed, Oxford University Press, South Melbourne, 2013) at [23.10] and [23.230]; and Philip Clarke and Julie Clarke *Contract Law: Commentaries, Cases and Perspectives* (2nd ed, Oxford University Press, South Melbourne, 2012) at 654 and 655.

<sup>64</sup> Paterson, Robertson and Heffey, above n 51, at 412–413; see generally McLauchlan, above n 51, at 585–590; and see generally Winterton, above n 5, at 449–450.

<sup>65</sup> Seddon, Bigwood and Ellinghaus, above n 50, at 23.6; Paterson, Robertson and Heffey, above n 51, at 412–413; and JLR Davis (ed) *Contract - General Principles: The Laws of Australia* (2nd ed, Thomson Reuters, Sydney, 2012) at [7.9.180].

<sup>66</sup> McLauchlan, above n 51, at 629.

value — actual position. In this situation, the formula for the difference in value, and thus the damages quantum, would be  $X - Y$ .

It must now be highlighted and remembered that this formula is *subject* to various limiting principles, such as causation, remoteness and mitigation, which will be discussed later in the paper.<sup>67</sup>

### *C HCA Majority Decision*

In contrast to NSWCA, all judges in the HCA thought that it made no particular difference whether the contract was for the sale of goods or a contract for the sale of a business.<sup>68</sup> The majority in the HCA stated that Clark's loss, or her expectation interest, was the value of what the promisee would have received if the promise had been performed.<sup>69</sup> On the facts, Clark expected to use 2,500 straws of warranted stock of sperm but she could, and in fact did, only use 504, as a result of Macready AsJ's decision on the breach of warranty.

Thus, applying the actual and expected positions formulation, Clark was entitled to the difference in value between 1,996 straws of warranted stock (X) and 1,996 straws of defective stock (Y) delivered to her. The defective stock would realise no value because it was unusable, consequently Clark was entitled to the value of the 1,996 straws of warranted stock as her damages ( $X - 0 = X$ ). As already mentioned, Gzell J used Xytex quotes from September 2005 to calculate the value of 1,996 straws of compliant sperm that St George should have delivered to Clark in 2002. The HCA majority judges were in full agreement with the findings of the primary judge.<sup>70</sup>

---

<sup>67</sup> Seddon, Bigwood and Ellinghaus, above n 50, at 23.2; and see also Paterson, Robertson and Heffey, above n 51, at 412–413.

<sup>68</sup> *Clark* HCA, above n 1, at [13] per Hayne J, at [30] per Crennan and Bell JJ, at [68] per Gageler J dissenting and at [108] per Keane J.

<sup>69</sup> At [10] per Hayne J, at [25] per Crennan and Bell JJ, and at [75] and [111] per Keane J.

<sup>70</sup> At [13] per Hayne J, at [25] per Crennan and Bell JJ and at [75] per Keane J.

In Keane J's decision, with whom the other majority judges concurred,<sup>71</sup> his Honour rejected the various arguments put forward by Maccourt's counsel. In particular, his Honour decided that the straws of sperm were definitely not valueless to Clark,<sup>72</sup> and that at the time of completing the Deed the value of the business must have been substantially less because of the inferior sperm.<sup>73</sup> As a consequence, Clark's right to the bargain must have been infringed. Furthermore, just like Gzell J in his judgment, Keane J held that the law on mitigation was not applicable as it would "fail to address the claim which [Clark] actually made"<sup>74</sup> and betterment discount was also inapplicable.<sup>75</sup>

This paper argues that the majority judges have failed to apply the law on mitigation correctly. From their individual judgments, it seems like the Judges assumed that the calculation of the difference in value had to be assessed solely at the date of breach. This approach allowed them to disregard legally the events that followed post breach. As it will become more apparent below, the law on mitigation is actually built into the difference in value measure. Thus, in order for the ruling compensatory principle of contract law to have been given effect to, it was crucial for the events post breach in *Clark v Maccourt* to have been properly analysed.

#### *D Dissenting Judgment*

Gageler J decided that *Clark v Maccourt* did not fit in the standard category of breach of contract cases where there is a market, to which the normal measure of damages would apply, because:<sup>76</sup>

The critical difference lies in the limited value to the buyer (Dr Clark) of the performance of the contract by the seller (the company) given the peculiar nature of

---

<sup>71</sup> At [23] per Hayne J and at [24] per Crennan and Bell JJ.

<sup>72</sup> At [114]–[124].

<sup>73</sup> At [128] and [134].

<sup>74</sup> At [128].

<sup>75</sup> At [142].

<sup>76</sup> At [68].



the asset (frozen sperm) which the company was obliged to deliver under the contract.

In other words, Gageler J suggested that St George sperm was always going to be used in the treatment of Clark's patients in the normal course of her practice.<sup>77</sup> As already mentioned, the ethical guidelines prohibited Clark from charging her patients a fee above her own acquisition costs and expenses;<sup>78</sup> Clark could never make a profit on these assets.<sup>79</sup> Therefore, because of this limited value of the asset and the fact that Clark would have never re-sold these assets in the market, the fundamental justification for the standard difference in value measure of damages was displaced.

In particular, Gageler J emphasised Clark's ability to use compliant sperm for the treatment of her patients.<sup>80</sup> Any loss Clark suffered was the extra cost she incurred when she was forced to place herself in the position of using compliant sperm in treating her patients when St George sperm was found to be unusable.<sup>81</sup> Thus, as the NSWCA held, Clark's *prima facie* loss was the Xytex replacement cost. However, Clark had already recouped that cost by charging her patients a fee. If there was any part of the overall cost that Clark did not recoup from her patients for the 1,996 straws of sperm, then that would have been recoverable from Macourt.<sup>82</sup> Thus, the measure adopted in the NSWCA was appropriate because:<sup>83</sup>

... it yields an amount which places Dr Clark in the same position as if the contract had been performed so as to provide her with the expected use in the normal course of her practice of 1,996 straws of the frozen sperm delivered to her.

---

<sup>77</sup> At [70].

<sup>78</sup> At [69].

<sup>79</sup> At [69].

<sup>80</sup> At [70].

<sup>81</sup> At [71].

<sup>82</sup> At [72].

<sup>83</sup> At [72].

It is important to note at this point that Gageler J did not discuss the law on mitigation, but instead held that the normal difference in value measure of calculating damages was displaced in view of the limited value of the stock to Clark.

### *E Robert Stevens' Rights Model*

This section of the paper discusses the “rights model” that has gained some support in academic literature.<sup>84</sup> Stevens believes that the primary right to performance of a contract is created upon the voluntary entry into a contract,<sup>85</sup> and so “[t]he infringement of the primary right to performance gives rise to a secondary right to damages which did not exist prior to breach.”<sup>86</sup> Therefore, an award of substantial damages acts in substitution of the infringed right of the claimant; hence, the term Stevens uses — substitutive damages.<sup>87</sup>

Substitutive damages require an objective assessment to be made at the moment of the infringement; thus, the date of assessment for the court is the date of breach.<sup>88</sup> Substitutive damages are available even if the loss as a matter of fact is not suffered because “damages seek to achieve the closest position to the wrong not having occurred”.<sup>89</sup> Stevens believes that “it is a mistake to think that where no loss is suffered no claim for [substantial] damages is available”.<sup>90</sup> In my view, this approach to damages goes against the fundamental compensatory principle, which states that actual loss must be proved by the claimants in order to give proper compensation to them. Stevens himself admitted that the “[s]ubstitutive damages are not compensatory for loss, properly so-called, at all”,<sup>91</sup> but act as “to vindicate the right to performance”.<sup>92</sup> Consequently,

---

<sup>84</sup> Robert Stevens *Torts and Rights* (Oxford University Press, Oxford, 2007) at 2.

<sup>85</sup> See generally at 10.

<sup>86</sup> Stevens, above n 56, at 172.

<sup>87</sup> Stevens, above n 84, at 59.

<sup>88</sup> At 60 and 69.

<sup>89</sup> See generally at 59; and Stevens, above n 56, at 174.

<sup>90</sup> Stevens, above n 84, at 61.

<sup>91</sup> Stevens, above n 56, at 173.

<sup>92</sup> At 172.

Stevens believes that damages should be quantified according to the degree of seriousness of the infringed contractual right.<sup>93</sup>

According to Stevens, consequential losses are also recoverable but, as opposed to being objectively assessed, they must be proved by the claimant.<sup>94</sup> Thus, consequential losses are assessed at the time of the judgment.<sup>95</sup> More importantly, the “breach of contract does not fall into the category of wrongs which require the proof of consequential loss before substantial damages will be awarded”.<sup>96</sup> On this point, Stevens also emphasised that mitigation and remoteness are questions *only* to be discussed when calculating the consequential loss, but are *not* questions to be discussed when calculating the value of the infringed right.<sup>97</sup> In other words, there is no need to inquire into mitigation or remoteness when the difference in value is assessed.

#### *F Criticism of Robert Stevens*

Andrew Burrows and James Edelman offer the main critique of the rights model, suggesting it is “a radical and novel reinterpretation of the law”.<sup>98</sup> Burrows argues: (a) the “rights-based approach” would trigger a right to substantial damages for each and every wrong;<sup>99</sup> (b) it contradicts the law on mitigation because post breach events would not be legally considered;<sup>100</sup> (c) this in itself goes against courts’ practice that does inquire into events subsequent to the breach;<sup>101</sup> (d) it does not leave any room for an award of nominal damages;<sup>102</sup> and (e) it would be meaningless to assess the value of the right

---

<sup>93</sup> Stevens, above n 84, at 79.

<sup>94</sup> At 60.

<sup>95</sup> At 60.

<sup>96</sup> Stevens, above n 56, at 176.

<sup>97</sup> At 181.

<sup>98</sup> Andrew Burrows “Damages and Rights” in Donal Nolan and Andrew Robertson (eds) *Rights and Private Law* (Hart Publishing, Oxford, 2012) 275 at 278.

<sup>99</sup> Andrew Burrows “Are ‘Damages on the Wrotham Park Basis’ Compensatory, Restitutionary or Neither?” in D Saidov and R Cunnington (eds) *Contract Damages: Domestic and International Perspectives* (Hart Publishing, Oxford, 2008) 165 at 181.

<sup>100</sup> At 182.

<sup>101</sup> At 183.

<sup>102</sup> At 184.

without considering the consequential impact of infringement because there is an obvious overlap between damages for the infringed right and the compensatory consequential damages.<sup>103</sup>

In addition, Edelman pointed out that the rights model causes one to be entitled to the full value of the right to a thing without any regard to the seriousness of the damage.<sup>104</sup> In other words, placing too much focus on the value of the right that has been infringed would render the nature of that infringement and its consequences as irrelevant.<sup>105</sup> Moreover, the approach would lead to double recovery if the claimant is permitted an award of damages for the infringement of its right *and* for any consequential losses.<sup>106</sup>

Robert Stevens has attempted to provide counter-arguments to his critiques. First, Stevens said that every wrong would not entitle the claimant to substantial damages because “[f]or some wrongs all that is actionable is consequential loss.”<sup>107</sup> With respect, a substantial damages award is typically made up of consequential loss if the latter is proved.

Secondly, Stevens argues that the law on mitigation would not be contradicted because the law does not apply to substitutive damages, but solely applies to consequential loss.<sup>108</sup> Once again, Stevens attempts to distinguish substitutive damages, which would ordinarily be calculated on the difference in value basis for defective goods, with consequential loss. This is incorrect, as this paper makes it clearer later, mitigation does apply to the difference in value calculation. Hence, logically the law on mitigation should always be analysed.

---

<sup>103</sup> At 184–185.

<sup>104</sup> James Edelman “The Meaning of Loss and Enrichment” in Robert Chambers, Charles Mitchell and James Penner (eds) *Philosophical Foundations of The Law of Unjust Enrichment* (Oxford University Press, New York, 2009) 211 at 219–220.

<sup>105</sup> Burrows, above n 98, at 280.

<sup>106</sup> Edelman, above n 104, at 220.

<sup>107</sup> Robert Stevens “Rights and Other Things” in Donal Nolan and Andrew Robertson (eds) *Rights and Private Law* (Hart Publishing, Oxford, 2012) 115 at 128.

<sup>108</sup> At 129.

Thirdly, Stevens said there would still be room left for the nominal damages because the infringement of the right is a notional quantification exercise and, in fact, the infringed right may be valueless.<sup>109</sup> With respect, this adds too much uncertainty and complication into law as it effectively begs the courts to create a spectrum of various rights' values, some of which may be *valueless* according to Stevens. Moreover, an award of nominal damages already serves the role of acknowledging the claimant's right to performance without any further proof of loss. Consequently, it is unnecessary to introduce a new exercise for the courts involving the task of putting a *number* on the value of the infringed right.

Furthermore, Stevens disregards the overlap between the damages for the infringed right and damages for the consequential impact of the infringement by simply stating that "[a] wrong and its consequences are not the same thing."<sup>110</sup> This is perhaps a further explanation as to why substitutive damages and consequential loss are treated as separate by Stevens — they are *simply* not the same thing.

Lastly, Stevens argues in reply to Edelman, that it is only the value of the infringement that is quantified in damages, as opposed to the full value of the right.<sup>111</sup> With respect, this actually suggests that the consequences of the infringement must be taken into account to calculate the value of the infringement; as otherwise, it may be impossible to put a financial measure on the infringement at all. Hence, there is definitely an overlap between the infringed right and its consequences. Stevens further said that it is impossible to cumulate claims with respect to the infringed right and consequential losses because "[r]ecovery under one head reduces the damages recoverable under the other."<sup>112</sup> In my view, this statement adds further weight to the argument that there is an overlap between the infringed right and its consequences if they act as a see-saw: where if one goes up, the other comes down.

---

<sup>109</sup> At 131.

<sup>110</sup> At 132.

<sup>111</sup> At 127.

<sup>112</sup> At 128.

### *G Conclusion on the Compensatory Principle*

Robert Stevens' rights model is possibly the best explanation for the majority's award of damages in *Clark v Maccourt*. Clark did not receive the warranted sperm, which she gained a primary right to upon entry into the Deed. As a consequence, Clark's right to performance was infringed and this in turn suggests that the million-dollar damages amount acted as a *substitute* for her infringed right. Moreover, the majority, consistently with Stevens' approach, assessed these substitutive damages "at the time of the infringement"<sup>113</sup> — the date of stock delivery in 2002 — because apparently, "[s]ubsequent events are irrelevant as the court's task is not to calculate what actual loss has been suffered."<sup>114</sup>

This paper suggests that the rights-based approach is incorrect and ought not to be accepted, because it wrongly fails to take into account the ruling compensatory principle of contract damages, especially with respect to the difference in value calculation. Therefore, it is clear that by allowing an award of over a million dollars in damages in favour of Clark, the HCA majority did not give proper compensation to Clark, despite having mentioned the compensatory principle in every judgment. In fact, the story does not end at the point where the claimant receives an award for the infringement of his or her right on the difference in value basis. In legal reality, the contract damages have limitations placed on them because further elements like causation, remoteness and mitigation ought to be considered and applied to the facts of the case, so that *proper* compensation is given. In summary, the criticism of Stevens in the contract law context is valid, and as Burrows rightly said "[t]he novel 'rights-based approach' of Stevens ... causes more problems than it solves."<sup>115</sup>

Overall, the majority in *Clark v Maccourt* failed to give enough weight to the fact that Clark passed the cost of replacement sperm on to her patients. As a result, the majority

---

<sup>113</sup> Stevens, above n 56, at 182.

<sup>114</sup> At 182.

<sup>115</sup> Burrows, above n 99, at 185.

placed Clark in one million dollars superior position than if the contract had been performed. In other words, the majority did not adequately discuss or give any proper effect to the law on mitigation, which would have reduced the quantum of damages; so, it is thoroughly discussed next in this paper.

## *VI The Law on Mitigation*

### *A The Three Rules*

*McGregor on Damages* sets out three rules that govern the law on mitigation.<sup>116</sup> Firstly, a claimant is not permitted to recover for avoidable loss.<sup>117</sup> Secondly, any expenses incurred by the claimant throughout the reasonable mitigating act are recoverable.<sup>118</sup> Thirdly, a claimant is prevented from recovering for avoided loss.<sup>119</sup> It is the last of these rules that is discussed in this paper because, in agreement with NSWCA, it is suggested that Clark has avoided her prima facie loss by passing the cost of the replacement Xytex sperm on to her patients. In other words, Clark has fully mitigated her loss and, thus, she should not have been awarded \$1,246,025.01.

### *B Avoided Loss*

Avoided loss has been described as a “topic of great difficulty”<sup>120</sup> and the law on the topic is “in a dreadful muddle”<sup>121</sup> or “a bit of a jumble”.<sup>122</sup> Nonetheless, this paper will attempt to explain what avoided loss encompasses and how it applies to *Clark v Macourt*.

---

<sup>116</sup> Harvey McGregor *McGregor on Damages* (18th ed, Sweet & Maxwell, London, 2009) at 7-003; and see generally Seddon, Bigwood and Ellinghaus, above n 50, at 23.41–23.43.

<sup>117</sup> At 7-004.

<sup>118</sup> At 7-005.

<sup>119</sup> At 7-006.

<sup>120</sup> Harvey McGregor “The Role of Mitigation in the Assessment of Damages” in D Saidov and R Cunnington (eds) *Contract Damages: Domestic and International Perspectives* (Hart Publishing, Oxford, 2008) 329 at 336.

<sup>121</sup> David McLauchlan “Expectation Damages: Avoided Loss, Offsetting Gains and Subsequent Events” in D Saidov and R Cunnington (eds) *Contract Damages: Domestic and International Perspectives* (Hart Publishing, Oxford, 2008) 349 at 384.

The modern law on the duty to mitigate and mitigation originates from the decision of the House of Lords in *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (British Westinghouse)*.<sup>123</sup> The duty to mitigate is a misnomer, because the plaintiff would not strictly be liable for a failure to mitigate.<sup>124</sup> On avoided loss, in *British Westinghouse*, Viscount Haldane said:<sup>125</sup>

... when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act.

This is taken to mean that even if the claimant goes beyond his or her duty to mitigate, and in doing so reduces his or her loss, those benefits ought to be taken into account when assessing the damages. This is done because one must “look at what actually happened, and to balance loss and gain”.<sup>126</sup> However, there is an important qualification; the act of the claimant or “[t]he subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business.”<sup>127</sup> In other words, the transaction has to be a “part of a continuous dealing with the situation ... and ... not an independent or disconnected transaction”, so as not to be considered as *res inter alios acta*.<sup>128</sup>

When discussing the avoided loss law, various authors in modern literature use the terms “collateral benefits”,<sup>129</sup> “compensating advantages”<sup>130</sup> or “offsetting gains”.<sup>131</sup> According

---

<sup>122</sup> McGregor, above n 120, at 336.

<sup>123</sup> *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 (HL) [*British Westinghouse*].

<sup>124</sup> Andrew Dyson “Recovery for Avoided Loss: Towards a New Account of Mitigation” (October 2012) Social Science Research Network <www.ssrn.com> at 8.

<sup>125</sup> *British Westinghouse*, above n 123, at 689.

<sup>126</sup> At 691.

<sup>127</sup> At 690.

<sup>128</sup> At 692.

<sup>129</sup> McGregor, above n 120, at 337.



to Andrew Burrows, indirect compensating advantages are not deducted from the defendant's damages bill but other compensating advantages may be deducted.<sup>132</sup> Harvey McGregor discusses the topic using collateral benefits that are not discounted because they are *res inter alios acta*.<sup>133</sup> David McLauchlan uses offsetting gains to denote any benefits or advantages accruing to the claimant post breach that must reduce the damages award.<sup>134</sup>

In this paper, the term "offsetting gains" is used to describe any advantages or benefits that the claimant acquires directly as a result of any mitigating act. These offset the primary loss to some degree. For example, in *Clark v Macourt*, Clark has acquired Xytex sperm for treatment once she could no longer use St George sperm because of the breach. It was found by Gzell J that Xytex had provided more extensive information about their donors,<sup>135</sup> and that Clark negotiated an exclusive deal with Xytex where she was the only purchaser in NSW.<sup>136</sup> Furthermore, Clark had actually saved costs by acquiring replacement sperm in portions as when required instead of having to store the St George sperm even if the latter were compliant.<sup>137</sup> The HCA majority should have properly considered these advantages Clark gained as a result of her mitigating act.

This paper suggests that any other actions that are undertaken to *avoid* the consequences of the loss are all part of the avoided loss umbrella, or similarly a part of the bigger mitigation umbrella. However, an enquiry must be made whether or not the action or transaction is *res inter alios acta*. For example, in *Clark v Macourt*, the mitigating act was the acquisition of replacement sperm; but, it is *further* argued that Clark's action of charging her patients a fee that covered the acquisition and related costs, was not *res inter*

---

<sup>130</sup> Andrew Burrows *Remedies for Torts and Breach of Contract* (3rd ed, Oxford University Press, New York, 2004) at ch 7.

<sup>131</sup> McLauchlan, above n 121, at 384.

<sup>132</sup> Burrows, above n 130, at ch 7.

<sup>133</sup> McGregor, above n 120, at 336–346.

<sup>134</sup> McLauchlan, above n 121, at 384.

<sup>135</sup> *Clark* NSWSC, above n 3, at [76].

<sup>136</sup> At [77].

<sup>137</sup> *Clark* NSWCA, above n 4, at [98].

alios acta but actually a *part* of the act undertaken to avoid the consequences of Clark's prima facie loss.

The reason that the arrangement to charge her patients a fee was not *res inter alios acta* is because it was a part of a *continuous* dealing with the situation that Clark has found herself in after the breach. On the facts of the case, in 2005, Clark had begun acquiring Xytex replacement sperm in small portions whenever she needed it in treatment, and this is obviously interlinked with the fee that she was going to charge her patients for that particular treatment. As NSWCA made clear, "it was perfectly legal and ethical for [Clark] to so charge her patients".<sup>138</sup> In contrast, what Clark did *not* do on the facts was to go into the market to acquire the *full* amount of straws from Xytex (ie 1,996 straws) and *then* decide to enter into contracts with her patients for the treatment, in which case the fees charged to patients could be viewed as independent transactions. In other words, as it happened on the *facts* of the case, Clark's mitigating act (ie the purchase of replacement sperm) *and* her charge made to the patients must be viewed as *one and whole* transaction that was definitely completed by Clark to *avoid* the consequences of the breach. In doing so, Clark had fully reduced her primary loss.

### C Andrew Dyson and Adam Kramer

In their article, Dyson and Kramer analyse the compensatory principle, the law on mitigation and the difference in value measure to arrive at various conclusions, some of which are very important to the analysis of *Clark v Macourt*. Dyson and Kramer argue that there is no such 'breach date rule' as discussed in many judgments.<sup>139</sup> In fact, in order to determine the correct date of assessment in a case, it is necessary to understand the rationale behind the law on mitigation.<sup>140</sup> Mitigation is the most important because it "is most often responsible for the mistaken belief in the existence of a breach date

---

<sup>138</sup> At [112].

<sup>139</sup> Andrew Dyson and Adam Kramer "There is no 'breach date rule': mitigation, difference in value and date of assessment" (2014) 130 LQR 259 at 259–260.

<sup>140</sup> At 259.

rule”.<sup>141</sup> Moreover, “[t]he key to resolving the date of assessment problem lies in understanding how the compensatory principle operates.”<sup>142</sup>

First, “the difference in value measure is an application of mitigation where there is an available market”,<sup>143</sup> or as McGregor calls it a “built-in” mitigation.<sup>144</sup> This conclusion is in stark contrast to Stevens’ formulation of the substitutive damages (ie difference in value). He believes that questions of mitigation and remoteness are not relevant to the direct loss — or infringement of the primary right to performance as the author puts it — but are solely relevant when measuring damages for consequential loss.<sup>145</sup> In opposition, Dyson and Kramer believe that the difference in value measure is not a “freestanding head of damages” which abides by its own rules, but like other measures it is subject to limitations.<sup>146</sup>

Secondly, where there is an available market, the mitigation norm is that “it is reasonable to expect the claimant to have prompt resort to it for substitute performance or extrication from the breach”.<sup>147</sup> Thus, the date of assessment should be the date when such opportunity arises for the claimant. The authors state that ordinarily once the defective goods are received, it is reasonable for the purchaser “to resort to the market as soon as possible to sell the defective goods and to purchase goods that conform to the contractual specification”.<sup>148</sup> However, if the claimant is unaware of the breach at the time, then the delivery date is irrelevant because it is not reasonable for the claimant to have had resort to the market at that date.<sup>149</sup> Therefore, it is only after the discovery of the defect that the date of assessment comes into play.

---

<sup>141</sup> At 260.

<sup>142</sup> At 261.

<sup>143</sup> At 269.

<sup>144</sup> At 269.

<sup>145</sup> Stevens, above n 56, at 181.

<sup>146</sup> Dyson and Kramer, above n 139, at 266.

<sup>147</sup> At 280.

<sup>148</sup> At 264.

<sup>149</sup> At 273.

Thirdly, “factual losses are recoverable unless the mitigation rule requires that the factual assessment of the breach position be displaced by the assumption that the claimant acted reasonably”.<sup>150</sup> To explain this in a different way, where there is no need to assume that the claimant acted reasonably because the claimant did in fact act reasonably, the claimant may only recover its factual losses as evidenced at the date of trial; hence, nothing is recoverable if there are no factual losses.

#### *D HCA Majority Judgments*

Hayne J said that Clark did not gain any benefits from her purchase and use of replacement sperm, nor was she any worse off “than she was before she undertook those transactions”.<sup>151</sup> Moreover, according to his Honour, simply showing that Clark could or did charge her patients a fee that covered her replacement sperm cost was irrelevant.<sup>152</sup> With respect, as a result of acquiring Xytex sperm Clark gained direct benefits — or offsetting gains — already mentioned above: an exclusive deal, saved expenses and extensive information on donors. Moreover, it is the whole underlying purpose of the law on avoided loss that any action taken to avoid the consequences of the breach that result in a reduction of the claimant’s loss must be taken into account; this includes an action of passing on the incurred costs to third parties, as long as the arrangement is not *res inter alios acta* — this was also discussed above with respect to *Clark v Maccourt*. It is worth repeating Clark’s concession that the charges she made to her patients “equalled the acquisition and other costs incurred by her”.<sup>153</sup>

Crennan and Bell JJ rejected the mitigation argument on the basis that Clark’s dealings with patients “did not avoid, or increase or diminish, the loss of her *bargain* for delivery of St George sperm which was compliant”.<sup>154</sup> This, once again, has a strong link to Stevens’ approach, as if Clark’s *right* to her bargain was infringed causing her loss; thus,

---

<sup>150</sup> At 277.

<sup>151</sup> *Clark HCA*, above n 1, at [19]–[21].

<sup>152</sup> At [22].

<sup>153</sup> At [37].

<sup>154</sup> At [37] (emphasis added).

the only focus was to compensate Clark using the difference in value calculation at the time of breach. This would allow one, and did allow the HCA majority, to disregard legally any events post breach. However, with respect, if “commonsense overall judgment”<sup>155</sup> is applied when one looks “at what actually happened”<sup>156</sup>, it is clear that Clark’s loss — the replacement stock cost — was recouped from her own patients and thus, her loss was fully avoided.

Keane J, in agreement with the primary judge,<sup>157</sup> seems to be a strong proponent of the ‘breach date rule’ because it would bring finality and certainty into commercial transactions.<sup>158</sup> However, Dyson and Kramer clarify that there is no such thing as a ‘breach date rule’ as long as one understands and applies the law on mitigation correctly. Neither is Keane J’s statement consistent with the view of the House of Lords in *The Golden Victory*.<sup>159</sup>

Unsurprisingly, Keane J rejected the mitigation argument because it would “fail to address the claim which the appellant actually made”.<sup>160</sup> Clark’s claim asked the court to compensate her for the loss sustained at the completion of the Deed.<sup>161</sup> This, perhaps, sheds light as to why the HCA majority judges were so focused on the date of breach in 2002, as opposed to considering events post breach in thorough detail. In other words, the majority did not truly inquire into Clark’s purchase of replacement sperm subsequent to the breach, the cost of which was also later recouped from her own patients. Their Honours simply used Xytex evidence to calculate what value Clark was entitled to back in 2002.

---

<sup>155</sup> *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (formerly Travelplan SAU) of Spain* [2014] EWHC 1547 (Comm) at [64].

<sup>156</sup> *British Westinghouse*, above n 123, at 691.

<sup>157</sup> *Clark* NSWSC, above n 3, at [18] and [19].

<sup>158</sup> *Clark* HCA, above n 1, at [109] and [110].

<sup>159</sup> See generally *The Golden Victory*, above n 53, at [63] and [64] per Lord Carswell.

<sup>160</sup> *Clark* HCA, above n 1, at [128].

<sup>161</sup> At [128].

As Dyson and Kramer explain, the difference in value should be assessed once the claimant has an opportunity to go into the market to get a substitute. On the facts, Clark purchased Xytex sperm as when it was required in her treatment starting September 2005. Therefore, the date of breach in 2002 was an incorrect date to assess the damages quantum. If using one of the conclusions from Dyson and Kramer's article, there is no need to treat Clark as if she had acted reasonably because Clark did in fact act reasonably. Consequently, Clark was only entitled to recover her factual losses as evidenced at trial. It is clear from the NSWCA's judgment that Clark passed the acquisition costs on to her patients and she herself conceded that point.<sup>162</sup> When one looks "at what actually happened" and balances loss and gain, Clark has suffered no loss, so there was nothing left to compensate.<sup>163</sup> For an argument's sake, there was the buffer difference that Clark was entitled to because her real costs were greater than what she charged her patients. However, as mentioned earlier, Clark never claimed these extra expenses in damages, thus, she was unable to recover them from Macourt.

When discussing betterment, Keane J rejected the argument because there was no evidence to establish "extra profitability attributable to the use of Xytex sperm".<sup>164</sup> In deciding so, his Honour limited the law on betterment to the particular facts of *British Westinghouse*, where extra profitability was gained by the claimant because of the higher efficiency of the newly purchased replacement goods.

With respect, this is incorrect because Clark acquired direct benefits from the superiority of Xytex stock when compared to warranty compliant St George straws. It is unnecessary to limit offsetting gains to situations where the benefits gained solely lead to claimant's extra profitability. If properly understood, the requirement proposed by Viscount Haldane is that the benefits are taken into account if the action undertaken by the claimant leads to a reduction of his or her losses.<sup>165</sup> Moreover, in *Clark v Macourt*, because of regulations, medical practitioners could not make any profit when using sperm in treatment.

---

<sup>162</sup> At [37].

<sup>163</sup> *British Westinghouse*, above n 123, at 691.

<sup>164</sup> *Clark HCA*, above n 1, at [142].

<sup>165</sup> *British Westinghouse*, above n 123, at 689.

Therefore, it is wrong to tell Macourt that there were no offsetting gains against Clark's primary loss simply because there was no extra profitability, when in actual fact, no profit could be made from the sperm when it was used in treatment. Overall, the only matter left for the counsel would have been to properly quantify these offsetting gains, or put a number on them, so that this would have ultimately reduced the damages bill awarded against Macourt.

### *VII Conclusion on Clark v Macourt*

Compensatory principle is the fundamental ruling principle that should be applied to each and every award of damages for breach of contract. I have attempted to show that the majority judges in *Clark v Macourt* did not apply the compensatory principle correctly to the facts of the case because their Honours failed to give proper attention to the law on mitigation. More specifically, Clark has recouped her replacement sperm costs from her patients, and in doing so she fully reduced her primary loss. Additionally, Clark gained direct advantages and benefits from the superiority of Xytex stock when compared to compliant St George sperm, which should have been properly treated as offsetting gains. As a result, because of a failure to apply the law on mitigation correctly, Clark was placed in a superior position, to the extent of over a million dollars, than if the contract had been performed. As Macourt's counsel put it:<sup>166</sup>

... the effect of the primary judge's award of damages is that Dr Clark will have been reimbursed twice for the expense of purchasing replacement Xytex sperm: first by her patients and, secondly, by order of the court.

As it was made more apparent, there is a strong link between the HCA majority reasoning and Robert Stevens' rights model and his substitutive damages. The latter approach has attracted much valid criticism and, therefore, the HCA majority decision is deserving of the same fate. On one hand, the decision, being so consistent with Stevens' approach, is "superficially attractive" because it advocates for the 'breach date rule' and a simple

---

<sup>166</sup> *Clark NSWCA*, above n 4, at [81].

difference in value calculation exercise.<sup>167</sup> Surely it may bring “finality and certainty to commercial dealings” as Keane J said.<sup>168</sup> On another hand, the approach and the decision are “ultimately flawed” because the HCA majority judges paid little attention to the law on mitigation.<sup>169</sup> Importantly, Dyson and Kramer emphasise that “the difference in value measure is an application of mitigation where there is an available market”, and thus, there is no ‘breach date rule’ properly so-called.<sup>170</sup> In their Honour’s attempt to give proper effect to the compensatory principle, it was necessary for the HCA judges to analyse the law on mitigation in more detail. However, this was not done.

Lastly, it will be recalled that Clark in her pleadings asked for “something equivalent to the value of the worthless Sperm”, which if read literally means she asked for an award of \$0 because worthless sperm would have realised nothing.<sup>171</sup> Ironically, Keane J stated that Clark “was entitled to frame her claim in the manner most advantageous to her, and to have that claim determined”.<sup>172</sup> Their Honours did not determine that claim when they “erroneously compensated” Clark with \$1,246,025.01, when she literally claimed \$0 (a figure she arguably should have been awarded!).<sup>173</sup>

---

<sup>167</sup> Burrows, above n 98, at 290.

<sup>168</sup> *Clark HCA*, above n 1, at [110].

<sup>169</sup> Burrows, above n 98, at 290.

<sup>170</sup> Dyson and Kramer, above n 139, at 269.

<sup>171</sup> *Clark HCA*, above n 1, at [32].

<sup>172</sup> At [103].

<sup>173</sup> *Clark NSWCA*, above n 4, at [131].



## VIII Bibliography

### A Cases

#### 1 Australia

*Clark v Macourt* [2013] HCA 56, (2013) 304 ALR 220.

*Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64.

*Macourt v Clark* [2012] NSWCA 367.

*St George Fertility Centre Pty Ltd v Clark* [2011] NSWSC 1276.

*Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272.

#### 2 United Kingdom

*British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 (HL).

*Flame SA v Glory Wealth Shipping Pte Ltd* [2013] EWHC 3153 (Comm), [2014] 2 WLR 1405.

*Fulton Shipping Inc of Panama v Globalia Business Travel SAU (formerly Travelplan SAU) of Spain* [2014] EWHC 1547 (Comm).

*Golden Strait Corp v Nippon Yusen Kubishika Kaisha* [2007] UKHL 12, [2007] 2 WLR 691.

*Robinson v Harman* (1848) 1 Exch 850, 154 ER 363.

*Wertheim v Chicoutimi Pulp Co* [1911] AC 301 (PC).

### B Legislation

#### 1 Australia

Human Cloning for Reproduction and Other Prohibited Practices Act 2003 (NSW).

Prohibition of Human Cloning for Reproduction Act 2002 (Cth).

Sale of Goods Act 1923 (NSW).

### C Books

HG Beale (ed) *Chitty on Contracts* (31st ed, Sweet & Maxwell, London, 2012).

Andrew Burrows *A Casebook on Contract* (4th ed, Hart Publishing, Oxford, 2013).

Andrew Burrows *Remedies for Torts and Breach of Contract* (3rd ed, Oxford University Press, New York, 2004).

John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012).

Maree Chetwin, Stephen Graw and Raymond Tiong *An Introduction to the Law of Contract in New Zealand* (4th ed, Brookers, Wellington, 2006).

Philip Clarke and Julie Clarke *Contract Law: Commentaries, Cases and Perspectives* (2nd ed, Oxford University Press, South Melbourne, 2012).

JLR Davis (ed) *Contract - General Principles: The Laws of Australia* (2nd ed, Thomson Reuters, Sydney, 2012).

Donald Harris, David Campbell and Roger Halson *Remedies in Contract and Tort* (2nd ed, Butterworths, Wellington, 2002).

Jonathan Law (ed) *A Dictionary of Law* (7th ed, Oxford University Press, New York, 2009).

Harvey McGregor *McGregor on Damages* (18th ed, Sweet & Maxwell, London, 2009).

Ewan McKendrick *Contract Law: Text, Cases, and Materials* (5th ed, Oxford University Press, Oxford, 2012).

Jeannie Paterson, Andrew Robertson and Peter Heffey *Principles of Contract Law* (2nd ed, Lawbook Co, Sydney, 2005).

Edwin Peel (ed) *The Law of Contract* (13th ed, Sweet & Maxwell, London, 2011).

N Seddon, R Bigwood and M Ellinghaus *Cheshire & Fifoot Law of Contract* (10th ed, Lexis Nexis, NSW, 2012).

Robert Stevens *Torts and Rights* (Oxford University Press, Oxford, 2007).

Lindy Willmott and others *Contract Law* (4th ed, Oxford University Press, South Melbourne, 2013).

#### *D Chapters in Books*

Andrew Burrows “Are ‘Damages on the Wrotham Park Basis’ Compensatory, Restitutionary or Neither?” in D Saidov and R Cunningham (eds) *Contract Damages: Domestic and International Perspectives* (Hart Publishing, Oxford, 2008).

Andrew Burrows “Damages and Rights” in Donal Nolan and Andrew Robertson (eds) *Rights and Private Law* (Hart Publishing, Oxford, 2012).

James Edelman “Gain-Based Damages and Compensation” in Andrew Burrows and Lord Rodger of Earlsferry (eds) *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press, New York, 2006).

James Edelman “The Meaning of Loss and Enrichment” in Robert Chambers, Charles Mitchell and James Penner (eds) *Philosophical Foundations of The Law of Unjust Enrichment* (Oxford University Press, New York, 2009).

Harvey McGregor “The Role of Mitigation in the Assessment of Damages” in D Saidov and R Cunnington (eds) *Contract Damages: Domestic and International Perspectives* (Hart Publishing, Oxford, 2008).

David McLauchlan “Expectation Damages: Avoided Loss, Offsetting Gains and Subsequent Events” in D Saidov and R Cunnington (eds) *Contract Damages: Domestic and International Perspectives* (Hart Publishing, Oxford, 2008).

Robert Stevens “Damages and the Right to Performance: A Golden Victory or Not?” in Jason W Neyers, Richard Brnaugh and Stephen GA Pitel (eds) *Exploring Contract Law* (Hart Publishing, Oxford, 2009).

Robert Stevens “Rights and Other Things” in Donal Nolan and Andrew Robertson (eds) *Rights and Private Law* (Hart Publishing, Oxford, 2012).

Robert Stevens “The Conflict of Rights” in Andrew Robertson and Tang Hang Wu (eds) *The Goals of Private Law* (Hart Publishing, Oregon, 2009).

#### *E Journal Articles*

KE Barnett “Contractual Expectations and Goods” (2014) 130 LQR 387.

Michael G Bridge “Mitigation of damages in contract and the meaning of avoidable loss” (1989) 105 LQR 398.

Andrew Dyson and Adam Kramer “There is no ‘breach date rule’: mitigation, difference in value and date of assessment” (2014) 130 LQR 259.

Fuller and Perdue “The Reliance Interest In Contract Damages: 1” (1936) 46 Yale LJ 52.

David McLauchlan “Remoteness Reinvented?” [2009] 9(2) OUCLJ 109.

David McLauchlan “Some Issues in the Assessment of Expectation Damages” [2007] NZ Law Review 563.

David McLauchlan and Nick Hegan “Contract Damages: Fundamental Principle, Fundamental Disagreement” (2008) 46 Can Bus LJ 89.

David Winterton “Money awards substituting for performance” (2012) 3 LMCLQ 446.

### *F Reports*

Australian Health Ethics Committee *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research* (National Health and Medical Research Council, September 2004).

National Health and Medical Research Council *Ethical guidelines on assisted reproductive technology* (1996).

### *G Internet Resources*

#### *1 Documents*

Andrew Dyson “Recovery for Avoided Loss: Towards a New Account of Mitigation” (October 2012) Social Science Research Network <[www.ssrn.com](http://www.ssrn.com)>.

Norton Rose Fullbright Australia “Chronology” (14 June 2013) High Court of Australia <[www.hcourt.gov.au](http://www.hcourt.gov.au)>.

#### *2 Websites*

Australian Government “Legal system” (February 2012) Department of Foreign Affairs and Trade <[www.dfat.gov.au](http://www.dfat.gov.au)>.

Fertility First “About Us” (2013) Fertility First Centre for Reproductive Health <[www.fertilityfirst.com.au](http://www.fertilityfirst.com.au)>.

Fitzroy Legal Services Inc “The Australian Legal System” (1 April 2014) The Law Handbook <[www.lawhandbook.org.au](http://www.lawhandbook.org.au)>.

High Court of Australia “About the Justices” <[www.hcourt.gov.au](http://www.hcourt.gov.au)>.

High Court of Australia “Case S95/2013” <[www.hcourt.gov.au](http://www.hcourt.gov.au)>.

***Word count***

The text of this paper (excluding table of contents, abstract, key words, footnotes, and bibliography) comprises approximately 7,950 words.