UPHOLDING THE RIGHT TO ENVIRONMENT: CONSTITUTIONAL, INTERNATIONAL, AND COMMON LAW INTERSECTIONS IN *FIJI FISH MARKETING GROUP LTD V PACIFIC CEMENT LTD*

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INTRODUCTION

On 18 April 2023, Amaratunga J handed down his judgment in the High Court of Fiji in *Fiji Fish Marketing Group Ltd v Pacific Cement Ltd* ('*Fiji Fish*'),[1] making an award of general and special damages for losses caused by the polluting transport of an environmentally hazardous industrial material across Suva Harbour. The significance of this case is manifold, most importantly for presenting one of the first applications of the right to environment embodied in the current Constitution of the Republic of Fiji, only having come into force in 2013.[2] This strand of constitutional jurisprudence thus still in its infancy, Amaratunga J's judgment provides a strong precedent for its practical application, particularly by incorporation of principles of international environmental law. The ongoing role of relevant common law principles is also affirmed, with particular insight on the role of judges to develop and mould such principles to operate in the unique constitutional context of Fiji. The case also provides significant guidance on when and how a common law duty of care is imposed upon polluters. These issues all ultimately render the case an important precedent for the further development of Fijian constitutional and environmental law.

CASE HISTORY

Factual background

Suva Harbour is home to Fiji's principal and busiest international port, which services a range of both passenger and industrial vessels. Pacific Cement Ltd and Tengy Cement Ltd were the first and second defendants in this case, whose cement manufacturing businesses required imports of a granular lime-based industrial product called 'Clinker' to Suva Port on approximately ten occasions every year. The first and second defendants had jointly contracted the third defendant, RPA Group (Fiji) Ltd to transport the Clinker shipments from Suva Port to their respective factories on the opposite side of the harbour, approximately 8 km away by road. A fish processing factory belonging to the plaintiff, Fiji Fish Marketing Group Ltd, was also located near the defendants' factories.

The third defendant had succeeded an earlier contractor, and initially continued using the same method to transport the Clinker. Namely, it would be offloaded onto trucks at the port, then

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[1] (High Court, Fiji, Amaratunga, 18 April 2023), available via www.paclii.org at [2023] FJHC 223.

[2] *Constitution of the Republic of Fiji 2013*, s 162(2).

covered, and driven the distance around the harbour to the factories. However, due to the imposition of weight restrictions on a key bridge forming part of the trucks' route, the third defendants switched to transporting the Clinker across the harbour by barge in December 2016. Upon arrival at a privately owned jetty near the cement factories, the barge's cargo would then be offloaded onto trucks. Offloading of each shipment could take up to 15 to 20 days to complete in full, particularly with days lost to poor weather conditions.

It was this process of transfer which gave rise to the cause of complaint in the case. By using open excavators, the third defendants' method caused Clinker dust to rise into the air, be carried on the wind, and finally settle on and around the surrounding roads, marine environment, and neighbouring properties (including the plaintiff's). Documents produced by multiple parties precisely demonstrated the dangers of this pollution: not only does Clinker dust pose a risk of respiratory and other health damage to humans, but is also corrosive and capable of infiltrating machinery parts and rendering them inoperable. This is particularly so given that upon contact with moisture, the substance clumps and becomes highly difficult to remove without acid. Most importantly for current purposes, it was therefore conceded that Clinker would be a hazardous environmental pollutant.

Despite this, the third defendant in interim proceedings produced evidence to the effect of claiming that they had obtained all relevant statutory approvals for conducting the Clinker offloading operation in this manner. First, they produced an email reply from Fiji's Department of Environment advising that no relevant permit was required under the *Environment Management Act 2005* (Fiji) (for which the Department was the responsible agency). This was despite the plain words of the Act stating that

> A facility must not- (a) discharge any waste or pollutant into the environment; (b) handle…. any hazardous substance; … or (d) engage in any activity that may have an adverse impact on human health or the environment, unless the facility is issued with a permit under this Part'.[3]

Second, the third defendant in the same proceedings produced a permit issued by the Maritime Safety Authority of Fiji (MSAF).

The plaintiff, Fiji Fish Marketing Group Ltd is one of Fiji's largest fish processing companies, whose factory lies a mere 100 metres from the jetty site. The factory exports 100% of its product. To participate in international markets, maintaining its international HACCP (Hazard Analysis and Critical Control Points) certification is essential. Part of that certification involves monitoring of pollutants and ensuring stringent standards of hygiene and cleanliness. The defendants' Clinker dust emissions therefore threatened not only this certification, but also the practical operation of the fish processing: the dust gathered in fishing vessels and in the factory, caused blockages in essential air conditioning units and freezers, and posed a contamination risk to the food.

The plaintiff gave evidence that factory operations were shut down for several days as a result. A further financial risk arose to the plaintiff from the fact that it owned the jetty where the third defendant would berth its vessels. Other third parties were also permitted to dock there for a

[3] *Environment Management Act 2005* (Fiji), s 35(1).

fee, but had begun to indicate that they would cease to do so should the Clinker dust pollution continue, threatening another of the plaintiff's revenue streams.

Interim decision

Despite correspondence between the parties in early 2017, in which various means of curtailing Clinker dust emissions were proposed, the parties failed to reach an amicable resolution to the dispute that had arisen between them. The plaintiff, represented by Mr W Clarke, made an *ex parte* application to the High Court of Fiji in March 2017. The plaintiff sought an interim injunction to restrain the third defendant from continuing to transfer Clinker by excavator at the jetty. With several weeks remaining before the next Clinker shipment was due, the case was converted to *inter partes* and the defendants, represented by Mr F Haniff, were permitted to file affidavits in opposition.

Justice Amaratunga ultimately granted the plaintiff's application, finding that the hazardous nature of Clinker, as well as application of the polluter pays principle against the defendants tipped the balance of convenience in the plaintiff's favour. The greater part of the interim judgment addressed the defendants' purported statutory approvals. Upon examining the words of the *Environment Management Act 2005* (above) for himself, Amaratunga J concluded that the Department's advice was incorrect, and that the relevant permit should have been obtained. Likewise, the permit issued by MSAF was unable to protect the Clinker operations, as it was never assigned by the previous contractor who had obtained it, and so it authorised no action of the third defendant. Though it was then strictly unnecessary to address the merits of the defendants' defence of statutory authority, his Honour nonetheless gave considerable obiter to the effect that *even if* the correct approvals were obtained, the plaintiffs' common law rights of nuisance would survive in the absence of express or implied statutory exclusion.

Final decision

The case proceeded to trial in September 2019, with the final judgment handed down over three and a half years afterwards (presumably due to court delays caused by the COVID-19 pandemic). The interim orders remained in place for that period.

At trial, the plaintiff, now represented by Ms P Low & Ms C Taki, brought an action in common law nuisance and negligence against all three defendants. The orders sought were a permanent injunction to restrain the Clinker transfer activities, as well as general and special damages for cost of factory repairs, cleaning, and loss of income. Both the claims of nuisance and negligence were successful, and the damages sought accordingly awarded. Though Amaratunga J rejected the plaintiff's contention that there existed a relationship of agency or service between the third defendant and the first and second defendants, all three were nonetheless ultimately held jointly and severally liable for the award by virtue of their shared knowledge and culpability.

The nuisance claim was dealt with only briefly, with the main issues at trial concerning the action in negligence. Namely: (1) whether a duty of care exists to avoid polluting the environment; and if so, (2) by whom is such a duty owed? More specifically, is the duty non-delegable?

After concluding a duty did exist, the significance of the second question posed was due to the first and second defendants' argument that the third defendant was an independent contractor and bore sole responsibility for ensuring the environmental safety of the Clinker transportation operations. Some evidential uncertainty existed as to whether the third defendant was indeed an independent contractor. However, this factual issue was unnecessary to decide, due to the formulation of the duty as non-delegable for all those with ultimate authority or power over the handling of the polluting material – here, that also included the first and second defendants. Perhaps more accurately, the judgment outlined *two* alternative non-delegable duties of care, which can be summarised as follows. Firstly, persons with responsibility for the transport of hazardous materials owe a duty *to the public generally* to effect transport without causing pollution ('first duty of care'). Secondly, a duty is owed to *specific persons* with whom a 'special relationship' arises, not to cause a nuisance to or otherwise infringe upon their right to environment by causing pollution, regardless of whether that pollutant is hazardous ('second duty of care').

It was this second duty of care which demonstrates the most significant development to Fijian environmental law, and thus to which the bulk of commentary will be addressed. Importantly, Amaratunga J found that the 'special relationship' arises by virtue of the Constitutional right to environment and international rules of environmental law, including ecologically sustainable development and the 'polluter pays' principle ('PPP').

Finally, his Honour found, obiter, that though these duties cannot be delegated, a party's own liability for instances of pollution may be reduced or excluded by demonstrating that they have taken all necessary measures to minimise such pollution.

COMMENTARY

Constitutional interpretation & international law

Fiji has had four different Constitutions since gaining independence in 1970, coming into force in 1970,[4] 1990,[5] 1998 (following enactment in 1997),[6] and 2013,[7] respectively. The fourth of these was in force for the entirety of this case's procedural history, and remains the current supreme law of Fiji.[8] In reaching his conclusion on the second duty of care, Amaratunga J relied on two key sections of the 2013 Constitution, both contained within Ch II – the Bill of Rights. These were ss 7 ('Interpretation of this Chapter') and 40 ('Environmental Rights').

The relevant parts of s 7 provide:

> 7.—(1) … when interpreting and applying this Chapter, a court, tribunal or other authority—…(b) may, if relevant, consider international law, applicable to the protection of the rights and freedoms in this Chapter.

[4] *Fiji Independence Order 1970,* ss 4(1), 2(1).
[5] *Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990*, s 2(2).
[6] *Constitution Amendment Act 1997* (Fiji), s 193(2).
[7] *Constitution of the Republic of Fiji 2013*, s 162(2).
[8] Above n 7, s 2(1).

> (4) When deciding any matter according to common law, a court must apply and, where necessary, develop common law in a manner that respects the rights and freedoms recognised in this Chapter.

No equivalent to any part of the above appears in either the 1970 or 1990 Constitutions. However, s 7(1)(b) above finds a close equivalent within s 43(2) of the 1997 Constitution. Additionally, s 7(4) above provides a much more dynamic approach to its 1997 equivalent, which merely states in s 43(1) that common law rights remain unlimited by the Bill of Rights insofar as they 'are not inconsistent' with that Chapter.

Contrastingly, s 40 is an entirely original addition to the 2013 Constitution, with no corresponding provision appearing in any of its predecessors:

> 40.—(1) Every person has the right to a clean and healthy environment, which includes the right to have the natural world protected for the benefit of present and future generations through legislative and other measures.

Both ss 7 and 40 in concert were essential to the outcome of the case. That combination having never before appeared in a Fijian Constitution, it thus presented a unique opportunity for Amaratunga J's judgment to make what is the first and only consideration of this Constitutional issue in Fijian jurisprudence thus far.

To understand the structure of the second duty of care analysis, it becomes necessary to examine his Honour's reasons in some closer detail. The starting point was to employ a common law test for the existence of a novel duty of care: the 'special relationship' between parties (this is examined more closely below). As s 7(4) of the Constitution requires common law concepts to be developed in a 'manner that respects' the Bill of Rights, this then allowed Amaratunga J to apply the right to environment between the parties to form the foundation of the requisite relationship. This alone was not sufficient however, as s 40 is stated in highly idealistic and non-prescriptive terms, giving little insight as to the practical *content* of the right. Therefore, to inform this content, his Honour drew upon international environmental law to incorporate the PPP and sustainable development more generally, as 7(1) allowed him to do. What then is the function of these two principles, and what practical use do they lend to s 40?

Sustainable development is in fact generally regarded as a collection of principles, including the PPP.[9] The most significant and foundational international source of law for the concept is the Rio Declaration,[10] created by the United Nations Conference on Environment and Development in June 1992. Most relevantly, the convention states that 'environmental protection shall constitute an integral part of the development process' (sustainable development), and that 'national authorities should endeavour to promote the internalization of environmental costs…taking into account the approach that the polluter should, in principle, bear the cost of pollution' (PPP).

Once it had been accepted that these principles were relevant, the application to the dispute in this case was then in fact relatively straightforward. Firstly, applying sustainable development as a general notion, as Amaratunga J considered that cement is a 'vital component of

[9] Pierre-Marie Dupuy and Jorge E. Viñuales, *International Environmental Law* (Cambridge University Press, 2nd ed, 2018) 91.

[10] *Rio Declaration on Environment and Development 1992*.

development,' and so must be manufactured in a sustainable manner which minimises environmental pollution. Secondly, as the second and third defendants had authority over and knowledge of the third defendant's operations, all three were 'polluters' upon whom the burden fell to invest in a closed-compartment vehicle (or other method) for Clinker transportation. Failure to do so had caused the plaintiff to incur great cost, and so Amaratunga J also saw the PPP as relevant to developing the common law of damages, which should place this economic burden back on the defendants.

Though certainly a novel application, this is not the first incorporation of these principles in Fijian law. The *Environment Management Act 2005* is Fiji's principal piece of environmental legislation, controlling the use of natural resources and management of developments. The Act's definition of sustainable development varies from that drawn from the Rio Declaration, and focuses primarily on intergenerational equity by describing development which meets the current generation's needs, without compromising the ability of future generations to do the same.[11] Fijian courts have also interpreted s 50 of the Act (which concerns civil claims for damages for pollution) as an embodiment of the PPP, despite the lack of explicit reference.[12] While not yet in force, Fiji's *Climate Change Act 2021* defines sustainable development by incorporation of more conventional elements, including encapsulation of the PPP and other principles of the Rio Declaration. These are essentially the only references in Fijian legislation however, and references in the case law are scarcely more frequent.

Of those infrequent references, the only other Fijian case whose discussion of sustainable development is of relevance for current purposes is *Nasinu Town Council v Khan.*[13] Decided in the Magistrate's Court at Nasinu in 2011, it also concerned an application for an injunction to restrain various polluting activities of the defendant. In granting the injunction, the Magistrate also referred to the Rio principles, but in a far less legally rigorous manner. In fact, the Magistrate's own judgment acknowledged that his approach contained 'technical errors',[14] before merely stating 'but those technicalities should not stand in the path of justice'.[15] Without reference to a Constitutional foundation, or any other legal rule allowing for the enlivenment or incorporation of international principles, the Magistrate assumed their relevance merely because of the case's public importance, and used them to support a conclusion that the plaintiffs 'deserve to live in a pollution free, safe and healthy environment'.[16] Though the judgment was not appealed, the approach taken certainly appears precarious, and perhaps would not have withstood substantive legal challenge or scrutiny.

It is clear therefore that *Fiji Fish* represents a significant improvement on the reasoning previously employed on these issues. Crucially, the benefit of the constitutional protections invoked in *Fiji Fish* were not available to the plaintiffs in *Nasinu Town Council v Khan*, who brought their case prior to the 2013 Constitution coming into force. Amaratunga J's legal methodology thus provides a much clearer and more robust practical precedent.

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[11] *Environment Management Act 2005* (Fiji), s 2.

[12] *Prasad v Total (Fiji) Ltd* (Court of Appeal, Fiji, Lecamwasam, Guneratne, Jameel, JJA, 28 February 2020), available via www.paclii.org at [2020] FJCA 26.

[13] (Magistrates Court, Fiji, Premachandra, RM, 27 July 2011) ('*Khan*'), available via www.paclii.org [2011] FJMC 82.

[14] *Khan*, above n 13, [56].

[15] *Khan*, above n 14.

[16] *Khan,* above n 13, [63].

Role of common law concepts

The role of common law as a valid source of law in Fiji is preserved by s 173(1) of the Constitution, which allows 'all written laws in force immediately before the date of commencement of this Constitution… [to] continue in force'.[17] As a consequence, Amaratunga J declared that the principle of recognising a duty of care by identifying a 'special relationship' is a flexible principle of the common law. As no further explanation was given as to the legal origin or content of this principle, an examination of its function here merits enquiry.

The phrase 'special relationship' certainly appears with great frequency within the tort law of common law jurisdictions, though such references do not converge on a single meaning. Its various usages include describing circumstances in which special knowledge of a party will render them liable for negligent misstatement,[18] relationships whereby a duty arises by virtue of one party's authority or power over the other,[19] and other times merely to reference the accepted categories of relationship in which courts have accepted a duty invariably arises. However, in *Fiji Fish*'s context of seeking to formulate a novel duty of care, the most appropriate and likely usage which Amaratunga J employs is the most general. Indeed, while there is there is little discussion on the term's meaning in the Fijian case law, this appears to be the general usage which emerges from the phrase's appearance in Fijian negligence cases.[20] This meaning essentially encapsulates all of the foregoing:

> There is no magic in the phrase 'special relationship'; it means no more than a relationship the nature of which is such that one party, for a variety of possible reasons, will be regarded by the law as under a duty of care to the other.[21]

Adding an entry to that 'variety of possible reasons' is where Amaratunga J situates his analysis, and so it is important to examine whether he follows the common law tests which generally inform that question.

It is generally acknowledged that the common law recognises no singular test for a novel duty of care, with several alternatives appearing from the historical development of the cause of action.[22] Of course, Lord Atkin's 'neighbour principle' and notions of reasonable foreseeability of harm are a key starting point emerging from the foundational case of *Donoghue v Stevenson*.[23] A test of 'proximity' for the relationship between the parties has also gained popularity in common law countries including in some Fijian courts,[24] and recognising duties

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[17] *Constitution of the Republic of Fiji 2013*, s 173(1).

[18] *Esso Petroleum Co Ltd v Mardon* [1976] QB 801, 827; *Manubhai Industries Ltd v Lautoka Land Development (Fiji) Ltd* [2002] Fiji Law Reports 43.

[19] For example, a teacher and student: *Carmarthenshire County Council v Lewis* [1955] AC 549, or a police officer and detainee: *Reeves v Commissioner of Police for the Metropolis* [2000] 1 AC 360.

[20] See *Wartaj Seafood Products Ltd v Ministry of Home Affairs* [2000] Fiji LR 51; *Adrenalin (Fiji) Proprietory Ltd v Denarau Investments Ltd* (High Court, Fiji, Rajasinghe AM, 13 December 2013), available via www.paclii.org at [2013] FJHC 690; *Reddy v Reddy* (High Court, Fiji, , 20 May 2016), available via www.paclii.org at [2016] FJHC 440.

[21] *Esso Petroleum Co Ltd v Mardon* [1976] QB 801, 828 (Ormond LJ). See also *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1962] 1 QB 396, 400.

[22] See Prue Vines, 'The Needle in the Haystack: Principle in the Duty of Care in Negligence' (2000) 23(2) *UNSW Law Journal* 35, 35–6.

[23] [1932] AC 562, 580–1 (Lord Atkin).

[24] *Wartaj Seafood Products Ltd v Ministry of Home Affairs* [2000] Fiji LR 51, *Manubhai Industries Ltd v Lautoka Land Development (Fiji) Ltd* , above n 18.

by incrementalism from established categories has remained a common approach.[25] Public policy justifications are also not uncommon.[26] There is some question of whether these tests actually yield substantially different results (given that similar notions underlie all of them),[27] but they remain convenient archetypes against which to compare *Fiji Fish*.

So, from this brief review of the most popular common law tests, can it be said that Amaratunga J's judgment accords with any of them, or takes them and develops them further? The judgment certainly made some reference to the parties' proximity and discussed the defendants' knowledge of the dust's ability to cause a nuisance to neighbours, perhaps echoing notions of reasonable foreseeability. However, this discussion appeared primarily in elaborating upon the factual circumstances of the case, rather than to support a legal conclusion by reference to established doctrine. The judgment did make brief reference to an established class of cases in which a duty is imposed upon those performing work of a 'hazardous' nature in a public space. Again however, this reference was used only to support a different conclusion that the duty was non-delegable, rather than to argue for the duty's existence *itself* through a process of incrementalism. Likewise, a clear public policy justification was not offered.

It is fair to state therefore that Amaratunga J's rights-based analysis represents a fundamentally new 'test' or methodology for establishing a novel duty of care in Fijian tort law. Though in this case it employed the right to environment, there is no reason to think the ratio should be limited in this way, as the reasoning would remain consistent if calling on any other provision of the Bill of Rights. Given the number of rights enumerated by the Constitution, this might raise concern that the methodology could give rise to an unjust expansion of the categories of duties and expose prospective defendants to new realms of liability. However, as the analysis requires the use of s 7 of the Constitution, the caveat contained therein that a judge must only develop the common law in this manner 'where necessary' arguably provides a sufficient degree of latitude for the approach to be applied judiciously.

A final point to note on the role of common law in this case is the manner in which the defendants' defence of statutory authority was dealt with in the interim decision. That judgment referred to the English decision of *Barr v Biffa Waste Services Ltd* ('*Barr*').[28] In that case, the principle was articulated that statutory controls and common law nuisance have co-existed for centuries, and that unless a specific express or implied exclusion appears in the statute, there is no reason to presume that the legislature intended to limit private law rights. *Fiji Fish*'s acceptance of that principle brings Fiji generally in line with the approach prevailing in other common law nations.[29] The principle has also been adopted by courts other Pacific Island nations, including Papua New Guinea[30] and the Solomon Islands.[31] In both those examples however, the courts took a slightly different approach. Both cases relied on the earlier English

[25] Prue Vines, above n 22, 40.
[26] Prue Vines, above n 25.
[27] Prue Vines, above n 22, 37.
[28] [2013] QB 455 ('*Barr*').
[29] See, eg, in Canada: *Ryan v Victoria (City)* [1999] 1 SCR 201, 202; and Australia: *Van Son v Forestry Commission* (1995) 86 LGERA 108, 121.
[30] *Medaing v Ramu Nico Management (MCC) Ltd* (Supreme Court, Papua New Guinea, Davani, Hartshorn and Sawong JJ, 22 December 2011), available via www.paclii.org at [2011] PGSC 40.
[31] *Saki v Ross Mining (Solomon Islands) Ltd* (High Court of Solomon Islands, 1 June 1999, Palmer J,).

authority of *Allen v Gulf Oil Refining* ('*Allen*'),[32] in which the principle was articulated that common law approvals survive grants of statutory authority, unless the nuisance is an 'inevitable consequence' of the grant.

It appears from a review of English authorities that the 'express or implied exclusion' and 'inevitable consequence' approaches are both valid alternative tests for determining the applicability of the defence.[33] Indeed, both formulations appear throughout lines of authority from both England and other common law systems,[34] with the earlier decision in *Barr* actually citing *Allen* on this alternative phrasing.[35] Both formulations would arguably have yielded the same result on these facts, and so with Amaratunga J's comments on this issue appearing only as obiter, the lack of reference to an 'inevitable consequence' is unlikely to exclude that formulation.

Application of human rights

It is worth noting that Amaratunga J's rights-based 'special relationship' analysis is only possible on these facts by adherence to a *horizontal* human rights theory.[36] That theory states that constitutional rights can be enforced between and against individuals, in contrast to a wholly *vertical* model where rights protect individuals only from action supported by State authority. While this binary distinction is somewhat simplistic,[37] it is a useful model for current purposes. The defendants and the plaintiff in this case were private parties with no element of State affiliation, which necessarily requires *Fiji Fish* to rely on s 6(3) of the Fijian Constitution, which provides that a provision of the Bill of Rights binds all 'natural or legal person[s]'. While not unique, Fiji thus stands among a minority of the worlds' countries whose constitutions explicitly allow for human rights to bind citizens horizontally,[38] though countries may nonetheless take this approach even in the absence of express constitutional endorsement.[39] On the other hand, some nations' constitutions appear to expressly limit themselves to a vertical model[40] – Fiji itself appeared in this category under the previous 1997 Constitution.[41] This of course presents yet a further reason why the principle from *Fiji Fish* was made possible only in the most recent of all four Constitutional contexts.

In light of this fact, to what extent is the case's applicability limited across the South Pacific region? Is it possible for other nations with similar legal and environmental contexts to follow *Fiji Fish*'s example by allowing enforcement of environmental rights against individuals or

[32] [1981] AC 1001.
[33] *Barr,* above n 28, 53; *Managers of Metropolitan Asylum District v Hill* (1881) LR 6 App Cas 193, 212; *Manchester Corporation v Farnworth* [1930] AC 171, 183.
[34] The situation is similar in Australia: *York Bros (Trading) Pty Ltd v Commissioner of Main Roads* [1983] 1 NSWLR 391, 397; *Benning v Wong* (1969) 122 CLR 249, 308–9.
[35] *Barr v Biffa Waste Services Ltd* [2011] EWHC 1003, [224].
[36] See generally John H. Knox, 'Horizontal Human Rights Law' (2008) 102(1) *American Journal of International Law*.
[37] See Jennifer Corrin, 'From Horizontal and Vertical to Lateral: Extending the Effect of Human Rights in Post Colonial Legal Systems of the South Pacific' (2009) 58(1) *International and Comparative Law Quarterly* 31.
[38] Danwood Mzikenge Chirwa, 'The Horizontal Application of Constitutional Rights in a Comparative Perspective' (2006) 10(2) *Law, Democracy and Development* 21, 22.
[39] Danwood Mzikenge Chriwa, above n 38, 22.
[40] Danwood Mzikenge Chriwa, above n 37, 22, 36-52.
[41] *Constitution Amendment Act 1997* (Fiji), s 21.

other non-State actors? This of course hinges on two questions: whether those nations permit for a horizonal model of constitutional rights, and whether an environmental right is embodied in their constitution.

The first question was last extensively examined in 2009,[42] following which the only Pacific nation whose constitution has been replaced is Fiji – as already outlined above.[43] Of the Pacific island states, it is thus now only Fiji, Papua New Guinea, and Tuvalu whose constitutions explicitly provide for a horizontal application (though case law in some other nations also favours a horizonal approach in the absence of any constitutional directive).[44]

The answer to the second question however is perhaps disappointing: Fiji is the only South Pacific nation to explicitly include a right to environment in their Bill of Rights.[45] Courts in Papua New Guinea have now also recognised a non-constitutional right to a clean and healthy environment partially by reference to international law,[46] which may therefore provide the closest comparison. That is not to say that other nations' constitutions are silent on environment, however. For example, the Constitution of Vanuatu contains an obligation on all citizens '[t]o safeguard the national wealth, resources and environment in the interests of the present generation and of future generations.'[47] However, as this is not a *right*, it would not readily transfer to a *Fiji Fish*-style analysis, and the non-justiciability of the obligation[48] would in any case appear to pose an insurmountable impediment for attempting to analogise with Amaratunga J's approach.

Given the unique combination of common law, humans rights, and international law elements required for its construction, this precedent is thus arguably limited in application to Fiji – though possibly extendable to Papua New Guinea.

A final point here is that this case presents an interesting example in response to concerns that human rights may face difficulty of enforcement in environments of legal pluralism.[49] Essentially, the concern is that the availability of different legal sources and processes in a plural legal system may undermine the ability of human rights to apply with ubiquity, especially where potential inconsistencies with customary rules are concerned.[50] Indeed, the state of Fiji's plurality of laws is perhaps even less clear now than it was previously, as the current Constitution has adopted an even narrower transitional provision than its predecessors, whereby only 'written laws'[51] in force prior to enactment are preserved. As the 1990

[42] Jennifer Corrin, above n 37, 33.
[43] It is also worth noting that the Solomon Islands did not ultimately adopt the draft constitution discussed in Jennifer Corrin, above n 37, 41.
[44] For a detailed exposition, see Jennifer Corrin, above n 37, 42–52. Unlike explicit constitutional provisions however, judicial interpretations are prone to fluctuation: see, eg, Miranda Forsyth, 'Is There Horizontal or Vertical Enforcement of Constitutional Rights in Vanuatu?' (2005) 9(2) *Journal of South Pacific Law* 1.
[45] Economic and Social Commission for Asia and the Pacific, *Feasibility study on the legal and institutional context in the Pacific: towards the development of a sub-regional instrument on access rights* (Report, 27 May 2022), 22.
[46] *Morua v China Harbour Engineering Co (PNG) Ltd* (National Court, Papua New Guinea, 7 February 2020), available via www.paclii.org at [2020] PGNC 16.
[47] *Constitution of the Republic of Vanuatu*, art 7.
[48] Above n 47.
[49] See Sue Farran, 'Is Legal Pluralism an Obstacle to Human Rights? Considerations from the South Pacific' (2006) 38(52) *The Journal of Legal Pluralism and Unofficial Law* 77, 77–8.
[50] Sue Farran, above n 49, 77–8.
[51] *Constitution of the Republic of Fiji 2013*, s 173(1).

Constitution expressly preserved customary law,[52] and the 1997 Constitution at least also preserved 'all other laws',[53] this is the weakest Constitutional position that customary law has experienced in Fiji since independence. Along with Tonga, Fiji is now one of only two common law Pacific Island who do not afford customary law a place within State law.[54] The difficulty is compounded by the fact that Fiji's Bill of Rights itself includes various specific caveats to permit a curtailment of rights, such as s 40(2), which permits the right to environment to be limited by a law or administrative action '[t]o the extent that it is necessary'.[55]

It is worth commenting therefore that in this unique scenario, legal pluralism of a different kind – a global pluralism – actually *enhanced* a court's ability to practically apply a human right. With international law now enjoying a stronger constitutional position than customary law, perhaps future cases may apply this enhancement across other provisions of the Bill of Rights, and strengthen its practical effect in Fiji going forward. The risk of this however is potential diminishment of the role of customary law. Though not raised in this case, customary law's role in this framework may thus be an issue that Fijian courts will have to examine in future.

CONCLUSION

Ten years on from the coming into force of Fiji's fourth constitution, its unique suite of provisions has now proved itself capable of effecting substantive environmental protection. Though the status of Fijian customary law has been eroded, the synergistic pluralism of constitutional, international, and common law sources employed in *Fiji Fish* have together provided future environmental plaintiffs with a strong precedent for a novel duty of care.

It is worth noting finally that across the globe, the law's primary mechanism to combat incidences of pollution tends to be of a regulatory nature. Indeed, the first and second defendants in the case were also handed prohibition notices from Fiji's Department of Environment in 2021 for separate instances of Clinker pollution.[56] However, where regulators are under-resourced, regulations themselves are under-powered, or relevant permits are simply not sought or complied with, there remains a need for the enforcement of environmental interests by individuals. Amaratunga J's judgment has given Fijian individuals a new pathway for exercising their constitutional right to a clean and healthy environment and could represent a significant development for the manner in which existing common law actions are used to combat environmental threats.

[52] *Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990*, s 100(3).
[53] *Constitution Amendment Act 1997* (Fiji), s 195(2)(e). For an examination of this wording's significance for customary law, see Jennifer Corrin Care, 'The Status of Customary Law in Fiji Islands After the Constitutional Amendment Act 1997' (2000) 4(1) *Journal of South Pacific Law* 1.
[54] See generally, *Constitution of Tonga 1875*.
[55] *Constitution of the Republic of Fiji 2013*, s 40(2).
[56] Shreya Kumar, 'Prohibition Notices Given to Pacific Cement and Tengy Cement', *Fiji Sun* (online, 24 March 2021) <https://fijisun.com.fj/2021/03/24/prohibition-notices-given-to-pacific-cement-and-tengy-cement/>.