IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2013-485-556
[2014] NZHC 2333

	BETWEEN	CAMILLE IRIANA THOMPSON Plaintiff
	AND	ATTORNEY-GENERAL Defendant

Hearing: 2 July 2014

Counsel: D A Ewen for Plaintiff
S M Kinsler and A C Walker for Defendant

Judgment: 24 September 2014

RESERVED JUDGMENT OF MACKENZIE J

I direct that the delivery time of this judgment is 4.30 pm on the 24th day of September 2014.

Solicitors: Rod Legal, Wellington, for the plaintiff.
Crown Law, Wellington, for the defendant.

[1] On 28 July 2010, the plaintiff was sentenced in the District Court at Wellington to 100 hours community work and nine months supervision. When the sentence of community work had not been completed by May 2012, an application was filed by a probation officer in the District Court at Wellington to review the sentence. That application was first called on 6 June 2012. It was adjourned to 25 June 2012, because there was no proof of service of the application on the plaintiff. There were two further adjournments for that same reason, and the application was ultimately listed to be called on 23 July 2012.

[2] Before that hearing, the plaintiff appeared in the Wellington District Court on 18 July 2012 before Judge Blaikie on unrelated charges and was sentenced to 15 months intensive supervision. A probation officer who was present in Court asked that the application to review the aforementioned sentence be dealt with that day, although it had not been listed for hearing that day. Judge Blaikie made an order on the application, cancelling the community work sentence. The making of that order was a final disposition of the application to review the sentence, and the listing of the application scheduled for 23 July 2012 should have been cancelled. It was not. The application was subsequently called on 23 July. There was, unsurprisingly, no appearance by the plaintiff. The presiding Judge issued a warrant to arrest her for failing to appear.

[3] The plaintiff was arrested pursuant to that warrant on 31 July 2012 at about 6.50 pm. She was detained in police custody overnight and appeared in the Wellington District Court the following morning, 1 August 2012. By then, the mistake in not removing the application from the list on 23 July 2012 was realised and the plaintiff was released. She spent approximately 15 hours and 22 minutes in custody.

[4] The plaintiff has issued these proceedings, pleading causes of action in false imprisonment, breach of statutory duty, negligence and systemic negligence, and alleging arbitrary arrest and detention contrary to the New Zealand Bill of Rights Act 1990 (BORA). She seeks a declaration that she was unlawfully arrested and detained, and $50,000 in damages.

[5] The essential facts are not in dispute. It is common ground that when the order was made cancelling the community work sentence, the scheduled listing for the application to review sentence on 23 July 2012 should have been cancelled. The administrative step which should have been taken to cancel the scheduled hearing was an entry in the electronic Court Management System (CMS). It is not in dispute that such a step should have been taken, and that it was not. Had it been taken, the application would not have been called on 23 July 2012 and the warrant for arrest would not have been issued.

[6] I deal first with the first four causes of action, which are all claims in tort. Counsel for the plaintiff asserts that the Crown is liable in tort for the failure on the part of the District Court staff to make the appropriate entry in the CMS. I describe briefly the allegations in this statement of claim for each cause of action.

[7] The defendant is sued, in respect of the first, second and third causes of action, on behalf of the Registrar of the District Court at Wellington and his staff who are collectively referred to as "the Registrar".

[8] In the false imprisonment cause of action, the plaintiff pleads that the Registrar knew or ought to have known that a failure to update the Court records accurately and timeously, showing that the case had been finally disposed of. She pleads that this gave rise to a real and substantial risk that an arrest warrant would be issued and executed; that the failure to update the Court records was negligent and was the direct cause of the arrest warrant and its subsequent execution; and that the Registrar thereby caused the plaintiff to be falsely imprisoned.

[9] In the second cause of action, breach of statutory duty, the plaintiff pleads that the Registrar had a statutory duty under s 13 of the District Courts Act 1947 to keep the Court records; that the failure to update the Court records was in breach of that statutory duty; and that the failure caused the issue of the arrest warrant and its subsequent execution, so that the Registrar's breach of statutory duty caused the plaintiff's loss, namely her arrest and detention.

[10] In the third cause of action, negligence, it is alleged that the failure to update the Court records was negligent and caused the issue of the arrest warrant and its subsequent execution, thereby causing the plaintiff's loss, namely her arrest and detention.

[11] In the fourth cause of action, systemic negligence, the defendant is sued in respect of the Secretary for Justice as Chief Executive of the Ministry of Justice, and any delegates of that office, referred to collectively as "the Secretary". The plaintiff asserts that the Secretary is required to ensure proper and adequate procedures are in place (including the allocation of sufficient appropriately trained staff) to ensure the proper operation of the Courts, including the proper upkeep of Court records. The plaintiff further asserts that the Secretary knew or ought to have known that a failure to update the Court records accurately and timeously showing a case had been finally disposed of gave rise to a real and substantial risk that an arrest warrant would be issued and executed. The plaintiff asserts that the Secretary failed to ensure proper or adequate staffing, training, or procedures to maintain the Court records and that this failure was a substantial contributor to the Registrar's failure to update the Court's record, thereby causing the plaintiff's loss.

Section 6 of the Crown Proceedings Act 1950

[12] The defendant pleads an affirmative defence, that all four causes of action are barred by the proviso to s 6(1) of the Crown Proceedings Act 1950, and that the first three causes of action (that is, excluding the cause of action for systemic negligence) are also barred by s 6(5) of that Act. It is convenient to deal with the s 6(5) defence first.

[13] Section 6 provides, as relevant:

> **Liability of the Crown in tort**
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> (1) Subject to the provisions of this Act and any other Act … the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject—
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> (a) in respect of torts committed by its servants or agents;

(b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and

(c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession, or control of property:

provided that no proceedings shall lie against the Crown by virtue of paragraph (a) in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate.

(2) Where the Crown is bound by a statutory duty which is binding also upon persons other than the Crown and its officers, then, subject to the provisions of this Act, the Crown shall, in respect of a failure to comply with that duty, be subject to all those liabilities in tort (if any) to which it would be so subject if it were a private person of full age and capacity.

(3) Where any functions are conferred or imposed upon an officer of the Crown as such either by any rule of the common law or by statute, and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the Crown in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown.

…

(5) No proceedings shall lie against the Crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.

[14] I deal first with s 6(5). The act or omission complained of is a failure to update CMS so that it would no longer list the case for hearing on 23 July. The cancellation of the 23 July hearing arose directly from the order made by Judge Blaikie. The order he made cancelling the sentence of community work necessarily brought to an end the application to review that sentence. The need to update CMS accordingly arose as a direct result of Judge Blaikie's order. The essential issue is whether the acts or omissions of Court staff in not updating CMS to cancel the listing of the application to review the plaintiff's sentence come within the term:

> … anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him

> or her or any responsibilities which he or she has in connection with the execution of judicial process.

[15] The scope of s 6(5) was addressed by the Court of Appeal in *Simpson v Attorney-General [Baigent's case]*.[1] Hardie Boys J said:[2]

> I do not read s 6(5) as referring solely to the exercise of judicial power. The expression "responsibilities of a judicial nature" is of wider scope, apt to include all those functions which are to be performed judicially. These would include the issue of a search warrant. The expression "judicial process" must be understood in the light of the earlier expression. It therefore means a process resulting from the exercise of responsibilities of a judicial nature. "Process" is not in law a precise term. It may refer broadly to the procedure of the Court, as in abuse of process, or to a particular step in Court proceedings. The law dictionaries set out what has and what has not been held to be a process; but none of the cases are really in point, for the meaning must always depend on the context. Here the general context is s 6(5) and the particular context is the conjunction of the noun with the adjective "judicial". In *Re Chase* [1989] 1 NZLR 325 the Crown contended that a search warrant was a judicial process, but the Court did not find it necessary to express a conclusion, although Cooke P and Henry J may be thought to have favoured that view. The point now requiring decision, I have concluded that in the context of s 6(5) "process" means an order or authority emanating from a judicial officer exercising judicial responsibilities. That would include a search warrant.

[16] Cooke P held that it was consistent with the right to be free from unreasonable search or seizure, affirmed in ss 3 and 21 of BORA, to interpret s 6(5) as not protecting the Crown from liability for the execution of a search warrant in bad faith. He held however that s 6(5) does cover an unreasonable execution of a search warrant carried out in good faith.[3] Casey J held that the issue of the warrant was a judicial process in terms of s 6(5). He also held that there was an arguable case that the police were neither executing, nor purporting to execute, the warrant and if that were established the Crown would not be protected in respect of that part of the search.[4] Gault J agreed with Hardie Boys J that a search warrant is a judicial process within s 6(5).[5] McKay J held that s 6(5) will apply to the actions of the police in the execution of the warrant.[6]

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1 *Simpson v Attorney-General [Baigent's case]* [1994] 3 NZLR 667 (CA) at 696.
2 At 696.
3 At 674.
4 At 690.
5 At 715.
6 At 716.

[17] That case therefore makes it clear that the execution of a search warrant ordinarily falls within the scope of s 6(5). I consider that the action which should have been taken by Court staff to remove the case from the list for 23 July following Judge Blaikie's order is even more clearly within the scope of the judicial process than is the execution of a search warrant. Removal of the case from the list was part of the Court process, necessary to give full effect to the order which Judge Blaikie made, and without which the making of that order would not have been fully effective. That clearly makes it a responsibility either of a judicial nature, or connected to the execution of judicial process.

[18] I was referred also to four decisions of this Court in which the scope of s 6(5) has been considered. In *Seatrans (Fiji) Ltd v Attorney-General,* an order had been made directing that money paid into Court be paid into an interest-bearing account under the control of the Registrar.[7] The Registrar did not do that, and the plaintiff sought to recover from the Crown the interest that would have accrued had the money been deposited as directed. Hillyer J considered whether the Registrar's payment of funds into an interest bearing account fell within the parameters of s 6(5). He said:[8]

> The act of paying money in the possession of the Registrar into an interest-bearing account, in my view, is neither a responsibility of a judicial nature, nor would it be in connection with the execution of judicial process. Mr Bartlett submitted, because there would perhaps be some element of discretion as to where the amount was paid, then there was something of a judicial nature, but I do not accept that. Equally, he said that the payment into the account would be the execution of a judicial process. Again, I do not accept that. It seems to me that there is no judicial element involved, nor was the payment into an interest-bearing account an execution. Those terms are appropriate to sitting in judgment, or to such matters as the enforcement against another person of an order made by the Court.

[19] That narrow view of the application of s 6(5) was not followed in the other three cases in this Court. In *Young v Attorney-General* the issue was whether the Registrar's responsibilities in annotating a grant of bail in the High Court fell within the scope of s 6(5).[9] Williams J said:[10]

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7 *Seatrans (Fiji) Ltd v Attorney-General* [1986] 2 NZLR 240 (HC).
8 At 244.
9 *Young v Attorney-General* [2003] NZAR 627 (HC)
10 At [29].

> The Registrar was putting the Judge's order into effect. He was accordingly exercising responsibilities connected with the execution of the judicial process, namely an "order or authority emanating from a judicial officer". The Registrar may have been in error but unreasonableness or bad faith not being pleaded, it is clear his actions are entitled to the immunity created by the second limb of s 6(5) …

[20] In *Crispin v Registrar of the District Court* the Registrar erroneously entered the name of the plaintiff as a defendant in a default summons in the civil record book.[11] In holding that s 6(5) applied, McGechan J said:[12]

> I consider that the seemingly separate exercise of discretion to enter judgment and obligatory recording of the result were in reality one function. That function was of a judicial nature. It was analogous to the formulation and delivery of an oral judgment continued by its transcription and ultimate signature. The recording element as part of a judicial act is in itself to be treated as judicial in nature.

[21] The fourth case is *Hill v Attorney-General*.[13] That case was a claim for damages against the Registrar of the District Court for issuing a warrant to arrest the plaintiff for failing to pay a fine which had been suspended pending an appeal. McGechan J reiterated that conclusion he had reached in *Crispin v Registrar of the District Court*.[14] He said:[15]

> … The Crown immunity is not some exceptional relic to be approached restrictively. It has an ongoing and publicly important purpose. The positive approach warranted accordingly is to be balanced, of course, to a proper extent by consideration of sections 6, 21, 22 and 23 New Zealand Bill of Rights Act 1990 dealing with interpretation approaches, and unreasonable seizure, arbitrary arrest or detention, and related matters. However, the trend which is evident from the authorities to give s 6(5) worthwhile scope and effect is in accordance with public needs, and should be continued.

[22] I consider that the responsibility which rested on Court staff to update the case management system by removing the listing for 23 July are quite clearly responsibilities of a judicial nature or in connection with the execution of judicial process. The making of the order cancelling the sentence of community work necessarily required that the application to review the sentence be removed from the system. Its removal was part of the process of fully implementing the order. The

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11 *Crispin v Registrar of the District Court* [1986] 2 NZLR 246 (HC).
12 At 250.
13 *Hill v Attorney-General* HC Wellington CP No 288/91, 29 April 1993.
14 *Crispin v Registrar of the District Court*, above n 11.
15 *Hill v Attorney-General*, above n 13, at 23.

responsibility for ensuring that was done was a responsibility forming part of, or in connection with the execution of, the judicial process.

[23] My conclusion that s 6(5) applies to the actions of the Registrar means that none of the first three causes of action, for false imprisonment, breach of statutory duty, or negligence, can succeed. In case I am wrong in that conclusion I deal, albeit quite briefly, with those three causes of action.

False imprisonment

[24] To be liable in false imprisonment, it must be demonstrated that the defendant had the necessary intention, as well as the ability, to detain the plaintiff. It is that element, the defendant's intention to detain, which is in issue. The defendant, for the purposes of this cause of action, is each relevant member of the District Court staff who was responsible for updating CMS. The Court staff were not directly involved in the plaintiff's arrest. To establish the necessary intention to detain, the plaintiff must prove that they intended their acts or omissions to set in train a series of events which would lead to the plaintiff's arrest. The plaintiff must at the least establish knowledge on the part of the relevant members of the Court staff: first, that this case had not been removed from the list; and second that a likely consequence in this case was that an arrest warrant would be issued in respect of the plaintiff. That knowledge is not established, on the evidence. I find, on the evidence, that failure to remove the case from the list for 23 July was not deliberate, rather it was an inadvertent omission. An inadvertent omission, as opposed to a deliberate omission, is inconsistent with the requisite knowledge. There is no evidence that the omission was deliberate. I find that it was inadvertent.

[25] Mr Ewen submits that if through a negligent act or omission a person is caused to be unlawfully detained, the negligent party will be liable for false imprisonment. He bases that submission on two propositions:

(a) that an action for false imprisonment will lie not only against a person who actually carries out the detention, but also against a person who sets the machinery of imprisonment in train; and

(b) that action will lie not only on proof of intention, but also in the event of causative negligence.

[26] A person may be held liable in false imprisonment where that person personally carries out the imprisonment, or where the imprisonment comes about through the act of someone for whose conduct that person is liable. A person who sets the machinery of imprisonment in train may therefore be liable. However, that will be so only where the person who actually carried out the imprisonment acts merely as the ministerial agent of the defendant, and not according to that person's own judgment and discretion.[16] In this case, neither the Judge, in issuing the warrant, nor the police, in executing the warrant, can properly be regarded as the ministerial agent of the Court staff member whose responsibility it was to update CMS. The first proposition is therefore not made out in this case.

[27] Mr Ewen cites two cases in support of the second proposition, that negligence will suffice, without a specific intention on the part of the defendant that the plaintiff be detained. The first is *Fowler v Lanning*.[17] That case was concerned not with false imprisonment, but with another form of trespass to the person. The plaintiff had been shot by the defendant. The defendant pleaded that the statement of claim disclosed no cause of action because the plaintiff did not allege that the shooting was either intentional or negligent. That pleading objection was upheld. Diplock J summarised the law as being that trespass to the person does not lie if the injury to the plaintiff, although the direct consequence of the act of the defendant, was caused unintentionally and without negligence on the defendant's part, and that the onus of proving negligence, where the trespass is not intentional, lies on the plaintiff, whether the action is framed in trespass or in negligence.[18] That has no relevance on the facts of this case.

[28] The second authority is *Mayfair Ltd v Pears*.[19] That was a case of trespass to land. A car unlawfully parked in a building caught fire and the building was

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16 Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at [4.5.02]; Anthony Dugdale and Michael Jones (eds) *Clerk & Lindsell on Torts* (20th ed, Sweet & Maxwell, London, 2013) at [15.53].

17 *Fowler v Lanning* [1959] 1 QB 426.

18 At 439.

19 *Mayfair Ltd v Pears* [1987] 1 NZLR 459 (CA).

damaged. It was held that the strict liability at common law for the escape of fire from land did not apply, and that there is no absolute rule either:

(a) that an intentional trespasser is liable for all the consequences of his actions; or

(b) that he may escape liability in the absence of intent or foreseeability.

[29] That case is not authority for the proposition that, in the tort of false imprisonment, negligence without an intention to detain on the part of the defendant will suffice to establish liability. An element of the tort of false imprisonment is that there must be an intention to detain on the part of the defendant. None of the authorities cited to me supports the proposition that a defendant may be liable for false imprisonment when the defendant is not actually aware that detention by another may flow from the defendant's acts or omissions.

[30] Mr Ewen submits that the relevant Court staff ought reasonably to have been aware that a negligent omission to update CMS might lead to a sequence of events which would result in the arrest of the plaintiff. But that general awareness, not related to the facts of a particular case, cannot give rise to the necessary intention to detain for false imprisonment, when the omission to update CMS in the particular case is inadvertent.

[31] The claim for false imprisonment must accordingly fail.

Breach of statutory duty and negligence

[32] The second cause of action is for breach of statutory duty, specifically a failure to update Court records in breach of the statutory duty under s 13 of the District Courts Act 1947 to keep Court records. The leading authorities on actions for damages for breach of statutory duty are the decisions of the House of Lords In *X (Minors) v Bedfordshire County Council*,[20] and of the Court of Appeal in *Minister of*

[20] *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (HL).

Fisheries v Pranfield Holdings Ltd.[21] The approach to be taken in such cases is described by Lord Browne-Wilkinson as follows:[22]

> …
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> The question is whether, if Parliament has imposed a statutory duty on an authority to carry out a particular function, a plaintiff who has suffered damage in consequence of the authority's performance or non-performance of that function has a right of action in damages against the authority. It is important to distinguish such actions to recover damages, based on a private law cause of action, from actions in public law to enforce the due performance of statutory duties, now brought by way of judicial review. The breach of a public law right by itself gives rise to no claim for damages. A claim for damages must be based on a private law cause of action . . .
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> Private law claims for damages can be classified into four different categories, viz: (A) actions for breach of statutory duty simpliciter (ie irrespective of carelessness); (B) actions based solely on the careless performance of a statutory duty in the absence of any other common law right of action; (C) actions based on a common law duty of care arising either from the imposition of the statutory duty or from the performance of it; and (D) misfeasance in public office, ie the failure to exercise, or the exercise of, statutory powers either with the intention to injure the plaintiff or in the knowledge that the conduct is unlawful.

[33] Neither category B nor category D need to be considered, as actions in category B are not sufficient to found a claim for damages in private law, and misfeasance in public office is not pleaded here.[23] I address categories A and C.

[34] Lord Browne-Wilkinson described the requirements for a claim which falls within category A in these terms:[24]

> …
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> (A) Breach of statutory duty simpliciter
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> This category comprises those cases where the statement of claim alleges simply (a) the statutory duty, (b) a breach of that duty, causing (c) damage to the plaintiff. The cause of action depends neither on proof of any breach of the plaintiffs' common law rights nor on any allegation of carelessness by the defendant.
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> The principles applicable in determining whether such statutory cause of action exists are now well established, although the application of those

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21 *Minister of Fisheries v Pranfield Holdings Ltd* [2008] NZCA 216, [2008] 3 NZLR 649.

22 *X (Minors) v Bedfordshire County Council*, above n 20, at 730-731; cited in *Minister of Fisheries v Pranfield Holdings Ltd*, above n 21, at [66].

23 At 732.

24 At 731.

> principles in any particular case remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: see *Cutler v Wandsworth Stadium Ltd* [1949] AC 398; and *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173. However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy . . .

[35] The present case is pleaded in the way described for category A. The statutory duty relied on is the statutory duty under s 13(1) of the District Courts Act 1947 on the Registrar to "keep or cause to be kept such records of and in relation to proceedings in the Court as may be prescribed by the chief executive of the Ministry of Justice." That statutory duty is not, on the proper construction of the statute, a duty imposed for the protection of a limited class of the public, intended to confer on members of that class a private right of action for the breach of the duty. It is a duty imposed for the proper administration of the Court, in the general public interest. The acts or omissions of Court staff in keeping Court records do not give rise to a cause of action under this category of the tort.

[36] Category C involves cases where a common law duty of care arises from the imposition or performance of the statutory duty. Lord Browne-Wilkinson described category C in these terms:[25]

> …
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> (C) The common law duty of care
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> In this category, the claim alleges either that a statutory duty gives rise to a common law duty of care owed to the plaintiff by the defendant to do or refrain from doing a particular act or (more often) that in the course of carrying out a statutory duty the defendant has brought about such a

[25] At 735.

> relationship between himself and the plaintiff as to give rise to a duty of care at common law. A further variant is a claim by the plaintiff that, whether or not the authority is itself under a duty of care to the plaintiff, its servant in the course of performing the statutory function was under a common law duty of care for breach of which the authority is vicariously liable.

[37] That requires a consideration of the circumstances to determine whether a relationship giving rise to a duty of care at common law exists. That is essentially the same question as must be addressed for the third cause of action, the cause of action in negligence simpliciter. It is therefore convenient to consider these two causes of action together.

[38] The essential issue is whether the statutory duty to maintain the Court records, or the ordinary principles governing liability for negligent acts or omissions, will in the circumstances of this case give rise to a duty of care on the part of the Court staff to the plaintiff. The approach to be adopted in deciding whether a duty of care is owed in a situation not covered by previous authority (as is the case here) is described by the Court of Appeal in *Rolls Royce New Zealand Ltd v Carter Holt*,[26] and by the Supreme Court in *Couch v Attorney-General*.[27] The ultimate question is whether, in the light of all the circumstances of the case, it is just and reasonable that a duty of care should be imposed. The focus is on two broad fields of inquiry: the degree of proximity or relationship between the parties; and whether there are other wider policy considerations that tend to negative or restrict or strengthen the existence of a duty of care in the particular case.[28] In *Couch v Attorney-General*, the majority of the Supreme Court, in approving that approach, said:[29]

> [80] The law has traditionally been cautious about imposing a duty of care in cases of omission as opposed to commission; in cases where a public authority is performing a role for the benefit of the community as a whole; and in cases where it is the actions of a third party rather than those of the defendant that are the immediate cause of the loss or harm suffered by the plaintiff. All three dimensions feature in the present case, but it is the third which is the most significant on the issue of proximity.

[39] The first two of those dimensions are present in this case. The plaintiff's claim is one of omission rather than commission, in a situation where a public

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[26] *Rolls Royce New Zealand Ltd v Carter Holt* [2005] 1 NZLR 324 (CA).

[27] *Couch v Attorney-General (on appeal from Hobson v Attorney-General)* [2008] NZSC 45, [2008] 3 NZLR 725.

[28] *Rolls Royce New Zealand Ltd v Carter Holt*, above n 26, at [58].

[29] *Couch v Attorney-General (on appeal from Hobson v Attorney-General)*, above n 27.

authority is performing a role for the benefit of the community as a whole. That suggests that this Court should be slow to hold that the necessary proximity exists. It also suggests that policy considerations negative the existence of a duty of care. An important factor in reaching that conclusion is s 6(5) itself. That provision indicates a clear legislative intention that Court staff involved in the process of carrying out administrative acts connected with the judicial processes of the Court should not be subject to a duty of care. Accordingly, even if I am wrong in my conclusion that s 6(5) applies, its terms are nevertheless relevant to demonstrate a clear legislative intention that the actions of Court staff in the performance of their function should not give rise to a private law cause of action. The relationship between Court staff and Court users is one in which, on my assessment, a duty of care sounding in the tort of negligence does not arise.

[40] For these reasons, the second and third causes of action must fail.

[41] In case I am wrong in my conclusion that no duty of care, actionable under the torts of breach of statutory duty or negligence, exists, I address briefly whether, on the facts, the plaintiff has established some negligent act or omission on the part of an individual for whom the Crown is vicariously responsible, in terms of s 6(1) of the Crown Proceedings Act 1950. The plaintiff did not adduce any evidence as to how the error occurred. The only evidence adduced by the plaintiff was directed to the fourth cause of action, systemic negligence. The absence of evidence as to how the listing for 23 July remained in CMS means that the plaintiff could succeed only if she could invoke the maxim *res ipsa loquitur*. It would have to be clear that the failure to remove the matter from the list must have resulted from negligence on the part of one or more members of Court staff, and there could have been no other cause. It is unnecessary for me to decide, whether that is so, because of my conclusion in relation to s 6(5), and my conclusion that the duty of care does not give rise to a private law cause of action. The inference that the omission to update the record was a negligent one may be strong, but I would hesitate to conclude that there could be no other possible explanation for it, in the absence of evidence.

Systemic negligence

[42] The fourth cause of action is referred to by Mr Ewen as systemic negligence. The essence of the allegation is that the Secretary was required to ensure proper or adequate procedures were in place (including the allocation of sufficient appropriately trained staff) to ensure the proper upkeep of Court records. It is alleged that the Secretary knew or ought to have known that a failure to update Court records timeously and accurately when a case had been finally dispensed of gave rise to a real and substantial risk that an arrest warrant would be issued and executed. It is alleged that the Secretary's failure to ensure proper or adequate staffing, training or procedures was a substantial contributor to the Registrar's failure to update CMS, and caused the plaintiff's arrest.

[43] The focus of the evidence in the hearing before me was on this issue. The plaintiff called Mr Keegan, a former District Court Deputy Registrar. The defendant called Ms Graham, who is one of three Court Services Managers at the Wellington District Court. I need not discuss their evidence, as I am satisfied that this cause of action cannot succeed, as a matter of law.

[44] The principles to which I have referred in dealing with the second and third causes of action apply to this cause of action also. The factors weighing against the imposition of a duty of care in negligence are stronger on this cause of action. The degree of proximity is more remote, and the policy considerations weigh more strongly against the imposition of a duty of care. This is quite clearly a case where a public authority is performing a role for the benefit of the community as a whole, namely the proper administration of the Courts. Further, s 6 of the Act points against the imposition of a duty of care. While s 6(5) has no direct application, the public policy considerations which underlie it are relevant. Also, under s 6(1), the Crown can have no vicarious liability unless the Secretary would be personally liable in tort. The Secretary has no duty, apart from his position as such, to perform the functions of his office, so as to expose him to personal liability in tort. The essence of the plaintiff's claim is that the Crown itself is directly liable for an alleged failure to provide adequate resources and training. That does not give rise to a personal liability in tort on the part of the Secretary.

[45] For these reasons, the fourth cause of action must also fail.

Arbitrary arrest or detention

[46] The final cause of action is a claim that the plaintiff has been arbitrarily arrested or detained, contrary to s 22 of BORA. The plaintiff has clearly been arrested and detained. The question is whether that arrest and detention is arbitrary. The meaning of "arbitrary" was considered by the Court of Appeal in *R v Goodwin (No 2)*.[30] Cooke P said:[31]

> "Arbitrary" is a somewhat elastic word. Dictionary definitions include "discretionary", "despotic", "capricious". Black's Law Dictionary (5th ed, 1979), includes among its definitions "without fair, solid and substantial cause; that is, without cause based upon the law", citing United States v Lotempio 58 F 2d 358, 359. Chambers English Dictionary (7th ed, 1988), gives as its first definition "not bound by rules".
>
> …
>
> A comprehensive ruling on the meaning of "arbitrary" in s 22 is not now called for. We leave open the possibility that there may be some limited exceptions to the principle that, in general, unlawful detention will be arbitrary detention. We have in mind such cases as detention unlawful yet imperative for the safety of the detainee or other persons, or detention in good faith for reasons falling just short of reasonable and probable grounds under ss 36, 37 or 38 of the Crimes Act 1961, as envisaged in *Duguay*.

[47] The detention in this case was not unlawful. It was effected pursuant to a warrant issued by a Judge. The circumstances were such that the basis upon which the warrant was issued was wrong, and that if the correct factual position had been known, the warrant would not have been issued. But the erroneous assumption on which the Judge acted, namely that the plaintiff was required to appear on 23 July, was a reasonable assumption on the information known to the Judge. Her decision to issue the warrant was not arbitrary and the subsequent execution of the warrant was also not arbitrary.

[48] There are many situations in which persons are arrested and detained on the basis of assumptions as to facts which are subsequently held to be incorrect. The arrest and detention of a person on a charge on which that person is later acquitted,

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30 *R v Goodwin (No 2)* [1993] 2 NZLR 390 (CA).
31 At 393 and 394.

or which is subsequently withdrawn, are everyday examples. An arrest in such a situation is not ordinarily an arbitrary arrest.

[49] The fifth cause of action must also fail.

Conclusion

[50] The plaintiff's claim is accordingly dismissed. There will be judgment for the defendant.

[51] If any issue of costs arises, the parties may submit memoranda.

"A D MacKenzie J"