

**ORDER PROHIBITING PUBLICATION OF NAME OR PARTICULARS  
LIKELY TO LEAD TO THE IDENTIFICATION OF WITNESS X.**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA74/05**

BETWEEN                      TAI HOBSON  
   Appellant  
  
AND                              THE ATTORNEY-GENERAL  
   Respondent

**CA238/05**

BETWEEN                      SUSAN COUCH  
   Plaintiff  
  
AND                              THE ATTORNEY-GENERAL  
   Defendant

Hearing:            10 November 2005

Court:               William Young P, Hammond and Chambers JJ

Counsel:           B P Henry and D A Watson for Appellant in CA74/05 and Plaintiff in  
                         CA238/05  
                         J C Pike and F E Guy Kidd for Respondent in CA74/05 and  
                         Defendant in CA238/05

Judgment:        17 May 2006

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**JUDGMENT OF THE COURT**

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**CA74/05**

**A        The appeal is dismissed.**

**B An order is made striking out the entire statement of claim.**

**C Costs are reserved.**

**CA238/05**

**D The question of law posed for the consideration of this Court is answered thus: the statement of claim discloses no reasonable cause of action and should be struck out.**

**E Costs are reserved.**

**F Order prohibiting publication of name or particulars likely to lead to the identification of witness X's name.**

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**REASONS**

Hammond J (dissenting in part)	[1]
William Young P	[101]
Chambers J	[144]

**HAMMOND J**

**Table of Contents**

	Para No
<b>Introduction</b>	[1]
<b>Background</b>	[2]
<b>The respondent acknowledges blame</b>	[10]
<b>The claimants</b>	[12]
<b>Some procedural matters</b>	[16]
<b>Negligence</b>	
(1) <i>The nature of a claim for negligence</i>	[25]
(2) <i>Establishing a duty of care</i>	[28]
(3) <i>Pleading negligence</i>	[35]
(4) <i>Breach of statutory duty</i>	[37]
(5) <i>The pleadings in this case</i>	[44]
(6) <i>The statutory context</i>	[48]
(7) <i>Strike-out principles</i>	[51]
(8) <i>This case</i>	[60]
(9) <i>Conclusion: negligence</i>	[86]

## **Misfeasance in public office**

(1) <i>The pleading</i>	[87]
(2) <i>Misfeasance: the law</i>	[88]
(3) <i>Mr Hobson</i>	[95]
(4) <i>Ms Couch</i>	[97]

<b>Conclusion</b>	[98]
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<b>Costs</b>	[100]
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## **Introduction**

[1] This is an appeal from a decision of Heath J reported in [2005] 2 NZLR 220, on a strike-out application.

## **Background**

[2] In 1997, Mr William Bell was sentenced to five years imprisonment following his conviction for the aggravated robbery of a service station. This robbery involved the use of a blunt instrument on the sole attendant, who escaped further injury only after locking himself in a bathroom.

[3] As required by the legislation in force at that time, Mr Bell was released on parole on 4 July 2001 when he had served two-thirds of the finite term of imprisonment imposed upon him.

[4] A number of special conditions were imposed on Mr Bell. He was:

- to make an appointment within 72 hours of release with a departmental psychologist and thereafter to keep such appointments and attend such counselling as was directed by his probation officer;
- to undertake such employment as was directed by his probation officer;
- to complete an assessment for the Straight Thinking Programme as directed by his probation officer;

- to make an appointment within 72 hours of his release for alcohol and drug assessment, to keep such appointment, and following assessment to undertake counselling as directed by his probation officer; and
- to reside at a specified address or an address approved by his probation officer.

[5] Mr Bell was initially placed under the supervision of a senior probation officer. However, shortly afterwards his supervision passed to X. X was a newly appointed probation officer, of some 10 months standing, who was working at the Mangere Community Corrections Service.

[6] It is convenient to note here that, at the hearing in this Court, an order was made for the suppression of X's name until further order of this Court. That order is still in full force and effect.

[7] Whilst still under X's supervision, and, it is alleged, with her knowledge, Mr Bell was accepted into a liquor licensing course with a view to obtaining employment in the liquor retailing industry. As part of the liquor licensing course, Mr Bell was assigned to work at the Panmure RSA Club. It is claimed that X was aware that Mr Bell was undertaking this work. If X was not so aware, it is claimed she took no steps to ascertain what he was doing to comply with his release conditions.

[8] The tragic events of 8 December 2001 which led to the proceeding now before us were described by this Court in Mr Bell's criminal appeal (CA80/03 7 August 2003) in the following terms:

[4] Bell entered the [Panmure RSA] premises with [a] shotgun at about 7.30am. Two people were already there and two more subsequently arrived. One of those originally present let him in as she recognised him and had no reason at that stage to know his purpose. Once inside Bell forced one of the victims to open the safe from which he took a sum of money. He then callously and systemically bludgeoned each of the four people in turn with the butt of the shotgun, after having shot one of them in the chest. Three of the victims died. One [the second appellant, Ms Couch] survived her ordeal; albeit grievously injured. She was the subject of the attempted murder conviction and is left with neurological damage of a substantial and permanent kind.

[9] Mr Bell was convicted of three counts of murder, and one count of attempted murder. He was sentenced to life imprisonment with a minimum non-parole period of 30 years.

### **The respondent acknowledges blame**

[10] We record that Mr Pike, for the Department of Corrections in New Zealand (which is represented by the Attorney-General in these proceedings), acknowledged that the Department must take a real measure of responsibility for the errors which undoubtedly occurred in the handling of Mr Bell's case. The Department sincerely regrets the awful consequences which resulted for the victims and their families.

[11] However, what is in issue before us is whether the respondent's role in what occurred so tragically on 8 December 2001 is actionable; by that I mean, whether there is any possible claim that the claimants can mount, in law, against the respondent.

### **The claimants**

[12] Mrs Susan Couch is the surviving victim of the attack. She suffered serious and permanent ongoing physical injury as well as psychological trauma as a result of this slaughter.

[13] Mr Tai Hobson's wife was one of the murder victims. The "damage" suffered by Mr Hobson is only obliquely pleaded:

[30] That it was a natural and probable consequence of the defendant's foregoing conduct that Bell would re-offend by planning to rob and robbing the Panmure RSA thereby causing grievous injury to the employees therein in the course of such re-offending *and that persons such as the plaintiff could, as a result, suffer mental anguish, shock, pain and general suffering* (italics added).

[14] By her statement of claim Ms Couch claims damages for pain and suffering of \$1,500,000 and exemplary damages of \$500,000.

[15] By his statement of claim Mr Hobson claims damages for pain and suffering of \$50,000 and exemplary damages of \$500,000.

### **Some procedural matters**

[16] Mr Hobson's claim was put on three bases: negligence; breach of statutory duty by the Crown; and misfeasance in a public office.

[17] The Attorney-General applied to strike out this claim on the footing that, however regrettable the circumstances of the death of his wife, Mrs Mary Hobson, no cause of action was advanced which had any possibility of being sustained in law.

[18] That strike-out application came before Heath J in May of 2004. In a judgment delivered on 23 September 2004 (see [1] above), the Judge struck out the causes of action in negligence, and for breach of statutory duty. That based on misfeasance in a public office was left live.

[19] On this appeal, it is argued for Mr Hobson that the cause of action in negligence should not have been struck out. There is no appeal with respect to the strike-out of the cause of action based on breach of statutory duty.

[20] As to Ms Couch's claim, it was pleaded in negligence and misfeasance in public office. No application was made to strike out that claim in the High Court but, by consent, on 8 September 2005 Associate Judge Sargisson made orders under rr 418 and 419 of the High Court Rules that the question whether Ms Couch's statement of claim disclosed a reasonable cause of action should be argued prior to trial, and that that question should be removed to this Court for determination.

[21] Therefore, as matters stand before this Court, they are not on all fours with what the position was in the High Court. Breach of statutory duty as a possible cause of action has fallen away altogether. Both Mr Hobson and Ms Couch plead negligence and misfeasance in office against the Attorney-General.

[22] There is no cross-appeal by the Attorney-General against the decision of Heath J leaving live the claim for misfeasance in office, in Mr Hobson's proceedings. But as I apprehend it, counsel accept that if Ms Couch's claim discloses no reasonable cause of action under that head, then that must also be fatal to Mr Hobson's pleading.

[23] This is a somewhat untidy procedural situation; it would have been preferable if there had been a cross-appeal by the Crown on the misfeasance cause of action. But in the result, given the circumstances I have noted above, I think nothing turns on that.

[24] It is convenient, and more orderly, to take each of the causes of action in turn. In so doing I acknowledge at once that the position of Mr Hobson in respect to a claim for negligence may well be different from that of Ms Couch, for reasons I will address later in this judgment.

## **Negligence**

### *(1) The nature of a claim for negligence*

[25] It is critically important in this case to keep first principles in mind, and with respect, I think these principles have not been entirely happily addressed by the appellants' pleadings.

[26] In everyday usage, the word "negligence" denotes mere carelessness. A person may say: "I negligently left my suitcase on the train." In legal usage however, the term signifies the failure to exercise that standard of care which the doer as a reasonable man or woman should, in the eyes of the law, have exercised in the circumstances. If there is no legal duty to take care, the apparent lack of care has no legal consequences. In the most general terms, there is a legal duty to take care where it was, or should have been, reasonably foreseeable that failure to do so was likely to cause injury.

[27] Hence the conventional elements of the cause of action for negligence are as follows:

- (1) A duty, recognised by law, to conform to the requisite standard of care for the protection of an identified person (or class of people) against the kind of harm in issue. Lawyers generally call this the “duty issue”. It will be observed that this is a judicial control mechanism over matters of policy as to what duties of care will be recognised in law, and those which will not.
- (2) A failure by the defendant to attain the requisite standard of care. This is the “negligence issue”. Significantly it is entrusted to the trier of fact. For a long time this was for a civil jury; today this issue of fact is determined by a trial Judge.
- (3) Actual injury to the defendant as a result of the breach of duty. A driver of a motor vehicle is under a duty not to drive carelessly on the road, and may in fact have done so, but if no damage arises there is no claim.
- (4) A reasonably proximate causal link between the breach of the duty and the harm. This is referred to in the law as the issue of “remoteness of damage” or sometimes “proximate cause”.

(2) *Establishing a duty of care*

[28] There are some well-established categories of negligence. Some of the more common categories are the liability of suppliers of goods to consumers; of professional persons doing work for their clients; and of persons using vehicles on the road to other road users.

[29] The categories of negligence are never closed, and it is occasionally necessary for a court – as in this case – to pronounce on whether a “new” category of negligence should be recognised in a particular jurisdiction.

[30] The basic question is then - though it is merely to state the obvious - whether it is just and reasonable that such a duty be imposed (see *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA)).

[31] How a Court is to make such a determination was summarised by a Full Court of this Court in *Wilson & Horton Ltd v The Attorney-General* [1997] 2 NZLR 513:

[On the established authorities], the first inquiry is an “internal” one, relating to the nature of the relationship between the parties. But there must also be an “external” inquiry into the wider factors which are thought to be relevant to that relationship, and the broader implications of imposing a duty of care from the perspective of the community at large. These would include such considerations as the kind and seriousness of the harm in issue; the possible extent of subsequent litigation arising from the recognition of a duty of the suggested kind; reasonable alternatives to tort based liability; the calculus of risk, and other economic implications; the simple requirements of “justice”; and any other relevant factors (per Hammond J at 520).

[32] What is suggested by the “economic” approach to a duty of care is perhaps most clearly articulated in the famous judgment of Judge Learned Hand in *United States v Carol Towing Co Inc* 159 F 2d 169 (2<sup>nd</sup> Cir, 1947). The relevant variables can be reduced to algebraic form:  $C = P \times D$  in which C is the burden of care required to avoid the risk; D, the possible injury; and P, the probability that injury will occur, if the requisite care is not taken.

[33] A similar approach to that of Judge Learned Hand was suggested by Mason J in *Council of the Shire of Wyong v Shirt* (1980) 146 CLR 40 (HCA):

In deciding whether there has been a breach of the duty of care the tribunal ... must first ask itself whether a reasonable [person] in the defendant’s position would have foreseen that his [or her] conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff .... The perception of the reasonable [person’s] response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have (at 47).

[34] More recently, in *Rolls Royce* (above at [30]) this issue was put this way (as summarised in the headnote):

The question when deciding whether a duty of care should be recognised in New Zealand was whether, in the light of all the circumstances of the case, it was just and reasonable that such a duty be imposed. There were two broad fields of inquiry. The first was as to the degree of proximity or relationship between the parties. The second was whether there were other wider policy considerations that tended to negate, restrict or strengthen the existence of a duty in the particular class of case. The proximity inquiry was concerned with the nature of the relationship between the parties. It was more than a simple question of foreseeability and involved consideration of:

- (i) the degree of analogy with cases in which duties were already established;
- (ii) balancing the plaintiff's moral claim to compensation for avoidable harm and the defendant's moral claim to be protected from undue restriction on its freedom of action and from an undue burden of legal responsibility;
- (iii) the extent to which the plaintiff's position was vulnerable having regard to whether the defendant's special skills created power over a vulnerable plaintiff;
- (iv) whether there were or realistically had been other remedies for the plaintiff;
- (v) the nature of the loss. The Courts were less willing to impose a duty of care in cases of economic loss than where there was physical damage to property; and
- (vi) the statutory and contractual background in defining the relationship between the parties which could point, depending on the circumstances, both towards and away from a finding of proximity.

### (3) *Pleading Negligence*

[35] It is worth reiterating that the underlying elements as to "negligence" should be reflected in the pleadings in a given case: the statement of claim should state the facts on which the supposed duty is founded, the duty allegedly owed by the plaintiff, the precise breach of that duty of which the plaintiff complains, and particulars of the injury and damage sustained.

[36] Thus, for instance, in a claim for damages for negligence against a solicitor, Bullen, Leake and Jacobs *Precedents of Pleadings* (15ed 2004) at 1296 suggest that the pleading should be something like:

In breach of contract and/or negligently the defendants failed to exercise the care and skill to be expected of reasonably competent conveyancing solicitors in performing their duties pursuant to the said retainer.

After that averment, distinct particulars of negligence should be set out; then particulars of loss and damage (and each of those heads should be particularised).

(4) *Breach of statutory duty*

[37] At all times relevant to this case, under s 125 of the Criminal Justice Act 1985 it was the duty of every probation officer to supervise those persons placed under that officer's control. I will return to this topic in more detail later in this judgment, but for clarification, I think it important to add some comments on the relationship between such a statutory duty and "negligence" in the legal sense.

[38] The starting point is that our law is committed to the view that negligence and breach of statutory duty are two distinct torts. The complication is that statutory requirements may influence decisions that are made in negligence cases.

[39] United States (and, more latterly, Canadian) law has preferred to regard breach of statutory duty as being merely a particular species of negligence which judges in those jurisdictions sometimes call "statutory negligence". Such an approach turns on two lines of reasoning. The first is an argument that Courts face insuperable difficulties if breach of statutory duty is treated as a nominate tort in its own right: Judges have to search the statute to find an intention which, by definition, is not there. Secondly, it is argued that the trend in the law of tort has been away from absolute liability towards liability based on fault (see, for instance, *Cambridge Water Company v Eastern Counties Leather Plc* [1994] 2 AC 264 (HL)). Thirdly, jurists of this persuasion consider that at the end of the day there are only marginal distinctions between the torts. Fourthly, it is suggested that statutory negligence has a number of advantages. The reasonable care test can leave a considerable area of doubt as to the level of precautions that are appropriate on particular facts. Statutory negligence on the other hand "crystallises" the position. Further, on this theory, the views of the legislature or executive become decisive. Of course if this view of the law is adopted there is still the problem of whether a breach of a statutory requirement constitutes negligence per se, or is merely prima facie evidence of negligence.

[40] Appellate courts in England and New Zealand have, by contrast, favoured the view that breach of statutory duty is a nominate tort distinct from negligence. It rests on a separate principle that depends on discerning the intention underlying the legislation. Any question of the application of the “statutory negligence” approach was distinctly laid to rest by the decision of the House of Lords in *London Passenger Transport Board v Upson* [1949] AC 155. Lord Wright there categorised the tort as a specific common law right which is not to be confused in its essence with a claim for negligence. The problem with this approach is in inferring the legislative intent. But it also has distinct advantages. It provides a technique for excluding the tort from areas in which courts deem its application to be inappropriate, and avoids the inflexible application of a criminal or quasi-criminal law standard (with the risk that damages awarded in a civil case might far outweigh any penalty imposed in criminal proceedings). The underlying concern of Judges of this persuasion is to avoid the prospect of tort damages being awarded for every marginal breach of a regulatory statute. This result is said to be favoured in view of the increasing proliferation of regulations that do not rest on any moral condemnation of the (prospective) defendant’s conduct. See also the comments of William Young J in *Attorney-General v Body Corporate No. 200200 & Ors* CA30/05 1 December 2005 at [47]-[49].

[41] For present purposes, what is important is that the House of Lords emphasised in *X (Minors) v Bedfordshire CC* [1995] 2 AC 633 that English law does not recognise careless performance of a statutory duty as an independent tort.

[42] This Court has previously made it clear that this is also the position in New Zealand. In *Attorney-General v Carter* [2003] 2 NZLR 160 this Court stated:

[43] We respectfully agree with this approach. It is consistent with, indeed the logical culmination of, a developing trend to place increasing emphasis on the terms of relevant legislation when, in a common law negligence case, that legislation is central to the relationship between the parties. The trend of authority has also regarded the legislative environment as informing the duty of care question rather than as providing an alternative basis upon which a claim for negligence might be maintained. ... [A] negligence claim can logically be brought as one for breach of statutory duty only if there is a statutory duty to take care (at 172).

[43] To put all of this another way, carelessness is actionable under the tort of negligence, but only in situations in which the criteria for the recognition of a common law duty of care have been satisfied. The tort of breach of statutory duty may impose a standard of reasonable care, but it does so only when the statutory duty in issue has been determined as intended to confer a private law cause of action on a defined class of persons. These constraints mean that there is not some sort of intermediate tort of careless performance of a statutory duty.

(5) *The pleadings in this case*

[44] Bearing in mind the points I have made, the third amended statement of claim in this case is somewhat confusing.

[45] Paragraph [26] of that pleading avers (in that part of the statement of claim which would normally be thought to be dealing with the factual assertions):

The defendant had a duty to ensure:

- Bell was removed from the course providing a licence controller qualification run by Transition Training Limited;
- Bell's places of work were known to them and verified;
- Bell was instructed he was not to seek work in the liquor industry;
- Bell was assessed to ensure he was not involved in the consumption of liquor;
- Bell was residing at suitable accommodation where any involvement in the consumption of liquor was not tolerated;
- That Bell was living in suitable accommodation to minimise the risk of re-offending.

[46] Then, in relation to claim for negligence it is averred, at [33]:

The defendant owed a duty to the plaintiff:

- (a) Not to encourage Bell, a known violent offender, with a record as set out herein to obtain work in the liquor industry.
- (b) Not to encourage Bell to illegally work in the liquor industry.
- (c) To ascertain where he was working.

- (d) To supervise where he was working.
- (e) To contact his employers to ensure they knew his propensity with alcohol and robbery.
- (f) To ascertain that he was working at the Panmure RSA.
- (g) To contact and warn the management and staff of the Panmure RSA (including the plaintiff) that Bell:
  - (i) Was a high risk violent offender who had conviction for aggravated robbery, and
  - (ii) Had a known propensity for re-offending.
- (h) Any combination of the foregoing.

[47] And further, at [34]:

The defendant:

- (a) Notwithstanding it was illegal for Bell to be involved in the sale of liquor encouraged Bell to work in the liquor industry.
- (b) Permitted Bell to obtain a Licence Controller qualification from Transition Training Ltd.
- (c) Ascertained he was working at the Panmure RSA, or;
- (d) Alternatively, were reckless as to where Bell was working.

[A]nd in breach of the aforesaid duties failed to contact and warn the management and staff of the Panmure RSA (including the plaintiff) as to the prior behaviour of Bell and the real risk of them being a victim of his violent offending.

(6) *The statutory context*

[48] It is convenient to return at this juncture to the statutory duties which X was required to observe, as they may assist in the determination of whether a (predetermined) duty of reasonable care has been breached.

[49] Under s 125 of the Criminal Justice Act 1985 a probation officer had a duty to ensure that all persons placed under the officer's supervision complied with the conditions of the sentence or the release, to co-ordinate and arrange community involvement, and to arrange courses of social education or counselling or personal services. The officer could initiate the variation, discharge or supervision of

conditions of the offender's release (s 107G(1)); apply for the imposition of additional conditions; and if he or she believed on reasonable and probable grounds that a parolee had committed a breach of condition of his or her release, arrest the offender without warrant (s 107H).

[50] As to Mr Bell's ability to work in the liquor industry, Mr Henry was unable to point to anything that would have provided an absolute legal barrier to Mr Bell working in licensed premises, even in a managerial capacity. The Sale of Liquor Act 1989 would clearly have provided an impediment (and presumably a very powerful one) to his obtaining a manager's certificate. This is because, on receiving an application for a certificate, the licensing authority would be required to seek a report from the police. It is highly likely that the police would have objected. It would then have been up to the licensing agency (or the Liquor Licensing Authority on appeal) whether to grant a certificate. Prior convictions would not, however, have been an absolute bar (see *Holland J in Re Sheard* [1996] 1 NZLR 751 at 758 (HC)).

(7) *Strike-out principles*

[51] I think it desirable to next add some comments on the appropriate approach to strike-out applications where novel duties of care are raised.

[52] The New Zealand authorities which apply in more "usual" cases are rehearsed by Richardson P in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 at 267 (CA).

[53] The President there also noted that some caution is required before striking out a case in a new or evolving area of the law. Nevertheless, in that case this Court thought the particular claim should be struck out. See also, more recently, in this Court, *Attorney-General v Body Corporate No. 200200 and Ors* CA30/05 1 December 2005.

[54] In *Barrett v Enfield London Borough* [2001] 2 AC 550 (HL) Lord Browne-Wilkinson suggested it to be "preferable" for complex cases in an evolving area of

law to be decided on the facts established at trial, least they proceed on a flawed basis (at 557-558).

[55] In my view, it is important to get back to first principles. I agree with Zuckerman *Civil Procedure* (2003) at 8.25 that the reason why a court is justified in striking out a claim is if the court can be confident that no further investigation or argument of any kind could provide any appreciable assistance to the task of reaching a correct outcome.

[56] There are two categories of cases.

[57] The first is where the Court can be satisfied on the merits: for instance, if it can correctly decide that a claim lacks some essential element.

[58] The second ground is materially different. The concern under this head is whether the issues raised require further investigation by the normal processes of that court. And in this area it may be appropriate to allow issues to be aired at trial even if the court believes that the claim or defence is groundless or has little mileage in it.

[59] What the Court may need is further consideration of the facts, or it may need much closer argument and consideration of the wider implications of recognising a particular duty of care, and how it is to be articulated. The Strasbourg Court was, with respect, wrong in considering that the English strike-out procedure *itself* was unfair in “new claim” areas (see *Osman* (2000) 29 EHRR 245). A strike-out process as such is not inherently unjust. The difficulty rather, is that (as here) there can be a much increased risk of interlocutory error inside a strike-out procedure in these new claim situations. This should make a Court distinctly cautious. In short, a Court must have everything it considers it needs to have before it for a proper decision before it strikes down a claim.

(8) *This case*

[60] Against all of this, I return to the instant case.

[61] There is one thing I can get out of the way at the outset. There is no doubt (and indeed the Department has acknowledged this) that very serious errors were made in his case by the respondent. Unsurprisingly, very strong particulars of carelessness or errors on the part of the respondent are pleaded: that Mr Bell was a high-risk re-offender; that X had only ten months experience and did not have the experience or skill to supervise him; that X was overworked due to her case load and inexperience; that the alcohol and drug programmes required for the proper rehabilitation of Bell were not available; that home visits were required for Bell's proper supervision, but did not occur; that Bell moved from his approved address, but his accommodation arrangements were not followed up on; that Bell was a violent offender, with a known, self-admitted, propensity to use violence to commit robbery to obtain further alcohol and/or money to enable him to obtain still further alcohol.

[62] The appellants' pleadings in this case are frustrating. The appellants have had three opportunities to articulate whatever is sought to be established in the way of a duty of care. And that must be even more important in this case, because ultimately the appellants would have to establish that a given breach of a particular duty caused the loss that is claimed.

[63] That said, each of the factors relied on in the most recent amended statement of claim can be criticised in their own way, but there is a centrality to the complaint: that this man, with his history, should not have been enabled - let alone encouraged - to work in the particular context in which he became employed, without prudential measures being employed, when there was a plain duty to closely supervise him. And in the end, it does not seem right to me that the present state of the pleadings should defeat a potentially sustainable claim, at this point of time.

[64] I do not find it necessary at this juncture of the case to traverse in depth such authorities as there are in the common law world as to when what could (loosely) be termed a "duty to supervise" may arise. It is only necessary, for present purposes, to say that there could possibly be a narrow duty of care on X, or the Department, at least in relation to Ms Couch. Whether there should be such a duty would be a matter for much fuller consideration than I can mount here, at trial.

[65] However, I add these considerations, which may be thought relevant in due course. The control that a custodial authority exercises over a prisoner in lawful detention has been thought sufficient to create a duty of care. And a custodial authority may be said to have assumed authority to take reasonable care for the health and safety of prisoners during their period of detention - see the unanimous views of the House of Lords in *Hague v Deputy Governor of Pankhurst Prison* [1992] 1 AC 58.

[66] As well as duties of care arising from the fact of control, a general duty of proper supervision has been placed on those responsible for the management of prisons in order to protect persons who are likely to come into contact with prisoners (see *Ellis v Home Office* [1953] 2 QB 135 (CA), confirmed in *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 (HL)).

[67] As to physical injury caused by a prisoner while on parole or bail, I am aware of only one English case supporting the imposition of liability in an analogous situation: *Holgate v Lancashire Mental Hospitals Board* [1937] 4 All ER 19 (KB). There, a decision by a medical officer to release a mental patient with a record of violence on “holiday licence” without properly checking “supervision” arrangements was held to be actionable. In *Palmer v Tees Health Authority* [2002] PNLR 87; [1999] Lloyd’s Med Rep 351 (CA) the English Court of Appeal struck out a claim brought by the mother of a child who was murdered after a health authority had released her killer from psychiatric care, even though the authority knew that the killer had a proclivity to commit sexual offences against children. *Holgate v Lancashire Mental Hospitals Board* was said to be wrong. *Palmer* was then applied in *K v The Secretary of State for the Home Department* [2002] EWCA Civ 775 where the Court of Appeal considered a claim by a woman who was raped by an individual who was awaiting deportation: it was said that there was no relationship of proximity where there was no other connection between the defendant and the claimant.

[68] However, some academic writing supports tortious liability even in the case of parolees, in appropriate cases. For instance, it has been said that, whilst a decision to release a prisoner on parole attracts no general duty of care, “there might be a

specific duty in relation to enforcing parole conditions imposed to protect potential victims, for example, a condition prohibiting a child molester from having contact with children” (Dugdale & Stanton *Professional Negligence* (3ed 1998) at [9.20]). This sort of approach is very much in line with the contemporary House of Lords jurisprudence (eg, *Barrett*, above at [54]).

[69] Ultimately, whether an actionable duty of care should rest on X or the department in a case such as the present is a matter for New Zealand law. Whether there should be such a duty in New Zealand would turn on a much closer consideration both of the facts of this case, and of the particular institutional context of probation officers in New Zealand, and perhaps other persons having a duty to oversee persons of a dangerous propensity, and related public policy concerns.

[70] These public policy concerns fall principally into four sub-sets in this case.

[71] The first - an “economic” concern - would assert that exposure to potential liability for probation officers would mean disproportionate time and expense having to be directed from other things into defending cases which were essentially about rehearsing the manner in which they do their job.

[72] The second reflects a “behavioural” viewpoint which would assert that potential liability would put a premium on probation officers covering their tracks to avoid subsequent actions (which would in turn inhibit performance without gains in morale or efficiency). Arguments of these kinds are distinctly discernible in the more recent House of Lords cases on the position of the police, detention, and supervision authorities.

[73] Thirdly, there is a “structural” problem of some complexity, in New Zealand. In this country, victims can sometimes obtain recompense from what is colloquially referred to as the “accident compensation” legislation. How is a prospective common law duty of care to be seen against such a context? In the northern hemisphere, there has been what is often described as an “explosion” of tort law liability. Some commentators - Professor Carol Harlow, in her *State Liability* (2004) is a good example - deprecate this phenomenon and urge “a new and less aggressive

system of state responsibility, founded on values of community and social solidarity” (at 9). So tort law should be “shrunk”, in favour of compensation in line with a simple, and narrow formula intended to cover “abnormal loss” and hardship, with “botheration payments” as Professor Harlow called them, in appropriate cases.

[74] Many, perhaps most, jurists would accept the proposition that the allocation of resources between redress for individuals and public benefits should be determined by legislation, through the design of compensation schemes, and the making of exceptional compensation payments, rather than through the extension of tortious liability rules. But then there is the difficulty that “the state will look after itself” - hence protective clauses even in compensation schemes, and remedial limitations.

[75] In New Zealand there is a real question whether the tort dress has been “over-shrunk”. That was always a potential consequence of the original ACC scheme, and it is hardly surprising that blisters are now forming at various points on the skin of the New Zealand polity, with increasing numbers of claims against the Crown for tortious redress, in one context or another. For at some level, tort law is concerned with social accountability. The sort of questions which necessarily arise are, how has a given institution - say the probation service - responded to incidents of the kind under consideration in this case? Are the huddled survivors of these appalling kinds of events to be left in the quagmire of an inadequate institutional response, if such it was? This service has not even been called upon - yet - to disclose fully what happened in this case. Unsurprisingly Ms Couch, in particular, sees her proceeding as one in which she seeks “public accountability” that she cannot get elsewhere. Hence the argument is run that, where it is apparent that resources or abilities have fallen woefully short, courts should not be deterred and, beneficially, should lay down duties of care that may then require some executive response.

[76] It is convenient under this head to indicate, having had the opportunity to read the judgment of the President in draft, that in my view the fact that damages would be “restricted” to exemplary damages in Ms Couch’s case is not dispositive. The Privy Council in *Bottrill v A* [2003] 2 NZLR 721 allowed that even inadvertent negligence which was so outrageous as to call for condemnation could fall within the

scope of the jurisdiction of the Court to award such damages. Here the State seeks to cut off, at the outset, any possibility of such a searching examination.

[77] Fourthly, there is a “deep” justice problem lying behind the sort of issues raised by this case: if the negligence of a public officer is excused, the law is transferring to those individuals who suffer the resultant injury “... the burden of administrative activities which are [imposed] for the benefit of the whole society” (Markesinis and others *Tortious Liability of Statutory Bodies* (1999) at 109). Indeed Professor Markesinis has tartly, and with some real force, observed that “some of our [senior] Judges, in their current ‘cerebral’ mode, may be sacrificing traditional tort aims such as justice, deterrence and compensation to the altar of prudent management of scarce resources” (at 99).

[78] These sorts of matters were not ventilated at all in the High Court, and even before us, the argument did not rise above the doctrinal level.

[79] My short point, against all of this, is that it would be premature to strike out Ms Couch’s claim in negligence, on a lack of duty basis. She was working in the enterprise to which Mr Bell had turned his attention, and she was one of his direct victims, when he was supposed to be under the direct supervision of X. The injuries suffered by her were both tangible and intangible, and of a character well recognised by the law. I am not sufficiently confident that there is not a duty to see her claim struck out now.

[80] Of course, if there is a duty, the breach of that duty must have been the cause of Ms Couch’s loss. There is a present problem under this head: until the relevant duty is articulated it is difficult to wrestle causation to the ground. And this area is so fact specific.

[81] Further, there is the limitation on the negligence actions of “proximity”, down which bolt-hole the English Court of Appeal has recently been wont to disappear (see *K v The Secretary of State for the Home Department*, at [67] above). “Proximity” in relation to probation officers is in any view a particularly difficult subject-area. Those officers have an affirmative duty to supervise, precisely because

they are “in control” (in a case like this) of particularly dangerous people. To say that there has to be an exact “prediction” of just who the specific victim will be goes too far. Again, however, I find it quite impossible to fairly deal with this issue, in the absence of a much closer examination of the facts, which are not available to me. In particular, I am not presently in a position to finally determine that these fellow employees are not a “suitable class”. On the face of it, they could be: where one lives, and works, is not to throw a claim open to the world at large.

[82] Mr Hobson is in an entirely different situation. It will be recalled that he is at a stage removed, as it were, from Mr Bell’s direct actions. A duty of care is an incident of the relationship between two individuals, specifically that between the injurer and his or her victim or a “suitable group” of victims. There cannot be a duty “at large” or “in the air” as it is sometimes put, giving rise to almost indeterminate liability to an indeterminate number of persons. Or, as it is sometimes said, the common law has an “individualistic bias”: in negligence the appellant must ground her claim to redress on breach of a duty owed personally to her, as a particular individual or group of individuals. As a matter of policy, the law will not allow the appellant to claim as the vicarious beneficiary of a duty owed to others. Ms X might have been remiss in her conduct, but this will not avail Mr Hobson if he was not a person to whom X owed a duty.

[83] It is sometimes said that this approach is distinctly tender to the interests of defendants: that it is tolerant of windfalls to a defendant if, by chance, the unfortunate victim of wrongful conduct fails in his or her personal standing for redress. But the short answer is that an appellant must build on a wrong done to her, not a wrong done to somebody else.

[84] As I apprehend it, this was the position taken by this Court in *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179. See, in particular, the extended discussion by Blanchard J at [44] and following, relating to the position of secondary victims.

[85] In Mr Hobson’s case, in my view, he is caught by this limitation in the law of negligence. And, there is no pleading of a claim of some extended kind of infliction

of emotional distress. Mr Hobson's claim in negligence should therefore be dismissed at the outset.

(9) *Conclusion: negligence*

[86] In the result, I would not strike out Ms Couch's claim for negligence; but I agree that Mr Hobson's claim for negligence should be struck out.

**Misfeasance in public office**

(1) *The pleading*

[87] In both statements of claim it is averred for Ms Couch and Mr Hobson that they have suffered "loss as a consequence of the defendant's misfeasance in office ...". Particulars of the misfeasance are set out. It is then averred that:

The foregoing decisions were wilful and/or reckless and as a natural and probable consequence of the conduct:

- Bell was inevitably going to commit a violent robbery seeking money for alcohol/drug abuse;
- Bell would use the certificate from Transition Training Limited to obtain employment in the liquor industry;
- Bell would plan to rob any employer in the liquor industry and would in the course of such re-offending cause serious injury or death to the staff working there.

(2) *Misfeasance: the law*

[88] Maladministration by public bodies or offices has historically not entitled the injured party to compensation. Misfeasance in a public office is the only tort specifically tailored to compensate for unlawful actions by public officers.

[89] The tort is committed whenever someone holding public office has misconducted himself or herself by purporting to exercise powers which were conferred on him or her not for personal advantage but for the benefit of the public

or a section of the public, either with the intent to injure another or in the knowledge that he or she was acting outside his or her powers and that this was likely to injure the plaintiff. In *Three Rivers District Council v Bank of England (No. 3)* [2003] 2 AC 1 the House of Lords emphasised that the tort involves an element of bad faith. See also the decision of this Court in *Garrett v Attorney-General* [1997] 2 NZLR 332.

[90] As to who can commit the tort, this must be by a public officer. This means anyone appointed to discharge a public duty and who receives compensation therefrom.

[91] The required “malice” can be proved in one of two alternative ways:

- by a malicious act which was aimed at injuring the plaintiff (so called “targeted malice”); or
- by a deliberate act which the public officer knew that he or she did not have power to do, and that the officer knew was likely to cause harm.

[92] As to targeted malice, “malice” in that context does not mean ill will. It covers any corrupt or improper motive, but it has been held that it does not extend to recklessness (*Bennett v The Commissioner of Police* [1995] 1 WLR 488 (Ch)).

[93] Turning to the second limb of misfeasance in a public office, the complaint that a public official has knowingly acted outside their powers is a much more difficult claim to prove. The claim has occasionally succeeded. An easily grasped example is where a Minister of Agriculture withdrew a general licence to import turkeys from France, knowing that by so doing he was infringing an article of the Treaty of Rome and that this would injure the plaintiffs in their business (*Bourgoin SA v Ministry Agriculture, Fisheries and Food* [1986] QB 716 (CA)). Likewise, in *Three Rivers*, the claim concerned an allegation that in failing to regulate the Bank of Credit and Commerce International, the Bank of England had made an unlawful and dishonest decision, knowing it would cause loss to existing or potential depositors. It is clear from the *Three Rivers* case that misfeasance will be proved if there was a

deliberate omission, involving an actual decision not to act. And their Lordships took the view that subjective recklessness in the sense of not caring whether the act was illegal or whether the consequences were sufficient to establish liability, can amount to misfeasance.

[94] Misfeasance in a public office has generally been thought to require a claimant to prove that he or she has suffered damage. It is, like negligence, an action on the case, so that damage is an essential element of the cause of action. Traditionally, this has been a rigorous requirement. In *Three Rivers* ([90] above) the House of Lords held that it was necessary for a plaintiff to prove that a defendant had actual foresight that damage would result from his or her actions. Something of a gloss was placed on that proposition, insofar as the English Court of Appeal held in *Watkins v Secretary of State for the Home Department* [2000] QB 883 that, where the right of a claimant amounts to a constitutional right which is infringed by the wrongful and malicious act of a public officer, there is no need to prove special damage. That decision has now been reversed by the House of Lords ([2006] 2 WLR 807). The House of Lords also accepted that in rare cases exemplary damages might be awarded where a compensatory award was insufficient to mark the Court's disapproval of proven misfeasance in office.

(3) *Mr Hobson*

[95] Here again I think Mr Hobson's claim does not get off the ground. Mr Hobson is outside the circle of persons to whom the duty was owed. It would be impossible for Mr Hobson to prove that X had actual foresight that damage would result to him from her actions. There was not recklessness, even on his own pleadings, of the requisite character. Damage of a requisite character is an essential element of the cause of action, and is here absent.

[96] I therefore disagree with Heath J under this head. I think that this claim should have been struck out.

(4) *Ms Couch*

[97] I consider this head of claim should also be struck out in Ms Couch's case. It cannot be said – and indeed it is not averred – that what X did, she did by a deliberate act which she knew she did not have the power to do, or that she was “reckless” in the legally required sense.

## **Conclusion**

[98] In the result, in my view, there is no cause of action of any description which Mr Hobson can maintain against Ms X or the department, and his claim should be struck out altogether.

[99] In the case of Ms Couch, the cause of action for misfeasance should be struck out. The claim should be allowed to proceed on the negligence cause of action.

## **Costs**

[100] I would reserve the question of costs. If the parties are unable to resolve that issue, counsel may submit memoranda in the usual way. The Crown should submit and serve its memoranda first; counsel for Mr Hobson and Ms Couch to have 14 days thereafter to reply.

**WILLIAM YOUNG P**

## **Table of Contents**

	Para No
<b>Introduction</b>	[101]
<b>Does Ms Couch have a tenable claim in negligence?</b>	
<i>Overview</i>	[104]
<i>Recovery of damages for personal injury and the availability of exemplary damages in vicarious liability and negligence cases</i>	[109]
<i>Ms Couch's primary case as to duty and breach - preliminary observations</i>	[110]
<i>Proximity considerations</i>	[115]
<i>Policy considerations</i>	[119]
<i>Conclusion - is it reasonable to impose a duty of care?</i>	[125]
<i>A final comment</i>	[129]

**Does Ms Couch have a tenable claim for misfeasance in public office?**

*General* [130]

*Can Ms Couch tenably allege that the Department had the necessary state of mind?* [131]

*Can Ms Couch tenably allege that injury to her was foreseen by the Department as the probable consequence of its alleged dereliction of duty?* [137]

*Can Ms Couch allege a tenable case as to causation* [139]

**Is Mr Hobson within a class of victims who could recover in negligence?** [140]

**Introduction**

[101] I agree with Hammond J that the claim by Mr Hobson must be struck out. I also agree that the misfeasance in public office claim by Ms Couch should be struck out. Where I disagree with him is as to the claim for negligence by Ms Couch. In my view that claim too should be struck out.

[102] I propose to discuss the case by reference to the following questions:

- (a) Does Ms Couch have a tenable claim in negligence?
- (b) Does Ms Couch have a tenable claim for misfeasance in public office?
- (c) If Ms Couch's claims were otherwise tenable, would Mr Hobson have a tenable claim for damages.

[103] For ease of reference I will, unless the context otherwise requires, not distinguish between X and the Department, referring to them both as "the Department".

## Does Ms Couch have a tenable claim in negligence?

### *Overview*

[104] Courts are now familiar with negligence claims which proceed on the basis that the defendant (usually a public body) owed a duty of care to a crime victim to take reasonable steps to avoid or limit the risks posed by a particular offender. Such cases often involve tragic and sometimes, as here, horrific facts. But they nonetheless fall to be determined in accordance with the ordinary legal principles that govern negligence cases. So I consider that the principles discussed in *Attorney-General v Body Corporate No 200200 CA30/05* 1 December 2005 are applicable despite the very different context. Accordingly, I see as applicable the general proposition which was stated at [36] of that case:

In determining whether a duty of care exists, the ultimate question for the Court is whether it is just and reasonable that such a duty be imposed. The courts look to the proximity or relationship between the parties and also to any wider policy considerations that bear on whether a duty of care should be imposed.

[105] There are cases in which public officials have been held to be liable (or arguably liable) for failures of supervision and the like in relation to offenders; most famously *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL) but also *Ellis v Home Office* [1953] 2 QB 135 (CA). Reference can also be made to *Holgate v Lancashire Mental Hospitals Board* [1937] 4 All ER 19 (a case of doubtful authority, see the *Dorset Yacht Co* case at 1032 and 1040-41). As well, and close to the facts of the present case, is the Australian case, *Swan v South Australia* (1994) 62 SASR 532 (SC). In that case, the offender was a paedophile who, at the time of his offending against the plaintiff, had been on parole on condition, inter alia that he not associate with children under the age of 14 unless another adult was present. The parole board was on notice that the offender was or may have been in breach of this condition, in that he was associating with the plaintiff who was under 14. In the view of the South Australian Supreme Court, the parole board arguably came under a duty of care to the plaintiff.

[106] The *Swan* case involves what is sometimes referred to as a situational duty. In the *Body Corporate* case, we said of such a duty:

*Reasoning backwards from the alleged negligence – situational duties*

[43] In cases of this sort, it is customary for a plaintiff to focus on what is alleged to be the negligence of the defendant and to formulate the proposed duty of care by reference to that alleged negligence. Such a duty of care may fairly be described as situational. This approach, if adopted by the Court, is likely to favour a plaintiff; this because it requires a primary focus on what is alleged to be the fault of the defendant and the limited nature of the asserted duty (with its narrow scope) is less likely than a more broadly expressed duty to engage countervailing policy arguments. ...

[44] It is not difficult to find cases in which Courts have reasoned backwards from apparent negligence to a conclusion that in the context of the particular risk which eventually crystallised, there was a duty of care, addressed to the amelioration of that particular risk. An example is *Pyrenees Shire Council v Day* (1998) 192 CLR 330 as explained in *Graham Barclay Oysters Pty Ltd* at 576 and 581 by McHugh J. Reference can also be made to the speech of Lord Pearson in *Home Office v Dorset Yacht Club Ltd* [1970] AC 1004 at 1052 which was adopted by this Court in *Wilson & Horton Ltd v Attorney-General* [1997] 2 NZLR 513 at 517. It would be wrong, therefore, to suggest that this is an illegitimate reasoning process.

[45] On the other hand, such reasoning is not without its difficulties. In this context, *Fleming v Securities Commission* [[1995] 2 NZLR 514 (CA)] is relevant and important. The plaintiffs had lost money in an investment scheme which had been illegitimately marketed. Although the scheme had come to the attention of the Commission, the steps it took in relation to it were both limited and ineffectual. The plaintiffs sued in negligence alleging a situational duty of care addressed to the particular circumstance that the Commission had been on notice of the illegitimate nature of the marketing of the scheme. The proceedings were struck out in the High Court. On appeal to this Court, Cooke P focused on the possible existence of a duty on the part of the Commission to take appropriate action if alerted to apparent breaches of the Act and was thus reasonably receptive to the argument that there was a duty of care (see 519 – 520). On the other hand, Richardson J, with whom the other judges (Casey, Gault and Ellis JJ) agreed, was not prepared to approach the case on this basis. If there was a duty of care, it would have to be much broader than that asserted by the plaintiffs and there were many policy arguments which militated against the existence of such a duty (see 529 – 531 per Richardson J). Reference can also be made to the dissenting judgment of Hayne J in *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at [301].

[46] The majority's approach in *Fleming* suggests that where a plaintiff's case proceeds on the basis of an alleged situational duty (ie closely focused on particular circumstances of risk which are said to have existed), the Court should:

- (a) During the proximity phase of the inquiry, be careful to ensure that the narrow duty alleged can credibly be regarded as

discrete from a broad (and untenable) duty of care in relation to the relevant statutory functions; and

(b) In assessing policy considerations, analyse carefully the implications, in terms of the scheme and structure of the relevant statute, of recognising even a situational duty.

[107] In this area of the law, it is important to use language precisely. It is very easy to conflate the concepts of duty and breach and assert a duty directed to the alleged acts or omissions of the defendant. There have been many examples of this in the present case. For instance, Ms Couch relies predominantly on what Mr Henry asserted was “a duty to warn” Ms Couch or her employer as to the risks posed by Bell. But a duty of care is never more than a duty to take reasonable care and there can be never be an absolute duty to warn. Rather, what Mr Henry must rely on is a duty of care owed to Ms Couch which was breached by the Department’s failure to warn her (or her employer) of the risk posed by Bell.

[108] Ms Couch’s case therefore depends upon it being shown that the Department owed her a duty of care to take reasonable precautions to protect her from the dangers posed to her by Bell.

*Recovery of damages for personal injury and the availability of exemplary damages in vicarious liability and negligence cases*

[109] The accident compensation legislation means that Ms Couch is not entitled to seek compensatory damages. Claims for exemplary damages are not excluded by the accident compensation regime; but Ms Couch faces two difficulties; first, she probably has no claim for exemplary damages against the Department if its liability is merely vicarious (*S v Attorney-General* [2003] 3 NZLR 450 (CA)) and, secondly, such damages are seldom awarded in negligence cases, see *Bottrill v A* [2003] 2 NZLR 721 (PC).

*Ms Couch’s primary case as to duty and breach – preliminary observations*

[110] The primary complaints made against the Department relate to two issues: first, the way in which the Department supervised Bell; and, secondly, the failure of

the Department to warn Ms Couch, directly or indirectly (via the management of the Panmure RSA), of the risk which Bell posed.

[111] These two aspects of the case raise different issues.

[112] It is not suggested that the Department owes a general duty of care to all and sundry as to the supervision of parolees. So the first difficulty for Ms Couch is to identify a class of people (to which she belongs) to whom the alleged duty was owed and which can be credibly distinguished from the public at large.

[113] A second and serious difficulty with the supervision complaints is that a more rigorous approach by the Department to the supervision of Bell would not necessarily have prevented Bell offending as he did in the Panmure RSA. Further, it is at least likely that if he had not committed offences there, he would have committed other serious offences against other people. Many of those who commit serious crimes are under official supervision (including parole supervision) at the time of their offending. It would be entirely unsafe and unfair to conclude that such offending means that the offender's supervision was faulty. So when assessing the assertion that the Department owed Ms Couch a duty of care as to how Bell was supervised, it is important to recognise that linkage between the breaches of that alleged duty and the damage suffered is doubtful and indirect, to say the least.

[114] Slightly different, although overlapping considerations are engaged by the complaints as to failure to warn. It seems highly likely that the management of the Panmure RSA would not have employed Bell if it knew of his history. So if the Department had warned the Panmure RSA's management of that history, it is plausible to assume that the events which give rise to this case would not have occurred. In that sense, there is, apparently at least, a reasonably direct link between the alleged breach of duty and the attack on Ms Couch. But, if the Department had warned potential employers of Bell about his history, he would presumably have remained unemployed. If it is the case (as seems likely) that a parolee's prospects of re-offending are best reduced by encouraging him or her into employment, it would seem contrary to the public interest to require the Department (on pain of being held

liable for damages in negligence) to act in a way which limits the prospects of a parolee obtaining employment.

*Proximity considerations*

[115] The powers and duties of the Department are discussed in the judgment prepared by Hammond J.

[116] I think that the key proximity considerations are as follows:

- (a) Leaving aside the possibility that the Department ought to have warned the Panmure RSA and thus Bell's work colleagues of his prior offending, there is no obvious step which the Department could have taken which would necessarily have avoided Bell offending in respect of the Panmure RSA premises.
- (b) There were no supervision options available to the Department which could have eliminated the possibility of Bell offending generally.
- (c) The strongest argument for Ms Couch rests on the consideration that, as a work-mate of Bell, she was one of a comparatively limited number of people who had a direct association with Bell in an employment environment and thus in a context in which Bell was required to act, at least to some extent, in accordance with the directions of the Department.
- (d) On the other hand, there is no suggestion that Bell posed a particular threat to work colleagues, as opposed to anyone who might be in premises which he was to target.
- (e) There was also no direct relationship between Ms Couch and the Department. Ms Couch presumably had no idea that Bell was on parole and could not be said to have placed any direct reliance on the Department.

[117] The case is distinguishable from situations where the defendant had physical control over the offender (as in the *Dorset Yacht Company* case), a consideration that I see as very important. Further, although Mr Henry sought to portray Bell as a walking time bomb, he did not have so an extensive list of convictions for violent offending so as to mark him out obviously from many other parolees with convictions for aggravated robbery or other serious offending involving violence.

[118] In context, I consider that the only credible basis upon which we could conclude that there was sufficient proximity arises out of the ability of the Department to give directions as to where Bell worked and Ms Couch's status as a workmate. I have real doubts whether this constitutes sufficient proximity but am content to proceed for the moment on the basis that it does.

#### *Policy considerations*

[119] If the Department owed a duty of care in respect of Bell which could be breached by failing to warn employers and workmates about his criminal propensities, there are no obvious reasons why such a duty should not be imposed in relation to all violent offenders or in relation to other offenders, for instance those with convictions for crimes of dishonesty. The primary policy considerations, which to my mind point conclusively against the imposition of such a duty, is that it would run counter to the objective of reintegration which is at the heart of the parole regime.

[120] Mr Henry's position broadly is that Bell was so dangerous that a common sense balancing of the risks he posed as against the likelihood of rehabilitation warranted the Department treating him as a special case and thus compromising his prospects of successful rehabilitation in favour of public protection.

[121] One problem with such an approach is that the Department's powers of supervision over Bell were limited temporally. Once Bell's parole terminated, he could live and work where he chose. If the Department had acted on the basis contended for by Mr Henry it would have limited the prospects of Bell offending at

the Panmure RSA but at the cost of probably increasing his prospects of offending in some other context while still on parole or after his parole finished.

[122] Further, the duty contended for is so indeterminate in scope as to make it impossible for the Department to determine in advance those whom it should treat as special cases and thus whose rehabilitative prospects should be subordinated to public safety considerations. The imposition of a duty of care in these circumstances would have the tendency to encourage probation officers to take over-cautious approaches to the risks posed by those they were supervising which would, on the one hand not provide appreciable net benefits in terms of public safety in the short term (ie while the parolees were still subject to parole) but rather would, in both the short and longer terms, contribute to a higher likelihood of offending (resulting from the parolees' prospects of successful rehabilitation being compromised).

[123] I am satisfied that the policy considerations to which I have referred render untenable the claim by Ms Couch associated with failures to warn.

[124] The same policy considerations might seem to be not applicable in relation to the inadequate supervision complaints; this because encouraging probation officers to supervise parolees effectively is consistent with the underlying statutory purpose. I have reservations, however, whether this is the correct way to look at the situation. This is because it is not correct to talk of duty to warn or a duty to supervise. The only relevant duty would be to take reasonable care. I suspect that if a duty of care to third parties is recognised this will lead to conflict with the statutory purposes of the parole scheme. In any event, and for reasons which I am about to come to, a claim based on the supervision complaints is untenable for other reasons.

*Conclusion – is it reasonable to impose a duty of care?*

[125] As is apparent, I am satisfied that the Department did not owe to Ms Couch (or to a class of which she was a member) a duty of care which was breached by what are alleged to be the failures to warn the management and staff of the Panmure RSA of Bell's violent propensity. Such a duty would be in conflict with the policy of the statute. It follows that it would not be reasonable to impose such a duty.

[126] I am inclined to think that the same applies to the complaints about failures of supervision. But in any event, there is no sufficient connection between the alleged supervision failures and the offending. It cannot be said with any degree of confidence that better supervision would, in any particular case, prevent offending. The lack of a direct connection between alleged failures of supervision and later offending mean that negligence claims would degenerate into sterile speculation about how events might have panned out if different supervision strategies had been followed. Indeed, I can see no realistic prospect of such a case succeeding as to causation. So it would be unreasonable to subject the Department to the postulated duty of care.

[127] I would have reached these views even if the accident compensation scheme did not exclude the right to seek compensatory damages for personal injury. But the accident compensation entitlements of Ms Couch and the associated exclusion of a compensatory common law claim support the conclusions I have reached.

[128] In jurisdictions in which compensatory damages for personal injury are available, claims comparable to Ms Couch's at least have the purpose of enabling those who have been injured to receive compensation. The desirability of ensuring proper compensation for the injured is a factor to be weighed against policy considerations which might be compromised by the imposition of a duty of care, a counter-weight which is not available here.

*A final comment*

[129] As a final, and unrelated comment, I note that the room for legitimate difference of opinion about the appropriateness of giving the sort of warnings which Mr Henry maintains should have been given, makes it inconceivable that a court could fairly conclude that the failure to give a warning about Bell was so outrageous as to warrant an award of exemplary damages even if other problems with the case (already discussed) could be overcome. I suspect that the same is true of the complaints as to failure to supervise.

## **Does Ms Couch have a tenable claim for misfeasance in public office?**

### *General*

[130] The elements of this tort are discussed in detail in three recent decisions, *Garrett v Attorney-General* [1997] 2 NZLR 332 (CA), *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 (HL) and *Odhavji Estate v Woodhouse* [2003] 3 SCR 236. Given this, I confine this section of my judgment to discussion of three issues:

- (a) Can Ms Couch tenably allege that the Department had the necessary state of mind?
- (b) Can Ms Couch tenably allege that injury to her was foreseen by the Department as the probable consequence of its alleged dereliction of duty?
- (c) Can Ms Couch allege a tenable case as to causation.

### *Can Ms Couch tenably allege that the Department had the necessary state of mind?*

[131] Misfeasance in public office is an intentional tort and, as Lord Millett observed in the *Three Rivers* case at 235B, two points follow from this:

First, the tort cannot be committed negligently or inadvertently. Secondly, the core concept is abuse of power. This in turn involves other concepts, such as dishonesty, bad faith, and improper purpose. These expressions are often used interchangeably; in some contexts one will be more appropriate, in other contexts another. They are all subjective states of mind.

[132] That analysis is well-settled in this jurisdiction. In *Garrett v Attorney-General* [1997] 2 NZLR 332, this Court stated at 351:

The common law has long set its face against any general principle that invalid administrative action by itself gives rise to a cause of action in damages by those who have suffered loss as a consequence of that action. There must be something more. And in the case of misfeasance of public office that something more, it seems to us, must be related to the individual

who is bringing the action. While the cases have made it clear that the malice need not be targeted there must, as we have said, be a conscious disregard for the interests of those who will be affected by the making of the particular decision.

[133] Given the conclusion that the negligence allegations are unsustainable, there is no scope for a claim that the Department has been guilty of what might be regarded as wilful (ie deliberate) or reckless negligence. The only public duties which can be relevant for present purposes is the Department's duty to supervise Bell and the associated duties provided for in s 125 of the Criminal Justice Act.

[134] Bell may not have been supervised particularly well, but he was supervised. So it cannot be said that there was deliberate or conscious decision on the part of the Department not to perform its primary statutory obligation of supervision.

[135] I accept that the obligations in s 125 are broadly stated and that there were obligations to "ensure" that the parole conditions were satisfied and to arrange for rehabilitative programmes and the like "as appropriate". But the aspirational (eg to "ensure" compliance with parole conditions) and indeterminate (as exemplified by the expression "as appropriate") nature of the relevant obligations provide an inauspicious context for an allegation of misfeasance in public office. The suggestion that the Department deliberately and dishonestly failed to "ensure" that parole conditions were satisfied or deliberately and dishonestly failed to provide for "appropriate" rehabilitative programmes is inherently implausible. Failure to comply with public duties due to funding or resource inadequacy is not misfeasance for these purposes, see *Odhavji* at [26] per Iacobucci J.

[136] On this issue, the case to be advanced by Ms Couch is at best marginal.

*Can Ms Couch tenably allege that injury to her was foreseen by the Department as the probable consequence of its alleged dereliction of duty?*

[137] In *Garrett*, the Court drew upon the reasoning of Clarke J in the first instance decision of the England and Wales High Court in *Three Rivers District Council (No 3)* [1996] 3 All ER 558. This Court stated at 349-350:

We are in respectful agreement with Clarke J that it is insufficient to show foreseeability of damage caused by a knowing breach of duty by a public officer. *The plaintiff, in our view, must prove that the official had an actual appreciation of the consequences for the plaintiff, or people in the general position of the plaintiff, of the disregard of duty or that the official was recklessly indifferent to the consequences and can thus be taken to have been content for them to happen as they would.* The tort has at its base conscious disregard for the interests of those who will be affected by official decision making. There must be an actual or, in the case of recklessness, presumed intent to transgress the limits of power even though it will follow that a person or persons will be likely to be harmed. *The tort is not restricted to a case of deliberately wanting to cause harm to anyone; it also covers a situation in which the official's act or failure to act is not directed at the injured party but the official sees the consequences as naturally flowing for that person when exercising power.* In effect this is no more than saying the tort is an intentional tort. In this context, a person intends to bring about the known consequences of his or her actions or omissions, even if other consequences form the primary motive. ... The concept of attributing intention by necessary inference in this way is well established.

(Emphasis added)

[138] Given the judgment in *Akenzua v Secretary of State for the Home Department* [2003] 1 WLR 741 (CA) I would be prepared to accept that it is sufficient for Ms Couch to show that injury to her, *as a member of the public*, was foreseen by the Department as the probable consequence of - as “flowing naturally” from - its alleged dereliction of duty. But even so, I do not see this element of the tort as being able to be made out. As Mr Pike rightly observed, “the worst that might be legitimately alleged is that the probation officer if she thought about the fact of non-enforcement of conditions may have accepted that there was a possibility that the risk that William Bell would act with violence again was enhanced to an unknown degree.” In my view that is not enough in the present context.

*Can Ms Couch allege a tenable case as to causation*

[139] For the reasons just given (and the associated comments made above in [126]), I am satisfied that there is no arguable case as to causation.

### **Is Mr Hobson within a class of victims who could recover in negligence?**

[140] Mr Hobson is not a primary victim of Bell’s violence. Instead, his claim is based on emotional anguish and the loss of love and affection resulting from the

death of his wife. His claim founders from the outset because his anguish is not of a kind which the law of tort recognises as being warranting a claim for damages. This is apparent from *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 at [65]:

We are not persuaded that the Courts of this country should depart from the position established in England and also, with isolated dissents, in Australia and Canada, namely that a claim by a secondary victim for mental suffering caused by awareness of death or injury to a primary victim through the negligence of the defendant will not lie unless the effect on the mind of the secondary victim has manifested itself in a recognisable psychiatric disorder or illness.

[141] Furthermore, even if a recognised psychiatric disorder or illness had been pleaded, Mr Hobson is not within the scope of recoverability because he was neither present at the time of the crime nor did he arrive on the scene soon afterwards. In *White v Chief Constable of the South Yorkshire Police* [1999] 1 All ER 1 at 41 (HL), Lord Hoffmann summarised the position in these terms:

- (1) The plaintiff must have close ties of love and affection with the victim. Such ties may be presumed in some cases (eg spouses, parent and child) but must otherwise be established by evidence.
- (2) The plaintiff must have been present at the accident or its immediate aftermath.
- (3) The psychiatric injury must have been caused by direct perception of the accident or its immediate aftermath and not upon hearing about it from someone else.

[142] Reference can also usefully be made to *Pou v British American Tobacco (NZ) Ltd* [2006] 1 NZLR 661 at [7] and following.

[143] In light of those authorities, Mr Hobson's claim as a secondary victim is untenable.

**Table of Contents**

	Para No
<b>Introduction</b>	[144]
<b>Ms Couch’s claim based on the Department’s vicarious liability for X’s negligence</b>	[149]
<b>Mr Hobson’s claim based on the Department’s vicarious liability for X’s negligence</b>	[155]
<b>Ms Couch’s claim based on the Department’s negligence</b>	[161]
<b>Mr Hobson’s claim based on the Department’s negligence</b>	[189]
<b>Misfeasance in a public office</b>	[195]

**Introduction**

[144] Heath J determined the viability of Tai Hobson’s claim on the basis of a second amended statement of claim. He held that Mr Hobson could not bring claims in negligence or for breach of statutory duty against the Crown: [2005] 2 NZLR 220 at [6]. But he considered that, if the claim were repleaded, it was “possible that a claim could be brought for misfeasance in public office”: at [7].

[145] Since His Honour’s decision, Mr Hobson’s legal advisors have drafted (but not formally filed) a third amended statement of claim. This statement of claim continues to allege a claim in negligence and a “reformulated” claim for misfeasance in a public office. The claim for breach of statutory duty has not been pursued.

[146] In the circumstances, I consider it is proper to focus on this draft pleading, even in respect of negligence. Clearly no court wants to strike out a claim which could potentially succeed if properly reformulated.

[147] Susan Couch’s claim was reformulated shortly before the hearing before us. There was no restraint on such repleading in her case, as her case comes to us by a different procedural route from Mr Hobson’s, as Hammond J has explained. Her latest pleading, while not identical to Mr Hobson’s latest draft pleading, is very close to it. The allegations she makes against X and her employer, the Department of Corrections, are essentially the same as Mr Hobson’s.

[148] It is essential, however, that Ms Couch's claims be looked at separately from Mr Hobson's, as they raise different issues. It is also essential that the position of X and the department be looked at separately, for reasons which I shall explain.

**Ms Couch's claim based on the Department's vicarious liability for X's negligence**

[149] A fundamental problem with both sets of pleadings is that the pleader has drawn no distinction between the duty of care said to have been owed by the department and the duty of care said to have been owed by X. The relevant paragraph of the Couch claim (paragraph 33) begins "The Defendant and the supervising officer [X] owed a duty to the Plaintiff", the nature of which is then specified in identical terms. That is obviously unsound as a matter of law for any conceivable duty of care owed by a probation officer could not be identical to any conceivable duty of care owed by the department. For present purposes, I shall assume that the pleaded duty in paragraph 33 is the duty said to have been owed by X and that the contention is that the department is vicariously liable for X's breach of that duty of care. (That last assumption is not actually pleaded. That must be an error, as the concept of vicarious liability is the only way in which the department could be liable for the employee's breach of a duty of care owed by her.)

[150] There is no dispute that Ms Couch was entitled to and did receive compensation under the Accident Insurance Act 1998 ("the 1998 Act") in respect of the personal injury she received at William Bell's hands on 8 December 2001. Because of that, she is barred from bringing an action for compensatory damages for the personal injury she suffered; at the date she commenced her proceeding, that bar was to be found in s 317(1) of the Injury Prevention, Rehabilitation, and Compensation Act 2001 ("the 2001 Act").

[151] Notwithstanding that bar on compensatory damages, Ms Couch has sought them. In prayer A of her claim for relief, she seeks "damages for pain and suffering" in the sum of \$1.5 million. That claim refers back to paragraph 30 in the amended statement of claim:

That the Plaintiff suffered pain and anguish as a consequence of the injuries received. In particular, she has been unable since the accident to participate in family life including losing the mother-son relationship with her then two and a half year old son, she being physically unable to hold and comfort him such that he developed a mother-son relationship with his grandmother to the exclusion of the Plaintiff.

[152] For present purposes, we must assume, of course, that such “pain and anguish” did result from the injuries caused by Mr Bell. But that cannot give rise to a claim for compensatory damages in circumstances where the sufferer has cover under an accident compensation statute. After all, virtually everyone who suffers personal injury by accident suffers pain, anguish, and grief as a result of the physical injuries caused to them. If such pain and suffering is to be compensated, it must be within the confines of the accident compensation legislation. It is no answer that the relevant legislation might not provide compensation for those particular consequences. If those consequences flow from an injury which is covered, the bar to suit applies: see Todd (gen ed) *The Law of Torts in New Zealand* (4ed 2005) at [2.3.03(2)] and *Attorney-General v B* [2002] NZAR 809 (CA). So the claim for compensatory damages is clearly untenable.

[153] That leaves Ms Couch’s separate claim for exemplary damages of \$500,000. That claim against the department is, however, unsustainable *in the vicarious liability context*: see *S v Attorney-General* [2003] 3 NZLR 450 at [88]-[93] and [122]-[124] (CA). I acknowledge that, at [93] of that decision, this court left open the possibility that the Crown might be held vicariously liable for exemplary damages in very rare cases. The example given was the case of “an official of the state, for example a police constable, [who] has deliberately, recklessly or (in the rare case contemplated by the Privy Council in *Bottrill v A* [2003] 2 NZLR 721) in a grossly negligent manner directly inflicted personal injury on the plaintiff, particularly if, as in *Monroe v Attorney-General*, that official has not been able to be identified and so the wrongdoer has not been punished or disciplined”. But that is certainly not the present case as it is currently pleaded; that example is a mile away from any conceivable view of the facts here.

[154] Accordingly, the vicarious liability claim based on X's alleged negligence must fail. The r 418 question must be answered that the statement of claim discloses no reasonable cause of action in this regard and should be struck out.

**Mr Hobson's claim based on the Department's vicarious liability for X's negligence**

[155] Mr Hobson did not suffer directly at Mr Bell's hands. It was his wife whom Mr Bell murdered. So Mr Hobson, unlike Ms Couch, did not suffer "personal injury by accident" for the purposes of the accident compensation legislation. He will have received certain compensation under that legislation in his capacity as Mary Hobson's surviving spouse. For example, he will have been entitled to a survivor's grant and weekly compensation (as Mrs Hobson was an earner): see generally the 1998 Act, Schedule 1, Part 5.

[156] Mr Hobson's present claim does not arise from any financial harm he has suffered as a consequence of his wife's unfortunate death. Rather, he seeks compensatory "damages for pain and suffering" in the sum of \$50,000: see prayer A of his claim. Somewhat oddly, there is no paragraph in the claim itself specifying what that "pain and suffering" was. The closest one gets is paragraph 30 of the claim (which is incorporated into the negligence cause of action by paragraph 35):

That it was a natural and probable consequence of the defendant's foregoing conduct that Bell would re-offend by planning to rob and robbing the Panmure RSA thereby causing grievous injury to the employees therein in the course of such re-offending and that persons such as the plaintiff could, as a result, suffer mental anguish, shock, pain and general suffering.

[157] There is nothing in the pleading to suggest that Mr Hobson has suffered a recognised or recognisable psychiatric injury, as for instance Mr Palmer suffered in *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 at 551 (CA). Mr Hobson's "pain and suffering" appears to be the normal grief which the spouse of any murdered person would suffer. It is well established that "mere upset, grief or distress do not give rise to any cause of action": Todd at [5.7.03]. Actionable mental injury requires identifiable psychiatric injury: *van Soest v Residual Health*

*Management Unit* [2000] 1 NZLR 179 at 197-199 (CA). Such injury has not been pleaded.

[158] In my view, therefore, quite apart from the other difficulties with the suggested cause of action, Mr Hobson's claim in negligence would have to fail because he has not suffered a type of loss recognised by law. A cause of action in negligence cannot succeed without proof of such loss.

[159] That leaves Mr Hobson's separate claim for exemplary damages of \$500,000. That claim is unsustainable for two reasons. The first is the same as enunciated in Ms Couch's case: see [153] above. The second is that, given Mr Hobson has not pleaded a recognised head of loss, the cause of action itself is unsustainable. A defendant could never be liable to "punishment" in tort in circumstances where that defendant had committed no actionable wrong to the plaintiff.

[160] For these reasons, I am of the view that Heath J was correct to strike out Mr Hobson's vicarious liability claim based on X's alleged negligence.

### **Ms Couch's claim based on the Department's negligence**

[161] Ms Couch claims the same general damages and exemplary damages against the department for its own liability as she did for its vicarious liability.

[162] So far as the claim for compensatory damages is concerned, it must fail for the same reasons as the claim based on vicarious liability: see [149]-[152] above.

[163] But the claim for exemplary damages could potentially stand, if the cause of action is a good one. See s 396 of the 1998 Act and its equivalent, s 319, in the 2001 Act.

[164] The duty said to be owed by the department was put in these terms:

- (a) Not to encourage Bell, a known violent offender, with a record as set out herein to obtain work in the liquor industry.
- (b) Not to encourage Bell to illegally work in the liquor industry.

- (c) To ascertain where he was working.
- (d) To supervise where he was working.
- (e) To ascertain and/or contact who his employers were and if he was unlawfully working in the sale of liquor industry to ensure those employing him knew he was unlawfully working in the sale of liquor industry and warn them of his propensity with alcohol and robbery.
- (f) To ascertain that he was working at the Panmure RSA.
- (g) To contact and warn the management and staff of the Panmure RSA (including the Plaintiff) that Bell:
  - (i) Was working unlawfully in the sale of liquor industry
  - (ii) Was a high risk violent offender who had conviction for aggravated robbery, and
  - (iii) Had a known propensity for re-offending.
- (h) Any combination of the foregoing.

[165] It is clear that that cannot be the duty of care. For a start, as the President has said, a duty of care is never more than a duty to take reasonable care. None of the components of the alleged duty here is expressed in such terms. All are pleaded as absolute duties.

[166] Secondly, again as the President has said, this pleading (even if notions of “reasonable care” could be injected into it) involves “reasoning backwards from the alleged negligence”, which can lead to an illegitimate reasoning process, as this court noted in *Attorney-General v Body Corporate No. 200200 CA30/05* 1 December 2005 at [43]-[46]. Any duty of care owed at a departmental level could not be as fact-specific as here pleaded.

[167] These allegations are really focusing on what X should have done. But, for reasons already given, any claim based on X’s negligence does not avail Ms Couch.

[168] I have turned my mind to the question of how a duty of care owed by the department itself could be formulated. It might be argued that the department should be under a duty to take reasonable care in formulating and managing procedures relating to the proper management and supervision of parolees and those released

from prison before their sentence expiry date. A duty in those terms is far removed from what has been pleaded to date, but it is nonetheless the only sort of duty which could sensibly be alleged at a departmental level.

[169] In my view, it would be unjust and unreasonable for the courts to impose such a duty of care. In reaching that view, I have considered the two broad fields of inquiry referred to by this court in *Rolls-Royce New Zealand Limited v Carter Holt Harvey Limited* [2005] 1 NZLR 324. The first of those is “the degree of proximity or relationship between the parties”. The second is “whether there are other wider policy considerations that tend to negative or restrict or strengthen the existence of a duty in the particular class of case”: at [58]. This court said that, at this second stage, the court’s inquiry is concerned with the effect of the recognition of a duty on other legal duties and, more generally, on society. These areas of inquiry reflect what was also said by this court in *Wilson and Horton Limited v Attorney-General* [1997] 2 NZLR 513 at 520.

[170] I think the proposed duty “fails” at both levels. First, the relationship between Ms Couch and the department (at the departmental level) was far from close. The class of persons who may be detrimentally affected by parolees is as wide as society itself. (Remember that I am looking at this at the departmental level; I am not considering the duty which X may have owed and those that she could have reasonably had in her contemplation as being affected by her decisions, acts, and omissions.) If the suggested duty were acknowledged, then there is a real risk that the Department of Corrections would be exposed to “a liability in an indeterminate amount for an indeterminate time to an indeterminate class”: *Ultramares Corporation v Touche, Niven and Co* 174 NE 441 at 444 (NY, 1931).

[171] Of course, here the pleader has purported to limit the duty of care to a small group, namely “the management and staff of the Panmure RSA”. But obviously that is not the class to which the suggested departmental duty of care is owed. Some pleaders seem to think that they can avoid the spectre of a liability to “an indeterminate class” by clever pleading purporting to restrict the class to a small group of which the plaintiff happens to be a member. With respect, that is quite incorrect reasoning.

[172] The wider policy considerations point strongly against the postulated duty. Most important in this regard, I think, is the statutory setting in which the department operated in 2001. The department had no say as to who came within its orbit. Some offenders were automatically released from prison by effluxion of time, notwithstanding how unsuitable they might in reality be for reintroduction into the community. If Ms Couch's pleadings are correct (and on allegations of fact we must assume them so to be), then Mr Bell would have been in this category. According to Ms Couch's amended statement of claim, Mr Bell was on 18 June 1997 sentenced to five years' imprisonment for aggravated robbery (paragraph 3). Aggravated robbery was at that time "a serious violent offence", as defined in s 2 of the Criminal Justice Act 1985. This meant that Mr Bell was not entitled to discretionary release on bail pursuant to s 89 of the Criminal Justice Act: see, in particular, subs (7). But he was entitled to "final release" after serving two-thirds of his sentence: s 90(1)(d). In light of that, it cannot be correct, as a matter of law, that the Parole Board determined that he "was eligible for parole" as pleaded in paragraph 5. If the pleading in paragraph 3 is correct, then it should have been a District Prisons Board which determined conditions of release under s 101. Something must be astray with the pleadings in this regard, but that need not be resolved now. The point I am really making is simply that the Department of Corrections ended up supervising a number of offenders whose release into society no one had power to prevent.

[173] Other offenders were paroled by the Parole Board or District Prisons Boards; the department had no right of appeal from decisions by those bodies, no matter how wrong it might have considered them to be. The department also had no say as to the conditions of parole. The department might consider the conditions to be completely inadequate, but it could do nothing about them, save apply to the body who made them for variation: Criminal Justice Act 1985, s 107G. If the offender had been inappropriately released on parole, those responsible for such release could not be liable in damages for any unfortunate consequences flowing from their "erroneous" decision (thanks at least in part to s 6(5) of the Crown Proceedings Act 1950).

[174] What is also significant was the limited powers conferred on the department with respect to parolees (which term I use to include those entitled to early release by statute). The department, through its probation officers, had power to *rule out*

specific residences or employment or associations, but those powers – essentially negative in nature – were the only powers conferred under the standard conditions of parole: Criminal Justice Act 1985, s 107B. Any special conditions of parole were exclusively within the power of the Parole Board or a District Prisons Board: s 107C. If a parolee breached the conditions of his or her parole, the department's only recourse, if it found out about the breach, was to prosecute the parolee or apply to the Parole Board or a District Prisons Board for the parolee's recall to prison: ss 107H and 107I.

[175] There is always a risk when offenders are released back into the community following a prison term. Everyone knows that some will reoffend – often very quickly after release. Indeed, official Ministry of Justice statistics we were given (from 2002) showed that 29% of inmates imprisoned for a violent offence were reconvicted of some offence within six months of release, while just under half (49%) were reconvicted within a year. Nearly two-thirds (65%) of inmates imprisoned for a violent offence were reconvicted within two years of their release. What is more, those proportions are lower than those for all inmates released. The best society can hope for is that the prison experience may deter some from reoffending, particularly if suitable rehabilitation programmes have been available to the offender while in prison. Whether an offender should be released (where there is a discretion) and the conditions on which he or she should be released involve delicate matters of professional judgment. How supervision should be carried out also involves matters of judgment. If the department were put under financial risk whenever a parolee re-offended, there would be a real risk that the department's decision-making process would be skewed and inhibited so as unduly to minimise the risk posed by the parolee, at least in the short term. Supervision might, as a matter of course, be carried out in totalitarian fashion, when such an approach may be quite counter-productive to the offender's rehabilitation into society and thus, in the long term, contrary to society's best interests. In turn, the spectre of departmental liability in negligence might induce those making parole decisions to err improperly on the side of caution. Distorted decision-making of this kind is a real risk if the postulated duty of care were accepted.

[176] Further, it is difficult to see, if the duty were acknowledged, how it could be restricted to the supervision of parolees. The department had at the relevant time responsibility for supervising offenders undergoing a broad range of community-based sentences, in particular community service, periodic detention, supervision, and community programme: Criminal Justice Act, Part 3. As well, the department had to monitor those granted leave for release to home detention. In all these areas, there would be a real prospect of risk-averse decision-making if the postulated duty were accepted.

[177] Finally, I think the postulated duty would have significant resource implications. For instance, it may well be the case, if the duty were recognised, that the department, in carrying out its duty of care, would consider it prudent to contact the employers and co-habitees of those under its supervision. Those steps are, after all, part of what Ms Couch and Mr Hobson say the department should have done in this case. I put to one side, for the moment, the likelihood of any parolee even obtaining employment if such warnings to the offender's prospective employers and workmates became *de rigueur*. Imagine how many more probation officers would be required. Either the Government would be required to increase Vote Corrections or reallocate spending within Vote Corrections. It is for the executive, not the courts, to determine how best Government money is allocated. One could well imagine that the necessary reallocation that recognition of the proposed duty would require would be very wasteful. It so happens in this case that Mr Bell chose to offend at his place of employment, but other offenders – indeed, one suspects the vast majority – would be more inclined to reoffend in places where they are not known. All the warnings in the world will not prevent reoffending.

[178] For all these reasons, I consider that the postulated duty of care should not be recognised, with the consequence that Ms Couch's claim based on departmental negligence must fail. The r 418 question should be answered accordingly.

[179] In reaching that conclusion I have not overlooked the decisions on which Mr Henry, for Ms Couch and Mr Hobson, relied when arguing, by analogy, that this new duty of care should be recognised. The first case Mr Henry referred us to was *Home Office v Dorset Yacht Company Limited* [1970] AC 1004 (HL). But that case

does not assist, as the duty of care recognised in that case was one owed by the Borstal officers, not the Home Office: at 1032, 1034, 1036, 1055, and 1057. I have been able to rule out the claims based on vicarious liability for X's actions (the equivalent of the Borstal officers' actions in *Dorset*) on other grounds.

[180] Next Mr Henry referred us to *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (HL). That decision does not assist his case, however. Their Lordships did not recognise the proposed duty of care said to be owed by the police to the female general public. The reasons why the police were held not to be under a general duty of care in the conduct of investigations into crime are in broad terms similar to those which have led me to rule out the proposed departmental duty in the present case. The inhibiting effect of the proposed duty of care, which both the Court of Appeal and Their Lordships referred to, is real and applies equally in the present case: see [1988] QB 60 at 75 (CA) and [1989] AC 53 at 65 (HL).

[181] Next, I refer to *Jane Doe v Board of Commissioners of Police for Municipality of Metropolitan Toronto* (1998) 160 DLR (4th) 697 (Ont Ct (Gen Div)). That was a first instance decision. The decision seems to me contrary to the House of Lords decision in *Hill*, a decision not cited by the trial judge. (I note that in *Osman v Ferguson* [1993] 4 All ER 344, the English Court of Appeal came to the same conclusion: at 353-353.) But in any event *Jane Doe* is distinguishable on the ground that, once again, the duty of care found was said to have been owed by two detective sergeants responsible for a rape investigation; it was they who made the decision not to warn women in the area: at 737. The defendant Board was liable vicariously for their breaches of duty: at 748. There was no suggestion in that case that the Board of Commissioners could have had a direct or personal liability.

[182] I now turn to *Osman*, on which Mr Henry relied. In my view, this decision strongly supports the Crown's case and the views I have expressed. On the assumed facts, McCowan and Simon Brown LJ found there was "a very close degree of proximity amounting to a special relationship" between the plaintiffs' family and the investigating police officers: at 350. (Beldam LJ preferred not to express a view on whether there was sufficient proximity: at 354.) Notwithstanding the majority's view on that, the court unanimously found that the existence of a general duty on the

police to suppress crime did not carry with it liability to individuals for damage caused to them by criminals whom the police had failed to apprehend when it was possible to do so: at 352. The court found that it would be against public policy to impose such a duty as it would not promote the observance of a higher standard of care by the police and would result in the significant diversion of police resources from the investigation and suppression of crime. Similar reasoning, in my view, applies in the present case and leads to the conclusion that it would be against public policy to impose the postulated duty of care.

[183] I have not overlooked the subsequent decision of the European Court of Human Rights, to which this dispute was referred after the Osmans were refused leave to appeal to the House of Lords: *Osman v United Kingdom* (1998) 29 EHRR 245. That court's views that Article 6(1) of the European Convention on Human Rights had been violated was based on a view that the English Courts had prevented the Osmans from access to a court for the purpose of securing compensation: at [153]. In this case, of course, the State has provided compensation to Ms Couch, Mrs Hobson's estate, and Mr Hobson, without any of them even needing to go to court and establish fault.

[184] At first blush, Mr Henry's next case was his best one. It was *Swan v South Australia* (1994) 62 SASR 532. The case concerned a paedophile who was living in the community on parole. A condition of parole was that he not be in the company of children unless another adult was present. The paedophile began to have children in his house without another adult present. The parole officers became aware of this fact. They took no steps beyond asking the parolee if the allegation was true. He denied that it was. The plaintiff was injured as the result of sexual assaults committed by the parolee. He sued the State of South Australia, seeking to recover damages for psychological harm and injuries which were a result of the sexual assaults upon him. He claimed that the State was vicariously responsible for the negligence of the parole officers.

[185] At first instance, the claim was struck out, but on appeal the Full Court of the Supreme Court of South Australia reinstated the claim, on the ground that it was arguable.

[186] The first point to note is that the State's liability (if any) was vicarious: at 540. That in itself distinguishes the case from the present. Further, however, on the assumed facts, the parole officers knew that children were staying overnight unsupervised with the parolee at his flat and knew that he was thereby in breach of his parole conditions. No surveillance or checks were undertaken. I can well understand a court concluding in those circumstances that those responsible for his supervision might be liable to the group of children known to be staying with the parolee in breach of the parole conditions. That is an entirely different situation from that applicable on the assumed facts of this case.

[187] Finally, Mr Henry referred us to the President's decision at first instance in *S v Midcentral District Health Board (No 2)* [2004] NZAR 342. But that case can be clearly distinguished. There both the plaintiff and her alleged attacker were mental health patients in the same psychiatric institution, operated by the defendant. As the President observed, the institution "had the ability to control the whereabouts of its patients (both potential offenders and potential victims) and thus the ability to increase or reduce the risk that its vulnerable patients faced": at [44]. Indeed, he observed that the District Health Board was "far better placed than the potential victims to recognise and address the dangers which they faced". I do not consider that that case provides any support for Ms Couch here, a view perhaps supported by the fact that the President agrees that Ms Couch's claim in negligence cannot be sustained.

[188] In the circumstances, I do not feel it necessary to deal with the cases on which Mr Pike, for the Crown, relied in opposing the submission that the department was under a duty of care. They provide further support for the view which I have expressed. I have felt it more important to deal with the cases on which Mr Henry relied.

### **Mr Hobson's claim based on the Department's negligence**

[189] Mr Hobson's claim against the department is pleaded, in the draft third amended statement of claim, in the same terms as Ms Couch's claim: see [164] above.

[190] In my view, Mr Hobson's claim must fail for the following reasons.

[191] First, for the same reason that the department owed no duty of care to Ms Couch, it owed no duty of care to him.

[192] Secondly, so far as compensatory damages are concerned, he has not suffered a type of loss recognised by law: see [158] above.

[193] Thirdly, so far as exemplary damages are concerned, the fact that Mr Hobson has not pleaded a recognised head of loss means that the cause of action itself is unsustainable: as said above at [159], a defendant can never be liable to "punishment" in tort in circumstances where that defendant has committed no actionable wrong to the plaintiff.

[194] For these reasons, I am of the view that Heath J was correct to strike out Mr Hobson's claim based on the department's alleged negligence.

### **Misfeasance in a public office**

[195] I have little to add to what the President and Hammond J have said under this head. I agree with Hammond J's conclusions at [95]-[97].

[196] I would add that there is a further reason why the department cannot be liable for the claimed exemplary damages. This tort, assuming for the moment it had been committed, was committed by X. She is the alleged "public officer". Any liability the department could have would be vicarious. The same reasoning which led to this court concluding that an employer could not be liable in negligence for exemplary damages *on a vicarious basis* applies equally to this tort: Todd at [20.2.04].

[197] I agree therefore with both the President and Hammond J that the misfeasance cause of action is not tenable.

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