

M478 McMillan, P. *Susan Couch v Attorney-General and the liability of public authorities*
2007

Pam McMillan

*Susan Couch v Attorney-General and the liability
of public authorities*

Submitted for LLB (Honours) Degree

Faculty of Law
Victoria University of Wellington

2007

AW

5741
JW
65
478
067



Victoria
UNIVERSITY OF WELLINGTON
*Te Whare Wānanga
o te Ūpoko o te Ika a Māui*



LIBRARY

TABLE OF CONTENTS:

I	INTRODUCTION	5
A	Facts	5
B	Issues	6
II	RELEVANT FACTORS	8
A	Original Accident Compensation regime	8
B	Development of the scheme	9
C	State sector	10
D	Department of Corrections	12
E	Accident prevention	14
F	Use of tort law for public authorities.....	15
III	EXEMPLARY DAMAGES	18
A	Purpose of Exemplary Damages	18
I	Punishment	18
II	Deterrence.....	20
III	Accountability	21
IV	Therapeutic purpose	22
V	Compensation	22
B	Parliament's intention.....	23
C	Judicial test.....	24
I	Negligence.....	24
II	Vicarious liability	26
III	Outrageous conduct	28
IV	FUTURE OPTIONS	31
A	Compensation schemes	32
B	Public inquiries, commission of inquiries	33
C	New Zealand Bill of Rights Act 1990	35
D	Return to tort law.....	37
E	Political pressure	39
V	CONCLUSION	39
BIBLIOGRAPHY		42
<i>Legislation</i>		42
<i>Caselaw and judicial proceedings</i>		42
<i>Books</i>		43
<i>Journal Articles</i>		43
<i>Newspaper articles</i>		44
<i>Reports/Papers/Websites</i>		44

TABLE OF CONTENTS

I INTRODUCTION 1

 A Title 1

 B Issue 1

II RELEVANT FACTORS 2

 A Original basis of Compensation system 2

 B Development of the system 2

 C State of law 2

 D Department of Compensation 2

 E Accident prevention 2

 F Use of tort law for public protection 2

III EXISTING DAMAGES 3

 A Purpose of Tortious Damages 3

 B Damages 3

 C Negligence 3

 D Vicarious liability 3

 E Contractual liability 3

 F Other sources 3

IV FUTURE OPTIONS 4

 A Compensation reform 4

 B Tortious reform 4

 C New Zealand Bill of Rights Act 1990 4

 D Issues to be law 4

 E Political process 4

V CONCLUSION 5

APPENDIX 6

 A 6

 B 6

 C 6

 D 6

 E 6

 F 6

 G 6

 H 6

 I 6

 J 6

 K 6

 L 6

 M 6

 N 6

 O 6

 P 6

 Q 6

 R 6

 S 6

 T 6

 U 6

 V 6

 W 6

 X 6

 Y 6

 Z 6

I INTRODUCTION

On 17 April 2007 the Supreme Court considered whether Susan Couch's claim seeking exemplary damages for alleged failure by the Crown and those responsible for supervising the parole of William Bell should be struck out.¹ The decision is still pending, but if the Court finds the Crown to be negligent, then this decision may determine the current test for exemplary damages. It may also throw some light on why some victims of personal injury involving public authorities have lost confidence in the state sector and are willing to seek justice through the arduous process of litigation.

A Facts

The facts of events leading up to the horrific attack by William Bell on 8 December 2001 against four employees at the Panmure RSA premises will not be fully disclosed until it reaches a jury trial. Susan Couch was the only victim who survived the attack, although with permanent neurological damage. At the time of the attack, Mr Bell was on parole for aggravated robbery of a service station. It is alleged by the appellant that there was a total failure by the parole officer to ensure Mr Bell met the conditions of his parole. The appellant claims that any reasonable probation officer would have realised that the breach increased the risk of Mr Bell re-offending and consequently should have warned the people he had worked with at the RSA.

William Bell was found guilty in the High Court at Auckland for three counts of murder and one of attempted murder. Susan Couch along with Tai Hobson, a

¹ *Susan Couch v The Attorney-General* (17 April 2007) Hearing SC 49/2006 Chief Justice, Blanchard J, Tipping J, McGrath J, Anderson J.

husband of one of the murder victims, were not satisfied with the criminal punishment of Mr Bell and sued the Attorney-General, on behalf of the Department for Corrections, "seeking compensatory and exemplary damages in respect of alleged failures by those responsible for supervising the terms of parole"². In their eyes the system had failed them. The defendant applied and succeeded in striking out the claim on the grounds that there was no reasonable cause of action.

The case was appealed to the Court of Appeal. The Court struck out Mr Hobson's claims for negligence (for nervous shock) and the claim for misfeasance by both Mr Hobson and Ms Couch on the grounds that the probation officer did not do a deliberate act which was not in their power to do³. The split came with the negligence claim for Ms Couch. For the majority, William Young P and Chambers J considered that Ms Couch's claim in negligence should be struck out. Hammond J would have kept Ms Couch's claim in negligence live.

Six years after the attack, Susan Couch succeeded in her application for leave to appeal to the Supreme Court. The Supreme Court decided the cause of action based on misfeasance in public office could not succeed, but granted leave relating to the negligence cause of action and exemplary damages.⁴ If the action succeeds she will then be able to go back to the High Court for a jury trial.

B Issues

The overriding issue from this case is the intersection between common law and the Accident Compensation regime. The Injury Prevention, Rehabilitation, and Compensation Act 2001 bars proceedings for compensatory damages for personal

² *Hobson v Attorney-General* [2005] 2 NZLR 220 (HC) Heath J.

³ *Hobson v Attorney-General* [2007] 1 NZLR 374, para 97 (CA) Hammond J.

⁴ *Susan Couch v Attorney-General* [2006] NZSC 66 Judgment of the Court.

injuries covered by the Act but does not bar proceedings for exemplary damages.

Therefore Ms Couch first has to prove that her personal injuries were caused by the defendant's negligence, and then has to meet the test for exemplary damages.

The difficulty for the judiciary in interpreting this can be seen by comments on the purpose of exemplary damages in the Court of Appeal decision. Hammond J suggested that tort law has been overshadowed as a consequence of the accident compensation scheme which does not address adequately the need for social and public accountability when the actions of institutions, such as the probation services, result in "appalling kinds of events to be left in the quagmire of an inadequate institutional response"⁵. In Hammond J's view "there was real force in the view that such a new claim in negligence may align with traditional rationales for tort law, including public accountability."⁶

Chambers J held that even if the negligent claim could have succeeded, exemplary damages were "unsustainable in the *vicarious liability context*"⁷. He also considered that if the Department of Corrections was put under threat of exemplary damages every time a parolee re-offended, they would be over-cautious to the detriment of the offender's rehabilitation and in the long-term society's best interest.⁸

Therefore, Hammond J is suggesting the courts address the lack of accountability of public authorities through the use of tort law, while Chambers J wants to keep tight reins on the use of tort law and is cautious of meddling with public policy issues that should be left to Parliament.

⁵ *Hobson v Attorney-General* above n 3, para 75, Hammond J.

⁶ Justice Hammond and Joel Harrison, *Court of Appeal Report for 2006* (Conference of judges of the Supreme Court, Court of Appeal and High Court of New Zealand, March 2007) 69.

⁷ *Hobson v Attorney-General* above n 3 para 153, Chambers J.

⁸ *Hobson v Attorney-General* above n 3 para 175, Chambers J.

The Supreme Court judiciary at the hearing closely questioned the counsel on who the cause of action should be against; what the purpose of exemplary damages was; and what the test for exemplary damages should be.

This case typifies the failing of the Accident Compensation regime for victims such as Susan Couch who have lost confidence in the state sector and are willing to seek justice through the court system. To explain this loss of confidence it is necessary to look at factors contributing to the way society, policies and the law has changed since the introduction of the regime in 1974. Only once this is understood can we consider how situations similar to the Couch case can be prevented in the future, or at least dealt with in a more accountable and just way.

II RELEVANT FACTORS

A Original Accident Compensation regime

The main purpose in replacing the common law system of tort action and employer liability insurance with a comprehensive statutory based accident compensation scheme in 1972⁹ was to have a fairer and more equal system for the protection of all citizens. The scheme was based on the Woodhouse Report of 1967¹⁰. In later years Sir Owen Woodhouse, chairperson of the Royal Commission, described three reasons for the Report¹¹. First, the negative argument that the common law system was inadequate; unfair; ignored rehabilitation; and was expensive. Second, the community should also be responsible for accidents as society itself had built up and encouraged heavily risk-laden activities undertaken for

⁹ Accident Compensation Act 1972.

¹⁰ Royal Commission of Inquiry *Compensation for Personal Injury in New Zealand* (Government Printer, 1967).

¹¹ Sir Owen Woodhouse "Aspects of the Accident Compensation Scheme" [1979] NZLJ 395.

the convenience and utility of society. And thirdly, the principle of community responsibility carries with it the equitable principle of comprehensive entitlement.

The aim of the reform was to use the amount of money already spent on accident compensation in a much fairer and equitable way. To do this successfully it was necessary to destroy the common law system for "if the common law survived, a comprehensive system for injury was unattainable and new resources of revenue would be needed rather than making better use of existing money."¹² Therefore, a social contract was made between the public and Parliament to give up the right to sue in exchange for guaranteed compensation for personal injury. The public trusted the government to look after them for the good of the community.

B Development of the scheme

However, as with all legislative schemes, the scheme has been amended over the years by different governments according to their policies and the social and economic trends of the day. In 1992¹³ the removal of lump sum payments meant that "persons unable to prove a loss of income received no financial redress for their injuries under the legislation¹⁴. The 1992 amendment also removed nervous shock claims from ACC cover and instigated rigorous work capacity procedures to encourage long term claimants to return to some form of employment. By the mid-1990s injured people covered by the Act were increasingly consulting lawyers looking for alternative means of compensation.¹⁵

¹² Geoffrey Palmer, *Compensation for Incapacity: A Study of Law and Social Change in New Zealand* (Oxford, Oxford University Press, 1979) 25.

¹³ Accident Rehabilitation and Compensation Insurance Act 1992.

¹⁴ Alisa Duffy "The Common law response to the Accident Compensation scheme" in *Conference Papers - Looking Back at Accident Compensation: Finding Lessons for the Future* (Victoria University of Wellington, Faculty of Law, NZ Centre for Public Law, 2-3 August 2001).

¹⁵ John Miller "Trends in personal injury litigation: The 1990s" 34(2) [2003] VUWLR 407, 408.

An amendment in 1998¹⁶ allowed private insurance companies to deal with workplace injuries, thus introducing a private market approach to the Scheme. The privatisation was later repealed and the lump sums reintroduced in 2001. However, the amendments along with lowering of compensation levels, showed the vulnerability of the Scheme to the whim of politicians.

At the same time the common law began to creep back in, again moving away from the social contract of the original scheme. Numerous cases followed the 1992 Act claiming both for nervous shock and also exemplary damages.

While the early Accident Compensation legislation received strong judicial support, "legislation's retreat from a comprehensive accident compensation scheme... caused the courts to be more sympathetic to attempts to revive common law actions"¹⁷. These developments must also be looked at in the wider context of the social and economic trends at the time.

C State sector

The Accident Compensation regime was introduced at a high point in the belief in 'cradle to grave' social welfare¹⁸ and a dominant public sector. Since then New Zealand society and the state sector in particular have undergone fundamental change. Reforms influenced by the free-market ideology were brought in to make the state sector more efficient.¹⁹

At the same time the state sector became subject to a range of controls designed to ensure transparency, and accountability. The two trends, in a way, can

¹⁶ Accident Insurance Act 1998.

¹⁷ Alisa Duffy, above n 14, 1.

¹⁸ Carol Harlow *State liability: tort law and beyond* (Oxford, Oxford University Press, 2004) 96.

¹⁹ State Sector Act 1988; Public Finance Act 1989; State Owned Enterprises Act 1986.

be said to be competing as while the State is being asked to become more efficient, public authorities are also being asked to be more accountable.

As a result of the conflicting trends, it was inevitable that the public became increasingly dissatisfied with a state sector straining under the pressure. Academic, Bob Gregory, suggests that this has resulted in accountability becoming a difficult issue with "reputation-protecting games and blame games"²⁰ being used to protect vulnerable ministers and officials. Or as Hammond J stated "there is the difficulty that "the state will look after itself"²¹. This could be interpreted to mean that while the judiciary is independent, the state is in danger of protecting their executive, thereby reducing the incentive to be truly responsible for their mistakes that may affect victims such as Susan Couch.

Not surprisingly the Accident Compensation regime was caught up in these trends resulting in a lack of commitment by both the State and the public to the original idea of a social contract. This is shown by the increase in personal injury cases against public authorities such as health care²², social welfare²³ and prison authorities²⁴. Public authorities, must, under law, fulfill the Government's social objectives that are presumably made in the public interest but with strained resources. The overall vision of the Department of Corrections, for example, is "[t]o focus on our primary outcome of safer communities by protecting the public and reducing re-offending through people performance quality and as a result have the New Zealand public's trust and confidence,"²⁵ at least arguably.

²⁰ Bob Gregory "Bringing back the buck: responsibility and accountability in politics and the state sector" (2007) 30(2) Public Sector, 4.

²¹ *Hobson v Attorney-General* above n 3, para 75, Hammond J.

²² For example *A v Bottrill* [2003] 2 NZLR 721 (PC) Nicholls LJ (Hope and Rodger LJJ concurring) Hutton and Millett LJJ dissenting.

²³ For example *S v Attorney-General* [2003] 3 NZLR 450 (CA) Blanchard for the Court.

²⁴ For example *Attorney-General v Taunoa* [2006] 2 NZLR 457 (CA) Judgment of the Court.

²⁵ Department of Corrections *Vision and values*

<<http://www.corrections.govt.nz/public/aboutus/visionvalues/>> (accessed 2 August 2007).

However, these trends may be changing for the better as the current Government acknowledges the need to improve the state sector effectiveness and accountability. This is shown in the 2005 Labour Party manifesto which promised to "rebuild our services from the pared-back state of the 1990s."²⁶ The State Services Commissioner now has a mandate to rebuild an appropriate state sector ethos and strengthen the trust in state services.²⁷ Whether these changes will affect the number of personal injury cases seeking exemplary damages is yet to be seen.

D Department of Corrections

The purpose of the Probation Service is to both rehabilitate the released offender and at the same time protect the public. At the time of the offence this framework was set out in section 107(c) of the Criminal Justice Act 1985²⁸ which says the Parole Board may impose special conditions on the offender in order to protect the public who may be affected by the release of the offender or for the rehabilitation of the offender. The parole officer has a statutory authority under section 125 of the same Act to supervise the offender and ensure all conditions of the release are complied with. The appellant argued that as there had been a total failure by the Parole officer in rehabilitating the offender there was an increased need to protect the public.²⁹

At the time of the offending in 2001 the Department acknowledged that there was a "hopelessly under-resourced, under-trained, under-supported Probation Service"³⁰. There was not enough money to fund the Mangare Center or enough

²⁶ Labour Party Manifesto 2005 187.

²⁷ Bob Gregory above n 20, 4.

²⁸ Criminal Justice Act 1985 s107(c) was repealed in 2002 by s 166(a) Sentencing Act 2002.

²⁹ *Susan Couch v Attorney-General* above n 1, 15 Henry.

³⁰ *Susan Couch v Attorney-General* above n 1, 44 Pike.

psychologists.³¹ The appellant suggests this contributed to William Bell's re-offending.

The situation did not improve greatly after the RSA attack as shown by the Department's Briefing to the Incoming Government in 2005:³²

Recruitment and retention are also issues in the Community Probation Service. The Service has had a 25% increase in its Probation Officer staffing levels over the last three years. This was in recognition of significant volume issues following the 2002 sentencing and parole legislation, and to improve the quality of service delivery from poor to satisfactory. Metropolitan areas, particularly Auckland, have had some difficulty in recruiting staff at all levels. This remains an issue for the Service.

Apart from recruitment of staff, there have been other problems with the parole system as shown by the recent example of Graeme Burton who killed Karl Kuchenbecker and injured four others while breaching his parole for a previous conviction for murder. There was found to be numerous breakdowns throughout the system that resulted in Burton being paroled when he should not have and Judge David Carruthers, Chairman of the Parole Board, publicly accepted responsibility and promised changes.³³

The Burton case showed how difficult it is to get the balance right between rehabilitation of offenders and public safety. The Sensible Sentencing Trust would say the justice system favours offenders over victims and public safety should be paramount. However, this is a short term argument as without giving serious attempt

³¹ *Susan Couch v Attorney-General* above n 1, 50 Pike.

³² Department of Corrections, Post-Election Brief (October 2005)

<<http://www.corrections.govt.nz/public/pdf/brief-incoming-minister/briefing-incoming-minister-200511.pdf>> (accessed 15 July 2007).

³³ Mike Houlahan "Parole still best way for convicted to re-enter society, says judge" (4 July 2007) *New Zealand Herald* Auckland 2.

to re-enter offenders into society they would only present long term risks to public safety as well as a huge financial cost to scarce public resources.

The Burton killing occurred at the time of reform to the Criminal Justice Act 1985. Karl Kuchenbecker's father was able to make a submission to Justice and Electoral Select Committee and the Criminal Justice Reform Bill was passed on 25 July 2007. In relation to parole, the amendments "spelt out that parole was a privilege and not a right...and allowed the commission of police to apply to have a parolee sent back to jail in some circumstances"³⁴. Therefore, this shows that some improvements will naturally come from the failing of a public body depending on whether Parliament is already looking at reform in the area and also depending on the publicity the situation receives.

E Accident prevention

Partly as a result of these social and political trends, public authorities now take greater risks to be efficient and when, as a consequence, accidents happen, the Accident Compensation regime does little to hold these public authorities accountable. As Blanchard J stated in *S v Attorney-General*: "[i]t can be said that in a jurisdiction with a no-fault accident compensation scheme and a bar on ordinary personal injury claims there are insufficient incentives to eliminate or reduce systematic negligence."³⁵

However, this may not be the fault of the original Accident Compensation scheme as the Woodhouse Report proposed that the prevention of accidents must be dealt with by a separate branch³⁶. Sir Owen Woodhouse later described this as "an

³⁴ "Criminal justice reform legislation passes" (July 26 2007) Newswire, NZPA.

³⁵ *S v Attorney-General* above n 23.

³⁶ Royal Commission of Inquiry, above n10, 19.

independent body, fully equipped both to regulate and to enforce its regulations"³⁷. Academic Richard Gaskin argues that "when Woodhouse recommended an end to personal injury lawsuits, he did not envision a world without deterrence. His scheme left clear space for a comprehensive accident prevention strategy that is still waiting to be discovered and implemented."³⁸

Government departments such as the Department of Labour and the State Services Commission have their own prevention strategies in place through the health and safety legislation³⁹ and the reviewing of the performance of each Public Service department⁴⁰. But the comprehensive accident prevention strategy envisaged by Sir Owen Woodhouse is still far from reality.

F Use of tort law for public authorities

Accident prevention is the one area where tort liability, at least in theory, trumps a statutory based compensation scheme. However, the question is whether tort liability, enforced by Courts under strict rules, would make public authorities more accountable and prevent accidents from occurring in the future or whether it would be to the detriment of wider public good as public authorities become overly cautious and reduce services.

In theory, the basic rule in tort law is that tort liability of public authorities is governed by the same principles as apply to private individuals. However, in practice, the effect and justification for punishment is different for public authorities and private bodies. This is because, generally, public authorities are less concerned

³⁷ Rt Hon Sir Owen Woodhouse "ACC: Integration or Demarcation?" (Rebuilding ACC Beyond 2000 Conference, Wellington, 1999) 11.

³⁸ Richard Gaskin "Recalling the future of ACC" [2000] VUWLR 215, 222.

³⁹ Health and Safety in Employment Act 1992.

⁴⁰ State Sector Act 1988 s6.

with profit making as compared to private bodies with an exception maybe for quasi governmental bodies such as state owned enterprises. Usually they respond better to political pressure rather than to financial pressure. It is also because the public expect public authorities to have higher standards of accountability than private bodies as they operate for the wider public good.

These factors put into question the instrumentalist theory that "tort liability promotes efficient investments in safety by visiting financial consequences on those who under-invest in safety"⁴¹. An American academic, Daryl Levinson, claims that:⁴²

when the political cost of diverting resources to loss prevention is sufficiently high, government will not make the investment even when it is economically justified.....And since the economic costs of damages awards falls on taxpayers not responsible in any direct fashion for tortious conduct, the corrective-justice rationale...is also wanting.

There has been much criticism of Levinson's theories. It ignores the theory of corrective justice that "tort liability embodies a moral obligation of culpable parties to provide compensation for losses for which they are fairly considered responsible"⁴³. It also ignores the vulnerability of politicians and officials to bad publicity. One opponent of Levinson's theories, Lawrence Rosenthal, claims that elected officials are highly sensitive to tort liability as their primary objective is to win the next election and they are unlikely to do that if the public condemn their conduct.⁴⁴ It has to be noted that these theories are about compensatory damages rather than exemplary damages. Exemplary damages for negligence make

⁴¹ Lawrence Rosenthal "A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings" 9 U. Pa. J. Const. L. 797, 798.

⁴² Lawrence Rosenthal, *Ibid*, 826.

⁴³ Lawrence Rosenthal, *Ibid* 798.

⁴⁴ Lawrence Rosenthal, *Ibid*.

Rosenthal's theory even more relevant as the purpose of the damages is to punish the offender, thus potentially resulting in increased condemnation by the public.

However, Levinson's point about the opportunity cost of diverting resources for loss prevention is a policy factor that was taken into account by the judges in both the Court of Appeal and the Supreme Court hearings for Susan Couch's case. Unlike the private sector⁴⁵, the state sector does not have unlimited resources to pay damages for torts liability. Generally this makes the courts wary of punishing public authorities as they are concerned that if public authorities are continually sued they will start to use defensive tactics and reduce services just to avoid potential liability.

The *Hill v Chief Constable*⁴⁶ decision was used in the hearing to show that if exemplary damages was a real possibility "it would just make operations of the Police so difficult if they had to be continually covering themselves against this type of claim that overall there was a real public downside that the Police wouldn't function properly"⁴⁷. However, Blanchard J balanced this argument by asking whether the allocation question would be a sufficient reason not to impose a duty of care if the Corrections built prisons with very thin walls because there was not enough money and as a consequence the prisoners got out.⁴⁸ His point was that the Court needs some way to prevent or punish outrageous conduct by public authorities in case it is not done by Parliament. The fact that public authorities are allocated scarce resources does not mean they should have immunity from being punished for endangering public safety.

The Levinson argument only considers the short-term political expediency and does not take into account the accountability of public sector to an elected in

⁴⁵ For example the Ford Pinto case, as seen in *Grimshaw v. Ford Motor Co.* (1981) 119 Cal. App. 3d 757 (4th Dist).

⁴⁶ *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53 (HL) Keith LJ for the Court.

⁴⁷ *Susan Couch v Attorney-General* above n 1, 51 Blanchard J.

Government. It also does not take into account the fact that the threat of court action, surrounding publicity, and judicial condemnation can have sobering effects on public officials.

III EXEMPLARY DAMAGES

A Purpose of Exemplary Damages

The fact that compensatory damages cannot be given by the judiciary for personal injury claims, means the test for exemplary damages is unique compared to other jurisdictions such as the United Kingdom. However, the real purpose of exemplary damages is still not settled. According to the counsel for the appellant, Susan Couch's purpose in claiming exemplary damages was a mixture of vindication of her version of events; public acknowledgement that something went horribly wrong; and a degree of therapeutic value in knowing society does not condone those failures.⁴⁹

I Punishment

In theory the purpose of compensatory damages is to compensate the plaintiff for his or her loss and to make them 'whole' again, while the primary purpose of exemplary damages is to punish the defendant for outrageous conduct.⁵⁰ While one focuses on the victim, the other focuses on the defendant.

⁴⁸ *Susan Couch v Attorney-General* above n 1, 54 Blanchard J.

⁴⁹ *Susan Couch v Attorney-General* above n 1, 36 Henry.

⁵⁰ Joanna Manning "Reflections on Exemplary Damages and Personal Injury Liability in New Zealand" [2002] NZ Law Review 143, 145.

Exemplary damages has been used in tort law since around the mid 1870s to punish "high-handed, insolent, vindictive or malicious' behaviour.⁵¹ The Court of Appeal in New Zealand took a sympathetic even expansionary approach to exemplary damages until they became wary of exemplary damages being used to top up compensation.⁵² In 1982 the Court of Appeal in *Donselaar v Donselaar*⁵³ held that exemplary damages fell outside the statutory bar on damages for personal injury covered by the Accident Compensation scheme. In reaction, the courts moved towards using exemplary damages for narrow punitive purposes.

Punishment is also recognised overseas as the primary purpose of exemplary damages as seen by the Australian courts⁵⁴, by the Law Commission in the United Kingdom⁵⁵ and the Ontario Law Commission⁵⁶.

Another reason for some judges to be reluctant to use exemplary damages is that punishment has traditionally been seen as the purpose of criminal law rather than civil law. The 1998 *Daniels v Thompson*⁵⁷ decision said the purpose of exemplary damages is to punish a person for the act he or she has committed, therefore, if they have already been punished in the criminal court, exemplary damages would mean double punishment.⁵⁸ Parliament disagreed and in effect reversed the decision by enacting section 319(2) of the Injury Prevention, Rehabilitation and Compensation Act 2001 which allowed exemplary damages to be awarded regardless of the results of criminal proceedings.

⁵¹ Joanna Manning, *Ibid* 145.

⁵² Joanna Manning, *Ibid* 152.

⁵³ *Donselaar v Donselaar* [1982] 1 NZLR 97, 107 (CA) Cooke, Richardson, Somers JJ.

⁵⁴ *Gray v Motor Accident Commission* (1998) 196 CLR 1, 9 (HCA) Gleeson CJ, McHugh, Gummow and Hayne JJ.

⁵⁵ United Kingdom Law Commission *Aggravated, Exemplary and Restitutionary Damages*, (LC247, London, 1997).

⁵⁶ Ontario Law Reform Commission *Report on Exemplary Damages* (Ontario, 1991) 38-39.

⁵⁷ *Daniels v Thompson* [1998] 3 NZLR 22, 29-30 (CA) Henry J for the Court.

II Deterrence

Deterrence is a major factor in tort liability as seen by the two theories of distributive justice and corrective justice. While punishment looks at the conduct at issue to determine if punishment is deserved, deterrence is forward-looking and seeks to influence the behaviour of all potential actors.⁵⁹ In practice this difference is not so distinctive as seen in *Bottrill v Attorney-General* where Richardson P noted that once an award reflecting the punitive purpose is made, "[d]eterrence is then achieved as a consequence of the appropriate punishment of the wrongdoer"⁶⁰.

There has been a shift in recent years in the United States and Canada from the traditional punitive role to a general deterrence rationale for the use of exemplary damages.⁶¹ American academics following a law and economics movement contend that the tort system serves two purposes "to compensate victims for individual harms and to deter injurers from perpetuating social harms"⁶². Two such academics, Professors Polinsky and Shavell, have argued that the true purpose of punitive damages is to fill the enforcement gap left when compensatory damages are not awarded to victims for various reasons.⁶³

This could be interpreted to justify an increased use of exemplary purposes in New Zealand due to the bar on compensatory damages in the Accident Compensation legislation. Cooke J in *Donselaar v Donselaar* suggested exemplary damages would have to perform alone the punitive and deterrent role formerly performed by the compensatory damages in personal injury cases.⁶⁴ However, most

⁵⁸ *Daniels v Thompson* Ibid.

⁵⁹ Joanna Manning, above n 50, 149.

⁶⁰ *Bottrill v A* [2001] 3 NZLR 622 para 42 (CA) Richardson J.

⁶¹ Joanna Manning, above n 50, 149.

⁶² "Developments in the Law: The Paths of Civil Litigation" (May, 2000) 113(7) *Harvard Law Review*, 1752, 1795.

⁶³ *Developments in the Law*, Ibid, 1795.

⁶⁴ *Donselaar v Donselaar* above n 53.

judiciary are cautious of using exemplary damages to fill the gap of compensatory damages as seen by Tipping J in *S v Attorney-General*:⁶⁵

The deterrent effect of liability to pay compensatory damages is as far as it is appropriate to go. The fact that such damages cannot be awarded for personal injury should not be allowed to skew the issue of deterrence beyond what is reasonable and in the interests of society as a whole.

It is interesting that Tipping J (who is on the Supreme Court bench for the Couch case) acknowledges that, in some cases, it may be in the interests of society as a whole to use exemplary damages for the purpose of deterrence. Whether Susan Couch's case is such a case is still to be decided.

III Accountability

Professor Carol Harlow maintains that public turn to tort law "to secure accountability for decision-making after other means of public accountability have failed".⁶⁶ An example she gives is the Hillsborough accident in the United Kingdom when poor policing of a football stadium resulted in death. A public inquiry⁶⁷ was held, but the victims and their families still sought tort action. This however, proved to be a poor vehicle for accountability as the actions failed.⁶⁸

Public accountability, however, is different from accountability of the decision-maker at fault. Ms Couch's counsel in the hearings said it is "not an issue of public accountability, it's an issue of the victim being able to have the wrongdoer account to

⁶⁵ *S v Attorney-General* above n 23, para 123 Tipping J.

⁶⁶ Carol Harlow, above n 18, 49.

⁶⁷ Lord Justice Taylor *Final Report into the Hillsborough Stadium Disaster* (HMSO, 1990).

⁶⁸ For example *Alcock v Chief Constable of South Yorkshire* [1992] 1 A.C. 310 (HL) Keith, Ackner, Oliver, Jauncey, Lowry LJJ.

her"⁶⁹. This is the type of accountability that Hammond J suggested is where tort law could be expanded.⁷⁰

Susan Couch's case has been funded by the Sensible Sentencing Trust who claim "parole should be abolished for ALL repeat offenders or violent criminals"⁷¹. They say that if the case does not get to court they will seek a law change to ensure that victims can seek redress in such cases.⁷² Therefore, the Trust has used this case as a publicity vehicle or "tin opener" to try and get Parliament to see that there is need for serious change.

IV Therapeutic purpose

Exemplary damages has also been said to have a therapeutic purpose to the plaintiff by mitigating the offence. However, as Blanchard J pointed out in *S v Attorney-General*, the therapeutic purpose helps the argument that the true offender should be punished, rather than the employer.⁷³ It also helps the argument that strike out applications resulting in delay in court action are unfair on claimants, such as Susan Couch, who may be recovering physically and mentally from a crime. Therefore, whether being awarded exemplary damages really has a therapeutic effect on a claimant depends on their specific circumstances.

V Compensation

The New Zealand judiciary became very wary of exemplary damages being used to top up Accident Compensation entitlements as this would, in effect,

⁶⁹ *Susan Couch v Attorney-General* above n 1, 36 Henry.

⁷⁰ *Hobson v Attorney-General* above n 3, para 97 Hammond J.

⁷¹ Sensible Sentencing Trust "Parole in a Civilised Society?" (25 July 2007) NZPA.

⁷² "Trust to Seek Law Change if RSA Victim's Court Bid Fails" (18 April 2007) *Newsroom*.

reintroduce damages for personal injury which would be against Parliament's intent. This caution increased after the lump sums were abolished in 1992.

Although Susan Couch has said she is not seeking exemplary damages for compensatory purposes, compensatory damages were claimed up to the Court of Appeal stage. Ms Couch's did not receive income-related accident compensation because she was working only part-time when she was injured.⁷⁴ Instead she is on an invalid's benefit. Because of the timing of the attack she did not receive a lump sum payment. This shows how some injured victims are not looked after by the Accident Compensation regime and consequently find it difficult to recover from their injuries. One argument could be that if the Accident Compensation regime gave compensation at a level similar to what the common law would give for compensatory damages, then victims like Susan Couch would be more satisfied with the system.

The message is that when a victim has been so badly let down by a public authority that was responsible for their safety, there is a mixture of reasons claimants go to court which can conflict with the intention of Parliament and the interpretation of the purpose of the remedy by the judiciary.

B Parliament's intention

As discussed, successive governments have amended the Accident Compensation legislation so it no longer reflects the original purpose of real compensation and comprehensive entitlement.

Parliamentary intention is taken seriously by the judiciary as seen in the hearing when Tipping J said "we've got all sorts of issues in that area as to whether

⁷³ *S v Attorney-General* above n 23, para 90 Blanchard J.

or not we can simply say "well actually Parliament, you're quite wrong"⁷⁵. However, the courts can use wide discretion in the interpretation of Parliament's intent.

Applied to the Couch case, Elias CJ said in the hearing:⁷⁶

exemplary damages in an ACC context may be necessary to express denunciation for conduct, in other words we used to have damages of a farthing so that people could get judgment for some sort of redress. I'm not sure that mightn't be in part what Parliament was looking for.

In other words Parliament may have intended the Courts to use exemplary damages to allow victims of negligence to get some form of redress that the Accident Compensation regime does not allow. This is obviously one area where the judicial use of exemplary damages can effect the way the legislation is amended in the future.

C Judicial test

I Negligence

The respondent in the Supreme Court hearing argued that, according to the facts, there were fundamental problems with proximity, causation and vicarious liability in the claim for negligence, and therefore, exemplary damages had no real possibility⁷⁷. The purpose of this essay is not to dissect the duty of care issue, but rather to acknowledge the connections between negligence and exemplary damages and how this may affect judicial decision-making.

Exemplary damages will not even be considered in these circumstances until negligence is found to have occurred. However, the fact that exemplary damages are

⁷⁴ "Debts climb as RSA survivor recovers" (3 September 2007) *Dominion Post*, Wellington, A1.

⁷⁵ *Susan Couch v Attorney-General* above n 1, 85 Tipping J.

⁷⁶ *Susan Couch v Attorney-General* above n 1, 86 Elias CJ.

the only form of redress for proceedings involving personal injury can make the test for negligence more difficult for claimants. For example, one way to prevent the abuse of exemplary damages is for the courts to use policy reasons, such as the opportunity cost of redirecting scarce resources, to reduce the potential for public authorities to be found liable for negligence. Another way is to make the cause of action difficult to prove. Applied to the Couch case, it may be difficult to prove that Ms Couch was at a higher risk of harm compared to the general public.⁷⁸

Strike out proceedings are also encouraged by the Courts to prevent juries sympathetic to victims such as Susan Couch from mixing up the purpose of compensatory and exemplary damages as "once the result of the strike out is known the parties usually settle"⁷⁹.

Courts may use the quantum of damages to discourage negligence cases in the area of personal injury. The Court of Appeal signaled curtailment of large claims in *Ellison v L* where \$250,000 exemplary damages had been claimed against a dentist.⁸⁰ In *A v Bottrill* Young J noted that "an award of \$20,000 to \$30,000 would stop virtually any claim for exemplary damages as there would be nothing left after deducting legal and other expenses"⁸¹.

In *McDermott v Wallace* the Court of Appeal used the test for quantum of damages from *Rookes v Barnard*⁸² and added considerations for: whether the claimant had received awards of compensation; whether the defendant had received a criminal penalty; and the conduct of the parties.⁸³ This rather strenuous test has

⁷⁷ *Susan Couch v Attorney-General (Department of Corrections)*, (Respondent's Case in Opposition to Application for Leave to Appeal) SC 49/2006, para 27.

⁷⁸ *Susan Couch v Attorney-General* above n1 Tipping J 76.

⁷⁹ Alisa Duffy, above n14, 19.

⁸⁰ *Ellison v L* [1998] 1 NZLR 416 (CA) Blanchard J for the Court.

⁸¹ *A v Bottrill* (19 March 1999) High Court Auckland CP 310/96 Young J.

⁸² *Rookes v Barnard* [1964] AC 1129 (HL) Judgment of the Court.

⁸³ *McDermott v Wallace* [2005] 3 NZLR 661 paras 100-102 (CA) Judgment for the Court.

enough discretion for the judiciary to keep the level of damages moderate if they wish.

Another hurdle is that family members find it very difficult to win negligence claims due to problems with duty of care as seen with *Tai Hobson*.⁸⁴ This seems contrary to the punitive purpose of exemplary damages as surely it does not matter if the family of a victim who has died as a result of the negligence makes a claim on their behalf.

Finally the difficulty in seeking exemplary damages on a vicarious basis limits the duty of care arguments able to be made by claimants.

II Vicarious liability

Exemplary damages are unlikely to be awarded in the New Zealand courts on a vicarious basis due to the purpose of attributing outrageous conduct to the actual offender as compared to their employer or agent. In *S v Attorney-General Blanchard J* distinguished the use of awarding compensatory damages on a vicarious basis which "enables the spreading of losses amongst those better able to bear them. But since exemplary damages are not concerned with losses, that rationale is inapplicable"⁸⁵. In this case the negligence, in the form of child abuse, was committed by foster parents and the Department for Social Welfare was not held to be negligent in any way. Therefore punishing the Department, who have more resources than foster parents, would not deter the accident or injury from occurring again as it was not the Department who caused the outrageous conduct.

This decision has not deterred other victims of abuse from seeking claims against the Child, Youth and Family Services and at May 2005 there were 29

⁸⁴ *Hobson v Attorney-General* above n 3.

negligence and other claims against the department seeking more than \$30 million in damages⁸⁶. It could be argued that the court, in this case at least, is splitting hairs over the vicarious liability issue in order to make the claim for exemplary damages more difficult to achieve.

However, vicarious liability was an important issue in the Couch hearing. At first, the judges reminded the counsel that "generally there was no vicarious liability for exemplary damages"⁸⁷. The judges were troubled by the informal agreement between the counsel that the probation officer would not be the defendant due to medical and other reasons and instead the Attorney-General would be the named defendant and would indemnify her if found liable. Blanchard J was concerned that the appellant was too focused on the sins of the Probation Officer and stated:⁸⁸

it's going to be exceedingly difficult to get home on exemplary damages on Ms X....she might be quite negligent but is she deserving of being punished....it might be a different case if the allegation is of systematic negligence against the Crown...there could be theoretically at least direct liability for the Department's own sins in not having a proper structure in place.

By finding the Department primarily liable, the Court would not have to be shoehorned into "altering the receive law about liability for exemplary damages on a vicarious basis"⁸⁹ and could still focus the cause of action and resulting damages on the Department who they thought would possibly be more deserving of punishment rather than the probation officer. Later in the hearing the appellant's counsel agreed to plead both for the Department and the Supervising Officer as the primary parties.

⁸⁵ *S v Attorney-General* above n 23, para 90 Blanchard J.

⁸⁶ Kay Martin "CYF faces lawsuits for \$30m" (19 May 2005) *The Dominion Post* Wellington.

⁸⁷ *Susan Couch v Attorney-General* above n 1, 5 Tipping J.

⁸⁸ *Susan Couch v Attorney-General* above n 1, 50 Blanchard J.

⁸⁹ *Susan Couch v Attorney-General* above n 1, 5 Anderson J.

This may be an important indication by the Supreme Court that they are willing to punish a public authority for systematic negligence if the conduct was bad enough to meet the test for exemplary damages. If this is so, they would be going more in the direction that Hammond J took in the Court of Appeal suggesting that courts should address the "inadequate institutional response"⁹⁰ by using tort law. However, this would be a change in direction from the Court of Appeal's narrow test for exemplary damages and desire to avoid meddling in public policy as followed by Chambers J in the Court of Appeal decision. This would be surprising considering the Supreme Court judges were all on the Court of Appeal bench previously.

III *Outrageous conduct*

In 1982 the Court of Appeal in *Donselaar v Donselaar* held that exemplary damages fell outside the statutory bar on damages for personal injury covered by the accident compensation scheme. This has been confirmed by Parliament in the 1998 and 2001 amendment acts.

Around the same time the criteria used to award exemplary damages in New Zealand was being developed with the *Taylor v Beere*⁹¹ case in which Richardson J referred to "contumelious disregard of the plaintiff's rights, high handed disregard of the rights of the plaintiff, or behaving in an outrageous or heinous manner, or oppressively or flagrantly."⁹² The test for exemplary damages was generally confined to cases of intentional harm in personal injury cases. However, in an

⁹⁰ *Hobson v Attorney-General* above n 3 para 75 Hammond J.

⁹¹ *Taylor v Beere* [1982] 1 NZLR 81 (CA) Cooke, Richardson, Somers JJ.

⁹² *Taylor v Beere* Ibid, 90-91.

attempt to widen the scope for claimants after the 1992 Act "lawyers argued that exemplary damages should be available in cases of "gross" negligence as well"⁹³.

This test has developed over the years in reaction to judicial concern over exemplary damages being used to top up accident compensation entitlements.

In 2002 the case of a pathologist, Dr Bottrill⁹⁴, presented another opportunity for the Court of Appeal to restrict the use of exemplary damages back to needing conscious wrongdoing or subjective recklessness for a claim to succeed. This made the cause of action more difficult to prove than the usual negligence tests in torts.

The Bottrill case was appealed to the Privy Council who overturned the Court of Appeal case with a 3-2 split deciding that intentional wrongdoing was not necessary, Lord Nicholls stated:⁹⁵

exemplary damages award is an expression of the court's condemnation of conduct which satisfies the criterion of outrageousness, the criterion would overwhelmingly involve intentional wrongdoing or conscious recklessness, but it would be "imprudent" to assume that in the absence of either, a defendant's negligent conduct could never give rise to a justifiable feeling of outrage calling for an award, "never say never" is a sound judicial admonition.

The decision cited cases across Australia, Canada and the United States to rule intentional wrongdoing or conscious recklessness was not essential for exemplary damages. Lord Nicholls considered it unlikely that there would be a great increase in total claims due the jurisdiction in New Zealand which is exercised with restraint and with moderate awards. The minority view agreed with the Court of Appeal's criteria of "deliberate risk-taking"⁹⁶.

⁹³ John Miller above n 15, 413.

⁹⁴ *Bottrill v A* above n 60, para 41.

⁹⁵ *A v Bottrill* [2003] 2 NZLR 721 (UKPC) per Lord Nicholls, para 26.

⁹⁶ *Susan Couch v Attorney-General* above n 1, 39 Tipping J.

There was some discussion at the hearing as to whether the Court of Appeal or the Privy Council test for the Bottrill case should be used with Tipping J saying it was "very likely"⁹⁷ to go back to the Court of Appeal test. This may be because the judges feel the local conditions including the Accident Compensation legislation were not given enough weight by the Privy Council. It should also be noted that Tipping J wrote the Court of Appeal decision for the Bottrill case. The appellant has argued that they will meet the conditions of either test as the Probation Officer was reckless as she "closed her eyes to the consequences of what was going on"⁹⁸

One difficulty with either Bottrill test is the discretion by the judges in what conduct constitute an acceptable level of outrage. The Privy Council test is more subjective compared to the Court of Appeal test. As the court said in *McDemott v Wallace*⁹⁹:

It might be said that Mr Wallace has persisted in declining to front up to the outrageousness of what he did, but in fairness to him that was dependent on judicial characterisation of the relevant behaviour.

Applied to the Couch case, in the Court of Appeal decision Chambers J compared the level of negligence in the Bottrill case to that in the Couch case when he said:¹⁰⁰

in some very rare cases, ie Bottrill, grossly negligent manner directly inflicted personal injury on the plaintiff, but that is certainly not the present case "that example is a mile away from any conceivable view of the facts here

⁹⁷ *Susan Couch v Attorney-General* above n 1, 38 Tipping J.

⁹⁸ *Susan Couch v Attorney-General* above n 1 37 Henry J.

⁹⁹ *McDermott v Wallace* above n 83, para 103.

¹⁰⁰ *Hobson v Attorney-General* above n 3, para 153, Chambers J.

This is a difficult comparison as negligent human behaviour is caused by a multitude of factors. Both Bottrill and the probation officer (or Department) had a duty to protect the public and both allegedly failed in their duty. However, the context for their conduct was very different. Therefore, it is a difficult test for juries to come to terms with as they are likely to look at the results of the conduct rather than the level of outrageousness of the conduct and after all, pain and suffering is an intangible loss.

Due to the uncertainty of this test and the difficulty for claimants in meeting its criteria it is necessary to consider other options for claimants with circumstances similar to Susan Couch's.

IV FUTURE OPTIONS

At present there is not a satisfactory system to punish public authorities or deter them from causing future accidents. The judiciary is generally reluctant to interfere with gaps in the Accident Compensation regime and "seem to be content to leave any perceived injustices to be dealt with by Parliament."¹⁰¹ Although there has been a hybrid of control mechanisms to encourage accountability in the State sector, these do not prevent accidents from reoccurring or victims of personal injury from seeking justice through litigation. The following options are not exhaustive but offer options to the current situation.

¹⁰¹ John Miller, above n 15, 420.

A Compensation schemes

The Injury Prevention, Rehabilitation, and Compensation Act 2001 could be amended in various ways to better answer the needs of victims of negligence. This is for Parliament to decide, but the judiciary could give some indication of what is needed in the Couch decision. The benefit in this option is that, compared to tort law, a statutory based compensation scheme is fairer and more efficient due to the distributive justice component.

To do this the scheme must return to the principles of 'comprehensive entitlement' and 'real compensation' proposed in the Woodhouse Report. Lump sum payments should be increased for the seriously injured and keep up with inflation. Common law standards of entitlement should be used to determine levels of compensation.¹⁰² However it is doubtful that this would be politically popular choice due to the need to reallocate scarce resources. It is also unlikely to stem the flow of claimants as it would not address the lack of accountability by public authorities.

An alternative statutory based compensation scheme for victims of crime could fill the gap for the victims and their families who do not received accident compensation such as Ms Couch. It may also stem the flow of victims seeking justice in litigation. There is support for this proposal from the Sensible Sentencing Trust, David Carruthers and the Human Rights Commission. Justice Minister, Mark Burton said victim's compensation will be considered by the Justice and Electoral Select Committee as part of the Inquiry into Victims Rights.¹⁰³

Alongside improved compensation, the community needs to be more responsible for preventing the accidents from occurring. This is the Woodhouse

¹⁰² Richard Gaskin, above n 38, 217.

¹⁰³ Kathy Webb "Crime victims 'should get compo from state'" (3 September 2007) The Dominion Post, Wellington, A1.

principle that has failed the most in practice. A public policy of injury prevention needs to be instigated. Again, this would require a reallocation of scarce resources.

B Public inquiries, commission of inquiries

The increase in use of inquiries by government is also result of the decrease in public confidence in public authorities. One example of such an inquiry is the Commission of Inquiry into the collapse of a viewing platform at Cave Creek near Punakaiki in which 14 people died in 1995.¹⁰⁴ A key finding of Judge Noble's report was:¹⁰⁵

No government department can do its job without adequate resourcing...Here, the evidence is clear that the Department of Conservation lacked, and continues to lack those resources. For future safety that must change.

As a result Department for Conservation pulled down all unsafe platforms, bridges and huts and had an increase in funding. Some public who enjoyed the use of those facilities would say the result was over-cautious and to the detriment of the public interest showing that it is not just tort law that can result in a retracting of services. Perhaps more important was the enactment that meant government departments would be able to be prosecuted under health and safety and building legislation.¹⁰⁶

¹⁰⁴ Judge Noble Report: *Commission of Inquiry into the collapse of a viewing platform at Cave Creek near Punakaiki on the West Coast* (Department of Conservation, Wellington, 1995).

¹⁰⁵ Judge Noble, *Ibid*, summary from the epilogue.

¹⁰⁶ Health and Safety in Employment Act 1992 s 3.

The Law Commission is currently doing a project on the role of public inquiries in New Zealand. They suggested:¹⁰⁷

There may be a question as to how broad the ongoing role for public inquiries is in this area. Our view is that while the need for such inquiries may increasingly be confined to major disasters or significant state sector failures, there is still a need for them where public confidence demands a greater impression of independence than other statutory officers and bodies can provide.

They are pointing to the independence of public inquiries compared to statutory bodies such as the Ombudsman or a special tribunal such as the Weathertight Homes Resolution Service. This independence helps assure the public that the state is not looking after itself.

Whether a public inquiry would satisfy the victim's needs is doubtful however. The appellant's counsel at the Hearing disagreed with the idea of a Commission of Inquiry saying "this is not an issue of public accountability, it's an issue of the victim being able to have the wrongdoer account to her"¹⁰⁸.

Therefore, the victims want something more personal and directed at the wrong done to them. An injured victim with a right to sue has more incentive to call the offender to account than a faceless public official, who does not have the same commitment or understanding of the wrong done.

¹⁰⁷ New Zealand Law Commission *The Role of Public Inquiries: Issues Paper One* (NZLC IP1, Wellington, 2007) para 27.

¹⁰⁸ *Susan Couch v Attorney-General* above n 1, 36 Henry J.

C New Zealand Bill of Rights Act 1990

The New Zealand Bill of Rights Act 1990 (BORA) offers an alternative and possibly more powerful means for claiming damages when rights have been breached. Since the 1994 decision *Simpson v Attorney-General (Baigent's Case)*¹⁰⁹ compensation has been an available remedy for a breach of the BORA. This remedy is of particular relevance to the harm done by public authorities as Hammond J noted in *Manga v Attorney-General*:¹¹⁰

Cases based upon violations of the Bill of Rights are about the vindication of statutory policies which are not "just" private: they have overarching, public dimensions... The object is to promote mutual justice, and to protect the weak from the strong.

Unlike private law remedies, such as exemplary damages, public law remedies can be tailored to the particular interest protected and in the particular contextual setting.¹¹¹ As Blanchard J stated in the recent *Taunoa v Attorney General* decision the remedy should be "sufficient to deter any repetition by agents of the State and to vindicate the breach of right in question"¹¹² Or as McGrath J stated, a BORA remedy "looks to repair the social harm caused by the breach...and secure[e] the future respect of the State for the right concerned"¹¹³. Therefore the advantage of BORA remedies is that they redress the public outrage and have deterrence purposes rather than the narrow punitive purposes used by New Zealand judiciary for exemplary damages

¹⁰⁹ *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA) Cooke P, Casey, Hardie Boys, Gault, McKay JJ.

¹¹⁰ *Manga v Attorney-General* [2000] 2 NZLR 65, 81 (HC) Hammond J.

¹¹¹ *Attorney-General v Taunoa* [2006] 2 NZLR 457 para 301 (CA) Hammond J.

¹¹² *Taunoa and Ors v The Attorney General and Anor* (31 August 2007) [2007] NZSC 70 para 253 Blanchard J.

¹¹³ *Taunoa and Ors v The Attorney General and Anor* Ibid paras 366-367 McGrath J.

However, there are issues around the use of the remedy for claimants such as Ms Couch. It would depend on what the BORA breach was and who caused the breach. It could be difficult to prove that the breach to Susan Couch's life or safety (sections 8 and 9) was caused by the Probation Service's poor supervision of William Bell. It is more likely to be available to the family of Liam Ashley who was murdered by an inmate while in a prison van¹¹⁴ as there is a tighter connection between the breach and the actor. Liam's family would be in the same position as Tai Hobson and would unlikely to succeed in a negligence cause of action, therefore a BORA application would be an alternative way to seek justice through the courts.

Another issue is that most BORA cases also include a cause of action in torts. Hammond J in the Manga and Taunoa decision has advocated a "top-up" approach on this issue with the tort damages calculated first then topped up for BORA purposes.¹¹⁵ Linked to this issue is whether the Accident Compensation bar covers BORA claims. In *Wilding v AG Blanchard J* stated:¹¹⁶

in the case of a claim based on or related to personal injury, the legislature has decided, in enacting the personal injury compensation legislation, that the effective remedy is found in the entitlements under the scheme. It is not for the Courts to question the adequacy of those entitlements and to supplement them by an award of damages quantified directly or indirectly by reference to the personal injury.

This view was affirmed by Blanchard J in the recent *Taunoa v Attorney-General* decision.¹¹⁷ However, in the *Wilding* decision Blanchard J also said compensation could be made to an 'affront of rights' so long as it was not directed at

¹¹⁴ "Family to sue Crown over death" (12 August 2007) *Sunday Star Times*, Auckland.

¹¹⁵ *Attorney-General v Taunoa* above n 24, para 298 Hammond J.

¹¹⁶ *Wilding v Attorney-General* [2003] 3 NZLR 787 para 15 (CA) Blanchard J for the Court.

¹¹⁷ *Taunoa and Ors v The Attorney General and Anor* above n 112 para 259 Blanchard J.

the physical injury.¹¹⁸ This 'affront' approach is still to be settled in New Zealand courts as are the quantum of damages that BORA claimants should received.

D Return to tort law

A more likely option is an increased use of tort law for negligent action resulting in significant personal injury or death. As Hammond J suggested, a new type of negligence claim could be created by the courts to force public authorities to become more accountable when causing injuries through their own negligence.

Tort law is based on a set of "familiar and intuitively compelling ideas about responsibility and justice" that the public understand.¹¹⁹ The court system is seen to be more independent than state funded compensation schemes.

Tort law has benefits other than compensation. For example, the wrongdoer has to pay, thereby making it more likely they will not re-offend. There is education of the public as to what are reasonable and unreasonable standards of conduct. And there is the important ombudsman or accountability factor.¹²⁰

However, a disadvantage of the tort system is that "transaction costs are enormous and consume great resources, thereby returning valuable benefits to only a minority of accident victims.¹²¹ United States studies show that personal injury victims receive about two-thirds of the compensation paid, the rest goes to pay legal expenses and expenses.¹²² That is partly why the Accident Compensation scheme was introduced in the first place. Court action impedes the rehabilitation of victims

¹¹⁸ *Wilding v Attorney-General* above n 116 para 16.

¹¹⁹ Carol Harlow, above n 18, 92.

¹²⁰ Carol Harlow, above n 18, 100.

¹²¹ Rt Hon Professor Sir Geoffrey Palmer "The Design of Compensation Systems: Tort Principles Rule, OK?" 29 *Valparaiso University Law Review*, 1115, 1120.

¹²² Mike Ross "No-fault liability defies human nature" (29 November 2002) *National Business Review* Auckland.

due to the time taken to get to court, and clogs up the court with matters that could be more efficiently dealt with by administrative means.

However, other common law countries are dealing with the decline of the welfare state with an increased use of tort law. In the United Kingdom tort law is assuming "last ditch function of filling gaps in declining welfare services for the few who are not protected adequately. The mood of judicial responsibility is to take care of vulnerable parties."¹²³

The floodgates argument is able to be responded to by introducing measure to place limits on quantum of damages given by the courts as seen by *McDermott v Wallace*. In the one-off cases, where an individual seeks damages in court for the wrong done to them, the cost and nature of litigation will act as a natural filter to unmeritorious claims.¹²⁴

Tort law can be used in combination with other options as seen by the Bottrill case where an objective assessment of Dr Bottrill's level of awareness was made by a Ministerial Inquiry.¹²⁵

The Couch decision by the Supreme Court will help to determine the place tort law has in improving the accountability of public bodies such as the Department of Corrections and thereby satisfying the needs of victims such as Ms Couch. But is punishing the Department of Corrections for failings six years after the offence really worthwhile?

¹²³ Carol Harlow, above n 18, 5.

¹²⁴ Susan Kneebone *Tort liability of public authorities* (North Ryde, LBC Information Services, 1998) 45.

¹²⁵ A P Duffy QC, D K Barrett, M A Duggan *Report of the Ministerial Inquiry into the Under-Reporting of Cervical Smear Abnormalities in the Gisborne Region* (Wellington, 10 April 2001).

E Political pressure

It could be argued that the above options are not necessary as the political pressures are enough to hold public officials accountable. An example given by Lawrence Rosenthal is the how the failures of the New Orleans' levee system caused by Hurricane Katrina were the result of easily foreseeable and readily repairable faults, which would make out a classic case of negligence. "Any instance of government bungling that compromises the public's safety is likely to have potent political consequences"¹²⁶. However, this is an example of a botched government response that, so far, has had impotent political consequences.

While this theory may be partly correct for large scale calamities such as the Cave Creek disaster, it is less obvious for cases of systematic failings such as by the Department of Corrections in this case. Since 2001 there have been more extreme cases of unnecessary deaths due to systematic failures by the Department of Corrections as shown above by the Graeme Burton example. This shows that the Department did not respond to the RSA killings as well as could be expected and, therefore, political pressure was not sufficient to improve the accountability of the Department.

V CONCLUSION

The Supreme Court hearing for Susan Couch raises important public policy questions on whether the judiciary should interfere in public policy regarding compensating victims and making public authorities accountable for their mistakes. It is obvious that the Accident Compensation scheme no longer fulfills its original principles of comprehensive entitlement and real compensation. Victims of

negligence by public authorities turn to litigation in the sole hope of being awarded exemplary damages. Since the mid 1990s the New Zealand judiciary has narrowed the purpose of exemplary damages in order to discourage it from being used by claimants to top up their compensation. This strict use of this remedy has lessened its effectiveness.

Public authorities will react to judicial condemnation due to the resulting bad publicity. However, litigation is an expensive and slow procedure for the claimants. A better solution would be for victims of serious personal injury to receive real compensation similar to what they would get under common law. This could be through victim compensation or the Accident Compensation regime. If this does not occur, the judiciary should loosen the test for exemplary damages so claimants get the accountability and vindication they deserve. The judiciary could use the *McDermott v Wallace* test to take into account compensation already given to the claimant. Legislation could be amended to give the judiciary more indication of the criteria to be used in determining awards. Official inquires could be held to determine the relevant facts as was done in the Bottrill case¹²⁷ or to prevent future accidents from occurring as with the Cave Creek inquiry. Victims should also be able to seek public law remedies for breaches of their human rights.

In this way a silo of remedies would be available to ensure public authorities are held accountable for their failings and fulfill their given objectives in a way that best serves the public interest.

¹²⁶ Lawrence Rosenthal, above n 41, 850.

¹²⁷ A P Duffy QC, above n 125.

BIBLIOGRAPHY

Legislation

- Accident Compensation Act 1972.
 Accident Insurance Act 1998.
 Accident Rehabilitation and Compensation Insurance Act 1992.
 Criminal Justice Act 1985 s107(c).
 Health and Safety in Employment Act 1992.
 Public Finance Act 1989.
 State Owned Enterprises Act 1986.
 State Sector Act 1988.

Caselaw and judicial proceedings

- A v Bottrill* (19 March 1999) High Court Auckland CP 310/96 Young J.
A v Bottrill [2003] 2 NZLR 721 (PC) Nicholls LJ (Hope and Rodger LJJ concurring) Hutton and Millett LJJ dissenting.
Alcock v Chief Constable of South Yorkshire [1992] 1 A.C. 310 (HL) Keith, Ackner, Oliver, Jauncey, Lowry LJJ.
Attorney-General v Taunoa [2006] 2 NZLR 457 (CA) Judgment of the Court.
Attorney-General of Trinidad and Tobago v Ramanoop [2005] 2 WLR 1324 (PC) Lord Nicholls of Brikenhead.
Bottrill v A [2001] 3 NZLR 622 para 42 (CA) Richardson J.
Daniels v Thompson [1998] 3 NZLR 22, 29-30 (CA) Henry J for the Court.
Donselaar v Donselaar [1982] 1 NZLR 97, 107 (CA) Cooke, Richardson, Somers JJ.
Ellison v L [1998] 1 NZLR 416 (CA) Blanchard J for the Court.
Gray v Motor Accident Commission (1998) 196 CLR 1 (HCA) Gleeson CJ, McHugh, Gummow and Hayne JJ.
Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757 (4th Dist).
Hill v. Chief Constable of West Yorkshire [1989] A.C. 53 (HL) Keith LJ for the Court.
Hobson v Attorney-General [2005] 2 NZLR 220 (HC) Heath J.
Hobson v Attorney-General [2007] 1 NZLR 374 (CA) Hammond J.
Manga v Attorney-General [2000] 2 NZLR 65 (HC) Hammond J.

- McDermott v Wallace* [2005] 3 NZLR 661 (CA) Judgment of the Court.
- Rookes v Barnard* [1964] AC 1129 (HL) Judgment of the Court.
- S v Attorney-General* [2003] 3 NZLR 450 (CA) Blanchard for the Court.
- Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA) Cooke P, Casey, Hardie Boys, Gault, McKay JJ.
- Susan Couch v The Attorney-General* (17 April 2007) Hearing SC 49/2006 Elias CJ, Blanchard, Tipping, McGrath, Anderson JJ.
- Susan Couch v Attorney-General* [2006] NZSC 66 Judgment of the Court.
- Susan Couch v Attorney-General (Department of Corrections)*, (Respondent's Case in Opposition to Application for Leave to Appeal) SC 49/2006.
- Taunoa and Ors v The Attorney General and Anor* (31 August 2007) [2007] NZSC 70 [253] Elias CJ, Blanchard, Tipping, McGrath, Henry JJ.
- Taylor v Beere* [1982] 1 NZLR 81 (CA) Cooke, Richardson, Somers JJ.
- Wilding v Attorney-General* [2003] 3 NZLR 787 para 15 (CA) Blanchard J for the Court.

Books

- Carol Harlow *State liability: tort law and beyond* (Oxford, Oxford University Press, 2004).
- Geoffrey Palmer, *Compensation for Incapacity: A Study of Law and Social Change in New Zealand* (Oxford, Oxford University Press, 1979) 25.
- Susan Kneebone *Tort liability of public authorities* (North Ryde, LBC Information Services, 1998) 45.

Journal Articles

- Andrew Butler "Is this a public law case?" 31 [2000] VUWLR 747.
- Bob Gregory "Bringing back the buck: responsibility and accountability in politics and the state sector" (2007) 30(2) Public Sector, 4.
- "Developments in the Law: The Paths of Civil Litigation" (May, 2000) 113(7) Harvard Law Review, 1752.
- Joanna Manning "Reflections on Exemplary Damages and Personal Injury Liability in New Zealand" [2002] NZ Law Review 143.
- John Miller "Trends in personal injury litigation: The 1990s" 34(2) [2003] VUWLR 407.

Lawrence Rosenthal "A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings" 9 U. Pa. J. Const. L. 797.

Richard Gasking "Recalling the future of ACC" 31 [2000] VUWLR 215.

Rt Hon Professor Sir Geoffrey Palmer "The Design of Compensation Systems: Tort Principles Rule, OK?" 29 Valparaiso University Law Review, 1115.

Sir Owen Woodhouse "Aspects of the Accident Compensation Scheme" [1979] NZLJ 395.

Newspaper articles

"Criminal justice reform legislation passes" (July 26 2007) Newswire, NZPA.

"Debts climb as RSA survivor recovers" (3 September 2007) *The Dominion Post*, Wellington, A1.

"Family to sue Crown over death" (12 August 2007) *Sunday Star Times*, Auckland.

Kathy Webb "Crime victims 'should get compo from state'" (3 September 2007) *The Dominion Post*, Wellington, A1.

Kay Martin "CYF faces lawsuits for \$30m" (19 May 2005) *The Dominion Post* Wellington.

Mike Houlahan "Parole still best way for convicted to re-enter society, says judge" (4 July 2007) *New Zealand Herald* Auckland 2.

Mike Ross "No-fault liability defies human nature" (29 November 2002) *National Business Review* Auckland.

Sensible Sentencing Trust "Parole in a Civilised Society?" (25 July 2007) NZPA.

"Trust to Seek Law Change if RSA Victim's Court Bid Fails" (18 April 2007) *Newsroom*.

Reports/Papers/Websites

A P Duffy QC, D K Barrett, M A Duggan *Report of the Ministerial Inquiry into the Under-Reporting of Cervical Smear Abnormalities in the Gisborne Region* (Wellington, 10 April 2001).

Alisa Duffy "The Common law response to the Accident Compensation scheme" in *Conference Papers - Looking Back at Accident Compensation :*

Finding Lessons for the Future (Victoria University of Wellington, Faculty of Law, NZ Centre for Public Law, 2-3 August 2001).

Department of Corrections, Post-Election Brief (October 2005)

<<http://www.corrections.govt.nz/public/pdf/brief-incoming-minister/briefing-incoming-minister-200511.pdf>> (accessed 15 July 2007).

Department of Corrections *Vision and values*

<<http://www.corrections.govt.nz/public/aboutus/visionvalues/>> (accessed 2 August 2007).

Judge Noble *Report: Commission of Inquiry into the collapse of a viewing platform at Cave Creek near Punakaiki on the West Coast* (Department of Conservation, Wellington, 1995).

Justice Hammond and Joel Harrison, *Court of Appeal Report for 2006* (Conference of judges of the Supreme Court, Court of Appeal and High Court of New Zealand, March 2007) 69.

Labour Party Manifesto 2005 187.

Lord Justice Taylor *Final Report into the Hillsborough Stadium Disaster* (HMSO, 1990).

New Zealand Law Commission *The Role of Public Inquiries: Issues Paper One* (NZLC IP1, Wellington, 2007).

Ontario Law Reform Commission *Report on Exemplary Damages* (Ontario, 1991)

Royal Commission of Inquiry *Compensation for Personal Injury in New Zealand* (Government Printer, 1967).

Rt Hon Sir Owen Woodhouse "ACC: Integration or Demarcation?" in *Conference Papers - Rebuilding ACC Beyond 2000 Conference* (Wellington, 1999) 11.

United Kingdom Law Commission *Aggravated, Exemplary and Restitutionary Damages*, (LC247, London, 1997).





VICTORIA UNIVERSITY OF WELLINGTON LIBRARY



3 7212 01717376 4

