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MEDIATING MULTIPLE LINES OF ACCOUNTABILITY IN THE *KIWIFRUIT* CASE

Submitted for the LLB (Hons) degree

Faculty of Law

Victoria University of Wellington

2018

Abstract

Strathboss Kiwifruit Ltd v Attorney-General *(*Kiwifruit*) held the Ministry of Agriculture and Forestry (MAF) liable in negligence for the Psa3 incursion. In this paper I consider the role of* Kiwifruit *in holding MAF to account for the incursion and how this interacts with public law lines of accountability. The experience of* Kiwifruit *demonstrates that, in recognising that a duty of care is owed by the government in tort, courts should ask themselves two questions. First, whether accountability has already been achieved. And secondly, if accountability has already been achieved, whether imposing multiple lines of accountability will complement each other or risk creating a dysfunctional accumulation of accountability mechanisms. This would give proper regard to the role that tort is able to play in holding the government to account and would serve to recognise the unique nature of the government as a litigant.*

Contents

I Introduction

In 2010 the kiwifruit vine-killing bacteria Psa3 was identified in New Zealand for the first time. The disease spread throughout kiwifruit orchards devastating the industry. This caused great stress for kiwifruit growers as they faced losing their livelihoods, and indeed some did while others had to take on massive debt. The incursion was thought to have come from an import of pollen by Kiwi Pollen pursuant to an import permit granted by the Ministry of Agriculture and Forestry (MAF).[1]

In *Strathboss Kiwifruit Ltd v Attorney-General* (*Kiwifruit*) Mallon J found MAF liable in negligence to kiwifruit growers for granting the permit.[2] This case is the first case in New Zealand to recognise a duty of care owed by public servants exercising functions under the Biosecurity Act 1993. It is set to be appealed.[3] In a press conference following the decision, Kiwifruit Claim Committee member Bob Burt described how at the beginning of the case the committee had talked about the importance of accountability. He stated that "in the decision that has come through, the accountability is there".[4] Grant Eynon, another member of the Kiwifruit Claim Committee, echoed this in an interview with Radio New Zealand saying that the case "is really about making [MAF] accountable to start doing their job".[5] These comments raise the question of what constitutes proper accountability for the Psa3 incursion.

Private law and public law have traditionally been seen as operating in distinct realms. Yet the law of government liability confuses the two. Following the orthodox approach, on the private law side of the divide public law concerns are irrelevant; in tort, a defendant

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1 Now the Ministry for Primary Industries (MPI).

2 *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596 [*Kiwifruit*].

3 Crown Law *Notice of Appeal: Attorney-General v Strathboss Kiwifruit Ltd* (24 July 2018).

4 Radio New Zealand "High Court partially upholds kiwifruit PSA claim" (29 June 2018) <www.radionz.co.nz>.

5 Radio New Zealand "Kiwifruit growers on MAF PSA finding: 'You went from hero to zero'" (29 June 2018) <www.radionz.co.nz>.

government will be subject to the same standards as a private defendant. The issue with this approach is that the government is very different to a private individual or company, making it questionable whether the same standards should be or even can be applied.[6] Wrapped up in this debate about when a public body should be liable in tort law is a public law question about accountability. Governments are subject to accountability relationships from a range of directions. To what extent does tort law achieve accountability and how does it interact with other mechanisms for accountability? This issue is explored in relation to the *Kiwifruit* case.

Government liability in tort provides a means of ensuring accountability additional to other public law accountability mechanisms. There were three broad types of accountability facing MAF as a response to the Psa3 incursion: political accountability, legal accountability through tort, and legal accountability through judicial review. While these bring with them different benchmarks and consequences, and so provide different modes of accountability, they do not exist in isolation from each other. The independent report on MAF's conduct in relation to the incursion provided effective accountability. Given this, the finding of negligence liability in *Kiwifruit* did little to improve accountability. Rather, it risked creating an excess of accountability and preventing effective political accountability in the future by interacting negatively with the independent report.

The analysis of accountability in *Kiwifruit* demonstrates that there is a need to consider whether accountability has already been satisfactorily achieved before recognising a duty of care owed by the government in tort. Often there may be situations where public law mechanisms have failed to provide accountability in which case a tort action will serve a useful accountability purpose. However, if the goal of accountability has already been fulfilled, then, before recognising a duty of care, a court should consider whether these multiple mechanisms for accountability will complement each other or risk creating a dysfunctional accumulation of accountability mechanisms.

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6 Daryl J Levinson "Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs" (2000) 67 U Chi L Rev 345; and Geoff McLay "The New Zealand Supreme Court, the *Couch* case and the future of governmental liability" (2009) 17 TLJ 77.

In *Kiwifruit* Mallon J provides an example of an attempt to undertake this task as her Honour considered the existence of other accountability mechanisms as a relevant policy factor within the duty of care inquiry. However, her Honour took a formal approach to accountability requiring that in order for there to be sufficient accountability a legal remedy was needed. Accordingly, her Honour held that accountability in tort would fill an "accountability gap". Yet a remedy for the wronged party is not a necessary component for holding the wrongdoer to account. Taking a more practical view, the independent report already provided effective accountability. Furthermore, in light of the accountability concerns about the interaction between the independent report and a finding of negligence, accountability as a policy consideration should have weighed against recognising a duty of care in *Kiwifruit*.

Part II provides a framework for assessing the accountability present in relation to the Psa3 incursion. I adopt a relational definition of accountability and outline three perspectives against which to assess its effectiveness, concluding that the learning perspective is of particular relevance in situations of government negligence. Part III considers in turn the three key types of accountability relevant to the Psa3 incursion – political accountability, legal accountability through tort and legal accountability through judicial review – setting out the role they played in holding MAF to account, how effective they were and how they interacted with each other. Part IV then draws a conclusion about the need to contemplate within the duty of care policy inquiry whether the government has already been effectively held to account and if so, how the multiple lines of accountability will fit together. I then assess how this was carried out in *Kiwifruit*.

II A Framework for Assessing Accountability

In the High Court Mallon J found that MAF had made multiple mistakes when granting Kiwi Pollen the import permit that was ultimately identified in the judgment as Psa3's pathway to New Zealand. First, the MAF literature review that was relied on in granting

the permit was fundamentally flawed. MAF scientists working on the review had failed to clarify its scope as between themselves and within the paper.[7] The effect of this was that the review's conclusion that there was no known risk of pests and diseases associated with pollen was misleading, if not wrong.[8] Secondly, one of the authors, in providing the review to MAF's Plant Imports Team to be used in deciding whether to grant the permit, did not read the attached details of the permit request.[9] The request was to import milled pollen and the review only applied to pure pollen.[10] Thirdly, no formal risk analysis or consultation with the industry was carried out prior to granting the permit.[11] Usually a formal risk analysis would be carried out where there was a new kind of import of risk goods, as Kiwi Pollen's request was, and this would involve industry consultation.[12] An independent report commissioned prior to the litigation also supported Mallon J's conclusion that there were major failings on the part of MAF.[13] It is clear then that something did go wrong and MAF needed to be properly held to account for its actions.

While we can readily accept the goal of accountability it is not so evident exactly what achieving this goal would look like. The concept of accountability can seem vague at times being often used as a "political catchword" to evoke a sense of transparency and trustworthiness.[14] To ground the discussion of accountability, I rely on a relational conception of accountability enunciated by Bovens. He defines accountability as:[15]

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7 *Kiwifruit*, above n 2, at [30] and [698].

8 At [725] and [763].

9 At [597], [778] and [782].

10 At [601], [772] and [781].

11 At [798] and [814]–[815].

12 At [810] and [812].

13 David Moore and Jeff Loan *A Review of Import Requirements and Border Processes in Light of the Entry of Psa into New Zealand* (Sapere Research Group, 29 June 2012) [*Sapere Report*] at v.

14 Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 ELJ 447 at 449–450; and Richard Mulgan *Holding Power to Account: Accountability in Modern Democracies* (Palgrave Macmillan, Basingstoke, 2003) at 1.

15 Bovens, above n 14, at 450.

> … a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.

References to "accountability" throughout this paper import this definition.

In relation to the Psa3 incursion, the actor is MAF. There are a number of different forums to which MAF may render account to, including individuals, such as the Minister for Primary Industries or the kiwifruit growers, and bodies, such as Parliament and the courts.[16] An obligation to account could even be self-imposed,[17] like the MAF-initiated *Pathway Tracing Report*.[18] The actual account giving of explaining, justifying, questioning and judging of conduct will vary depending on the particular forum. The final requirement that there be a possibility of consequences is given a broad interpretation by Bovens as being inclusive of consequences more informal and subtle than those that courts may order.[19]

In examining the accountabilities faced by MAF in the Psa3 incursion, I primarily classify and organise them according to the type of forum to which account is rendered. On this basis, there are two broad types of accountability: legal accountability, which is accountability to the courts; and political accountability, involving forums other than the courts. As a broad statement of approach, I define political accountability by reference to what is not legal accountability. The second classification dimension that I rely on is the nature of the benchmarks or the conduct to which the accountability attaches. Under this, legal accountability is divided into tort and judicial review.[20] On the basis of these two

16 At 450.

17 At 451.

18 Ministry of Agriculture and Forestry *Psa – Pathway tracing report* (5 December 2011) [*Pathway Tracing Report*].

19 Bovens, above n 14, at 452.

20 These classification dimensions are drawn from Bovens. I take a slightly broader approach to political accountability than is outlined by Bovens (at 455) viewing it as inclusive of the aspects of administrative and social accountability that exist in this case. The independent review of MAF's

classification dimensions I identify three broad types of accountability facing MAF as a response to the Psa3 incursion: political accountability, legal accountability through tort, and legal accountability through judicial review.

There are three reoccurring perspectives on accountability in the academic literature against which the effectiveness of accountability may be assessed: the democratic perspective; the constitutional perspective; and the learning perspective.[21] These three may not always reach the same conclusion and in any given situation one may be more appropriate than the other.[22] Under a democratic perspective the aim of accountability is to enable representative bodies, such as voters or Parliament, to control the actions of the government.[23] The citizens transfer their power to the government via Parliament and, as such, citizens and Parliament should have a form of control over the actions of government. The constitutional perspective sees the purpose of accountability as being to prevent the concentration and abuse of power by the government.[24] The accountability forum needs strong investigative powers backed up by the availability of serious consequences in order to deter abuses of power. Under the learning perspective the aim of accountability is to provide public agencies with feedback for the purpose of learning and improving processes and outcomes.[25] The possibility of negative feedback and consequences motivates public agencies to search for better ways of doing things and to reflect on their past successes and failures. These three perspectives are used to assess the effectiveness of the different modes of accountability arising out of the Psa3 incursion.

Of these three perspectives, the learning perspective is of particular relevance to *Kiwifruit*. A learning perspective of accountability is highly relevant to negligent conduct as

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import requirements and the need to account to the kiwifruit industry arise from political considerations and have political consequences.

21 At 462.

22 At 466–467.

23 At 463.

24 At 463.

25 At 463–464.

negligence involves accidental and careless conduct in the course of operational decisions, not policy or political decisions. The most effective way to protect against this is to learn from past mistakes and make improvements. In situations involving negligence it is not so relevant to protect against abuses of power or to ensure that the public has sufficient information on a government's negligent conduct when voting. These perspectives are likely more relevant to political decision-making. In this paper I consider all three perspectives but place greater weight on the learning perspective of accountability.

III Three Types of Accountability

There were three broad types of accountability facing MAF as a response to the Psa3 incursion: political accountability, legal accountability through tort, and legal accountability through judicial review. In this part I set out the role that they each played in holding MAF to account, how effective they were and how they interacted with each other. I find that the independent report provided highly effective accountability under a learning perspective. It would also rate well from a democratic and constitutional perspective, supported in this endeavour by parliamentary debate. In relation to liability in tort, while accountability is not a traditional aim of tort law, in practice it performs an accountability function. In *Kiwifruit* it provided the individual-orientated form of accountability and monetary consequences that the kiwifruit growers perceived as lacking from the political accountability. It would be assessed favourably under all three perspectives. However, considered in light of the independent report, it largely duplicates the report's efforts in providing learnings for the future. Furthermore, the apparent use of the report as a springboard for litigation risks deterring effective political accountability in the future. Finally, the potential for judicial review as an accountability mechanism was largely overtaken in this case by the independent report and the tort action.

A Political Accountability

Following the Psa3 incursion, the first type of accountability on the scene was political accountability. Kiwifruit is New Zealand's largest horticultural export with over 80 per cent of kiwifruit grown in the Bay of Plenty where the incursion first struck.[26] To a nation dependent on biosecurity, the incursion was high on the political agenda.[27] There were three identifiable ways in which accountability played out within a political context. Most significant was the independent report commissioned by the Minister for Primary Industries into the import requirements in place prior to the incursion (the *Sapere Report*).[28] An internal MAF *Pathway Tracing Report*, and parliamentary questions and debate acted as additional political accountability mechanisms, although they were not quite as effective.[29] First, in order to situate these three mechanisms within the landscape of political accountability, I offer a view as to how political accountability mechanisms ultimately revolve around democratic elections. While an independent expert report may not appear inherently political, it is the democratic system in which it exists that empowers it to perform a political accountability role. Secondly, I take the three identified political accountability mechanisms in turn and explain how they operated and how effective they each were.

1 Elections as the central feature of political accountability

Government accountability plays out through the democratic political system.[30] Government departments are "extensions of the Minister acting in the Minister's name and

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26 New Zealand Kiwifruit Growers *New Zealand Kiwifruit Labour Shortage* (July 2018); and New Zealand Horticulture Export Authority "Kiwifruit" <http://www.hea.co.nz>.

27 See *Kiwifruit*, above n 2, at [148].

28 *Sapere Report*, above n 13.

29 *Pathway Tracing Report*, above n 18.

30 See Mulgan, above n 14, at ch 2; and Bovens, above n 14, at 455.

in accordance with the Minister's wishes".[31] When MAF officials make a decision to grant an import permit they are acting under the authority of their minister. The Minister for Primary Industries is responsible to Parliament, which is ultimately responsible to the voting public. And so the grand chain of democratic accountability is completed.[32] The actions of a public servant can ultimately be traced through an upwards chain of responsibility to fall at the feet of voters, mirroring the chain of delegation of power from the public to the government.[33]

The significance of this, of course, is that voters vote. Elections create the overarching forum for holding the government to account, loss of votes, and therefore loss of power, being the ultimate consequence.[34] Whether or not votes are actually lost in the event of a failing will depend on a multitude of factors including the circumstances of the failing, the seriousness, the adequacy of the response, the public's knowledge and so on. All political accountability exists within this framework of democratic government. A complex web of accountability mechanisms sits alongside and supports accountability by elections. These mechanisms involve different accountability relationships but are ultimately backed up by elections. The three mechanisms identified as present in the Psa3 response form part of this complex web.

2 MAF Pathway Tracing Report*: an ineffective mechanism for accountability*

Following the incursion, MAF initiated an internal *Pathway Tracing Report* to try to understand how Psa3 entered and spread within New Zealand.[35] The report gave rise to a

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31 Janet McLean "New Public Management New Zealand Style" in Paul Craig and Adam Tomkins *The Executive and Public Law* (Oxford University Press, Oxford, 2006).

32 See Matthew Palmer "Ministerial Responsibility versus Chief Executive Accountability: Conflict or Complement" (paper presented to Institute for International Research conference, Wellington, April 2001).

33 Bovens, above n 14, at 445.

34 Mulgan, above n 14, at 41–45.

35 *Pathway Tracing Report*, above n 18, at 2.

potential accountability relationship between MAF and the public as it made available information on which the public could judge how and whether MAF was at fault for the incursion. The potential consequence for MAF was that there may be a negative reaction from the public leading to ministerial intervention, and there was also a recognised risk of claims.[36] However, the report did not provide effective accountability.

The report examined a number of potential pathways for Psa3. It was not able to state with any certainty how Psa3 entered the country.[37] In relation to the import of pollen as the pathway, it concluded that this was a possible pathway, but the risk was "uncertain but probably low".[38] It noted that further evidence was needed about the viability of pollen as a pathway in order to provide a more accurate assessment of the likelihood.[39] Subsequent to the writing of the report, but before the report was released to the public, Kiwi Pollen's second pollen import from the same Chinese company tested positive for Psa3.[40] A finding that pollen was in fact contaminated with Psa3 would appear to provide evidence highly relevant to whether pollen was a viable pathway for Psa3. This was therefore, at least to some degree, evidence of the kind that the report's authors stated was needed in order to provide a more accurate assessment. In light of the new evidence there was some discussion about whether this report should be made public with MAF officials alive to the risk of claims.[41] In the end, the report was released to the public but without any updating to take into account the positive test for Psa3.

Assessing the effectiveness of the report in providing accountability, it is unlikely to rate highly from either a learning, democratic or constitutional perspective. The report could have potentially been positively evaluated under the learning and democratic perspectives as it sought to provide information on which the public could assess MAF's conduct and

36 See *Kiwifruit*, above n 2, at [1246], n 610.

37 *Pathway Tracing Report*, above n 18, at 29.

38 At 4.

39 At 4 and 29.

40 See *Kiwifruit*, above n 2, at [1246], n 610.

41 At [1246], n 610.

MAF could assess what went wrong and learn from it. However, the exclusion of the subsequent relevant information limited its accuracy and usefulness. It is unlikely to be evaluated positively under a constitutional perspective given that it was an internal review and its potentially misleading conclusion protected it from giving rise to any serious consequences. The kiwifruit industry appeared to share the view that it did not provide sufficient accountability. The industry requested an independent report into MAF's importing requirements for kiwifruit pollen.[42] The Minister agreed and commissioned the *Sapere Report*.[43]

3 The Sapere Report*: highly effective accountability from a learning perspective*

The *Sapere Report* was an external review conducted by the Sapere Research Group into the import requirements in place prior to the Psa3 incursion. Unlike the *Pathway Tracing Report* it did not seek to address the cause of the outbreak or the extent to which the border processes contributed to the outbreak.[44] Rather, it was focused on trying to work out where MAF's processes had failed and how MAF could do better in the future, giving practical recommendations for improvement. From a learning perspective, it was a particularly effective form of accountability.

The *Sapere Report* identified "major shortcomings with the relevant import requirements and border processes".[45] It foreshadowed the conclusions reached in *Kiwifruit* as to the flaws in the literature review, the failure to recognise that Kiwi Pollen's request was not for pure pollen, and the failure to carry out consultation with the industry.[46] However, it looked beyond the failings with individual decisions and focused on the deficient MAF processes

42 Kiwifruit Vine Health "KVH welcomes release of MAF Psa-pathway tracing report" (press release, 16 December 2011).

43 Kiwifruit Vine Health, above n 42.

44 See *Sapere Report*, above n 13, at v.

45 At v.

46 At v–vi.

within which these individual decisions existed. It described MAF's systems for managing emergent risks as under-resourced and decentralised.[47] The report stated that the shortcomings were:[48]

> … primarily due to the lack of a strategic view of the risk to the kiwifruit industry, a failure to adequately respond to changing circumstances, and the absence of effective working relationships between MAF, industry stakeholders and scientific researchers.

The report was therefore able to take a broad view when assessing what went wrong to include consideration of systemic failings, rather than being limited to fault on the part of individuals.

Because of the nature of political consequences, it can be difficult to pinpoint exactly what consequences stemmed from the *Sapere Report*, as opposed to what would have happened regardless of the report. The *Sapere Report* did however offer six recommendations, which provides a means by which to trace the impact that it had.[49] The recommendations for MAF included: centralising the process for dealing with emerging risks rather than leaving it up to individuals each focused on a particular pathway; increasing the transparency around when plant material is being imported to New Zealand for the first time, which would involve consultation with the industry where it has not yet been consulted on as part of developing an import health standard; and strengthening its connections and relationship with industry and research organisations.[50] All of the recommendations have been adopted.[51]

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47 At viii.

48 At vi.

49 At [361].

50 At [361].

51 (6 December 2012) 686 NZPD 7265.

The *Sapere Report* would rate highly from a learning perspective of accountability due to its focus on trying to work out where MAF's processes had failed and how MAF could do better in the future. It was not concerned with whether or not MAF's substandard processes had actually caused the harm. The harm had occurred and MAF's processes at the time were substandard; whether or not MAF's failings in this regard were in fact the cause of the harm was irrelevant to whether MAF could and should do better in the future. The *Sapere Report* also appears to have been successful in enabling crucial learnings for the future: the recommendations were adopted and structural changes occurred.[52]

Although not as significant in this context as the learning perspective, a democratic perspective would also see the *Sapere Report* as an effective form of accountability as it increases the information available to voters. Through the recommendations it provides the public with a clear framework against which to assess MAF's conduct in responding to the report. Finally, under the constitutional perspective, the report was undertaken by an independent body. However, it was commissioned by the Minister with the terms of reference set by the Minister, which may be seen as impinging on its independence to some extent. As is necessary under the constitutional perspective, the Sapere Research Group was given strong powers to investigate,[53] and this is further evidenced by the detailed findings it reached. The *Sapere Report* may be considered as lacking the strong consequences that this perspective deems necessary to prevent abuses of power as it does not provide a monetary consequence. Arguably though, the political consequence of negative attention can be just as severe as monetary consequences. Given the dynamics of democratic government and the public finance system, negative attention may serve as a greater deterrent on government then the actual payment of money.[54] This is discussed further below.[55] In summary, the *Sapere Report* appears to provide highly effective

52 See also the changes detailed in *Kiwifruit*, above n 2, at [214].

53 *Sapere Report*, above n 13, at 92–93.

54 See Geoff McLay "Tort, Settlements and Government: A Preliminary Inquiry" (2011) 9 NZJPIL 247; and Levinson, above n 6.

55 See Part III(B)(2).

accountability under the learning perspective, and also effective accountability from a democratic and constitutional viewpoint.

4 Parliament: supplementary accountability

The Psa3 incursion was the subject of a Ministerial Statement and several questions in Parliament.[56] While the *Pathway Tracing Report* focused on cause and the *Sapere Report* on failings within MAF's processes and systems, the parliamentary discussion on the incursion was primarily concerned with the big picture resource allocation and policy issues. For example, the Minister for Primary Industries was asked:[57]

> Given that he cut the front-line biosecurity budget by more than $2 million and slashed the number of border control staff, does he accept responsibility for the regulatory failings that led to the Psa outbreak?

The Green Party took an even wider perspective and suggested that perhaps the entire approach to biosecurity should be reviewed in favour of a more risk-adverse approach to imports.[58]

Parliamentary discussion did not provide a mechanism for sustained and in-depth accountability like that in the *Sapere Report*. It was not particularly conducive to learning because it dealt with the issues only on a surface level and was heavily influenced by political motivations to place the blame on the governing party. It would, however, rate well from a democratic and constitutional perspective of accountability as it is both an elected body and a different branch of government that is doing the holding to account.

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56 See (9 November 2010) 668 NZPD 15067; (16 November 2010) 668 NZPD 15289; (23 November 2010) 669 NZPD 15637; (6 December 2012) 686 NZPD 7265; and (22 May 2018) 729 NZPD (Budget Debate, Shane Jones).

57 (6 December 2012) 686 NZPD 7265.

58 (9 November 2010) 668 NZPD 15067.

Perhaps the best way to conceive of the function of parliamentary accountability in this context is that its strengths from a constitutional and democratic perspective bolster the political accountability provided by the *Sapere Report*.

Despite the *Sapere Report* and the parliamentary discussion, in the claimants' view the goal of accountability had not been served.[59] Presumably in the eyes of the claimants the accountability so far was orientated towards the public rather than the harmed individuals and lacked severe consequences. In the following section I examine how tort liability in *Kiwifruit* was able to provide a different form of accountability and how this interacted with the previous political accountability in the *Sapere Report*.

B Legal Accountability through Tort

Accountability is not traditionally seen as an aim of tort law.[60] It is an essentially public law concept. However, in practice, tort law can perform an accountability function. This is particularly relevant in the context of government liability where due to the public nature of the defendant, and the consequent mixing of the public and private spheres of law, accountability is more likely to be a prominent consideration. In this section, given that accountability is not a traditional aim of tort law I first set out how tort law performs this function, drawing on academic and judicial discussion on the subject. I then explain the nature of accountability that *Kiwifruit* provided in comparison to the political accountability identified in the previous section. I find that *Kiwifruit* provided the individual-orientated form of accountability and monetary consequences that the kiwifruit growers perceived as lacking from the political accountability. Finally, this leads me to

59 See Radio New Zealand, above n 4; and Radio New Zealand, above n 5.

60 For traditional theories and functions of tort law see Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (10th ed, Thomson Reuters, Sydney, 2011); Ernest J Weinrib *The Idea of Private Law* (Oxford University Press, Oxford, 1995); Richard A Posner *Economic Analysis of Law* (4th ed, Little, Brown and Co, Boston, 1992); and Robert Stevens *Torts and Rights* (Oxford University Press, Oxford, 2007).

consider the interaction between the *Sapere Report* and *Kiwifruit*. I reach the conclusion that, considered in light of the *Sapere Report*, *Kiwifruit* largely replicates the report's efforts in providing learnings for the future. Furthermore, the apparent use of the report as a springboard for litigation risks deterring effective political accountability in the future.

1 "Tort Law as Ombudsman"[61]

It is not hard to find examples of claimants describing the desire for accountability as a motivating factor for bringing tort litigation. *Kiwifruit* provides a ready example. Bob Burt and Grant Eynon of the Kiwifruit Claim Committee both indicated that a desire for accountability was one motivating factor for the litigation.[62] In *Re Chase*,[63] where the claimant alleged a negligent shooting by the police, Geoff McLay notes accountability as the likely motivator: "The object … was perhaps not so much to win but to bring the whole matter into the open."[64] A similar illustration of accountability as an aim is provided by Gillian Hadfield's finding that some of the families of 9/11 victims in making their decision to sue rather than accept government compensation were at least partly motivated by:[65]

> … a strong sense of duty to act as an agent of the community to gain information about what happened, to hold people accountable and to play a role in prompting responsive change.

It may be that a desire for "truth", "justice" and "accountability" is even more salient to a litigant than receiving compensation for the loss suffered.[66] AM Linden provides the example of a claimant in a medical malpractice suit who incurred CAD 35,000 in legal

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61 AM Linden "Tort Law as Ombudsman" (1973) 51 Can Bar Rev 155.

62 Radio New Zealand, above n 4; and Radio New Zealand, above n 5.

63 *Re Chase* [1989] 1 NZLR 325 (CA).

64 Geoff McLay "The Chase case: in search of a future for tort?" (1990) 20 VUWLR 255 at 257.

65 Gillian K Hadfield "Framing the Choice Between Cash and the Courthouse: Experiences With the 9/11 Victim Compensation Fund" (2008) 42 Law & Socy Rev 645 at 673.

66 AM Linden and Bruce Feldthusen *Canadian Tort Law* (9th ed, LexisNexis, Ontario, 2011) at 23.

costs when the total amount of damages he would have received, had he been successful, was CAD 8,000.[67] Similarly, in a study of disaster litigation Celia Wells found that bereaved relatives had a range of motivations for pursuing litigation, including accountability and, relatedly, a desire to prevent future tragedies.[68] She states that often the claimant's "search for satisfaction … appears to go beyond mere compensation and becomes a quest for something like 'truth' or 'justice'".[69] These examples demonstrate that the way in which claimants use tort law may be motivated, at least partially, by an appetite for accountability rather than solely by the desire for compensation.

Linden characterised tort law as an ombudsman.[70] It could serve as an "instrument of social pressure" on power, "empower[ing] the injured".[71] In other words, it was a mechanism for accountability. Linden saw this function as being the way in which tort law would remain relevant in the future.[72] This was in light of some authors at the time "singing a requiem for tort law" due to the emerging recognition of more efficient schemes of social compensation.[73] As the task of compensation moved from the purview of tort law to the modern welfare state, Linden thought that tort law's accountability function might come to "dominate the future evolution of tort law" and be the way in which tort law continued to serve a useful societal purpose.[74]

Linden notes that while there are limits on tort law's ability to act as an ombudsman (for example, economic and resource constraints) there will always be gaps that criminal law, administrative regulations, and governmental ombudsman do not fill; tort law therefore

67 Linden, above n 61, at 166.

68 Celia Wells *Negotiating Tragedy: Law and Disasters* (Sweet & Maxwell, London, 1995) at 158.

69 At 158.

70 Linden, above n 61.

71 At 156.

72 At 156.

73 At 156 citing PS Atiyah *Accidents, Compensation and the Law* (Weidenfeld & Nicolson, London, 1970); and TG Ison *The Forensic Lottery* (Staples Press, London, 1967) as examples.

74 Linden and Feldthusen, above n 66, at 20–28.

provides one additional mechanism by which grievances can be addressed.[75] Litigants may turn to tort law, which can act as a "polyfiller" – the putty used to fill small holes and defects in walls, when other methods of accountability do not exist or are perceived to have failed.

This idea of tort law as an ombudsman in relation to public parties has been picked up by judges in two New Zealand Court of Appeal decisions of note: Hammond J in *Hobson v Attorney-General*[76]and Cooke P in *Chase*.[77] Both judges recognised an accountability function for tort law where the relevant members of the executive had not yet been satisfactorily held to account.

In *Hobson* the Court of Appeal considered the vicious attack by Mr Bell on Ms Couch at the Panmure Returned and Services Association (RSA). Mr Bell was a parolee at the time, having served a sentence for aggravated robbery of a petrol station, and was placed at the RSA for work experience. In the course of carrying out a robbery of the RSA Mr Bell and his accomplices murdered three staff members and inflicted permanent disability on Ms Couch. Ms Couch qualified for compensation from the Accident Compensation Corporation scheme (ACC) but sought exemplary damages.

Justice Hammond dissenting found that a duty of care was arguable. In the following passage his Honour proclaims a role for tort law as an accountability mechanism where other mechanisms have proved inadequate. Referencing ACC in the first line he states:[78]

> [75] In New Zealand there is a real question whether the tort dress has been "overshrunk". … 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

75 Linden, above n 61, at 168.

76 *Hobson v Attorney-General* [2007] 1 NZLR 374 (CA).

77 *Chase*, above n 63.

78 *Hobson*, above n 76, at [75].

> 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 Mrs 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.

In line with Linden's remarks about the future relevance of tort law arising from its ombudsman role, Hammond J acknowledges that this is one function that is unique to tort law when compared with its ACC substitute in the personal injury arena. While ACC fulfils the compensatory function, the no-fault principle prevents it from providing accountability. On appeal, the Supreme Court agreed with Hammond J's conclusion that a duty of care was arguable, but it did not consider the potential of tort law as an accountability mechanism any further.[79]

President Cooke's judgment in *Chase* is significant because it envisages a role for tort based on accountability where tort's primary function of compensation is not available. President Cooke cited with approval Linden's ombudsman function as a purpose of tort law.[80] Mr Chase was fatally shot in his home by a police officer. The police officers were exercising a search warrant unannounced at dawn. In the dim light of the hallway the police officer confused an exercise bar Mr Chase was holding with a gun.[81] An official inquiry into the shooting was undertaken by a Queen's Counsel at the request of the Attorney-General, which exonerated the police.[82] A second investigation, this time by the coroner, made some statements critical of the police's decision to carry out a "dawn raid".[83] There remained

79 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725.

80 *Chase*, above n 63, at 333.

81 At 327. See also Ngā Taonga Sound & Vision "Lower Hutt Man, Paul Chase, Shot by Police" (podcast, 19 April 1983) <https://ngataonga.org.nz>.

82 CM Nicholson *Report for the Minister of Police* (September 1983).

83 *Chase*, above n 63, at 328.

doubt as to the appropriateness of the police conduct. The administrator of Mr Chase's estate sought a declaration as to the fault of the police.

President Cooke accepted Linden's conception of the purposes of tort law as being wider than just the provision of compensation to include an ombudsman role.[84] On this basis his Honour concluded that there should be jurisdiction for granting a declaration.[85] While there may be no monetary remedy available,[86] a declaration could serve to ensure accountability – a function of tort law. However, a declaration is subject to discretion.[87] President Cooke was of the view that the goal of accountability had already been served by the official inquiry and the coroner's inquest and so a declaration would not add anything useful.[88] He thus endorsed a polyfiller approach.

As illustrated by Linden, Hammond J and Cooke P, tort law can perform a useful accountability function where other accountability mechanisms do not exist or are perceived to have failed. The real challenge is discerning whether there is an "accountability gap" that needs to be filled and if not, whether it is appropriate to impose further accountability.

2 *The nature of accountability in* Kiwifruit*: legal and individual-orientated accountability*

Kiwifruit provided another mechanism by which to hold MAF to account for granting Kiwi Pollen's import permit. It was, however, of a different type and nature than the political accountability that had already occurred. The key differences echo the claimants'

84 At 333.

85 At 334.

86 The Accident Compensation Act 1982 barred compensatory damages and the Law Reform Act 1936 prevented the estate from claiming exemplary damages.

87 Declaratory Judgments Act 1908, s 10.

88 *Chase*, above n 63, at 334.

perceptions of inadequacies, identified above, with the political accountability that had taken place – the political accountability being orientated towards the public rather than the harmed individuals and lacking severe consequences. Here, the court was the accountability forum and the benchmarks were those of liability in negligence. This brought with it a more individual-orientated form of accountability and apparently harsher, although not necessarily more effective, consequences.

Kiwifruit was a form of legal accountability as MAF was being held to account in the courts, rather than through the democratic political system. It involved an independent and external check-up of the executive's conduct by another branch of government. While the *Sapere Report* also gave an independent perspective – that of an expert consulting group – this was only provided at the request of the Minister. The parliamentary debate involved a separate branch of government, but from a constitutional perspective it was perhaps hampered somewhat by the closeness of Parliament and the executive in New Zealand. In this way accountability through the courts appears stronger from a constitutional perspective of accountability as it arises and operates wholly independently from the executive arm. Furthermore, it has the key benefit of being able to be initiated solely by citizens, rather than citizens needing to get the Minister or another parliamentarian interested in the issue in order to initiate an investigation.[89] While MAF was rendering account to the court, it was also rendering account via the court to the claimants. It was the claimants who initiated the proceedings and it was the claimants' arguments and critiques MAF had to answer to. The direct involvement of citizens strengthens legal accountability from a democratic perspective.

Along with accountability to the courts comes a legal benchmark against which the actor is assessed against. The assessment is no longer against what is politically tenable in the public's eye but rather against a defined standard in law. The particular standard that existed in *Kiwifruit* – that of tort, and specifically negligence – has repercussions for the nature of accountability that followed. Accountability in tort has a strong individual dimension to it.

89 Mulgan, above n 14, at 76.

First, building on the point identified above about the involvement of the affected individuals in legal accountability generally, tort is essentially concerned with protecting private interests. Secondly, and stemming from the first point, the accountability "consequence" placed on MAF is also the remedy obtained by the plaintiff.

Tort law is orientated towards protecting the interests of individuals. In *Chase*, when finding that granting a declaration in that case would not serve the purpose of accountability, Cooke P placed significance on the fact that a Commission of Inquiry could have been appointed under the Commissions of Inquiry Act 1908 to investigate the shooting, and this was not done.[90] The government must therefore not have regarded "the matter as of sufficient public importance".[91] In response, McLay makes the point that "tort is a private action satisfying private ends. Society may not be interested but an issue might be vital to an individual."[92] Tort law's individual-orientated form of accountability may therefore have a particular role to play where an issue is not seen as sufficiently important to the wider public to make it onto the political agenda. However, as demonstrated under the discussion of political accountability, this was not the situation in *Kiwifruit*. Perhaps though, even if a matter galvanises political accountability mechanisms, there may still be a benefit in additional accountability directly to those whose interests were harmed?

Given that "tort is a private action satisfying private ends",[93] it provides a remedy to the plaintiffs. An award of damages is the primary remedy in tort. As a broad starting point, damages in tort aim to compensate the innocent party by putting them back in the position as if the wrong had not occurred.[94] As between torts, the approach to damages will vary

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90 *Chase*, above n 63, at 334.

91 At 334.

92 McLay, above n 64, at 278. See also Peter Cane "Tort Law and Public Functions" in John Oberdiek (ed) *Philosophical Foundations of the Law of Torts* (Oxford University Press, Oxford, 2014) 148 at 165; and Harry Woolf "Public Law-Private Law: Why the Divide? A Personal View" [1986] PL 220 at 221.

93 McLay, above n 64, at 278.

94 *Livingston v Rawyards Coal Co* (1880) 5 App Cas 25 (HL) at 39.

depending on the specific function the tort performs.[95] Torts that are actionable per se (for example, trespass and defamation) have the primary function of vindication.[96] Damages will serve the purpose of reinforcing and safeguarding those protected rights independent of whether any factual harm occurs.[97] On the other hand, torts like negligence are primarily concerned with compensating the wronged party for factual harm caused by the fault of another.[98] In *Kiwifruit* the finding of liability in negligence entitles the kiwifruit growers to damages to compensate for their loss. The exact amount is yet to be assessed, but the kiwifruit growers are claiming $450 million.[99]

From an accountability perspective, the function of damages is conceived of slightly differently as it goes to one of the defining features of an accountability relationship – the possibility of facing consequences. Here, the emphasis is on MAF's need to be held to account, rather than the kiwifruit growers' need to be compensated for loss. However, the possibility of consequences requirement could presumably be fulfilled by the threat of a negative judgment and ensuing publicity, as illustrated by Cooke P's envisioned use of declaratory judgments for accountability.[100] Individuals who have suffered harm may likely see an award of damages as the necessary consequence for proper accountability to be served. On this Carol Harlow exclaims: "have we succumbed to the influence of globalized consumerism and bought the idea that, without financial compensation, accountability is necessarily incomplete?"[101] Yet on the other hand, from a constitutional perspective, an award of damages may provide the serious consequences that this perspective deems as necessary to deter abuses of power.[102]

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95 Jason NE Varuhas *Damages and Human Rights* (Hart Publishing, Oxford, 2016) at 13.

96 At 13.

97 At 13.

98 At 13.

99 Radio New Zealand, above n 4.

100 See Linden, above n 61, at 156–159 on tort and the "publicity sanction".

101 Carol Harlow *State Liability: Tort Law and Beyond* (Oxford University Press, New York, 2004) at 52.

102 Bovens, above n 14, at 463.

The point was raised earlier in the paper that the real deterrence mechanism is perhaps more likely to come from the negative publicity that the government receives from a finding of liability rather than from the actual payment of money.[103] Daryl Levison explains that the "government does not internalize costs in the same way as a private firm. Government actors respond to *political* incentives, not *financial* ones – to votes, not dollars."[104] Where the government is ordered to pay large awards of compensation in tort the money often comes from additional central government funding.[105] Therefore, it does not directly affect the bottom line of the department concerned, making the financial consequence less likely to serve as a deterrent on that department.[106] What is more likely to act as a deterrent is the negative publicity that a department receives from a finding of liability. This line of argument supports the claim that the constitutional perspective's requirement for a strong deterrent consequence is likely to be just as, if not more, effectively fulfilled by negative publicity arising from the *Sapere Report* than a monetary consequence arising from tort.

From this discussion we can draw the following conclusions. *Kiwifruit* provided a means of accountability additional to that which had occurred in the political arena. It was, however, of a different nature in that it was orientated towards the affected individuals rather than the public as a whole and brought with it monetary consequences. The question is whether, given this, *Kiwifruit* was necessary to achieve the goal of accountability. The *Sapere Report*, supplemented by parliamentary discussion, had already provided effective accountability across all three perspectives, particularly from the learning perspective. Legal accountability generally performs well under a democratic and constitutional perspective, but, despite appearances, tort's focus on providing a monetary remedy to the individual is not necessary for effective accountability for Psa3 under a constitutional perspective. On this basis there is no clear need for additional accountability in tort for the Psa3 incursion. Yet what has not yet been considered is *Kiwifruit*'s performance under the

103 Levinson, above n 6; and McLay, above n 54. See Part III(A)(3) of this paper.

104 Levinson, above n 6, at 345.

105 McLay, above n 54, at 249.

106 At 249.

learning perspective. The next section looks to the interaction between the *Sapere Report* (as the primary form of political accountability present) and the finding of liability in negligence to determine how this dual accountability might impact on the learning perspective.

3 Interaction with the Sapere Report*: threats to the learning perspective*

From a learning perspective of accountability, *Kiwifruit* did not improve accountability; the *Sapere Report* had already provided accountability and this was more effective than that which was provided by the Court. Furthermore, in light of the perception that the *Sapere Report* had been used as a springboard for the litigation, the effect of imposing liability may deter the government from undertaking and publishing such reviews in the future.

Justice Mallon endorsed the learning perspective of accountability. In regards to investigations into the cause of events, her Honour stated that "[f]rom such reviews, learnings are gained so that similar mistakes in the future may be avoided."[107] Her Honour considered that the *Kiwifruit* proceedings had been effective from a learning perspective. Drawing from the testimony of the MAF witnesses, her Honour concluded that they had viewed the court proceedings, like the *Sapere Report*, as "providing helpful guidance for the future".[108]

Across 178 pages Mallon J considered the mistakes made by MAF in granting the import permit and clearing the import at the border.[109] Undoubtedly, this judgment, and the investigations, expert evidence and hearings that it necessitated, provide MAF with a thorough resource for appreciating what went wrong and learning how to do better in the future. However, the *Sapere Report* had already covered much of this terrain and reached

107 *Kiwifruit*, above n 2, at [488].

108 At [488].

109 At 178–352.

substantially similar findings to *Kiwifruit* on the mistakes made. Under the learning perspective, the goal of accountability had already been fulfilled rendering the case of little use in holding MAF to account.

In addition, it appears that the *Sapere Report* actually provided more effective learning accountability than *Kiwifruit*. The *Sapere Report* was able to take a more contextual and wider view as to what went wrong by considering the systemic failings of MAF as an organisation.[110] It was not limited to finding negligent actions on the part of specific MAF personnel, which is necessary for a finding of tort liability to lie against the government.[111] Furthermore, it provided recommendations as to how to improve for the future, whereas the tort action only pointed out MAF's failures.[112] While the *Sapere Report* did not make a finding on whether MAF's mistakes had actually caused the incursion, from a learning perspective of accountability it was not particularly necessary for that conclusion to be reached. Whether or not MAF's failings were in fact the cause of the harm was irrelevant to whether MAF should and could do better in the future. *Kiwifruit* therefore did not improve accountability by making a finding on causation (and in fact, it recognised that it was not possible to prove causation here to a scientific standard, and so accepted causation on a lower standard).[113]

Not only did the *Sapere Report* provide more effective accountability from the learning perspective than the tort action, but the tort action may also have the effect of preventing such effective accountability from taking place in the future. The Crown submitted that the *Sapere Report* had been used as a springboard for the litigation.[114] Holding the government liable in negligence in this situation would, on the government's argument, deter future governments from openly accounting to the public in this way, lest they open themselves

110 See *Sapere Report*, above n 13, at vi.

111 Crown Proceedings Act 1950, s 6. See also Mulgan, above n 14, at 80–81.

112 *Sapere Report*, above n 13, at [361].

113 *Kiwifruit*, above n 2, at [37]–[39].

114 At [487].

up to claims.[115] The Chief Executive of MAF at the relevant time enunciated this concern to the Court. In relation to independent reviews he stated:[116]

> … it is important that such reports are produced in the model of free and frank advice. If reports assign blame or liability, that undermines an organisation's willingness to open itself to critical review in the interests of performance improvement and can be highly damaging long-term.

Therefore, there is a real risk that by finding the government liable in negligence for the incursion, the next time such an event occurs the government will not initiate, or at least not publish, an independent report that is critical of the government's actions.

One might say that it does not matter if this risk of deterring accountability does eventuate because a tort action can step in to provide the necessary accountability. However, this is far from ideal. Litigation requires an enormous amount of time and resources, which would make it an untenable option for many people. Indeed, the kiwifruit growers were likely an exception to this as the industry is highly organised and the claimants were able to access the resources needed for their claim by a litigation funder.[117] Accountability should not be something that an injured party has to pay for; rather, there should be an expectation on the government that it opens itself up to accountability. Furthermore, a tort action sets the government up to try to minimise and excuse its conduct rather than to acknowledge and learn from failings.[118] A tort action would therefore not provide a sufficient alternative.

Justice Mallon did not deal directly with this issue of liability deterring accountability as her Honour considered that the facts did not support the conclusion that the *Sapere Report* had been used as a platform for the proceedings.[119] Her Honour found that, prior to the

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115 At [487].

116 At [487], n 345 summarising the evidence of Murray Sherwin.

117 At [217].

118 Mulgan, above n 14, at 81.

119 *Kiwifruit*, above n 2, at [488].

Sapere Report, some members of the industry already believed that the disease had come from the pollen imported pursuant to Kiwi Pollen's permit.[120] While this may be true, there is no doubt that the *Sapere Report* must have been of significant help to the claimants in preparing their case on breach of duty. Furthermore, as we are dealing with deterrence, perhaps what is more important is the government's perception of what happened, rather than what happened in fact. According to the government's argument, it appears to consider that the *Sapere Report* did prompt the claim. Based on this understanding the government is likely to be deterred from initiating such reports in the future. Therefore, for the purposes of deterrence, is not so important whether or not the *Sapere Report* did actually encourage the litigation so long as the government perceives that it did.

Finally, one might argue that it should not matter whether the *Sapere Report* prompted the litigation because we should expect higher standards from government than we would from individuals. If a public official has committed a tort the government should be held liable for it. It is just that the government should be open about its failings and that this openness should assist citizens to seek justice in court. Statements from Mallon J suggest that she may have been of this view. While her Honour found that the *Sapere Report* had not been a springboard for the litigation, directly after this finding she makes the following comment:[121]

> In commissioning [the *Sapere Report*] MAF was displaying the kind of good governance to be expected of a ministry of the Government. The Government acts for the benefit of the public. It is to the benefit of the public to determine the cause of events which have had serious ramifications for people in our society.

This could be taken as an indication that even if the *Sapere Report* had been used as a springboard this would not be inappropriate because high standards are expected of the government. In theory this argument is correct. Yes, the government should be held to high standards. However, this view risks ignoring reality. In practice, public officials may

120 At [488].

121 At [488].

hesitate to release critical reviews if such reviews might prompt litigation. This is just like what we saw with MAF's hesitation to release the *Pathway Tracing Report* where officials explicitly considered the risk of claims.[122]

Based on this analysis, while *Kiwifruit* did provide an additional accountability mechanism it did not improve the overall accountability for the Psa3 incursion. Considered in isolation from the previous political accountability, *Kiwifruit* did provide effective accountability under the three perspectives. However, when viewed in light of the *Sapere Report*, it did not add anything significant in accountability terms and may even have the effect of deterring effective political accountability in the future.

C Legal Accountability through Judicial Review

MAF, now renamed the Ministry for Primary Industries (MPI), came under legal scrutiny for its decision-making again in 2018 in relation to a different matter. However, this time the scrutiny took place within an action for judicial review rather than tort. In *Waimea Nurseries* the High Court found that MPI's decision to classify approximately 55,000 fruit seedlings as "unauthorised goods" and to subsequently seize the goods for containment or destruction was unlawful.[123] In this section I compare the accountability in *Waimea Nurseries* to that in *Kiwifruit* to highlight the different nature of accountability that exists in judicial review and in tort. After establishing the key differences, I then consider why judicial review was not pursued in relation to the Psa3 incursion.

122 At [1246], n 610.

123 *Waimea Nurseries Ltd v Director-General for Primary Industries* [2018] NZHC 2183.

1 The nature of accountability in Waimea Nurseries*: public-orientated accountability*

Judicial review is the classic legal mechanism for holding public power to account.[124] Unlike tort law, judicial review sits firmly on the public law side of the "divide". It recognises that those making "public" decisions may err in ways that do not apply to those acting in a private capacity.[125] Flowing from judicial review's public orientation come benchmarks and consequences that are fundamentally different from those that exist in tort.

Waimea Nurseries concerned MPI's decision to order 55,000 fruit seedlings to be contained or destroyed.[126] This was due to the discovery of operational deficiencies at the United States facility that was charged with confirming that the plants were free from pests and diseases. In making the decision, MPI was required to act "in accordance with law, fairly and reasonably".[127] MPI claimed it was acting pursuant to s 116 of the Biosecurity Act 1993, which gives MPI the power to seize and dispose of unauthorised goods. The crux of the judicial review was whether the goods were "unauthorised goods" under the Act and therefore whether MPI had acted in accordance with law. Ultimately, applying the definition in the Act, Cooke J found that the seedlings were not unauthorised goods and s 116 therefore did not provide authority for MPI's decision.[128] However, the Judge considered that there were other provisions in the Act under which MPI may be able to act to address any biosecurity risk from the seedlings.[129]

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124 Graham Taylor *Judicial Review: A New Zealand Perspective* (2nd, LexisNexis, Wellington, 2010) at [1.01].

125 Philip A Joesph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [22.2.3].

126 See Eric Frykberg "No biosecurity concern over 55,000 seized cuttings - industry" (7 June 2018) Radio New Zealand <www.radionz.co.nz>.

127 *New Zealand Fishing Industry Assoc Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552 per Cooke P. See also *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) at 410 per Lord Diplock.

128 *Waimea Nurseries*, above n 123, at [36].

129 At [69]–[83].

Both *Waimea Nurseries* and *Kiwifruit*, as forms of legal accountability, were concerned with holding MPI/MAF to a legal standard. In *Waimea Nurseries* this standard was whether MPI had acted in accordance with law, fairly and reasonably. In *Kiwifruit* the standard was whether MAF had caused damage to the claimants by breaching a duty of care owed to them. The divergence in these standards comes from the different mischief that judicial review and negligence aim to address.[130] As described earlier,[131] tort law is primarily concerned with protecting individual interests and compensating for harm.[132] In a negligence action the courts will only find the defendant liable where the plaintiff has suffered harm; a careless act in itself is not sufficient.[133] What follows is that the nature of accountability in tort takes on an individualised element. On the other hand, one of the commonly cited aims of judicial review is to ensure that public actors properly perform their duties.[134] The failure of a public agent to do so is in itself a harm to the public whether or not there is any consequential harm to an individual.[135] On this view, what it serves to protect is for the benefit of the public as a whole.[136] Therefore, the individual-orientated accountability present in tort is not necessarily present in a judicial review because the concern is with the performance of duties rather than the occasion of harm to a specific person.

The different orientation of a judicial review and a negligence action is further reflected in the remedies available. Both *Waimea Nurseries* and *Kiwifruit* established that MPI/MAF had failed to live up to a legal standard. However, the consequences that attached to these

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130 Woolf, above n 92, at 221; and Cane, above n 92, at 165.

131 Part III(B)(2).

132 Woolf, above n 92, at 221; and Cane, above n 92, at 165.

133 Geoff McLay and David Neild "Torts" in Peter Blanchard and others (eds) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2011) 87 at [2.4.1].

134 Woolf, above n 92, at 221; and Jason NE Varuhas "The Public Interest Conception of Public Law: Its Procedural Origins and Substantive Implications" in John Bell and others (eds) *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, Oxford, 2016) 45 at 67.

135 *Mercury Energy Ltd v Electricity Corporation of New Zealand* [1994] 2 NZLR 385 (PC) at 388.

136 At 388; Taylor, above 124, at [1.01]; Woolf, above n 92, at 221; and Varuhas, above n 134, at 65.

failures were vastly different. In *Kiwifruit* the finding of liability meant that the claimants were entitled to damages to compensate for their loss. Because the mischief that negligence is concerned with is an infringement on a person's right that causes harm, compensation is needed and is available as of right.[137] However, traditionally damages are not an available remedy in judicial review and any remedy will be discretionary.[138] A common view is that remedies in judicial review do not aim to compensate like tort law, or to punish like criminal law, but to ensure that public agents properly perform their duties.[139] Justice Mallon states that one of the reasons for the lack of damages in judicial review is that it "serves to encourage candour in public authorities explaining to the Court their reasoning and to set standards for future decision-making".[140] It is similar to the *Sapere Report* in this regard. The consequence in *Waimea Nurseries* was that Cooke J ordered the decision to be set aside five days after the release of the judgment.[141] This would have the effect of preserving the status quo (that the goods would be kept contained by MPI) for five days so as to give MPI time to consider exercising its other statutory powers and not comprise the biosecurity response in the meantime. This demonstrates the public interest considerations that may guide the granting of a remedy in a judicial review.[142]

While judicial review shares with tort some of the generic accountability features that come from legal accountability, it has a distinctly different accountability orientation. The benchmarks against which the actor's conduct is assessed and the remedies or consequences that are imposed can be seen as orientated towards the collective good rather than the interests of individuals. A judicial review action would therefore provide accountability of a different type to tort. It would, however, be similar to that that had already been provided by the *Sapere Report* as it represents another public law mechanism for accountability.

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137 McLay and Neild, above n 133, at [2.2.1].

138 Cane, above n 92, at 166; Taylor, above n 124, at [5.25]; and *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA).

139 Cane, above n 92, at 166.

140 *Kiwifruit*, above n 2, at [482].

141 *Waimea Nurseries*, above n 123, at [95].

142 Taylor, above n 124, at [5.25]; and Varuhas, above n 134, at 67.

2 Kiwifruit *and judicial review*

The kiwifruit growers could have sought to judicially review MAF's decision to grant the permit and to clear the import at the border. There are a number of potential grounds for review, for example: mistake of fact as to the risks associated with pollen, the scope of the literature review and the assumption that the pollen was to be pure, leading to an unreasonable decision; or breach of legitimate expectation as to process and consultation given the usual procedure in the event of a new import not covered by an import health standard was to carry out a formal risk analysis, which would involve consultation.

The issue with a judicial review is that it would not have been able to provide a remedy sufficient in the eyes of the kiwifruit growers. The industry was not aware of the permit until after Psa3 was identified in kiwifruit orchards. Bringing a judicial review would therefore not have been able to prevent the incursion or provide compensation for the kiwifruit growers' loss. Justice Mallon considered that, because there was no remedy available to the kiwifruit growers under judicial review tort law needed to step in and provide the remedy to the claimants.[143] What a judicial review could have done was require MAF to account for and explain its decision, but this would add very little to the learning accountability already provided by the *Sapere Report*.

IV Mediating the Lines of Accountability

The government is subject to accountability relationships from a range of directions. This paper has identified three key lines of accountability in the Psa3 incursion. First, political accountability primarily through the *Sapere Report*. Secondly, the individual-oriented legal accountability through *Kiwifruit*. And thirdly, the potential for public-orientated legal

143 *Kiwifruit*, above n 2, at [483].

accountability through a judicial review claim. The *Sapere Report* provided highly effective accountability from a learning perspective, and also effective accountability from a democratic and constitutional viewpoint. Its sole focus was on working out what had gone wrong and how MAF could do better in the future. It has resulted in substantial changes as to how MAF carries out its biosecurity functions.[144] *Kiwifruit* provided effective accountability from a constitutional and democratic perspective as it involved the courts and allowed the concerned individuals to initiate the accountability mechanism. However, from a learning perspective, when viewed in light of the *Sapere Report*, *Kiwifruit* did not add anything significant in accountability terms and may even have the effect of deterring effective political accountability in the future. It appears to have created excess accountability. Judicial review was not pursued as its use as a learning accountability mechanism was largely overtaken by the *Sapere Report*, and the tort action was the means by which the claimants could get the remedy they wanted.

As illustrated by the interaction between the *Sapere Report* and *Kiwifruit*, imposing a private law duty on public bodies has implications for accountability. A private individual is not subject to the same extent of accountability mechanisms that exist in relation to public bodies. Not only does having insufficient accountability mechanisms raise concerns, but too much accountability can also cause a range of problems.[145] The existence of different accountability forums that apply different criteria can lead to conflicting expectations being placed on agencies making it difficult for an agency to prioritise expectations.[146] Requiring agencies to account in multiple forums can unnecessarily increase transaction and opportunity costs as meaningful accountability requires time and effort.[147] Excessive accountability may have a "paralysing effect" making public actors

144 See at [214]; and (6 December 2012) 686 NZPD 7265.

145 Bovens, above n 14, at 462.

146 Thomas Schillemans and Mark Bovens "The Challenge of Multiple Accountability: Does Redundancy Lead to Overload?" in Melvin J Dubnick and H George Frederickson (eds) *Accountable Government: Problems and Promises* (ME Sharpe, New York, 2011) 3 at 6.

147 At 6–7.

overly cautious and unable to make decisions.[148] It may also produce a climate of negativity as "different forums outbid one another in their negative attention to public agencies", which may "divert attention from the more fundamental question of how to improve public services".[149]

In light of the risks of excessive accountability, and in accordance with Linden, Cooke P, and Hammond J's polyfiller principle, there is a need to consider whether accountability has already been achieved before finding that the government owes a duty of care. Often there may be situations where public law mechanisms have failed to provide accountability in which case a tort action will serve a useful accountability purpose. The Law Commission reflected this view in its report on the Crown Proceedings Act 1950:[150]

> While there is no doubt that accountability arrangements within government departments now do much of the work that may have previously been done by exposure to liability, it should be recognised that sometimes these systems will fail.

If the goal of accountability has already been performed then, before recognising a duty of care, a court should consider whether these multiple mechanisms will complement each other or risk creating a "dysfunctional accumulation" of accountability mechanisms.[151] In line with this approach, Mallon J in *Kiwifruit* considered that other accountability mechanisms were a relevant factor in deciding whether to recognise a duty of care.[152] The real difficulty comes in discerning whether there is an "accountability gap" that needs to be filled and if not, whether it is appropriate to impose further accountability. In relation to this inquiry, Mallon J's conclusion that tort law was needed as an accountability polyfiller appears to be deficient.

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148 At 7.

149 At 7.

150 Law Commission *A New Crown Civil Proceedings Act for New Zealand* (NZLC R135, December 2015) at [3.80].

151 Bovens, above n 14, at 462.

152 *Kiwifruit*, above n 2, at [481]–[488].

Justice Mallon accepted that tort liability was an accountability mechanism and that there were other accountability mechanisms available,[153] citing parliamentary accountability, independent reports and judicial review.[154] However, her Honour considered that tort liability would not cut across those other accountability mechanisms. Rather, it would act as a polyfiller or a complementary form of accountability. Her Honour stated that: "The existing accountability mechanisms that help to ensure careful and proper biosecurity decisions are made leave unfilled gaps."[155] This was because none of those other accountability mechanisms could provide a legal remedy for the kiwifruit growers.[156] Her Honour explains this in the following passage:[157]

> If, for example, MAF had unreasonably declined to issue a permit to Kiwi Pollen (by, for example, failing to consider any scientific information about biosecurity risks arising with pollen but assuming without any reasonable basis that serious risks arose), Kiwi Pollen could apply for judicial review. But where MAF has unreasonably issued a permit (on the basis of, for example, a scientific review which was for a different use of pollen than that to which the permit related and this different purpose was relevant to the risks), *the plaintiffs have no remedy.*

This illustrates her Honour's view that there was no other remedy than that in tort because there was no remedy in judicial review. Requiring the remedy to come either from judicial review or tort demonstrates that in the Judge's view the "remedy" needed to be a legal remedy rather than an administrative one. The *Sapere Report*'s improvement of processes to make sure the same kind of mistake did not happen again was therefore regarded as an insufficient remedy.

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153 At [483].

154 At [482] and [487].

155 At [496(d)].

156 At [483] and [496(d)].

157 At [483] (emphasis added).

For Mallon J the goal of accountability could not be fulfilled in this case without a legal remedy for the plaintiffs. Requiring recognition of legal remedial rights before accepting that the goal of accountability was fulfilled represents a very formal view of accountability that is not consistent with how accountability operates in practice. On a basic level, accountability is concerned with the implications for the wrongdoer, not with whether the wronged party has had their rights recognised. The availability of a legal remedy is not required before a relationship can be classified as one of accountability. An accountability relationship needs only the possibility of consequences for the wrongdoer, which Bovens was careful to distinguish from legal sanctions.[158] Neither is a legal remedy necessary before an accountability relationship can be recognised as an effective one under any of the three accountability perspectives. The *Sapere Report* provided a highly effective form of accountability without any legal sanctions. Rather, its consequences took place in the political realm and it had the effect of creating real improvements in MAF's processes. Even under a constitutional perspective we saw that the imposition of severe deterrent consequences on the government could perhaps be better performed in a political realm than by a monetary fine.[159]

Rather than deciding on how the availability of other accountability mechanisms impacts on the duty of care inquiry, the inquiry in *Kiwifruit* became about how the availability of other remedies impacts on the recognition of a duty of care. While the availability of other more suitable remedies may be a relevant consideration in finding a duty of care it does not take the place of an inquiry into whether accountability has already been effectively performed. They are distinct inquiries. Therefore, while the judgment appears to in theory recognise that accountability is a relevant consideration, its application of this fails to properly consider whether the practical goal of accountability had been achieved.

Had a more realistic conception of accountability been adopted then the case would have had to grapple with the key accountability questions that I have raised. First, whether the

158 Bovens, above n 14, at 463.

159 See Part III(B)(2).

Sapere Report had fulfilled the goal of accountability and whether accountability on private law lines added anything. On my analysis, there appears to be no real accountability gap as the *Sapere Report* had already provided effective accountability. Secondly, if accountability had already been effectively performed, how a finding of liability might interact with previous accountability mechanisms. In my view, the imposition of accountability in tort risks interacting negatively with the *Sapere Report* by potentially deterring effective political accountability in the future. Therefore, in contrast to Mallon J's view, this was a policy factor that weighed against recognising a duty of care. This policy factor would of course still need to be weighed in the balance with all the other factors that feed into the duty of care inquiry and so is not determinative in itself.

V Conclusion

Accountability is one factor that should be considered before imposing a duty of care on the government. This would serve to acknowledge that the nature of the government as a litigant is different to that of a private individual. Governments can face multiple accountability relationships stemming from both public and private law. Tort law can provide a useful mechanism for achieving effective accountability where public law mechanisms have failed to do this. A lack of effective accountability through other means can therefore weigh in favour of recognising a duty of care and providing accountability through tort. However, where public law mechanisms have already satisfied the goal of accountability, if further accountability is imposed through tort there is a potential risk of excess accountability and negative interactions between accountability mechanisms. If this is the case, then the accountability policy inquiry may weigh against recognising a duty of care.

In *Kiwifruit* Mallon J recognised that accountability was a relevant policy factor to consider. However, her Honour took a formal approach to accountability that in order for it to be effective a legal remedy for the kiwifruit growers was required. This led to the conclusion that tort was needed to fill an accountability gap. However, if a more practical

view is taken of accountability, the *Sapere Report* had already provided effective accountability and so there was no accountability gap that tort needed to fill. The accountability policy inquiry would not support finding a duty of care. Consideration would then turn to how imposing additional accountability through tort would interact with the other accountability mechanisms. In light of the concerns about the *Sapere Report* being used as a springboard for the litigation, imposing additional accountability through tort risked deterring effective political accountability in the future. Therefore, this should likely have weighed against recognising a duty of care in *Kiwifruit*.

The experience of *Kiwifruit* demonstrates that, in recognising that a duty of care is owed by the government, courts should ask themselves two questions. First, whether accountability has already been achieved. And secondly, if accountability has already been achieved, whether imposing multiple lines of accountability will complement each other or risk creating a dysfunctional accumulation of accountability mechanisms. This would give proper regard to the role that tort is able to play in holding the government to account and would serve to recognise the unique nature of the government as a litigant.

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Word count: 11,234 words (including 83 words in two substantive footnotes).