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Litigation funding for public law claims; what is its feasibility and what is its effect on the public law principles of Aoteroa?

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Abstract

Litigation funding is prominent in many parts of the world but not in New Zealand. This is likely to change in the coming years and this paper inquires into how the practice interacts with public law. Initially, this paper looks at how feasible litigation funding for public law claims is by investigating the extent to which a selection of claims are monetizable. Ultimately, the tort of negligence is found to be the most viable for litigation funding. After, the investigation focuses on how litigation funding for public law claims affects the right to justice, the public interest, and the arguments for state liability. In conclusion, although access to justice is enhanced by litigation funding, the practice is detrimental to the public interest and makes it inappropriate to hold the state liable. It is undesirable in this way to let the commercial world erode some of the core principles of public law.

Key Words: “litigation funding”, “public law”, “public interest”, “public liability”, “negligence”

Contents

I Introduction

Litigation funding is a practice within New Zealand that is relatively unknown. It involves investors funding a claim in return for profit. The reason for its low profile is due to the fact it exists in somewhat of a legal limbo, not necessarily being outcast by the Courts or statute but far from being accommodated by them either. Yet this is likely to change. Following the Law Commission's report into the practice, its recommendations suggest that our legal landscape should evolve to ground litigation funding in our judicial system.

This change won't come without consequences. The rise of litigation funding may not be desirable for all types of claims, especially in the field of public law. Why? The 'publicness' of public law claims makes them unique from others. They are inherently charged with a degree of public interest that generally involves policy considerations that do not normally have to be accounted for. Exploring litigation funding in this area shows where the commercial, profit-driven world can intersect with fundamental public law principles. This paper will consider how access to justice, public interest and State liability are all affected.

The idea of profiting from a public law claim might appear unusual to those in the legal field. Generally speaking, one would not associate a public law action with substantial amounts of monetary compensation. However, the first part of this paper will illustrate to what extent a handful of public law claims are monetizable. It will also determine if this extent for each respective claim is sufficient enough to make litigation funding in the area feasible. Finally, it will conclude on what particular public law claim is the most viable.

After showing the genuine scope for litigation funding in the public law arena, the second part of this paper then considers how it may conflict with the aforementioned principles. This investigation firstly discusses what the purpose of public law is, and the role that damages plays within it. Next, this paper argues that although litigation funding in the area will enhance access to justice, it will not advance the public interest. There is a significant degree of vulnerability for litigation funders to hijack a claim for their own purposes at the

expense of social good. Litigation funding also modifies the arguments for public liability, in that it is less appropriate to hold public institutions accountable.

Overall, I conclude that although the rise of litigation funding will bring many merits to our legal system, proliferation of it in the public law sector is undesirable and could thwart the core purposes public law is designed to achieve.

Part One: Monetization of public law claims

II Litigation funding; third party funding for commercial value

Litigation funding is a practice where a third party that does not have an interest in the litigation, funds a plaintiff's claim in return for a percentage of the money recovered upon success. This agreement is formalized by contract and referred to as the funding agreement. The funding agreement provides exactly how much compensation the funder can receive, how much control it has over the claim, and how the costs of the claim will be appropriated in the event the claim is unsuccessful.

Importantly, claims are funded on a 'no win, no fee basis.' Essentially this means if the claim fails, the litigation funder will get paid nothing. In fact, in the event of an adverse cost order by the Court, a litigation funder and potentially even its investors could lose more than their initial investment. This shows the inherent degree of risk in the practice.

To mitigate this risk, litigation funders stringently assess the merits of claims to determine their probability of success before they agree to fund them.[1] This is often done through the hiring of independent counsel to review and provide their opinions on them. Only the best

[1] New Zealand Law Society "Litigation funding and class actions" (7 June 2019) New Zealand Law Society <https://www.lawsociety.org.nz/news/lawtalk/issue-929/litigation-funding-and-class-actions/>.

claims are selected.[2] One litigation funder stated for every case they had proceeded with, there were about ten to twenty they had rejected.[3]

Generally, criteria will outline that a claim must meet an acceptable risk and return threshold. A litigation funder will obviously not invest where the cost of the litigation would outweigh the potential upside of a successful win. They must also consider the defendants ability to pay damages should they be ordered to pay, along with enforceability if the defendant resides in another jurisdiction. However, many litigation funders also incorporate a certain moral element in their prospecting by not considering cases that even in the event of a successful claim fail to provide the plaintiff with a fair proportion of compensation.[4] One publication suggests a fair proportion should be at least 50 percent,[5] although in other cases the plaintiff's cut has been far lower.

Returns in the litigation funding sector are often significant; ranging anywhere from around 20% to over 100%.[6] This helps to justify the risk of losing the whole of the principal amount invested. Investment horizons also vary greatly which affects the return. Litigation can either end quickly in a few months with a settlement, or it can turn into a lengthy trial lasting many years which leaves investors waiting long periods before their investment bears any fruit.

Litigation funding is not limited to backing just one individual plaintiff. Many plaintiffs with similar interests can collectively bring their claims under a single action known as a 'class action', where one representative pursues a claim on behalf of the class. This streamlines costs and efficiencies, leveraging many small claims to even up the power dynamic. Other jurisdictions have already implemented class action regimes, whilst New

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[2] Above n 1.

[3] Above n 1.

[4] Above n 1.

[5] Laina Miller Hammond "Steps in the Litigation Finance Process" (January 2020) Validity Finance <https://validityfinance.com/wp-content/uploads/2020/01/Bloomberg-Law-Steps-in-the-Litigation-Finance-Process.pdf>.

[6] Tets Ishikawa "Funders' pricing and the real value of litigation risks" (June, 2021) Dispute Resolution Blog < http://disputeresolutionblog.practicallaw.com/funders-pricing-and-the-real-value-of-litigation-risks/>

Zealand is considering one.[7] Nevertheless class actions are permitted under 4.24 of the High Court Rules 2016.[8] This paper will consider both individual and class actions.

The definition of litigation funding used by this paper focuses strictly on funding for commercial monetary return. Although conceptually legal aid and 'legal crowdfunding' are similar, they will not be considered for the purposes of this paper. They will be briefly mentioned later on for comparative purposes.

A The New Zealand litigation funding industry

There are currently around seven litigation funding providers in New Zealand.[9] According to a Law Commission report in 2020, there have been 40 cases of litigation funding in New Zealand.[10] Ten have been representative actions under High Court rules 4.24, of which only one has been made against the Government.[11] Additional cases of litigation funding against public bodies are discussed below. Typical claims backed by litigation funding are often in the millions, although some litigation funders will consider claims with values less than that.

As will be noted in the next section, the practice is less established in New Zealand than in the rest of the world mainly owing to the legal grey area in which the practice exists. This is despite the fact that litigation funding is currently unregulated in New Zealand, whilst jurisdictions with statutory governance like the United Kingdom and Australia have thriving markets.

Our courts have taken a cautious approach towards litigation funding as shown by their refusal to explicitly abolish the torts of maintenance and champerty like our fellow

[7] Chapman Tripp "Proposed class action and litigation funding regime" (28 June 2022) Chapman Tripp < https://chapmantripp.com/trends-insights/proposed-class-action-and-litigation-funding-regime/>
[8] High Court Rules Act 2016, s 4.24
[9] New Zealand Law Society "Seven litigation funding services in NZ" (5 May 2016) New Zealand Law Society <https://www.lawsociety.org.nz/news/legal-news/seven-litigation-funding-services-in-nz/> .
[10] Above n 1.
[11] Above n 1.

jurisdictions. The torts of maintenance and champerty are key to litigation funding as they prohibit the assignment of a bare cause of action. The Supreme Court in *PriceWaterhouseCooper v Walker* decided that although these torts remain part of the law, they have a very minimal role.[12] They have yet to be relied upon in New Zealand,.[13] and the Law Commission has recommended abolishing them. Our courts are more concerned with the arrangement between the litigation funder and plaintiff. Although they do not explicitly take on a supervisory role to give prior approval to funding arrangements, they will investigate an arrangement if its terms and existence are relevant to the application.[14] They will intervene in funding agreements where there has been an abuse of process, the agreement amounts to a bare cause of action, and where a representative action has been promoted through misleading statements.[15]

The courts accept that there will inevitably be a degree of control held by the litigation funder in the relationship, although too much control will be held to be objectionable. The recent Law Commission report recommends that a litigation funding agreement should only be enforceable by a funder if it has been approved by the Court.[16] The Court will only approve litigation funding agreements when it is satisfied the agreement is fair and reasonable and the plaintiff has had independent legal advice.

B Litigation funding internationally

The practice of litigation funding originated in medieval England where corrupt nobles exploited the legal system by using their subjects to fight their own claims, or as a way of

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[12] *PricewaterhouseCoopers v Walker and Ors* [2017] NZSC 151.

[13] Above n 1.

[14] Adina Thorn and Rohan Havelock "The third party litigation funding law review: New Zealand" (22 November 2021) The Law Reviews <https://thelawreviews.co.uk/title/the-third-party-litigation-funding-law-review/new-zealand>.

[15] Above n 14.

[16] Law Commission *Class Actions and Litigation Funding* (NZLC R147) at 42.

increasing their wealth.[17] To combat this practice, the torts of maintenance and champerty were created to prohibit third-party funding.

Yet the modern litigation funding market is said to have started in Australia in 1995, when insolvency practitioners were permitted to use their power of sale to sell the rewards of a legal claim if the claim was company property.[18] However, the 2006 decision of *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* the High Court fully struck down the remaining barriers to litigation funding by stating that litigation funding was not contrary to public policy and in fact in promoted it.[19]

Today, the market in Australia is booming. As of 2021, there were 33 litigation funders in Australia with a total market size of around $128.4 million AUD.[20] Some are even listed on the stock market. England and Wales similarly saw the rise in litigation funding after court consideration. After *Arkin v Borchard Lines Ltd*, adverse costs were limited to the amount of funding paid by the funder.[21] Other reforms in 2010 known as the Jackson Reforms demonstrated support for the litigation finance market. Finally, in 2011, the Association of Litigation Funders of England and Wales was created. It has 20 members according to a 2019 study and the total value of cases and cash held by UK funders was £1.9 billion. Numerous funders also exist outside of the association.

Globally, the litigation funding market was forecast to reach $13 billion USD in 2021.[22]

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[17] Omni Bridgeway "Litigation finance" Omni Bridgeway <https://omnibridgeway.com/litigation-finance#section-6> .

[18] Above n 17.

[19] *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] 229 CLR 386.

[20] Jason Geisker and Dirk Luff "The third party litigation funding law review: Australia" (22 November 2021) The Law Reviews <https://thelawreviews.co.uk/title/the-third-party-litigation-funding-law-review/australia#:~:text=The%20Australian%20Law%20Reform%20Commission,in%20the%20past%20two%20years> .

[21] Above n 17.

[22] Simon Latham and Glyn Rees "The third party litigation funding law review: United Kingdom – England and Wales" The Third Party Litigation Funding Law Review <https://thelawreviews.co.uk/title/the-third-party-litigation-funding-law-review/united-kingdom-england--wales>.

Litigation funding is pervasive worldwide and also exists in Germany, the Netherlands, Switzerland, Italy, France and Spain.[23] The United States, Canada, Singapore and Hong Kong additionally have markets for litigation finance.[24] With these statistics in mind, the rise of litigation funding is evident, and it's rise in New Zealand is imminent.

C What can litigation funding offer public law claims?

There are benefits and limitations of litigation funding. A frequently promoted benefit of litigation funding is increased access to justice. Plaintiffs are able to make claims when they otherwise would not because the cost barrier to litigation is removed. Another benefit is the increase in efficiency within the justice system. Plaintiffs can access funds faster to pursue their claims rather than relying on a cumbersome state support system. Litigation funding is also said to have increased the number of representative actions brought in New Zealand.[25]

Empirical evidence not only demonstrates the cost of litigation for parties but also the difficulty in obtaining other financial assistance like legal aid. A report noted that cost was a major barrier to getting legal aid in civil disputes, whilst recording that the average hourly rate for lawyers was $292.70 and median weekly earnings for households were $959.[26] This means that just over 3 hours of a lawyer's time would expend the household's full earnings for the week. Furthermore, the legal aid income eligibility threshold is set quite low at $23,820 (although this will be raised to $27,393 next year[27]) so only very select individuals without dependents are able to qualify.[28]

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[23] Above n 17.

[24] Above n 17.

[25] Above n 1.

[26] New Zealand Law Society "Charge-out rates information released" New Zealand Law Society < https://www.lawsociety.org.nz/news/publications/lawtalk/issue-893/charge-out-rates-information-released/>.

[27] Ethan Griffiths "Legal aid rates and minimum income thresholds lifted" *Radio New Zealand* (online ed, 27 May 2022) .

[28] Sol Dolor "Study finds substantial barriers to civil legal aid assistance" *NZ Lawyer* (online ed, 25 May 2018).

Another benefit of Litigation funding is that it mitigates the imbalance of power between plaintiffs and large institutional defendants, or those who hold substantial influence. This is especially relevant to public law claims considering that often the State will be the defendant. Without litigation funding, smaller parties have a diminished capability to bring actions on their own. But whilst it may be uneconomic individually, plaintiffs combining together with a litigation funder makes taking action collectively economic.[29] An additional advantage from the large capital backing that the funder provides is that defendants are likely to be more wary of their conduct and will take the plaintiff more seriously because there is a higher threat of litigation. The large capital backing can also be used to leverage a more favorable settlement, and plaintiffs can no longer be bullied into accepting less than adequate resolutions. Overall, this improves accountability for wrongdoing and in the future it may help to deter harmful conduct.

Finally, a less common benefit is the capital management advantage litigation funding can provide. Plaintiffs can bring a claim without allocating the capital to fund it, which can thereafter be used to serve other interests, reducing the opportunity cost of pursuing the claim.

On the other hand, there is concern that the practice could clog the judiciary by encouraging baseless claims to be advanced, ultimately creating inefficiencies in our judicial system. Another concern is that litigation funders could take advantage of plaintiffs and use them for their own profit seeking. It is noted that excessively high profits may take away from plaintiff's substantive justice.[30]

Arguably the 'David and Goliath rhetoric' could be criticized given that there is often an improper power dynamic between the litigation funder and the claimants themselves.[31] Claimants are potentially vulnerable and open to exploitation through onerous funding

[29] Above n 1.
[30] Above n 1.
[31] Above n 1.

agreements. This risk could be even greater in New Zealand given the lack of any statutory regulation of litigation funding.

A recent example of the pitfalls of litigation funding occurred in a class action against cladding maker James Hardie. A London based litigation funder backed the $220 million claim but pulled their funding mid-trial after losing confidence that the case could be won. This left the plaintiffs with little choice but to accept a mid-trial settlement as they could no longer afford to continue litigation. Almost ironically, in order to seek recourse against the litigation funder the plaintiff will need more funding from another party. Leaving plaintiffs stranded like this exposes how vulnerable they become once they enter into the funding agreement. Although it is necessary that litigation funders reserve the right to protect their commercial interest, it will inevitably come at the cost of the plaintiffs.

III Monetizing public law claims: the gateway for litigation funding

A litigation funder must seek some sort of cash return for its investors. Ultimately, its interest in public law claims hinges on large amounts of damages being recoverable. However, the causes of action to be able to seek this remedy in public law are limited and discretionary. For example, damages are not available for a judicial review claim. There are only a few types of public law claims that can be monetized. Some examples of claims include nuisance, false imprisonment, deceit, defamation, malicious prosecution and occupier's liability. Not every claim will be considered in this paper. The following section selects some of these claims based on their pre-emptive potential to generate money.

There is also a nuanced distinction in what we perceive as public law claims. What makes them inherently 'public' can be sorted in to two categories. One type of claim originates in public law (judicial review, Bill of Rights, Treaty of Waitangi) and is conventionally what we think of as public law. The other type of claim is another form of law (mainly tort law) but the claim is made against the state. In this sense it is public law by the policy factors that the claim is forced to engage in.

A Litigation funding model to determine adequate monetization

As the baseline of litigation funding is that a claim must be monetizable, the next question is to what extent must it be monetizable to be funded. Determining a minimum threshold of return for litigation funding to be commercially viable will vary depending on each litigation funder's preferences and specialty. This paper will estimate an amount after considering the minimum claim values for each of the seven litigation funders that operate in New Zealand. These are set out in the table below.

Table 1.1 Litigation Funder Minimum Claim Values

Litigation Funder	Minimum claim value
LPF Group	$2,000,000
Litigation Lending Services	$1,000,000
Harbour Litigation Funding	10/1 Ratio ($1,000,000+ assumed)
Tempest Litigation Funders	$200,000 – 2,000,000
Omni Bridgeway	$1,000,000
Quantum Funding	Data not available.
Litigation Funding	Data not available.

*Note as some of the funders are Australian entities it is unclear if the specified value is in AUD or NZD but for the purposes of this paper we will assume NZD.

As shown in the table, the largest litigation funder in New Zealand LPF Group will only considers claims above $2 million or more, whereas Tempest Litigation Funders will consider litigation funding claims between $200,000 and $2 million.[32] Harbour funds on

[32] Above n 1.

the basis of ratios; the ratio of claim value to funding must be at least 10/1. But it is assumed from the examples used on their website that the claim value must be in the millions.[33]

Minimum claim values for the other litigation funders operating within New Zealand could not be found. Based on these figures, it seems that a minimum claim value of $1 million dollars is an appropriate threshold for which a claim must be monetizable. The amount will satisfy the prerequisite amounts for most of the litigation funders, although the biggest funder LPF will not be interested until the claim value is doubled. Table 1.2 reflects this model.

Table 1.2 Litigation Funding Model Assumptions

	Claim value does not exceed $1 million dollars	**Claim value is $1 million dollars or more**
Action	Litigation funding will not be considered	Litigation Funding will be considered.

We can now apply this model to public law claims in order to assess their feasibility. Of course, this is only one criterion; once adequate return potential can be established then further criteria can be investigated.

However, a caveat must be acknowledged at this stage. Cases are highly subjective as to their facts and an average estimation of claim values discards outliers. Even though the bulk of claims under a specific category have historically had little claim value, this does not rule out the potential for a future claim to meet the threshold.

[33] Harbour Litigation Funding ""FAQs: our criteria" Harbour Litigation Funding <https://harbourlitigationfunding.com/wp-content/uploads/2017/08/FAQs-Criteria.pdf>

Although there is potential for litigation funding for smaller value claims, they bring up a range of other issues that are not worth considering in depth. Resultingly, funding for smaller claims is out of the scope of this paper. In reality, it must be remembered that the return from a public law claim will be weighed against the opportunity cost of returns from other prospective claims.

B A selection of public law claims

This paper will now consider the various monetizable public law claims and generate an average claim value to which to apply the model. It will go through how each claim is made out and then discuss case law to consider claim value. In summary, many types of claims fail to meet the threshold set by the model. This perhaps speaks to why there has been little litigation funding in the area so far. Generally, this is because many of the actions are rigidly 'public' in nature; they are so focused on the regulation of arbitrary power over monetary compensation that it stifles their commercial potential. To interest a litigation funder, the action must achieve a delicate balance between adhering to its public law origins whilst awarding a damages remedy substantial enough to allow commercialization.

1 Misfeasance in public office

The tort of misfeasance in public office is one such money-making claim. It is an exception to Dicey's equality principle as it holds the Government to a different standard of liability. To establish he tort, four limbs must be satisfied as summarized in *Currie v Clayton* by the Court of Appeal:[34] Firstly, the plaintiff must have standing to sue, and the defendant must be a public officer. Secondly, the defendant must then have acted or omitted to act in purported exercise of her public office unlawfully either intentionally or recklessly. Thirdly, the officer must have acted with 'malice' towards the plaintiff or knew or was reckless to the fact their conduct would hurt the plaintiff. Fourthly and finally, the plaintiff must have suffered loss caused by the defendant's actions.

[34] *Currie v Clayton* [2014] NZCA 511 at [40].

A plaintiff's action for misfeasance in public office must show that they had suffered some special damage not suffered by the general public. This can include harm to reputation, loss of employment, or other forms of economic loss. Emotional harm in of itself will not be enough to be an actionable damage, but it may be a consideration.

This tort can be problematic to make out as it can be difficult to show that a public officer acted with malice. The difficulty in proving the tort is illustrated by its historically low success rate. For example, an Australian study found that only 204 cases of misfeasance in public office have been pleaded since 1950. Of those 204, only nine were ultimately successful.[35] Over 50% of those cases failed because they were unable to prove the mental element of the tort.[36] The Law Commission of England and Wales once proposed to abolish the tort over doubts over its practical utility.[37]

There have been relatively few cases that have established a successful claim for misfeasance within New Zealand which make it hard to generalize an average claim value. In *Garrett*, the plaintiff sought damages totaling $415,000 but this claim was unsuccessful.[38] Australian cases also do not offer much guidance. In *Nyoni v Shire of Kellerberrin*, the malicious conduct of a CEO was imputed the Crown which was his employer. Mr Nyoni was awarded $30,000 in damages.[39] Another case held the State liable for the illegal removal of an aboriginal child from his family but it is unclear as to if damages were awarded.[40]

In a litigation funding context, it is likely that a case involving a single public officer will not involve sufficient damages to entice a litigation funder to fund a claim. Public officers

[35] Kit Barker and Katelyn Lamont "Misfeasance in public office: raw statistics from the Australian front line" (2021) 43 SLR 315 at 324.
[36] At 324.
[37] At 316.
[38] *Garrett v Attorney-General* [1997] 2 NZLR 332.
[39] *Nyoni v Shire of Kellerberrin* [2019] FCA 530.
[40] *Trevorrow v State of South Australia (No 5)* [2007] SASC 285.

are unlikely to have adequate capital even if a substantial order was made against them. The more feasible route will be for a plaintiff to argue for vicarious liability of the public officer's employer or the State, which will target the large reserves of taxpayer money. Even so, *Nyoni* shows small scale damages if this is established. Overall, even though there is the possibility that exemplary damages can also be awarded, it seems unlikely that the average claim amount will entice litigation funder interest.

2 New Zealand Bill of Rights Act 1990

Another avenue is through the breach of the New Zealand Bill of Rights Act 1990. Following the Supreme Court decision in *Baigents Case*, damages are able to be awarded for a breach of the Bill of Rights Act 1990.[41] However, the starting remedy for a breach of the Bill of Rights is a declaration; compensation will only be awarded when there has been a serious breach.

Additionally, under s 92M of the Human Rights Act 1993, damages can be awarded for a pecuniary or emotional loss as a result of discrimination by the Government.[42] The Human Rights Review Tribunal can also award damages under the Privacy Act 1993, the Privacy Act 2020, and the Disability Commissioner Act 1994.

The amount of damages for breaches of the Bill of Rights should not be extravagant.[43] The amount of damages awarded has on very few occasions reached the five figure range.[44] In fact the low quantum of damages available have caused some to question the utility of the remedy.[45]

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[41] *Simpson v Attorney General* [*Baigent's case*] [1994] 3 NZLR 667.

[42] Bill of Rights Act 1990, s 92M.

[43] Andrew Geddis and M B Rodriguez Ferrere "Judicial innovation under the New Zealand bill of rights act – lessons for queensland" (2016) UQLJ 251 at 267.

[44] At 267.

[45] At 267.

Examples include *Pere v Attorney-General* where an officer of the Armed Offenders Squad had accidentally discharged his firearm into the plaintiffs back during his arrest.[46] Ultimately the judge decided there was a breach and awarded $20,000 in damages. In another case, *Dunlea v Attorney General*, the plaintiffs were awarded $18,000 and $16,000 respectively.[47] Evidently this low quantum of damages will fail to meet the model's threshold.

Recently in *Fttzgerald v Attorney-Gerneral of NZ* the High Court awarded $450,000 to a mentally ill man after deciding that he had received a grossly disproportionate prison which was in breach s 9 of the Bill of Rights Act.[48] Though this award is comparatively larger than the others, it reflects the significant discrimination Mr Fitzgerald faced and the tedious 4-year process it took him to get to this point. In the end, it still falls short of the threshold. Even if a plaintiff takes the route of pursuing a claim in the Human Rights Review Tribunal, it will still fail the threshold because the tribunal can only award damages to a maximum of $350,000. Another difficulty is that under section 92 of the Human Rights Act 1993, the Director can provide representation for a party. As legal aid exists in this area, the need for litigation funding becomes more redundant. In conclusion, a litigation funder is again unlikely to be interested in this type of claim.

3 Breach of statutory duty

Another claim is the tort for breach of statutory duty. The tort is mostly self-explanatory; it involves alleging that a duty has been created by a statute and that the defendant has then violated that duty. However, by itself a breach of statutory duty does not give rise to a right to damages. Rather, it is the Court which decides whether the statute was intended by Parliament to allow actions for damages. The Court must also determine whether the plaintiff is within the class of persons for which the statute was intended to protect.

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[46] *Pere v Attorney-General* [2022] NZHC 1069.

[47] *Dunlea v Attorney-General* [2000] 3 NZLR 136.

[48] *Fitzgerald v Attorney-General of NZ* [2022] NZHC 2465.

Acts that have a statutory compensation provision include the Land Transfer Act,[49] and the Public Works Act 1981 for compensation for land taken by compulsion. Like the other claims, it poses difficulties. Critics have pointed to the tort as involving a fundamental contradiction; ascertaining a statutory purpose to provide compensation when the statute has already omitted to include one.[50] Statutory interpretation leads to the inference that Parliament did not intend compensation to be awarded. Furthermore, if an alternative remedy has already been incorporated into the statute, it will reinforce this implication as compensation has already been provided. This requirement makes it inherently hard to attain a damages remedy.

As a final blow, the Courts have also proved to be reluctant to enforce private law liability for the breach of the tort. They appear reluctant to impose liability when the state is acting in a regulatory or welfare manner, which makes it exceedingly hard for a public law claim to succeed. Many claims alleging breach of statutory duty have failed. For example, in *Three Meade Street Ltd v Rotorua District Council* the plaintiff tried and failed to establish a breach of statutory duty under the Building Act 1991.[51] All these issues make the idea of seeking great monetary compensation from a breach of statutory duty doubtful.

Again, there are little if any cases in New Zealand which illustrate damages being awarded for breach of statutory duty. The closest is in *Daisley v Whangarei District Council* where the Court allowed the possibility of a statutory duty being found under the Resource Management Act but did not specifically award damages.

Australian cases provide some guidance although it must be remembered that each case will turn on its own facts. In *Doe v Australian Broadcasting Corporation & Others*, the Court found ABC breached its statutory duty after it published material that led to the

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[49] Land Information New Zealand "Compensation" Land Information New Zealand <https://www.linz.govt.nz/land/land-registration/land-transfer-system/compensation>

[50] Land Transfer Act 2017, Subpart 3.

[51] Public Law Team "Monetary remedies in public law" Law Commission UK (11 October 2004) <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/04/Monetary_Remedies_Paper.pdf> at 2.26.

identification of a victim of sexual assault. The plaintiff was awarded $110,000 in general damages along with $124,190 in special damages.[52] Based on this example. a breach of statutory duty will not meet the threshold for damages.

4 Negligence

The tort of negligence offers the greatest potential avenue to recover substantial damages. For a claim to be successful, three limbs must be made out; the public body must have owed a duty of care to the plaintiff, this duty was breached by a failure to take reasonable care, and that the breach of duty caused the loss suffered by the plaintiff.[53]

Before a duty of care is established, a Court must determine whether a claim against the public body is justiciable. The Privy Council in *Anns v Merton London Borough Council* outlined that where policy matters make the claim not justiciable, the claim will fail.[54] The test to find the existence of a duty of care originates from *Caparo Industries v Dickman*.[55] The first prerequisite is that the harm must have been reasonably foreseeable. There must have also been a sufficient nexus between the plaintiff and defendant. Lastly, it must be fair and just to impose a duty of care upon the defendant.

The first limb that will be especially affected in a public law claim as it engages with policy arguments. Difficulty arises as there are numerous policy arguments as to why it would not be fair and just to impose a duty of care on a public body.[56] These arguments can be broadly categorized into four groups. Firstly, where there would be unacceptable economic consequences of imposing liability on a public body. Secondly, where imposing a duty of care would have a 'chilling effect' on public bodies and constrain their decision making. Thirdly, where the separation of powers would come into question by allowing the

[52] *Jane Doe v Australian Broadcasting Corporation & Others* [2007] VCC 281.
[53] Above n 51, at [2.30].
[54] *Anns v Merton London Borough Council* [1977] UKHL 4.
[55] *Caparo Industries v Dickman* [1990] UKHL 2.
[56] Above n 51, at [2.40].

judiciary to have too much control over an arm of the executive. Lastly, where victims might already have adequate remedies available to them. Courts have also been shown to be hesitant to impose liability for a failure to exercise a statutory power.[57]

The plaintiff must then show that the duty was breached by a failure to meet the standard of care. This test is assessed objectively – whether a reasonable person in the circumstances would or would not have done something. Other factors influence the standard of care including the seriousness of the harm potentially caused by the act, the cost of preventing it, and the risk that an adverse event will occur. The same policy arguments used before in determining whether the public body owes a duty of care also contribute to ascertaining the standard of care required. Causation is made out through two elements. There is the traditional 'but-for' test that establishes factual causation, and then the legal causation element that considers whether the connection between the defendant's act and the harm done is sufficiently close.

A notable policy argument against state liability is that holding the state accountable will have a negative effect on society because the state will naturally implement safety measures to protect itself. Arguably this is what occurred in the building sector. Following claims by houseowners in respect of a public body's building regulatory function, the public body implemented stricter building standards that increased the cost of building and burdened the public.

The case *Strathboss Kiwifruit Ltd v Attorney-General* is a great example of when a public law claim has been backed by litigation funding. LPF group funded the class action claim on behalf of kiwi fruit growers alleging that the Ministry of Agriculture and Forestry caused the associated losses following the outbreak of PSA bacteria. [58] *Strathboss Kiwifruit Ltd v Attorney-General* initially sought around $450 million in damages. The facts were that the

[57] At [2.40].

[58] New Zealand Law Society "Balancing corrective justice and indeterminate regulator liability" (12 May 2020) New Zealand Law Society <https://www.lawsociety.org.nz/news/lawtalk/lawtalk-issue-939/balancing-corrective-justice-and-indeterminate-regulator-liability/>

Ministry had granted a permit to a shipment of kiwifruit pollen which contained PSA bacteria. This gave rise to the inquiry whether the Government owed a duty of care to the growers for allowing the import permit and for failing to inspect the kiwifruit pollen.

The case also presented useful discussion of the 'fair, just and reasonable' limb of the negligence test. Originally the High Court found that imposing a duty of care was fair, just and reasonable, although the Court of Appeal then overturned that decision. The Court reasoned that although it would have found that the duty was breached if a duty was owed, the Crown had statutory immunity and policy factors meant that a duty could not be found. These policy factors particularly focused on the risk of indeterminate liability. They also reinforced the need to protect against the chilling effect of restricting public bodies liberty to perform their regulatory function. The Court discussed that the financial costs of paying out such large compensation and the cost of managing them would come at the expense of spending on other public serves, whilst also increasing the likelihood that excessive protective measures would be passed on to the public.

Strathboss then appealed to the Supreme Court but the case ended up settling before trial. The sum the Ministry agreed to pay was $40 million, far from the original claim of $450 million. LPF was reportedly paid around 40% of the sum, or about $15 million for their role.[59] In terms of costs, the Crown spent $6 million on defending itself.[60] Although the figure LPF spent is unclear, being stated as "more than a million dollars",[61] estimating a $3 million investment LPF received a 500% gross return. This clearly demonstrates the investment potential of public law claims in negligence. Given the prior history of litigation funding in the area, a negligence claim is likely to pass the commercial viability threshold according to the model and will invite litigation funder interest.

[59] Hamish McNicol "Funder's costs and fees reduce $40m kiwifruit settlement by $15m" *The National Business Review* (online ed, 9 December 2021)

[60] Above n 1.

[61] Above n 1.

5 *Treaty of Waitangi*

The Treaty of Waitangi is a unique type of public law claim that results in monetary compensation. It differs from the other claims as the process exists outside of the traditional judicial system. The process is started by aggrieved iwi negotiating with the Crown. Once an acceptable agreement is reached a deed representing it is created. The final step is that this deed is turned into legislation and settlement is complete.

As of 2018, 73 settlements have been completed totaling $2.24 billion[62] which shows that settlements have involved significant sums of value. However not all compensation is monetary; many settlements will also comprise of property. However, non-monetary compensation will not be considered as a valid return within a litigation funding context by this paper. Examples of large settlements include the Ngati Porou settlement in 2010 which totaled $90 million including Crown forestry rental and cultural redress, and the 1997 Ngai Tahu settlement for $170 million.[63]

There are notable factors which restrict the feasibility of litigation funding for this type of claim. First, the Crown already provides a degree of financial support to Maori negotiators to reach a settlement. On average, this funding amounts to $600,000 per settlement.[64] Iwi may also receive support from the Crown Forestry Rental Trust to advance their claims in the Waitangi Tribunal. The total of this support package averages approximately $5.3 million.[65] Finally, there are other legal aid options available to support iwi.[66] Because of the vast amount of legal assistance provided, it is managed by the Office of Treaty Settlements. The degree of legal assistance available reduces the need for litigation funding in the first place.

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[62] Te Tai "What are Treaty settlements and why are they needed" Te Tai <https://teara.govt.nz/en/te-tai/about-treaty-settlements>.

[63] New Zealand Government "Find a Treaty Settlement" New Zealand Government < https://www.govt.nz/browse/history-culture-and-heritage/treaty-settlements/find-a-treaty-settlement/>.

[64] Dean Cowie "The treaty settlement process" in Nicola Wheen and Janine Hayward *Treaty of Waitangi settlements* (Bridget Williams Books Limited, Wellington, 2012) 48 at 52.

[65] At 52.

[66] At 52.

Another factor is the risk that litigation funding of treaty claims could erode the substantive justice sought by the plaintiffs. In many cases the purpose of a Treaty claim is to recoup the historic loss suffered by iwi, and this may be undermined by the large fees taken by a litigation funder. Litigation funded class actions could be a different avenue for claims pertaining to breaches of Te Tiriti o Waitangi. However, it has been noted that there may be extra procedural requirements for a representative plaintiff of this type of collective. One is that they must have a mandate according to tikanga in order to represent the group.[67] Conversely, those with a tikanga mandate may not comply with the requirements of a representative plaintiff. Overall, even though there is sufficient potential for return in the area, the existence of legal aid is likely to make litigation funding unnecessary.

6 Extra-judicial avenues

There may also be extra-judicial remedies through which monetary compensation can be awarded. Some statutes have provisions that facilitate this. For example, claimants under the guarantee of title provisions of the Land Transfer Act 2017 can seek compensation from the Crown, but such statutory regimes are not common. Another way is when claimants may be awarded ex-gratia compensation; that is when public bodies compensate claimants without being legally compelled to do so. They instead award compensation on a voluntary basis and do not admit guilt by doing so.

Another way is through an Ombudsman's recommendations, whose function is to inquire into concerns that the executive is not exercising its power correctly. It should be noted that they only have the power to make a non-binding recommendation which can promote ex-gratia payment. Yet in practice an Ombudsman's recommendations are generally complied with. Another flaw is that complaints to the Ombudsman are extra judicial which means there are less safeguards available to plaintiffs from exploitive litigation funders.

[67] Above n 1.

An Ombudsman may disprove of the litigation funding relationship and award less damages as a result.

Ombudsman recommendations can result in significant amounts of money being awarded. In the UK, farmers subject to government maladministration were awarded £600,000.[68] Additionally, Barlow Clowes victims were awarded $150 million in ex gratia payments.[69] This size would meet the threshold to make litigation funding worth the effort. But despite this success in the UK, awards such as these have proved to be somewhat rare in New Zealand.

In comparison to Court based claims, it appears easier for an extra-judicial remedy to be obtained. An Ombudsman can make a recommendation for compensation if they find evidence of maladministration, whilst the courts require a private law cause of action to be made out. Yet an Ombudsman can only make a recommendation and has a great level of power in deciding how much compensation should be awarded, whilst the Court makes binding orders that pay out full compensation for the harm caused. Generally, this means that lesser sums of money are awarded. However, that should also be weighed up against the lesser time, cost and expense spent on litigation.

Similar to Treaty claims, the problem with these claims from a litigation funding perspective is that there are relatively few lies cost barriers which require litigation funding to overcome. Anyone is able to make an Ombudmsan complaint with the cost being next to none. Essentially this means that litigation funding in the area is non-viable.

7 Administrative claims

As mentioned earlier, the remedies for administrative claims do not include damages. For the plaintiff to recover monetary compensation for judicial review, they must establish an

[68] Above n 51 at 2.100.
[69] At 2.100.

additional private law cause of action. Either they must bring a judicial review claim and add on a private law claim, or they must use a traditional private law claim for damages. The claims are legally distinct from each other.

Some judicial review claims have been handsomely rewarded. The *Quake Outcasts* case dealt with a class action against a public body..[70] Following the Christchurch Earthquakes and subsequent creation of 'red-zone' areas, uninsured houseowners in these areas took on the Government to judicial review this action as unfair, unreasonable and unlawful After lengthy litigation spanning nearly six years the Government eventually settled the case for around $12 million. The Government ended up paying all of the persons who were uninsured homeowners in the red zones, not just those who were part of the action. In instances like this, there could possibly be scope for litigation funding.

Despite the success of *Quake Outcasts*, damages depend on the supplementary action brought with a judicial review claim not the judicial review claim itself. In effect, this makes it hard to generalize a claim return due to the variability of supplementary actions. For the most part, it appears that damages will not pass the threshold although in rare cases like *Quake Outcasts* there will be potential.

IV Conclusion

The bulk of the claims fall litigation funding feasibility because they are unable to provide sufficient monetary incentive to a litigation funder. Of course, the circumstances of each case may vary the feasibility – a record level of damages may be sought by an individual greatly harmed by the state in a Bill of Rights action for example. But on average, the claims mainly fail to meet the requisite threshold of $1,000,000. Besides this, many of the claims also have substantial procedural or practical difficulties that present a hinderance to litigation funding.

[70] Quake Outcasts New Zealand Parliament "Outcasts case settled" (press release, 5 September 2017).

A breach of the Bill of Rights is unlikely to be funded due to the lower relative scale of damages awards. Another issue is the high likelihood of the plaintiff's and litigation funders objectives clashing. Vindication of a plaintiff is may not best be facilitated through damages, and this divergence in motives is likely to cause problems that will deter litigation funding.

The only likely way a misfeasance in public office claim would be funded is if vicarious liability could be established which may be able to create a sufficient level of damages. The possible advantages that a misfeasance claim may has over a claim of negligence is that it is apparently easier to recover damages for pure economic loss compared to negligence.[71] It also does not require proximity to be shown as in negligence.[72] But the main disadvantage is the difficulty in having to prove that the act was unlawful in a public law context – the "public law hurdle". As alluded to before, it is also very difficult to prove the fault limb. This makes litigation riskier and lowers the chances of success.

Breach of statutory duty also suffers from the same "public law hurdle" and limited quantum of damages. Given that it is up to the Court to decide whether a right to damages was intended by Parliament, the probability of success may be hard to quantify. Noting that the Courts appear hesitant to impose liability on public bodies for the policy reasons discussed, this avenue is inferior to negligence.

Extra-judicial remedies are able to meet the commercial threshold, but this action is ruled out because the costs of bringing an action are extremely low. Despite advantages like an action in Court is not necessary or usually only proof of maladministration is required,[73] the lack of litigation cost barriers mean there is no real need for litigation funding. The process exists outside of the Courts and all that is needed is a complaint.

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[71] Above n 51, at 2.21.

[72] At 2.21.

[73] At 2.103.

Treaty of Waitangi claims also satisfy the commercial viability test but again existing support in the area makes funding in the area redundant. There is also somewhat of a morally objectionable element, as the recourse provided back to the iwi or tagata whenua would be depleted by a commercial entity taking the lion's share of the compensation. It is reminiscent of iwi being taking advantage of in the first place, not to mention that settlements can be disputed by other iwi who feel that they have been cut out.

Finally, this paper concludes that the tort of negligence is the most viable public law claim for a litigation funder to back. It is able to produce sufficient reward to justify investment and it has comparatively less obstacles to a successful claim. Historic cases of litigation funding for negligence also confirm its viability. Public bodies are the best targets for a litigation funder as they open up a significant base of capital from which to reap damages. In terms of litigation risk, negligence is superior as the plaintiff does not have to prove that an act was unlawful in a public law context before arguing the act violated a duty of care.

Part Two: The implications of litigation funding on principles of public law

V The essence of public law; what is it designed to achieve?

The next part of this paper delves into how litigation funding affects public law principles. Specifically, it will investigate how it may affect the right to justice, the promotion of the public interest, and the arguments for state liability. Overarchingly, this discussion centers around how well can these principles withstand a degree of commercialization before they crumple. Whether a suitable compromise between the two can be achieved helps to determine the future of litigation funding in the area. After reviewing the aims of public law, this part then looks at how litigation funding affects each principle individually.

A What is public law?

Defining public law helps to establish exactly how litigation funding will affect it, although ascertaining a definition is not an easy task. The difficulty in finding an appropriate definition is said to partly originate from a Diceyan rule of law perspective; that there should only be one body of laws that everyone including the government should be ruled by.[74] This naturally excludes the possibility of a separate body of law called public law as opposed to private law. However, courts have been compelled to recognize that the application of common law principles to public authorities must also account for public interest and policy as a result of the Governments role expanding.[75] This is one of the ways in which public law can be differentiated from private law. But the origins of public law also speak to its purpose. Public law mainly exists to curb the arbitrary use and abuse of power held by the state.

B What is the purpose of damages in public law claims?

As part of this inquiry, Mclay suggests it is useful to ask the key question of what the role of damages is within a public law system.[76] Varhaus suggests that although damages have traditionally played a minor role in public law, they serve the function of protecting fundamental rights, ascertaining the limits of governmental power, and effecting the rule of law principle of equality.[77] Exemplary damages are said to be crucial in "restraining the arbitrary use of executive power and buttressing civil liberties".[78]

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[74] Sin Boon Ann "Public Law: An examination of purpose (Part I)" (1991) Singapore Journal of Legal Studies 431 at 431.

[75] At 431.

[76] Geoff McLay "What are we to do with the public law of torts" 2009 7 NZJPIL 373 at 374.

[77] Jason Varuhas "Examplary damages: public law functions, mens rea, and quantum" (2011) 70(2) 284 at 284.

[78] At 285.

The role of damages was considered in the Supreme Court in *Taunoa* in relation to a breach of the Bill of Rights.[79] *Taunoa* contemplates that the purpose of awarding damages in vindication is a signaling device to the government as opposed to a traditional compensatory device. This requires an amount that is moderate but also instigates governmental action. *S v Attorney-General* reiterated the same argument that damages should be used to incentivize government behaviour.[80]

The award of public law damages is also discretionary as opposed to other types of claims. As Mclay puts it, "the right to damages becomes then more of an ability to petition the Court to consider compensation, and in deciding the Court has to balance public and private interests in a way that would be foreign to private damage suits".[81] Public law damages are not a remedy by right; they are awarded when the Court considers it to be part of their supervisory role.[82]

Not all commentators agree that an award of damages helps to enforce the separation of powers.[83] Some commentators have suggested that the remedy of public law damages is actually contrary to that principle by removing the flexibility provided to public bodies as to how they respond to a conventional public law remedy.[84]

In summary, damages are supposed to act as a deterrent to the Government and as a tool for the judiciary to push back against encroaching Government power. Additionally, damages allow reparation against the state when there is an expectation that our society should be protected against the state in situations where private individuals would not intervene.[85] Damages actions have the potential to initiate political accountability.[86]

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[79] *Taunoa and Ors v The Attorney General and Anor* [2007] NZSC 70.

[80] *Simpson v Attorney General* [*Baigent's case*] [1994] 3 NZLR 667.

[81] Sam Miles "The purpose of remedial discretion and the public law rights" (LLB(Hons) Dissertation, Victoria University of Wellington, 2018)

[82] Above n 81.

[83] Above n 81.

[84] Above n 81.

[85] Above n 76, at 376.

[86] Above n 77, at 284.

This explains why only a select number of claims are sufficiently monetizable; damages are a signaling device not a market making initiative. Those claims which are sufficiently monetizable present a grave need for governmental change in the area, as there has been an acute failure of the Government to protect the people. Bigger monetary awards may also be awarded when there is a failure by the Government to change its conduct.

But the effectiveness of damages as a signaling device has not always been agreed upon. Some question whether damages are the appropriate remedy to effect this purpose. For example, the Leaky Building crisis was criticized for not being a particularly effective incentive for the state to change conduct despite the cost, and litigation was said to have failed to provide an adequate mechanism for compensation.[87]

VI Consistency of litigation funding with public law principles

This section will consider whether litigation funding is beneficial or detrimental to each of the listed principles. Broadly, the answers are not clear cut. Whilst litigation funding may enhance some aspects of each principle, it may also be detrimental in various ways. Deciding whether litigation funding is beneficial or detrimental to each principle is more of a holistic evaluation after weighing up all the implications.

A Right to justice

A point of contention is that litigation funding could diminish our fundamental right to justice through proliferating unmeritorious claims. The general concern is that a litigation funders profit motive will lead them to fund as many claims as possible to maximize profits, and without paying attention to the particulars of each case. This in turn will 'clog' our Courts up with an administrative burden in dealing with a rapid influx of claims and many that should not have been tried in the first place. Because of the resulting decrease in efficiency, our right to justice will be negatively impacted. We believe as we exist in the

[87] Above n 76, at 385.

state's pastoral care, they must provide us with equal and efficient access to recourse for harm suffered. Additionally, many people shudder at the thought of commodifying justice. This is perhaps because we feel like justice should be independent of any relationship to money. If money is able to buy the sorts of things we consider to be beyond reproach, like justice, it alters how we value them.[88]

But I argue that litigation funding will improve access to justice and will especially benefit society by bringing actions that are in the public interest. Litigation funding is seen by many as a strong proponent for the right to justice. The recently published Law Commission report on litigation funding reiterated that:[89]

> There are significant barriers to accessing civil justice in Aotearoa New Zealand, including the costs associated with litigation. Class actions and litigation funding are not a silver bullet for those issues but we think they can both make important contributions

The sad reality is that justice is already beyond reach for people without sufficient funds, and litigation funding is a tool to alleviate this inequality. The argument that litigation funding will encourage unmeritorious claims to be brought is flawed and ignores the basics of litigation funding. Simply funding as many claims as possible will not maximize a litigation funder's profits, as their profit depends only on the funding of *successful* claims. Given that the litigation funder will lose all of its investment in the case no damages are awarded, there is little chance that they will disregard the facts of claims and encourage those that are baseless. Meticulous attention to the merits of claims is required to maintain longevity in business. Another safeguard is the Lawyers and Conveyances Act Rules 2008 which reminds lawyers of their duty of fidelity to the Court, which would be breached by bringing a baseless claim. Finally, some also believe that a clogging of the courts is also unlikely because the courts are actually "well equipped"[90] to deal with a rise in claims.

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[88] B C Bailey "Litigation funding: some modest proposals" (LLB (Hons) Dissertation, University of Otago, 2018).

[89] New Zealand Law Commission "Law commission recommends new class action act and court oversight of litigation funding" (press release, 27 June 2022).

[90] Above n 1.

More lessons can be gauged from Australia. In 1992, a federal class action regime was introduced into Australia despite the numerous concerns mentioned above. However, those fears never really materialized.[91] Worries that the 'litigation floodgates' would open were not met as the number of class actions grew but they did not increase exponentially.[92]The regime operated to enhance access to justice.[93] I suggest the same would happen here.

Overall, litigation funding enhances the right to justice and is desirable in facilitating more public law claims to be brought. Noting some of the significant claims against public bodies like *Strathboss*, litigation funding may be the only practicable way that these large claims can be viable. It is unlikely that individuals will be capable of fronting up the necessary capital, whilst businesses also face the opportunity cost of deploying large amounts of capital to pursue any action. Litigation funding evens up the playing field and makes the power dynamic of taking on the State less daunting. In this sense, it is consistent with Dicey's equality principle in being able to hold the State more accountable.

B Contrary to public interest

Public law duties are said to be not legal but political ones, with the primary duty being to act in the public interest.[94] Litigation funding can conflict with the public interest component of public law claims, which reduces the desirability of funding in the area. The concern is that the litigation funders profit motive will not align with the plaintiffs objective, and they will act selfishly at the expense of the plaintiff and general public who have an interest in the claim. Even though a litigation funding agreement will be objectionable when the litigation funder has too much control over the claim, they are still

[91] Hon Justice S C Derrington "Litigation funding: access and ethics" (4 October 2018) Australian Academy of Law Lecture <https://www.alrc.gov.au/wp-content/uploads/2019/08/AAL-Lecture-2018.pdf>
[92] Above n 91.
[93] Above n 91.
[94] Above n 81.

able to exert some control over the litigation.[95] A litigation funder is permitted to take steps to protect its investment,[96] which still poses the risk that the funder selfishly pushes for a profit-inducing outcome instead of the best possible outcome for the plaintiff and society.

This risk is higher in a public law claim context as there are limited avenues to recoup damages. Damages may not be the best way for the plaintiff to receive vindication for their rights. As discussed before, if damages are used as a remedy then they are more about deterring the Government than compensating the plaintiff. Yet a litigation funder will likely direct litigation strategy towards damages regardless. For example, a plaintiff may prefer a declaration of inconsistency for a breach of the Bill of Rights Act 1990, but a litigation funder could pressure them to seek damages for emotional loss.

Whilst the threat it poses to proper vindication affects the public interest in appropriate recourse, the divergence in motives also thwarts the public interest more indirectly. Public interest litigation is often brought to the Courts to further the good of the people and clarify points of law. One such example was the judicial review of the Covid-19 lockdown orders.[97] If a litigation funder was to take control of such cases, they could stifle important developments in the law for their own commercial advantage. Public law claims inherently involve a degree of public interest because they involve questioning the bounds and proper use of authority, which makes them especially vulnerable to this detrimental effect.

Divergence means that two functions of the judiciary may come into conflict; to resolve claims and provide compensation to people within its jurisdiction, and as a vehicle for lawmaking which qualifies the state of the law. Undoubtedly both are important, but having one prevail over the other is unnecessary and undesirable. Generally, the judiciary should be able to fulfill these functions in tandem.

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[95] Above n 88.

[96] Above n 88.

[97] *Andrew Borrowdale v Director-General of Health and Attorney-General* [2020] NZHC 2090.

Moreover, litigation funders are incentivized to settle claims out of Court to mitigate the risk of their investment. Litigation funding can be used to leverage more favorable settlements as defendants more wary of lengthy litigation from a well-resourced plaintiff that could drain both parties' costs. A settlement guarantees a return for investors but only offers money as compensation and denies the formulation of a precedent. Although this serves the social benefit in providing a resolution to claimants, it may not be the one they wanted and leaves questions surrounding the law unsettled. Litigation and judicial intervention should not hinder the pursuit of the common good.[98]

One caveat is that cases that deal the most with public interest may not be of interest to a litigation funder due to their lack of potential to be sufficiently monetizable. As shown in Part One traditional 'public interest' claims like Bill of Rights or judicial review actions have little potential to generate returns. The Commission notes that the profit driven incentive of a litigation funder may mean it has a limited role in public interest litigation, or where non-monetary compensation is sought after.[99] Because these claims focus so heavily on a non-monetary result, this may be an inherent safeguard to detrimental litigation funding. Another factor to be aware of is that the Law Commission has recommended the creation of a public class action fund to provide funding for plaintiffs. Ultimately this would serve the purpose of funding these types of claims, and would mitigate the aforementioned risk.

Even so, some are fearful of the risk that a litigation funder could impose a political agenda by using their power to pick and choose what cases to fund. A scenario such as this would harm the public interest and undermine democracy in our society. Whilst in depth consideration of litigation funding for returns other than commercial gain is outside of the scope of this paper, the vulnerability should be noted here. Yet as considered above, the fact that a litigation funder depends on its commercial viability above all else will likely minimize this effect.

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[98] Jason Varuhas "The development of the damages remedy under the New Zealand Bill of Rights Act 1990: from torts to administrative law" (2016) NZLR 213 at 233.

[99] Above n 1.

C State liability

Another issue unique to litigation funding for public law claims is the appropriateness for public bodies on the other side to be fronting up the bill for successful claims. Ultimately, this is a cost suffered by the taxpayers. In this sense, litigation funding may encourage the 'milking' of public authorities which contradicts the signaling purpose of damages in public law claims.

Concerns around public law liability bring up similar key points to justify restricting it. Generally, there is worry around the justiciability of discretionary public policy decisions that deal with the allocation of resources between competing social ends.[100] Another worry is that a body's failure may be a 'pure omission' to prevent immediate harm. There is also the possible incompatibility of any duty of care with the intentions and purposes of legislation under which the public authority acts. Furthermore, the imposition of a duty may cause the state to react defensively to the detriment of the public, and it may create dilemmas for decision makers due to legal or ethical conflict from competing responsibilities. Other concerns revolve mainly around the significant or indeterminate liabilities which could come about from a single wrong decision, the coherent development of negligence law with other legal principles, and the need for an appropriate balance to be reached between the public body's function to protect individuals and to protect themselves.[101]

The cases of *Anns v Merton* and *Home Office v Dorset Yacht Co Ltd* were the first to consider public authority liability. As articulated by Mclay, there is a conceptual tussle as to when liability should rise; when does an expectation for the Government to treat us well turn into something that amounts to a private law right that grants compensation.[102] State liability was considered in New Zealand in the leaky building saga which gave rise to a

[100] Justine Bell-James and Kit Barker "Public authority liability for negligence in the post-Ipp era: sceptical reflections on the 'policy defence'" 40 MULR 1 at 6.
[101] At 6.
[102] Above n 76, at 374.

debate whether local councils or private actors should bear the cost.[103] This resulted from construction that took place between the 1990's and mid 2000's which utilized subpar materials and installation techniques, leading to many defective buildings. The Court grappled with whether the local councils who inspected and granted consents for these buildings should then be held liable. Historically many class actions have revolved around this issue.

Arguments focusing against imposing state liability include the proposition that the Government should not have to indemnify against social costs when its function aims to improve social good. Obviously, there must be justice regardless of who violates it, but it is suggested that it is inherently fairer that we target private actors who are able to assess and insure against the financial risk. These private actors have commercial objectives, and we want to avoid the chilling effect where public bodies become wary of performing the function that they need to. It is undesirable to regulate public power to such extent that it subverts the public interest it was tasked with upkeeping.[104]

Furthermore, the standard of care that applies to public bodies is altered by public interest arguments. On one side, they should be held to a lower standard because they perform a function that benefits the whole of society and not just individuals within it. They also cannot choose whether to perform their function or not and resultingly have little choice in the risk they take on. Scholars have warned against the Courts increasing the scope of liability too far.[105] Yet this can also be used to argue for a higher standard of care as we expect them to create this benefit for society. They could perhaps be likened to private fiduciaries who also are subject to stricter legal standards because they deal with the affairs of others.[106]

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[103] *North Shore City Council v Body Corporate 189855 (Byron Avenue)* [2010] NZSC 78.
[104] Above n 98, at 233.
[105] Above n 76, at 373.
[106] Above n 100, at 8.

But when there are private actors who are making a market out of the Government's mistakes, it upsets the balance of arguments in holding public authorities liable. A Court may be more hesitant in appropriating responsibility, as they may be uncomfortable that private actors will essentially be draining taxpayer money for their own private enterprise. The same money that could potentially be used to create more social good rather than line the pockets of a few. Tort law has even been criticized in that it fails be achieve the goal of compensating.[107]

Despite these concerns, some judges have stated that "the proceeds of taxation represent the price paid for maintaining respect by public officials for the observance of the rule of law, to the benefit of taxpayers and society as a whole".[108] Varhaus also notes that a Court should be slow to deny or reduce awards of damages on the basis of an authority's means to pay, especially when a serious breach of civil liberties has occurred.[109] Effectively, the monies paid by authorities are part of the cost of upkeeping the separation of powers.

Continually, allowing private actors to profit from Government mishaps may improve public accountability. Bovens describes public accountability as:[110]

> 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 judgment, and the actor can be sanctioned

This keeps in line with the signaling purpose of damages as the Government becomes incentivized to rapidly alter its conduct if it faces significant liability, and to shut down the market it has inadvertently created.

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[107] Above n 76, at 383.

[108] Above n 77, at 287.

[109] At 287.

[110] Controller and Auditor-General "Part 5: planning for, managing and evaluating public accountability in *Public Accountability: a matter of trust and confidence* (Controller and Auditor-General, Discussion Paper, September 2019) at 5.4.

Massive awards of damages against public bodies are not new, as demonstrated by some of the case law mentioned. The leaky building saga still poses a significant financial burden upon councils. Although it is suggested that the amount of leaky building claims in Auckland is decreasing, it is stated that the Council must still set aside $350 million every year to cover potential future settlements.[111] Back in 2017, the estimated total cost of the leaky building saga was $600 million.[112] A recent review into building defect disputes spanning 2008 and 2018 additionally considered the financial risk posed to consent authorities. The review stated that the Building consent authorities had paid out $1 billion in settling building disputes over this period.

However, the reality is that litigation funding in the area could well become a victim of its own success. The proliferation of claims for vast sums of money against public bodies is not desirable and could potentially cripple them from functioning. As previously discussed, it would be severely detrimental to the public interest to make authorities wary of performing the regulatory function. In this context, the separation of powers is also threatened as the judiciary can impose significant and cumbersome liability upon the executive. This oversteps its mandate to protect against an encroaching state and usurps the balance of power in its favour.

If the Government feels too threatened, they may legislate to bring an end to litigation funding in this area. Therefore, the longevity of litigation funding in the area depends on achieving a finely tuned balance between holding the Government accountable and signaling it needs to change its ways, and illegitimately allowing private actors to profit at the expense of a well-functioning executive.

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[111] Stephen Forbes "Auckland Council group's ongoing battle to settle leaking building claims" *Interest New Zealand* (online ed, 5 June 2019).

[112] Above n 111.

D Summary

Litigation funding appears to be consistent with the right to justice and plays an important role in enhancing it for public law claims. Despite this, it seems that the public interest intrinsic to public law claims is vulnerable to a litigation funders selfish profit motive. Furthermore, the fact of litigation funding weakens the policy arguments for holding the State liable. At the forefront of these findings is the revelation that the line between the public law realm and commercial world must be drawn here. Allowing a booming litigation funding market for public law claims will constitute an inappropriate infringement on some of the very core purposes public law aims to achieve. Therefore, it is unlikely that litigation funding will succeed in this area bar a few ripe pickings.

VII Conclusion

Litigation funding involves bankrolling a legal claim in return for a percentage of any compensation awarded. Not only must the claim be able to produce some monetary compensation, it must also pass a commercial test that the quantum of compensation justifies the risk of investment. In relation to public law claims, litigation funding in the area has been sparse. This paper concludes that this is due to the low level of damages that many of these claims may glean.

Yet suing a public body for negligence is one action that stands out as being able to accommodate litigation funder interest. The high scale of damages and comparatively less difficulties make it a prime candidate for litigation funding, whilst it already has a track record of being funded. However, the ‘public’ component of public law claims calls for extra caution and prevalence of litigation funding in the area is not necessarily a joyful outcome.

Although the practice enhances the right to justice, public law claims are especially vulnerable to being misappropriated for selfish commercial purposes at the cost of their public interest purpose. Especially when a public body is being made to pay out huge sums

of money to private investors, the policy arguments for imposing state liability are weaker. Many remain sceptical of the ‘deterrent’ role that damages are said to play.

Overall, the public law claim market has been relatively untapped up until now and it is probably best if it stays that way. That said, with increasing attention in the area and more regulation close to being implemented, these risks could be better mitigated. Funding an action in negligence against a public authority is a potentially profitable avenue to explore, as long as funding does not overstep to create inappropriate exploitation of the public/private relationship.

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