IN THE SUPREME COURT OF NEW ZEALAND

SC 49/2006
[2008] NZSC 45

	BETWEEN	SUSAN COUCH Appellant
	AND	ATTORNEY-GENERAL Respondent

Hearing: 17 April 2007

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: B P Henry and T Walker for Appellant
J C Pike and F E Guy Kidd for Attorney-General

Judgment: 13 June 2008

JUDGMENT OF THE COURT

The appeal is adjourned in terms of paragraph [1] of the reasons.

REASONS

ELIAS CJ AND ANDERSON J

(Given by Elias CJ)

[1] The victim of a criminal assault claims exemplary damages from the Attorney-General for claimed failures of the Probation Service to exercise reasonable care in the supervision of the parolee who seriously injured her. Her claim has been

struck out in the Court of Appeal on the basis that it discloses no cause of action because no duty of care was owed by the Probation Service to her. A further argument that the claim should be struck out on the basis that exemplary damages are not available for negligently causing personal injury did not have to be addressed in the Court of Appeal, because it took the view that no duty of care arose. Whether exemplary damages can be claimed, if a duty of care cannot be excluded, remains a live preliminary issue but is not disposed of in this judgment because the parties did not have time at the hearing to address the point. The question for determination now is whether the Probation Service may owe a duty of care in law to the victim. As the Court is unanimous in resolving this question in favour of the plaintiff, so that the basis on which the claim was struck out in the Court of Appeal falls away, it will be necessary to hold a further hearing on the availability of exemplary damages, if the parties require that matter to be determined before trial. Because the parties may wish to reconsider whether the availability of exemplary damages is suitable for determination before trial, in the light of the discussion in the reasons of the Court about the principles upon which strike-out is appropriate, the appeal is formally adjourned so that memoranda can be filed within one month on that point. If further hearing is required, a fixture will then be made. If further hearing is not necessary, formal orders reinstating the proceedings will be made.

[2] Whether the Probation Service may owe a duty of care to the victim of a criminal assault by a parolee under its supervision is not resolved by New Zealand authority. It falls to be determined in this Court on a strike-out basis, ahead of determination of the facts and before completion of pre-trial processes, including finalisation of the pleadings. Whether the circumstances relied on by the plaintiff are *capable* of giving rise to a duty of care is the question for the Court. If a duty of care cannot confidently be excluded, the claim must be allowed to proceed. It is only if it is clear that the claim cannot succeed as a matter of law that it can be struck out.

[3] We are of the view that the claim is not so clearly untenable as to be suitable for peremptory determination on untested facts. We are unable to agree with the majority in the Court of Appeal that it should be struck out. We consider that strike-out is premature for reasons similar to those that persuaded Hammond J to dissent in the Court of Appeal.

[4] Although we agree with Tipping J that the claim should not be struck out as disclosing no duty of care, we differ from him in the approach to be taken in ascertaining whether a duty of care can arise in these circumstances. Tipping J suggests that a duty of care to prevent harm inflicted by a third party arises only where the plaintiff, either as an individual or as a member of an "identifiable and sufficiently delineated class", is known to the defendant to be "the subject of a distinct and special risk" of the harm suffered because of particular vulnerability.[1] Requiring such test to be satisfied in all cases where harm results from third party intervention seems to us to introduce undesirable relational rigidity into the general organising principles for the tort of negligence applied in New Zealand in such cases as *Bowen v Paramount Builders (Hamilton) Ltd*[2] and *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd*,[3] in application of *Donoghue v Stevenson*[4] and *Anns v London Borough of Merton*.[5] Whether there is sufficient relationship of proximity between the person injured by a parolee and the Probation Service supervising the parolee turns on a broad inquiry without controlling emphasis on the plaintiff's membership of an "identifiable and sufficiently delineated class".

[5] Two factors are likely to be key at trial. The first is the background of the Probation Service's statutory obligations of supervision and control over the parolee, which included the power to control where he worked. The statutory obligations and powers are imposed in substantial part for the protection of the public. We do not think it can be confidently said at this preliminary stage that in carrying out its statutory responsibilities the Probation Service cannot owe a duty of care to the plaintiff, whether as fellow employee of the parolee (the basis upon which her counsel puts it) or indeed as a member of the public. The second factor is the knowledge held as to the risk the parolee presented and the means reasonably available to the Probation Service for avoiding harm through realisation of such risk. Cardozo CJ famously said of duty of care in negligence that "risk imports relation".[6]

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1 At para [112].
2 [1977] 1 NZLR 394 (CA).
3 [1992] 2 NZLR 282 (CA).
4 [1932] AC 562.
5 [1978] AC 728.
6 Delivering the judgment of the majority of the Court of Appeals of New York in *Palsgraf v Long Island Railroad Company* (1927) 248 NY 339 at p 344.

Because the facts bearing on risk and its avoidance are not yet known, and in the absence of any other clear impediment to the existence of a duty of care (such as might be found if such a duty was inconsistent with the statutory functions of the Probation Service), we consider that to strike out the proceedings would be premature.

The claim

[6] The plaintiff, Ms Couch, was seriously injured by William Bell when he robbed the Returned Services Association where she worked. Three other people, fellow employees of Ms Couch, were killed. Bell has been convicted of their murders and the attempted murder of Ms Couch. At the time of the robbery, Bell was on parole after his release from prison having served two-thirds of a sentence of five years' imprisonment for the aggravated robbery of a petrol station. It is not suggested that the RSA knew that Bell was on parole when he was placed there for work experience. Ms Couch claims exemplary damages against the Attorney-General for what, on her contention, amounts to grossly deficient supervision of Bell by the Probation Service of the Department of Corrections and the probation officer responsible for his supervision. We refer to the defendant throughout as "the Probation Service". Ms Couch says that her injuries would not have occurred if the Probation Service and the probation officer supervising Bell had acted with the standard of care reasonably to be expected of those with statutory obligations to supervise a known violent offender who had been assessed by the Probation Service psychologists as at high risk of reoffending.

[7] The fact that Ms Couch was injured by Bell while he was under the supervision of the Probation Service does not itself make the Service or the supervising probation officer liable for his actions. No vicarious liability for Bell's actions arises in law in such circumstances. The claim is brought rather in negligence for harm caused by breaches of duties of care directly owed to Ms Couch by the Probation Service and the officer.

[8] The Attorney-General has effectively accepted vicarious responsibility if negligence is established against the probation officer in this case. That is because

the Attorney-General has agreed to indemnify the probation officer for any liability. She has not been joined as a defendant, apparently because counsel for the plaintiff took the view that such a step was unnecessary if she was to be indemnified. It seems that either vicarious liability will be admitted, if pleaded, or the probation officer will be joined, allowing the indemnity to take effect on its own terms. For the purposes of the strike-out consideration we think it proper in the circumstances to proceed on the assumption that vicarious liability of the Probation Service for any negligence of the probation officer has been pleaded and admitted.

[9] To succeed in negligence at trial Ms Couch must establish that a duty of care was owed to her, that the Probation Service or the probation officer breached the duty by failing to exercise reasonable care in Bell's supervision, and that the breach caused the harm suffered by Ms Couch. The questions of breach of care and causation of loss are significant hurdles in themselves. And any breach will have to be a significant departure from proper standards of care to warrant liability for exemplary damages.

[10] Claim for compensatory damages for personal injuries caused by negligence is barred by s 317(1) of the Injury Prevention, Rehabilitation, and Compensation Act 2001. Under the Accident Insurance Act 1998 (in force at the time Ms Couch was injured) and now under the Injury Prevention, Rehabilitation and Compensation Act 2001 which replaced it, Ms Couch has received benefits to compensate her for the personal injuries she suffered. An ability to claim exemplary damages for conduct by the defendant that has resulted in personal injury is, however, specifically preserved by s 319 of the 2001 Act, as it had been under s 396 of the 1998 Act. Whether s 319 applies in the present case is a point not conceded by the Probation Service. Its counsel contends that s 319 applies only to claims against a defendant who is criminally responsible for personal injury and that a stand-alone claim for exemplary damages for negligence is barred by s 317 of the Act. This argument was not reached at the hearing. Whether the contention is correct, as already indicated, is not therefore considered in this judgment and will have to be the subject of further argument, if it is to be pursued. It will need to overcome the objection that s 319 is not in its terms confined to intentional torts. And it may be thought to be

inconsistent with the approach taken by the Privy Council in *Bottrill v A*[7] and with dicta in judgments of the Court of Appeal that a stand-alone claim for exemplary damages may serve the non-compensatory ends of tort liability and is necessary to respond to "the community's sense of justice".[8] A further objection to the availability of exemplary damages in the present case advanced by the Probation Service is that such damages ought not in principle be available for vicarious liability. *S v Attorney-General* is said to provide support for the argument.[9] Again, since it was not reached at the hearing, we express no view on this contention. It should be noted, however, that it may not provide an answer to the claims made directly against the Probation Service for what might be called systemic failings.

[11] For present purposes, it is sufficient to note that in order to succeed in a claim for exemplary damages based on negligence, on present authority Ms Couch will have to establish that the departure from the standard of care reasonably to be expected constituted "truly exceptional and outrageous" conduct.[10] The defendant must have departed "so far and so flagrantly from the dictates of ordinary or professional precepts of prudence, or standards of care", that the conduct should be punished by an award of exemplary damages.[11] Whether exemplary damages are justified in a particular case depends upon whether the conduct of the defendant is deserving of punishment. To qualify, the defendant's conduct must not only be in breach of a duty to take reasonable care but must be high-handed, irresponsible, or in some other respect outrageous. Exemplary damages in such circumstances may meet the non-compensatory ends of tort law in deterring unsafe conduct, vindicating those who are injured, and raising standards.

[12] Counsel for the Attorney-General has throughout acknowledged that the

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7 [2003] 2 NZLR 721 at para [37] per Lord Nicholls.

8 See *Donselaar v Donselaar* [1982] 1 NZLR 97 at p 104 per Cooke P (although this was a case concerning an intentional tort) and *Daniels v Thompson* [1998] 3 NZLR 22 at p 68 per Thomas J dissenting.

9 [2003] 3 NZLR 450 at paras [81] – [95] (CA) per Blanchard J.

10 *Bottrill v A* [2003] 2 NZLR 721 at para [37] (PC) per Lord Nicholls.

11 *Bottrill* at para [26] per Lord Nicholls. In argument, the Solicitor-General indicated that if the claim proceeds to trial the Attorney-General may contend for the higher standard of deliberate risk-taking preferred by the minority in *Bottrill*, in agreement with the standard preferred by the Court of Appeal in that case ([2001] 3 NZLR 622).

probation supervision of Bell was deficient. The general picture of an under-resourced and overwhelmed Probation Service, described by the statement of claim, has not been resisted. It is acknowledged that the probation officer supervising Bell was inexperienced and overworked. The management of the Mangere Branch, to which Bell reported, was inadequate and the training of its officers was deficient. The Branch suffered from lack of resources, the cause of which is not yet known. For the purposes of considering fault or any policy reasons why liability may not ultimately be appropriate, it cannot be assumed that the state of the office was a result of high policy assessment of priorities (which might be a consideration against duty of care or its breach, depending on the view taken of the statutory obligation) rather than administrative blunders (which may raise no such concerns of policy or excuse).[12]

[13] As a result of the state of the Mangere Branch of the Probation Service, the programmes, assessments and counselling Bell was required to undertake as conditions of his release on parole were not available to him. Some of these conditions had been imposed to address Bell's alcohol abuse, which was known to have been a factor in his previous offending, and which he had no motivation to address himself. Ms Couch claims failure on the part of the Probation Service to supervise Bell properly. In addition, she alleges that, with knowledge of Bell's background and the deficiencies in his supervision, the probation officer should not have permitted Bell's placement for work experience at the RSA, where the combination of alcohol and cash exacerbated the risk of Bell's reoffending violently. She also claims that the probation officer should have warned the RSA of the risk Bell posed.

[14] No statement of defence has yet been filed, pending determination of the question whether the claim discloses a cause of action. The defendant says that deficiencies in the supervision of Bell could not amount to breach of any duty of care owed by the Probation Service or the probation officer to Ms Couch. Counsel for the Attorney-General also indicated that, in relation to the claims of failure to take

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[12] See the distinction discussed by Lord Slynn in *Barrett v Enfield London Borough Council* [2001] 2 AC 550 at p 571. See also paras [58] – [59] below.

reasonable care, the position of the Probation Service is that nothing in Bell's background suggested his capacity for the terrible violence he carried out at the RSA. There was nothing, it is said, to mark him out from many other offenders released on parole. These are matters that cannot be resolved on the basis of the pleadings and on preliminary consideration. The question is, rather, one of proximity or relationship: was the connection between the Probation Service and Ms Couch clearly too remote to give rise in law to a duty of care?

[15] By consent, orders were made in the High Court under r 418 of the High Court Rules that the question whether the statement of claim discloses a reasonable cause of action should be argued before trial. The question was removed under r 419 into the Court of Appeal, which was already seized of a similar question on an appeal in proceedings brought by Mr Hobson, the husband of one of the women killed by Bell at the RSA clubrooms. In those proceedings Heath J, in the High Court, had dismissed the claim as disclosing no reasonable cause of action, on the strike-out application of the Attorney-General.[13] His conclusion was reached on the basis that the claimed duty of care to the victims of Bell's violence could not be differentiated from a duty to anyone who happened to come within his vicinity, and failed the requirement of sufficient proximity. The Court of Appeal upheld the strike-out of the Hobson claim.[14] The claim by Ms Couch was also held to disclose no reasonable cause of action and was struck out. The Judges in the majority, William Young P and Chambers J, came to the result by different reasoning. William Young P, while doubtful that there was sufficient proximity between the Probation Service and Ms Couch to found a duty of care, found it unnecessary to determine the matter. He held that any such relationship of proximity was outweighed by policy considerations against recognition of liability on the part of the Probation Service. In addition, he considered that there was "no realistic prospect" that the plaintiff could establish that the harm she suffered was caused by any failure by the Probation Service to meet a reasonable standard of care.[15] Chambers J

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13 [2005] 2 NZLR 220.

14 *Hobson v Attorney-General* [2007] 1 NZLR 374 (William Young P, Hammond and Chambers JJ).

15 At para [126].

considered that no duty of care arose, both because of lack of proximity and because of the policy of the Criminal Justice Act 1985. Hammond J dissented. He considered that strike-out was premature because it was not possible to be confident without further development of the facts and argument that sufficient proximity could not be established or must be negated for reasons of policy.

The factual background

[16] Bell was released on parole in accordance with the Criminal Justice Act 1985. He was subject to the standard conditions provided by s 107B of the Act as to reporting to a probation officer, notification of place of residence, and notification of employment. The probation officer can give directions as to place of residence under s 107B(d). Section 107B(e) also gives the probation officer control of the place of work of a parolee:

> The offender shall not engage, or continue to engage, in any employment or occupation in which the probation officer has directed the offender not to engage or continue to engage:

[17] In addition to the standard conditions, the Parole Board imposed special conditions upon Bell under s 107C of the Act. Such special conditions are those the Board "thinks necessary to protect the public or any person or class of persons who may be affected by the release of the offender" or for the offender's rehabilitation or welfare. There is no suggestion that the conditions were imposed for the protection of any person or class of persons. For present purposes it is right we think to treat the conditions as imposed for the protection of the public and, which is in part the same thing, for Bell's rehabilitation and welfare.

[18] The special conditions imposed on Bell were that he:

- make an appointment within 72 hours of his release to see a Department of Corrections psychologist, keep the appointment and attend any counselling directed by his probation officer;

- undertake such employment as directed by his probation officer;

- complete an assessment for the Straight Thinking programme[16] as directed by his probation officer;

- make an appointment within 72 hours of his release for alcohol and drug assessment, keep the appointment and (after assessment) undertake such counselling as directed by his probation officer; and

- live at an address approved by his probation officer.

[19] The duties of probation officers at the relevant time are contained in s 125 of the Criminal Justice Act 1985. As is relevant, it provides:

> **125. Duties of probation officers**
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> (1) It shall be the duty of every probation officer—
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> (a) To supervise all persons placed under the officer's supervision pursuant to … a release on conditions under Part VI this Act, and to ensure that the conditions of the sentence or of the release are complied with:
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> …
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> (b) To arrange and monitor courses of social education or counselling or personal services directed at the social re-integration of offenders and the reduction of the likelihood of re-offending, where appropriate, and in accordance with any instructions issued by a controlling officer:

[20] The summary of facts that follows is taken from the statement of claim and what was referred to in argument, drawing on what has been disclosed to date. Formal discovery has not yet been provided. To the extent that the summary is untested it must be treated with caution. Much appears however to be common ground.

[21] The aggravated robbery for which Bell had been imprisoned was the first

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[16] A programme designed to motivate offenders to reform.

time he had been convicted of an offence of serious violence (he had been convicted of common assault on an earlier occasion). The robbery had been accompanied by gratuitous violence which had perhaps not resulted in significant injury to the petrol station attendant only because he managed to escape to a locked room. The circumstances of the offending were known to the probation officer and the Probation Service.

[22] Bell had been psychologically assessed before his release from prison and had been found to be at high risk of further offending, particularly if he did not address a known problem with alcohol abuse. He was assessed to have low motivation to address his offending and his alcohol dependency. The pre-release report recommended that Bell receive close supervision. Despite these assessments of risk, known to the probation officer and the Probation Service, Bell was not closely supervised and did not undertake the programmes to assist his rehabilitation. He was not assessed for the Straight Thinking programme because the programme was not available. Nor were the assessments required by the conditions of his parole for alcohol and drug use and psychological status. No counselling, such as might have been directed following such assessments, therefore eventuated.

[23] Perhaps because of her case-load, the probation officer did not keep a number of appointments with Bell and failed to require him to report at all for significant periods. No apparent change in Bell's supervision or reassessment of its adequacy followed his conviction for assault in a domestic context, four months after his release. Although it was a special condition of his parole that Bell should live at an address approved by his probation officer, the probation officer did not check the suitability of his living circumstances after he changed his address from that specified on his release (where he was known to have family support). Despite knowing that Bell had been assessed as at particular risk of reoffending if using alcohol, and despite knowing that the programmes which might have addressed his dependency and low motivation had not been provided, the probation officer supported his decision to undertake a liquor licensing course with a view to obtaining employment which entailed the sale of liquor. She did not intervene to prevent his placement for work experience at the RSA, nor did she warn the

management of the RSA about his history and the assessed high risk of his reoffending. The combination at the RSA of cash carrying and alcohol is claimed by Ms Couch to have foreseeably added to the risk of Bell's reoffending. (He is said to have been candid in acknowledging that he was motivated to carry out robberies to support his alcohol habit.) Bell's risk of reoffending is also suggested to have been exacerbated by the lack of effective supervision and support, including under the programmes which were a condition of his release. Any such exacerbation of risk is said to have been caused by the failures of the probation officer and the Probation Service to carry out their statutory duties and responsibilities in Bell's supervision.

[24] As already indicated, the Probation Service has not yet pleaded or given discovery, although much material from its files appears to have been disclosed to the plaintiff. But, because of the stage the claim has reached, little is known of the basis upon which the Service and the probation officer acted or failed to act in the supervision of Bell. It is not known, for example, whether consideration was given either to the suitability of Bell's obtaining work experience at the RSA or to warning the RSA of any risk he was known to pose. It is not known what steps were taken by the Service to provide the programmes which were a condition of Bell's release and why they were not available. Although counsel for the Attorney-General referred to funding constraints, the basis for any such constraints is not known. The acceptance by counsel for the Attorney-General that the supervising probation officer was insufficiently experienced and the Mangere Branch was not functioning properly may suggest some administrative or professional ineptitude rather than high policy explanations for the acknowledged deficiencies in Bell's supervision. The fact that these matters have not yet been explored suggests the need for caution in assuming that there are policy considerations which should negative the existence of a duty of care. Indeed, as we indicate later, some of the policy considerations which weighed with William Young P and Chambers J in the Court of Appeal in holding against a duty of care might more properly be addressed at trial in considering whether there was breach of any such duty.

The judgment in the Court of Appeal

[25] William Young P was doubtful whether there was sufficient proximity between the probation officer and the Probation Service on the one hand and Ms Couch on the other such as would give rise to a duty of care. For the purposes of the strike-out determination he was however prepared to treat the ability of the probation officer to give directions to Bell as to where he worked as establishing sufficient proximity between the Service and Bell's fellow workers at the RSA. But William Young P held that a claim based on failure to warn was untenable on policy grounds because it would compromise the purpose of the legislation in promoting reintegration of offenders. And he held that, in so far as the claim was based on failure to exercise reasonable care in supervision, there was insufficient connection between any such failure and the offending by Bell. Since there was "no realistic prospect" of the case in this respect succeeding as to causation, "it would be unreasonable to subject the department to the postulated duty of care".[17] William Young P thought it of significance that the counterweight policy justification of ensuring proper compensation for those injured through the carelessness of another was not available in New Zealand because Ms Couch had a statutory entitlement to compensation through the accident compensation scheme. Moreover he thought it "inconceivable" that failures to warn, the appropriateness of which left room for legitimate difference of opinion, could be such outrageous breach as to warrant an award of exemplary damages.[18] And he suspected the same was the case with the complaints of failure to supervise.

[26] Chambers J considered that a vicarious claim against the Probation Service for exemplary damages for any breach of duty of care owed by the probation officer could not succeed, on the authority of *S v Attorney-General*. As already noted, in this Court counsel for the Attorney-General indicated that an undertaking had been given to the probation officer that she would be indemnified if held to be liable,

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17 At para [126].
18 At para [129].

effectively accepting vicarious liability for any exemplary damages ordered, for the purposes of this case. Chambers J considered in addition that no direct duty of care was owed by the Probation Service arising out of its supervision or management of parolees, both for reasons of lack of proximity and for reasons of policy. The suggested duty could not be confined by "clever pleading" to the management and staff of the Panmure RSA, but could only be to a class "as wide as society itself".[19] Chambers J considered that the wider policy considerations pointed strongly against any duty. They included the Probation Service's lack of control over the release of prisoners on parole, the limited powers of the Probation Service in relation to parolees (when compared with the control able to be exercised by prison authorities over prisoners), the notoriously high risk of reoffending generally among those released from prison, the distortion in the administration of parole if the Probation Service were induced by the risk of liability to "err improperly on the side of caution",[20] the implications for liability in respect of others supervised by the Probation Service in the community (with prospect of similar risk-averse decision-making), and the resource implications if the duty were recognised.

[27] Both William Young P and Chambers J distinguished *Home Office v Dorset Yacht Company*.[21] There, probation officers for whom the Home Office accepted vicarious responsibility were held to have been in breach, through careless supervision of borstal inmates, of duties of care owed to the owners of yachts foreseeably damaged by the inmates as they escaped from the island to which they had been taken. William Young P and Chambers J took the view that the case was not properly comparable with the claim by Ms Couch because the powers of supervision and direction of Bell fell short of the power of custody exercised by the probation officers in the *Dorset Yacht* case in respect of the borstal inmates.

[28] Hammond J differed from the other members of the Court. Although critical of the pleading of the claim, he was not convinced that it was unsustainable. He

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19 At paras [170] – [171].
20 At para [175].
21 [1970] AC 1004.

thought that whether a duty of care could arise as between the Probation Service and Ms Couch would turn on:[22]

> much closer consideration both of the facts of this case and of the particular institutional context of probation officers in New Zealand, and perhaps other persons having a duty to oversee persons of a dangerous propensity, and related public policy concerns.

Hammond J considered it significant that the Probation Service "has not even been called upon – yet – to disclose fully what happened in this case".[23] The question of proximity in relation to the liability of probation officers is, he considered, "in any view a particularly difficult subject-area":[24]

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

[29] Hammond J allowed that policy considerations would have to be addressed before concluding that a duty of care existed, but was of the view that they could not be weighed before the facts were understood. In that connection, he expressed the view that the fact that compensatory damages were precluded by the accident compensation regime was not determinative: exemplary damages were available in New Zealand law and the "searching examination" which might lead to a determination that they should be awarded should not be cut off by the State "at the outset"; public policy considerations would include consideration of whether precluding claims might be to sacrifice traditional tort aims such as "justice, deterrence and compensation".[25] Such matters had been insufficiently identified and argued. For these reasons, Hammond J considered it would be "premature to strike out Ms Couch's claim in negligence, on a lack of duty basis":[26]

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22 At para [69].
23 At para [75].
24 At para [81].
25 At paras [76] – [77].
26 At para [79].

> She was working in the enterprise to which Mr Bell had turned his attention, and she was one of his direct victims, when he was supposed to be under the direct supervision of [the probation officer]. The injuries suffered by her were both tangible and intangible, and of a character well recognised by the law. I am not sufficiently confident that there is not a duty to see her claim struck out now.

Hammond J acknowledged that there could well be difficulties in establishing cause and effect between any deficiencies in supervision of Bell and the harm inflicted upon Ms Couch. But he considered that the question of causation could not be confidently addressed on strike-out because the duty had been insufficiently articulated and the area of causation was "so fact-specific".[27]

Strike-out principles

[30] The claim is barely developed. All Judges in the Court of Appeal were critical about the pleadings and, it may be inferred, about the lack of adequate analysis in the claim and the arguments advanced in support of it. It must be said that the pleadings remain unsatisfactory and that counsel for Ms Couch was obliged to shift his position during the course of argument in this Court on a matter as fundamental as whether the Probation Service was said to be directly or vicariously liable. The statement of claim continues to seek compensatory damages, despite the Court of Appeal determination, clearly correct, that such a claim is precluded by s 317(1) of the Injury Prevention, Rehabilitation and Compensation Act 2001. The Second Amended Statement of Claim, supplied in draft to the Court of Appeal, has still not been filed. No further pleading has yet been drafted to meet the criticisms expressed by the Court of Appeal. There is no distinct pleading of the bases on which it is said that the Probation Service or the supervising probation officer is liable to Ms Couch. They have to be inferred from the pleaded background facts and allegations of breach. Most allegations of fault are made against both the probation officer and the Probation Service. The probation officer is not a party to the proceedings. Counsel for Ms Couch indicated that, if vicarious liability is not admitted, the probation officer will be joined as a party (allowing the indemnity the

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[27] At para [80].

Attorney-General has given her to operate on its own terms). There is currently no claim that the Probation Service is vicariously liable for the acts and omissions of the probation officer (although at the hearing of the appeal such pleading was foreshadowed). Some of the pleaded breaches are in respect of duties of care that can only have been owed directly by the Probation Service.[28] It is entirely unsatisfactory to have the allegations dealt with on an undifferentiated basis, because the existence and scope of any duties of care owed by the Probation Service directly and derivatively through the probation officer may be quite different.

[31] With such foundations, it may have been inevitable that the arguments addressed to us on behalf of the plaintiff lacked focus. That, it has to be said, is not uncommon where questions of legal liability come to be determined on a summary basis ahead of findings of fact. In *Takaro Properties Ltd (in receivership) v Rowling* for example, the pleadings were acknowledged to be "obscure".[29] They did not distinctly identify the carelessness said to be causative of loss.[30] Despite these deficiencies, the Court of Appeal unanimously reinstated the proceedings, which had been struck out in the High Court. Richmond P referred with approval to the view of Barwick CJ in *General Steel Industries Inc v Commissioner for Railways (NSW)* that the jurisdiction summarily to terminate an action where it is so clearly untenable that it cannot succeed is to be "sparingly employed" and is not suitable for use:[31]

> except in a clear case where the Court is satisfied that it has the requisite material and the necessary assistance from the parties to reach a definite and certain conclusion.

[32] It is often not easy to decide whether a duty of care not previously recognised by authority is owed to the plaintiff, as Woodhouse J in *Takaro* acknowledged[32] and as is amply demonstrated on the authorities. It may be unrealistic to expect that the pleadings and arguments to support a claim will always be adequate at an early stage

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28 They include the claims that the probation officer who was assigned to the case was inexperienced and overworked and that programmes of supervision and counselling Bell was required to attend under his conditions of parole and which were necessary for his proper supervision were not available.

29 [1978] 2 NZLR 314 at p 317 (CA) per Richmond P.

30 At p 322 per Woodhouse J.

31 (1964) 112 CLR 125 at para [8], as referred to by Richmond P at p 317.

32 At p 322.

of the proceedings. Caution in disposing of such cases on a summary basis is necessary both to prevent injustice to claimants and to avoid skewing the law with confident propositions of legal principle or assumptions about policy considerations, undisciplined by facts.

[33] It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed.[33] The case must be "so certainly or clearly bad"[34] that it should be precluded from going forward. Particular care is required in areas where the law is confused or developing. And in both *X v Bedfordshire County Council*[35] and *Barrett v Enfield London Borough Council*[36] liability in negligence for the exercise or non-exercise of a statutory duty or power was identified as just such a confused or developing area of law. Lord Browne-Wilkinson in *X* thought it of great importance that such cases be considered on the basis of actual facts found at trial, not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike-out.[37] Lord Slynn in *Barrett* was of the same view:[38]

> the question whether it is just and reasonable to impose a liability of negligence is not to be decided in the abstract for all acts or omissions of a statutory authority, but is to be decided on the basis of what is proved.

[34] Proper and necessary limits to liability in negligence do not require blanket immunity through over-restriction of the circumstances in which a duty of care arises. There is particular risk of such over-restriction on summary consideration on strike-out where policy considerations are said to preclude a duty of care. Policy considerations arise and overlap at all three inquiries in a claim for negligence: duty of care, breach, and remoteness of loss (once "but for" causation in fact is established). Lord Morris thought the policy argument against liability in *Dorset Yacht* (inconsistency between liability and the public interest in rehabilitation of borstal trainees – the sort of consideration that weighed with Young P and

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33 *X v Bedfordshire County Council* [1995] 2 AC 633 at p 740 per Lord Browne-Wilkinson (with whom the other members of the House agreed); *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA); *General Steel Industries* at para [35] per Barwick CJ; *Takaro* at p 329 per Woodhouse J.

34 *W v Essex County Council* [2001] 2 AC 592 at p 601 per Lord Slynn (with whom the other members of the House agreed).

35 [1995] 2 AC 633.

36 [2001] 2 AC 550.

37 At p 741.

38 At p 574.

Chambers J in the Court of Appeal in the present case) was relevant to breach, rather than duty of care.[39] The policy of rehabilitation was important "when considering the measure of any duty of care which the officers might owe to the company and whether they failed to do what in the circumstances they ought to have done":[40]

> but it in no way determines the question whether the officers did owe some duty of care.

A similar approach was taken by the Supreme Court of Canada in *Just v British Columbia*.[41] Cory J, for the Court, thought it important to keep duty of care distinct from the standard of care required.[42] Policy considerations as to whether liability should be imposed on a highway authority obliged to prioritise its spending for failure to remove a hazard were appropriately to be weighed by the trial judge in considering whether the system of inspection operated by the highway authority was reasonable. Whether it *had* a duty of care to highway users did not depend on such policy factors. These approaches strike us as sound.

[35] Where liability for negligence is determined at trial, it should not much matter whether questions of policy are considered as going to duty of care or its breach. But on strike-out on a threshold question of duty of care, it may matter a great deal. The facts as eventually found may make it clear that the policy consideration was not engaged in what happened and is not a justification for denial of responsibility. This was a reason why Lord Browne-Wilkinson was not prepared to strike out the claim in *Lonrho plc v Tebbit*:[43]

> Therefore, far from being able to perform the necessary analysis of all the facts and circumstances, I am asked to decide the question of the existence of a private law duty of care in the absence of even detailed factual allegations, let alone knowledge of the facts themselves. I know nothing of the factors which the defendants either did take into account or should have taken into account. For all I know, the reason for the delay in releasing the undertaking was a purely administrative blunder (eg the papers being wrongly filed), involving no considerations of policy at all.

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39 At pp 1034 – 1035.
40 At p 1035.
41 [1989] 2 SCR 1228.
42 At pp 1243 – 1244.
43 [1991] 4 All ER 973 at p 985 (ChD). Lord Browne-Wilkinson's decision was affirmed on appeal ([1992] 4 All ER 280 (CA)).

Similar concerns led Lord Hutton in *Barrett* to refuse to strike out on policy grounds a claim in respect of harm suffered by a child taken into care:[44]

> It is not known at this stage what factors the defendant and its officials and social workers did take into account in making decisions relating to the plaintiff and in planning his future. It may be that no matters of policy involving the balancing of competing public interests or the allocation of limited financial resources were involved in the decision and it may be that at trial the judge, in the words of Mason J in the *Sutherland Shire Council* case, would be called upon: "to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness".[45]

[36] In the present case, William Young P and Chambers J were prepared to treat the public interest in facilitating the reintegration of offenders as inconsistent with the existence of a duty of care owed to the plaintiff. That approach effectively makes the Probation Service immune from an action for negligence by someone injured by a parolee, no matter how great the foreseeable risk and no matter how gross the want of care in supervision. Such result does not sit well with s 6 of the Crown Proceedings Act 1950 or s 27(3) of the New Zealand Bill of Rights Act 1990. As importantly, it may be based on erroneous assumptions, as Lord Browne-Wilkinson and Lord Hutton foresaw. If the policy of promoting the reintegration of parolees is examined in considering the question of breach at trial, no such blanket immunity will be imposed on the basis of hypothetical facts. It will come to be considered in the context of the actual supervision of Bell. It may well be that any deficiencies in his supervision arose not because of legitimate policies which outweigh the general policy of the law in providing redress, but through administrative blunder or professional error for which the Probation Service is properly liable.

[37] A decision that a claim is not so clearly bad that it should be struck out says little about its eventual merit. Here the plaintiff may well face difficulties in establishing that the Probation Service was in breach of any duty, particularly to the standard of fault required to justify exemplary damages. Lord Hutton in *Barrett* stressed that the standard of care for negligence in carrying out a statutory function

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44 At pp 586 – 587.

45 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at para [39].

must be related to the nature of the duty to be performed and to the circumstances in which the defendant has to carry it out:[46]

> Therefore the standard of care to be required of the defendant in this case in order to establish negligence at common law will have to be determined against the background that it is given discretions to exercise by statute in a sphere involving difficult decisions in relation to the welfare of children. Accordingly … the trial judge, bearing in mind the room for differences of opinion as to the best course to adopt in a difficult field and that the discretion is to be exercised by the authority and its social workers and not by the court, must be satisfied that the conduct complained of went beyond mere errors of judgment in the exercise of a discretion and constituted conduct which can be regarded as negligent.

[38] Such assessment cannot be made without close consideration of the facts as to the nature of the function being fulfilled and the circumstances in which the function was carried out. Knowledge of risk, extent of risk and the available options are likely to be key. They are not suitable for determination on the basis of assumed difficulties and facts. No inconsistency with the terms of the legislation was contended for here on behalf of the Probation Service. As indicated, we do not think any clear impediment such as would justify summary dismissal of the claim can be found in wider policy considerations of the type William Young P and Chambers J thought precluded duty of care here. Such policy considerations may not arise when the facts are known. Even when engaged, they may be better weighed in considering breach. In any event, we do not think they can be fairly addressed at the present stage of the proceedings.

[39] The plaintiff may well face difficulties in establishing causation in fact. But we cannot agree with William Young P that the claim can be properly struck out on that basis. Causation is a "matter for investigation".[47] It is "quintessentially a matter of fact".[48] Factors relevant to causation which remain unclear in the present case bear on: the risk Bell posed; the steps reasonably available to the Service in addressing any such risk; and any additional or enhanced risk created through deficiencies in the supervision and support of Bell. As Hammond J said, the

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46 At p 591.
47 *Barrett* at p 575 per Lord Slynn.
48 *Barrett* at p 557 per Lord Browne-Wilkinson. See also at para [43] below.

Probation Service has not yet been called upon to disclose fully what happened in this case.

[40] We consider that a claim should not be struck out as disclosing no duty of care unless there is clear legal impediment to its succeeding at trial. Thus in *New Zealand Social Credit Political League v O'Brien*, the Court of Appeal was able to find on strike-out application that the claim for "breach of professional duty" was misconceived on the basis that the only sanction available for breach of such duty was disciplinary proceedings.[49] Such clear impediment was found in the present case by Chambers J, alone in this view in the Court of Appeal, to consist in absence of sufficient proximity between the Probation Service and Ms Couch. He rejected the suggestion that any duty of care could be confined to the management and staff of the Panmure RSA and thought that Ms Couch belonged to a class "as wide as society itself".[50] We do not agree that it is clear there is insufficient proximity between the Probation Service and Ms Couch to found a duty of care. We would not preclude Ms Couch seeking to substantiate her contention that, as a co-worker with Bell, she was a member of a class to whom the Probation Service in its supervision of Bell owed a duty of reasonable care. Indeed, we do not think it can be confidently said that a duty of care was not owed to her as a member of the public. It is necessary to explain why.

Duty of care

[41] The present appeal is concerned principally with the existence of a duty of care. As indicated above, there is however some artificiality in dividing up the elements of negligence. The factors bearing on duty of care, breach of duty and consequential harm, overlap. The point was made by Lord Pearson in *Dorset Yacht*:[51]

> The form of the order assumes the familiar analysis of the tort of negligence into its three component elements, viz., the duty of care, the breach of that

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49 [1984] 1 NZLR 84 at p 87 per Cooke J.
50 At para [170].
51 At p 1052.

> duty and the resulting damage. The analysis is logically correct and often convenient for purposes of exposition, but it is only an analysis and should not eliminate consideration of the tort of negligence as a whole. It may be artificial and unhelpful to consider the question as to the existence of a duty of care in isolation from the elements of breach of duty and damage. The actual damage alleged to have been suffered by the plaintiffs may be an example of a kind or range of potential damage which was foreseeable, and if the act or omission by which the damage was caused is identifiable it may put one on the trail of a possible duty of care of which the act or omission would be a breach. In short, it may be illuminating to start with the damage and work back through the cause of it to the possible duty which may have been broken.

[42] Although some may deprecate this as "reasoning backwards",[52] it strikes us as largely inevitable when determining liability for harm carelessly caused. So, Deane J in *Sutherland Shire Council* made it clear that his conclusion that no relevant duty of care was owed by the Council in that case was based to "no small extent" on the particular combination of factors, "including the nature of the damage sustained by the respondents".[53] And Gault J, delivering the judgment of the Court of Appeal in *Wellington District Law Society v Price Waterhouse*, took the view that, instead of starting with duty analysis, it is equally legitimate to start with "aspects of causation or damage" or "the claimed cause of liability", in order to "determine whether the 'proximity' of the parties is such that the law should impose that liability".[54] Gault J pointed out that, while the sequence should not matter in the end, starting with "the claimed cause of liability" tends:[55]

> to highlight the limits of the strike out jurisdiction because it requires early focus on the facts of the case which may not be sufficiently clear to warrant dismissal without further investigation.

[43] As already discussed, care needs to be taken in strike-out determinations to ensure that the facts are sufficiently known to enable it to be confidently said that no duty of care can be owed. In difficult cases, duty of care is no more suitable for peremptory assessment on assumed facts than questions of breach or damage. The sequence in which the elements of negligence are considered should not matter. Since considerations relevant to determination of duty of care are also relevant to

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52 See William Young P at para [106] and Chambers J at para [166] in the Court of Appeal in this case. To perhaps similar effect, Tipping J in this Court notes at para [118] that "the assessment should be made prospectively".

53 At para [22].

54 [2002] 2 NZLR 767 at paras [42] – [44].

55 At para [45].

breach of duty or causation and remoteness of damage, only high level and generalised legal policies may be suitable for consideration in relation to duty of care on strike-out. Consideration of the particular circumstances of the case may more properly be treated as bearing on the remoteness of damage or breach, by which ultimate responsibility under a duty of care owed by the defendant to the plaintiff is determined.

[44] In the present case, Chambers J in the Court of Appeal considered that such a generalised legal policy, justifying strike-out on the basis of no duty of care, was to be found in the circumstance that the plaintiff belonged to a class "as wide as society itself".[56] In this Court, Tipping J, while accepting that strike-out is premature, is of the view that a duty of care for harm caused through third party intervention could only be owed to a plaintiff who is either known by the defendant to be at special risk or is a member of an "identifiable and sufficiently delineated class" known to be at "special risk".[57] It is not suggested that this is an approach of general application in considering liability in negligence in novel circumstances. Rather, it is suggested that it is a requirement in cases where loss is caused by the actions of a third party. Tipping J traces this requirement to the judgment of Lord Diplock in *Dorset Yacht*. We are of the view that the question of duty of care, in the case of third party intervention as in other cases, falls to be determined on the general approach followed since *Anns*, for reasons developed further below. But, in any event, we do not read Lord Diplock's judgment in *Dorset Yacht* to suggest a rule of general application that duties of care can be owed only to members of a confined group.

[45] Lord Diplock considered that it would be arbitrary to hold borstal officers liable for the criminal actions of escaped trainees when the risk of criminal damage by those already within the community lies where it falls. He thought a duty of care would arise between a negligent custodian and a person harmed by an escaped inmate only where there was:[58]

> some relationship between the custodian and the person to whom the duty is owed which exposes that person to a particular risk of damage in consequence of that escape which is different in its incidence from the

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56 At para [170].
57 At para [112].
58 At p 1070.

> general risk of damage from criminal acts of others which he shares with all members of the public.

He found such "distinctive added risk" in the fact that a trainee who has escaped is liable to recapture and therefore it is:[59]

> a reasonably foreseeable consequence of a failure to exercise due care in preventing him from escaping … that in order to elude pursuit immediately upon the discovery of his absence the escaping trainee may steal or appropriate and damage property which is situated in the vicinity of the place of detention from which he has escaped.

A duty of care was owed:[60]

> only to persons whom he could reasonably foresee had property situate in the vicinity of the place of detention of the detainee which the detainee was likely to steal or to appropriate and damage in the course of eluding immediate pursuit and recapture. Whether or not any person fell within this category would depend upon the facts of the particular case including the previous criminal and escaping record of the individual trainee concerned and the nature of the place from which he escaped.

[46] In the circumstances of a case concerned with damage caused by escape from the island to which parolees had been taken under supervision, temporal and spatial proximity and knowledge of risk were important to the conclusion that a duty of care was owed to those who suffered damage. Lord Diplock considered that such a duty was a "rational extension" of the principle accepted in *Ellis v Home Office*[61] and *D'Arcy v Prison Commissioners*[62] (which cases he treated as sound) that a custodian who has a legal right to control the physical proximity between a detainee and the person or property harmed owes the person who suffers loss a duty of care.[63] The "extended relationship" Lord Diplock was prepared to allow:[64]

> substitutes for the right to control the knowledge which the custodian possessed or ought to have possessed that physical proximity in fact existed.

[47] On this approach, sufficient relationship to found a duty of care might arise in

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59 At p 1070.
60 At pp 1070 – 1071.
61 [1953] 2 All ER 149 (CA).
62 "The Times", November 17, 1953.
63 At p 1071.
64 At p 1071.

the present case both by reason of the probation officer's right to control Bell's place of work (and thus "the physical proximity between the person … sustaining the damage and the [parolee] who caused it"),[65] and by reason of the probation officer's knowledge, as pleaded, of the physical proximity between Bell and those working at the RSA.

[48] We have discussed Lord Diplock's reasons to show that we do not think they preclude the duty contended for here. More importantly, however, we do not think that such rigid relational requirement is consistent with modern authorities as to how the question of duty of care is to be approached in cases not covered by authority. Whether the defendant is under a duty of care to the plaintiff is a matter of judgment arrived at principally by analogy with existing cases and with no better organising tools than the broad labels of "neighbourhood", foresight, proximity, remoteness and such other considerations of policy as may be prompted by the circumstances. Proximity, "neighbourhood" and remoteness are general concepts which, as Professor Jane Stapleton has pointed out in relation to remoteness, may in fact be misleading if they are taken to suggest purely temporal or spatial concerns.[66] Nor does the connection between plaintiff and defendant which gives rise to a duty of care in law depend on an existing relationship. Cardozo CJ described negligence as itself "a term of relation":[67]

> The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.

[49] In *Wellington District Law Society v Price Waterhouse*, Gault J described the proximity between defendant and plaintiff as "a broad concept not confined to the closeness of the relationship":[68]

> That is only one aspect. It is not possible to determine whether the law should impose a duty of care in the abstract or merely by reference to the nearness or distance of the relationship between the parties. To the extent

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65 At p 1071.

66 "Perspectives on Causation" in Horder (ed), *Oxford Essays in Jurisprudence* (4th series, 2000) 60, pp 78 – 79.

67 Delivering the judgment of the majority of the Court of Appeal of New York in *Palsgraf v Long Island Railroad Company* (1927) 248 NY 339 at pp 344 – 345.

68 [2002] 2 NZLR 767 at para [42] (CA).

> that there are incorporated into the concept of proximity aspects of foreseeability and reliance (appropriately limited by remoteness policies) it is necessary to focus on the potential scope of any duty. What is it that should have been foreseen, whom was it likely to harm, and in what way? In what circumstances is it said that there was a duty to take reasonable care? This can be approached by asking of the duty contended for what is there a duty to protect against. That in turn extends into aspects of causation and damage.

[50] The "neighbours" in law invoked by Lord Atkin in *Donoghue v Stevenson* were those:[69]

> so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

[51] To these concepts of proximity and foreseeability, Lord Wilberforce in *Anns* acknowledged a controlling role for considerations of policy which "ought to negative, or to reduce or limit the scope of the duty or the class of persons to whom it is owed or the damages to which a breach of it may give rise".[70] In this explanation he drew on Lord Reid's judgment in *Dorset Yacht*. There, Lord Reid declined the invitation to return to the days when the categories of negligence were "virtually closed".[71] He thought the time had come to apply Lord Atkin's statement of principle in *Donoghue v Stevenson* to novel circumstances "unless there is some justification or valid explanation for its exclusion".[72]

[52] *Anns* has been consistently followed in New Zealand with acknowledgement that the ultimate judgment must be one that is "fair, just and reasonable".[73] Despite refinement of the *Anns* test in subsequent decisions of the House of Lords[74] and High

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69 At p 580.

70 At p 752.

71 At p 1026.

72 At p 1027.

73 *Brown v Heathcote County Council* [1986] 1 NZLR 76 at p 79 (CA) per Cooke P and *South Pacific Manufacturing* at pp 294 – 295 per Cooke P and at pp 305 – 306 per Richardson J, in application of the approach suggested by Lord Morris and Lord Pearson in *Dorset Yacht*, applied by Lord Keith of Kinkel in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210 and formalised in the tripartite test adopted in *Caparo Industries Plc v Dickman* [1990] 2 AC 605, where it was applied to a claim for economic loss. In *X* it was used by Lord Browne-Wilkinson in a case of physical harm to hold that no duty of care applied despite the fact that the defendant had not contested foreseeability and proximity. The "fair, just and reasonable" formula was confirmed in England as one of general application, not confined to claims for economic loss alone in *Marc Rich & Co AG v Bishop Rock Marines Co Ltd* [1996] 1 AC 211 at pp 221 – 225 per Lord Lloyd.

74 *Peabody* and *Caparo*.

Court of Australia,[75] in New Zealand we have tended to take the view that no substantial difference in result follows the changes in emphasis.[76] The Supreme Court of Canada has similarly found it unnecessary to reconsider *Anns*.[77] The leading case in New Zealand is *South Pacific Manufacturing*. As Cooke P pointed out in that case, the loose methodology described in *Anns* does not purport to be normative.[78] It supplies no answers. It is simply an aid to analysis.

[53] Except in cases of clear impediment (such as where tortious liability is inconsistent with statute), the judgment whether as a matter of proximity and policy it is right to recognise a duty of care in novel circumstances will usually be intensely fact-specific. Lord Steyn in *Gorringe v Calderdale Metropolitan Borough Council* emphasised the especial need to focus closely on the facts and background social context when negligence arises in the exercise of statutory duties and powers, a subject he regarded as one of "great complexity and very much an evolving area of the law".[79] Kirby J in *Pyrenees Shire Council v Day* thought it best to accept that liability in negligence in such hard cases is fixed by reference to a "spectrum" of factors of the kind examined in *Stovin v Wise* by Lord Nicholls[80] and by the "candid evaluation of policy considerations" by Lord Hoffmann[81] in the same case.[82] We agree with that view. It is effectively the approach taken in *South Pacific Manufacturing*.

[54] The fact that the direct cause of injury to Ms Couch was the deliberate conduct of Bell, a third party, does not prevent the Probation Service from being liable for its lack of care in Bell's supervision, if that want of care is causative of loss. *Dorset Yacht* established as much. To the argument that no one is responsible for the acts of another not acting on his behalf, Lord Reid made the reply that the ground of liability was not responsibility for the acts of the escaping trainees but

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75 *Pyrenees Shire Council v Day* (1998) 192 CLR 330.
76 *South Pacific Manufacturing* at pp 294 – 295 per Cooke P.
77 *Kamloops v Nielsen* [1984] 2 SCR 2, *Cooper v Hobart* [2001] 3 SCR 537.
78 At pp 294 – 295.
79 [2004] 1 WLR 1057 at p 1059 (HL).
80 [1996] AC 923 at pp 938 – 941.
81 At pp 956 – 958.
82 (1998) 192 CLR 330 at para [242].

"liability for damage caused by the carelessness of these officers in the knowledge that their carelessness would probably result in the trainees causing damage of this kind".[83] If tortious or criminal action is the "very kind of thing" likely to result from such lack of care, the damage will not be too remote.[84]

[55] *Dorset Yacht* also illustrates that statutory authority does not licence needless harm, carelessly caused.[85] It has been established since *Mersey Docks and Harbour Board Trustees v Gibbs*[86] that public bodies are liable in tort in the same way as private individuals. If public bodies act to create a danger or cause direct harm through use of their powers, there is no impediment to their liability on ordinary principles, unless such liability is inconsistent with the statute conferring their powers. Although it was argued in the present case that the nature of probationary supervision under the legislation was inconsistent with the existence of a duty of care for policy reasons (an argument we have already indicated we do not think can be dealt with on strike-out application), no direct statutory exclusion of liability in the Criminal Justice Act was identified. In those circumstances, whether a duty of care can arise between the Probation Service and Ms Couch falls to be determined on general principles.

[56] A duty of care in the exercise of statutory obligations and powers will often be more readily apparent than in the case of private actors, as Lord Nicholls, dissenting, recognised in *Stovin v Wise*:[87]

> Parliament confers powers on public authorities for a purpose. An authority is entrusted and charged with responsibilities, for the public good. The powers are intended to be exercised in a suitable case. Compelling a public authority to act does not represent an intrusion into private affairs in the same way as when a private individual is compelled to act.

[57] Those operating under statutory duties, as the Probation Service was in supervising Bell, are not entitled to be indifferent bystanders. In *Stovin v Wise*,

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83 At p 1027.

84 As Lord Reid made clear at p 1028, applying a dividing line proposed by Greer LJ in *Haynes v Harwood* [1935] 1 KB 146 at p 156 (CA).

85 At p 1032 per Lord Reid and at p 1036 per Lord Morris.

86 (1866) 1 LR HL 93.

87 At p 935.

Lord Hoffmann, who delivered the leading speech for the majority, accepted that there is no "why pick on me?" concern in such cases.[88] In similar vein, Mason J in *Sutherland Shire Council* expressed the view that the "floodgates" concern is not so potent with respect to public authorities, noting:[89]

> It scarcely needs to be mentioned that the reasons which lie behind the common law's general reluctance to require an individual to take positive action for the benefit of others have no application to a public authority with power to take positive action for the protection of others by avoiding a risk of injury to them.

[58] In the present case, the Probation Service could not be a bystander. It was obliged to undertake the supervision which was its statutory duty. It had no discretion whether or not to supervise. Since it was obliged to exercise its statutory powers reasonably, a duty of care in negligence would "march hand in hand" with its statutory responsibilities.[90] Probation officers are properly to be regarded as professional people exercising skill, as Lord Bingham thought was significant in the case of the social workers in *X*,[91] and as Lord Slynn accepted was important to consider in relation to the social workers in *Barrett*.[92] The functions being performed were not self-evidently policy-laden. And to the extent that what happened may have been a result of closely balanced discretionary decisions (something that is wholly unclear at present), the care reasonably to be expected of the probation officer and the Service will be adjusted in considering breach. The recognition that probation officers must act with reasonable care is in line with what is expected of other skilled professionals, also acting in circumstances of pressure and asked to make difficult judgments. It is not immediately apparent why a probation officer should have an immunity not possessed by solicitors, nurses, engineers or building inspectors, such as would be provided by denial of a duty of care.

[59] The statutory duties imposed on the Probation Service were not general, high level responsibilities of the type Lord Scott in *Gorringe* described as "target

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88 At p 944.
89 At para [37].
90 *Stovin v Wise* at p 936 per Lord Nicholls.
91 At p 659.
92 At p 569.

duties".[93] With respect to such duties there may be reluctance to impose on public bodies liability for failure to use general powers to prevent harm.[94] This was the area of disagreement between the majority and minority in *Stovin v Wise*. It was also the area of difference between the views taken in *Takaro* by the Court of Appeal and Privy Council.[95] It may be more readily accepted that the existence of an action in negligence for acts and omissions in the course of exercising such high level responsibilities may be precluded as a matter of implied legislative intent. But, as Deane J suggested in respect of the liability of a building inspector in *Sutherland Shire Council*, no such legislative intent can be assumed "where the relevant powers and functions are of a routine administrative or 'operational' nature".[96] As importantly for present purposes, in such circumstances he considered that "the existence of the statutory powers and functions, the assumption of responsibility which may be involved in their exercise, or any reliance which may be placed upon a presumption that they have been or are being properly exercised" may give a relationship between the public body and a private citizen "a degree of proximity which [is] adequate to give rise to a duty of care under the principles of common law negligence".[97]

[60] A duty of care may arise through the exercise or existence of statutory duties or powers. They may create sufficient relationship between the statutory authority and a person suffering harm as a result. That was the view of Lord Hutton in *Barrett*.[98] He cited as authority the judgment of Lord Greene MR in *Fisher v Ruislip-Northwood Urban District Council*,[99] holding that a local authority was

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93 At p 1078.

94 See *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 and *Stovin v Wise*.

95 *Rowling v Takaro Properties Ltd* [1987] 2 NZLR 700 (PC).

96 At para [7]. Although an "operational"/"policy" divide has been doubted by some of the English cases (see, for instance, *Takaro* at p 709 per Lord Keith of Kinkel for the Board, *Gorringe* at p 1067 per Lord Hoffmann, and *Stovin v Wise* at p 951 per Lord Hoffmann), in Australia it was adopted by Mason J in *Sutherland Shire Council* at paras [38] – [39] and it is used in Canada (see *Kamloops v Nielsen* [1984] 2 SCR 2 at p 23 per Wilson J, *Just v British Columbia* at pp 1239 – 1243 per Cory J, and more recently *Cooper v Hobart* [2001] 3 SCR 537). For present purposes it is enough to note that a similar concept is addressed by reference to "justiciability" in the English cases (see, for instance, *Barrett* at p 571 per Lord Slynn and at p 583 per Lord Hutton). For the purposes of considering whether the scheme of legislation is properly to be seen as excluding liability in negligence, the "operational"/"policy" division seems to us to be a useful consideration.

97 At para [7].

98 At pp 577 – 585.

99 [1945] 1 KB 584 (CA).

liable in negligence for failing to light an air-raid shelter on the highway. There Lord Greene said:[100]

> Negligence is the breach of a duty to take care. That duty arises by reason of a relationship in which one person stands to another. Such a relationship may arise in a variety of circumstances. It will, to take a simple instance, arise when a person exercises his common law right to use the highway – by doing so he places himself in a relationship to other users of the highway which imposes upon him a duty to take care. Similarly, if the right which is being exercised is not a common law right but a statutory right, a duty to take care in its exercise arises, unless, on the true construction of the statute, it is possible to say that the duty is excluded.

Lord Greene considered that the exercise of such powers placed the authority "in a relationship to the public which from its very nature imports a duty to take care".[101]

[61] In *Dorset Yacht*, Lord Pearson put the duty of care on the same basis. He considered that a duty of care arose "to make proper exercise of the powers of supervision and control for the purpose of preventing damage to the plaintiffs as 'neighbours'".[102] A public policy in the system of borstal training (which was said to require that the inmates be given a considerable measure of freedom) would affect the content of the standard of the duty but not its existence:[103]

> The needs of the Borstal system, important as they no doubt are, should not be treated as so paramount and all-important as to require or justify complete absence of care for the safety of the neighbours and their property and complete immunity from any liability for anything that the neighbours may suffer.

[62] Liability in negligence arises where a defendant has assumed a responsibility to protect the plaintiff from injury, including at the hands of a third party. Such assumption of responsibility is illustrated by the case where a decorator failed to follow instructions to lock the door when he left the house where he was working, leaving it vulnerable to burglary.[104] If voluntary assumption of responsibility can give rise to sufficient proximity, it would seem odd if statutory imposition of

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100 At p 595.
101 At p 615.
102 At p 1056.
103 At p 1056.
104 *Stansbie v Troman* [1948] 2 KB 48 (CA).

responsibility is wholly irrelevant to the judgment whether there is a duty of care. We do not think it can be. In some cases such responsibility may be determinative. In others it may be simply one of the circumstances to be weighed. Key to the ultimate assessment will be the purpose of the statute and the ability of individuals to protect themselves from harm of the sort suffered. The last was a consideration which was important to Lord Atkin's judgment in *Donoghue v Stevenson* that the manufacturer of the ginger beer owed a duty of care to consumers.

[63] *Fisher v Ruislip-Northwood* was relied upon by Mason J in *Sutherland Shire Council* in developing the view that proximity sufficient to give rise to a duty of care may arise out of the existence of public duties when there is "general reliance" upon the proper exercise of such powers:[105]

> There will be cases in which the plaintiff's reasonable reliance will arise out of a general dependence on an authority's performance of its function with due care, without the need for contributing conduct on the part of a defendant or action to his detriment on the part of a plaintiff. Reliance or dependence in this sense is in general the product of the grant (and exercise) of powers designed to prevent or minimize a risk of personal injury or disability, recognized by the legislature as being of such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection. This situation generates on the one side (the individual) … a general reliance or dependence on its exercise of power. The control of air traffic, the safety inspection of aircraft and the fighting of a fire in a building by a fire authority … may well be examples of this type of function.

[64] The High Court of Australia in *Pyrenees* and the House of Lords in *Gorringe* have retreated from a concept of "general reliance". Those cases treat the statutory obligations as directly relevant only to exclusion of duty of care (where such legislative intention is properly to be inferred), leaving proximity to be assessed on general tortious principles in which the statutory background is largely irrelevant. For ourselves, we would be prepared to allow that proximity sufficient to give rise to a duty of care can arise by reason of statutory obligations and powers, particularly in the circumstances identified by Mason J where individuals cannot take steps for their own protection or where social conditions have led individuals to rely on fulfilment

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105 At para [29].

of statutory responsibilities. That is consistent with the New Zealand authorities.[106] It is also a view supported by the minority in *Pyrenees*.[107] It may be, as Kirby J suggested in *Pyrenees*, that "general reliance" is a fiction, best avoided, and that it is, rather, a metaphor for "proximity".[108]

[65] We would not be prepared to depart from the New Zealand authorities without better argument than was addressed to us in this preliminary hearing. We accept that proximity between a statutory body and a plaintiff who has suffered harm is not readily to be assumed whenever statutory duties and powers could reasonably have been used to avoid foreseeable loss. But the statutory obligation is we think highly relevant to the judgment of sufficient proximity between plaintiff and statutory authority to give rise to an actionable duty of care. And in some cases, particularly those where individuals cannot reasonably protect themselves from risk which a statutory body has a duty to abate or manage, we consider that sufficient proximity may well follow from the statutory obligations.

[66] Whether the obligations and powers conferred on the Probation Service under the Criminal Justice Act in supervising parolees themselves give rise to a duty of care in an individual case should not be undertaken on hypothetical facts. It is notable that cases such as *Gorringe* and *Invercargill City Council v Hamlin*[109] were not determined on strike-out application. The facts, and in particular the extent to which the plaintiffs had opportunity or obligation to protect themselves, were significant in the decisions. For present purposes it is enough to say that the existence of a duty of care arising out of the proximity created by the statutory obligations cannot confidently be excluded.

[67] The scope of those to whom the Probation Service might ultimately be liable will be relevant in any final determination of whether there is a duty of care. As indicated, we do not think that the authorities compel the view that duties of care can be owed only to those who are members of a limited class. It is in the nature of

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106 See especially *Invercargill City Council v Hamlin* in the Privy Council ([1996] 1 NZLR 513 at p 518 per Lord Lloyd) and in the Court of Appeal ([1994] 3 NZLR 513 at p 519 per Cooke P), and *South Pacific Manufacturing* at p 297 per Cooke P.

107 Brennan CJ and Kirby J.

108 At para [231].

109 [1994] 3 NZLR 513 (CA), affirmed in [1996] 1 NZLR 513 (PC).

public functions that those foreseeably at risk if statutory responsibilities are discharged negligently will be a wide class, perhaps as wide as the general public if the responsibilities are imposed for public protection (as the duties imposed by the Criminal Justice Act upon the Probation Service explicitly are) and if the risk warrants it. Actual liability will be limited by the need to show causation and by principles of remoteness of damage. Although duties of care may be expressed as being owed by manufacturers to consumers for defective products, by public authorities to road users for highway hazards, by local councils to owners and occupiers of houses for building defects, by the police to "young people" at risk from a paedophile, these "categories" effectively amount to recognition of duties to the whole world. But, at least in the case of physical harm, it is only those who come within the vicinity of the hazard who will be harmed and who may have a claim. In principle, therefore, we do not see a decisive impediment to proximity in the breadth of the class to whom the Probation Service might owe a duty of care in the supervision of a parolee. If the Probation Service is shown to have acted below the standard reasonably to be expected and that want of care is causative of loss, it is not immediately clear that the plaintiff should not be able to claim as a member of the public if she suffers harm, if the public generally is foreseeably at risk and the harm not too remote. Much will depend on the nature of the risk and whether it is significant enough to import the necessary relation.

[68] On any view, knowledge of the risk posed by Bell will be critical to an ultimate conclusion of legal responsibility. It turns on facts yet to be established. Counsel for the Attorney-General submitted that nothing in Bell's record indicated any propensity for such terrible violence or that those working with him would be at risk. Counsel for Ms Couch points to the psychological assessments, the serious violence offered in the previous offending in relation to the service station, the known self-admitted association between Bell's alcohol use and resort to robbery, and the knowledge of lack of remedial programmes and effective supervision. Such matters cannot be resolved on partial pleadings and without evidence. On the basis of the undisputed information before the Court for the purposes of this preliminary application, it cannot confidently be concluded that Ms Couch will be unable to establish knowledge on the part of the Probation Service that should have alerted its officers to risk of a magnitude that made it a breach of duty to fail to exercise

available powers of control of physical proximity between Ms Couch and Bell or to take such other steps as were reasonably available to eliminate or contain the risk. Such other steps might have included warning the RSA of risk[110] or providing Bell with the sort of support envisaged in his conditions of release. These considerations clearly go to "scope" of the duty[111] and breach of the duty of care. They may also eventually lead to the conclusion that there is no duty. On any view they are not suitable for summary determination on strike-out.

[69] Some further considerations supportive of the existence of an arguable duty of care should also be noted briefly. In both *X* and *Barrett* members of the House of Lords expressed the view that in considering the liability of public authorities, "the public policy consideration which has first claim on the loyalty of the law is that wrongs should be remedied and that very potent counter-considerations are required to overrule that policy".[112] William Young P seems to have taken the view that the statutory regime of compensation overtakes this principle. But the continued role of exemplary damages may indicate that the remedy for a wrong is not to be seen in terms of compensatory damages only. If the plaintiff has suffered wrong due to egregious fault on the part of the defendant, there may be public policy in the remedies of vindication, insistence on proper standards, and general deterrence provided through exemplary damages. An ability to call to account those who cause such harm through serious fault may be thought to serve a public need. In this connection it is of significance that the harm for which redress is sought is physical injury, not economic loss or nervous shock. Floodgates considerations are less potent in the case of physical injury.

[70] The high incidence of reoffending by those released from prison means that it may be difficult in a particular case to establish breach of a duty of reasonable care or causation. Probation officers are not guarantors of good behaviour. What they can reasonably achieve through supervision may be slight. And the imposition of

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110 Deane J in *Sutherland Shire Council* at para [11] accepted that a failure or omission to "protect, warn or rescue" a person put at risk by third party negligence may itself amount to actionable negligence.

111 See, for example, Kirby J in *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254.

112 *X* at p 749 per Lord Browne-Wilkinson. See also at p 663 per Lord Bingham and *Barrett* at p 568 per Lord Slynn.

liability does not require of them more care than is reasonable in the circumstances. But the fact that parolees are known to have a high recidivism rate does not immediately strike us as a reason against recognising a duty of care for their supervision, as Chambers J suggested. It may well be a factor in favour of recognition of such a duty. It is relevant to knowledge of risk because it is clear that, as Hammond J put it in the Court of Appeal, probation officers supervise "particularly dangerous people".[113] To deny any duty of care to the public is to be cynical about the efficacy of supervision at all.

[71] Members of the public are vulnerable. They do not have the knowledge of risk possessed by the Probation Service. In circumstances where the statute has the explicit purpose of protection of the public and an obligation to take reasonable care is consistent with the statutory obligations, this vulnerability supports the recognition of a duty of care.[114] There is no public law remedy for those injured if the Probation Service acts carelessly in the discharge of its responsibilities. This circumstance was one thought to support a duty of care in negligence by Lord Nicholls in *Stovin v Wise*.[115]

[72] Although parolees are not under the close control exercised in respect of prison inmates, they are nevertheless subject to continuing supervision and control in the ways already described. The case is therefore not comparable to the position in *Hill v Chief Constable of West Yorkshire*.[116] It is analogous rather to other cases in which powers of control have been significant in the recognition of a duty of care such as the school/pupil control in *Carmarthenshire County Council v Lewis*,[117] the prison authority/prisoner control in *Ellis v Home Office* and *D'Arcy v Prison Commissioners*, and the borstal officer/trainee control in *Dorset Yacht*. While the degree of control is no doubt lighter in the case of a parolee, that circumstance will be relevant to causation and breach. The fact of control means that the present case comes within established principle and is unsuitable for peremptory rejection.

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113 At para [81].
114 *Stovin v Wise* at p 940 per Lord Nicholls.
115 At p 940.
116 [1989] 1 AC 53 (HL).
117 [1955] 2 WLR 517 (HL).

BLANCHARD, TIPPING AND McGRATH JJ

(Given by Tipping J)

Introduction

[73] The appellant, Ms Susan Couch, appeals from the decision of the Court of Appeal[118] determining on a strike-out application that she had no cause of action against the Attorney-General whom she had sued on behalf of the Department of Corrections. On 8 December 2001, in the course of robbing the premises of the Panmure Returned Services Association (RSA), William Bell murdered three RSA employees and grievously injured a fourth employee. That person was Ms Couch. Bell was on parole at the time. Ms Couch commenced proceedings seeking exemplary damages from the Attorney-General on account of allegedly negligent failings by the Department and a specified probation officer in the administration of Bell's parole.

[74] Her claim for exemplary damages is based on the proposition that the Department[119] and the probation officer each owed her a duty of care in tort and breached their duties in a way which entitles her to the relief sought. The duty of care which Ms Couch alleges is said to arise because Bell was known to the Department to be a violent offender and there was a known risk that he might cause injury to someone in Ms Couch's particular circumstances. Putting the matter broadly, the defendants are said not to have supervised Bell's parole with sufficient care, and not to have given an appropriate warning of the risk he posed. Ms Couch contends that if the defendants had fulfilled their duties of care the events which led to her injuries would not have taken place.

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118 Reported as *Hobson v Attorney-General* [2007] 1 NZLR 374, upholding the same conclusion reached by Heath J in the High Court in *Hobson v Attorney-General* [2005] 2 NZLR 220.

119 The Department is said to be liable both in its own right and vicariously on account of the actions of the probation officer. Counsel indicated that the probation officer would be joined as a defendant personally, if necessary. We will therefore approach the issues as if the probation officer were a defendant.

[75] During 1997 Bell was sentenced to five years' imprisonment for the aggravated robbery of a service station. He was released on parole on 4 July 2001, after serving two-thirds of his sentence. His parole was subject to conditions that he undertake such employment as was directed by his probation officer and not engage in any employment in which his probation officer had directed him not to engage. The allegations made against the defendants, which must, for present purposes, be taken as capable of proof, include the proposition that, with the knowledge of his probation officer, Bell was accepted into a liquor licensing course with a view to his obtaining employment in the liquor retailing industry. As part of this course Bell was assigned, again it is said with the knowledge of his probation officer, to obtain work experience at the Panmure RSA club rooms. It is further alleged that the probation officer knew that Bell had had problems with alcohol in the past.

[76] The essence of the causative negligence alleged against the probation officer is first, that she did not exercise her powers to prevent Bell from being engaged at the Panmure RSA and second, if he was to be allowed to be engaged there, in not warning his employer and fellow employees that Bell had committed aggravated robbery. Ms Couch contends that if such a warning had been given, either the RSA would not have engaged him or, when he unexpectedly sought entry to the RSA premises at about 7:30 am on the morning of 8 December 2001, intending to rob them, he would or might well not have been admitted. She also relies on systemic failings on the part of the Department leading or contributing to the specific failings of the probation officer.

[77] An identical claim brought by Mr Hobson, the husband[120] of one of the deceased employees of the RSA, who was himself also an employee, was struck out by Heath J in the High Court, on the basis that no duty of care was owed by the defendants to Mr and Mrs Hobson in all the particular circumstances.[121] Without a duty of care negligence is not actionable. Heath J's decision was upheld by the

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[120] Apparently on behalf of both himself and his wife: *Hobson v Attorney-General* [2005] 2 NZLR 220 at paras [23] and [24] (HC).

[121] At para [95].

Court of Appeal. In the meantime the High Court had removed the identical issue arising in Ms Couch's case to the Court of Appeal for concurrent determination. That is the general background to the appeal by Ms Couch to this Court in which she contends that the Courts below were wrong or, at least, that her claim should be allowed to go to trial before any final decision is made on the duty of care issue.

Common law background

[78] It is appropriate to refer briefly to the basis upon which New Zealand courts have hitherto decided whether a duty of care is owed in a situation not covered by previous authority. Neither side contended that the established approach should be revisited by this Court. In short, whether a duty of care is owed has been determined on the basis of whether it is fair, just and reasonable to impose it. Proximity and policy are the two headings under which the courts have determined that ultimate question. The leading case is *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd*.[122] That case was followed in *Attorney-General v Carter*, where the Court of Appeal said: [123]

> Whether it is fair, just and reasonable to hold that a duty of care is owed by defendant to plaintiff in a situation not covered by authority is conventionally addressed in terms of proximity and policy: see for example *Price Waterhouse v Kwan* (supra) at p 41 para [6], and of course *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282. Generally speaking, proximity is concerned with the nature of the relationship between the parties whereas policy is concerned with the wider legal and other issues involved in deciding for or against a duty of care.

[79] The most recent decision of the Court of Appeal on this subject is *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd*[124] in which the Court adopted the same approach and listed a number of factors which it considered may be found helpful in considering the proximity and policy issues.[125] If proximity is found to

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122 [1992] 2 NZLR 282 (CA).
123 [2003] 2 NZLR 160 at para [22].
124 [2005] 1 NZLR 324.
125 At paras [59] – [65].

exist it is necessary to examine what influence wider policy considerations may have on whether it is appropriate to impose a duty of care. As the point was not argued we do not propose to discuss whether establishing proximity gives rise to any presumption of a duty of care.[126]

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

[81] Here the plaintiff seeks to hold a public authority liable for omissions which have allegedly enabled a third person to harm the plaintiff. It is the voluntary and independent conduct of the third person[127] that has been the immediate cause of the loss or damage suffered by the plaintiff. The necessary causative link between the defendants' conduct and the harm suffered by the plaintiff is said to lie in the failure of the defendants to exercise an available power of control over the immediate wrongdoer or in a failure to warn of the risk the immediate wrongdoer posed. Discussion of the appropriate way to determine such cases can usefully begin with the general observation of Dixon J in *Smith v Leurs* that it is:[128]

> exceptional to find in the law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature.

[82] It is important for a proper understanding of Dixon J's frequently cited statement to appreciate that his reference to special relations was a reference to the relationship between the defendant (here the Department of Corrections and the

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126 See, for example, *South Pacific Manufacturing* per Cooke P at p 294, Richardson J at p 308 and Casey J at p 312; contra *Rolls-Royce* at para [64] per Glazebrook J for the Court.

127 It is convenient to refer to this person as the immediate wrongdoer.

128 (1945) 70 CLR 256 at p 262.

probation officer) and the immediate wrongdoer (Bell).[129] Whether that relationship is sufficiently special is conventionally assessed by reference to the concept of control. Did the defendant have sufficient power and ability to exercise the necessary control over the immediate wrongdoer? Unless that is so, it would be inappropriate to impose a duty of care on the defendant in favour of the plaintiff, fulfilment of which necessarily requires that power and ability.

[83] We should add that it is conventional to examine whether a duty of care exists and its scope without reference to questions of breach. In most cases that yields a satisfactory result but this approach should not be rigidly applied. Sometimes the nature of the breach can be relevant to the scope of the duty.[130] For example, in circumstances of the present kind,[131] it may be appropriate to hold that, in the case of a failure to warn, a duty is owed more widely than in the case of a failure to control. Indeed, it is possible to posit a case in which a duty to warn[132] might be owed to a substantial number of people and, perhaps, though it would be rare, even to the public in general, albeit difficult causation issues might then arise. However, in this particular case that is not so. The Department's ability to control Bell related, so far as is relevant, only to where he was to be employed. There is no basis for holding that the Department owed a duty requiring a warning to be given to anyone not connected in some way with Bell's employment. Hence, we will not distinguish, for duty purposes, between the allegations of failure to control and failure to warn.

[84] In the present case it is possible that Ms Couch will be able to establish that the Department, through the probation officer, had sufficient power and ability to control Bell in a way which would have prevented the harm which Ms Couch suffered. The following discussion will therefore proceed on the premise that there was a special relation in that sense between the Department and Bell.

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129 See, for example, *State of New South Wales v Godfrey* [2004] NSWCA 113 at para [21] per Spigelman CJ.

130 See Lord Pearson's speech in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at p 1052. This case will be examined more fully below.

131 Where the immediate cause of the harm is the voluntary and independent action of someone other than the defendant or a person for whom the defendant is vicariously liable.

132 Strictly speaking the duty is to exercise reasonable care, fulfillment of which may require a warning. A duty to warn is nevertheless a convenient shorthand phrase.

[85] There is, however, another relationship which must be examined in cases of this kind. It is the relationship between the defendants (the Department and the probation officer) and the plaintiff (Ms Couch). That relationship must also be special in the sense that there is sufficient proximity between the parties to render it fair, just and reasonable, subject to matters of policy, to impose the duty of care in issue. The harm suffered by the plaintiff must of course have been foreseeable by the defendant. But that is not enough. As we will demonstrate, it is also necessary for proximity purposes to assess the nature of the risk which the immediate wrongdoer posed to the plaintiff. The more specific and obvious that risk is, the stronger will be the case for holding that the defendant (having sufficient power and ability to eliminate or at least reduce the risk) had a duty of care to the plaintiff, fulfilment of which required the reasonable exercise of that power and ability. There is a need for both qualifying relationships (control and proximity), not only in cases which require the defendant to control the immediate wrongdoer, but also in cases which require the defendant to give a warning to the plaintiff on account of control having failed or not been exercised or attempted.

[86] The first case in England in which the concept of a special risk was employed in this context was *Home Office v Dorset Yacht Co Ltd*.[133] A party of borstal trainees was working on an island in Poole Harbour under the supervision and control of three borstal officers. During the night seven of them escaped and boarded a yacht which they found nearby. They cast the yacht adrift and it collided with the plaintiff's yacht, which was moored in the vicinity. They then boarded the plaintiff's yacht and did a lot of damage to it. In breach of their instructions the borstal officers had gone to bed, leaving the trainees to their own devices. Five of the seven trainees had a record of previous escapes from borstal institutions.

[87] Their Lordships focused primarily on control in deciding that a duty of care was owed. It was only Lord Diplock who made specific reference to the two different relationships we have identified above.[134] Speaking of the relationship between defendant and plaintiff (the proximity relationship) his Lordship made a distinction for duty of care purposes between people who were at risk from the

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133 [1970] AC 1004.

134 At pp 1061 and 1062.

actions of the immediate wrongdoer simply because they were members of the general public (to whom no duty was owed) and people who were the subject of a "particular risk", different in its incidence from the risk faced by the general public, to whom a duty was owed.[135]

[88] His Lordship also used the concepts of a "distinctive added risk" and an "exceptional added risk" in making that distinction. Lord Diplock was thereby using special risk as an indicator of the existence of a sufficient relationship between plaintiff and defendant to give rise to the necessary proximity between them. In the case at hand Lord Diplock regarded the plaintiff yacht owner as being a member of a sufficiently delineated group which was the subject of the necessary enhanced risk. Hence there was proximity between plaintiff and defendant.

[89] Lord Morris of Borth-y-gest also took the view that the Home Office owed a duty of care to the plaintiff yacht owner because he was a member of a class of persons who were at distinct risk of harm from the escapees. His Lordship said that the borstal officers must have appreciated that, either in an escape attempt or by reason of some other prompting, the boys might interfere with one of the yachts with consequent likelihood of doing some injury to it. His Lordship described the risk of harm to owners of yachts in the vicinity as being "glaringly obvious".[136] In effect therefore Lord Morris found that a duty of care was owed to them because they were at special risk of suffering the harm which eventuated. A little later in his speech Lord Morris used the test of "manifest and obvious risk".[137]

[90] The aspect of Lord Pearson's speech in *Dorset Yacht* which is significant for present purposes is his Lordship's reference to the citation by Lord Thankerton in *Bourhill v Young*[138] of a passage from the judgment of Lord Johnston in *Kemp & Dougall v Darngavil Coal Co Ltd*[139] in which Lord Johnston had said that the person to whom a duty of the kind in question is owed "must be a person or of a class definitely ascertained".[140] Lord Pearson went on to say that on this basis the

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135 At p 1070.
136 At p 1034.
137 At p 1035.
138 [1943] AC 92 at p 98.
139 [1909] SC 1314.
140 At p 1327.

plaintiffs as boat owners were in law "neighbours" of the defendants and were thus owed a duty of care.[141]

[91] The next case of significance in England is *Hill v Chief Constable of West Yorkshire*.[142] The Chief Constable had been sued by the mother of one of the victims of the notorious murderer, Peter Sutcliffe.[143] She sued as the personal representative of her daughter alleging that the Chief Constable, representing the West Yorkshire police, had owed her daughter a duty of care to apprehend Sutcliffe and was in breach of that duty. Her claim was struck out as disclosing no tenable cause of action, essentially because no duty of care was owed in the circumstances. Lord Keith of Kinkel, who delivered the principal speech, referred to passages from the speech of Lord Diplock in the *Dorset Yacht* case and concluded that Ms Hill was "at no special distinctive risk" in relation to Sutcliffe's activities.[144] He later referred to persons who were "at special risk" and reaffirmed that Ms Hill was not such a person. She could not be distinguished "from the female general public" and no duty could be owed by the Chief Constable to so wide a class as that.[145] His Lordship went on to say that the appeal could be disposed of on the additional ground that public policy did not support the imposition of a duty of care, for reasons he then canvassed.[146]

[92] The High Court of Ontario dealt with a case having some similarity to the present in *Hendrick v De Marsh*.[147] A parolee, under the supervision of Ontario's Ministry of Corrections, was boarding in the plaintiff's house. He intentionally started a fire which severely damaged the house and its contents. His parole officer knew that he had a propensity to light fires but did not inform the plaintiffs, even though they had specifically asked the officer whether the parolee was reliable. Pennell J found there was a duty of care and that it had been breached.[148] The

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141 At p 1054.
142 [1989] AC 53.
143 Popularly known as the Yorkshire Ripper.
144 At p 62.
145 At p 62.
146 At pp 63 – 64.
147 (1984) 6 DLR (4th) 713.
148 At pp 729 – 733.

former conclusion was based on the fact that the relationship between the parole officer and the plaintiffs was sufficiently proximate to give rise to a duty to warn. The necessary proximity arose both generally and in the light of the inquiry about the parolee's reliability.

[93] A broadly similar issue came before the Supreme Court of South Australia in *Swan v State of South Australia*.[149] The eight year old plaintiff brought proceedings against the South Australian Department of Correctional Services alleging that it owed and had breached a duty of care to him as regards the actions of a parolee. The parolee had been sentenced to imprisonment for sexual abuse of a boy aged 14. He was paroled on the condition that he not associate alone with children under the age of 14 years. In breach of this condition, children under that age, including the plaintiff, stayed overnight at the premises where the parolee lived. Parole officers employed by the Department became aware of allegations that this was happening. They took no steps upon this information, other than to accept the parolee's statement that another adult was present at all times. The plaintiff claimed that the parolee had sexually assaulted him on a number of occasions after the parole officers had become aware of the allegations. He claimed that he was owed a duty of care in the particular circumstances and that the parole officers and the Department were in breach of it.

[94] His claim was struck out in the District Court but the Supreme Court allowed his appeal and reinstated the claim. The Court found that the Department did not owe any general duty of care to members of the public at large but, as information had come to the Department's notice suggesting that the parole condition had or might have been breached, and the breach could be foreseen as likely to cause harm to a particular person or persons, the requirement of proximity was met.[150] The Department owed a duty of care towards the particular person or persons likely to be harmed. The Court relied on *Hill*'s case in finding, in effect, that the plaintiff was a

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149 [1994] 62 SASR 532.
150 At p 542.

member of a sufficiently identifiable and delineated class of persons.[151] This class was at special risk from the foreseeable actions of the parolee. Its members were owed a duty of care by those whose task it was to enforce the non-association condition on receipt of information suggesting the parolee was in breach of it.

[95] Another, more recent, Canadian case should be included in this survey. It is *Jane Doe v Metropolitan Toronto (Municipality) Commissioner of Police*.[152] The plaintiff had been raped by a serial rapist who had gained entry into her second floor apartment through a balcony door. The rapist had previously raped four women who shared characteristics similar to those of the plaintiff in that they were single women who lived alone in second and third floor apartments in the same geographical area. The plaintiff sued the police for negligence in their investigation of the so-called "balcony rapist". The evidence established that in the course of their investigation the police became aware of the geographical area in which the rapist was operating and that it was a "virtual certainty" that he would attack any one of a small number of women whom they had identified as potential targets from his modus operandi. These women were given no warning and were used as "bait" without their knowledge.[153]

[96] The trial Judge, MacFarland J, held that the police owed the plaintiff a duty of care. She cited the foundational cases of *Anns v London Borough of Merton*[154] and *City of Kamloops v Nielsen*[155] and the views of the Divisional Court in the *Jane Doe* case when an application to strike out went unsuccessfully on appeal.[156] The essence of Her Honour's reasoning was that in the particular circumstances a special relationship of proximity existed. This was because the plaintiff was one of a small group of women who were known by the police to be at "risk from an almost certain attack".[157] The police were in breach of that duty by failing to warn the members of the group.

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151 At p 551.
152 (1998) 160 DLR (4th) 697 (Ontario Court of Justice, General Division).
153 At p 725.
154 [1978] AC 728.
155 [1984] 2 SCR 2 (SCC).
156 (1990) 72 DLR (4th) 580 at p 585.
157 At p 738.

Additional authorities

[97] The foregoing survey covers the principal cases cited by counsel. It is useful to engage in a review of some additional authorities. They demonstrate that in cases of the present kind the general approach which we have outlined has been used and maintained with some consistency in common law jurisdictions down to the present time. In *Osman v Ferguson* the Court of Appeal in England held that the plaintiffs had been "exposed to a risk [from the immediate wrongdoer] over and above that of the public at large".[158] That risk was found to give rise to a "very close degree of proximity".[159] In *Swinney v Chief Constable of the Northumbria Police Force* the Court of Appeal held that it was at least arguable that the plaintiffs were "distinguishable from the general public" because they were "particularly at risk".[160] In *Palmer v Tees Health Authority* Gage J spoke of the plaintiff victim as not being a person who was subject to a "special or exceptional or distinctive category of risk".[161]

[98] In Australia, the New South Wales Court of Appeal spoke in *State of New South Wales v Godfrey* of "an element of special risk"[162], and in *SB v State of New South Wales* the Victorian Supreme Court spoke of an individual or class possessing "a particular vulnerability" to the risk in question.[163] Also of assistance are the observations made by Gleeson CJ, with whom Gaudron and Hayne JJ agreed,

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158 [1993] 4 All ER 344 at p 350 (CA). The immediate wrongdoer was a male school teacher who had formed an unhealthy attachment to the 15 year old male plaintiff. In the course of an interview with a police officer, as a result of his having thrown a brick through a window at the boy's home, the teacher said that he was distressed by the loss of his job and there was a danger he would do something "criminally insane". The police laid an information against the teacher for the brick incident but did not serve the summons. A little later the teacher followed the boy to his home and there shot and severely injured him, and killed his father. The boy and his mother (as administratrix of her late husband) brought proceedings against the police. Although the Court of Appeal found sufficient proximity, they held that for policy reasons no duty of care was owed.

159 At p 350.

160 [1997] QB 464 at p 479.

161 (1998) 45 BMLR 88 at p 101 (QB). A psychiatric patient told medical authorities he would murder a child following discharge. He did just that. The victim lived on the same street as the man who killed her. This degree of physical proximity was not regarded as giving rise to the necessary special and distinct risk. This aspect did not feature on appeal: [1999] 1 Lloyd's Med Rep 351 (CA).

162 [2004] NSWCA 113 at para [67].

163 (2004) 13 VR 527 at para [166].

in *Modbury Triangle Shopping Centre Pty Ltd v Anzil*.[164] The Chief Justice's observations give support to the special risk approach in cases of the present kind, albeit the defendant in *Modbury* was not a public body having general supervisory duties imposed by statute like the Department of Corrections.

[99] Modbury owned and operated a supermarket and shopping mall. The plaintiffs, who were employees of businesses which rented space in the mall, sued for damages on account of injuries suffered when they were attacked by unknown men in the mall's carpark. They claimed that Modbury was negligent in not having the carpark lights on at the relevant time.

[100] The first question was whether Modbury owed the plaintiffs a duty of care. In the course of deciding that it did not, Gleeson CJ said:[165]

> The unpredictability of criminal behaviour is one of the reasons why, as a general rule, and in the absence of some special relationship, the law does not impose a duty to prevent harm to another from the criminal conduct of a third party, even if the risk of such harm is foreseeable.
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> There may be circumstances in which, not only is there a foreseeable risk of harm from criminal conduct by a third party, but, in addition, the criminal conduct is attended by such a high degree of foreseeability, and predictability, that it is possible to argue that the case would be taken out of the operation of the general principle and the law may impose a duty to take reasonable steps to prevent it. The possibility that knowledge of previous, preventable, criminal conduct, or of threats of such conduct, could arguably give rise to an exceptional duty, appears to have been suggested in *Smith v Littlewoods Ltd* [1987] AC 241, 261.

[101] The special relationship to which Gleeson CJ was referring was of course the relationship created by the existence of a special risk – the proximity relationship, as we have earlier described it. The Chief Justice built his approach substantially on the passage from the judgment of Dixon J in *Smith v Leurs*, to which we have already referred, containing as it does the need for "a special relation" in cases of this kind, albeit the Chief Justice was addressing the proximity relationship rather than the control relationship. In his view therefore both relationships had to be special rather than general. Significant also in Gleeson CJ's reasoning was Brennan J's

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164 (2000) 205 CLR 254.
165 At paras [29] – [30].

reference in *Sutherland Shire Council v Heyman*,[166] to the fact that "the common law distinguishes between an act affecting another person, and an omission to prevent harm to another".[167]

[102] Lord Goff of Chieveley made a similar point in *Smith v Littlewoods*.[168] His Lordship was considering why the law does not recognise a general duty of care to prevent others from suffering foreseeable loss or damage caused by the deliberate wrongdoing of third parties. The fundamental reason, in Lord Goff's view, was that the common law does not impose liability for what he called pure omissions.[169] By that he meant omissions to act when there is no special relationship between the parties in consequence of which an affirmative duty to act might be appropriate. Lord Goff added that even if the law were to recognise a general duty to take affirmative action to prevent the plaintiff suffering foreseeable harm at the hands of a third party, that duty was likely to be strictly limited.[170] The proposition that a duty to take such action arises only when the plaintiff is known to be at special risk of harm from the third party is very much in tune with what Lord Goff was saying about this kind of situation.

[103] In her judgment in *Modbury* Gaudron J made the point that there are some situations in which the common law recognises a duty to warn or take other steps to protect another against harm from third parties. Such a duty, she said, can be owed to a person who has "special vulnerability" to harm at the hands of the third party, provided the person said to owe the duty has sufficient ability to control or at least influence the conduct of the immediate wrongdoer,[171] this of course being the control relationship to which we have earlier referred. It is that special vulnerability which distinguishes the plaintiff from members of the general public to whom no such duty is generally owed. We should add that in the *Sutherland Shire* case, Brennan J spoke, as we have done, of duties of the kind in question being owed "to the plaintiff

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166 (1985) 157 CLR 424.
167 At pp 477 – 479.
168 [1987] 1 All ER 710.
169 At p 729.
170 At p 729.
171 At para [42].

or a class of which the plaintiff is a member",[172] thereby recognising that such a duty is not owed generally.

[104] It is also appropriate to recall Deane J's words in *Sutherland Shire*, which was a case, like the present, involving a public body:[173]

> That being so, reasonable foreseeability of a likelihood that such loss or injury will be sustained in the absence of any positive action to avoid it does not of itself suffice to establish such proximity of relationship as will give rise to a prima facie duty on one party to take reasonable care to secure avoidance of a reasonably foreseeable but independently created risk of injury to the other. The categories of case in which such proximity of relationship will be found to exist are properly to be seen as special or 'exceptional': cf per Dixon J in *Smith v Leurs* (1945) 70 CLR 256, 262 and *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004.

Deane J was no doubt reflecting the fact that in *Dorset Yacht* a majority of their Lordships found that there existed a special relationship of an exceptional kind between plaintiff and defendant.

[105] Turning to the position in Canada, we observe that a similar approach was taken by the British Columbia Court of Appeal in *BM v British Columbia*.[174] The Court held that the plaintiff could not be said "to fall into a large indeterminate class; to the contrary she was a person with a special distinctive risk".[175]

[106] Finally we mention two recent New Zealand cases before referring to the decisions of the High Court and Court of Appeal in the present case. In *Maulolo v Hutt Valley Health Corporation Ltd* Wild J referred to "the ability of the defendant to identify the victim".[176] This is a similar idea to that captured by the special risk test. So too is William Young J's approach in *S v Midcentral District Health Board (No 2)* where he employed the concept of the immediate wrongdoer posing a "particular threat to a particular individual or small group of individuals".[177]

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172 At p 487.
173 At pp 501 – 502.
174 *BM v British Columbia* (unreported, British Columbia Court of Appeal, 22 July 2004).
175 At para [46].
176 [2002] NZAR 375 at para [30] (HC).
177 [2004] NZAR 342 at para [22] (HC).

Decisions below

[107] In the present case Heath J, at first instance, adopted William Young J's approach in *Midcentral*. In the Court of Appeal each Judge delivered his own reasons. William Young P and Chambers J held that the statement of claim should be struck out for want of a duty of care. Hammond J dissented. He regarded it as premature to take this course. His Honour did not expressly adopt or reject the special risk approach and seems to have merged questions of proximity and policy to some extent. The President was influenced in his decision by several factors. When discussing proximity considerations his Honour observed that there was no suggestion that "Bell posed a particular threat to work colleagues as opposed to anyone who might be in premises which he was to target".[178] His Honour also considered that this case could be distinguished from a situation where the defendant had physical control over the offender as in *Dorset Yacht*, as opposed to the ability to give directions as to where Bell worked.[179] His Honour expressed real doubt whether there was sufficient proximity, but held that in any event policy considerations, which he traversed, militated against imposing a duty of care.[180] Chambers J considered that Ms Couch's case for a duty of care failed for both lack of proximity and for policy reasons. On proximity his Honour canvassed a number of the cases we have discussed and came to the conclusion that they did not support the imposition of a duty in this case.[181]

Legislative background

[108] For completeness we will refer next to the relevant legislative background. At the material time the legislation governing parole was the Criminal Justice Act 1985. Section 107C stated that a Parole Board or a District Prisons Board could impose on an offender such special conditions of parole as it thought necessary to protect the public or any person or class of persons who might be affected by the

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178 At para [116].
179 At para [117].
180 At para [124] and following.
181 At paras [169] – [170].

release. No condition focusing discretely on a particular person or class of persons was imposed on Bell. His conditions were all directed at the protection of the public generally.

[109] Section 125(1)(a) provided that it was the duty of every probation officer to supervise all persons placed under the officer's supervision and "to ensure that the conditions of … the release are complied with". Mr Henry rightly accepted that this statutory duty was owed to the public generally and did not sound in damages for breach of statutory duty at the suit of an individual. He submitted that the duty in s 125 was part of the legislative landscape in which the court was required to determine whether it was fair, just and reasonable to impose a common law duty of care.

[110] The general statutory duty which rested on probation officers under s 125 gives no support for the view that they or the Department owed a common law duty in tort to all members of the public. Mr Henry did not argue that this was so. The public nature of the Department's statutory duties does not mean that its duties of care in tort should be of equal breadth. The tort law concept of proximity in a case like the present, where responsibility derives from capacity to control a third party, mandates a closer connection between plaintiff and defendant than where the plaintiff is simply a member of the general public.

[111] By the same token, the generality with which the duty is expressed in s 125 has no relevance to determining whether Ms Couch was a member of a class of persons who were at special and distinct risk from Bell's conduct following his release on parole. In short, the statutory framework is neutral on the proximity issue, pointing neither for or against a common law duty of care. The most that can be said is that the duty in s 125(1)(a) would not conflict with a common law duty if it were otherwise appropriate to impose one.

Conclusion on law

[112] Mr Henry accepted the general tenor of the "special risk" approach. Indeed he invoked it in support of his argument for a duty of care. The general principle

deriving from the cases is a sound and well established one for determining proximity in cases where the harm suffered by the plaintiff is immediately caused neither by the defendant nor by a person for whom the defendant has vicarious liability. The probation officer and the Department did not owe Ms Couch any duty of care simply because she was a member of the public. To establish a duty of care Ms Couch must demonstrate that, either as an individual or as a member of an identifiable and sufficiently delineated class, she was or should have been known by the defendants to be the subject of a distinct and special risk of suffering harm of the kind she sustained at the hands of Bell. The necessary risk must be distinct in the sense of being clearly apparent, and special in the sense that the plaintiff's individual circumstances, or her membership of the necessary class rendered her particularly vulnerable to suffering harm of the relevant kind from Bell.

[113] If the necessary special and distinct risk can be established the plaintiff will thereby have demonstrated the proximity criterion for the imposition of a duty of care. It then becomes necessary to examine policy issues to determine whether they militate against the imposition of a duty, despite proximity having been established. If the necessary special and distinct risk cannot be established there will be no proximity and therefore no need to examine policy issues, because without proximity there can be no duty of care.

The facts as pleaded on special risk

[114] We will now examine the pleadings on this, the crucial aspect of the case. On this strike-out application the plaintiff's factual assertions must, of course, be treated as capable of proof at trial. The conclusion we reach is that the pleadings do not raise an arguable case that Ms Couch was at special and distinct risk. We are, however, of the view that her claim could be amended to raise an arguable case for proximity between herself and the defendants on account of her being at special risk. We will first examine the case as pleaded and then outline the basis upon which we consider the case could be pleaded so as to raise an arguable case for a duty of care.

[115] Ms Couch says that the Department was fully aware of Bell's offending history, it knew he had been assessed as being at high risk of reoffending and would

need close supervision, especially regarding alcohol, when released on parole. The Department was also aware that Bell was a violent offender. Up to this point the pleading presents the risks inherent in Bell's case as general rather than specific to any particular person or class of persons.

[116] The pleading then continues by stating that by 5 December 2001 Bell's supervising officer (having encouraged him to further a career in the sale of liquor industry), knew, or was reckless if she did not know, that Bell was seeking and had obtained temporary work in the sale of liquor industry, in particular, at the Panmure RSA. The claim then states that the conduct of the Department and the supervising officer "put the workers employed at the Panmure RSA at a significantly greater risk than the other members of the general public, [it] being a business where the parolee had ready access to substantial quantities of alcohol and cash". Ms Couch alleges that in these circumstances the Department and the supervising officer "had a duty to take reasonable care to ensure the safety of persons who were being placed at significantly greater risk by its failures of supervision and otherwise". The allegation of breach of the alleged duty is framed on the basis that the Department and supervising officer "failed to warn the management and employees at the Panmure RSA that there was a risk that Bell, without the required supervision, would reoffend and that such reoffending could include violence".

[117] It is clear from this pleading that Ms Couch is not saying she was at special risk as an identified individual. The risk she asserts is as a member of a class comprising employees of the Panmure RSA. In itself that is an identifiable and sufficiently delineated class. The question becomes whether in all the relevant circumstances members of that group of people were by dint of that characteristic the subject of a distinct and special risk of suffering harm of the kind Ms Couch suffered at the hands of Bell.

[118] It is important in making the necessary assessment to avoid the wisdom of hindsight. The assessment should be made prospectively. But, also importantly, the case should be allowed to go to trial, unless as a matter of law the pleaded facts are incapable of giving rise to the duty of care asserted. Whether a duty of care did exist in the circumstances outlined is, of course, a matter of law.

[119] Ms Couch does not point to anything in Bell's general background to suggest that fellow workers as such were the subject of a sufficiently enhanced risk of suffering harm at his hands as against the risk he posed to members of the general public. The position may have been different if Bell had a history of robbing premises in which he was working or had worked. It is important to bear in mind the nature of the offence committed by Bell which is the principal basis of the risk he posed. Aggravated robbery as a generic offence has so many variables that in itself it does not start to delineate a special risk group for reoffending. At the next level of specificity Bell's previous offending involved the aggravated robbery of a service station. There is no suggestion that Bell had had any previous connection with the service station. His previous offending could hardly lead to a duty of care to all service station owners and employees in premises which might be visited by Bell while on parole. The service station dimension has no logical connection with those employed on the RSA premises. No other specific aspect of the aggravated robbery committed by Bell was pleaded or relied on by Mr Henry as demonstrating that fellow employees comprised a class of persons to whom the necessary special and distinct risk might apply.

[120] The fact that the RSA employees were in more frequent physical proximity to Bell than members of the general public is not enough in itself to create the necessary distinct and special risk. At least in the present case greater opportunity to harm the plaintiff or a group which includes the plaintiff does not give rise to the necessary distinct and special risk. Some additional element is necessary so as to create a qualifying class or group to whom the duty is owed. That element might be found either from the circumstances in which the immediate wrongdoer comes into contact with the class or group or from the characteristics of those with whom he comes into contact, or perhaps from the wrongdoer's own characteristics. The relatively greater frequency with which Bell was going to come into contact with his fellow employees at the RSA cannot here be regarded as a sufficient risk enhancing factor. Nor can the group's characteristic as fellow employees. There is nothing in Bell's history which suggests that either those with whom he was in contact frequently or those with whom he associated in an employment environment, were the subject of any enhanced risk.

[121] Mr Henry placed emphasis on the alcohol dimension. A man known to suffer from alcohol problems was allowed to undertake employment in premises where alcohol was available. That feature does not, however, lead to the necessary distinct and special risk that Bell would subject his fellow employees to violence. There is no suggestion that the presence of alcohol on the premises had anything to do with Bell's decision to rob them on 5 December 2001. Nor is there anything before the Court to suggest that Bell was under the influence of alcohol when he arrived at the premises at 7:30 am on that morning. The presence of cash in the premises, or at least a perception that they may contain cash, suggests that those premises, together with all other similar premises, could be the subject of robbery. That of itself does not support these premises as being at any special risk.

[122] In summarising his oral submissions Mr Henry contended that three things in combination gave rise to the required special risk. They were (1) the physical proximity of Bell to his fellow employees at the RSA; (2) the nature of the business of the RSA, involving as it did the presence of alcohol and cash on the premises; and (3) the nature of the offence for which Bell was on parole, namely the aggravated robbery of a service station. We have already dealt with each of these three features individually. We do not consider that their combination results in any different outcome.

[123] It is necessary, however, to consider whether on the available material there is a reasonable possibility that Ms Couch may yet be able to formulate an arguable claim that she was at special risk of injury at the hands of Bell. It is surprising that those acting for Ms Couch did not give further attention to the basis on which the claim was formulated in the light of the conclusions of the High Court and the majority of the Court of Appeal that the whole claim should be struck out. It is a commonplace of the strike-out jurisdiction that the Court will consider not only the basis upon which the claim is presently pleaded but also any other basis upon which the claim might be pleaded.[182] That is usually evidenced by a draft amended statement of claim lodged for the purpose.

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[182] See *McGechan on Procedure* at paras [HR 186.08] and [HR 477.03]. The claim must be beyond repair: see, for example, *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316 at p 323 (HC) and *Cooper v van Heeren* [2007] 3 NZLR 783 at para [51] (CA) per Chambers J.

[124] There is material before the Court which leads us to the view that the claim could be pleaded in a way which would give rise to an arguable case that Ms Couch was the subject of the necessary distinct and special risk of being physically harmed by Bell. We must not be thought to be expressing any ultimate view on that question. All we are saying is that the basis of claim about to be outlined would be sufficiently arguable to allow it to go to trial. The defendants knew that Bell was classified as posing a high risk of reoffending. The service station robbery was arguably marked by a particularly dangerous and unusual feature in the form of what appears to have been an attempt by Bell to inflict gratuitous and random violence on a person present at the robbery scene. Bell was known to be in constant need of money to feed his alcohol addiction. He was allowed to work at premises in which significant amounts of cash in the form of bar takings were likely to be present. He was able, while engaged on the premises, to find out about the security systems and arrangements which were in force. His ability to do this made the RSA premises a predictable target for any further robbery he might be minded to commit. Hence anyone who might be present in the premises at the time of such robbery was at greater risk than members of the public generally and those present were particularly vulnerable because Bell had exhibited a tendency to commit random violence during a robbery.

[125] It would not be appropriate for us to go further than simply outlining this possible basis of claim. It will be for Ms Couch and her advisers to decide how to reformulate the claim and properly plead it on this basis. Any amended statement of claim and the statement of defence to it should also refer to the policy considerations that are said to militate for or against the imposition of a duty of care.

Policy

[126] As it is possible there may be proximity between the Department and Ms Couch on the basis just outlined, it is necessary to address the question of policy. The claim should be struck out on the ground that policy militates against a duty of care only if, at this stage of the proceedings, it can be said that this is undoubtedly so. Claims in tort relying on breach of a duty of care have of course been struck out

in the past on this basis. But everything depends on the circumstances and, in particular, on whether it is necessary or desirable for the case to go to trial to enable a fair and fully informed policy determination to be made.

[127] The present claim is for exemplary damages on account of personal injury. No compensatory damages can, of course, be awarded because of the bar in the accident compensation legislation. This means that the purposes and compass of exemplary damages may well come into the policy mix. In this respect the precise circumstances in which breach took place could well be relevant to the ultimate policy determination.

[128] The plaintiff's present pleading, there being as yet no statement of defence, does not address in any detail or depth whether such negligence as may be proved against the defendants, derived from individual performance failings or from more systemic failings or from a combination of both. The consequences of imposing a duty of care on the defendants cannot be measured with any confidence on the present pleading. The balance between protection of citizens and rehabilitation of offenders similarly cannot be finally determined with complete confidence on the pleadings. The legislative environment cannot be said to point conclusively against a duty of care on policy grounds.

[129] It must be said that the policy arguments against recognising a duty of care, even to a person at special risk, have force, but we do not consider that we can hold, at this stage, that they are strong enough to lead to the conclusion that, even if proximity exists by dint of the existence of a special risk, a duty of care should not be recognised for policy reasons. It will also be necessary to bring to account such policy factors as may be said to favour recognition of a duty of care.

[130] Although conclusions could be drawn on both sides of the policy equation, and an ultimate assessment made on the present rather abstract basis, we consider that in this case it is necessary and, if not necessary, desirable to make the ultimate determination when all relevant facts have been examined and conclusions can be reached upon them. Although policy determinations can finally be made on strike-

out applications in cases of this kind if the position is clear enough on the pleadings, we do not consider that this is an appropriate case to do so.

Conclusion

[131] We therefore agree that the hearing of the appeal should be adjourned to enable the parties to make submissions on exemplary damages if so advised. Subject thereto, the appeal should be allowed and the case permitted to go to trial.

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