

A Square Peg in a Round Hole: Reshaping the Approach to Systemic Negligence in the Modern Public Service

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The public service presents a unique challenge for tort law. For historic and practical reasons it has no separate legal identity from the Crown. Modern public bodies have outgrown this framework; they have developed an institutional nature, relying on systems to co-ordinate the work of individual public servants operating as an integrated unit. Consequently, plaintiffs increasingly claim “systemic negligence”: an allegation the fault of which lies with a flaw in the system itself. Properly defined, it is a discrete head of direct liability incompatible with the existing framework. In theory, systemic negligence is a better deterrent and assigns moral responsibility fairly because it reflects the true source of liability-inducing behaviour. Tort law’s distributive function is more problematic; the individualistic nature of a tort claim appears to contradict the public service’s focus on the good of the community. Further, systemic negligence requires courts to consider the merits of polycentric allocative decisions. However, these concerns are ameliorated if courts show a degree of deference when determining if the standard of care has been breached. A two-pronged approach is required for reform. First, an evidential duty should be imposed on the public body in cases of systemic negligence. The strictness of the duty should adjust according to the level of allocative decision involved. Secondly, legislative amendments are required to explicitly introduce systemic negligence as a distinct form of liability.

I INTRODUCTION

When the Supreme Court heard oral arguments in *Couch v Attorney-General*, Blanchard J said:¹

Vicarious liability is liability for the sins of an agent in these circumstances, of an employee of the Department, but there could be theoretically at least direct liability for the Department’s own sins in not having a proper structure in place. In having an

* BHSc/LLB (Hons). The author would like to thank Janet McLean and Hanna Wilberg for their feedback on this article.

1 *Couch v Attorney-General* Transcript SC49/2006, 17 April 2007 at 50 [*Couch* Transcript].

inadequate system which in itself has created a breach of duty of care on the part of the Department itself.

His Honour's comments resonate with plaintiffs who, as a group, are increasingly alleging "systemic negligence" — an assertion that fault lies with a public body's internal systems and not with individual public servants. The trend is understandable given the institutional nature of public bodies within the modern public service.² Systemic negligence is a form of direct liability; a square peg that cannot fit into the round hole of vicarious liability to which the public sector is confined. Courts have largely ignored or circumvented the incompatibility, primarily because the term "systemic negligence" has not been properly defined. I define it as a distinct form of direct liability, which shows that judicial attempts to make the peg fit rely on significant falsehoods. This article argues for an end to that charade. First, I outline the current approach to public service liability in tort including relevant historical developments. Secondly, I develop my definition of systemic negligence as a discrete form of liability. Thirdly, I assess whether systemic negligence should be imposed according to three criteria: deterrence, moral responsibility and distributive justice. Finally, I propose legislative and judicial reforms.

II TORTIOUS LIABILITY IN THE PUBLIC SERVICE

To understand why Blanchard J's comments are problematic, it is necessary to outline the present state of public service liability and how it arose.

Historical Underpinnings

New Zealand law has closely followed developments in England. In the early 19th century, the ancient maxim that "the King can do no wrong" meant that the Crown could not commit or authorise a tort.³ Therefore, Crown servants could be personally liable, even if commanded to commit a tortious act.⁴ Because vicarious liability ascribed the wrongful actions of the servant — not merely his or her liability — to the master, the Crown could not be liable because it could not commit the wrong.⁵

The position changed significantly for local offices. Local offices were empowered by statute to carry out most public services.⁶ Those statutes increasingly provided immunities for officers who acted in good faith,

2 Defined as the bodies listed in sch 1 of the State Sector Act 1988.

3 *Tobin v The Queen* (1864) 16 CBNS 310, 143 ER 1148 (CB) at 1157–1158 and 1165; and *Feather v The Queen* (1865) 6 B & S 257, 122 ER 1191 (QB) at 1205.

4 Stuart Anderson "Central Executive: The Legal Structure of State Institutions" in William Cornish and others (eds) *The Oxford History of the Laws of England* (Oxford University Press, Oxford, 2010) 342 at 369 and 371.

5 *Feather v The Queen*, above n 3.

6 Stuart Anderson "'Grave injustice', 'despotic privilege': the insecure foundations of crown liability for torts in New Zealand" (2009) 12 Otago LR 1 at 6.

leaving plaintiffs without a remedy.⁷ Further, local offices were often jointly held by several commissioners or a board so they were often sued in the secretary's name.⁸ Although a mere matter of convenience, it was later considered suggestive of a symbolic head of a corporation.⁹ Local offices could also levy rates. Initially, rates could not indemnify an officer's liability because they were for public services.¹⁰ However, the combined effect of the first two changes encouraged a different view.¹¹ From the mid-19th century, courts began creating a quasi-corporate personality for local offices from those elements, enabling them to be held vicariously liable for servants' torts.¹²

The public service under the central government did not follow suit. The courts resisted creating an abstract notion of the Crown.¹³ Equally, no abstract legal identity was created for the central public service. It was frequently empowered by statute, but statutes rarely created offices in order to avoid trespassing on the prerogative.¹⁴ Instead, public servants were grouped into departments to create public bodies of significant political power.¹⁵ Further, the central public service had no money of its own or the ability to raise its own revenue.¹⁶ Treasury's tightening controls over expenditure meant funds were consolidated, which reflected the concept of a unified civil service.¹⁷ Expenditure required an annual vote of supply in the House of Commons, so the judiciary had no constitutional power to order satisfaction of a judgment.¹⁸ Additionally, as a unified service, Crown servants were not employed by each other, so no servant could be liable for another's torts.¹⁹ Public body liability thus diverged: local offices had quasi-corporate identities and vicarious liability, whereas the central public service had neither. The divided approach meant that the basis of immunity became doctrinaire.²⁰ To provide relief, an informal practice arose whereby servants would be nominated as placeholder defendants in order to pay compensation directly from the Crown.²¹

The colonies liberalised this area of law procedurally and substantively. The Privy Council upheld direct actions in tort against the Crown in Australia, because the colonial government was more involved in private enterprise and immunity would create greater hardship.²² New

7 Anderson "Central Executive", above n 4, at 374–375.

8 At 374–375.

9 At 375.

10 At 370.

11 At 375.

12 Anderson "Grave injustice", above n 6, at 7–8; and Anderson "Central Executive", above n 4, at 375–377.

13 See *Viscount Canterbury v Attorney-General* (1843) 1 Ph 306, 41 ER 648 (Ch).

14 Anderson "Central Executive", above n 4, at 346 and 361.

15 See at 343.

16 At 380.

17 Anderson "Grave injustice", above n 6, at 9.

18 Anderson "Central Executive", above n 4, at 379–380.

19 Anderson "Grave injustice", above n 6, at 8; and Anderson "Central Executive", above n 4, at 377

20 At 376.

21 See *Royster v Cavey* [1947] 1 KB 204 (CA) at 206–207.

22 *Farnell v Bowman* (1887) 12 App Cas 643 (PC) at 649.

Zealand enacted the Crown Redress Act 1877, under which the government could be sued for acts done with express or implied authorisation or for which the government would be liable if it were a private subject.²³ The courts held that this wording permitted direct liability.²⁴ Later legislation was held to carry the same meaning,²⁵ though it was increasingly subject to numerous exceptions.²⁶

Meanwhile, in the United Kingdom, the placeholder servant practice eventually unravelled.²⁷ The legislature reformed the procedure by enacting the Crown Proceedings Act 1947.²⁸ Soon after, New Zealand enacted the Crown Proceedings Act 1950, a close copy of the United Kingdom blueprint.

The Current Position

Section 6 of the Crown Proceedings Act treats the Crown as an ordinary legal person but restricts tortious liability to the following terms:²⁹

6 Liability of the Crown in tort

Subject to the provisions of this Act and any other Act, and except as provided in subsection (4A), the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject—

(a) in respect of torts committed by its servants or agents;

...

provided that no proceedings shall lie against the Crown by virtue of paragraph (a) in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his or her estate.

...

It is generally accepted that s 6(1)(a) only permits vicarious liability.³⁰ Vicarious liability involves the liability of a servant tortfeasor being ascribed to his or her master, whereas direct liability is only imposed on the person

²³ Section 2.

²⁴ See *Williams v The Queen* (1882) 1 NZLR CA 222; affirmed in (1884) 9 App Cas 418 (PC).

²⁵ *Hankins v The King* (1906) 25 NZLR 787 (CA).

²⁶ See Crown Suits Act 1881, Crown Suits Act 1908 and Crown Suits Amendment Act 1910, ss 3 and 4.

²⁷ *Adams v Naylor* [1946] AC 543 (HL); and *Royster v Cavey*, above n 21, at 208–211.

²⁸ Crown Proceedings Act 1947 (UK) 10 & 11 Geo VI c 44.

²⁹ Section 6(2) appears to import direct liability for a breach of statutory duty. Geoff McLay “A Very Short History of Crown Liability” (paper presented to New Zealand Law Society Seminar on the Liability of Public Authorities, June 2004) 3 at 10 observes it has largely been ignored. Contrast *Cashmere Pacific Ltd (in rec and liq) v New Zealand Dairy Board* [1996] 1 NZLR 218 (HC); and *G v Attorney-General* [1994] 1 NZLR 714 (HC).

³⁰ See Arrowsmith *Civil Liability and Public Authorities* (Earlsgate Press, South Humberstone (UK), 1992) at 159; Stephen Todd *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at 1193–1195; and Anderson “Grave injustice”, above n 6, at 1–4.

who actually commits the tort.³¹ For an institution, like a public body or a private company, to commit a tort directly, it must in reality act through the servants that animate it.³² Rules of attribution determine which acts count as the acts of the company.³³ These will frequently overlap with instances of vicarious liability, particularly for cases of negligence, which require no guilty mind.³⁴ Superficially, then, there appears to be no useful distinction between direct and vicarious liability. However, there are two key differences. Vicarious liability requires that the servant is personally liable but does not require any fault by the master. Direct liability, on the other hand, is a finding that the master is at fault and does not depend on a complete tort being committed by a servant.³⁵ On the plain wording of s 6(1)(a) — which requires a complete tort committed by the servant — only vicarious liability is applicable to the Crown.

The courts have not consistently undertaken such an analysis of s 6(1)(a). The position for intentional torts, which require a specific state of mind,³⁶ is less controversial because s 6(1)(a) precludes attributing a guilty mind to the Crown.³⁷ However, in some negligence cases the Crown has seemingly been held directly liable on the assumption that it must have acted through a negligent servant, given that it is otherwise incapable of acting.³⁸ In *Couch v Attorney-General (No 2)*, the Supreme Court was confronted with the issue of direct or “institutional” liability. The majority had reservations about whether the Crown’s liability was only vicarious but Tipping J expressly doubted direct liability.³⁹ The Court’s interpretation of public servant immunity under s 86 of the State Sector Act 1988 supports Tipping J’s view. Section 6(4) of the Crown Proceedings Act applies any defence that the public servant could use to the Crown. It states:⁴⁰

- (4) Except as provided in subsection (4A), any enactment which negatives or limits the amount of the liability of any government department or officer of the Crown in respect of any tort committed by that department or officer shall, in the case of proceedings against the Crown under this section in respect of a tort committed by that department or officer, apply in relation to the Crown as it would have applied in relation to that department or officer if the proceedings

31 Paula Giliker *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, Cambridge, 2010) at 16.

32 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC); and *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA).

33 *Meridian Global Funds*, above n 32.

34 See, for example, *Trevor Ivory*, above n 32.

35 Claire McIvor *Third Party Liability in Tort* (Hart Publishing, Oregon, 2006) at 111–112.

36 See *Hobson v Attorney-General* [2007] 1 NZLR 374 (CA) at [130]–[138].

37 *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149 at [173] [*Couch (No 2)*].

38 See, for example, *The Queen v Levy Brothers Co Ltd* [1961] SCR 189; *Duncan v The Queen* [1966] Ex CR 1080; and *Carty v The London Borough of Croydon* [2004] EWHC 228 (QB) at [75] [*Carty (HC)*]. New Zealand cases are discussed in Part II.

39 At [173]–[177].

40 Crown Proceedings Act 1950, s 6(4).

against the Crown had been proceedings against that department or officer.

- (4A) Despite certain Crown servants being immune from liability under section 86 of the State Sector Act 1988,—
- (a) a court may find the Crown itself liable in tort in respect of the actions or omissions of those servants; and
 - (b) for the purpose of determining whether the Crown is so liable, the court must disregard the immunity in section 86.

...

If the public service could utilise the s 86 immunity, its liability would be reduced to cases of bad faith. But the majority held that s 86 only provided immunity for public servants as against a department seeking indemnity and not as against plaintiffs — an awkward interpretation.⁴¹ This approach is unnecessary if the Crown could be directly liable. Ultimately, the decision left open the issue of direct liability.⁴²

Parliament attempted to address the immunity issue by introducing s 6(4A). It allows the court to ignore servant immunity for the purpose of determining the Crown's liability. It speaks of "the Crown itself" being liable, which could suggest direct liability. However, if the amendment actually introduced direct liability it would not be necessary to disregard servant immunity.

III DEFINING SYSTEMIC NEGLIGENCE

Lack of clarity as to the basis of the Crown's liability is especially problematic when plaintiffs allege "systemic negligence" against a public body. The better view is to coherently define systemic negligence in order to avoid the artificial presumptions currently used.

Systemic Negligence: The Square Peg

"Systemic negligence" is alleged when the internal processes of an organisation, not necessarily its servants, are at fault for failing to prevent harm. The term "system" refers to the way different parts of a mechanism interact. In an organisation that comprises many individuals working towards a common goal, systems enable the disparate acts of those individuals to cohere in a functioning unit, thereby advancing the organisation's goal.⁴³ As public bodies have become highly institutional, dividing their work among individual departments and servants, adequate systems are increasingly important to regulate and co-ordinate individual

41 *Couch (No 2)*, above n 37, at [7], [71] and [173]–[177].

42 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679.

43 Peter Cane *Responsibility in Law and Morality* (Hart Publishing, Oregon, 2002) at 158–159.

contributions.⁴⁴ “Systemic negligence” is thus alleged when the public body’s culpability is a product of how it functions as an institution, based on the public body’s failure to prevent its own servants causing harm to third parties. In terms of the public servant’s own culpability, he or she may be an innocent party or a jointly liable tortfeasor. Despite these qualities, the term has not actually been defined as a form of liability.

Plaintiffs typically claim systemic negligence in situations with at least one of four characteristics:

- where there is no identifiable public servant at fault;
- where the institution’s systems caused the servant’s tort;
- where the institution’s systems are more culpable than the servant’s tortious behaviour; or
- where the individual servant’s actions are not blameworthy but the institution’s systems are.

The first and last of these examples are problematic for the public service as there is no foundation upon which to build a claim of vicarious liability. However, the case law shows that it has not always followed this pattern. Moreover, the courts have occasionally constructed a separate legal identity to side-step the limitations of the Crown Proceedings Act.

Vicarious Liability: The Round Hole

This section considers how New Zealand courts have approached the four categories of systemic negligence. The categories will be referred to throughout the article.

1 Category One

Category one involves a failure between public servants and departments to interact. It is often difficult to identify a blameworthy individual.

These cases have enjoyed mixed success. In *Minister of Fisheries v Pranfield Holdings Ltd*, there was a “failure of public administration” in two ways.⁴⁵ First, the Ministry misunderstood its legal authority to reject permit applications. Secondly, it lost an application. The State Services Commissioner found that the Ministry “did not have adequate, appropriate or consistent administrative systems and processes for granting permits”, which led to inconsistent treatment.⁴⁶ But because the applicant could not prove misfeasance by a particular public officer, the Court rejected its claim for compensation. By comparison, in *Jenssen v Minister of Fisheries*, the

44 Legislation Advisory Committee *Legislation Advisory Committee: Guidelines on Process and Content of Legislation: 2001 Edition and Amendments* (May 2001 – updated 2006) 171; and Cabinet State Sector Reform and Expenditure Control Committee *Better Public Services Paper 6: Amendments to the State Sector Act 1988* (4 May 2012).

45 *Minister of Fisheries v Pranfield Holdings Ltd* [2008] NZCA 216, [2008] 3 NZLR 649 at [110].

46 At [51].

individuals who processed a misplaced cheque could be identified.⁴⁷ However, the Court found it more likely that, the plaintiff had failed to submit the cheque correctly, so the public servant was not negligent. In *Morgan v Attorney-General*, a prisoner in a labour programme was given worn boots to wear for forestry work, which caused him to slip and injure his foot.⁴⁸ The prisoner complained about the boots but the warden saw no problem with them. Evidence of how the work programme was run showed that different wardens were in charge of issuing boots and supervising work. The Court allowed an inference that the issuing warden should have nevertheless known that the prisoner was undertaking outdoor work and therefore required studded boots.

2 Category Two

Category two involves an institutional “culture” that encourages public servants to cause harm to third parties.⁴⁹

Cases involving servants’ attitudes have been pleaded as misfeasance. In *Chesterfield Preschools Ltd v Commissioner of Inland Revenue (No 2)*, the plaintiffs alleged misfeasance in public office against a number of public servants, who had collectively failed to respond to the plaintiffs’ repeated requests for updates regarding their tax liability.⁵⁰ It was alleged that the public servants did so in order to negotiate a settlement more favourably. Although the decision-making process was overseen by a number of individuals, Fogarty J held that it was theoretically possible to find liability for the nonfeasance of a group.⁵¹ On appeal, the plaintiffs’ pleadings against the Commissioner of Inland Revenue shifted to an argument based on corporate liability.⁵² The Court of Appeal held that the Commissioner could not be liable for the acts of an officer using delegated powers. The proper route was a claim of vicarious liability against the Crown for the acts of individual servants.⁵³ Similar misfeasance was alleged in *Delamere v Attorney-General*, in which Heath J held that the wording of s 6(1)(a) excluded institutional torts.⁵⁴ Individual public servants who committed torts had to be identified.

Cases involving the abuse of vulnerable persons in state institutions such as orphanages also fall within category two. The court could take an individualistic view: the paedophilic public servant seeks out the orphanage as an opportunity to offend so the orphanage should only be directly liable if

47 *Jenssen v Ministry of Fisheries* HC Wellington CP41/01, 27 March 2003.

48 *Morgan v Attorney-General* [1965] NZLR 134 (SC).

49 See Margaret Hall “After Waterhouse: vicarious liability and the tort of institutional abuse” (2000) 22(2) *J Soc Wel & Fam L* 159.

50 *Chesterfield Preschools Ltd v Commissioner of Inland Revenue (No 2)* [2012] NZHC 1302, (2012) 25 NZTC 20-128.

51 At [56]–[57].

52 *Chesterfield (CA)*, above n 50.

53 At [69].

54 *Delamere v Attorney-General* HC Auckland CIV 2008-404-1377, 3 March 2010.

it carelessly selects servants.⁵⁵ But this approach does not account for the global trend of paedophilia in some institutions and not others. The phenomenon is better explained by empirical evidence that a culture of silence in orphanages fosters deviancy and prevents victims from speaking out.⁵⁶ Additionally, power and dependency relationships between caregivers and children can nurture wrong-doing.⁵⁷ Overseas litigation has used the vicarious liability framework to advance both views: finding either that the intentional paedophilic act is outside the scope of employment,⁵⁸ or that the employment relationship involves both control and opportunity.⁵⁹ In New Zealand, the Ministry of Social Development set up a compensation scheme for abuse victims notwithstanding that the Accident Compensation Corporation (ACC) scheme would bar many actions.⁶⁰

3 Category Three

Category three involves servants or departments harming third parties due to insufficient support within the public body.

As noted earlier, *Couch (No 2)* did not definitively rule on the basis of liability.⁶¹ An overworked and under-experienced parole officer authorised convicted violent offender William Bell to work at a branch of the Returned Services Association (RSA). His history indicated that alcohol and theft were precursors to his violence but the RSA was not warned. Bell committed an armed robbery, killing and seriously wounding the civil servants. The Supreme Court was concerned with the availability of exemplary damages for negligence. In imposing a subjective test, the Court precluded claims of systemic negligence.⁶²

4 Category Four

Category four cases involve the public body's systems preventing a servant from performing his or her work.

The Court of Appeal in *Attorney-General v Prince* held that the Ministry of Social Development could be liable for a total failure to investigate a complaint of child abuse without identifying the servant involved.⁶³ This case, however, was only at the strike out stage. Education cases from the United Kingdom are also illustrative. In *X v Bedfordshire County Council*, the House of Lords held that former students are not able to

55 Hall, above n 49, at 160.

56 At 162–163.

57 *Bazley v Curry* [1999] 2 SCR 534.

58 *Trotman v North Yorkshire County Council* [1999] LGR 584 (CA).

59 *Bazley v Curry*, above n 57.

60 Geoff McLay “Tort, Settlements and Government: A Preliminary Inquiry” (2011) 9 NZJPIL 247 at 264–267.

61 *Couch (No 2)*, above n 37.

62 At [159]–[161] per Tipping J.

63 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 281 [*Prince*]. See also *B v Attorney-General* [2003] UKPC 61, [2004] 3 NZLR 145.

sue their schools directly for failing to provide adequate education.⁶⁴ However, in *Carty v Croydon London Borough Council*, the Court suggested, in obiter, that evidence of a total failure to provide any education might establish a type of direct liability, although it doubted that there could ever be a failure by the authority that could not be attributed to public servants' actions.⁶⁵ By contrast, the doctrine of *res ipsa loquitur* was applied in *Carmarthenshire County Council v Lewis*.⁶⁶ A child wandered off school grounds, across a road and caused a traffic accident that killed a driver. The majority decisions did not criticise the teacher's failure to supervise the child because her priorities were correct — she was distracted by an injured pupil. It was not necessary to determine how the gates were left unlocked or whether a better system could be devised to supervise children in such situations.

If any trend can be observed from the courts' approaches, it is that they seem slower to confine themselves to vicarious liability in cases of personal injury. This is not useful in New Zealand given the ACC bar.⁶⁷

Rounding the Edges: Judicially Constructed Separate Identities

Plaintiffs have avoided the limitations of the Crown Proceedings Act by suing the public bodies directly.⁶⁸ The correct defendant is the Attorney-General in respect of whichever body or chief executive that office must represent.⁶⁹ However, judges have indulged the fiction, permitting actions in tort in the name of a public body without statutory authority.⁷⁰ At times the court has noted the defect but considered the merits of the case by consent.⁷¹ However, the matter is often not fully addressed.⁷² The High Court has referred to a public body's "corporate veil", suggesting it operates as a company.⁷³

This approach mirrors the judicial creation of identity for local offices in the 19th century. However, little has changed for the central public service. Usually a public body's only legal recognition is through being listed in the State Sector Act 1988. With some exceptions, there are no

64 *X v Bedfordshire County Council* [1995] 2 AC 633 (HL).

65 *Carty* (HC), above n 38, at [75]. Direct liability was not considered on appeal in *Carty v Croydon London Borough Council* [2005] EWCA Civ 19, [2005] 1 WLR 2312 [*Carty* (CA)].

66 *Carmarthenshire County Council v Lewis* [1955] AC 549 (HL).

67 Accident Compensation Act 2001, s 317.

68 Anderson, above n 6, at 19–21.

69 Crown Proceedings Act, above n 40, s 3(2)(c).

70 See *Crispin v Registrar of the District Court* [1986] 2 NZLR 246 (CA) at 255.

71 See, for example, *Reid v New Zealand Fire Service Commission* [2010] NZCA 133, (2010) 19 PRNZ 923 at [13]; and *Read v Minister of Economic Development* HC Auckland CIV-2007-404-2655, 12 September 2007.

72 See, for example, *Du Claire v Palmer* [2012] NZHC 934 at [192]–[193]; *Barine Developments Ltd v Minister of Fisheries* HC Wellington CIV-2004-485-2066, 14 December 2006; *Jenssen v Ministry of Fisheries*, above n 47; *Integrated Education Software Ltd v Attorney-General (on behalf of the Ministry of Education)* [2012] NZHC 837; and *Pewhairangi v Ministry of Health* HC Tauranga CIV-2006-470-95, 7 August 2007.

73 *Barine Developments Ltd v Minister of Fisheries*, above n 72, at [12].

statutes creating the bodies.⁷⁴ An empowering statute usually refers to a neutral body so that the name and structure of the administering body can change without requiring legislative amendment.⁷⁵ While some bodies may operate quite independently from ministerial control, that does not sever them from the Crown for the purposes of civil liability.⁷⁶ Nineteenth century courts focused on the personal immunity and financial independence of local bodies but s 6(4A) of the Crown Proceedings Act removes any doubt: servant immunity will not leave plaintiffs without a remedy.⁷⁷ In terms of financial independence, modern public bodies, with significant control over their budgets, can settle small claims and some can collect revenue.⁷⁸ Ultimately, however, they still receive most of their funding from the Treasury.⁷⁹

Civil proceedings are more often brought against the chief executive of a department.⁸⁰ This approach provides a symbolic figurehead for the public body, much like the secretaries of local offices in the 19th century. As the administrative head of the body, the chief executive is responsible for the body's conduct, management and the performance of its functions.⁸¹ Some bodies have operational independence from their responsible ministers.⁸² However, the chief executive does not have personal oversight of all of her public body's operations and must delegate her powers and functions, so such symbolism does not target the actual cause of negligence.⁸³ To impose a non-delegable duty on the chief executive recreates the same fiction as placeholder servants in the United Kingdom.

Conceptual Clarity: Defining Systemic Negligence

The variable approach to systemic negligence is perhaps best explained by the fact that its conceptual underpinnings have not been adequately defined. This is equally true of the private sector because, as a private company may be vicariously or directly liable, it has never been necessary to explicitly acknowledge systemic negligence.⁸⁴ To provide clarity, I will propose a definition that accounts for the four above-mentioned categories.

Systemic negligence is not based on vicarious liability. Vicarious liability does not apply to category four because the servant is not personally

74 Exceptions include the Foreign Affairs Act 1988, Conservation Act 1987, Department of Justice (Restructuring) Act 1995, Customs and Excise Act 1996, and Ministry of Maori Development Act 1991.

75 Legislation Advisory Committee *Departmental Statutes and Other Legislation Relating to Departments Report Number 4: A Discussion Paper* (September 1988).

76 Legislation Advisory Committee, above n 44.

77 Compare *Couch (No 2)*, above n 37, at [7], [71], [173]–[174], [193] and [250].

78 McLay, above n 60. One example is the Land Transport Act 1998, s 168.

79 Legislation Advisory Committee, above n 44, at [9.1.1].

80 See, for example, *Hooker v Director General of the Department of Conservation* (2009) 142 Whangarei MB 12.

81 State Sector Act 1988, ss 31 and 32.

82 See, for example, the Serious Fraud Office Act 1990.

83 See Peter H Schuck *Suing Government: Citizen Remedies for Official Wrongs* (Yale University Press, New Haven, 1983) at 104.

84 Giliker, above n 31, at 47–48.

liable. It is tempting to presume vicarious liability applies to category one because an individual servant must have been at fault. But strictly speaking, the individual's contribution must be identified before it can be vicariously attributed to the master.⁸⁵ Further, it is erroneous to conclude that there must have been a natural person in charge of developing adequate systems who neglected his or her duty, even if he or she cannot be identified, solely because a public body cannot act without natural beings animating it.⁸⁶ Rather, the need for adequate systems stems from the need to organise individuals' actions so that they function as a unified group. In short, systems make institutional bodies.⁸⁷ Thus, an inadequate system that negligently harms others is a failure of the body to work as a coherent whole.

Systemic negligence is better understood as a form of direct liability against an institution. However, it has a number of unique features that enable it to be treated as a distinct subcategory. First, it is akin to omission-based liability in that the public body failed to prevent harm caused by its servant, rendering the system causally peripheral.⁸⁸ Even in category four, although the servant is not liable, he or she is a more proximate cause of the harm than the negligent system. But it is not a true omission because the servant is not an independent causal agent.⁸⁹ Secondly, the public body is held liable not because the actions of a servant with a particular status can be attributed to it but because of the nature of the institution itself. That is, systems go to the very core of what it means to operate as an institution.⁹⁰ On this basis, then, it seems justifiable to construct a legal identity for the defendant as an institution so that it may be directly sued. However, the fact that systemic negligence has these distinguishing features means it can be imposed as a discrete head of liability, thereby avoiding the complications of imposing direct liability against the public service as a legal person. Given that systemic negligence is a subspecies of direct liability, it cannot be made to fit within the Crown Proceedings Act. Nor can it be imposed on a personified public service without resorting to the same fictions currently employed.

IV SHOULD THE PUBLIC SERVICE BE LIABLE?

Before proposing reform, the merits of liability for systemic negligence must be evaluated. The previous section indicated that systems are equally utilised in the public and private sector, but that alone does not justify imposing

85 McIvor, above n 35, at 111–112.

86 See generally Anthony W Bradley and John Bell "Government Liability: A Preliminary Assessment" in John Bell and Anthony W Bradley (eds) *Governmental Liability: A Comparative Study* (United Kingdom National Committee of Comparative Law, London, 1991) 1; and Cane, above n 43, at 159.

87 Cane, above n 43, at 160.

88 Hanna Wilberg "In defence of the omissions rule in public authority negligence claims" (2011) 19 TLJ 159 at 161–162.

89 McIvor, above n 35, at 111.

90 See generally Cane, above n 43, at 160–165.

liability. Popular support for Diceyan equality is merely a political idea and not a distributive mechanism.⁹¹ Public service liability must be compatible with the many factors that distinguish public decision-making.⁹² This section considers whether systemic negligence deters negligence, ascribes moral fault and distributes loss better than vicarious liability in the public sector.

Deterrence

In order to effectively deter negligence, it is necessary to understand its behavioural causes and the extent to which liability may incentivise change.

1 Sources of Liability-causing Behaviour

Peter Schuck reduces the sources of negligent behaviour to four categories.⁹³ Although his thesis studied the United States civil service, which has a high degree of federal state immunity,⁹⁴ his categories are generally applicable to other contexts.

First, negligent behaviour may be based on a lack of comprehension.⁹⁵ Public servants frequently receive conflicting information about the nature of their task because of an inability to transmit a clear message.⁹⁶ The problem is compounded because a top-down directive is often lost through the grapevine, with each recipient perceiving and transmitting it differently based on his or her own subjective interpretation.⁹⁷ For example, recipients are likely to hear and relay messages that most influence their own needs. Additionally, the directive itself is often unclear. Public policy is frequently couched in terms of aspirational ideas rather than specific means of execution.⁹⁸ How ideas are delivered to the public may be different to what was originally envisioned.

Secondly, the behaviour may be caused by lack of resources.⁹⁹ Categories three and four are examples. “Resources” include funding, time, information and flexibility.¹⁰⁰ The institutional abuse cases in category two may also involve resource deficiency in that there are insufficient complaints mechanisms or staff lack the knowledge to identify signs of abuse.

Thirdly, the behaviour may be caused by ulterior motives.¹⁰¹ A common motive that leads servants astray is the desire to reduce personal liability.¹⁰² Though ultimately an empirical claim requiring proof, it is often

91 Peter Hogg, Patrick Monahan and Wade Wright *Liability of the Crown* (4th ed, Carswell, Ontario, 2011) at 2–4 and 218–219.

92 McLay, above n 29, at 11.

93 Schuck, above n 83, at 4–13.

94 Carol Harlow *State Liability: Tort Law and Beyond* (Oxford University Press, New York, 2004) at 24.

95 Schuck, above n 83, at 4.

96 At 4.

97 At 4 and 61.

98 At 61.

99 At 6.

100 At 7.

101 At 8.

102 Harlow, above n 94, at 26–27. See also Schuck, above n 83, at 8 and 68–69.

thought that fear of liability drives servants to be overcautious, acting too conservatively or prematurely.¹⁰³ I return to this idea shortly. Another motive is a perception that a directive will have a perverse effect or is illegitimate.¹⁰⁴ For example, it may come from an external source with a limited understanding of the public servant's work. Moreover, the servant's personal ideology might influence his or her enthusiasm for the policy. Finally, the sexual abusers in category two can be partially motivated by the lack of a reporting procedure.¹⁰⁵

Fourthly, there is simple human frailty. People inevitably make mistakes.¹⁰⁶ All of the categories contain elements of such frailty.

At this general level, public bodies are similar to private corporations in that they may struggle to communicate effectively, motivate employees and account for human error.¹⁰⁷ However, aspects of a public servant's work enhance the risk of liability. Public services are often not voluntary and when the government is a monopoly provider or exercises coercive powers, the relationship is tense from the outset.¹⁰⁸ Public services frequently oblige a servant to act.¹⁰⁹ Unlike private persons, the public service cannot claim personal autonomy to justify inaction.¹¹⁰ Further, public objectives can be ambiguous. Goals such as promoting public welfare or minimising public harm are difficult to operationalise. Thus, the way a servant is directed to fulfil those obligations can conflict. Servants must often make difficult choices between two competing interests, which makes injury to some unavoidable.¹¹¹ For example, investigating child abuse as in *Attorney-General v Prince* (a category four case) involves balancing the child's safety and parents' privacy interests.¹¹² Finally, servants are both faced with many rules (legislative and otherwise) and required to exercise considerable discretion, and so need guidance on how to reconcile the two.¹¹³ Thus the public sector faces a unique minefield of liability.

The sources of negligent behaviour are thus mostly institutional.¹¹⁴ They result from working as a group, therefore requiring adequate systems to be put in place. The first two sources of negligent behaviour are difficult for an individual servant to change.¹¹⁵ However, adequate systems of disseminating information would resolve communication errors and good training procedures can overcome lack of knowledge. Motivation issues and

103 Hanna Wilberg "Defensive Practice or Conflict of Duties? Policy Concerns in Public Authority Negligence Claims" (2010) 126 LQR 420 at 438.

104 Schuck, above n 83, at 11.

105 Hall, above n 49, at 163.

106 Schuck, above n 83, at 12.

107 At 57.

108 At 60–61.

109 At 62–64.

110 McIvor, above n 35, at 101.

111 Cane, above n 43, at 276. See also Schuck, above n 83, at 64–65.

112 *Prince*, above n 63.

113 Schuck, above n 83, at 66–67.

114 David Cohen "Regulating Regulators: The Legal Environment of the State" (1990) 40 UTLJ 213 at 220.

115 Schuck, above n 83, at 101–102.

human error appear to be individualistic, but an institution can try to improve perceived illegitimacy and incentivise public servants.¹¹⁶ Additionally, human error — while not totally extinguishable — can be controlled by implementing risk-reducing systems. For example, standard forms reminding servants to ask pertinent questions and mandatory double-checking increases chance error detection. In many cases, human error is also preventable by supporting servants with sufficient resources.

2 Efficient Deterrence

Tort law is often justified on the basis that it deters people from harming others, although empirical evidence does not wholly support its effectiveness.¹¹⁷ Bearing in mind the above analysis, this section examines whether potential liability would motivate the public service to avoid negligent behaviour.

(a) The Effect of Individual Liability

An individual with no control over institutional causes of fault is not well placed to minimise harm. Moreover, individual liability can produce more harm. The cost would be financially devastating for most servants.¹¹⁸ Empirically, public servants tend to have a greater perception of being at risk of liability, particularly as they are only punished for their wrongs and not rewarded for their successes.¹¹⁹ Public servants, who are motivated to minimise their risk of liability, tend to adopt inaction because courts are slower to find negligence from nonfeasance.¹²⁰ Yet in the public sector, a decision not to act or acting too slowly can lead to more dire consequences than wrongful action.¹²¹

Public servants can be better placed to hide their negligence than employees in the private sector. Recipients of public services often have less agency to recognise and raise issues of mistreatment.¹²² Shifting loss may not be unique to public bodies but the nature of public services means that vulnerable persons often have no alternative either because they cannot afford private services, private services are not available, or because the government is using coercive or monopolistic powers.

(b) The Effect of Vicarious Liability

Vicarious liability places the financial burden on the public service. Coupled with an indemnity scheme, it should relieve the pressure for an individual

116 At 77 and 131–135.

117 Harlow, above n 94, at 26.

118 Cabinet State Sector Reform and Expenditure Control Committee, above n 44, at [85]–[90].

119 Cohen, above n 114, at 225.

120 Schuck, above n 83, at 56–57.

121 At 62–63.

122 At 56–57, 72 and 80.

servant – instead it compounds the issues.¹²³ It does not remove the need to find individual fault and so the servant remains subject to intense scrutiny,¹²⁴ which may cause risk aversion even without financial consequences. It may also be futile and expensive where no individual is readily identifiable.¹²⁵ Moreover, it fails to recognise the institutional causes of liability, so little is gained from the enquiry.¹²⁶ Most importantly, vicarious liability offers no defence that the body took all reasonable care, so it incentivises covering up the fault rather than investigating it. Yet the body is best placed to investigate the negligence of its servants and develop strategies for improvement.¹²⁷ Garmon argues that a collusion-proof model of liability allows a vicariously liable defendant to seek a contribution from its negligent servant, thereby encouraging the defendant to investigate where the fault lies.¹²⁸ It is unnecessary to adopt that model. The key is that the ability to defend oneself by proving an absence of fault incentivises investigation and solutions, whereas strict liability does not.

(c) The Effect of Systemic Negligence

As I have stated, public bodies with adequate systems have the potential to prevent negligent behaviour. But to justify introducing systemic negligence, it must be shown to have a deterrent effect and prompt a better institutional reaction than other forms of liability.

In theory, compensation for negligence deters private bodies because it reduces profits and may increase prices to uncompetitive levels.¹²⁹ Some argue that this cost-benefit analysis does not apply to the public sector, which has no need to account for fiscal ramifications.¹³⁰ The public sector may externalise the cost of liability by increasing taxes.¹³¹ It often has no direct competitor and so no market pressure to be efficient. If it cannot raise funds to cover its losses, it can compromise the quality of its services without repercussions from its frequently involuntary clients.¹³²

The public service's financial accountability in New Zealand is not so dire. The Crown Proceedings Act permits the Governor-General to satisfy a court judgment without further appropriation,¹³³ though it is unclear where the Governor-General would source such funds.¹³⁴ In reality, no money can be spent without express appropriation. Public bodies either receive money from the annual budget, passed as an Appropriation Act, or through

123 Cabinet State Sector Reform and Expenditure Control Committee, at [85]–[90].

124 Schuck, above n 83, at 70. See also *Couch* Transcript, above n 1, at 1–9.

125 Cohen, above n 114, at 221.

126 At 220–221.

127 Hall, above n 49, at 164.

128 Christopher Garmon “A Note on Negligence and Collusion-Proof Liability” (2005) 25 *Int Rev Law & Econ* 256 at 257 and 261.

129 At 251.

130 At 240.

131 At 244.

132 At 243–244 and 253–254.

133 Section 24.

134 McLay, above n 60, at 253.

Supplementary Estimates, which reflect changes in expected expenditure.¹³⁵ Both are scrutinised by Parliament, though the complexity of the exercise can compromise its thoroughness.¹³⁶ A Cabinet circular creates an added layer of accountability. A public body cannot pay a claim exceeding \$75,000 without Crown Law approval or a court judgment.¹³⁷ A chief executive can only authorise up to \$150,000 and a Minister up to \$750,000 before Cabinet approval is needed.¹³⁸ Thus there is hierarchical oversight of a public body's liability. Further, public bodies are subject to accounting standards' reporting requirements in accordance with the Public Finance Act 1989.¹³⁹ However, while expenses actually incurred are reported, contingent liabilities need only be noted.¹⁴⁰ Tortious liability may therefore be mentioned without specificity or forecast on a worst-case scenario basis. Although the disclosure and scrutiny regime is not ideal, it is difficult to imagine voters permitting the government to continuously raise taxes to cover public sector negligence. Moreover, some suggest that political pressure is more of an incentive than market pressure.¹⁴¹

Anecdotal evidence suggests financial and political pressures motivate the public service to address the causes of liability. A number of high-profile cases alleging systemic negligence have resulted in thorough investigations, reform and increased resources.¹⁴² However, liability for systemic negligence could foster defensive behaviours. Public bodies are not immune from hypersensitivity to litigation, which can manifest systemically. For example, inaction can be fostered through excessive loss prevention mechanisms.¹⁴³ Further, fear can stifle organisational change.¹⁴⁴ Child abuse cases in categories two and four show how an excessively cautious approach may cause harm. In a field where expediency is important, failure to investigate abuse complaints breaches a primary duty owed to the child.¹⁴⁵

Claims of a chilling effect are empirically unproven.¹⁴⁶ But even if true, overcautious responses should not necessarily preclude liability for systemic negligence as they might equally be induced by vicarious liability. Further, overcautious systemic responses are not always inherently harmful.¹⁴⁷ Efficiency is a balance between the quality of the outcome and the resources required to achieve it. The true concern is when such responses

135 At 255–256; and Public Finance Act 1989.

136 At 251.

137 Cabinet Office Circular "Guidelines and Requirements for Proposals with Financial Implications" (18 October 2011) CO (11)6 at [55].

138 At [55].

139 State Sector Act 1988, s 19.

140 McLay, above n 60, at 254–255.

141 Anthea Williams "Government Litigation and Settlement of Health Care Tort Claims: A Framework for Consistency and Management of Legal Risk" (2007) 22 NZULR 511 at 513–514.

142 McLay, above n 60.

143 Cohen, above n 114, at 224.

144 McIvor, above n 35, at 99.

145 *Prince*, above n 63, at 281.

146 Kit Barker and others *The Law of Torts in Australia* (5th ed, Oxford University Press, Melbourne, 2012) at 593.

147 Wilberg, above n 103, at 438.

conflict with a primary duty.¹⁴⁸ The courts must be mindful as to whether liability will improperly disturb that balance. Moreover, systemic inertia might be avoided by providing discretion to act quickly in urgent circumstances. Ultimately, it is conceded that systemic negligence is an imperfect deterrent. It is nevertheless preferable to individual liability because it targets the source of the problem.

Moral Responsibility

Another function of tort law is to assign liability to the party responsible for the harm. Responsibility in this sense is moral rather than causal.¹⁴⁹ This section explores whether systemic negligence is incompatible with traditional notions of individual responsibility.

1 Humanistic Approach

On the dominant humanistic view, moral responsibility is derived from a human being's intrinsic ability to exercise free will and make choices.¹⁵⁰ Thus responsibility is totally anchored in the agent.¹⁵¹ Underpinning this view is an election to consider humans as agents of their own fate rather than victims of their circumstances. The law largely follows this approach but makes some allowances where circumstances mitigate responsibility.¹⁵²

An individualistic framework fits uneasily with group responsibility. Harlow argues that this is because interpersonal interaction is the fundamental denominator of tort liability.¹⁵³ Attempting to sheet responsibility to a larger body is merely attacking a deeper pocket. Yet groups are an important unit of social organisation. Working collaboratively, individuals can achieve more than the sum of their individual efforts.¹⁵⁴ The legal personification of a group, such as a company, is a legal construct that enables the group to be credited with the benefits reaped and harms caused.¹⁵⁵ Liability is often attached by way of vicarious liability or attribution. However, both concepts involve locating the individual within the group that caused fault. They ignore the additional quality of group membership and activity, holding the group strictly liable for actions that it could not control.¹⁵⁶ If the negligent servant's behaviour was in the course of employment, a body will be liable regardless of whether it took all reasonable care to avoid harm. Attribution similarly relies on the rank of the

148 At 438–439.

149 See generally Cane, above n 43, at 144.

150 At 143–144.

151 At 144–145.

152 At 69–71.

153 Harlow, above n 94, at 16–17.

154 Cane, above n 43, at 145.

155 At 146.

156 James Goudkamp "The Spurious Relationship Between Moral Blameworthiness and Liability for Negligence" (2004) 28 MULR 343 at 357–358.

individual in the body, but the behaviours of similarly ranked servants may be irrelevant.¹⁵⁷

2 Group Responsibility

A preferable theoretical basis for direct liability is to consider when a group can justifiably have a stand-alone personality. The debate is not merely legal — there is a common notion that moral responsibility cannot simply be offloaded by delegation.¹⁵⁸ A theory must explain what distinguishes groups operating with unity from a mere aggregate of people. Carol Rovane argues that the quality inherent in a personified group is that the individuals within it are committed to achieving overall rational unity through collaboration.¹⁵⁹ However, this does not account for many personified groups, like companies, where decisions are made on voting rules.¹⁶⁰ Peter French argues that a group achieves personality through its internal decision-making structure.¹⁶¹ The structure consists of two elements: first, an organisational hierarchy that defines different levels and roles across the group; and secondly, rules in the group's policy that recognise legitimate decisions. These elements exist throughout the group on a macro and micro-scale and together subordinate and harmonise the intentions and actions of individual members.¹⁶² French's model relies on a modified conception of humanistic responsibility.¹⁶³ It accounts for the judicial instinct to hold public bodies responsible as a group even when they do not exist at law. The two elements distil the essence of group personality.

3 Systemic Negligence

Group responsibility relies on the fact that the group has structures in place to organise individuals into a coherent, synthesised whole. These structures control interactions between disparate parts. This overlaps with the concept of a system as I have defined it in this article. On this basis, it seems morally justifiable that systems permitting a body to operate with a sense of personhood should be a basis for liability when those systems negligently harm others. This may be a stepping-stone towards direct liability generally but that is beyond the scope of this article.

Distributive Justice

Tort law has a distributive function because it decides who bears loss, balancing the defendant's freedom of action and the victim's freedom from

157 *Meridian Global Funds*, above n 32.

158 Cane, above n 43, at 163–164.

159 See generally Carol Rovane *The Bounds of Agency: An Essay in Revisionary Metaphysics* (Princeton University Press, Princeton, 1998) at 136–160.

160 Cane, above n 43, at 166–167.

161 Peter French "The Corporation as a Moral Person" (1979) 16 *AmPhilQ* 207.

162 Cane, above n 43, at 167–168.

163 At 168.

harm.¹⁶⁴ This is arguably inappropriate where public bodies are already balancing the best interests of the public. This section responds to various objections of this theme. When addressed separately, none are insurmountable.

1 Public and Private Rights

Proponents of Crown immunity argue that because the public sector aims to serve the public and not to profit, resources should not be redistributed to an individual.¹⁶⁵ This objection has three aspects.

First, a successful claim deprives the sector of resources that would otherwise be spent on serving the public good.¹⁶⁶ Hall counters this objection using enterprise theory arguments.¹⁶⁷ She argues that altruistic services create a product analogous to those in the private sector, being the knowledge that the State is looking after vulnerable persons in society.¹⁶⁸ Because the public benefits from believing that something of a humanitarian nature is being done, it should also bear the cost of harm caused in the process. If not, it is receiving a falsely discounted product.¹⁶⁹ However, when applied to the public service, this argument treats the public as both a customer and a shareholder. Further, Hall's argument does not provide a framework for preferring the rights of one member of the public over others, which the public service must do.

A more fundamental counter argument is that an objection to liability based on the altruistic nature of services cannot be contained to the public sector. On such a view, a charity or non-profit organisation should also have immunity.¹⁷⁰ It is difficult to determine when a motive is benevolent because this is partly a subjective concept. Further, fault in negligence is not based on the defendant's state of mind,¹⁷¹ so it would be odd for motive and purpose to mitigate liability. Thus the "public good" objection cannot be a defence for the public service: it is merely a general argument against negligence. It cannot be implemented without uncertainty as to when one acts in the public good. Arbitrary lines must be drawn.

A second, related objection is that there is no reason why a successful plaintiff should gain priority over other recipients of public services.¹⁷² For example, where a body is required to protect the public at large, the public service is exposed to potentially limitless liability.¹⁷³ This is especially the case when there is a positive duty to act in order to protect the

164 At 251–254.

165 Arrowsmith, above n 30, at 168–169.

166 McIvor, above n 35, at 99.

167 Hall, above n 49, at 169–172.

168 At 170–171.

169 At 171.

170 Harlow, above n 94, at 31.

171 Todd, above n 30, at 408–409.

172 McIvor, above n 35, at 99; and Barker, above n 146, at [11.3.3.1].

173 Wilberg, above n 88, at 181–184.

general public from other primary causes of harm.¹⁷⁴ However, this does not justify blanket immunity from systemic negligence. The bilateral nature of tort law and of court procedure requires a relationship between the plaintiff and the defendant to structure the risk distribution, responsibility and remedy.¹⁷⁵ Thus it is generally accepted that there is no duty of care owed to the world at large.¹⁷⁶ Plaintiffs must distinguish themselves based on some special quality that renders them more proximate to the public service than the general public.¹⁷⁷ And as noted earlier, systemic negligence is not a true form of omission because public servants who cause harm are not third parties. The objection is therefore dealt with under the ordinary test for a duty of care.

The third objection is that unlike an ordinary private customer a “customer” of public services has no right to public benefits. There is no entitlement to sue for failing to receive a benefit.¹⁷⁸ Empirically, this is often the case; the provision of public services frequently involves discretionary decisions.¹⁷⁹ However, this does not call for a different legal framework — it simply means that a plaintiff is less likely to succeed. Thus to say that there is no entitlement to public services is merely to observe that in some cases there will be no causative link between the duty owed to the plaintiff and the loss suffered, particularly when claims are broadly expressed.

2 Allocative Decisions

In my view, the strongest objection to liability in the public service is that it questions polycentric, allocative decisions, which is incompatible with tort law’s distributive function. There are two types of allocative decisions. The first involves choosing between competing rights.¹⁸⁰ Such decisions are polycentric because they distribute the risk to and rights of third parties.¹⁸¹ The second involves competition between the interests of individual claimants and broad policy considerations.¹⁸² In order to find systemic negligence in allocative decisions, the court must determine that the decision was wrong.¹⁸³ For example, with a category four allegation that budget cuts caused understaffing to negligent levels, the court must consider whether increased workloads were negligent. The issue is whether courts should second-guess these decisions.

174 See Carol Harlow and Richard Rawlings *Law and Administration* (3rd ed, Cambridge University Press, New York, 2009) at 760–764.

175 Wilberg, above n 88, at 184–186.

176 Contrast Elias CJ in *Couch v Attorney-General* [2008] NZSC 45, [2003] 3 NZLR 725 at [5], [40] and [67] [*Couch (No 1)*].

177 Wilberg, above n 88, at 159–160.

178 *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057.

179 McIvor, above n 35, at 100. See also Michael Fordham “Reparation for Maladministration: Public Law’s Final Frontier” [2003] JR 104.

180 Scott Wotherspoon “Translating the public law ‘may’ into the common law ‘ought’: The case for a unique common law cause of action for statutory negligence” (2009) 83 ALJ 331 at 338; and Wilberg, above n 103, at 424–425.

181 Harlow, above n 94, at 26–28.

182 Harlow and Rawlings, above n 174, at 764–765.

183 Harlow, at 28–30.

(a) Constitutional and Institutional Problems

Two objections relate to the judiciary's constitutional role. First, the public service is part of the executive branch of government. Its role is to carry out responsible ministers' policies. Often that function is assigned through Parliament's legislative direction.¹⁸⁴ If the court is permitted to second-guess those decisions, it goes beyond merely holding that body accountable. It is usurping that role and ignoring Parliament's will.¹⁸⁵

Secondly, many decisions made by public bodies involve political matters.¹⁸⁶ Some argue that the plaintiff's remedy should be political.¹⁸⁷ Because all responsible ministers are also members of Parliament, they can be held accountable through democratic processes.¹⁸⁸ The Ombudsmen complaints regime¹⁸⁹ and the State Services Commissioner's investigative powers provide additional layers of accountability.¹⁹⁰ The judiciary can oversee these powers through judicial review,¹⁹¹ which typically focuses on the process of decision-making and thus provide oversight while minimally encroaching on the executive's role.¹⁹²

The institutional capacity of the court is also limited. The court is designed to be an adversarial institution: it is only concerned with the proofs and arguments of the parties before it and not the polycentric considerations of allocative decisions.¹⁹³ Joining more parties is impractical when the class of persons affected is too wide. Further, the court has no greater access to information used in making the decision than the public body,¹⁹⁴ whereas public bodies can consider matters of a broader scope. Some servants are also experts in their field.¹⁹⁵

(b) Responses

While allocative decisions are problematic to litigate, they are not impossible. First, in terms of the court's constitutional role, it provides accountability where other mechanisms are less effective. Ministerial responsibility alone is limited because voters consider a number of issues. I have argued that political unpopularity is akin to market pressure on government spending, but that is a sector-wide issue more likely to register on voters' political radar than individual cases of negligence. Furthermore,

184 Legislation Advisory Committee, above n 44.

185 Cane, above n 43, at 272–273; and Geoff McLay “Negligence and Government Authorities” (paper presented to New Zealand Law Society Seminar on the Liability of Public Authorities, June 2004) 21 at 31–33.

186 Carolyn Sappideen and Prue Vines (eds) *Fleming's the law of torts* (10th ed, Thomson Reuters Professional Australia, New South Wales, 2011).

187 See, for example, *Couch (No 2)*, above n 37, at [161].

188 *Prince*, above n 63, at 277.

189 Ombudsmen Act 1975.

190 State Sector Act 1988, pt 1.

191 Harlow, above n 94, at 34.

192 See *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 (HL).

193 Lon L Fuller “The Forms and Limits of Adjudication” (1978) 92 Harv L Rev 353 at 394–396.

194 Cohen, above n 114, at 233.

195 Cabinet State Sector Reform and Expenditure Control Committee, above n 44, at [89].

forcing the debate into this arena politicises issues and detracts from a principled consideration of the merits of the claim.¹⁹⁶ Thus cases that resonate with the public could enjoy more success than those with the greatest culpability.¹⁹⁷ Less sympathetic victims might be overlooked because of unfavourable public opinion. The public service is already led and held accountable by democratically elected ministers. If the victim's ability to seek compensation is subjected to popular or political opinion, it places a significant amount of power in the same majoritarian framework. The judiciary is therefore a constitutional counterbalance that vindicates the rights of individuals against the majority.¹⁹⁸

Secondly, Parliament's will is taken into account because the legislative framework of a public body's actions is closely scrutinised to determine what duty, if any, a public body owes.¹⁹⁹ For example, explicitly chosen dispute resolution processes tell against a duty of care.²⁰⁰ Often those processes defer to specialised tribunals that have flexible remedies to suit their context. Similarly, a legislative compensation regime, such as Land Information New Zealand's, prescribes the appropriate liability for that public body.²⁰¹ Thus the court avoids usurping the other branches of government.

Further, other accountability mechanisms will not always be a viable alternative.²⁰² Judicial review is only practically available to correct a wrongful process prospectively. Even when it is available, it does not provide financial compensation,²⁰³ and so it cannot rectify the financial loss caused by decision or by the delay in having a decision reviewed.²⁰⁴ Less formal accountability regimes like the Ombudsmen and State Services Commissioner are ill-suited to methodically determine and administer compensation.²⁰⁵

Similarly, the court's institutional limitations should not be hyperbolised. Systemic negligence will not always directly involve allocative decisions. Cases involving a miscommunication such as the lost application form in category one raise almost no resource allocation decisions, except perhaps the initial investment in infrastructure that establishes an adequate system of communication and tracking between departments. But where allocative decisions are directly considered, adjustment to the court's approach is needed.

196 Williams, above n 141, at 514.

197 See the case studies in McLay, above n 60.

198 See generally Wotherspoon, above n 180, at 333 and 337–338.

199 See, for example, the Court's approach in *Prince*, above n 63.

200 *Prince*, above n 63, at 275–276.

201 Land Transfer Act 1952.

202 Fordham, above n 179.

203 At [3].

204 Stephen Bailey "Public authority liability in negligence: the continued search for coherence" (2006) 26 *Legal Studies* 155 at 182–183.

205 At 161–162.

(c) Overcoming Institutional Limitations: Adjusting the Court's Approach

The first type of allocative decision — the weighing of competing rights — can be accommodated within the duty inquiry. Courts should not impose liability for a decision if it would conflict with the public body's primary duties.²⁰⁶ Further, evaluating whether competing rights are properly weighed is not unique to the public sector. For example, when a patient discloses that he or she will harm others, a psychiatrist must decide between the patient's right to confidentiality and public protection.²⁰⁷ To an extent, the psychiatrist uses his or her expertise.²⁰⁸ However, lawyers must make similar choices when privileged information raises the potential for harm, and lawyers have no particular expertise in such matters.²⁰⁹ The main factor that distinguishes public bodies from these examples is the scale on which the decisions occur: they affect a larger number of people, who are often treated similarly.²¹⁰ The public is also generally more diverse and has more conflicting interests, some of which will inevitably be subordinated to others.²¹¹ The Crown is an attractive target to plaintiffs because it is enduring, has deep pockets and cannot avoid judgment.²¹² These concerns justify a more conservative approach to liability and a degree of deference to the decision-maker but not total immunity.

The second type of allocative decision is the weighing of broader policy considerations such as resource distribution. Some authors suggest that *Wednesbury* unreasonableness, as used in judicial review, should be transplanted.²¹³ The threshold is high but slightly lower in cases involving individual rights,²¹⁴ so the concept may be sufficiently flexible for negligence claims. Five Australian states legislated to include the test as a defence to negligence for public authorities.²¹⁵ However, the House of Lords rejected a cross-pollination of concepts from different jurisdictions.²¹⁶ The latter approach is preferable for a number of reasons.

First, many quasi-public bodies could argue that they have made allocative decisions and seek similar relief, which introduces further uncertainty into an already fluid area of law.²¹⁷ Moreover, the courts have failed to clarify a distinction between policy decisions and operational

206 See Wilberg, above n 103, at 424–425.

207 *Tarasoff v Regents of the University of California* 17 Cal 3d 425, 551 P 2d 334 (1976). Compare Peter Carstensen *The Evolving Duty of Mental Health Professionals to Third Parties: A Doctrinal and Institutional Examination* (1998) 17(1) *Int'l J L & Psychiatry* 1 at 3–5.

208 See generally Carstensen, above n 207, at 4–6.

209 *Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008*, r 8.2.

210 Williams, above n 141, at 513.

211 Cane, above n 43, at 278.

212 Williams, above n 141, at 513.

213 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA). See Wotherspoon, above n 180; and Mark Aronson "Government Liability in Negligence" [2008] 32 *MULR* 44 at 76.

214 *Wolf v Minister of Immigration* [2004] NZAR 414 (HC).

215 Aronson, above n 213, at 79. See more generally 76–81.

216 *Barrett v Enfield London Borough Council* [2001] 2 AC 550 (HL).

217 Bailey, above n 204, at 184.

decisions in negligence, howsoever phrased.²¹⁸ Australian attempts to legislate these boundaries have been highly unsuccessful.²¹⁹ Additionally, the concept of reasonableness considers different things in judicial review and negligence. The former seeks a logical connection between the matters the public body should have considered and its conclusion. The latter concerns the level of care taken and the foreseeability of harm,²²⁰ thereby balancing freedom of action against freedom from harm.²²¹ The terms cannot be directly equated.

Similarly, the concept of public law illegality is unhelpful.²²² Negligence may occur even when a public body is acting *intra vires* — such as the lost application form in *Pranfield*.²²³

The concept of justiciability may assist. Justiciability is employed when a court recognises that its capacity to review the numerous, complex matters weighed by the public body is limited.²²⁴ It has been compared to the *Bolam* standard applied in professional negligence cases, whereby the court concedes its limited competence to prefer one expert's opinion over another's.²²⁵ Again, the doctrines are at cross-purposes; the former yields to polycentricity whereas the latter yields to expertise so no direct comparison can be made.²²⁶ However, justiciability can be utilised to assist the court's approach.²²⁷ The result is that the court requires the decision to be self-evidently negligent — unlike yielding to professionals' expertise this is not a matter of preferring evidence.²²⁸ Rather, it requires a specific, detailed pleading, disclosing such carelessness that the fact that polycentric considerations were at play does not excuse the decision made.²²⁹ Moreover, the level of deference should be proportionate to the allocative decision involved.

Summary

Imposing liability for systemic negligence correctly assigns moral responsibility to the public body. This is preferable to the erroneous assumption that an unidentified servant in the institution must be at fault. Systemic negligence may also encourage investigating and reducing the causes of harm. The nature of systemic negligence means that the courts

218 McIvor, above n 35, at 99–101

219 Barker, above n 146, at [11.3.3.3].

220 Fordham, above n 179, at [10].

221 Aronson, above n 213, at 80.

222 Swati Jhaveri “Constructing a framework for assessing public authority liability in negligence: The role of public norms, private law norms and policy arguments” (2011) 19 Tort L Rev 3 at 12. Compare *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL).

223 *Pranfield*, above n 45.

224 Fuller, above n 193.

225 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 (QB). See also McLay, above n 185, at 40.

226 Christopher Walton (ed) *Charlesworth & Percy on Negligence* (12th ed, Sweet & Maxwell, London, 2010) at [2-291]–[2-292].

227 Barker, above n 146, at [11.3.3.3]

228 Jhaveri, above n 222, at 11–12.

229 Walton, above n 226, at [2-292].

must occasionally question allocative decisions and respond with a proportionate degree of deference. Other concerns about public service liability can be addressed within the existing elements of negligence.

V REFORMING PUBLIC SERVICE LIABILITY

Accepting that systemic negligence should be imposed, appropriate reform must reflect two main features. First, deterrence is best served by enabling a public body to investigate and improve itself. Secondly, the allegation of negligence must be proportionate to the level of allocative decision making involved. I suggest that a dual approach is required.

Evidential Duty

Internal investigation and resolution are best encouraged by placing an evidential duty on the public body. The evidential duty requires a plaintiff to allege systemic negligence and provide prima facie evidence, but places the evidential onus of disproving it on the public body.²³⁰ This approach is similar to that used in bailment cases: it requires the party with the most knowledge to produce evidence in its defence.²³¹ However, the evidential duty is not an independent cause of action; it does not change the elements of negligence that must be established. Neither does it place a formal onus on the public body to rebut. The evidential duty simply requires the public body to put forward an explanation of the systems it has in place and their adequacy.

To an extent, this reflects the existing position. In *Barine Developments Ltd v Minister of Fisheries*, the plaintiffs' interlocutory application to interrogate was granted because the public body could not hide behind its oblique processes.²³² Similarly in *Jenssen v Ministry of Fisheries*, evidence of the processing systems utilised by the public body were shown to be adequate and disproved its negligence.²³³ Formalising the approach provides consistency. In both cases, the focus was still on what the individuals within the public body did, whereas the evidential duty is directed at the systems the body has in place.

The concept of justiciability should be employed to reduce the level of evidence that a public body is required to produce.²³⁴ In *Pewhairangi v Ministry of Health*, the plaintiff alleged that the public body's system of screening for Hepatitis C in blood transfusion was negligent.²³⁵ The public body brought evidence that the state of medical knowledge at the time was

230 Cherie Booth and Dan Squires *The Negligence Liability of Public Authorities* (Oxford University Press, Oxford, 2006) at [9.108].

231 *Shipbuilders Ltd v Benson* [1992] 3 NZLR 549 (CA).

232 *Barine Developments Ltd v Minister of Fisheries*, above n 72, at [12].

233 *Jenssen v Ministry of Fisheries*, above n 47.

234 This occurred in *Prince*, above n 63, at 281, but the evidence was not relevant to the particular time period.

235 *Pewhairangi v Ministry of Health*, above n 72.

limited so that the risk could not have reasonably been contemplated. It also provided evidence that screening for what was perceived to be a minimal risk at the time was too costly.²³⁶ It was not held liable. Placing the duty on the public body enables it to bring evidence about the matters it weighed. This correlates with a more onerous obligation on the plaintiff to show that, given those considerations and the various options available, the public body's systems were still negligent. Alternatively, the plaintiff could allege that a superior system was realistically available. Such circumstances would be rare. As *Pewhairangi* demonstrates, negligence must still be assessed in the context of the knowledge and resources available to the public body.

Is Legislative Reform Necessary?

The evidential duty's focus on systemic issues is more advantageous to the public body because it can defend itself: if the public body can demonstrate that its systems were adequate, it was not negligent. However, as a form of direct liability, systemic negligence is not readily available on the wording of s 6 of the Crown Proceedings Act. A more liberal interpretation of subs 6(1) and (4A) may provide scope for the inclusion of systemic negligence.²³⁷ Nevertheless, it would ultimately rely on the fictions currently employed, which fail to address the dimensions of group responsibility.

A general duty of "good administration" would be simplest but has been rejected by the Court of Appeal.²³⁸ Attempts in Australian states to legislate guidelines for Crown liability have been largely unsuccessful.²³⁹ Broad legislative statements mostly repeat the state of the common law without providing clarity.²⁴⁰ Systemic negligence cases are highly fact dependent so it is difficult to provide a comprehensive definition of what a duty to prevent it might entail. Moreover, many employees are faced with conflicting duties. Adding another duty that is difficult to operationalise will not clarify the law.

The most attractive mode of reform would be to include in the State Sector Act provision for the liability of public bodies for torts committed by employees as individuals, as a group, or by virtue of the collective nature of their operation. Thus it would only apply to public bodies as defined in this paper, and it avoids creating a separate scheme within the Crown Proceedings Act. The provision would be subject to incompatible legislation. If liability is problematic for a particular type of work or function, relevant legislation could provide an alternative form of redress or — in rare circumstances — immunity. This work or function based approach provides flexibility.

236 At [44].

237 Arrowsmith, above n 30, at 159.

238 *Minister of Fisheries v Pranfield Holdings Ltd*, above n 45.

239 Aronson, above n 213; Barker, above n 146, at [11.3.3.3]. See Civil Law (Wrongs) Act 1958 (Vic); Civil Law (Wrongs) Act 2002 (ACT); Civil Liability Act 1983 (SA); Civil Liability Act 2002 (NSW); Civil Liability Act 2002 (Tas); Civil Liability Act 2002 (WA); and Civil Liability Act 2003 (Qld).

240 See generally Aronson, above n 213.

VI CONCLUSION

Reforming the Public Service's liability for systemic negligence requires a two-pronged approach. To escape confusion over the source and nature of the liability, a clear legislative directive is required. This prevents reliance on a strained interpretation of vicarious liability that fabricates direct liability and subverts the true basis of an institution's responsibility as a group of individuals. Such fictions only encourage inconsistent outcomes. However, legislative reform must provide flexibility to allow the public sector to respond to the community with redress and immunities as required. Thus the second prong is a change of judicial approach. An analysis of the rationale for systemic negligence indicates that its appropriateness is contextual. It is valuable where it encourages public bodies to improve their systems and avoid causing negligent behaviour. But when allocative decisions are questioned it must yield to the limitations of the adversarial system. A careful and pragmatic court must strike a balance between the higher burden on the plaintiff and an evidential duty on the public body. Such an approach is needed to untangle the problems of holding the public service liable for systemic negligence.