

TORT, SETTLEMENTS AND GOVERNMENT: A PRELIMINARY INQUIRY

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This article is part of a wider project to assess the effect of tort liability, or other settlements, on government. The hypothesis of this project is that the special nature of the government must be taken into account when examining the effect that liability or settlements might have on government, and that a particularly important part of such liability or of settlements is the information that they can generate. As the research project developed it became clear that a necessary first step in making such an evaluation was to determine how the government goes about settling claims and accounting for tort or ex gratia settlements. This article reviews and explains the basic way in which the New Zealand government accounts for liabilities and settlements and then shows how that framework was employed through a number of case studies. The author hopes that other scholars will use the material gathered as a starting point for more examination of the relationship between private law, traditional public law and the way that Government accounts for its activities.

I INTRODUCTION

In *S v Attorney-General*, Blanchard J wrote of the effect that he hoped the finding might have on the Department of Social Welfare's operations:¹

This result may provide an incentive for the State to take even greater precautions in the future for the protection of children in its care by way of vetting and monitoring of foster parents. We do not see that

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¹ *S v Attorney-General* [2003] 3 NZLR 450 (CA) at [71]–[72].

as likely to affect the Department's trust in people who take on this role to an extent which has an adverse impact on the relationship.

If those efforts are successful even in only a few cases in preventing or limiting abuse of a child, there may well be savings in social costs of the kind to which Ms Cooper drew attention, to which we would add the costs of accident compensation claims by sexual abuse victims now that all emerging cases of child abuse are covered under the current legislation.

Arguments for supposed deterrence or incentives are common in tort literature. But the government is obviously different from a private organisation.

This article is part of a wider project to assess whether such a deterrent effect is likely. I begin with the hypothesis that, rather than having a monetary deterrence effect, a better way of understanding the effect of tort liability or the process of settling tort-like claims in the government environment may be in terms of the information that such processes produce. For that information process to be at its most effective there ought to be channels through which that information can make its way to decision makers and the public. However, as the research project developed it became clear that a necessary first step in making such an evaluation was to determine how the government goes about settling and accounting for tort settlements. While I had set out to answer the big question posed by Blanchard J's dicta, the research presented in this piece remains very much a preliminary inquiry into how the government settlement process works. It is hoped that other lawyers and those interested in the study of government will find that this account furnishes a useful starting point for further analysis of the interaction between claims made against the government and the realities of the public finance system. If my inquiries have established anything it is that there is more work to be done on the interface between the law and the public finance system.

The preliminary conclusion of the article is that, by and large, New Zealand has such information channels as a result of strong parliamentary control over expenditure and a good culture of making information about settlements available to those who inquire. This article suggests that central government should, as is done in British Columbia, collate the information as a matter of course, and make it publically available, albeit at the Parliamentary Library in Wellington. I would add though, that when approached directly almost all the government departments we dealt with provided us with the information, in one form or another, that we sought.

In countries with a fully operating tort system it is relatively easy to understand the contentions made in relation to private corporations by those like Calabresi; that tort judgments might require private individuals or corporations to internalise the costs of accidents that occur and to pass those costs on to their consumers.² Whether one agrees with such contentions is another matter.³ There

2 Guido Calabresi *The Costs of Accidents: a Legal and Economic Analysis* (Yale University Press, New Haven, 1970).

are, of course, disputes over whether private individuals or corporations respond to such liability and, if so, how and why they do.⁴ It may be, as Schwartz suggests, that the incentive or deterrent effects of tort liability may vary and that often it may not provide the deterrence that its advocates claim. However, tort liability might provide more deterrence than its detractors sometimes suggest.⁵ There is of course a further New Zealand twist on the issue of deterrence. The no-fault basis of the Accident Compensation Corporation (ACC) scheme in large measure rejects deterrence as a critical feature of tort law, instead preferring to compensate all those who suffer physical injury through accident from one central source. Certainly any deterrence is blunted by the inability to award compensatory damages in all cases where there has been a physical injury.

Leaving that aside and returning to the main point, government organisations, in contrast to private organisations, cannot necessarily reduce the services that they provide. Child protection services, for instance, cannot withdraw from the "market" of protecting children because of tort liability. Nor do public agencies have the same bottom line as private individuals. Money for large tort payments, as this article shows, often comes from additional central government funding. To use a New Zealand example, the payments made by the Crown in relation to the Cave Creek disaster, where a viewing platform collapsed, did not affect the bottom line of the Department of Conservation, or mean, for instance, that it was unable to undertake other conservation efforts (perhaps saving fewer kiwis). Rather, compensation was funded from a central appropriation.

One of the purposes of imposing liability is to send a signal about the incorrectness of past practice and the need to prevent further failure. However, where claims are instead settled this relies on transparency in paying for settlements. Signals cannot be correctly read if the accounting mechanism obscures the cost of settling claims. Since such settlements are likely to be politically sensitive, it is important that the process is transparent and that the public can access information about the nature of claims and how they are settled. The case studies discussed below all involve settlements rather than payment of judgments. Settlements that are confidential between the parties are, of course, a useful way of solving private disputes, but confidentiality might frustrate public accountability.

This article examines how central government accounts for tort claims or settlements that would be dealt with by tort law in other countries. One of the purposes of the article is to set out the basic arrangements in government for paying settlements. A second purpose is to consider the degree to which it is possible for those outside a particular government agency to assess which claims are

3 Ibid.

4 See Don Dewees, David Duff and Michael Trebilcock *Exploring the Domain of Accident Law: Taking the Facts Seriously* (Oxford University Press, Oxford, 1996). The authors argue, after an analysis of various tort impact studies, that it could not be decisively concluded that tort had a major effect on accident rates.

5 Gary T Schwartz "Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice" (1997) 75 Tex L Rev 1801.

succeeding against government and what kinds of settlements are being made. This article begins a debate on such processes rather than seeking to reach a definitive conclusion. Nevertheless, it suggests that New Zealand might seek to increase the transparency of such claims by providing one central registry of claims settled or judgments paid.

Three different case studies were chosen to illustrate the New Zealand government's method of settling civil claims.⁶ These were:

- (1) The Cave Creek settlement for a total sum of \$2.675 million, as announced in February 1997.
- (2) The \$31 million compensation package paid to persons who contracted Hepatitis C through infected blood or blood products prior to July 1992.
- (3) Compensation paid in 2001 and 2004 relating to treatment in the Lake Alice child and adolescent psychiatric unit. A total of 183 former patients received \$10.7 million in compensation.

The Ministry of Social Development was approached about how claims of institutional abuse were handled, and provided significant information both in writing and during an interview. Information was received from the New Zealand Police and the Department of Corrections about tort claims brought against those departments. Both the Police and Department of Corrections were prepared to provide information about total settlements in particular years. Many of these claims would have been influenced by the Accident Compensation Act 2001 prohibition on compensatory damages. Some also involved claims that would have been barred by the Limitation Act 1950 (as it then was). But they serve as useful examples of how the Government might go about settling claims. They stand in default for the reality that ACC prevents what might be simply common law claims in other jurisdictions.

II A VERY BRIEF BACKGROUND TO THE NEW ZEALAND PUBLIC FINANCING PROCESS

Without a basic understanding of New Zealand's public finance system it is impossible to understand the government's framework for settling claims and judgments against it.⁷ The following is a very basic introduction to that process and it is by no means definitive.⁸

6 This approach follows the suggestions of colleagues at Victoria University of Wellington, Adjunct Professor Kevin Simpkins and Dr David Carter.

7 For a general account see Philip Joseph *Constitutional and Administrative Law in New Zealand* (Thomson Brookers, Wellington, 2007) at 299–301.

8 Greater guidance can be found in Treasury publications or in the work of the former Clerk of the House of Representatives, David McGee. See David G McGee *The Budget Process: a Parliamentary Imperative* (Pluto, London, 2007).

Section 22 of the Constitution Act 1986 sets down a basic fundamental of Westminster style government. Expenditure cannot be incurred without express authorisation. The Public Finance Act 1989 sets out the appropriation process. Estimates describe government spending plans and are grouped within "Votes" that broadly reflect ministerial portfolios. The Appropriation Act is the yearly instrument by which such appropriations are made. The Appropriation Act must be passed within three months of introduction, the time period being designed to give sufficient opportunity for parliamentary scrutiny.⁹

Supplementary Estimates are used to deal with changes in expectations regarding expenditures and liabilities. An Appropriation (Supplementary Estimates) Act must come into effect by 30 June of the relevant year, which is the end of the central government's financial year. Imprest Supply Acts are used to validate expenditure in advance of the first Appropriation Bill for a year and expenditure that occurs after the main decisions have been taken that are reflected in the Estimates. These are subject to normal parliamentary scrutiny including by select committees, and of course to the rigours of the budget process within government. The process is complex. McGee concludes that the sheer volume of information makes it difficult for full parliamentary scrutiny.¹⁰

Government accounts are prepared according to generally accepted accounting practice, primarily comprising financial reporting standards approved in New Zealand by an independent crown entity, the Accounting Standards Review Board (from 1 July 2011, the External Relations Board).¹¹ Essentially the same rules that apply to the private sector apply to the public sector.¹² Financial accounts must be prepared on an accrual accounting basis.¹³ Appropriations in turn reflect this, by also being established on an accrual basis.¹⁴

9 Ibid, at 51.

10 Ibid, at 42.

11 The Board was established by the Financial Reporting Act 1993. The Financial Reporting Amendment Act 2011 provides for the establishment of the External Reporting Board from 1 July 2011.

12 Note that the financial reporting standards do include some specific requirements that apply only to public benefit entities, including the government and departments among others.

13 New Zealand Equivalent to International Accounting Standard 1 – Presentation of Financial Statements (NZ IAS 1) standard 27 and 28, available at <www.nzica.com>.

14 New Zealand Treasury *A Guide to the Public Finance Act* (2005).

The decision to incur an expense has to be accompanied by a corresponding appropriation.¹⁵ Expenses under a contract should not, for instance, require a separate appropriation, since the cost of dealing with them should have already been accrued when the decision to incur the obligation was made. This model does not work well in relation to liability for tort or *ex gratia* payments that settle analogous claims. There is a basic difficulty in dealing with tort settlements and judgments within a framework that requires prior authorisation for expenditure. The very nature of torts is that they are seldom authorised. This difficulty led to the old case law distinction that prevented the tortious actions of Crown servants being ascribed to the Crown,¹⁶ while allowing contracts concluded on behalf of the Crown to be so ascribed.¹⁷

III THE BASIC NEW ZEALAND FRAMEWORK FOR SETTLING CLAIMS AND PAYING JUDGMENTS

In theory, the basic New Zealand framework for claims against central government agencies is contained in the Crown Proceedings Act 1950. The statutory procedure is essentially a double-barrelled one. First, judgment must be obtained from the court and, second, a certificate is to be given to the Governor-General, who then can satisfy judgment without making any further appropriation. This rather convoluted procedure differs from that in the model statute, the Crown Proceedings Act 1947 (UK), on which the New Zealand Act is based. Under that statute, a certificate is delivered directly to the relevant government department, which then authorises

15 This is explained, *ibid*, at 12:

Output expense appropriations authorise expenses to be incurred by departments or other entities in supplying outputs to parties external to the entity. The expenses authorised include both direct expenses and indirect expenses allocated to those outputs.

Output appropriations encourage the Government and Parliament to focus on the goods and services to be delivered by an entity in respect of the appropriations. They permit attention to be directed to the value obtained from government expenditure as much as how that expenditure was made. They also provide departments with autonomy in determining the appropriate input mix and, where necessary, to alter that input mix during the period.

The guide contrasts this with what occurred before adopting accrual accounting:

Prior to the adoption of accrual accounting by the New Zealand Government, appropriations controlled the amounts that could be spent under various categories of cash payments (for example, salaries) in respect of broadly defined programmes. Such traditional input-based appropriations did not support the focus on deliverables and constrained the way in which resources could be used to deliver outputs.

16 See *Tobin v The Queen* (1864) 16 CB (NS) 310, 143 ER 1148. See generally for an explanation of the rule, Peter W Hogg and Patrick J Monahan *Liability of the Crown* (3rd ed, Carswell, Scarborough, 2000).

17 The leading textbook on Crown contractual liability is Nicholas Seddon *Government Contracts: Federal, State, and Local* (Federation Press, Annandale (NSW), 2004).

payment. The reason for a different statutory regime may be a hang-over from Australian concern over compulsory enforcement of judgments against the government.

The constitutional concern about judgments essentially bypassing the appropriations process is long standing. Before the Crown Proceedings Act was adopted in 1950, New Zealand crown liability law was governed by the Crown Suits Act 1908. This provided for direct crown liability for torts but did not allow direct execution against departments. Rather, judgment led to a certificate being delivered to the Governor instead of direct enforcement. When enacting the Crown Suits Act 1871, the first general statute enabling claims to be brought against the Government, parliamentarians were alive to the Victorian "Darling crisis" of the 1850s. They were desirous to avoid what they believed to be the irresponsible government that the crisis represented. Supply had been refused by the Legislative Council as a result of a dispute over tariff policy. However, the Victorian Government managed to govern without any appropriation on the basis of essentially contracting with suppliers in the expectation that the contracts would create debts, which would then be sued upon in court.¹⁸

In addition to requiring a separate certificate, s 24(4) of the Crown Proceedings Act 1950 also requires a separate report to be tabled by the Minister of Finance detailing monies paid under this section without any other appropriation. If it were the practice to pay all judgments under this section, such reports would be a valuable resource for those who sought to assess Crown liability as determined in court, although it does not include a requirement to record settlements.¹⁹ In fact, payments appear to be made under existing appropriations or from special appropriations. It is not clear as a matter of modern constitutional, or accounting, practice how the Governor-General would carry through the role described in s 24(3) or authorise payment.²⁰

A Cabinet Circular governs the settlement of claims against departments. This Circular provides that depending on the amount of the claim, authorisation must be sought from the Department, the relevant minister, or from Cabinet.²¹ The Cabinet Circular specifically excludes the payment of settlements and *ex gratia* payments from the general delegation given to Chief Executives of government departments. It sets in place the regime by which those payments must be made. Chief

18 See the account in Alpheus Todd *Parliamentary Government in the British Colonies* (2nd ed, Longmans Green, London, 1894). See also the account in JM Bennett *Sir James Stawell: Second Chief Justice of Victoria* (Federation Press, Sydney, 2004).

19 Crown Proceedings Act 1950, s 24.

20 Email from William More, solicitor, New Zealand Treasury to Geoff McLay (31 July 2009).

21 Cabinet Office Circular "Guidelines for Changes to Baselines" (24 September 2009) CO 09/06. These figures were increased from the previous maxima provided for in Cabinet Office Circular (30 June 1999) CO 99/7 which provided for settlements of \$100,000 without reference to the Minister, and payments without the approval of Cabinet of \$500,000, and *ex gratia* payments of \$20,000 without ministerial approval and \$75,000 with approval.

Executives are authorised to make payments of up to \$150,000, while responsible ministers may make payments of up to \$750,000. Crown Law endorsement or a court judgment is required for the settlement of claims over \$75,000, while sums below that may be settled by the endorsement of a departmental solicitor. There are lower limits for *ex gratia* payments. Chief Executives may make a payment of \$30,000, while a responsible minister may make a payment of up to \$75,000. *Ex gratia* payments are defined in the circular as "those made in respect of claims that are not actionable at law, but for which there exists a certain moral obligation and payment should be made".²² Claims outside these limits require Cabinet authorisation.

In many ways this process is to be commended. It means that legal advice has been sought in relation to all but the lowest value claims, and ministers have been to be involved in settling claims of what might be considered low value claims. There is, however, no public repository of information about claims met by government departments that are below these particular thresholds. This category is likely to include most tort claims made against government departments. The Cabinet Office suggested that the best approach was to seek the information directly from the department involved,²³ something of a fishing expedition.

Another way that legal claims against the government could possibly be assessed is the requirement for contingent liabilities to be noted in departmental and whole of government accounts. The relevant accounting standard draws a distinction between those liabilities for which provision is to be made in accounts,²⁴ and those that are contingent. Contingent liabilities need merely be disclosed, as opposed to having a provision made for them in the accounts as must be done with the former.²⁵

22 Ibid.

23 Letter from Michael Webster, Deputy Secretary of the Cabinet to Geoff McLay (9 January 2009):

You also asked for documents relating to the compensation, settlement and *ex gratia* payments in relation to other claims that have been authorised under Cabinet Office Circular COC(99)7 ... the best approach for accessing information relating to specific settlements or payments would be to contact the individual agencies responsible for the payment in question.

24 That is, they are recognised as expenses.

25 New Zealand Equivalent to International Accounting Standard 37 – Provisions, Contingent Liabilities and Contingent Assets (NZ IAS 37) (November 2004, amended November 2007), available at <www.nzica.com>. A contingent liability is defined in that standard as:

- (a) a possible obligation that arises from past events and whose existence will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events not wholly within the control of the entity; or
- (b) a present obligation that arises from past events but is not recognised because:
 - (i) it is not probable that an outflow of resources embodying economic benefits will be required to settle the obligation; or
 - (ii) the amount of the obligation cannot be measured with sufficient reliability.

The requirement to note contingent liabilities is not a particularly useful tool for assessing the effect that tort payments might have on government for a number of reasons. A materiality requirement applicable to all requirements of financial reporting standards means that not all claims are separately disclosed in the whole of government action. Moreover, claims made might not reflect the amount likely to actually be settled. Current practice is to record the total amount claimed, which by itself is not an admission of liability and not an estimate of likely judgment or settlement. The 2009 Budget, for example, provided the following disclaimer:²⁶

Where contingent liabilities have arisen as a consequence of legal action being taken against the Crown, the amount shown is the amount claimed and thus the maximum potential cost. It does not represent either an admission that the claim is valid or an estimation of the amount of any award against the Crown.

Those which are not recorded separately can be combined into a generalised category named "other quantifiable contingent claims". For much of the last decade or so the only observable tort claims that might be seen in the whole of government financial statements related to the Hepatitis C infection through blood transfusions, or possible liability for leaky buildings.

Very large claims may not be subject to proper estimation. The 2009 Budget, for instance, remarked:²⁷

Accounting standard NZ IAS 37 requires that contingent liabilities be disclosed unless the possibility of an outflow of resources embodying economic benefits is remote. Disclosure of remote contingent liabilities is only required if knowledge of the transaction or event is necessary to achieve the objectives of general purpose financial reporting. This part of the Statement provides details of those contingent liabilities of the Crown which cannot be quantified (remote contingent liabilities are excluded).

Claims have been made against central government in relation to the failure of many New Zealand houses to prevent or respond to water ingress and the claimed failure of the regulatory body, the Building Industry Authority (BIA), to prevent the damage through better regulation. It is now estimated that leaky building claims will reach \$11 billion by the time all necessary repairs are made.²⁸ Since 2004, the Government's financial statements have included a note of unquantifiable contingent liability showing that there are still claims being made.²⁹

26 New Zealand Treasury *Budget Economic & Fiscal Update 2009: B.2 & B.3* (2009) at 124.

27 *Ibid*, at 129.

28 PricewaterhouseCoopers *Weathertightness – Estimating the Cost* (prepared for the Department of Building and Housing 2009).

29 New Zealand Treasury *Financial Statements for the Government of New Zealand 2004: B.11* (2004) at 71:

The change in wording did not completely reflect the position in the *Attorney-General v Body Corporate 200 (Sacramento)* case that the BIA could not be liable for the way in which it formulated the building code or regulated private building inspectors.³⁰

IV THE CASE STUDIES

A Introduction

The first point of looking at three prominent settlements is to show how these settlements were financed. None of the three settlements involved payments made out of existing departmental funding, but rather through supplementary appropriations. A subsidiary purpose is to discover how much information might be accessible about the settlements, so that the use of public money in the settlements might be evaluated. In fact, a great deal of information about the settlements can be discovered, but that is because, by their nature, they had been discussed publicly. One wonders the degree to which details of less well known settlements might be discoverable. The need in each case to seek supplementary appropriations to cover increases in "legal costs" meant that the monetary effect of the claims was observable – something which aids transparency. However, the way in

Building Industry Authority litigation

The Building Industry Authority is one of a number of defendants in lawsuits alleging negligence on the part of the Authority regarding its performance on weathertightness issues. The Authority considers that other proceedings are likely to be brought against it both in the High Court and under the Weathertight Homes Resolution Services Act.

The Authority had no direct involvement with any of the buildings concerned. The outcome of the claims essentially depends on questions of law relating to the Authority's performance of its statutory duties. The Authority considers that it has at all times performed those duties properly. In the absence of decided cases on the relevant questions of law there is no certainty as to the outcome of the claims. Notwithstanding the outcomes of the claims, should the Authority be found to be liable, the amounts payable will depend on the amounts paid by other defendants who are also held to be liable. It is therefore not currently possible to quantify the Authority's contingent liabilities.

That statement was altered after 2005 to take account of the absorption of the Building Industry Authority into the Department of Building and Housing:

Building Industry Authority

The Building Industry Authority (BIA) is a joint defendant in a number of claims before the courts and the Weathertight Homes Resolution Service relating to the BIA's previous role as regulator of the building industry.

The BIA has been disestablished and absorbed into the Department of Building and Housing and, to prevent conflicts of interest, Treasury was given responsibility for managing weathertight claims against the BIA on behalf of the Crown from 1 July 2005.

³⁰ *Attorney-General v Body Corporate 200 (Sacramento)* [2007] 1 NZLR 95 (CA). Sacramento is the name of the building complex that failed.

which such payments were described in the supplementary estimates did not make that tracking straightforward, and took some persistence. In our inquiries to departments we made it clear that our project was an academic inquiry focusing on government processes. In an attempt to anticipate refusals based on the grounds of legal privilege or privacy, all letters stressed that our inquiry was not concerned with the identity of claimants or particular persons but with the processes and decision-making criteria.

Unsurprisingly, none of the government departments were prepared to share with us legal opinions on which the settlement had been based. The Ministry of Health and the Ministry of Social Development, however, were prepared to provide us with general information about the nature of their settlement and the settlement process.

From a transparency perspective the case studies are reassuring. The reassurance comes from basic constitutional norms having been observed – large settlement amounts required parliamentary approval. From an incentive/deterrence perspective, the reality is that all three of the claims were settled from extra-departmental appropriations. Of course, that is not to say that explanations would have been required within the bureaucratic process when seeking approval for the supplemental appropriation. It might be argued that the whole system somewhat resembles a self-insurance model, with the Treasury, and perhaps Audit New Zealand providing the oversight that an insurance company might.³¹

The purpose of the case studies is not to evaluate whether the compensation provided, or in other cases, not provided, to particular claimants was fair, or whether the claims in general might have been better dealt with. These cases involve controversial matters, in each of them there are doubtless those would argue that the actual settlements were not fair, or that others have been excluded from compensation. Nor is the intention of this article to establish the truth of allegations that led to the settlements. The fact that the cases did not get to a final determination in court means the facts of what happened sometimes still remain disputed. The point of the inquiry here was to assess what kind of information was available from government sources about the nature of the settlement processes and the source from which the settlements were funded.

B Case Study One: the Cave Creek Disaster

On 28 April 1995, a Department of Conservation viewing platform collapsed, plunging 17 polytechnic students and their teacher into the gully below. Fourteen were killed and the rest left terribly injured. The collapse of the platform was subsequently revealed to have been caused by its rather rudimentary construction. A Commission of Inquiry led by Judge Noble blamed systemic failures within the Department but refused to allocate responsibility to any particular official. At times the Report highlighted the underfunding of the Department, but as Graeme Scott, former

31 For an examination of the effect that insurance might have on a regulator see Richard V Ericson, Aaron Doyle and Dean Barry *Insurance as Governance* (University of Toronto Press, Toronto, 2003).

Secretary of the Treasury wrote in his book on public management, the Judge failed to link the general underfunding of the Department with the errors made in the construction of the platform.³² A second report undertaken by the State Services Commission into the management of the Department did not reveal that there had been failings in the way that the Department as a whole had been managed.³³

Generally speaking, because of New Zealand's unique no-fault accident compensation regime, plaintiffs are unable to obtain damages for personal injury. However, they may sue for exemplary damages based on defendants' outrageous or contemptuous behaviour.³⁴ At the time of the Cave Creek disaster it had not been finally established that exemplary damages would be available for inadvertent or grossly negligent behaviour, as opposed to deliberate or risk taking behavior, and indeed it would not be finally decided until 2010.³⁵ Furthermore, it had not been finally established in the Court of Appeal, as it would be in 1998, that proceedings by witnesses of accidents were not barred by the accident compensation regime, although that was the likely interpretation of statutory changes in 1992.³⁶ However, the ability of relatives who were not witnesses to accidents to bring claims remains unsettled, and the claimants need to establish a recognisable psychiatric illness.³⁷

Despite these uncertainties over legal liability, it is a matter of public record that \$2.67 million was ultimately paid to the surviving victims and affected families. The total amount to be awarded to the Cave Creek victims was determined by retired Court of Appeal Judge Sir Duncan McMullin.

The Department of Conservation's memorandum to Cabinet, that accompanied Cabinet's consideration of the final settlement, was withheld on the grounds of protecting individual privacy,³⁸ or confidences.³⁹ Much of the justification for the settlement and the way in which it was arrived at, however, was detailed in a memorandum, produced jointly by the Attorney-General and

32 Graeme Scott *Public Sector Management in New Zealand: Lessons and Challenges* (New Zealand Business Roundtable, Wellington, 2001).

33 *Ibid*, at 144.

34 *Donselaar v Donselaar* [1982] 1 NZLR 97 (CA). Exemplary damages have been expressly provided for since 2001 in what is now the Accident Compensation Act 2001, s 319.

35 It was accepted in 2003 by the Privy Council that the fact that behaviour was inadvertent was not necessarily a bar to an award of exemplary damages: *A v Bottrill* [2003] 2 NZLR 721 (PC). The Supreme Court accepted in *Couch v Attorney-General (No 2) (on appeal from Hobson v Attorney-General)* [2010] 3 NZLR 149 (SC) that some advertence to the risk was a necessary element.

36 This was confirmed by *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 (CA).

37 *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179.

38 Official Information Act 1982, 9(2)(a).

39 Official Information Act 1982, 9(2)(ba).

the Minister of Finance, which was presented to Cabinet at the same time.⁴⁰ The award was not, it seems, of an *ex gratia* nature. Rather, it was intended to anticipate claims that might be made through tort law, either through exemplary damages by the survivors or through a claim for psychiatric injury on the part of the families. The memorandum concluded that the likely success of those claims was amongst the advantages of the mediation procedures that had been chosen.⁴¹

In March 1996, Cabinet agreed on what it termed a "flexible" strategy in dealing with claimants. A \$400,000 settlement was made in May 1996 with a paraplegic survivor.⁴² Cabinet agreed subsequently that a supplemental appropriation be made to cover this amount. However, negotiation between the Crown and the remaining claimants appeared to break down. This was partly due to uncertainty surrounding the nature of the legal claims and their likelihood of success.⁴³

Once the Crown had determined that it might be liable in tort law it somehow fixed upon the amount of \$2.4 million. The claimants had demanded \$6.75 million. The arbitration to resolve this dispute proceeded along the lines that the families and victims themselves would determine the allocation of funds.⁴⁴ Any further obligation of confidence would necessarily conflict with the requirement that funds needed to be appropriated.⁴⁵

The accounting process would require the ultimate release of the total amount when the government sought an appropriation to fund the settlement.⁴⁶

The Crown is able to disclose the fact that a settlement has been reached, and the total compensation figure determined payable (the figure will need to be disclosed at some stage given the requirements for a suitable appropriation in the Supplementary Estimates).

The Cave Creek case study does show very real government responsiveness to the disaster and the inquiries that followed. As a result of the Noble Report, government departments were subjected to the criminal sanctions of the Building Act 1991 and the health and safety provisions in the Employment Relations Act 2000.⁴⁷ But perhaps the most telling result of the public scandal

40 Attorney-General and Minister of Finance, Memorandum to Cabinet "Cave Creek Compensation" (19 February 1999) [Memorandum to Cabinet "Cave Creek Compensation"].

41 Ibid, at [8].

42 The figure is not in the Cabinet paper but it is seemingly well-known, see Graeme Hunt "Weight of Evidence" (30 April 2005) 198 NZ Listener, available at <www.listener.co.nz>.

43 Memorandum to Cabinet "Cave Creek Compensation", above n 40, at [12].

44 Ibid, at [10].

45 Ibid.

46 Ibid.

47 Crown Organisations (Criminal Liability) Act 2002.

surrounding Cave Creek has been the allocation of large amounts of extra government funding. The Department described in 2006:⁴⁸

Resources for the department were forthcoming. The Government spent \$45 million between 1997 and 2003 developing and upgrading our tracks and structures, and committed a further \$82 million for 2004–2012.

The Department instituted a "Visitor Assets Management System", which involved both an immediate inventory of existing structures and a management plan which ensures inspection of those structures.⁴⁹ But it was very much the inquiries and the surrounding publicity that seemed to be the spur to the provision of extra funding.

When setting up the mediation and arbitration processes Cabinet agreed to a supplementary appropriation which would be made to cover the necessary payment. The net effect of this was that the amount available to the Department of Conservation for its core services or work was not reduced. Rather, the whole-of-government essentially covered the cost. This was confirmed by a Cabinet minute, which expressly provided:⁵⁰

Approve a Non-Departmental Other Expenses appropriation of \$2.675 million in Vote: Conservation in 1996/97 only, in order to meet the cost of compensation to survivors and families of the Cave Creek tragedy.

Agree that the change in appropriation referred to in paragraph (c) above be included in the 1996/97 Supplementary Estimates, and in the interim this expense be met from Imprest Supply.

C Two Different Case Studies from the Ministry of Health

The Cave Creek case study was clearly within the shadow of potential common law liability for exemplary damages. One of the Ministry of Health settlements for contaminated blood occurred in an environment where tort damages were likely barred by ACC. The Lake Alice settlements arose in the context of litigation, although many of the claimants may also have been barred by the operation of the ACC scheme. Both were studied in an effort to show how the New Zealand government might have structured such *ex gratia* settlements in contexts that might have given rise to liability in other countries. These case studies turned out to be useful in showing the mechanics of government settlements, but are perhaps ultimately of limited use in assessing issues of accountability, at least through the prospect of tort suits. Funds in both cases were the subject of separate appropriations, which required the usual departmental and parliamentary scrutiny.

48 Department of Conservation "Ten Years On" (2005) <www.doc.govt.nz>.

49 Ibid.

50 Memorandum to Cabinet "Cave Creek Compensation", above n 40, at [15].

1 Contaminated Blood compensation

Like many comparable jurisdictions, New Zealand has had a number of contaminated blood scandals in which a patient receiving transfusions has been infected. The most prominent of these have been the problems relating to HIV Aids and Hepatitis C.⁵¹ Haemophiliacs have often been over represented amongst the victims. Screening of blood products for Hepatitis C was not brought into place in New Zealand until 27 July 1992. This left the possibility that infections might have been avoided if the screening had been in place earlier.

The ACC legislation presented difficulties for those seeking cover under that scheme. First, infections had to be the result of *medical misadventure* for them to be covered. The legislation prohibits common law actions if the infection was the result of medical misadventure. Secondly, after 1992 it was necessary to establish either *medical mishap* (an adverse consequence of medical treatment which has less than a 1 per cent chance of happening) or *medical error*, which was akin to negligence. Even for those who might fall within the medical error provision, the Accident Rehabilitation and Compensation Insurance Act 1992 removed the possibility of lump-sum payments. The transitional provision meant that claims had to be filed with the ACC by 1 October 1992 if those claims were to receive lump sum payments under the Accident Compensation Act 1982, or be treated under the medical error criteria for medical misadventure under the Accident Rehabilitation and Compensation Insurance Act 1992 regardless of when the infection occurred.⁵² In 2001 limited lump-sum payments were reintroduced. In 2005 the concept of medical misadventure was replaced by *treatment injury*.

Both the National Government in 1998 and the Labour Government in 2000 were prepared to settle claims as a result of the belated implementation of a proper screening regime:⁵³

- (1) 1998 settlement: People who could prove they were infected between August 1990 (when screening was recommended) and 27 July 1992 (when screening was introduced).

51 For the United Kingdom experience, see Lord Archer, Norman Jones and Judith Willetts *Independent Public Inquiry on NHS Supplied Contaminated Blood and Blood Products (The Archer Inquiry)* (2009), available at <www.archercbbp.com>. The experience in Ireland is recorded in *Report of the Tribunal of Inquiry into the Infection with HIV and Hepatitis C of Persons with Haemophilia and Related Matters* (2002). The experience in Australia is discussed in a Commonwealth parliamentary report: The Senate Community Affairs References Committee *Hepatitis C and the Blood Supply in Australia* (2004), available at <www.hepc.org.au>. The experience in Canada is discussed in the Krever Report. See Krever Commission *Commission of Inquiry on the Blood System in Canada (Krever Commission)* (Health Canada, 2008), available at <www.hc-sc.gc.ca>.

52 Accident Rehabilitation and Compensation Insurance Act 1992, s 153(5), considered in *Childs v Hillock* [1994] 2 NZLR 65 (CA).

53 The process of the settlements was reviewed in Anthea Williams "Government Litigation and Settlement of Health Care Tort Claims: A Framework for Consistency and Management of Legal Risk" (2007) 22 NZULR 511.

- (2) 2000 settlement: People who could prove they were infected between February 1990 (when screening became feasible) and 27 July 1992 (when screening was introduced nationwide).

The first two settlements covered 118 people. They excluded both people who were infected before 1990 and haemophiliacs who were unable to prove that they were infected between 1990 and 1992 because of the ongoing regularity and necessity of their blood transfusions.

During the 2005 election campaign the Labour government faced considerable political pressure from those who had contracted the diseases before testing could have been implemented. As a result of promises made during that campaign, the Labour Government concluded a further settlement in December 2006. Payments were to be based on the ACC lump sum of \$27,000 that would have otherwise been available had the entitlement under the Accident Compensation Act 1982 not been removed by the application of the Accident Rehabilitation and Compensation Insurance Act 1992. Appropriate interest payments were also included. The maximum payment would be \$70,000. The conditions for the settlement were that the claimants:⁵⁴

- (1) had been infected in New Zealand with the Hepatitis C virus through blood or blood products where the blood was collected in New Zealand before 27 July 1992; and
- (2) continued to test positive for the presence of the virus in their blood or have a record of a treatment, which had successfully cleared the virus; and
- (3) choose to put forward their details so an amount could be calculated for them; and
- (4) choose to accept any calculated amount offered and then enter into a payment agreement with the Crown.

The total cost of the settlement was \$30 million, providing one-off payments to an estimated 550 people. As of April 2008, 486 people had applied for compensation and the government had paid out \$25.5 million. This included 155 haemophiliacs, who had received payments of \$43,200 to \$69,600 each.

The Ministry of Health declined an Official Information Act request for the Cabinet papers that led to the settlements on the grounds that they involved legal professional privilege, but the Ministry did provide considerable information about the process.⁵⁵ The first two settlements closely adhered to what would likely have been assessed at common law liability for the failure to properly regulate the blood transfusion service. The terms of that settlement focused on the Government's *fault* for failing to implement appropriate screening, even though there might not actually be any legal liability. The last settlement appears to have been an expressly political one, standing outside any

⁵⁴ Hon Pete Hodgson "Way Ahead on Hep C Blood Product Infections" (press release, 5 December 2006).

⁵⁵ Letter from Andrew Bridgman, Deputy Director-General of Health to Geoff McLay (undated, reference number H200900417).

perceived legal obligation. Even so, the removal of the claims had a very real impact on the financial statements of the Ministry of Health, at least in terms of the way in which it had to declare them as contingent liabilities. The Ministry of Health 2006 financial report recorded amongst its contingent liabilities some \$90 million worth of claims being brought in relation to tainted blood. The 2007 report recorded \$70 million in claims, while the 2008 report records claims of only \$39 million. The 2009 Budget disclosed that those claims had reduced to \$16 million as of 31 March 2009.

Phil Knipe, Chief Legal Advisor of the Ministry of Health, described the settlement as being "an administrative process" in that it does not involve negotiating with individual claimants, rather claims are processed against the eligibility criteria and payment approved if the criteria are met.⁵⁶ Much of the process has been, and continues to be, handled by the ACC rather than by the Ministry of Health. Any clinical assessment or judgment is exercised by the ACC. That delegation was a decision made by Cabinet, on the basis of the ACC's experience in similar claims. Once a determination has been made, the chief legal advisor approves the settlement. Payment is made to the infected person, accompanied by a letter of acknowledgement from the Prime Minister. Crown Law has some role in determining payments, which have been relatively consistent over time.

2 *The Lake Alice Settlement*

Claims of mistreatment of children and adolescents at the Lake Alice psychiatric hospital emerged in the late 1990s. It was alleged that unit head Dr Selwyn Leeks had used inappropriate treatments.⁵⁷ Some claims reached pre-trial stages.⁵⁸ A first group sought some \$38 million. Christchurch lawyer Grant Cameron represented that group. Before trial, the Government commissioned a report into the matter by Sir Rodney Gallen, a retired High Court judge. That report has never officially been made public. There has been no further public inquiry. Nevertheless, 183 former patients have received both a Crown apology and compensation. The claimants had been divided into two rounds of compensation.

In theory many of the claimants would have been able to make claims under the ACC regime. However, many fell into a hole created by changes that would not allow lump sums to be awarded under the Accident Rehabilitation and Compensation Insurance Act 1992.⁵⁹ No distinction, however, appears to be made in the settlements between those who might be eligible to receive ACC

56 Interview with Phil Knipe, Chief Legal Advisor, Health Legal, Corporate Services Directorate Ministry of Health (Geoff McLay, 11 March 2009).

57 See *McInroe v Leeks* [2000] 2 NZLR 721 (CA), (2000) 14 PRNZ 164, concerning whether the case ought to be heard by jury alone. The plaintiff's claims are further elaborated in *McInroe v Leeks* HC Wanganui CP 12/94, 27 March 1996.

58 See the Court of Appeal decision in *McInroe v Leeks*, above n 57.

59 *Ibid.*

payments and those who are not. The first group of 95 received about \$6.5 million in total in 2001. This made for average compensation of \$68,421.05 before legal fees were deducted.

In the second round, in 2004, 88 additional claimants received \$4.2 million, an average of \$47,727.20 each. The Government had reduced the payments by 30 per cent to take account of the fact that the second group would not have to pay contingency fees to Mr Cameron, and had not assumed any litigation risk. The aim of this deduction was to have parity between the two groups in terms of payments that they received rather than to discriminate between groups. That decision was subsequently criticised by District Court Judge Broadmore in 2006.⁶⁰ The second round claimants later had their payments topped up.⁶¹

Sir Rodney Gallen essentially acted as an arbitrator, determining how the money would be divided between particular plaintiffs. The first stage simply involved proof that a claimant was in the child and adolescent unit during the period. The second step involved a determination by Sir Rodney as to quantum. Once the settlement had been signed by the claimant it was forwarded to the Ministry of Health to be signed off by the Chief Legal Adviser on behalf of the Crown. A letter of apology was also sent, signed by the Prime Minister. It is a term of the settlement that each individual payment must remain confidential.

3 Where did the money come from?

Additional appropriations were sought from Vote: Health. However, despite the significant size of the amounts, they were not detailed separately. They are included under the heading of "legal expenses". It is possible (once one knows the sums), to trace the effect that the settlement had in the 2001 and 2004 accounts. For example, the Appropriation (2001/02 Estimates) Act 2001 lists legal expenses for the Ministry of Health at \$2 million, but the Supplemental Estimates lists legal expenses at \$8.695 million. To put this amount into perspective the total amount in Vote: Health for 2001–2002 was \$7,472.841 million.⁶²

D The Settlement of Institutional Child Abuse Claims

1 The nature of the settlement process

Like many comparable jurisdictions, New Zealand is trying to deal with a large number of complaints brought against the Government by those who claim to have suffered institutional abuse, often as children in institutional or foster care. Unlike the Bad Blood or Lake Alice situations, there has been no attempt at a global settlement of institutional abuse claims. The Ministry of Social

⁶⁰ *Zentveld v Attorney-General* DC Wellington CIV-2003-085-528, 11 September 2006, per Judge Broadmore.

⁶¹ Knipe, above n 56.

⁶² New Zealand Treasury *Estimates of Appropriations for the Government of New Zealand for the Year Ending 30 June 2002 Estimates: Vote Health B.5 Vol I* (2001) at 2.

Development has, however, attempted a formal settlement of claims using an internal process. Yet the Lake Alice settlement detailed above has not become a general template for the settlement of historic abuse claims.

In 2007, the Chief Executive of the Ministry of Social Development, Peter Hughes, issued a press release in which he said that the Ministry would do the "right thing" in relation to claims.⁶³ The Ministry has set up an historical abuse claims unit which receives claims and assesses their merits. The unit also interviews the claimant. In appropriate cases the Ministry has made *ex gratia* payments, which are not dependent on legal liability.

One can commend attempts by the Ministry of Social Development to do "the right thing" and the Ministry's openness in revealing information about the process once asked. Inquiries in other jurisdictions have, however, revealed systemic failings in their child welfare system that contributed to the ability of employees and others to commit abuse.⁶⁴

In response to an Official Information Act request, Garth Young, the head of that unit, met with me to discuss how the settlement process works. He was open in discussing the process. Whether or not claims were barred by limitations or by the Accident Compensation Act 2001 was not, according to Mr Young, relevant to the determination of whether an *ex gratia* payment might be made.

In a press release issued in response to criticism of the process, Mr Young replied:⁶⁵

... the Ministry is owning its mistakes and doing whatever it can to put things right. When we have got it wrong, we acknowledge that and apologise and if there is good reason to offer a financial settlement then we do that too.

Following enquiries Mr Young summarised the history of the payments:⁶⁶

The range of *ex gratia* and settlement payments made to date is from \$1,150 to \$75,000. Ministerial approval is required for an *ex gratia* payment greater than \$30,000 and has been sought once. Ministerial agreement is required for settlement payments greater than \$150,000 and has not been required to date.

63 Peter Hughes "Ministry will do the right thing in respect of historic claimants" (press release, 9 May 2007).

64 The most prominent of which is perhaps that in Ireland, The Commission to Inquire into Child Abuse *Committee Report* (May 2009). Others include: Australian Human Rights Commission *Bringing them Home: The 'Stolen Generation' Report* (May 1997); and Newfoundland, *Royal Commission of Inquiry into the Response of the Newfoundland Criminal Justice System to Complaints (the Hedges Commission)* (Office of the Queen's Printer, St Johns, 1996).

65 Ministry of Social Development "Ministry process for historic claims working well" (press release, 24 July 2009).

66 Information provided by Garth Young. Email from Garth Young to Geoff McLay (18 February 2011).

The following table provides an update of claims resolved and settled as at 1 February 2011:⁶⁷

	<i>Filed in Court</i>	<i>Direct to Ministry</i>
Claims received	469	256
Claims settled	49	79
Court claims discontinued or struck out	37	N/A
Settlement offers made	60	N/A
Offers rejected/not resolved	7	12
Claims heard in Court	2	N/A
Active claims	387	156

Another 15 settlements and *ex gratia* claims were being considered.

In our interview, Mr Young emphasised the learning role for the Ministry in the process, a role that was further emphasised by the Chief Executive.⁶⁸

A further role of the Historical Claims Team is to investigate what claims say about the overall standard of care that was provided through the child welfare system. So that it can do this, the team has been established outside of Child Youth and Family to give it the independence it needs to undertake this role. A priority for me is that we learn from what has happened in the past, and that if there is evidence of broader failure in the system that this is acted upon as it should be.

To the degree to which this process was spurred by the legal claims, it perhaps presents evidence of tort spurring departmental learning.

2 *Where did the money come from?*

Total payments (including costs) for resolved claims (both formal court claims or through the Ministry's system) from 1 January 2004 to 23 May 2009 amount to only \$369,257. A bid was made in the 2007 budget round to include within the legal expenses budget appropriations a sufficient amount to settle claims. Mr Young reported that there had been significant savings, partly as a result of there being fewer court cases involving institutional abuse than had been expected.

The Ministry of Social Development 2009 Annual Report concluded as to the scope of these claims:⁶⁹

⁶⁷ The table was provided by Mr Young, *ibid*.

⁶⁸ Interview with Garth Young Head of Ministry of Social Development Historical Claims Team (Geoff McLay, undated).

⁶⁹ Ministry of Social Development *Annual Report 2008/2009* (2009) G60 at 74.

Unquantifiable contingent liabilities.

There is legal action against the Crown relating to historical abuse claims. At this stage the number of claimants and outcomes of these cases are uncertain and disclosure of an amount in respect of these claims may prejudice the legal proceedings.

This note does not describe the way in which claims are dealt with or amounts that are being settled.

V THE PROCEDURE IN BRITISH COLUMBIA

British Columbia has a substantially different model for paying and recording both judgments and settlements compared to New Zealand, the United Kingdom, Australia and, indeed, the rest of Canada. Under the British Columbian approach, information about settlements is public information and must be tabled in the Legislative Assembly.

The form of the British Columbian section is, in fact, similar to s 24 of the New Zealand Crown Proceedings Act 1950. However, instead of requiring a certificate to be served on the Lieutenant Governor, it requires certificates to be served merely on the solicitor responsible for the litigation. The section also requires the Minister of Finance to directly draw the judgment from the consolidated fund.⁷⁰ This appears to be actual practice rather than just the form of a practice, as is the case with the New Zealand Crown Proceedings Act 1950. It requires the British Columbian government to estimate for each year the amounts that will be needed to be paid from the consolidated fund.⁷¹

Rather than leaving settlement as a matter of administrative discretion as is done in other parts of the Commonwealth, the British Columbian Crown Proceedings Act sets out the process for settlement:⁷²

- (1) (a) The Attorney General considers that the claim, if pursued, could result in an order referred to in section 13(4) for the payment of money by the government, and
- (1) (b) It is in the public interest to settle the claim in an amount set out in the certificate,
- (2) If a proceeding authorized by this Act has been commenced and the Attorney General certifies that it is in the public interest to make payment into court, the Minister of Finance must pay into court the amount set out in the certificate.

...

70 Crown Proceedings Act RSBC 1996, c 89.

71 *Ibid*, s 13.

72 *Ibid*, s 14.

- (4) Money paid by the Minister of Finance under this section must be paid out of the consolidated revenue fund.

The British Columbian statute also requires the compilation of payments made both under judgments and settlements, and a report must be laid before the Legislative Assembly.⁷³ Those documents are publicly available at the Parliamentary library in Victoria, British Columbia, but are not otherwise published. These documents are a comprehensive record of whole-of-government expenditure on legal claims. They enable the relatively easy collation of information about claims made against the British Columbian government and how those claims have been settled. Often the details in the documents include the names of the plaintiffs. However, in claims such as sexual abuse there is sometimes appropriate non-disclosure of the plaintiff's identification.

VI WHO CARES? WHY DOES THIS MATTER?

If suits against government are to make sense in terms of providing incentives for those in government, an important part of the incentive process has to be making public the settlement amounts. It is difficult to see how any particular settlement or group of settlements would, by itself, be a restraint on government behaviour. It is just conceivable, however, that the rigorous public disclosure of the fact that settlement of a specific amount has been made might provide some political impetus within government departments or amongst their political masters to get processes right in the future or to provide additional funding. Indeed the need for more public provision of information was a key finding of the recently completed Law Commission of England and Wales report on public authority liability, that otherwise rejected the substantive changes it had previously proposed to liability rules.⁷⁴ But for those who would focus on the importance of political deterrence, the reality is that real change was more likely to be pushed by other public law accountability mechanisms such as inquiries or ombudsman reports.

When I visited the Parliamentary library in Victoria, British Columbia, to access the British Columbian Crown Proceedings reports, everybody there expressed amazement when I explained that such data was not as easily collated in New Zealand. However, as the case studies show, a large amount of information can be obtained by official information requests and analyzing official documents. Officials were generally extremely helpful in providing information. The Cabinet Circular regarding settlements means that the settlement of claims is subject to the external control of the Crown Law Office and in significant cases, to the political control of the Minister. Departments may desire not to make public what settlements have been reached with potential plaintiffs to avoid encouraging others and to avoid establishing "a tariff". However, this is not

73 Ibid, s 15.

74 Law Commission of England and Wales *Administrative Redress: Public Bodies and the Citizen* (Law Com no 322, 2010).

consistent with the need to inform the public about what kinds of wrongdoing or alleged wrongdoing the government has been prepared to settle.

