IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CP No. 17/99

BETWEEN	D J EVERS and R S McKEEN
	Plaintiffs
AND	THE ATTORNEY-GENERAL
	First Defendant
AND	TAURANGA DISTRICT COUNCIL
	Second Defendant
Date of hearing:	16 December 1999
Counsel:	Robert Vigor-Brown for Plaintiffs John Pike for First Defendant
Judgment:	23 December 1999

JUDGMENT OF CHAMBERS J

Lawyers:

R Vigor-Brown, DX JP 30061, Rotorua, for Plaintiffs
Crown Law Office, DX SP 20208, Wellington, for First Defendant
Sharp Tudhope, DX HP 40049, Tauranga, for Second Defendant

Nature of the claim

[1] Mr Russell McKean (the second-named plaintiff) is fed up with the activities of unruly youths outside his motel at Mt Maunganui. In the summer months - "the season" as it is called in the second amended statement of claim - youths assemble in the beach car park outside the motel and fight, drink, tag buildings, urinate, speed in fast and noisy cars, drag race, and turn up their boom boxes. Life becomes intolerable for the motel's guests, it is said, and many of them leave early and do not return. Mr McKean, and the motel owner before him, Mr David Evers (the first-named plaintiff), have complained to the police, but they say to no avail. Police response, they say, has been non-existent or tardy and any investigations perfunctory. They want the police to do something to stop this illegal behaviour.

[2] This claim is their attempt to persuade the courts to get the police to act. They have sued the Attorney-General, representing the Commissioner of Police, in public law and private law. There are two public law claims: failing reasonably to exercise statutory powers and breach of legitimate expectation. There are two private law claims: negligence and breach of statutory duty. The police have moved to strike out the second amended statement of claim ("the claim") on various grounds. That is the application with which this judgment is concerned.

[3] The plaintiffs had also sued the Tauranga District Council, the local authority with jurisdiction over Mt Maunganui. It was alleged that the council had failed to exercise its powers reasonably and had been negligent. The council, like the Attorney-General, had moved to strike out the claim on a number of grounds. On the day of the hearing before me, the plaintiffs filed a notice of discontinuance against the council.

[4] It is common ground that on a striking-out application all the allegations of fact (including those set out in paragraph [1] of this judgment) are presumed to be true: see *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 at 267 (CA) and *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries* [1993] 2 NZLR 53 (CA).

Failure reasonably to exercise powers

[5] The plaintiffs' first cause of action pleads that "the Attorney-General" failed "to reasonably exercise [his] Statutory Powers to maintain the rule of law", particularly with respect to "the illegal behaviour and actions of young persons aged between approximately 15 and 20 years". These young persons are not named, and the inference must be from the lack of particularisation that their identity is not known to the plaintiffs. There is no suggestion in the claim that the same people are involved in all the incidents about which complaint is made. As a consequence of the behaviour of these youths and of the police failure to catch them, the plaintiffs have suffered loss. That loss is said to be a "general loss of business". As well, the plaintiffs have allegedly suffered (unspecified) "breaches of ...personal security" and have been deprived of "reasonable night's sleep". In so far as the police failings are particularised at all, they are to be found in paragraph 12 of the claim, which reads as follows:

> "12. WHEN the Plaintiffs reported the actions of the unruly young persons to the Defendants often there was:
>
> (a) No response
>
> (b) A delayed response
>
> (c) A failure to investigate the complaint in a satisfactory manner
>
> (d) A failure to take appropriate action to maintain the rule of law."

[6] The claim, while listing the various Acts which the unruly youths were allegedly breaking, did not specify what statutory powers the Attorney-General or any member of the police were allegedly failing to exercise. I asked Mr Vigor-Brown to specify them. He pointed to s 37(1) of the Police Act 1958, which specifies the oath which every constable is required to take. By that oath, every police constable swears to Her Majesty the Queen that he or she "will see and cause Her Majesty's peace to be kept and preserved", "will prevent to the best of [his or her] power all offences against the peace", and "will to the best of [his or her] skill and knowledge discharge all the duties [of a constable] faithfully according to law". Mr Vigor-Brown's submission is that police constables in the Tauranga and Mt Maunganui area are failing to adhere to that oath in that they are not causing the peace to be kept and preserved and they are

not preventing to the best of their power all offences against the peace. The real complaint, however, is that insufficient policing is going on, according to the plaintiffs, around their motel. It is a resources complaint in essence.

[7] Mr Vigor-Brown's difficulty is that he has powerful English Court of Appeal and House of Lords authority against his plea for court intervention. The English Court of Appeal authority relied on by Mr Pike is *R v Commissioner of Police of the Metropolis, ex p Blackburn* [1968] 2 QB 118, a decision Mr Vigor-Brown conceded to be correctly decided and applicable to New Zealand conditions. In that case, a Mr Blackburn became concerned that the police were not properly enforcing the gaming laws in certain gaming clubs in London. He pointed to a policy decision issued to senior officers of the Metropolitan Police effectively instructing them "to take no proceedings against clubs for breach of the gaming laws unless there were complaints of cheating or they had become haunts of criminals" (*ibid* at 134). Mr Blackburn sought a writ of mandamus directing the Commissioner to reverse that policy direction. The application was unsuccessful. Lord Denning MR set out the legal position with his customary clarity (*ibid* at 136):

> "I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone. That appears sufficiently from *Fisher v Oldham Corporation*, and *Attorney-General for New South Wales v Perpetual Trustee Co. Ltd.*
>
> "Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere. For instance, it is for the Commissioner of Police of the Metropolis, or the chief constable, as the case may be, to decide in any particular case whether inquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter. He can also make policy decisions

> and give effect to them, as, for instance, was often done when prosecutions were not brought for attempted suicide. But there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere. Suppose a chief constable were to issue a directive of his men that no person should be prosecuted for stealing any goods less than £100 in value. I should have thought that the court could countermand it. He would be failing in his duty to enforce the law."

[8] Mr Vigor-Brown conceded that he could not point to any "policy decision" here of the kind Lord Denning said could be challenged. This was not a case where, so far as is known, the local police commander has ordered that crimes in Mt Maunganui are not to be investigated. All that has happened is that the level of policing is not at the level the plaintiffs would prefer. But that is a matter on which no court can give the local police commander direction.

[9] Before I discuss Mr Vigor-Brown's submission as to why *Blackburn* can be distinguished, I shall turn to the House of Lords authority which also causes him difficulties. It is *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238. This was a negligence case, but their Lordships' speeches are nonetheless instructive on the reviewability of police actions in the public law area as well. Between 1969 and 1980 a series of 13 murders and 8 attempted murders were committed by a man called Sutcliffe, who became known popularly as "the Yorkshire Ripper". This proceeding was brought by the mother and administratrix of his last victim. She claimed damages against the chief constable in whose area most of the offences had taken place. She alleged that the circumstances of the earlier murders and attacks were so similar that it was reasonable to infer that they had been committed by the same person, that it was foreseeable that unless apprehended that person would commit further offences of the same type, that it was the duty of the police to use their best endeavours and exercise all reasonable care and skill in apprehending him, and that they had been in breach of that duty in the manner in which they had carried out their investigation, thereby failing to detect Sutcliffe before he murdered her daughter. The chief constable applied to strike out the claim as disclosing no reasonable cause of action. The House of Lords did strike out the claim. Lord Keith of Kinkel, with

whom the other Law Lords agreed, specifically affirmed the Court of Appeal's decision in *Blackburn* in these words (*ibid* at 240):

> "By common law police officers owe to the general public a duty to enforce the criminal law: see *R v Metropolitan Police Comr, ex p Blackburn* [1968] 1 All ER 763, [1968] 2 QB 118. That duty may be enforced by mandamus, at the instance of one having title to sue. But as that case shows, a chief officer of police has a wide discretion as to the manner in which the duty is discharged. It is for him to decide how available resources should be deployed, whether particular lines of inquiry should or should not be followed and even whether or not certain crimes should be prosecuted. It is only if his decision on such matters is such as no reasonable chief officer of police would arrive at that someone with an interest to do so may be in a position to have recourse to judicial review. So the common law, while laying on chief officers of police an obligation to enforce the law, makes no specific requirements to the manner in which the obligation is to be discharged. That is not the situation where there can readily be inferred an intention of the common law to create a duty towards individual members of the public."

[10] Mr Vigor-Brown conceded in light of those authorities that ordinarily no claim could be brought against the police for the failings alleged here in paragraph 12 of the claim. But he said that *Blackburn* and *Hill* could be distinguished because in the present case a "special relationship" existed between the plaintiffs and the police. No such "special relationship" was pleaded, but notwithstanding that I explored with Mr Vigor-Brown what the pleading might be. It is well accepted that amendments may be made to a statement of claim on a striking-out application, if by such amendment a reasonable cause of action can be found: see *Marshall Futures Ltd v Marshall* [1992] 316 at 323. Mr Vigor-Brown submitted that the "special relationship" arose from the presence of the following four factors (all of which he said had to be present for the relationship to exist):

[a] The continuing nature of the problems being experienced;

[b] The consistent type of offending;

[c] The fact that the offending emanated from an identifiable class of persons;

[d] The "unique" geographical setting of the motel, which accentuated the harm caused by the youths' unlawful behaviour.

[11] The nature of the "special relationship" said to arise from these factors meant, so Mr Vigor-Brown submitted, that these plaintiffs could bring a public law claim against the police and constituted an exception to the principle of *Blackburn*. Mr Vigor-Brown conceded that he could find no authority in support of his proposition, and certainly there is nothing in *Blackburn* even remotely to support it. The principal problem the plaintiffs face is not one of standing, to which Mr Vigor-Brown's proposition seems to be directed, but rather the fact that, save in exceptional circumstances, no court can direct the Commissioner of Police how to dispose of his force and how scarce police resources should be allocated.

[12] This was a point strongly made by the House of Lords in the recent decision of *R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1999] 1 All ER 129 (HL). This was a public law challenge to the chief constable's decision to reduce the level of policing at Shoreham in Sussex, from which port International Trader's Ferry Ltd was exporting live animals to the continent. The shipments attracted substantial protests from those opposed to the trade of live animals to the continent. The chief constable said that he had to reduce the level of policing in order to provide equitably for "the policing needs, expectations and rights of the remainder of the community throughout East and West Sussex" (*ibid* at 133). The House of Lords acknowledged that the traders had a common law right to trade, which right was reinforced by article 34 of the EC Treaty. But how to manage the conflicting rights and to utilise limited resources was a matter for the chief constable. Lord Slynn of Hadley said (*ibid* at 137):

> "In a situation where there are conflicting rights and the police have a duty to uphold the law the police may, in deciding what to do, have to balance a number of factors, not the least of which is the likelihood of a serious breach of the peace being committed. That balancing involves the exercise of judgment and discretion.
>
> "The courts have long made it clear that, though they will readily review the way in which decisions are reached, they will respect the margin of appreciation, or discretion, which a chief constable has. He knows, through his officers, the local situation, the availability of officers, his financial resources and the other demands on the police in

the area at different times: *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 at 154, [1982] 1 WLR 1155 at 1174. Where the use of limited resources has to be decided, the undesirability of the court stepping in too quickly was made very clear by Bingham MR in *R v Cambridge Health Authority, ex p B* [1995] 2 All ER 129 at 137, [1995] 1 WLR 898 at 906 and underlined by Kennedy LJ in the present case. In the former, Bingham MR said, in relation to the decisions which have to be taken by health authorities:

> 'Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make.'

"The facts here are different and the statutory obligations are different but, mutatis mutandis, the principle is relevant to the present case."

[13] Lord Hoffmann approved Lord Denning's judgment in *Blackburn* (*ibid* at 148) and went on to say (*ibid* at 149):

> "The fact that a chief constable considers that certain resources would be needed to prevent some kind of criminal behaviour does not entail that he is obliged to provide them. He might, for example, decide that the only way to eliminate muggings on the streets of Brighton or burglaries in Rottingdean would be to have many more constables on patrol and spend large sums on vehicles and communication equipment. This cannot create a duty to find the resources at the expense of other policing activity. I can see no distinction between the interests of ITF in obtaining protection from demonstrators and those of the citizens of Brighton and Rottingdean in obtaining protection from muggers and burglars."

[14] This case shows clearly that resource issues and how police are deployed are for the Commissioner or his local commanders, not the courts.

[15] The non-justiciability of the plaintiffs' claim in the first cause of action is demonstrated by the relief sought. The plaintiffs seek orders as follows:

> "(a) A Declaration that the First Defendant the Attorney-General ... failed to reasonably exercise [his] Statutory Powers and to maintain the rule of law and/or to keep the peace.
>
> (b) A Declaration that the Attorney-General ought to reasonably exercise his Statutory Powers."

[16] Mr Vigor-Brown now accepts that the Attorney-General has no power over the Commissioner of Police, so that the reference in each prayer should be to the Commissioner, not the Attorney-General. But, putting that to one side, where would we get to? What would the declaration mean? The vagueness of the proposed declaration really demonstrates the lack of any specific attack on the Commissioner's general discretion. This case is even weaker than *Blackburn* because we have here no decision of any kind under attack.

[17] I am satisfied that the first cause of action is doomed to failure and must be struck out.

Legitimate expectation

[18] The second cause of action is again based on the statutory power said to be created by s 37 of the Police Act. It is alleged that "on 10 March 1999 the First Defendant the Attorney-General advised the Plaintiffs that the Police were reviewing the crime problems and were seeking a lasting solution to the persistent problems in the area" (paragraph 15 of the claim). That advice is said to have given rise to a legitimate expectation that the Attorney-General would take all reasonable steps to enforce and maintain the rule of law and would take "proper and due care in the circumstances" (paragraph 18 of the claim).

[19] Mr Evers's claim can immediately be struck out because he sold his interest in the motel in 1998, and accordingly the expectation said to be created by this March 1999 advice cannot have influenced him in any way.

[20] Mr McKeen's claim runs into a number of difficulties. First, there is still the *Blackburn* problem: Mr McKeen is seeking to review police actions in the operational sphere. Secondly, it cannot be as a matter of constitutional law that the "Attorney-General" is under the duties alleged, as he or she has no control over the day to day operations of the police. Presumably, Mr Vigor-Brown would argue that the duty fell on either the Commissioner or individual police constables. If the former, what is the "statutory power" relied on? And was the advice given by the Attorney-General or the Commissioner? If by the Attorney-General as pleaded, how is the Commissioner

bound by it? Thirdly, the advice is of a far too general nature to found a legitimate expectation.

[21] Mr McKeen's second cause of action must be struck out.

Negligence

[22] The third cause of action is in negligence. The claim states baldly that the Attorney-General owed the plaintiffs "a duty of care in tort". The Attorney-General is said to have breached that duty by failing "to enforce and maintain the rule of law in the area in a reasonable manner, or at all". As a consequence, Mr Evers is said to have suffered a loss of $80,000 between September 1996 and December 1998. How that sum is calculated is not particularised. Mr McKeen claims to have suffered a business loss of $4849 between 18 December 1998 and 31 March 1999 (the end of "the season").

[23] Clearly the Attorney-General is not under the duty alleged, as Mr Vigor-Brown now accepts. I asked Mr Vigor-Brown to specify who owes the alleged duty, its nature, and to whom the duty is owed. He formulated the position thus: every police officer has a duty to take reasonable care to ensure that the rule of law is maintained, the duty being owed to those people in a "special relationship" with the police, as defined in paragraph [10] above. The reason for the limitation to those in a "special relationship" no doubt reflected the fact that the alleged duty would be impossibly broad otherwise: every time a police officer was a little slow to the scene of a burglary or undertook a perfunctory investigation of a crime, he or she would be responsible to the victim for the loss caused by the crime. That could not conceivably be the law, a point inferentially conceded by the limitation placed on the range of potential plaintiffs by Mr Vigor-Brown.

[24] I am satisfied that the police, whether the Commissioner or the constable walking the beat, is not subject to the alleged duty. The same reasoning which prevented the public law attack dictates that the private law attack must also fail. In so holding, I am not saying that the police can never be liable in negligence. But on the facts as alleged here, there can be no duty of the kind submitted. Mr Vigor-Brown

conceded that he could find no case directly supporting this alleged duty: it would have to be an incremental step into new territory if the duty were to be recognised. I am satisfied, however, that there is powerful authority against such an extension of the ambit of negligence.

[25] First, I return to *Hill*, which, as I previously mentioned, was a negligence claim. The House of Lords held that the alleged duty of care could not lie for three main reasons. First, Mr Sutcliffe was "never in the custody of the police force" (*ibid* at 243). In that regard, their Lordships contrasted the position of the borstal trainees in *Home Office v Dorset Yacht Co* [1970] AC 1004 (HL), a case to which I shall return presently. So here, those who have allegedly caused the economic harm to the plaintiffs, the unruly youths, have never been in the police's control. For whatever reason, the police have not caught them, in the same way that the Chief Constable of West Yorkshire had failed to catch Mr Sutcliffe.

[26] Secondly, Miss Hill, the murdered woman, was "one of a vast number of the female general public who might be at risk from [Sutcliffe's] activities but was at no special distinctive risk in relation to them" (*op cit* at 243). The House of Lords accepted that there existed reasonable foreseeability of likely harm to such as Miss Hill if Sutcliffe were not identified and apprehended, but there was "absent from the case any such ingredient or characteristic as led to the liability of the Home Office in the *Dorset Yacht case*". So here, despite Mr Vigor-Brown's attempt to introduce a "special relationship" arising from previous reports of illegal activities, the plaintiffs were but two of many at risk from the illegal activities of youths at a popular beach resort. The fact that one has reported illegal activity previously cannot put one in a special position vis-à-vis the rest of the public. The fact that one has suffered from illegal activity on earlier occasions cannot put one in a special position either.

[27] Thirdly, the House of Lords held that the alleged duty of care was against public policy (*op cit* at 243). Their Lordships doubted that the police's "general sense of public duty [would] be appreciably reinforced by the imposition of such liability so far as concerns their function in the investigation and suppression of crime". Lord Keith continued (*op cit* at 243):

> "From time to time they make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded. Further, it would be reasonable to expect that if potential liability were to be imposed it would be not uncommon for actions to be raised against police forces on the ground that they had failed to catch some criminal as soon as they might have done, with the result that he went on to commit further crimes."

[28] I believe all three reasons are equally applicable to the present case. Mr Vigor-Brown's attempt to distinguish *Hill* on the basis of a "special relationship" said to arise from "consistent and continual complaints" is unconvincing, and in any event fails to answer the other two objections to the suggested duty given by the House of Lords.

[29] The second case against Mr Vigor-Brown's submission is *Alexandrou v Oxford* [1993] 4 All ER 328 (CA), to which Mr Pike referred me. The plaintiff's clothing shop was burgled on a Sunday evening. The burglars' entry activated the shop's exterior and interior burglar alarms and also a recorded telephone message to the local police station stating that the alarm had been activated. Two police officers promptly attended the scene, but failed to inspect the rear of the shop where the burglars had forced entry. Some hours later a substantial quantity of goods was removed from the shop. The plaintiff sued the chief constable for the value of the goods stolen, alleging that the police had been negligent by, inter alia, failing to take adequate precautions to discover why the alarm had been activated and in assuming that it was a false alarm.

[30] The Court of Appeal held that a plaintiff alleging that a defendant owed a duty to take reasonable care to prevent loss to him or her caused by the activities of another person had to prove not merely that it was foreseeable that loss would result if the defendant did not exercise reasonable care but also that he or she stood in a special relationship to the defendant from which the duty of care would arise. On the facts, there was no such special relationship between the plaintiff and the police because the communication with the police was by way of emergency call which in no material way differed from such a call by any ordinary member of the public. If a duty of care

owed to the plaintiff were to be imposed on the police, that same duty would be owed to all members of the public who informed the police of a crime being committed or about to be committed against them or their property. Furthermore, the Court of Appeal held, it would not be in the public interest to impose such a duty of care on the police as it would not promote the observance of a higher standard of care by the police, but would result in a significant diversion of resources from the suppression of crime. That reasoning is directly applicable to the present case. *Alexandrou* is clearly not distinguishable on the facts and Mr Vigor-Brown did not address any argument as to why it might be wrong on the law. I believe, with respect, that the Court of Appeal's logic is impeccable, and the policy choice not only correct but also in line with earlier higher authority.

[31] The third case against Mr Vigor-Brown's submission is *Osman v Ferguson* [1993] 4 All ER 344 (CA). I quote the relevant facts from the headnote:

> "P, a schoolteacher, formed an unhealthy attachment to a 15-year-old male pupil and harassed him by accusing him of deviant sexual practices, following him to his home and alleging a sexual relationship with a friend. In May 1987 P changed his surname to that of the boy's and damaged property connected with the boy by throwing a brick through a window of the boy's home, smearing dog excrement on the front door and slashing the tyres of the car of the boy's father. In mid-1987 P was dismissed from the school, but continued the harassment. The police were aware of those facts and in the latter part of 1987 P even told a police officer that the loss of his job was distressing and there was a danger that he would do something criminally insane. In December 1987 P deliberately rammed a vehicle in which the boy was a passenger. The police laid an information against P in January 1988 alleging driving without due care and attention but it was not served. In March P followed the boy and his family to their flat and shot and severely injured the boy and killed his father. The mother, as administratrix of the father's estate, and the boy brought an action against, inter alios, the Commissioner of Police of the Metropolis alleging negligence in that although the police had been aware of P's activities since May 1987 they failed to apprehend or interview him, search his home or charge him with a more serious offence before March 1988."

[32] The commissioner applied to strike out the statement of claim as disclosing no reasonable cause of action. The Court of Appeal did so. The Court was unanimous that the suggested duty was against public policy, for the same reason as was enunciated in *Hill* and *Alexandrou*. McCowan LJ rejected a submission that the

ratio of *Hill* was that policy decisions were protected by public policy immunity but operational decisions were not (*ibid* at 353). Such a dividing line would be, he said, "utterly artificial" and impossible to draw. While all members of the Court held that the statement of claim must be struck out on public policy grounds, two members (McCowan and Simon Brown LJJ) did nonetheless consider that, on the assumed facts, "there existed a very close degree of proximity amounting to a special relationship" (*ibid* at 350 and 354). The significance of the case is that public policy defeated the duty even where the majority considered there was a "special relationship". Even if I am wrong therefore in finding no "special relationship" in the present case, public policy would still operate to negate the potential duty.

[33] The fourth case against Mr Vigor-Brown's submission is *Ancell v McDermott* [1993] 4 All ER 355 (CA). I shall not lengthen this judgment by giving its facts. The Court of Appeal stressed that "it is exceptional to find in the law a duty to control another's actions to prevent harm to strangers" (*ibid* at 365). Where such a duty did lie, it was because of a "special relationship", which did not exist in that case, the Court held. Further, the Court found the proposed claim against the police barred on the ground of public policy.

[34] I appreciate these are all English cases, but Mr Vigor-Brown was not able to proffer any reason as to why the principles so clearly enunciated in them should not also hold true for New Zealand conditions. The constitutional position of the police is very similar in New Zealand and the United Kingdom.

[35] Mr Vigor-Brown pinned his hopes on two cases. The first was *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL). In that case, the House of Lords held that the Home Office could be liable for damage caused by borstal trainees who escaped from Brownsea Island at night, boarded a yacht moored nearby in order to make their way to the mainland, and manoeuvred it so as to damage the plaintiffs' yacht. *Dorset* was considered in the above cases I have mentioned, and distinguished. In particular, it was considered in detail in *Hill*. What was crucial to the finding of a "special relationship" in *Dorset* was that the trainees were in the authorities' control and custody. Secondly, the prison authorities had brought the boys, of whose propensity to escape they were aware, into the locality where the yachts were moored and so had

created a potential system of danger for the owners of those yachts. Thirdly, the public policy reasons against police liability were not applicable to prison authorities. Those three factors distinguished *Dorset*, the House of Lords said in *Hill*, and they also distinguish *Dorset* from the present case.

[36] The other case on which Mr Vigor-Brown relied was *Arsenault v Charlottetown (City)* (1991) 280 APR 44, a decision of the Prince Edward Island Supreme Court. In that case, the plaintiffs had brought an action against Charlottetown for damages for failure to enforce its body shop control bylaw. The plaintiffs lived next to a body shop whose activities were a nuisance to them. A preliminary question of law was referred on whether the city had a duty to enforce its bylaws and whether breach of that duty grounded an action for damages. McQuaid J ruled that the city did have such a duty and that breach could ground an action for damages. There is no explanation in the case as to why the plaintiffs could not simply have sued the operators of the body shop in nuisance.

[37] While I am not convinced, with respect, by the reasoning in *Arsenault,* I do not have to analyse it in detail as I am satisfied the decision can be distinguished. First, the decision is grounded in a peculiar statutory matrix where the city was obliged to provide a police department, which was required to "provide police services", including the enforcement of bylaws (*ibid* at 54). That was a mandatory duty. The police's constitutional position was accordingly quite different from the position of the police in the United Kingdom or here, where the police have a wide discretion as to whether or not they will prosecute in any particular case. Secondly, the case was determined entirely in light of the authorities relating to the liability of *local authorities* in negligence. Presumably that was because administration of the police department in Charlottesville was vested by statute in "the Police committee of the City Council": see City of Charlottetown Act 1979, s 77, cited at 280 APR at 46. That committee had "the control and management of such police". As Mr Pike stressed, that is quite different from the position here. Thirdly, in *Arsenault*, the wrongdoer was known, and still the city did nothing. Here the wrongdoers are unknown. There is no pleading here that the police know who the offenders are but are refusing to prosecute them. Rather the allegation is that the offenders remain

unknown and unrestrained because of police dilatoriness in following up reports of criminal activity and because of perfunctory criminal investigations.

[38] I am satisfied that the alleged duty of care cannot be sustained. The cause of action in negligence will accordingly be struck out.

Breach of statutory duty

[39] The plaintiffs' final cause of action was for breach of statutory duty. Mr Vigor-Brown conceded that that could not be sustained. By consent, therefore, it is struck out.

Exemplary damages

[40] The plaintiffs had claimed in the private law causes of action damages for loss of business and exemplary damages. Mr Vigor-Brown conceded that this was not a case where exemplary damages could be sought. Even had I been prepared to leave in the negligence cause of action, the claim for exemplary damages would have had to be struck out.

Conclusion

[41] All causes of action have therefore been either abandoned or struck out. The Attorney-General is entitled to costs. If the parties cannot agree them, then memorandums are to be filed. Messrs Evers and McKeen are to respond to any memorandum filed by the Attorney-General within 10 working days of such memorandum being served on them. The Attorney-General may then reply to any memorandum of theirs within 5 working days of her receiving their memorandum. "Working days" has the same meaning ascribed by rule 3(1) of the High Court Rules.

[42] I wish to end by saying that of course one has great sympathy with Messrs Evers and McKeen with respect to the problems they have faced. Unruly youths at beach resorts are troublesome. The mixture of sand, sun, holidays, fast cars, and

alcohol can be a heady one. There is no doubt that those who live near to where young people are wont to congregate at night can suffer stress and inconvenience and often more. I do not know whether the police at Mt Maunganui have got the balance of police deployment right, but I have no doubt that they are conscious of the plaintiffs' concerns and will do what they can to alleviate the problem.

Robert Chambers