Stay in Your Lane?

The Justiciability of Public Authority Decisions in Negligence

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Introduction

The negligence liability of public authorities is a notoriously difficult issue.[1] On one hand, is the Diceyan concern that the rule of law requires that "every man, whatever be his rank or condition, is subject to the ordinary law of the realm".[2] On the other hand is the fundamentally different character of public authorities compared to private defendants. Generally, they exercise statutory powers, can be held accountable in judicial review and the political realm, and their decisions can have an enormous impact on our lives. Negligence law must therefore seek to strike the appropriate balance between recognising public authorities' special features while also treating them as far as possible like private defendants.

One aspect of negligence law where this tension is particularly apparent is whether high-level public authority decision-making, made under statutory powers, can be challenged at all. The core of negligence is an inquiry into the reasonableness of a defendant's conduct or decision. Courts have often been hesitant about whether they *can* (for practical reasons) or *should* (for constitutional reason) assess the reasonableness of certain decisions. Therefore, they have traditionally granted special protection to what have, at various times, been called "discretionary", "policy" or "non-justiciable" decisions.[3] This special protection is in the form of an immunity (denying a duty of care altogether) or requiring the plaintiff to overcome additional public law hurdles.

The purpose of this dissertation is to evaluate the various mechanisms used to immunise certain public authority decisions. The primary focus will be on New Zealand but I also consider the experiences of other jurisdictions. I argue that there is currently an unjustified level of immunity for public authorities that is not warranted by the theoretical concerns the immunity purports to address.

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[1] Keith Stanton and others *Statutory Torts* (Sweet & Maxwell, London, 2003) at 58-59: "notwithstanding the continued efforts by the courts to elucidate the principles relevant to imposing civil liability on the basis of an exercise (or non-exercise) of public powers and duties this remains one of the more intractable and uncertain areas in the law of tort".

[2] AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, Palgrave Macmillan, London, 1979) at 193.

[3] Ken Oliphant "The Liability of Public Authorities in England and Wales" in *The Liability of Public Authorities in Comparative Perspective* (Intersentia, Cambridge, 2016) 127 at 136-137.

In chapter 1, I outline the two theoretical concerns in this area (practical and constitutional) and how early case law in the United Kingdom gave effect to them. In chapter 2, I survey some of the approaches taken in New Zealand over the last 40 years. Because of these differences, it is hard to say what the "current" New Zealand approach is. Additionally, as we do not have personal injury claims, there is an unfortunate lack of engagement with this issue. In chapters 3, 4 and 5, I assess the relative merits of each approach and find that none are entirely satisfactory. Nevertheless, there are positive elements that we can draw on. Chapter 6 therefore pulls together these various strands to suggest a new approach that New Zealand courts can take to this issue. I argue that the constitutional concerns are the only legitimate justification for an immunity and that issues about practicality are better taken into account when assessing whether the public authority has breached their duty.

This dissertation cannot cover all aspects of how a negligence claim against public authorities should proceed. In particular, I note that I will not be addressing the Crown Proceedings Act 1950, liability for pure omissions, systemic negligence, quasi-judicial decisions, or other policy factors that might be considered at the second stage of a novel duty of care analysis. These might all be considered adjacent to what I am talking about and will sometimes overlap. However, a proper consideration of the issues they raise is beyond the scope of this dissertation.

Chapter 1: Background

As mentioned above, there are certain decisions that judges believe they cannot or should not assess the reasonableness of in a negligence claim. The purpose of this section is to explain what is meant by these concerns in the context of public authority negligence liability and how early case law tried to address them. This historical perspective is important because nearly all concepts in subsequent cases can be traced back to them. New Zealand cases should not and cannot be understood in isolation.

A. Theoretical concerns

The first theoretical concern is that negligence must "operate consistently with the doctrine of separation of powers".[4] This is the idea that judges do not have the constitutional authority to second-guess the reasonableness of certain types of public authorities' statutory decision-making powers.[5] Parliament has entrusted this power to public authorities and not the judiciary. There are also other, more appropriate processes to provide redress as opposed to a negligence claim. Most notably is the political process which includes elections, interest groups, community groups, the media, and exerting popular pressure. Alternatively, these claims may be better dealt with in a judicial review setting where damages are not awarded and the court is not required to substitute its opinion for that of the public authority. In essence, separation of powers requires the court to consider whether, in a private law claim, it ought to trespass into the public authority's realm of decision-making or leave matters up to other institutions and processes.[6]

The second concern is that courts might lack the practical competence to determine the reasonableness of certain decisions. Often public authority decision-making is technical and difficult. Judges are not "suited by their training and experience" to determine these matters.[7] Additionally, these decisions may be polycentric. Lon Fuller described polycentricity as situations involving a complex balancing exercise of various interests, where the prioritisation

[4] *Attorney-General v Strathboss Kiwifruit Ltd* [2020] NZCA 98, [2020] 3 NZLR 247 at [167] citing Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 175.
[5] Kit Barker "Public Power, Discretion and the Duty of Care" in Kit Barker and others (eds) *Private Law and Power* (Hart Publishing, Portland, 2017) 207 at 219.
[6] Barker, above n 5, at 215.
[7] *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL) at 1067.

of one will necessarily have flow-on effects elsewhere.[8] In a negligence claim, judges fear "there is no criterion by which [they] can assess" the weight to be given to competing interests.[9] These are decisions without clearly discernible "legal yardsticks".

These two limbs have been called various names but, for the sake of clarity, I will refer to them as (respectively) the court's *constitutional competence* and *practical competence*. Sometimes, there will be overlap between these two concerns in that the same decision may trigger both. However, the two are distinct and should not be conflated;[10] their boundaries are not coterminous.[11] As I explain further in chapter 4, this becomes especially important when we consider that the practical difficulties of assessing reasonableness are not unique to public authority decision-making.

These two reasons are, of course, not the only relevant considerations when it comes to the broader negligence inquiry.[12] At the duty of care stage, there must still be sufficient proximity and a consideration of whether other policy factors negate or support a duty. These second stage "policy" factors include how duty of care may not be imposed if it leads to: indeterminate liability; defensive behaviour; conflicts of interests; or inconsistency with the broader legal background.[13] While these other issues may overlap with issues of practical and constitutional competence, they are conceptually different.[14] Therefore, consideration of the problems they raise is beyond the scope of this dissertation.

B. Early case law

Historically, public authorities did not play as expansive a role in society as they do today. Not only were there far fewer of them but their statutory powers tended to be less expansive. Therefore, early cases often did not treat public authorities any differently to private defendants. For example, in *Mersey Docks and Harbour Board Trustees v Gibbs*, Blackburn J

[8] Lon L Fuller "The Forms and Limits of Adjudication" (1978) 92 Harv L Rev 353 at 395.
[9] *Dorset Yacht*, above n 7, at 1067.
[10] Justine Bell-James and Kit Barker "Public Authority Liability for Negligence in the Post-*Ipp* Era: Sceptical Reflections on the 'Policy Defence'" (2016) 40 MULR 1 at 7.
[11] Barker, above n 5, at 219.
[12] Barker, above n 5, at 219-220.
[13] Barker, above n 5, at 220; and Oliphant, above n 3, at 133.
[14] Barker, above n 5, at 221.

stated that Parliament's intention is for a statutory body to "have the same duties, and … same liabilities as the general law would impose on a private person doing the same things".[15]

This was reaffirmed in *Geddis v Proprietors of the Bann Reservoir*, where a statute had conferred powers on the defendants to construct and maintain a reservoir in order to supply water downstream to mills throughout the year.[16] The defendants failed to clear out a channel which then overflowed causing damage to the adjacent land. The House of Lords rejected the defendant's argument that Parliament had implicitly authorised this damage by giving them statutory powers, with Lord Blackburn stating: [17]

> … no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorized, if it be done negligently.

For Lord Blackburn it was self-evident that statutes empowering bodies to do things implied a duty to take reasonable care. Merely exercising statutory powers was no defence to a claim in negligence. This was understandable because in that era statutory authorities were a substitute for private enterprise.[18]

The expansion of the welfare state in the middle of the 20th century resulted in an increasing delegation of discretionary decision-making from Parliament to public bodies.[19] Consequently, in later cases, there was an increased reluctance from the courts to intervene with this discretion.[20]

The first major case to signal a departure from the equal treatment of public and private defendants was *Home Office v Dorset Yacht Co Ltd*.[21] The House of Lords took it as an opportunity to reconsider the scope of *Geddis*. Here, a group of Borstal trainees escaped from

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[15] *Mersey Docks and Harbour Board Trustees v Gibbs* (1866) 1 LR HL 93 at 110 per Lord Blackburn.
[16] *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430 (HL). Strictly speaking, this was a private Act of Parliament incorporating a company but it was to effectively create a utilities authority.
[17] At 455-456.
[18] TR Hickman "The Reasonableness Principle: Reassessing its Place in the Public Sphere" (2004) 63 CLJ 166 at 171.
[19] Barker, above n 5, at 207.
[20] Thomas Geuther "The Search for Principle – The Government's Liability in Negligence for the Careless Exercise of its Statutory Powers" 31 VUWL Rev 629 at 634.
[21] *Dorset Yacht*, above n 7.

an island they were taken to and caused damage to nearby yacht. The Home Office had a broad statutory discretion to choose the particular design of its borstal training programme. Lord Reid and Viscount Dilhorne held that *Geddis* did not apply when Parliament had conferred a discretion.[22] In doing so, Parliament could not have intended that merely any "errors of judgment" were actionable.[23] However, there came a point when the discretion is exercised "so carelessly or unreasonably that there has been no real exercise of the discretion which Parliament has conferred".[24]

Lord Reid and Viscount Dilhorne were alluding to the public law concept of *Wednesbury* unreasonableness and this is how subsequent cases interpreted their comments.[25] It comes from an earlier case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* which held that courts can review decision in public law which are "so unreasonable that no reasonable authority could ever have come to it".[26]

Lord Diplock took a subtly different approach. He distinguished *Geddis* partly on the basis that here the Home Office was faced with a much more difficult balancing act of competing interests.[27] It had to consider the interests of the particular Borstal trainees, the wider group of trainees, the nearby community and the general public:[28]

> … there is no criterion by which a court can assess where the balance lies between the weight to be given to one interest and that to be given to another. The material relevant to the assessment of the reformative effect upon trainees of release under supervision or of any relaxation of control while still under detention is not of a kind which can be satisfactorily elicited by the adversary procedure and rules of evidence adopted in English courts of law or of which judges (and juries) are suited by their training and experience to assess the probative value

[22] At 1031 per Lord Reid and at 1049 per Viscount Dilhorne.
[23] At 1031 per Lord Reid.
[24] At 1031 per Lord Reid and at 1049 per Viscount Dilhorne.
[25] *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (HL) at 736 per Lord Browne-Wilkinson; and *Connor v Surrey County Council* [2010] EWCA Civ 286, [2011] QB 429 at 103.
[26] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230.
[27] *Dorset Yacht*, above n 7, at 1067. The other difference he saw was that in *Geddis* there was an act that "would itself give rise to a cause of action at common law if it were not authorised by statute". However, as it has been pointed out, this reasoning is circular. JJ Doyle "Tort Liability for the Exercise of Statutory Powers" in PD Finn (ed) *Essays on Torts* (Law Book Company, Sydney, 1989) 203 at 240: "It is because the exemption is granted that a cause of action in negligence cannot arise." Therefore, Lord Diplock's other reason will not be further considered.
[28] *Dorset Yacht*, above n 7, at 1067.

This is why, according to Lord Diplock, "the public law concept of ultra vires has replaced the civil law concept of negligence as the test of legality".[29] The function of the courts was confined to "deciding whether the act or omission complained of fell within the statutory limits imposed upon the department's or authority's discretion."[30] Proof of ultra vires was a "condition precedent" to any liability in negligence.[31] This suggests that, unlike for Lord Reid and Viscount Dilhorne, any head of review (eg. illegality and procedural impropriety) could be used.[32]

On the actual facts, the escape was not due to a conscious Borstal training design but rather because the supervising officers had (contrary to their instructions) left their posts early. For Lord Reid and Viscount Dilhorne, no discretion had been given to the officers, and so the issue of determining *Wednesbury* unreasonableness did not arise.[33] For Lord Diplock, by disobeying their instructions they had acted outside their delegated discretion.[34]

Not all the judges in *Dorset Yacht* were convinced by the importation of public law concepts. Lord Morris held that the fact that the Home Office was making public policy decisions to try to rehabilitate the trainees "no way determines the question whether the officers did owe a duty of care".[35] However, it was "relevant when considering the measure of any duty of care which the officers might owe to the company and whether they failed to do what in the circumstances they ought to have done". Similarly, Lord Pearson held that existence of decisions taken to achieve a public purpose would "affect only the content or standard and not the existence of the duty of care":[36]

> The needs of the Borstal system, important as they no doubt are, should not be treated as so paramount and all-important as to require or justify complete absence of care for

[29] At 1067. Lord Diplock does not provide any support for this broad assertion.
[30] At 1068.
[31] At 1069 and 1070. This means that the Court would still need to assess whether a duty of care would be owed based on factors such as proximity, policy and whether it is fair, just and reasonable.
[32] Margaret Allars "Private Law Remedies and Public Law Standards: An Awkward Statutory Intrusion into Tort Liability of Public Authorities" (2020) 14 FIU L Rev 5 at 7.
[33] *Dorset Yacht*, above n 7, at 1031 per Lord Reid.
[34] At 1069.
[35] At 1035.
[36] At 1056.

> the safety of the neighbours and their property and complete immunity from any liability for anything that the neighbours may suffer.[37]

Dorset Yacht was followed by *Anns v Merton London Borough Council*.[38] Lord Wilberforce, writing for the majority, drew a distinction between discretionary matters (which he saw as synonymous with "policy") and operational matters, but accepted that this was a matter of degree.[39] In relation to discretionary matters, the plaintiff would have to show the defendant acted outside the limits of the delegated discretion.[40] Lord Wilberforce, drew heavily on Lord Diplock's statements in devising this approach.[41]

Anns involved a claim in negligence against the local council for allowing the construction of buildings with insufficient foundations.[42] Given it was a pre-trial application, it was not known whether the council had failed to inspect the house or, having inspected, had approved the foundations anyway. Lord Wilberforce considered a decision to not inspect was discretionary.[43] Similarly, although the actual inspection was "heavily operational", it too contained elements of discretion as to the "time and manner of inspection, and the techniques to be used".[44] He concluded that the case could not be struck out as the allegations were "consistent with the council or its inspector having acted outside any delegated discretion either as to the making of an inspection, or as to the manner in which the inspection as made."[45] This was something that could only be determined with a full trial.

At one point, Lord Wilberforce said, in relation to the decision to not inspect, that it could be challenged if the plaintiffs proved that the council had not given "proper consideration" to the question.[46] This is phrased differently to the overarching idea of proving the discretion was exercised outside of its statutory scope. However, Lord Wilberforce did not think that the two were contradictory. Instead, he appears to have thought that failing to give *proper* consideration was simply a *particular* way of showing that overall the discretion went outside its scope. This

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[37] At 1056-1057.
[38] *Anns v Merton London Borough Council* [1978] AC 728 (HL).
[39] At 754.
[40] At 757.
[41] At 757-758.
[42] *Anns* was overruled by the House of Lords in *Murphy v Brentwood District Council* [1991] 1 AC 398. However, this decision did not focus on the aspects relevant to public authority discretion and public law.
[43] *Anns*, above n 38, at 754.
[44] At 755.
[45] At 758.
[46] At 755.

is because unlike dealing with the positive exercise of discretion (such as how a Borstal training regime is to operate) there is instead a failure to exercise a discretion.

More problematic is Lord Wilberforce's inconsistent use of the terms "discretionary" and "policy".[47] At one point, he says that the two are synonymous.[48] By classifying the actual inspection as discretionary (since there was discretion as to its timing, manner and technique) he suggests they both simply mean the availability of choice. However, elsewhere there are counterindications that he considered "policy" decisions to mean when the content of that choice related to "[striking] a balance between claims of efficiency and thrift".[49] The correctness of these decisions "can only be decided through the ballot box, not in the courts".[50] As we will see, later cases have tended to differentiate between "policy" and "discretion".

[47] M Kevin Woodall "Private Law Liability of Public Authorities for Negligent Inspection and Regulation" (1992) 37 McGill LJ 83 at 92-93.
[48] *Anns*, above n 38, at 754.
[49] At 754.
[50] At 754. Arguably, these are not the sort of issues which arise at the ballot box.

Chapter 2: New Zealand approaches

This chapter sets out some of the approaches that have been taken to public authority negligence liability in New Zealand in approximately the order they emerged/predominated.

A. Public Law Filters

Taranaki Catchment Commission v R & D Roach Ltd is an early example of a court using public law concepts in a negligence claim.[51] The plaintiff ran a motor camp near a river mouth. The Commission had granted the Council a water right to discharge sewerage and waste. The plaintiff claimed that contrary to the water right, the pipeline had been polluting the nearby area, and that the Commission failed to enforce the terms of the right.[52] It sought damages for the loss suffered by its business. The Commission applied to strike out the claim.

Justice Cooke, for the Court of Appeal, refused the strike out application. The Commission had a "considerable range of discretion as to whether or not to take enforcement steps, or as to the steps to be selected".[53] However, the Commission had to properly consider its discretion and, depending on the circumstances, this may have extended to taking reasonable care to protect the plaintiff's interest.[54] He cited Lord Wilberforce in *Anns* as authority.[55] Nevertheless, there were insufficient facts to determine this at a strike out stage because the reasons for non-enforcement of the terms of the water right were unclear.[56] Justice Cooke "[emphasised] that it is no part of the Court's function to interfere with the lawful exercise of the statutory discretions of public authorities".[57] "Lawful" must mean "lawful in public law" as otherwise the statement is tautological.

Justice Hardie Boys drew heavily on *Anns* and *Dorset Yacht* when considering negligence in *Brown v Heathcote County Council*.[58] The Browns sought approval as to the site of a proposed building and a building permit from the Council. After referring the matter to the Drainage

[51] *Taranaki Catchment Commission v R & D Roach Ltd* [1983] NZLR 641 (CA).
[52] At 644.
[53] At 644.
[54] At 644.
[55] At 644.
[56] At 645.
[57] At 645.
[58] *Brown v Heathcote County Council* [1982] 2 NZLR 584 (HC).

Board, the approval and the building permit were granted by the Council. Neither the Council nor the Board adverted to the possibility of flooding. Soon after, the property was flooded.

The Browns sued the Council in negligence arguing the Council ought to have known about flood susceptibility. Following lengthy quotations of *Anns* and *Dorset Yacht*,[59] Hardie Boys J held that the decision to not investigate the possibility of flooding was a "policy decision" dictated "by considerations relating to the allocation of resources".[60] It was taken "within the ambit of the [Council's] statutory discretion" and there was no evidence that the Council had failed to give proper consideration to whether or not it should have investigated.[61] Therefore, the Council was not liable in negligence.[62]

We know that Lord Wilberforce considered building inspections as still within the discretionary sphere.[63] Justice Hardie Boys, however, characterised New Zealand cases involving negligent building inspections and permit issuances as "[relating] to the 'operational' sphere".[64] Therefore, unlike Lord Wilberforce, he appears to have considered policy decisions not as meaning choice but rather when the choice concerns the allocation of resources.

Although the use of public law concepts waned in the subsequent years, they remerged in 2008 Court of Appeal decision in *Minister of Fisheries v Pranfield Holdings Ltd*.[65] In *Pranfield*, the Court of Appeal adopted[66] Lord Browne-Wilkinson's interpretation of *Anns* in *X (Minors) v Bedfordshire County Council*.[67]

Lord Browne-Wilkinson differentiated between the meaning of "policy" and "discretion". "Discretion" meant a decision about "the extent to which, and the methods by which, such statutory duty is to be performed".[68] As a public authority "could not liable for doing that which

[59] At 594-596.
[60] At 598.
[61] At 598.
[62] The judgment was appealed but only on the issue of the Drainage Board's liability: *Brown v Heathcote County Council* [1986] 1 NZLR 76 (CA) and *Brown v Heathcote County Council* [1987] 1 NZLR 720 (PC).
[63] *Anns*, above n 38, at 755.
[64] *Brown v Heathcote County Council*, above n 58, 597-598. Some of the cases he referred to as being operational were *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 (CA) (negligent building inspection) and *Johnson v Mount Albert Borough Council* [1977] 2 NZLR 530 (SC) (negligent building permit).
[65] *Minister of Fisheries v Pranfield Holdings Ltd* [2008] NZCA 216, [2008] 3 NZLR 649.
[66] At [91].
[67] *X (Minors)*, above n 25.
[68] *X (Minors)*, above n 25, at 736.

Parliament has authorised",[69] the plaintiff would have to show that the decision was "so unreasonable that it falls outside the ambit of the discretion conferred upon the local authority".[70] However, if a discretion was on matters of "policy" (defined as "social policy, the allocation of finite financial resources… or… the balance between pursuing desirable social aims as against the risk to the public inherent in so doing") then the court cannot adjudicate on such matters.[71] In other words, policy was defined as a narrower subset of discretionary decisions; policy decisions could never be impugned.[72]

In *Pranfield*, the plaintiffs had applied to the Ministry of Agriculture and Fisheries (MAF) for permits to fish for scampi. MAF did not process their applications before a moratorium was introduced on fishing for scampi.[73] A couple of years later, scampi was introduced into the Quota Management Scheme where allocations were based on previous catch history.[74] As the plaintiffs did not have permits, they were unable to establish a catch history and were therefore excluded from a quota allocation. An important aspect to the litigation was that the three different offices of MAF (North, Central and South) had adopted different approaches to their applications.[75] MAF South (which is where the plaintiffs applied to) had a policy of (in most cases) declining permits as they were concerned about pressure on fisheries caused by overfishing.[76] Permits were more easily obtainable from the other offices.[77]

The Court of Appeal held that MAF had a discretion in relation to the approval of permits.[78] It applied Lord Browne-Wilkinson's approach finding that:[79]

> … it was not unlawful for that discretion to be exercised for fisheries management purposes. The failure to adhere to the national policy was poor public administration, but did not make the decisions of MAF ultra vires.

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[69] At 736.
[70] At 736.
[71] At 737.
[72] At 738: "[A] common law duty of care in relation to the taking of decisions involving policy matters cannot exist".
[73] *Pranfield*, above n 65, at [1].
[74] At [2].
[75] At [23]-[24].
[76] At [30].
[77] At [26]-[27].
[78] At [97].
[79] At [96]-[97]. There is a subtle difference between O'Regan J's and Lord Browne-Wilkinson's approach. O'Regan J talks about whether the decision was ultra vires where Lord Browne-Wilkinson considered that only the ground of public law unreasonableness was relevant. These differences are addressed in chapter 3.

The Court accepted there may have been a duty to process applications efficiently but that this was not causative of loss because even if they had been processed in time, they would have been declined due to the fisheries management concerns of MAF South.[80]

There is some ambiguity in the decision. By even considering the decision, O'Regan J might be taken to mean that it was not a policy decision. Alternatively, it could be that he would have only considered whether it was a policy decision if it had been found to be ultra vires in the first place.

B. The policy-operational distinction

This second group of cases draws on the policy-operational distinction derived from *Anns* and *X v Bedfordshire* but eschew the use of public law concepts.[81] As we saw in *Pranfield*, a policy decision is one which involves social, financial or risk distribution considerations.

The policy-operational distinction was briefly considered in *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council*.[82] The plaintiffs' land was flooded when water breached a stopbank. The plaintiff alleged the council had failed to identify and repair a gap in the stopbank and that this was what caused the inundation.[83] One of the arguments raised by the council was that the construction and maintenance of the stopbank was dictated by the available funding and that the plaintiffs were therefore attempting to challenge significant policy and resourcing issues.[84] The Court rejected this argument:[85]

> … the Council explicitly undertakes monitoring and maintenance of the stopbanks, and budgets for that activity. A significant percentage of the annual rating of landowners benefiting from the [stopbank] is spent on maintenance. Council work gangs inspect the banks on a regular basis. *No major policy or resource allocation issue arises. The allocation has been made already. The Council monitors and maintains.*

[80] At [97].
[81] *X (Minors)*, above n 25; and *Anns*, above n 38.
[82] *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council* [2012] 1 NZLR 120 (HC).
[83] At [122].
[84] At [130].
[85] At [133] (emphasis added).

It can be inferred that had the failure been caused by insufficient resource allocation to inspections, the Court would have considered this a policy issue and therefore not intervened. However, here there were simply deficient inspections.

The policy-operational distinction was also raised by Elias CJ and Anderson J in *Couch v Attorney-General*.[86] *Couch* involved a claim against the probation services for negligent supervision of a parolee (Bell). Bell was on parole from his conviction for aggravated robbery. He was allowed to work at a Returned Services Association where there were large quantities of cash and alcohol was served. One morning, he arrived to rob the premises and in doing so injured the plaintiff.[87] The Supreme Court had to determine whether it was arguable that the probation service owed Ms Couch a duty of care.

Chief Justice Elias drew a distinction between "high level responsibilities" and those of a "routine administrative or 'operational' nature".[88] Although the exact terms are not used, she makes it clear that she perceives this as the application of the policy-operational distinction.[89] On these facts, the "functions being performed by the probation officer were not self-evidently policy laden."[90]

Citing Lord Slynn in *Barrett v Enfield London Borough Council*,[91] Elias CJ explicitly accepts that probation officers are like "professional people exercising skill".[92] Therefore, even though difficult judgments have to be made, it:[93]

> … is not immediately apparent why a probation officer should have an immunity not possessed by solicitors, nurses, engineers or building inspectors, such as would be provided by denial of a duty of care.

Nevertheless, to the:[94]

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[86] *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725. Hereafter, I will refer to the minority judgment as Elias CJ's judgment.
[87] This was a claim for exemplary damages and therefore was not barred by the accident compensation legislation as a personal injury claim.
[88] At [59].
[89] At [59], n 96.
[90] At [58].
[91] *Barrett v Enfield London Borough Council* [2001] 2 AC 550 (HL).
[92] *Couch*, above n 86, at [58].
[93] At [58].
[94] At [58].

> … [extent] that what has happened may have been a result of closely balanced discretionary decisions… the care reasonably to be expected of the probation officer and the Service will be adjusted in considering breach

In tailoring the standard of care, judges need to be cognisant of the potential for genuine differences of opinion.[95] Elias CJ therefore appeared willing to shift the emphasis from questions of duty to that of breach. She derived support for this from Lord Morris' comments in *Dorset Yacht*.[96]

On the facts of *Couch*, Elias CJ noted that the reason for the supposedly deficient supervision was unclear.[97] As further facts (which could only be known at a full trial) were needed, it was premature to strike out the claim.

C. Justiciability

The Privy Council in *Takaro Properties Ltd v Rowling* offered an alternative to the other prevailing approaches to public authority liability.[98] Lord Keith stated that their Lordships were aware of the criticism directed at the policy-operational distinction:[99]

> They incline to the opinion, expressed in the literature, that this distinction does not provide a touchstone of liability, but rather is expressive of the need to exclude altogether those cases in which the decision under attack is of such a kind that a question whether it has been made negligently is unsuitable for judicial resolution, of which notable examples are discretionary decisions on the allocation of scarce resources or the distribution of risks … If this is right, classification of the relevant decision as a policy or planning decision in this sense may exclude liability; but a conclusion that it does not fall within that category does not, in their Lordships' opinion, mean that a duty of care will necessarily exist.

[95] At [37] citing *Barrett*, above n 91.
[96] At [34] citing *Dorset Yacht*, above n 7, at 1034-1035 per Lord Morris. Lord Morris' approach is explained in chapter 1.
[97] At [36].
[98] *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700 (PC).
[99] At 709. The trial judge had used this distinction in *Takaro Properties Ltd v Rowling* [1986] 1 NZLR 22 (HC).

In some respects, Lord Keith is responding to an argument that was never made. The policy-operational distinction was never intended to "provide a touchstone of liability".[100] The Privy Council erroneously assumed that a classification as "operational" meant a duty of care was automatically owed.[101] However, perhaps the more important takeaway from *Takaro* was that "policy" decisions could still be justiciable.

At issue in *Takaro* was a decision by the Minister of Finance to reject a company's application for overseas investment.[102] Earlier judicial review proceedings found that he had made his decision taking into account irrelevant considerations and was therefore directed to reconsider.[103] However, before he did, the overseas investors pulled out and the company collapsed. It sued the Minister for negligence in making his original decision.

The Privy Council accepted that the decision is "capable of being described as having been of a policy rather than an operational character".[104] However, because they did not think the policy-operational distinction was a touchstone of liability, "the allegation of negligence… is not… of itself such a character as to render the case unsuitable for judicial decision".[105] What this "character" refers to was not explained. Nevertheless, Lord Keith continued and said there were other considerations which pointed against a duty of care: the only effect of a negligent decision of this kind was delay which judicial review could promptly quash;[106] that it was rare to characterise an error of law as negligent;[107] that imposition of a duty of care would lead to defensive conduct;[108] and the Minister was not under a duty to seek legal advice.[109] These

[100] For example, Lord Diplock referred to a "condition precedent" to liability in *Dorset Yacht*, above n 7, at 1069 and 1070.
[101] RA Buckley "Negligence in the Public Sphere: Is Clarity Possible?" (2000) 51 NILQ 25 at 43: "But this perception seems to have been based, at least in part, on the fallacious assumption that that distinction purported to be a *comprehensive* statement of the conditions required for the imposition of negligence liability upon public authorities." Lewis N Klar "The Tort Liability of Public Authorities: The Canadian Experience" in Simone Degeling, James Edelman and James Goudkamp (eds) *Torts in Commercial Law* (Thomson Reuters, Sydney, 2011) 243 argues that some Canadian cases used a finding that a decision was operational to justify creating a duty in the first place. However, these appear to be isolated incidents and based on a misunderstanding of the role of the distinction. They also came after *Takaro* and therefore could not have been what Lord Keith was referencing.
[102] *Takaro*, above n 98, at 705.
[103] See *Rowling v Takaro Properties Ltd* [1975] 2 NZLR 62 (CA). The irrelevant consideration was the Minister's desire for the land to revert to New Zealand ownership.
[104] *Takaro*, above n 98, at 709.
[105] At 709.
[106] At 709.
[107] At 710. The Court accepted this was about the breach of duty inquiry but said it was relevant to the duty of care inquiry too.
[108] At 710
[109] At 710

findings were tentative, however, as Lord Keith explained he did not need to reach a final conclusion on the duty question.[110]

The House of Lords in *Barrett v Enfield London Borough Council*[111] and *Phelps v Hillingdon London Borough Council*[112] were supportive of a broad justiciability approach. For instance, Lord Slynn in *Barrett* held that the "the ultimate question is whether the particular issue is justiciable or whether the court should accept that it has no role to play."[113] The policy/operational test and discretion/operational test were simply guides to determining that question.[114] Similarly, Lord Hutton held that:[115]

> It is only where the decision involves the weighing of competing public interests or is dictated by considerations which the courts are not fitted to assess that the courts will hold that the issue is non-justiciable on the ground that the decision was made in the exercise of a statutory discretion.

Justiciability received the faintest mention in *Couch.* In discussing the policy-operational distinction, Elias CJ noted that a "similar concept is addressed by reference to justiciability".[116]

The recent Court of Appeal decision in *Strathboss* makes a more explicit use of the justiciability concept as a threshold question before engaging in a duty of care analysis.[117] Citing Todd on Torts,[118] the Court noted that the negligence liability of public authorities must be consistent with the doctrine of separation of powers.[119] This helped to differentiate between complaints about the "broad merits of a decision made in the exercise of a statutory power" and complaints about the manner of its implementation:[120]

> No duty is owed as regards the former, "policy" matters, because the decision to be made is one for the public body, not the courts. But a duty may be owed in respect of

[110] At 708.
[111] *Barrett*, above n 91.
[112] *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 (HL).
[113] *Barrett*, above n 91, at 571.
[114] At 571.
[115] At 583.
[116] *Couch*, above n 86, at [59], n 96.
[117] *Strathboss*, above n 4.
[118] Todd, above n 4.
[119] *Strathboss*, above n 4, at [167].
[120] At [167].

> "operational" matters, for the court asks only whether the policy has been implemented with care. However, drawing the distinction is difficult, and more recent decisions tend to focus on the question whether a decision is justiciable, or is essentially of a political character. In these ways the courts seek to draw a line between their own role in determining private disputes and the policy or political role of other branches of government.

The plaintiffs in *Strathboss* brought several claims in negligence against the Ministry of Agriculture and Fisheries (MAF). A contagious disease spread through New Zealand kiwifruit orchards causing millions in loss. The plaintiff's case was that the disease entered New Zealand through a consignment of kiwifruit pollen imported by Kiwi Pollen Ltd. The plaintiff alleged the Ministry was negligent in issuing the import permit (pre-border negligence) and not inspecting the consignment at the border (negligence at the border). The issue of justiciability arose in relation to the pre-border negligence.[121]

Under the Biosecurity Act 1993, the Director-General of the Ministry is able to set what are known as "Import Health Standards". These set out the risk assessment requirements for risky goods before they could be imported and cleared at the border. The relevant import health standard for kiwifruit pollen was the Nursery Stock Import Heath Standard. This required an import permit and a period of post-entry quarantine. In processing Kiwi Pollen Ltd's application and granting an import permit, staff at the Ministry made a string of errors. They did not include a period of post-entry quarantine and misunderstood the scope of a report which had set out the potential risks of importing pollen.

The Crown argued that some of the challenged decisions were non-justiciable.[122] First, it said that the plaintiff's case was that MAF should have had in place better import health standards which would have prohibited the import of the pollen or placed further restrictions. The Court accepted that the standards were immune from suit as "in effect constituting delegated legislation".[123] However, the plaintiffs were not trying to challenge them but rather "downstream steps such as the grant of the import permits".[124] The granting of import permits was justiciable.

[121] Therefore, the claim about negligence at the border is not discussed further.
[122] At [168].
[123] At [174].
[124] At [174].

The second Crown contention was that border control could not be subject to a duty of care since it would "require the Court to make a determination as to the correct public policy or political decisions to be made, including the level and manner of resourcing".[125] The Crown argued that the "nature of border control decisions is not one for which there is an appropriate legal yardstick".[126] In response, the plaintiff claimed that the "impugned conduct occurred at an 'operational' level" and had taken "MAF's strategy and resourcing as a given".[127]

The Court of Appeal noted initially that "public law concepts should be rejected" in the inquiry into justiciability.[128] However, the policy-operational distinction "may retain relevance in the context of a question of justiciability" as "informing the inquiry" into it.[129] It acknowledged the "challenging nature of the task in drawing the line between policy and operational decisions".[130] However, it considered that the various decisions made by MAF staff in assessing the risk profile of the pollen were "'technical decisions'… unrelated to economic or political considerations".[131] The decision on whether to include additional conditions over and above the import health standard requirements was similarly characterised as "operational".[132]

As none of the impugned decisions were non-justiciable, the Court then went onto apply a novel duty of care analysis and consider breach. The Court's comments about justiciability, though extensive and subject to arguments from counsel, were strictly obiter as the proceedings were determined on a different prior basis.[133]

D. Summary

It may be helpful to briefly summarise the points that have been made so far and outline the argument in the subsequent chapters. So far, we have seen that courts are concerned about their

[125] At [175].
[126] At [183].
[127] At [183].
[128] At [184].
[129] At [184] citing Todd, above n 4, at 356.
[130] At [185] citing *George v Newfoundland and Labrador* 2016 NLCA 24, 399 DLR (4th) 440.
[131] At [188].
[132] At [189].
[133] At [148]. In short, the Crown Proceedings Act 1950 meant the Crown could not be sued directly in tort. The Crown could only be vicariously liable. The plaintiffs had to prove direct negligence on the part of the Crown's servants. However, they were unable to do this as the Biosecurity Act 1993 provided for exclusions from liability for MAF employees.

constitutional and practical competence to assess the reasonableness of public authority decision-making. This has resulted in the creation of special protections for public authorities. One kind has been a prima facie immunity for discretionary or policy decisions which must be shown to be unreasonable or ultra vires at public law to be challengeable in private law. The second kind is denying a duty of care altogether for claims against "policy" decisions. The third is to also deny a duty of care but for "non-justiciable" decisions.

It is very difficult to say which case is the leading authority in New Zealand. The most recent authority is *Strathboss* but these comments were obiter. *Couch* was considered by the Supreme Court but the relevant issue only received attention in the minority judgment and in the context of a strike-out application. The use of public law concepts was criticised in *Strathboss* but there was no reference to *Pranfield* which had used them just 12 years earlier. Additionally, in *Pranfield*, the discussion of the issue was part of the ratio of the case and not just obiter. Therefore, in a sense, each is a potential candidate and therefore deserves thorough consideration.

The argument I am going to make in the following chapter is that using public law concepts is problematic as they are dislocated from their original context and therefore do not neatly intersect with the functions of negligence. However, while we may reject public law concepts, arguably the underlying principles may provide some guidance. In chapter 4, I show that the policy-operational distinction should be abandoned, and more weight given to the breach of duty stage. In chapter 5, I argue there are several positive elements to *Strathboss* but that these improvement risk becoming undone by simply reverting back to the policy-operational distinction as a proxy.

Chapter 3: Public Law Filters

Public law concepts have been used in a variety of ways in different negligence cases in New Zealand. The purpose of this chapter is to show that the move away from them was correct. However, because there have been so many variations of the public law approach itself, it is necessary to consider each of their relative merits.[134]

A. "Discretionary" decisions

Let us consider the approach taken by Lord Reid and Viscount Dilhorne in *Dorset Yacht*, Lord Wilberforce in *Anns* and Lord Browne-Wilkinson in *X (Minors)*. It is also the approach taken by Cooke J in *Taranaki Catchment Commission* and O'Regan J in *Pranfield*. The initial inquiry is whether there is a discretion or not. "Discretion" in this context means "choice" or the ability to choose between alternatives.[135] This is why, for instance, Lord Wilberforce considered an inspection "discretionary" since there was choice as to its timing, manner and inspection.[136] Similarly, Cooke J talked about the Council's choice "as to whether or not to take enforcement steps, or as to the steps to be selected".[137] Lord Browne-Wilkinson spoke of discretion as choosing the "extent to which, and the methods by which, such statutory duty is to be performed".[138] If there is a discretion, the plaintiff must demonstrate it was exercised ultra vires or unreasonably at public law.

The underlying rationale is that when Parliament confers a discretion, it should be left to the authority to decide how best to exercise it. Parliament's intention is to authorise any action, thereby immunising it from negligence claims, so long as the public authority remains within the scope of their discretion (ie. by fulfilling their public law duties).[139] This is therefore a separation of powers type argument. It is not concerned with the court's practical competence

[134] For instance, do we use the discretionary-operational distinction or the policy-operational distinction? Are all heads of judicial review relevant or just public law unreasonableness?
[135] Mark Aronson and Harry Whitmore *Public Torts and Contracts* (Law Book Company, Sydney, 1982) at 69.
[136] *Anns*, above n 38, at 755.
[137] *Taranaki Catchment Commission*, above n 51, at 644.
[138] *X (Minors)*, above n 25, at 736.
[139] Duncan Fairgrieve and Dan Squires *The Negligence Liability of Public Authorities* (2nd ed, Oxford University Press, New York, 2019) at 43.

because the mere presence of choice does not make a decision polycentric nor does it differentiate public authorities from private bodies.[140]

However, inferring a Parliamentary intention of this kind, merely from the conferral of a discretion, is a fiction.[141] Can Parliament really be seen to authorise the absence of reasonable care by just granting a discretion? If loss has been caused by an unreasonable exercise of discretion (though not *Wednesbury* unreasonable or ultra vires) the innocent victim should not be denied redress simply because he or she cannot demonstrate the higher public law threshold.[142] This finds support in Lord Blackburn's judgment in *Geddis*.

Another reason we may struggle to ascertain such an intention is by comparing New Zealand and United Kingdom legislation with that of the United States. Section 2680(a) of the Federal Tort Claims Act 1946 explicitly excludes liability in tort in relation to any claim:[143]

> …based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government…

It is likely that Lord Wilberforce was directly influenced by American jurisprudence as he cites cases which talk about this statutory "discretionary function exception". [144] This is problematic as there is no equivalent expression in New Zealand or United Kingdom statutes.

Moreover, to accept an immunity for intra vires conduct in every situation where Parliament leaves room for choice (as *Taranaki Catchment Commission* and *Pranfield* does) is incredibly wide. It would apply unless Parliament has created an express duty or prescriptively laid out exactly how a power is to be exercised which, for practical reasons, is often not the case:[145]

> To the extent that the authority is not under absolute statutory duties to do [anything] in a *particular way at a particular place*, the authority may be said to have a "discretion" in these matters.

[140] Woodall, above n 47, at 91.
[141] Fairgrieve and Squires, above n 139, at 43.
[142] Assuming the other elements of the tort are met.
[143] Federal Torts Claims Act 28 USC § 2680.
[144] *Anns*, above n 38, at 756. Lord Wilberforce cites *Indian Towing Co v United States* 350 US 61 (1955).
[145] Dawn Oliver "Anns v London Borough of Merton Reconsidered" (1980) 33 CPL 269 at 270.

Such an intra vires immunity is also contrary to well-established lines of negligence liability in New Zealand. Notably, there have been several cases holding councils liable for negligent building inspections[146] even though, as Lord Wilberforce attested, there is a "discretion as to the time, manner and technique of inspection". In these cases, the courts have never asked plaintiffs to prove the council was *Wednesbury* unreasonable or acted ultra vires.

At an abstract level, the core purpose of these public law filters is to ensure consistency between public law and private law. It brings to mind comments in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations* about ensuring that negligence liability does not cut across other areas of the law.[147] Hickman strongly advocates for immunising intra vires conduct from a negligence suit. He argues that to see it otherwise requires: [148]

> … accepting that decisions may be the subject of a negligence claim although they have in fact been made intra vires and would not have been impugnable had an action been brought otherwise than for damages. In other words, conduct can apparently now amount to a wrong although nothing has ever been done wrong.

The concern is to ensure that public authorities do not get "mixed messages" from the law.[149] The other side of the same coin is that in public law, courts focus on the legality of a decision and are reluctant to consider its merits. There is therefore a concern that if a public law threshold is not used, there is nothing preventing a court undertaking merits review when applying the standard of care in negligence.[150]

However, the problem with these arguments is that it ignores the difference between "lawfulness" in public law (ie. that a decision is intra vires) and "lawfulness" in negligence.

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[146] For example, *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 [*Spencer on Byron*].
[147] *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 298 per Cooke P.
[148] Hickman, above n 18, at 176.
[149] Barker, above n 5, at 212.
[150] Elizabeth Carroll "Wednesbury Unreasonableness as a Limit on the Civil Liability of Public Authorities" (2007) 15 Tort L Rev 77 at 80. Paul Craig and Duncan Fairgrieve "Barrett, Negligence, and Discretionary Powers" (1999) PL 626 at 648 argue that negligence and public law are both simply mechanisms for holding a public body to account and therefore the standard ought to be the same.

The purpose of public law is to uphold the rule of law and promote good governance. This is fundamentally different from the aims and remedies of tort law which is primarily to right private wrongs with compensation.[151] De Vries notes that "negligence is not concerned with the decision-making process the defendant employed to create a risk of harm, and public law is not concerned with assessing fault".[152] This means that just because a public authority had acted intra vires (thereby fulfilling their public law duties) does not necessarily mean they have fulfilled their private law duties.[153] While this may mean that the same conduct is subject to different standards, this is acceptable when we consider the duties are owed to different people, for different purposes and with different consequences for their breach.[154]

B. "Policy" decisions

Drawing an initial demarcation between discretionary and operational decisions is problematic. An alternative distinction and rationale can be seen in Lord Diplock's judgment in *Dorset Yacht*. Lord Diplock distinguished *Geddis* partly on the basis that it involved a far less sophisticated balancing of various competing interests. He emphasised that it is "not the function of the court, for which it would be ill-suited, to substitute its own view of the appropriate means for that of the department or authority".[155] He is in effect getting at the court's constitutional and practical competence to measure the reasonableness of these actions. It is more than just a separation of powers type argument.

Justice Hardie Boys in *Brown v Heathcote County Council* drew heavily on Lord Diplock's reasoning. Justice Hardie Boys emphasised that it is not enough just for there to be a discretion but that it relates to the allocation of scarce resources. Contrary to Lord Wilberforce, Hardie Boys J explicitly considered that building inspection cases were in the "operational sphere".[156] The benefit of this is that it explains why perhaps New Zealand courts did not raise public law thresholds in defective building cases.

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[151] Jonathan de Vries "Negligence, Discretion and the Liability of Municipalities for Building Regulation: The Case for Increased Deference" (2018) 25 Tort L Rev 119 at 132.
[152] De Vries, above n 151, at 132.
[153] Barker, above n 5, at 212.
[154] Stephen Bailey "Public Authority Liability in Negligence: The Continued Search for Coherence" (2006) 26 LS 155 at 166.
[155] *Dorset Yacht*, above n 7, at 1067.
[156] *Brown v Heathcote County Council*, above n 58, 597-598.

Nevertheless, for both judges, these initial "policy" decisions can still be challenged in negligence if they are ultra vires.[157] Suppose the decision is found to be ultra vires for reasons of illegality or procedural impropriety (I will return to *Wednesbury* unreasonableness shortly). Such a finding in public law does not make the *reasonableness* of these decisions any easier to ascertain in private law.[158] And yet, part of the reason for affording a prima facie immunity to policy decisions was because the court ostensibly lacked the practical competence to determine private law unreasonableness. This means that there is a disconnect between the original reason for granting the immunity and the reason for defeating it.

Brown v Heathcote County Council shows some of the difficulties in this area. Justice Hardie Boys classified the decision to not undertake flood research as a policy one. From Lord Diplock's judgment we know this means that the court is not practically or constitutionally competent to consider the reasonableness of this decision. However, immediately after making the classification, Hardie Boys J states:[159]

> I regard [the decision] as *perfectly reasonable* and proper… At the relevant time [the Council] had only some 2000 ratepayers. It is clear that an adequate study of the danger of flooding involves not only a considerable span of time and the engagement of expert assistance, but is also dependent on the collation of data gathered over a wide geographical area… It is the Board, with its much more extensive geographical area, its much more ready access to the means and sources of relevant information, and its more specialised function which enables it to devote its resources in a more concentrated manner to the particular problem, that is the appropriate authority to exercise jurisdiction.

As this followed immediately after the policy classification, it is arguably not expressed as an alternative reason for his decision. Instead, it appears he did think the Court could and should assess the reasonableness of this decision.[160] Yet we cannot easily say this is a matter of him

[157] Justice Hardie Boys used the phrase "within the ambit of the discretion" which is, in effect, the same thing.
[158] Aronson and Whitmore, above n 135 at 66; and Sue Arrowsmith Civil Liability and Public Authorities (Earlsgate Press, Winteringham, 1992) at 176.
[159] *Brown v Heathcote County Council*, above n 58, at 598.
[160] JG Fogarty "Where Will it End?" in *Individuals' Claims Against Local Authorities* (New Zealand Law Society seminar, 1985) 46 at 49: "the Judge considered he could pass a judgment upon such a policy decision and that liability for negligence in this area was possible".

getting the policy classification wrong. This was, after all, a decision genuinely about the allocation of resources.

C. The Australian Post-Ipp Era

What if instead of allowing all the heads of review to defeat the policy immunity, it is restricted to just *Wednesbury* unreasonableness? This is, in effect, the approach that has been taken in several Australian states following the recommendations of the Ipp Report. The authors of the report recommended a "policy defence":[161]

> In any claim for damages for personal injury or death arising out of negligent performance or non-performance of a public function, a policy decision (that is, a decision based substantially on financial, economic, political or social factors or constraints) cannot be used to support a finding that the defendant was negligent unless it was so unreasonable that no reasonable public functionary in the defendant' s position could have made it.

The authors explicitly said, "This test of 'unreasonableness' is taken from public law where it is known as the test of '*Wednesbury* unreasonableness'".[162] The purpose of introducing it was to substitute *Wednesbury* unreasonableness for the standard of care in negligence.[163]

Wednesbury unreasonableness might seem more sensible since it purports to look at the reasonableness of decisions as well. However, and to reiterate De Vries' earlier point, this is to dislocate *Wednesbury* from its context and apply it a totally different sphere.[164] As Aronson writes:[165]

> When [public authority] decisions are measured against *Wednesbury*, the court does not balance the decision-maker's interests against the interests of the person affected

[161] David Andrew Ipp and others *Review of the Law of Negligence Final Report* (Commonwealth of Australia, September 2002) at 158. This "policy defence" was then legislated, albeit inconsistently across states. See Bell-James and Barker, above n 10, at 3.
[162] Ipp and others, above n 161, at 157
[163] Ipp and others, above n 161, at 157.
[164] Rachael Baillie "A Square Peg in a Round Hole: Reshaping the Approach to Systemic Negligence in the Modern Public Service" (2014) 20 Auckland U L Rev 45 at 69.
[165] Mark Aronson "Government Liability in Negligence" (2008) 32 MULR 44 at 80 (emphasis added). See also Donal Nolan "Varying the Standard of Care in Negligence" (2013) 72 CLJ 651 at 669; and Roderick Bagshaw "Monetary Remedies in Public Law – Misdiagnoses and Misprescription" (2006) 26 LS 4 at 17.

> by the decision. Negligence law by contrast tries to strike a balance between the interests of plaintiff and defendant. *The verbal formula is the same, therefore, but transplanting Wednesbury into negligence soil will mean that it has a wholly different operation*. Before its transplant, *Wednesbury* had nothing to say to decision-makers about being careful to avoid harming others.

Wednesbury unreasonableness is simply not capable of substituting for the standard of care analysis in negligence.[166]

[166] Carroll, above n 150, at 87. I accept that some New Zealand courts have lowered the standard of public law unreasonableness so that *Wednesbury* is no longer the sole standard. While this may alleviate some of the "harshness" it still leaves unaddressed the fundamentally different rationales. Therefore, it is not considered further.

Chapter 4: The policy-operational distinction

The policy-operational distinction has three different functions. First, as in *Brown v Heathcote County Council*, it demarcates decisions that require the plaintiff to overcome an additional public law hurdle.[167] Second, as in *Easton*, *Couch* and *Pranfield*, it demarcates decisions which cannot ever be susceptible to a duty of care.[168] Thirdly, as in *Strathboss* (and to an extent *Couch*), it "informs" the inquiry into justiciability.[169] I will return to this third function in the next chapter.

In this chapter, first, I argue that the policy-operational distinction is too uncertain to be a workable test. Second, the distinction unjustifiably immunises too many decisions on the basis of the court's lack of practical competence.

A. An unworkable distinction

As discussed above, a "policy" decision is one dictated by social, economic or risk distribution considerations. There is an "attractive simplicity" to it and this perhaps explains why there is recourse to it in so many cases.[170] It works well at the extremes.[171] For instance, *Easton* involved how the Council went about its inspections given that they were already doing it. As the resourcing decisions had already been made, this was an operational decision. If the challenge had been to the decision to build a stopbank, given this is clearly about resource allocation, we would see this as a policy decision.

However, the distinction has also been strongly criticised, most notably in *Stovin v Wise*.[172] Lord Nicholls stated the "boundary [between policy and operational decisions] is elusive, because the distinction is artificial".[173] Similarly, Lord Hoffman talked about how the "distinctions which [are drawn] are hardly visible to the naked eye".[174]

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[167] *Brown v Heathcote County Council*, above n 58.
[168] *Easton*, above n 82; *Couch*, above n 86; and *Pranfield*, above n 65.
[169] *Strathboss*, above n 4.
[170] Lewis N Klar *Tort Law* (4th ed, Carswell, Toronto, 2008) at 305.
[171] Geoff McLay and Dean Knight "Government Negligence" in *Liability of Public Authorities* (New Zealand Law Society seminar, 2009) 13 at 17.
[172] *Stovin v Wise* [1996] AC 923 (HL).
[173] At 938. Lord Nicholls believed that an area of blanket immunity was "undesirable and unnecessary".
[174] At 956.

The use of the distinction in Canada testifies to its problematic nature. Cases with remarkably similar facts have resulted in opposite classification without an understandable explanation. One case is *Just v British Columbia*.[175] The plaintiff and his daughter had stopped in a line of traffic on a highway next to a rocky slope. A boulder came down the slope, crashing to the car. The plaintiff was severely injured while his daughter was killed. The Department of Highways was empowered by statute to maintain the highway and had set up a system for inspection and remediation.[176] A crew would make visual inspections from the highway for signs of instability. In areas known for instability, a worker would scale the slope for a closer look. The trial judge, the Court of Appeal, and a (dissenting) Supreme Court judge all considered the case as involving policy decisions.[177]

Justice Cory, for the majority in the Supreme Court, acknowledged that the difficulty of fixing the dividing line between policy and operation but said "it is essential that it be done."[178] He concluded:[179]

> … the public authority had settled on a plan which called upon it to inspect all slopes visually and then conduct further inspections of those slopes where the taking of additional safety measures was warranted. Those matters … were not decisions that could be designated as policy decisions. Rather they were manifestations of the implementation of the policy decision to inspect and were operational in nature.

He effectively considered only the decision to inspect as policy whereas everything done thereafter was operational.

In the second case of *Brown v British Columbia* the plaintiff's car skidded on an icy patch of highway and crashed.[180] At the time, the Department of Highways was operating on a less-intensive "summer schedule" rather than its "winter schedule".[181] Under the summer schedule, de-icing crews were not actively working on Friday, Saturday and Sunday. The crash happened

[175] *Just v British Columbia* [1989] 2 SCR 1228.
[176] At [5]-[7].
[177] Klar, above n 170, at 306.
[178] *Just*, above n 175, at [17].
[179] At [31].
[180] *Brown v British Columbia* [1994] 1 SCR 420.
[181] At [16]-[17].

on a Friday when crews were only available on call. Mr Brown argued the Department was negligent by not having personnel on duty at the time of the crash.[182]

Justice Cory, again writing for the majority, quoted lengthy passages from his judgment in *Just*. He held:[183]

> … the decision of the Department to maintain a summer schedule, with all that it entailed, was a policy decision. Whether the winter or summer schedule was to be followed involved a consideration of matters of finance and personnel

The same judge in both cases therefore reached different answers to remarkably similar fact patterns. Moreover, we cannot confidently say if either was actually decided wrongly. This demonstrates the troublesome nature of the policy-operational distinction. As McLachlin J wrote in the later Canadian Supreme Court case of *R v Imperial Tobacco*, the distinction "posits a stark dichotomy between two water-tight compartments - policy decisions and operational decisions. In fact, decisions in real life may not fall neatly into one category or the other." [184] In essence, it is difficult to disentangle the policy and operational elements intermeshed into nearly every decision. [185] Similarly, the focus of the inquiry is into whether there are social, financial or political considerations behind the decision. However, almost every decision by a public authority, "no matter how trivial it may seem, affects the budget of the public authority".[186]

Although New Zealand has not yet had to encounter these difficult situations, the uncertainty of the policy-operational distinction makes it an unworkable test.

B. An overprotective distinction

The basic purpose of the policy-operational distinction is to demarcate the bounds of the court's constitutional competence and practical competence. We have already seen this our previous

[182] There was another claim that the crew did not respond in a timely fashion. However, this did not get very far as the court held that even if they had responded in a timely manner, the accident would not have been prevented.
[183] At [39].
[184] *R v Imperial Tobacco Canada Ltd* 2011 SCC 42, [2011] 3 SCR 45 at [86].
[185] Klar, above n 170, at 305.
[186] Stovin v Wise, above n 172, at 951 per Lord Hoffman.

discussion of Hardie Boys J in *Brown v Heathcote County Council* and what he drew from Lord Diplock in *Dorset Yacht*.[187] Canadian cases which use the distinction justify it on a similar basis. For instance, in *Just*, Cory J approvingly cited American jurisprudence which talked about preventing "judicial interference with decision making that is properly exercised by other branches of government" and that "objective standards are notably lacking".[188]

This raises two problems. The first is that, as I noted earlier, the boundaries of the two concerns are not coterminous. Yet, one tool is expected to adequately demarcate both. Arguably, this explains why courts have struggled to use it in a predictable way.

The second problem is that difficult decision-making and the concomitant practical incompetence of the court is not a valid justification for zones of immunity. Even if judges themselves lack expertise, they "appear happy to adjudicate upon matters of great complexity with the guidance of a specialist witness".[189] In particular, Bailey and Bowman argue that the House of Lord's decision in *Bolam v Friern Hospital Management Committee*, [190] which dealt with medical negligence, ought to be applied widely to public authorities as well.[191] In *Bolam*, the House of Lords recognised that professionals are expected to perform to the standard of care of someone possessing their skill and expertise.[192] However, a professional:[193]

> … is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art… Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view

The House of Lords in *Barrett*[194] and *Phelps*[195] also affirmed that *Bolam* applies to the decisions of public authorities in the United Kingdom.

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[187] *Dorset Yacht*, above n 7.
[188] *Just*, above n 175, at 17.
[189] SH Bailey and MJ Bowman "The Policy/Operational Dichotomy – A Cuckoo in the Nest" (1986) 45 CLJ 430 at 434.
[190] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 (QB).
[191] Bailey and Bowman, above n 189, at 434.
[192] *Bolam*, above n 190, at 586.
[193] At 587.
[194] *Barrett*, above n 91, at 572 per Lord Slynn.
[195] *Phelps*, above n 112, at 655 per Lord Slynn and 672 per Lord Clyde.

Moreover, the focus on polycentricity in public authority decision making ignores how it exists in all types of decision-making.[196] Even Fuller conceded as much saying that "concealed polycentric elements are probably present in almost all problems resolved by adjudication".[197] We may even say that some decision-making by private defendants is *more* polycentric than public authorities. High-level decisions by Fletcher Building, Meridian Energy or Fonterra will often involve a far more complicated balancing exercise than, say, that undertaken by a small local council. However, the common law has never granted such private defendants a special immunity. Bailey and Bowman note that "the private law breach principles have never been limited to the weighing of interests that are strictly comparable".[198]

Todd has also argued that the standard of care is sufficiently flexible to adapt to public authorities.[199] Also analogising with professionals, he notes that they do not need to "[make the right decision or to guarantee success in any particular venture".[200] Instead, they have to "act within the boundaries reasonably to be expected of a person claiming skill and competence in the particular area".[201] For public authorities, we should therefore ask whether the decision was "reasonably open to the defendant or, conversely, whether it was outside the range of decisions that a reasonable person charged with the activity in question could have made".[202]

Chief Justice Elias' judgment in *Couch* places a lot more emphasis on the standard of care compared to the duty of care inquiry.[203] She acknowledges that other skilled professions are also "asked to make difficult judgments".[204] Therefore, it was not apparent why the public authority should "have an immunity not possessed by solicitors, nurses, engineers or building inspectors, such as would be provided by a denial of a duty of care". Instead:[205]

> … to the extent that what happened may have been a result of closely balanced discretionary decisions (something that is wholly unclear at present), the care

[196] Barker, above n 5, at 216.
[197] Fuller, above n 8, at 398.
[198] Bailey and Bowman, above n 189, at 434.
[199] Todd, above n 4, at 378.
[200] At 379.
[201] At 378.
[202] At 378.
[203] *Couch,* above n 86.
[204] At [58].
[205] At [58].

> reasonably to be expected of the probation officer and the Service will be adjusted in considering breach.

In effect, Elias CJ can be seen as removing the concern about the court's lack of practical competence from the duty of care analysis and instead considering it at the breach stage. This brings the treatment of public and private defendants closer together.

Arguably, Elias CJ's formulation is more sophisticated and nuanced than a simple application of *Bolam*. In fact, she explicitly does not cite *Bolam* in support of her argument even though it is used as the basis in other United Kingdom cases which she cites (and therefore she presumably can be taken know it). The explicit reference to "probation officer *and the Service*" shows the judgment contemplated varying the standard of care beyond just professionals and even perhaps to larger organisational decisions as well.[206] Additionally, she expressly considers that the standard of care varies "to the extent" of difficult decision-making. This is not a binary question of applying *Bolam* or not but rather a matter of weight.

The standard of care and breach of duty analysis is inherently flexible.[207] For instance, the courts tailor reasonableness based on the degree of harm, the social value of the activity and the burden of taking precautions.[208] No one would question the utility of this flexibility to make the inquiry fact specific. Equally, looking at practical difficulties of determining reasonableness is simply another factor to take into account. The result is that the more it is present, the harder it will be for the plaintiff to discharge the burden of proof.[209]

Even if it is claimed that public authority decision-making is *more difficult* (which will not necessarily always be the case), this is a matter of degree rather than kind. Therefore, this could still be accommodated at the standard of care stage rather than through blanket immunities. This simply means that for more difficult decisions, the plaintiff will be less able to discharge the onus of proving any breach of duty on the facts.[210] Varying the standard of care, is a "more rational and defensible approach than throwing one's hands in the air and declaring the relevant

[206] Couch, above n 86, at [58].
[207] Nolan, above n 165, at 654.
[208] Todd, above n 4, at 439-445.
[209] Barker, above n 5, at 216; and Bailey, above n 154, at 170.
[210] Barker, above n 5, at 216.

sphere of decision to be a duty-free zone."[211] The "practical difficulty of deciding whether a body has breached its duty is no reason to deny that the duty exists".[212] In any event, as I later discuss, because some decisions still ought to be immune for constitutional reasons, the decisions towards the more complex end will nevertheless be protected.

I accept that a key difference between public authorities and private bodies is that if the risk of liability gets too large, the latter can always choose to withdraw from providing the service.[213] The fear of treating public authorities the same is that if liability is imposed, they too might withdraw or becoming overly risk-averse. However, as I indicated at the start, concerns about defensive behaviour are unrelated to issues about the court's constitutional and practical competence.[214] In other words, this particular factor of public authorities (could still be used to deny (or enlarge) a duty of care separately from concerns about separation of powers and polycentricity.

It might also be argued that public defendants are different because they act for a public benefit and not necessarily to generate a profit. However, altruism is not exclusive to public authorities.[215] In fact, if we accepted such a rationale, it should logically be extended to charities or non-profit organisations.[216] Furthermore, as negligence is based on fault rather than motive, it would be wrong for the latter to be used to mitigate the former.[217]

Some authors have argued that because the practical difficulty of determining reasonableness applies to all decision-making, public authority defendants should be treated entirely "in the same way as other defendants".[218] However, while we may accept that the practical concerns are not a good enough reason to deny a duty of care, this still leaves unanswered the court's constitutional competence to second-guess public authorities. There is only so far that public authorities can be analogised with professionals. With professionals, the court defers to their judgment as evidence of what is reasonable but still retains control over the weight to be given to competing interests and can substitute its own judgment if appropriate:[219]

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[211] Barker, above n 5, at 217.
[212] Barker, above n 5, at 216.
[213] Anthony M Dugdale "Public Authority Liability: To What Standard?" (1994) 2 Tort L Rev 143 at 152.
[214] Barker, above n 5, at 220-221.
[215] Baillie, above n 164, at 64.
[216] Baillie, above n 164, at 64.
[217] Baillie, above n 164, at 64.
[218] Bailey, above n 154, at 163.
[219] Arrowsmith, above n 158, at 175 citing *Sidaway v Bethleman Royal Hospital* [1985] AC 871 (HL).

> With public authorities the court does not retain this control even in theory: the authority's decision is not just evidence of what is reasonable, but the responsibility of deciding what should be done is with the authority itself.[220]

In essence, the separation of powers concern has no private law analogy. Therefore, it *does* represent a good reason to justify departing from the Diceyan conception and grant protections that are not available to private defendants. It cannot properly be taken into account at the breach of duty stage because the whole rationale is that the courts simply should not enter into that assessment in the first place.

In the next chapter, I argue there is implicit acceptance of this more limited role for justiciability and in chapter 6, I outline how such an inquiry could be carried out. This includes some examples of cases which have been found to be policy but which I argue are better seen as satisfying the standard of care.

[220] Arrowsmith, above n 158, at 175.

Chapter 5: Justiciability

A. Two steps forward

There are two positive elements to the judgment in *Strathboss*.[221] First, and perhaps quite understated, is the subtle shift to have justiciability as a threshold question before the standard duty of care analysis.[222] In other cases, such as *Easton* and *Couch*, these concerns have been mixed together with other elements of the duty of care analysis.[223] To have it acting as a "screening mechanism" perhaps akin to that of foreseeability is logical. After all, if separation of powers mandates that the courts should not inquire into this issue, it follows that the inquiry should go no further. This reinforces the how a finding of non-justiciability is final.[224]

Second, there is also a noticeable shift in emphasis for what justiciability is about. In *Takaro,* the Privy Council had talked about decisions which were "unsuitable for judicial resolution" which is ambiguous and merges the two theoretical concerns.[225] I argue that the Court of Appeal in *Strathboss* intentionally focussed on just the separation of powers concern. There appears to be a deliberate avoidance of mentioning issues of practical competence. For instance, although the Crown raised the concern that there was "no appropriate legal yardstick", the Court did not address this in their reasoning.[226]

B. One step back

Unfortunately, however, the Court of Appeal still found it necessary to return to the policy-operational distinction as a proxy for the separation of powers rationale. This is despite ostensibly de-emphasising its importance (it "*may* retain relevance").[227] As argued before, the distinction sought to capture both the separation of powers and practical competence concerns in one packaged tool. However, here the Court of Appeal deliberately opted for justiciability to be an inquiry into only the former. The result is that the degree of protection given to public

[221] *Strathboss*, above n 4.
[222] *Strathboss*, above n 4, at [167]-[191].
[223] *Easton*, above n 82; and *Couch*, above n 86. See Bell-James and Barker, above n 10, at 9.
[224] Fairgrieve and Squires, above n 139, at 24.
[225] *Takaro*, above n 98, at 709.
[226] At [182].
[227] Strathboss, above n 4, at [184].

authorities is wider than would be necessary if practical competence was factored into the breach of duty stage.

Moreover, by going back to the distinction, the Court of Appeal appeared to be rebranding it as an inquiry into justiciability. Despite the Privy Council in *Takaro* trying to create a divergence between the two approaches,[228] there has instead been a convergence. Simply calling the approach justiciability will not make its application any easier[229] nor will it overcome the "same devils of indeterminacy" as the policy-operational distinction.[230]

In effect, *Strathboss* makes the mirror-image mistake to *Couch*. In *Couch*, Elias CJ implicitly accepted moving issues of practical competence to the standard of care stage but still used the policy-operational distinction as a threshold. In *Strathboss*, the Court focusses on just the separation of powers rationale but nevertheless also reverts to the distinction.

Some authors have attempted to show that justiciability is a wider concept than the policy-operational distinction. Susan Kneebone, for instance, says that arguments about indeterminate liability (the "floodgates" concern) and whether liability would create defensive practices help inform the justiciability inquiry.[231] In support, she cites *Takaro* where the "claim was considered to be non-justiciable".[232] However, this is a misreading of *Takaro*. The Privy Council explicitly said that the decision *was* justiciable but that there were other policy reasons (such as the concern of defensiveness) which negated imposing a duty of care.[233] In effect, Kneebone expands the meaning of justiciability to simply mean whether a duty of care will be imposed at all rather than as a particular tool to be used within that inquiry. Deakin, Johnston and Markesinis make the same mistake by suggesting that the floodgates and defensiveness factors are part of the justiciability inquiry.[234] As I previously indicated, these factors do not stem from a concern about practical competence or separation of powers. While they are still

[228] *Takaro*, above n 98, at 709.
[229] Basil S Markesinis and others *The Tortious Liability of Statutory Bodies: A Comparative and Economic Analysis of Five Cases* (Hart Publishing, Oxford, 1999) at 106, n 5.
[230] John Doyle and Jonathon Redwood "The Common Law Liability of Public Authorities: The Interface Between Public and Private Law" (1999) 7 Tort L Rev 30 at 45.
[231] Susan Kneebone *Tort Liability of Public Authorities* (Law Book Company, Sydney, 1998) at 36. At 110, she also states: "The contrast between *Takaro* and *Lonrho v Tebbit* suggests that the policy behind the justiciability factor is the spectre of opening the floodgates to numerous actions against careless officials".
[232] Kneebone, above n 231, at 36.
[233] *Takaro*, above n 98, at
[234] Simon Deakin, Angus Johnston and Basil Markesinis *Markesinis and Deakin's Tort Law* (Oxford University Press, New York, 2008) at 419.

reasons why a duty of care may not be imposed, they should not be subsumed within the justiciability inquiry.[235]

Thus, the difficulty with justiciability is to craft an approach which focusses on just the separation of powers concern without having to resort to the policy-operational distinction or dislocated public law concepts. In the next chapter, I demonstrate that this is possible.

[235] Barker, above n 5, at 220-221.

Chapter 6: Pulling together the strands

From the preceding discussion, I draw on the positive aspects of cases to craft a better approach and then apply it.

A. Justiciability

First, like in *Strathboss*, there ought to be an initial inquiry into justiciability which focusses on ensuring consistency with the doctrine of separation of powers.[236] To distinguish this from the current justiciability approach, I refer to it as *constitutional justiciability*. The benefit of a threshold question, prior to issues of duty of care, is that it places constitutional justiciability in the correct position. If a decision is constitutionally non-justiciable, the negligence inquiry should not continue as, by definition, it is inappropriate for the courts to get involved.[237] As I have argued, the constitutional justiciability inquiry should not simply be done through the proxy of the policy-operational distinction as this uses a different rationale that is unjustified and too broad.

How should the constitutional justiciability inquiry be carried out? I suggest there are two groups of decisions that courts should not intervene in. Notably, in both of these groups, the focus is shifted away from the substance of the decision and towards the identity of the decision-maker and/or the process by which the decision is made. This means that it will be much harder to conflate issues of practical competence and constitutional competence since the former is based on the substance of the decision. However, I note that constitutional justiciability is likely to indirectly filter out some of the types of decisions that courts previously considered they lacked the practical competence to consider.

First, the courts ought not to intervene in publicly facing decisions of elected officials, such as ministers or councillors. Elected officials have democratic legitimacy and reflect the "will of the people". They can also be held politically accountable. It would be constitutionally inappropriate for a judge, who is appointed and faces almost no external accountability, to override their decisions and award damages in a negligence claim. However, it is not just any

[236] *Strathboss*, above n 4.
[237] Fairgrieve and Squires, above n 139, at 24.

decision by elected officials that ought to command non-interference. The requirement for decisions to be publicly facing ensures that stakeholders are aware of them. These decisions can therefore be challenged in the political realm or in judicial review. As I indicated earlier, the political realm is broader than just elections and includes the numerous other ways to exert popular pressure such as through the media, interest groups and community groups. We may contrast this with internal decisions that instead avoid scrutiny.[238]

Second, even if a decision is not made by an elected official, the courts nevertheless ought not to intervene if it is made with stakeholder consultation or participation. If there is stakeholder involvement, this "stamps" the decision with democratic legitimacy. It would be constitutionally inappropriate for the courts to override this. The courts are not the correct forum to determine the reasonableness of these types of decisions because stakeholders are party to the process for determining this. These decisions receive heightened scrutiny and can also be challenged in the political realm or through judicial review. Additionally, there is an incentive for public authorities to therefore consider a wider range of views and this is likely to enhance their decision-making. It will filter out obvious errors.

These two groups of decisions will be relatively easier to ascertain than the policy-operational distinction and are consistent with the underlying separation of powers rationale.

B. Standard of care

If a decision is found to be justiciable, the standard duty of care analysis must still occur. Assuming for our purposes that a duty of care is found to exist, we move to consider whether there has been a breach.

At the breach stage, courts ought to adopt Elias CJ's modulated standard of care from *Couch*.[239] To the extent the decision involves a difficult, polycentric exercise, the court should tailor the standard expected. The effect of this is to make harder for the plaintiff to prove the public authority breached their duty of care.[240] However, if the plaintiff is able to adduce such evidence, there is no principled reason for a court to not find the public authority negligent as,

[238] Fairgrieve and Squires, above n 139, at 66.
[239] *Couch*, above n 86.
[240] Barker, above n 5, at 216.

at this point, we have already determined the court is constitutionally competent to make such a judgment.

Tailoring the standard enables the court to make a pragmatic and proportionate response to the issue of their lack of practical competence.[241] Crucially, it treats private and public defendants the same. Instead of struggling to classify decisions which could plausibly be "policy" or "operational" a variegated standard of care is able to take this into account. While there cannot be degrees of a duty of care, there can be degrees of what is expected of public authorities depending on the circumstances.[242] Rather than denying a duty of care, regardless of the conduct and divorced from the context, placing more emphasis on whether there has been a breach at least enables the possibility of a successful claim.

I accept that shifting more of the "heavy-lifting" to the breach of duty stage will result in more cases going to trial, where the full facts must be known, rather than struck out. At trial, there will also be a need for more evidence and involvement of expert witnesses. This will undoubtedly result in an increase to the cost of litigation. However, if the plaintiff is prepared to discharge the onus of showing there has been a breach, the court ought not to prevent this. Additionally, even being able to proceed to trial increases the potential for access to justice rather than being struck-out without knowing the full facts.

C. Application

I consider that some cases would be decided the same under the constitutional justiciability approach. For example, in *Strathboss*, the import health standards are created following stakeholder consultation; therefore, the court should not intervene in a negligence claim.[243] In contrast, issuing import permits, is made by low-level staff without wider stakeholder input. The same can be said about the probation officer's decisions in *Couch*. Therefore, these decisions would be constitutionally justiciable.

[241] Nolan, above n 165, at 684.
[242] Nolan, above n 165, at 684.
[243] *Strathboss*, above n 4, at [158].

In *Pranfield*, O'Regan J was ambiguous about whether MAF's policy of declining most permit application was a "policy" decision.[244] Under this new approach, it would be seen as constitutionally justiciable. The fisheries policy was determined internally at a branch level and there is no evidence of wider stakeholder input.

A hypothetical example of a constitutionally non-justiciable decision is as follows. A regulator needs to determine its enforcement strategy to prioritise taking action against only certain types of conduct.[245] After consulting with stakeholders (for instance, through releasing their proposed strategy in a consultation document to the public) this strategy is finalised and threshold for enforcement are set. Later, based on this strategy, the regulator makes a decision not to intervene even though there has been wrongdoing. This non-intervention results in loss to Company A. Company A would not be able to establish a duty of care because the decision by the regulator would be constitutionally non-justiciable.

Several cases that were previously considered policy, instead ought to be constitutionally justiciable with a greater emphasis on whether there has been a breach of duty. *Brown v Heathcote County Council* is a good example. The Council made an internal decision not to investigate flooding.[246] There is no evidence of stakeholder consultation in that decision. Thus, I consider the Court would have been constitutionally competent to assess its reasonableness. As I argued before, the actual decision indicates this too. Assuming that a duty of care was found, it is clear that Hardie Boys J considered the decision to be "perfectly reasonable and proper".[247]

If the Canadian cases of *Just v British Columbia* and *Brown v British Columbia* were decided in New Zealand, in a non-personal injury context, they also ought to be considered constitutionally justiciable.[248] In *Just*, the policy of highways inspections was made by a "rock work section" within the Department of Highways. Although not clear from the Supreme Court judgment, there are further facts in the lower court decisions.[249] The rock work section

[244] *Pranfield*, above n 65.
[245] This is based off *Taranaki Catchment Commission*, above n 51, if further facts were known.
[246] *Brown v Heathcote County Council*, above n 58, at 590.
[247] *Brown v Heathcote County Council*, above n 58, at 598.
[248] *Just*, above n 175; *Brown v British Columbia*, above n 180.
[249] The Supreme Court indicated that references to "rock scaling crew" in the trial judgment actually meant the "rock work section" and so I proceed on this basis.

"developed and followed its own program" of inspections and scaling.[250] It "created the standards and determined their enforcement".[251] This suggests that the policy of inspections were made internally, with no wider input. This is incredibly similar to *Brown*.[252] While *Brown* had the added factor that the decision about winter or summer schedules were influenced by negotiations with a union, they were still essentially internal staffing decisions with no wider stakeholder involvement.

In summary, the application of the proposed approach results in more predictable outcomes and restricts the previous scope of immunity.

[250] *Just v British Colombia* [1985] 64 BCLR 349 (BCSC) at [11].
[251] *Just*, above n 250, at [16].
[252] *Brown v British Columbia*, above n 180.

Conclusion

The main thrust of my argument has been that there must be an appropriate balance between treating public and private defendants alike while also extending protections where justified and appropriate. In chapter 1, I explained how concerns about the separation of powers and difficulty determining reasonableness resulted in the creation of special protections for public authorities. Chapter 2 assessed the New Zealand response to these concerns and the various approaches that have been used.

In the subsequent chapters, I argued that the separation of powers concern is the only good reason to grant an immunity to public authorities on the basis that courts should not assess the reasonableness of those decisions. Concerns about practical competence are better taken into account at the standard of care and breach of duty stage of analysis. In this respect, public authorities should not be treated differently from private defendants. None of this requires the use of public law concepts which are informed by different rationales and make for problematic transplants into private law.

Arguably, *Strathboss* and Elias CJ's judgment in *Couch* demonstrate movement in this direction. They too have recognised the importance of separation of powers while also emphasising the ability of the standard of care to be flexible. However, these cases still relied on the policy-operational distinction which is too uncertain and grants an overbroad immunity. My proposed new approach of constitutional justiciability gives appropriate weight to the separate of powers, is more coherent and more predictable to apply. While New Zealand has not necessarily had the same magnitude of cases as overseas, establishing a proper basis allows greater clarity and coherence going forward.

Bibliography

A. Cases

New Zealand

Attorney-General v Strathboss Kiwifruit Ltd [2020] NZCA 98, [2020] 3 NZLR 247.
Brown v Heathcote County Council [1982] 2 NZLR 584 (HC).
Brown v Heathcote County Council [1986] 1 NZLR 76 (CA).
Brown v Heathcote County Council [1987] 1 NZLR 720 (PC).
Couch v Attorney-General [2008] NZSC 45, [2008] 3 NZLR 725.
Easton Agriculture Ltd v Manawatu-Wanganui Regional Council [2012] 1 NZLR 120 (HC).
Johnson v Mount Albert Borough Council [1977] 2 NZLR 530 (SC).
Minister of Fisheries v Pranfield Holdings Ltd [2008] NZCA 216, [2008] 3 NZLR 649.
Rowling v Takaro Properties Ltd [1975] 2 NZLR 62 (CA).
South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd [1992] 2 NZLR 282 (CA).
Takaro Properties Ltd v Rowling [1986] 1 NZLR 22 (HC) and (CA).
Takaro Properties Ltd v Rowling [1987] 2 NZLR 700 (PC).
Taranaki Catchment Commission v R & D Roach Ltd [1983] NZLR 641 (CA).

Australia

Crimmins v Stevedoring Industry Finance Committee [1999] HCA 59, (1999) 200 CLR 1.
Pyrenees Shire Council v Day [1988] HCA 3, (1998) 192 CLR 330.
Sutherland Shire Council v Heyman (1985) 157 CLR 424.

England and Wales

Anns v Merton London Borough Council [1978] AC 728 (HL).
Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223.
Barrett v Enfield London Borough Council [2001] 2 AC 550 (HL).
Bolam v Friern Hospital Management Committee [1957] 1 WLR 582 (QB).
Bolton v Stone [1951] AC (HL).
Connor v Surrey County Council [2010] EWCA Civ 286, [2011] QB 429.
Dutton v Bognor Regis Urban District Council [1972] 1 QB 373 (CA).

*Geddis v Proprietors of Bann Reservoir (*1878) 3 App Cas 430 (HL).
Home Office v Dorset Yacht Co Ltd [1970] AC 1004 (HL).
Mersey Docks and Harbour Board Trustees v Gibbs (1866) 1 LR HL 93.
Murphy v Brentwood District Council [1991] 1 AC 398 (HL).
Phelps v Hillingdon London Borough Council [2001] 2 AC 619 (HL).
Sidaway v Bethleman Royal Hospital [1985] AC 871 (HL).
Stovin v Wise [1996] AC 923 (HL).
X (Minors) v Bedfordshire County Council [1995] 2 AC 633 (HL).

Canada

Brown v British Columbia [1994] 1 SCR 420.
City of Kamloops v Nielsen [1984] 2 SCR 2.
George v Newfoundland and Labrador 2016 NLCA 24, 399 DLR (4th) 440.
Just v British Colombia [1985] 64 BCLR 349 (BCSC).
Just v British Columbia [1989] 2 SCR 1228.
R v Imperial Tobacco Canada Ltd 2011 SCC 42, [2011] 3 SCR 45.
Swinamer v Nova Scotia (Attorney General) [1994] 1 SCR 445.

United States

Indian Towing Co v United States 350 US 61 (1955).
United States v Gaubert 499 US 315 (1991).

B. Legislation

United States

Federal Torts Claims Act 28 USC § 2680.

C. *Books*

AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, Palgrave Macmillan, London, 1979).

Basil S Markesinis and others *The Tortious Liability of Statutory Bodies: A Comparative and Economic Analysis of Five Cases* (Hart Publishing, Oxford, 1999).

CT Walton (ed) *Charlesworth & Percy on Negligence* (14th ed, Sweet & Maxwell, London, 2018).

Duncan Fairgrieve and Dan Squires *The Negligence Liability of Public Authorities* (2nd ed, Oxford University Press, New York, 2019).

Keith Stanton and others *Statutory Torts* (Sweet & Maxwell, London, 2003).

Kenneth Palmer *Local Authorities Law in New Zealand* (Brookers, Wellington, 2012).

Lewis N Klar *Tort Law* (4th ed, Carswell, Toronto, 2008).

Mark Aronson and Harry Whitmore *Public Torts and Contracts* (Law Book Company, Sydney, 1982).

Peter Cane *Administrative Law* (5th ed, Oxford University Press, New York, 2011).

Peter W Hogg and Patrick J Monahan *Liability of the Crown* (3rd ed, Carswell, Toronto, 2000).

Philip A Joseph *Joseph on Constitutional and Adminisrative Law* (5th ed, Thomson Reuters, Wellington, 2021).

Simon Deakin, Angus Johnston and Basil Markesinis *Markesinis and Deakin's Tort Law* (Oxford University Press, New York, 2008).

Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019).

Sue Arrowsmith *Civil Liability and Public Authorities* (Earlsgate Press, Winteringham, 1992).

Susan Kneebone *Tort Liability of Public Authorities* (Law Book Company, Sydney, 1998).

D. ***Edited Chapters***

John Sopinka "The Liability of Public Authorities: Drawing the Line" (1993) 1 Tort L Rev 123.

Kit Barker "Public Power, Discretion and the Duty of Care" in Kit Barker and others (eds) *Private Law and Power* (Hart Publishing, Portland, 2017) 207.

Lewis N Klar "The Tort Liability of Public Authorities: The Canadian Experience" in Simone Degeling, James Edelman and James Goudkamp (eds) *Torts in Commercial Law* (Thomson Reuters, Sydney, 2011) 243.

Stephen Todd "Liability in Tort of Public Bodies" in Nicholas J Mullany and Allen M Linden (eds) *Torts Tomorrow: A Tribute to John Fleming* (Law Book Company, Sydney, 1998) 36.

E. ***Journal Articles***

Alice Coppard "Mediating Multiple Lines of Accountability in the *Kiwifruit* Case" (LLB (Hons) Dissertation, Victoria University of Wellington, 2018).

Aloke Chatterjee, Neil Craik and Carissima Mathen "Public Wrongs and Private Duties: Rethinking Public Authority Liability in Canada" (2007) 57 UNBLJ 1.

Anthony M Dugdale "Public Authority Liability: To What Standard?" (1994) 2 Tort L Rev 143.

David Cohen and JC Smith "Entitlement and the Body Politic: Rethinking Negligence in Public Law" (1986) 64 Can Bar Rev 1.

Dawn Oliver "Anns v London Borough of Merton Reconsidered" (1980) 33 CPL 269.

Donal Nolan "Varying the Standard of Care in Negligence" (2013) 72 CLJ 651.

Elizabeth Carroll "Wednesbury Unreasonableness as a Limit on the Civil Liability of Public Authorities" (2007) 15 Tort L Rev 77.

Jane Convery "Public or Private – Duty of Care in a Statutory Framework: Stoven v. Wise in the House of Lords" (1997) 60 MLR 559.

JJ Doyle "Tort Liability for the Exercise of Statutory Powers" in PD Finn (ed) *Essays on Torts* (Law Book Company, Sydney, 1989) 203.

John Doyle and Jonathon Redwood "The Common Law Liability of Public Authorities: The Interface Between Public and Private Law" (1999) 7 Tort L Rev 30.

Jonathan de Vries "Negligence, Discretion and the Liability of Municipalities for Building Regulation: The Case for Increased Deference" (2018) 25 Tort L Rev 119.

Justine Bell-James and Kit Barker "Public Authority Liability for Negligence in the Post-*Ipp* Era: Sceptical Reflections on the 'Policy Defence'*"* (2016) 40 MULR 1.

Ken Oliphant "The Liability of Public Authorities in England and Wales" in *The Liability of Public Authorities in Comparative Perspective* (Intersentia, Cambridge, 2016) 127.

Lewis Klar "Case Comment: Falling Boulders, Falling Trees and Icy Highways: The Policy/Operational Test Revisited" (1994) 33 Alta L Rev 167.

Lon L Fuller "The Forms and Limits of Adjudication" (1978) 92 Harv L Rev 353.

M Kevin Woodall "Private Law Liability of Public Authorities for Negligent Inspection and Regulation" (1992) 37 McGill LJ 83.

Margaret Allars "Private Law Remedies and Public Law Standards: An Awkward Statutory Intrusion into Tort Liability of Public Authorities" (2020) 14 FIU L Rev 5.

Mark Aronson "Government Liability in Negligence" (2008) 32 MULR 44.

MJ Bowman and SH Bailey "Negligence in the Realms of Public Law – A Positive Obligation to Rescue?" (1984) PL 277.

Nicholas Seddon "The Negligence Liability of Statutory Bodies: Dutton Reinterpreted" (1978) 9 FL Rev 326.

Paul Craig and Duncan Fairgrieve "Barrett, Negligence, and Discretionary Powers" (1999) PL 626.

Peter Bowal and Lynn Boland "Crowning Glory: Liability in Negligence of Public Authorities Revisited" (1994) 24 RDUS 435.

RA Buckley "Negligence in the Public Sphere: Is Clarity Possible?" (2000) 51 NILQ 25.

Rachael Baillie "A Square Peg in a Round Hole: Reshaping the Approach to Systemic Negligence in the Modern Public Service" (2014) 20 Auckland U L Rev 45.

Roderick Bagshaw "Monetary Remedies in Public Law – Misdiagnoses and Misprescription" (2006) 26 LS 4.

SH Bailey and MJ Bowman "The Policy/Operational Dichotomy – A Cuckoo in the Nest" (1986) 45 CLJ 430.

Stephen Bailey "Public Authority Liability in Negligence: The Continued Search for Coherence" (2006) 26 LS 155.

Thomas Geuther "The Search for Principle – The Government's Liability in Negligence for the Careless Exercise of its Statutory Powers" 31 VUWL Rev 629.

TR Hickman "The Reasonableness Principle: Reassessing its Place in the Public Sphere" (2004) 63 CLJ 166.

F. *Seminars and Reports*

David Andrew Ipp and others *Review of the Law of Negligence Final Report* (Commonwealth of Australia, September 2002).

Geoff McLay and Dean Knight "Government Negligence" in *Liability of Public Authorities* (New Zealand Law Society seminar, 2009) 13.

JG Fogarty "Where Will it End?" in *Individuals' Claims Against Local Authorities* (New Zealand Law Society seminar, 1985) 46.