

IN THE SUPREME COURT OF NEW ZEALAND

SC 49/2006

BETWEEN

SUSAN COUCH

Appellant

AND

THE ATTORNEY-GENERAL

Respondent

Hearing 17 April 2007

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Counsel B P Henry and T Walker for Appellant
J C Pike and F E Guy Kidd for Respondent

CIVIL APPEAL

10.02am

Henry May it please Your Honours I appear with Miss Walker for the appellant.

Elias CJ Thank you Mr Henry, Miss Walker.

Pike May it please the Court, I appear with Ms Guy Kidd for the respondent in this matter.

Elias CJ Thank you Mr Pike, Ms Guy Kidd. Yes Mr Henry?

Henry There is one preliminary matter Your Honour which is suppression of name which Mr Pike will need to speak to first because he's seeking the suppression.

Elias CJ And what's your attitude to that?

Henry We totally agree with it. There was medical evidence produced in the *Tai Hobson* case as to why the name suppressed and we're looking for a jury trial so as far as we're concerned suppression should continue. It's an issue after the trial's complete would be our position.

Elias CJ Yes, well then

Pike And I'll move accordingly to formalise it.

Elias CJ Yes, yes, well name suppression will continue until further order of the Court.

Pike If the Court pleases.

Elias CJ Yes I should say that's of the witness X, the probation officer.

Henry We've defined that is the supervising officer in the amended statement of claim, and that brings me to another preliminary point which is vicarious liability. There is an agreement between the appellant and respondent that the respondent will accept vicarious liability for the supervising officer if the Court determines that exemplary damages are due. As part of that arrangement we withdrew the pleading expressly against the officer, so she's no longer named and again certainly from my side of the proceedings we accepted that based on the medical position of the officer concerned, but for the purposes of this appeal the issue is whether this appellant as the victim is owed a duty of care that could give rise to award of exemplary damages out of the conduct and duties owed by the supervising officer. So while she's not

Elias CJ Does that mean that the only cause of action is based on the duty owed by the supervising officer. You're not running any sort of systemic basis for liability?

Henry Correct.

Tipping J What happens Mr Henry if the Court is of the view that but for this present acceptance there would have been no vicarious liability. I mean that might affect the law generally but the concession no doubt appropriately made in this case, if that's not in accordance with the law generally, how do we then proceed.

Henry Well the issue of vicarious liability is not before you Sir. It is something agreed between the parties

Tipping J Well I don't know that we can ignore underlying law if we're determining questions of duty of care, otherwise are you saying that this case is likely to have no precedent effect at all, or possibly wouldn't have even got leave?

Henry No, what I'm saying Sir is it has huge present effect as between the appellant and the supervising officer, but there is an agreement if we are able to shoot home a duty and able to shoot home exemplary damages against the officer, then the Crown will accept that they are vicariously liable for that award.

Tipping J Even if as a matter of strict law they aren't?

Henry Well they've accepted that as their position and that is an agreed position between the parties, and you want to debate the vicarious law side of it which we're not overly prepared to do because of the concession, it is simply a fact of modern law if you don't accept vicarious liability you won't have employees.

Tipping J Yes I understand why the parties have done it, but perhaps we just let the matter emerge Mr Henry.

Henry It's just a straight commercial reality but I do understand the point Your Honour is raising, and I'll see how my friend develops around the point and I'll reply on it but I don't intend to take it any further at this stage in the submission.

Elias CJ Does that mean that the form of your proceedings are going to be the plaintiff against X?

Henry Yes. What we say is that and I'll start in my opening because it develops as I go, the policy of parole is to place offenders in work without employers and employees knowing their behavioural history of their work-mate.

Elias CJ Sorry Mr Henry I just want to clear away this preliminary point first. You're starting with

Henry I am dealing with that.

Elias CJ Oh you are, because I was going to ask Mr Pike to confirm the position.

Pike Being able to be acting for X.

Elias CJ What's the position Mr Pike?

Pike Yes may it please the Court. The difficulty that arose between the parties was Mr Henry's case is substantially against X. Allegations against X, though I have to confess to being surprised that the proceeding would, if allowed to run, would be against X as the only defendant because of our undertaking. What we say is we say in all cases that if this is a case where a duty of care was owed and we understood that X was perhaps predominantly the misfeasor in this case but the pleadings indicates in our argument some systemic failings

as well as quite a few instances of that, and what we accepted we'd always accept is that if the Court were to find that a duty of care was owed

Elias CJ By X.

Pike By X and the other persons implicated in this tragedy

Blanchard J So there is a case based on systemic fault?

Pike We seem to drift to different paths Your Honour. We see it

Tipping J Well Mr Henry's just said he's not relying on any systemic

Pike I know, that's a difficulty that

Blanchard J I don't see how that can be separated out quite so simply.

Pike No I don't. Unfortunately we'd always taken the pleadings and in fact I don't want to take my friend's time on it, but there are substantial pleadings indicating that X was inexperienced and X was not properly supervised; that there were not proper facilities to treat Bell

Blanchard J But on the cases Mr Henry was apparently content to put it, if we were to come to the conclusion that there was no duty of care owed by X, or if there was a duty of care, it hadn't been breached then that's an end of it even if there were faults by others within the probation service.

Pike Yes, that's Mr Henry's position, but what we say simply is that if X is found at fault and liable per se then of course the Attorney-General stands behind her; she is an employee, although she

Elias CJ So the pleadings would in form be against the Attorney-General with a pleading that the Attorney is vicariously liable and you're indicating that you would admit that pleading?

Pike Yes.

Elias CJ Yes.

Pike Yes, yes we do because we don't isolate employees and also we have been favoured with this suppression in lack of focus on the pleadings on X and therefore we've also had to admit to Mr Henry that the quid pro quo is that we don't make any issue of ultimate responsibility for the Attorney-General in this matter. If systemically or X alone there's a duty of care; it was breached; exemplary damages flow, then this case would be tried we would hope with the Attorney-General as being

Blanchard J Well wait a minute, we seem to be back into systemic liability as a possibility.

Pike I'm sorry, perhaps that has to emerge from Mr Henry

Elias CJ I think it does.

Pike The Court will have to adjudicate as to whether in fact the pleading does that or not.

Elias CJ Yes, on the pleadings we have that issue is a live one.

Pike Yes.

Anderson J I would have thought the Attorney would just have agreed to indemnify X. That would have been a short route wouldn't it?

Pike It would but that leaves X isolated in a Courtroom Your Honour, in a psychological state of some brittleness as the only

Anderson J The arrangement between the parties shoehorns the Court into altering the receive law about liability for exemplary damages on a vicarious basis. That's the problem.

Pike It does, well I'm not entirely sure that it does with respect, because we are going obviously on the basis that is the law, and I know that *Covers* says to the contrary, but of course there are cases the Court will be well aware of where vicarious liability in England has been found in exemplary cases. But if the law in this country is not to be so then Mr Henry and I will have to discuss, well there may not be a case to discuss about, but we are bound by the law, both counsel

Tipping J But didn't the Court of Appeal a little while ago in a case that Justice Blanchard and I at least were in hold not foreclosing on the possibility that there might be a different position in extreme cases but generally there was no vicarious liability for exemplary damages

Pike Yes, Mr Henry disputes those cases I understand.

Tipping J Well I'm sure he does but are we not to be favoured with any argument about that?

Pike Yes we will be favoured with arguments Sir. The point is that we're simply in the position that if however it is cast, if X is found first in her own right liable, owing a duty of care and breached it, then the Attorney-General stands behind X.

Tipping J I can understand her standing behind her as a matter of contract, but

Blanchard J I'm completely confused about what each side is wanting to argue or not argue.

Pike Yes Your Honour.

Blanchard J If we came to the conclusion that X was personally liable, is or is not the Crown's position that it will indemnify her?

Pike Oh yes it certainly is no matter which

Blanchard J And what's its position on its own liability?

Pike It's position on its own liability is as Mr Henry said that we have accepted that the law in New Zealand allows us arguably to be vicariously liable for exemplary damages, but our undertaking or our agreement is on the basis that the law in New Zealand will be found to be that way. I think both counsel must accept

Tipping J Contrary to the views of the Court of Appeal in the *W&S* I think

Pike Yes.

Elias CJ Yes.

Pike Yes it is contrary to those views as expressed in that Court.

Tipping J You're in effect fettering our hands in that respect.

Blanchard J Despite the fact that the Crown argued the other way in those cases.

Pike It did. Well the difficulty we're in is to repeat that Mr Henry took X out of the equation as the defendant, therefore we simply indicated that if the law runs that the Attorney-General or the State can be vicariously liable in exemplary damages, of course we will you know stand behind it; we will pay those damages; we will be the defendant, but I think as I said unless Mr Henry has a different view of it, if the law is not that way then we have to stand behind X in a different way

Tipping J As a matter of contract.

Pike As a matter of contract. We cannot bind the Court to find the law in a particular way.

Tipping J But you can say can't you we stand behind her in contract, but that's entirely over to you as to what the terms of the contract are but the idea that you're standing behind her because that's the law strikes me as a rather bizarre stance.

Pike Well as I've said we thought it was appropriate to give Mr Henry the comfort and it may be

Tipping J You give him the comfort in contract.

Pike That's no matter what happens any damages will be paid by the State, I mean that's the point for Mr Henry.

Tipping J Yes, it's a matter of contract.

Pike Yes.

Tipping J Is that the position, rather than you're conceding that the law requires you to?

Pike No we never conceded that. Probably what we've done is said if we're seen to bind the Court by via the concession as to law, we don't. What we do say is that if the law in this country does not run in the manner that the counsel have decided amongst each other on, and we say that it's arguable it does not, but if it does not we will certainly indemnify, or Mr Henry's client will have costs and damages from the Crown no matter what.

Elias CJ Well that would suggest that relying on the contractual arrangements with the Crown, the proceedings should be against X.

Pike Yes, and we were seeking to protect X.

Elias CJ Do you have instructions on behalf of X Mr Pike? I'm not aware of that.

Pike Oh we do.

Elias CJ And on that basis the only issues will be 'was X negligent and is she liable for exemplary damages'.

Pike Yes.

Elias CJ And those would be the only issues at trial if the matter were to proceed?

Pike Yes, Mr Henry's position, yes.

Tipping J Did X owe a duty of care?

Pike Yes.

Blanchard J It's shorthand for that

Tipping J I'm sorry, we're working on the premise at the moment that she was negligent.

Pike Yes that's right, if she owed a duty of care, breached it in the manner that attracts exemplary damages the State will pay the damages they were awarded to the plaintiff

Tipping J Not as a matter of law but as a matter of contract.

Pike Certainly as a matter of contract or moral obligation or however it be put, but certainly I regret the situation, the confusion as to the position on vicarious liability, it may have been an infelicitous use of wording. What Mr Henry should have been told and I trust he understands is that even if we are successful in that, but X is nevertheless to be found liable in exemplary damages, there is no question whatever that the State will pay.

Blanchard J Even if you're successful in what?

Pike If there was no vicarious liability.

Blanchard J But vicarious liability goes out the window on this. We don't get into it. There's no point in our giving a ruling on vicarious liability in this case

Tipping J Because it's moot. You're going to cover them anyway.

Pike On our undertaking it would be because we will accept it in that sense.

Blanchard J Well why should we determine the question?

Elias CJ Well we wouldn't and nor would the trial Court have to consider it. It does seem to me however that the pleadings, and of course this is a strike-out application, so the pleadings aren't partly taken to be in their final form that Mr Henry will have to consider whether he is nevertheless also wishing to pursue a claim against the Department for Corrections through the Attorney-General for the systemic matters that at the moment he's pleading, or whether the Attorney can be dropped as a party to the proceedings, but that really will have to be further considered. The important thing is for the purposes of this hearing we are not concerned with the vicarious liability for the actions of X.

Pike No we can avoid that Your Honour without doing violence to the underlying argument at all.

Elias CJ Saving it for another day Mr Pike?

Pike Indeed, yes.

Elias CJ Thank you.

Pike And I'm sorry for that confusion.

Elias CJ No, no, that was extremely helpful, thank you. Thank you Mr Henry.

Henry The problem as I always understood that the Crown had is that they did not wish to have X as a defendant at trial and that is why we have to shift. We originally sued her and would continue to be suing her but or the discussion that I had with Mr Pike that we have been through.

Elias CJ Well I must say now I am confused because I had thought that the position you had indicated was that she would be the defendant.

Henry She would be the defendant.

Elias CJ If this matter proceeds.

Henry Well what

Tipping J The effective defendant

Henry She's the effective defendant. What they're trying to achieve is a trial where the Attorney-General is the named defendant but we proceed on the basis that if she is in fact the defendant but they don't want her isolated for medical and other reasons as the sole focus of the trial and I'm quite happy to put her back as a defendant if that kills the problems.

Elias CJ Well we're not going to advise you Mr Henry but you might want to look at the transcript as to where matters have got to but I had taken from the discussion that X would be the defendant with the Crown indicating that it will indemnify her.

Henry I'm very happy to proceed on a statement of claim on that basis, and I'm addressing on the basis that she is in fact the person liable and the person responsible for any exemplary damages

Tipping J So we can read the present statement of claim, the second amended, as if she was the sole defendant but we know the Crown's backing her, and with the knowledge that it is her personal negligence only that is an issue – no systemic negligence on the part of the Crown?

Henry Well her personal negligence is a duty of care that we postulate to warn. Part of the reason we say that that duty to warn comes into effect is the systemic failure so factually you'll go through this

Elias CJ You'll have to have two defendants it seems to me Mr Henry.

Henry It will end up with two defendants and I'm quite content with that. We've just removed her. I will simply put her back, which is what I originally had.

Tipping J But she will even though the Crown will be there, it will only be her negligence personally that is an issue albeit as a factual background it will be said that there was circumstances

Henry Yes.

Tipping J Of a systemic kind that are relevant to assessing her personal position.

Henry Vis a vis whether the duty of care owed was breached, yes.

Tipping J Yes.

Elias CJ Well that's not what I'd understood you were saying.

Tipping J Well that's why I asked because I

Elias CJ The statement of claim that we're actually meant to be considering

Henry What we've done is we've alleged a second amended statement of claim

Elias CJ I know you have but what's the one that the case has

Henry The one in front of the Court of Appeal is in the case at

Blanchard J If X's failure is what the case is all about and the systemic faults are simply the background that shows why that occurred, then the Crown isn't a proper defendant because the allegation has not been made against the Crown, it's only been made against X.

Henry If I have an undertaking from the Crown as Mr Justice Anderson indicated to indemnify that would be

Blanchard J But that undertaking relates to X's personal liability.

Henry Yes.

Blanchard J Not the Crown's liability?

Henry Yes.

Blanchard J So if the Court were ultimately to conclude that X was not at fault, that any fault was other Crown people; in other words a systemic fault; your case would fail because the Crown would not have been a defendant?

Henry Using the word 'fault' is probably not appropriate. It's the duty of care that is owed

Blanchard J Well whose duty of care? Are we talking about X's duty of care or the Crown's duty of care or both?

Henry It's X's duty of care.

Blanchard J Well in that case the Crown isn't a proper defendant.

Henry Apart from vicarious liability that was conceded.

Blanchard J Yes.

Henry Because what we've always said is X owed the duty of care and the Crown is vicariously liable for what she has failed to do.

Blanchard J Okay, well let me just get it absolutely nailed down. If it is found that X owed a duty of care; judgment against X; the Crown indemnifies. If X owed no duty of care or was not in breach of a duty of care but Crown agent Y was in breach of a duty of care, there can't be a judgment against Y because Y's not a part and there won't be a judgment against the Crown because the allegations are not directed to the Crown in relation to anything that Y did.

Henry In respect to this pleading, correct.

Blanchard J Right.

Henry And we do make the point that Your Honour the Chief Justice has reminded us, this is a strike-out application and while we've had access to the file in respect of this offender, we have not yet had access at a wide range of documentation that is between the supervising Officer in the Department as to her instructions and the like. But it may well emerge later that we identify another person that we impose a duty on, but we accept we are going to be imposing a duty on an Officer specifically and the Crown's position is always going to be one of vicarious liability. There is no contention that the Crown has some wide-ranging duty of care and as I was reminded very aptly by the Court of Appeal, it's important to keep the distinction between duties and duties of care very carefully under control and hopefully today I will succeed in doing that.

Anderson J Were you about to say Mr Henry a short time ago that the statement of claim before the Court of Appeal was that appearing at page 15 of the case?

Henry Ah yes Sir.

Anderson J And the subsequent one which is either filed or in draft is called second amended statement of claim dated blank?

Henry Yes Sir, that's the

Anderson J Is that a draft?

Henry Yes Sir it should be draft, yes.

Anderson J It's a draft.

Henry The purpose of that is because it's a strikeout the obligation we have is to show that we can't reformulate.

Anderson J Right.

Henry If I turn to the position of the appellant. First of all the written submissions there we stand by that, and I want to speak to it and I'm not going to go through it in specific detail, and the starting point is the policy of parole is to place offenders in work without the employer or employees knowing the behaviour history of their work mate and the trade-off for that is Probation Officers supervise the parolee and provide support in the hope that this person will not re-offend. And what we say is whether unable to supervise then a reasonable Probation Officer can identify a group at greater risk than the rest of the public, then the duty to warn comes in. So quite clearly there are statutory duties they have to do. If they can't carry out their statutory duties, and we say here it's wholly abrogated – they didn't do their statutory duties whatsoever, and they can, putting on the hat of a reasonable Probation Officer, identify a group who is at greater risk, then they have a duty to warn that group. And there are two obvious groups to a reasonable Probation Officer. The first is where they live; the second is where they work and generally where they live knows their history. In this case he was directed to live with a woman, I think it was his mother who had had him during his weekend pre-releases leading up to parole. On the first reporting he told Probation he had moved elsewhere. He gave two addresses which was never checked and never in any way taken anywhere by the Probation Officers other than to record the fact. The second group are the employers and employees and the position is they never know because that's fundamental to the policy. In this case the parolee was working at the Panmure RSA, involved with cash and alcohol, which are a very substantial feature in his failing and leading to his being incarcerated in the first place, and we say that a reasonable Probation Officer supervising this parolee, knowing his propensities, and knowing that they are unable to carry out their duties to supervise, has a duty to warn the employees in this case because it is something they can reasonably see.

Anderson J What would the form of warning be?

Henry It has to be a warning Sir as to the nature and quality of the person. This man is on parole release for aggravated robbery. It has to be factual, honest and free.

Anderson J Suppose they'd said that in all probability he wouldn't have been employed.

Henry Exactly, well that's precisely the point.

- Anderson J But then he would have attacked someone else.
- Tipping J What sort of background do you have to have to invoke this warning. I mean here's a relatively, prior to these terrible events, a relatively routine aggravated robber, now
- Henry Well we're pleased to know there's routine aggravated robbers, but Sir this is a young man. Since he was 17 he spent something like six months free in the community. The rest of the time he's been in jail.
- Tipping J But can you answer my question in the more abstract terms, what is the nature and quality of the offender that has to be shown or be present before the duty to warn?
- Henry One aggravated robbery conviction is surely sufficient.
- Tipping J Well that's arguing *ad hominem*, in other words on the facts of this case. We can hardly lay down a law that says if you've got one aggravated robbery there's a duty to warn. That's not going to help anyone much.
- Henry I'm not asking you to. What I'm asking you to do is say that if a reasonable Probation Officer, knowing the nature of the parolee, and in this case knowing he's got a conviction for aggravated robbery, where he not only committed an aggravated robbery, he chased the poor supervisor of the Service Station to the toilet, had all the money and was still beating on the door to try and deal the attendant, that's what they knew he was. A reasonable Probation Officer would consider first that him working at this stage of his rehabilitation amongst alcohol and cash was very imprudent
- Tipping J So wherever you draw the line as to the attributes of the offender, this man is over it, is that your answer?
- Henry He's over it, that's the answer. But the point we make Sir is the reasonable Probation Officer has to make a judgment. You can't lay down three convictions, one conviction, two convictions. The Probation Officer, as a question of fact, has to put on the reasonable hat and say this offender with these things we know is someone when it comes into me having an obligation to warn. You can't lay down the simple rule. It's a factual issue.
- Elias CJ Mr Henry I think we will need to explore that a little further but I'm interested in the antecedent question, because in your pleadings this duty to warn arises out of the duty to supervise and I wonder if you're going to tell us what the content of the duty to supervise is?
- Henry The first aspect of the duty to supervise is to comply with the order for release. In this particular case he was to undertake psychiatric and

alcohol and various assessments. None of those services were available. He was never directed to do it. They couldn't direct him to do it.

Anderson J Well it couldn't have been X's fault that they weren't available.

Henry It's not her fault they were not available and we're not saying it is, we're saying that once as a reasonable Probation Officer she knows that, she has to start thinking about the people who are at greater risk because she can't do her job.

Anderson J Well part of her job was to help rehabilitate the parolee such as through work

Henry Yes Sir.

Anderson J Well there's very few businesses that don't have money around them.

Henry Well Sir he was working in three jobs. One was a Nursery – there's no money there; the other was a labour hire-pool where he just provides the labour and there's no money there. Both appropriate places for this man.

Anderson J Well if you can't find money at work you'll find somewhere else to steal. I mean where do you stop?

Henry Well Sir that's a fact of life and that's a fact of the policy that the legislation has adopted. What we're saying here is where you have got a Probation Officer who knows that they're not able to support in any manner this man, and you've got to understand the totality here. He did not attend any of the medical or alcohol courses. He was not supervised as to where he lived. He was directed to go to a place. First day he arrives he gives two addresses and nobody checks it.

Elias CJ Mr Henry the Court is trying to grapple with the principles which is why we're putting to you perhaps some more abstract questions and you're answering in terms of the facts and you make want to do that but it's difficult to get a handle of the concepts and that's really what you're being engaged about. When I asked you what the duty of supervision was, you said that because she wasn't able to comply with the order of release she had to think what she had to do to protect others or something to that effect. Does that mean that you're saying that the Probation Officer has a duty to protect others, and if so what's the source of that duty and what's its scope?

Henry Part of the purpose and part of the philosophy behind parole is that orders are made to rehabilitate the offender but orders are also made for the protection of the public, then you've got a balance. We in society accept that, and as Mr Justice Anderson pointed out, this parolee may have walked into my home and decided that's where the

aggravated robbery would be committed. I am not in a position where I can say the reasonable Probation Officer would foresee me as greater risk. I'm random in what he's done. If however I'm employing him and I've got a cash business and the Probation Officer knows that nothing has been done for his rehabilitation, because we're saying here there's a total failure - in fact worse than a total failure. The only thing the Probation Officer did was encouraged him into the liquor industry which was totally inappropriate in our view.

Elias CJ Well I'm still trying to grasp the concepts. You say that part of the philosophy of the Parole Legislation is to protect the public. Are you saying that the Probation Officer had a duty to protect the public?

Henry I am saying that the Probation Officer by properly supervising the parolee is effecting part of the intention of the Legislation which is to protect the public.

Elias CJ Well does that mean she had a duty to protect the public?

Henry It is part of her duties to do it but she doesn't have an express statutory duty to do that but it is clearly part of the scheme of what they were doing is that by ensuring these parolees do carry out medical and other conditions, ensuring that when they report they are interviewed properly by the officer in control, ensuring that they're given proper directions where they work and live. They are all measures that are there in part to protect the public. They give a measure of control on the offender.

McGrath J Are there any passages in the Legislation that you can point to as saying they're indicative of such an implied duty which I think is what you're suggesting?

Henry Section 107(c) Sir at page 3 of the first line of authorities says that 'subject to s.107(a) of this Act

Elias CJ Just pause a moment because I'd like to

McGrath J Is this at page 991?

Henry Page 3 of the bundle.

Blanchard J 995.

Henry 'The Parole Board or a District Prison Board may impose on an offender such special conditions as it thinks necessary to protect the public or any person or class of persons who may be affected by the release of the offender, or for (a) the rehabilitation of the offender; or (b) the welfare of the offender'.

Tipping J That's the Board's, one or another of the Boards?

Henry Yes Sir, this is a Prison Board order.

Tipping J Yes, yes, but you say that the Probation Officer has a duty to implement

Henry That order.

Tipping J That order.

Henry And the purpose of that order is in part to protect the public, to protect persons or classes of persons affected by the release and

McGrath J That's what has to be supervised Mr Henry but I just wondered if there is anything in relation to the functions of Probation Officers in the legislation that might bear on such a duty?

Henry No, not that I'm aware of. I think the Act is pretty neutral. They're told they have to enforce the order but the actual

McGrath J Where's that, because that might be a more promising basis to a dire source. A source of duty that is.

Henry Section 125 of the Criminal Justice Act which is tab 1 in my learned friend's bundle.

Elias CJ Section?

Henry Section 125, the very bottom of the page. 'To supervise all persons placed under the Officer's supervision pursuant to sentence or a release on conditions under Part 4 of this Act, and to ensure that the conditions of the sentence or of the release are complied with'.

Elias CJ Well where's the duty, oh I see

Tipping J It's actually two or three pages further on in the same bundle but Mr Henry reverted us to the amended section 125.

Elias CJ So the supervision referred to here is not a general supervision of the person released, it's a supervision pursuant to release on conditions? So it is a supervision of observance of the conditions?

Henry Yes, and then you have to at the end of the day go to the document that grants the licence for the parole and look at what its terms are.

Elias CJ Yes. Can you take us to those here?

Henry That's in para.6 of the statement of claim.

Henry Those are the key ones

Elias CJ	Paragraph 6?
Henry	Yes, that's not a full copy of the order, they're just the key ones that we pleaded.
Elias CJ	Do we have a copy of the order?
Henry	I don't have it here but it does have the standard conditions which are imposed under the Act which is live and work where directed
Elias CJ	Sorry, I'm looking at page 17, so it's not that
Henry	Which statement of claim has Your Honour got in the case?
Elias CJ	Well it was the one in the bundle that I was looking at but you want me to look
Henry	Page 17 in the case
Elias CJ	I see, it's para.5.
McGrath J	Is that what you wish us to look at or the one that you've attached with your submissions?
Henry	It's easier to use the one attached to the submissions Your Honour.
Tipping J	You accept I think Mr Henry that whereas the beauty in the Act is couched as a general duty for tort purposes the duty is only owed to a specific group, identifiable group, who are at greater risk than the public generally?
Henry	Yes.
Tipping J	Yes.
Henry	That must be the case.
Tipping J	Must be the case, yes.
Henry	And I'm not contending that the door should be opened up to say oh look this guy breached the parole or you should be sued because that is way beyond I would need to argue and one where public policy I'm sure would have some very good answers.
Elias CJ	I might depend on the scope of the duty though, but if the duty is something to supervise for conditions that would seem to be for example in some of the containment cases escape of prisoners and so on, where there is a duty to control

Henry That is very correct.

Elias CJ The scope of the duty probably conceivably could be as wide as the public at large depending on the nature of the threat posed.

Henry Yes, it must stem though from the order, the order that is controlling or providing the supervision powers over the offender.

Elias CJ So as far as your argument is concerned, the duties on the Probation Officer on which you rely are the duties are arising out of the conditions imposed?

Henry Yes.

Elias CJ Right.

Henry And what we're trying to emphasise here is that we are not trying to take a huge leap away from where the cases are. What we have that's unusual here is a total failure by Probation to supervise this man and I know I keep going back to the pleadings but the facts here are very unusual, because what we're saying is the Probation Officer, if she put on her hat as a reasonable Probation Officer, couldn't get any of the treatments expressly ordered; wasn't supervising where he lived; saw him on two occasions and encouraged him to work in the alcohol industry which we say is entirely inappropriate. But the majority of the time this man just reported, signed the book and waited, then he went home. And that happened time and time and time again. There's a period of a month when he wasn't even asked to report. She didn't see him.

Elias CJ Sorry, I don't want to forestall you too much but I am interested in the chain of reasoning. In terms of these conditions is there one that you put to the forefront the Probation Officer's ability to control employment?

Henry The one to control employment is important because that is the area where the deliberate policy is to conceal the true nature of this man from the employer and employees and that is very important as we say to the philosophy of what's occurring when you start looking at tort and it's the totality of the failure though that we say would make a reasonable Probation Officer say I can do nothing or I'm doing nothing to assist this parolee; knows the nature of the parolee and any reasonable Probation Officer we say would say this man working at the Panmure RSA is putting those people at a real direct risk and they should be warned.

Elias CJ Well that's what I'm angling for. What did she do wrong in terms of these conditions?

Henry He was never sent to the Department's psychologist; he did work where directed; she encouraged him into the alcohol industry, which we say is inappropriate

Tipping J Are you saying it was negligent to direct him to work where he wanted to work?

Henry It was negligent to direct him or encourage him to work in the sale of liquor industry.

Tipping J So the answer is yes?

Henry Yes.

Elias CJ In fact you'd say presumably it was negligent to permit him to take up that employment since she had the power to control it under the conditions.

Henry Yes sure, that's the correct way to put it. She should have directed him he does not have anything to do with that industry.

Anderson J Because of the likelihood that he would take drink?

Henry Because of the likelihood he would take drink; he would take money, and he could repeat a violent method of doing so.

Tipping J By take drink do we mean consume or steal?

Henry Both.

Tipping J Both.

Henry Consuming or stealing unless he's paying for it.

Anderson J So they were running an economic risk at the RSA?

Henry Oh they had a real economic risk yes, but we're not suing for that, I'm suing for a victim who is in a very special position.

Anderson J I suppose it's fairly elementary you wouldn't normally put a drunk in charge of the bar.

Henry Correct Sir. Nor would you put an aggravated robber in charge of the bar.

Anderson J Well you never know about that, but this is a different type of failure from the one that you're pinning your hopes on in the pleadings, which is a failure to warn. This is a dereliction in terms of putting the temptation in front of him.

Henry Yes, we're talking about here the duties of a Probation Officer, we're not talking about the duty of care owed by the Probation Officer.

Tipping J Where are you pleading that it was negligent to permit him to work at the RSA?

Henry Paragraphs 26 and 27.

Tipping J Thank you.

Henry I'm sorry, 25, 26 and 27. 'And so the defendant and the Supervising Officer's foregoing conduct put the workers employed at the Panmure RSA to significantly greater risk than other members of the general public, being a business where the parolee had ready access to substantial quantities of alcohol and cash. In the foregoing circumstances the defendant's Supervising Officer had a duty to take reasonable care to ensure the safety of persons who are being placed at a significantly greater risk by the defendant's failures' set out in para.15 to 24.

Tipping J But all that is introductory to the allegation in 27 of a failure to warn. It's not pleaded as an independent head of negligence.

Henry It's not pleaded as a duty of care that's owed.

Anderson J But the duty of care you say arises out of the susceptibility of people who worked with him, that gives rise to the duty of care, and the next step is how was that duty breached? And the allegation is that duty of care was breached by failure to warn.

Henry Yes.

Anderson J But a more direct route might have been that duty was breached by sending him to work there or allowing him to work there because it immediately created a temptation for a specific and ascertainable limited class of people.

Henry That

Anderson J The ones that would be within range of his drunkard excesses.

Henry That is a way Sir

Anderson J As is pointed out I think in the Court of Appeal judgment there has to be analytical distinction between a duty of care breached by a failure to warn and what you've sometimes referred to is a duty to warn.

Henry I understand that Sir. What we're saying in the draft pleading we put up is that when you look at the duties they had, it was not the act of a

reasonable Probation Officer to encourage this man to work in the sale of liquor industry.

Anderson J It's a bit like the *Dorset* case isn't it that the liability of the error arose because of the proximity of the affected people. They were geographically approximate to the Borstal boys and if they broke out they were going to attack those around them or do damage to those around them. Here you've attempted to show proximity in relation to a failure to warn but the more obvious path of proximity is really the proximity of the bar and those around it, and the cash.

Henry That's certainly an alternative way of putting it, yes. I'm not going to drop the duty to warn but I'm quite happy to take the sort of duty that Your Honour suggests

Tipping J It's a double-header. You shouldn't have let him work there and if you were going if you had least warned. I don't know why this is also, it's not easy to spell it out from this pleading, but those are your two essential heads of negligence isn't it? Shouldn't have let him work there and if you were going to do that you should have at least warned.

Henry Yes.

Tipping J It's as simple as that.

Henry But there's a bigger totality failure in this

Tipping J Oh yes against the whole background. This was where the crunch breach of duty, if there is one, arose.

Elias CJ And you have pleaded but perhaps you could just tell me. You said the Straight Thinking Psychiatric and Alcohol and Drug Programmes were not available. Did he not attend any?

Henry He attended nothing.

Elias CJ No.

Henry There was nothing available.

Elias CJ And that was known to the Probation Officer?

Henry Yes.

Blanchard J Mr Henry can I just clarify what part alcohol actually played in this? Is it being alleged that he was drunk?

Henry I honestly don't know the full facts of his personal state Sir, but what we're saying in this pleading is that what they did is they let in this

man into an area where there was cash and alcohol and he had a propensity to steal violently for both.

Blanchard J Did he steal alcohol?

Henry Alcohol was taken, money was taken is my understanding.

Blanchard J Right.

Anderson J The relevance of the other parts about not being psychologically evaluated etc etc, those are part of the context which we would say aggravated their decision to let him work unsupported as he was by their safety nets.

Henry Yes.

Tipping J What was his history of violence? What is the pleading about history of violence that gives rise to the risk?

Henry We have not in the pleading dealt with anything other than the aggravated robbery conviction, but we do plead the assessment reports because he was assessed as a violent offender and as a significant recidivist risk.

Elias CJ Were those assessment reports available to the Probation Officer? You might not know that.

Henry Yes, they're on the file.

Elias CJ They're on the file.

Henry They're on her file, yes.

Elias CJ Yes, thank you.

Henry The Probation Officer who was originally assigned to him, a lady called Jan Cling, actually prepared them, she was transferred elsewhere and the lady in question then took over her file so it was all there.

Tipping J So the only pleading is he was a high-risk offender, re-offender, but the more important one is the final bullet-point in 13 is it that it was known that he was a violent offender?

Henry Yes.

Tipping J Alright, that's the only plea. It was known that he was a violent offender.

Henry All of that comes straight out of the file that we were provided and what we say and will say at trial is that when you go through the file

you're left in no doubt. They had to know this man was a real risk of violence. But that's a factual dispute that my learned friend will totally disagree with.

Tipping J Yes but you're entitled to the benefit of the

Henry Those are trial issues and will be serious issues at trial.

McGrath J Mr Henry can I just come back to the Statute, which is really going back to the Chief Justice's question as to what's the source of the power. Now I think you've probably moved from s.107(c) back to the Criminal Justice Act at s.125(1) and I can see now what's been apparent in the local decisions that you emphasise the duty to ensure conditions of the release are complied with. Now is there anything else other than those two statutory provisions that bears on the duty that you're inviting us to say applies in tort?

Henry Oh absolutely Sir. A competent reasonable

McGrath J In the Statute. I'm looking at the

Henry In the Statute, no.

McGrath J No, those are the only statutory provisions that bear on this is that right?

Henry Yes, s.107(c) sets the framework and then the rest flows from that as far as we

McGrath J Well s.125 I think is perhaps your stronger provisions, particularly the second half of para.(a).

Henry Section 125

McGrath J And the word 'ensure' you rely on I gather?

Henry Section 125 says you must do it. What I'm referring to is the aspect of what they have to do which regards protecting the public, so yes they have to enforce the orders 125 but the philosophy of protecting the public as an aspect of that duty comes from s.107(c) which is the purpose of the order that they are enforcing.

McGrath J Thank you.

Elias CJ And again just on this question of duty. Insofar as the duty arose from exercise of a discretion to give directions as to employment and to do something about non-compliance with the other conditions, you say it was negligently exercised.

Henry What we say is there was no attempt to exercise it at all. This is a total failure. There was not an attempt to exercise any of those discretions. She certainly wasn't there.

Elias CJ But you're in that area of no reasonable Probation Officer or something like that on the cases.

Henry She simply never saw him. Over the whole period of time she saw him about twice.

Elias CJ What was the whole period of time?

Henry We're talking eight months, something like that. I've actually got pleaded the appointments where he turned up, was not seen. It's para.16(f) and literally what happened on those dates as we understand the file is he signed the book to say he was there, he sat in the seat and waited but he was not seen.

Tipping J One of the things that puzzled me Mr Henry when reading this pleading was insofar as there are pleas about failing to make sure he lived in the right place and so on, I couldn't understand what possible causative bearing that would have on the events. I'm trying to sort of isolate out of this what seen reasonably to be causative of what happened.

Henry There's a reason that's there Sir and that's at this stage where all I've managed to do is file a statement of claim, we are yet to obtain a lot more information and it is our belief that where he was living will lead very directly to the group that he committed the offence with. We believe, and as I say, we don't have the evidence yet, but the pleading will modify once we know more about where he was living and it will come quickly around to where he was living; was in the wrong influences; they never checked it; he wasn't where he was first directed to go. They just let him loose.

Elias CJ Well is it the case that you're saying that the methods of control and check available to the Probation Officer under the conditions were not being used and that may also have had a bearing on any exercise of any power she had?

Henry We say factually for all practical purposes none of those powers or functions available were considered or exercised. He walked in on the first day and said I've moved, these are my two addresses and they just took the addresses and did nothing. There were indicators to suggest they should be doing things and nothing was done. The problem the Probation Officer faces is this man turned up every time. He wasn't in breach of any of the directions they were giving him. He was actually compliant as far as he could. They were the ones that were failing and the feature of this case is, this is not one where like the gentleman

down this way, Mr Burton, who broke away, disappeared, wouldn't co-operate. This man turned up every time.

Elias CJ Well that cuts both ways because it may be in fact an indication that nothing much is amiss and that therefore she didn't have information which would put her on her guard to check the suitability of some of the other residential commitments, that sort of thing.

Henry Had she seen him and interviewed him properly I'd accept that but she never saw him.

Blanchard J But that's presumably all a matter for trial.

Henry That's facts for trial.

Elias CJ Yes.

Henry But those sort of issues will come out but certainly from what we're saying and what we're pleading there was never an exercise of a reasonable Probation Officer's brain on the supervision of this man.

Tipping J I would just like to just explore with you because I think it's crucial why before the events occurred this group comprising employer and fellow employees at the RSA should be seen as a particular 'at risk' group and therefore qualifying on the authorities. Is it the presence of alcohol?

Henry It's a series of things Sir. The first is that from the position of a reasonable Probation Officer they know that the employer and employees do not know the nature of the man that's there. They do not know that he has been let out of prison early on a basis that they are supervising him and this is in the hope that he will not recommit offences like he's done in the past.

Elias CJ Are you saying they were vulnerable because they didn't

Henry They are more vulnerable because he is there in their midst.

Tipping J It's the geographical presence.

Henry It's the fact he's working with them, yes.

Tipping J Yes, yes, it's the geographical proximity that you're relying on.

Henry Yes, yes, they are letting him in the door every day because that in fact is the thing that the warning would have stopped. He wouldn't have got through what is a thick steel crash door because my client would have recognised what he was and wouldn't have opened the door. She opened the door, he came in, she got hit. That was the sequence.

Elias CJ Well wouldn't she have opened the door because he was an employee?

Henry That's why she opened the door, but if she knew that he had this history. See he was there at an unusual time. He was there early. She opened the door because she knew he was an employee. It was an unusual thing and she's got a little peephole she looks through, saw his face and opened the door. As soon as she opened the door she sees he's in a Police uniform and she's got a bit of wood going straight to her head.

Tipping J It's the physical proximity which is really the key point is it? The alcohol is relevant but not really the key delineator of this particularly vulnerable group.

Henry The physical proximity is the first indicator; the nature of the business, vis a vis, his offending is a second but still important point. If he was going to the Labour Pool, where there's no money, no cash and no alcohol, it wouldn't be such a strong physical proximity issue, so the two have to sit together.

Anderson J What was there to suggest to the Probation Officer that work mates or work people were at particular risk? Is there anything in his history to suggest that?

Henry Yes, it comes back to the alcohol and the cash.

Anderson J But that's a different issue. You said they were secondary. You said it was the proximity of having work mates.

Henry No I went on to say Sir the two are combined together. You can't divorce one from the other because that's your factual matrix. You can't split it out.

Tipping J Was he involved, no, no perhaps I won't because it's a factual issue.

Henry But at the end of the day what we have to say is that it is not untenable for us to argue a duty of care in that way and proximity in that way.

Tipping J Your submissions are premised on the basis that we will apply these traditional approaches in New Zealand proximity and policy? This is how you create the proximity and you're no doubt in due course going to advance arguments as to why policy issues as per the Court of Appeal should not be seen by us in the same light? So it's geographical plus the nature of the business? It's the two marching together?

Henry Yes and the nature of his offence.

Tipping J And the nature?

Henry And the nature of his offence - the aggravated robbery. It's the nature of the beast that they're talking about. The proximity geographically with the people he's working with in an industry that has cash and alcohol

Tipping J When he's an aggravated robber.

Henry Mm, it's putting the wolf in sheep's clothing amongst the sheep as far as we're concerned.

Blanchard J Would the duty of care have been breached if what he'd done was to go to some place where he was not working but where there was money and alcohol and had committed a robbery there?

Henry I would say Sir that's a far harder and more difficult duty to argue but the answer to that is I believe that is an arguable position but

Blanchard J So there could have been a duty of care owed to the employees of any pub in the South Auckland area?

Henry But the reason I do that Sir is that because we're only looking at exemplary damages, the proximity argument of the floodgate control doesn't exist because you're only punished for one event once. That's why I say that is an arguable position. I don't need to argue that today because that's not my facts, but in my submission

Elias CJ I'm sorry I don't understand that response.

Henry At a later Court you will be faced with a situation if you allow this through where someone will try and argue this man was known as an armed robber, you have done nothing, and remember it's 'you have done nothing to supervise' is the key to the duty. He's committed this robbery. Because we are only seeking exemplary damages which means punished once by it doesn't matter how many plaintiffs, but he's only punished once by the Court, the strength of the proximity argument as a means of controlling a floodgate

Blanchard J You've got to establish a liability in negligence. The question of what kind of damages is a later step surely.

Henry I agree with that Sir but proximity is also a floodgate control, that's why I say that, but I don't have to argue that today and I'm not arguing that today. All I simply say is that for a later Court at a later stage because you've shifted the factual matrix one step further away from what we need to deal with today.

Elias CJ Well it's generally looked at in determining whether there is a duty of care.

Henry The duty of care Your Honour has to be determined on the facts of the case before the Court of trial and it's not a case of

Elias CJ Well is capable of giving rise to a duty of care.

Henry Yes and what I'm saying is it's capable of giving rise to a duty of care to warn where someone in a role doing something dangerous absolutely abrogates everything they're supposed to do. They know they're abrogating it and if they can identify someone specifically at risk because of abrogation then the duty clicks in because they can identify someone at greater risk and that comes back to the earlier point which is greater risk is a part of the

Tipping J I don't quite understand the relationship between this alleged total failure to supervise as being the key component of it being negligent to permit him to work at the RSA.

Henry Your Honour's quite right. It's an essential factual background but when you walk away from these facts slightly which is what I understand we're discussing, the total failure to supervise is an important part. But if they could come to Court and say look as a reasonable Probation Officer I assessed all these things, I weighed up his risks, I weighed up his offending, I weighed up the fact that he's with alcohol and that sort of thing and we knew he was abstaining because we had done all these checks, we thought we've done it right, they may very well show they didn't breach that duty of care.

Tipping J Well surely it was against his background and the nature of the proposed employment.

Henry They owed the duty of care.

Tipping J They owed the duty of care.

Henry But they haven't breached it if they have properly weighed up all their factors. They must be in a position where they come and are able to argue that.

Tipping J You mean within an area of discretion which they can't claim to be in when they didn't exercise any discretion, is that

Henry That's right.

Tipping J Yes well that's an interesting public law dimension being introduced into a concept of tort.

Elias CJ There are cases of courses that do.

Henry If this was a Probation Officer who had exercised their position I'd be in a much more difficult position to argue duty of care.

Tipping J I'm not sure that you would because you could say well no reasonable Probation Officer could exercise the discretion in that way.

Henry We would be saying that.

Tipping J Yes you would but doesn't that amount to the same thing?

Henry Yes you're correct Sir they do.

Elias CJ I'm still left with a question as to who the duty, just looking at the statutory duties now, as to whom they're owed. I accept that the purpose of parole and the functions of the Parole Board are concerned with, among other things, public safety. Is there anything that links the role of the Supervising Officers with that goal or is it simply implicit?

Henry It's linked through the fact that under s.125 they have to ensure the conditions of the release are complied with. The conditions of release come out of s.107 and that ties it back to the public.

Elias CJ Oh yes, 107(c), yes thank you.

Tipping J While we're talking about statutory duties, these duties under s.125, could you just help me here, they're duties of a statutory kind owed to the community, but I don't think you're suggesting that they're sound in damages for their breach per se.

Henry Correct.

Tipping J So they're just simply part of the legislative landscape against which we have to determine whether it's fair, just and reasonable to impose a duty in tort.

Henry Yes Sir.

Tipping J Yes.

Blanchard J But I think you were saying that the conditions are for the protection of the public generally and there couldn't be a duty to them, but they're also to protect any personal class of persons who may be effected by the release and I think you're arguing that that's where you get in.

Henry In part Sir but I also get in we say because in the conditions there's always 'to live and work where directed'. So because they'd have control of where they work that is always

Blanchard J So that's a class of persons?

Henry Yes, that's always a focus of what they have to have in their heads. That's why I hopefully very carefully at the opening said 'it's where

they live, it's where they work' are the ones that the officer would identify as being at greater risk, or could be at greater risk.

Tipping J But there was no condition here directed to any class of person was there?

Henry No there was no, I think in my understanding of that section if there is a victim from the crime then there is a power to put a condition on that they don't go near the victim or the victim's family and the like and that is where primarily the section's aimed.

Tipping J The duty under s.107(c) rests on the Board and it's there that you can delineate classes of persons. The duty under 125 rests on the Probation Officer.

Blanchard J The Probation Officer is supposed to be ensuring the carrying out of the conditions, I think that's where

Tipping J Yes but there's no condition directed to a particular class. Although the point is relevant from a

Blanchard J If there's a standard condition relating to employment

Tipping J Ah yes

Blanchard J Then arguably

Tipping J But there was an express standard but it's express to work where directed and that's where you say it was negligent to permit him to work at the RSA.

Henry And we say that is in part to protect the public and part to make sure there's proper control and you're trying to

Blanchard J The standard condition is under 107(b), little (b) 'there has to be a notification among other things of the nature and place of the employment on request' and then 107(b), little (e), 'the offender shall not engage or continue to engage in any employment or occupation which the Probation Officer's directed the offender not to engage or continue to engage'.

Tipping J I think that's your high-water mark Mr Henry, the fact that there was a power to prohibit it. Working in the RSA, you say it should have been exercised and it was negligent not to exercise it in the circumstances.

Henry Yes we accept and that is one of the key points we are making.

McGrath J One thing you are also able to say I suppose Mr Henry is that given the very strong way in which the s.125(a) duty is expressed to ensure compliance that the duty in tort that you put forward is not conflicting

with the Public Law obligation under the Statute that's placed on Probation Officers. It's not going to get in the way of performance of that obligation. It runs the same way.

Henry It runs the same way and in fact the duty is underpinning the whole basis of the scheme and you could even go further and say would the Prisons Board really have wanted to release this man if they knew it was going to be the same as releasing him at the end of his term, because we say he effectively was released as if he had ended his term with no control. That's effectively the facts. Nothing happened.

Elias CJ He was released at the statutory

Henry He had a statutory release, correct. But what we're saying is that the whole purpose of the legislation is he doesn't do his full term because we don't just want him walking out on the street, we say in this case on the facts he just walked out on the street. He did go to an office and sign his name a few times but that's about it. That's how fundamental, and I think Justice Hammond said, there's a totality of failure here.

Tipping J Could he have been placed in any form of employment without a warning?

Henry Yes where he was working in the labour pool, that's fine. That's where somebody needs labour in a building site or something, he turns up and he provides muscle and grunt and that's where he was working. He was working in a Nursery which was

Tipping J So it's the alcohol?

Elias CJ The cash.

Tipping J And the cash.

Henry It's being in the Panmure RSA with alcohol and cash, yes.

Tipping J It's the alcohol and the cash.

Henry It's the proximity, the temptation you're putting where his chance of re-offending goes up expedientially.

Anderson J Let's bear in mind that we're not necessarily looking at causation at this level, however that might become an issue if it ever gets to trial but you're arguing on the basis that leaving aside causation you can see in the circumstances of this case a discrete class of people who are likely to be at a significantly greater risk than the rest of the community.

Henry Yes, that fundamentally is it.

Elias CJ Well where do you want to take us now then Mr Henry?

Henry Well His Honour Justice Tipping said I was now going to go to public policy but I think I've just about been right through it.

Tipping J I suppose you answer Justice William Young, the President's point, by saying that we're not precluding any employment, we're just precluding a particular type of employment without a warning.

Henry Yes, we're complaining about a specific employment where his chance of re-offending can be seen by the reasonable Probation Officer to be high. I have no problems with no warning at the Nursery; I have no problems with no warning at the Labour Pool, because you haven't got the man where he's got a propensity to offend and Your Honour is correct, the fact that he was at a hotel-type operation where there was alcohol and cash is a major factor in why we say they could identify this group was at risk, and that is

Tipping J And it's the same point coincidentally that defeats the policy concerned in the sense that it's not all employment, it's only a particular type of employment that should have been prohibited.

Henry Yes.

Tipping J Or a warning given if they had chosen to take the risk.

Henry Yes.

Elias CJ Unless you had a particularly good bead on his re-integration through compliance with the other conditions which might have given you some comfort about his ability to handle that more tempting employment.

Henry If it was a genuine exercise of discretion, while we could argue it was a breach of a duty owed to put him into that type of industry, we could be met with the answer 'look we work through the facts responsibly; I did what any responsible Probation Officer would do and I have not been negligent' and that would be a total answer to it. The duty of care would be there

Tipping J I made the wrong call but it was not negligent.

Henry Yes, the duty of care is there but I didn't breach it.

Anderson J That would be the end of it wouldn't it? Is this why you're not so interested in that but more interested in saying there's a breach of duty of care evidenced by a failure to warn?

Henry Yes that's correct.

- Anderson J So it's alright to put them there, it's alright to let the person drink problem and the robbery background to go to a place where there's both drink and takings, so long as you warn people?
- Henry No Sir, so long as you're exercising your duties prudently and you are using your discretion. What we say here there was a total failure. See we don't even get
- Anderson J You have difficulty with this proposition that there is a dereliction in failing to warn and the more obvious route is that there was dereliction in letting him be there.
- Henry I'm happy with that route too Sir.
- Anderson J I thought you'd just assuaged on the basis that you might find that there's no negligence involved.
- Henry What I'm saying Sir is there is a duty of care but if they could show an exercise of discretion theoretically, which they can't, then they could answer the position. I'm saying here that it's a direct route on these facts, yes.
- Elias CJ What constitutes a breach on the facts might well include whether there was some warning given or something like that.
- Henry Yes, yes.
- Anderson J Like what, keep an eye on him; make sure he doesn't get into the drink and keep him away from monetary temptation?
- Henry If it was just a pure recidivist alcohol taker, yes, but unfortunately here you have a violent
- Elias CJ Have you pleaded what he was doing in the RSA, what his job was?
- Henry No, he was on work familiarisation or something like that was the role he had. He was there as a trainee learning how to work the bar and do those things.
- Tipping J I'm not sure I feel totally comfortable with the view Mr Henry just so that you can guard yourselves against it that causation is wholly relevant at this stage.
- Henry I don't think it is Sir. I've actually dealt with causation at the very end of the pleading but what we're saying there is we're quite happy we can come within *Atkinson* on the facts but we do point to a range of recent cases and I don't perceive that all I have to do is more than say that it's not untenable for me to argue those cases. That loss of chance and those sort of things are available for me at trial and I actually look forward to the day when we can come back with the full facts and

actually answer the questions instead of speculate on them. That's all we want to do. And really that comes back to, in my submission, what was the reason for the dissent in the Court of Appeal is that let it go, let the full facts come out, then come back and we'll decide because your decision today is you don't have to decide that this duty of care exists. You've just got to say it's tenable for us to argue that at trial because that's what we want to do.

Blanchard J I'm not sure where loss of chance would come in.

Elias CJ No that's a horrible notion.

Henry It's the loss of the chance to protect itself Sir because the facts are going to be

Blanchard J But what you have to establish is that the breach of the duty of care if there was one was causative. In other words it was the cause or a substantial cause. That loss of a chance has got nothing to do with it.

Henry We don't shirk from that Sir. What I'm simply saying is that the law in that area is on the move

Blanchard J Well it may be on the move but not in the direction of loss of a chance.

Henry We are saying that we have no problems as a fact meeting a direct causation

Blanchard J I understand that argument, I simply wanted to disabuse you of the idea that loss of a chance had anything to do with it.

Henry No what I've done Sir is simply put those cases in because we simply show the law in this area is on a move but we say quite boldly and clearly we can meet the *Atkinson* test and we are quite happy with that test. But that's a factual issue.

Elias CJ Do you want to say anything to us about exemplary damages?

Henry We make some points on exemplary damages in para.6.2, which is page 13 of the synopsis, and we deal with the position of s.319 of the Injury Prevention Legislation and the fact that they have expressly recognised that exemplary damages for a person who should be preserved and we go to the policy point that the *Daniels and Thomson* decision which in our submission quite correctly upheld the principle that you only punish once

Blanchard J What's that got to do with it? This is not a case against Mr Bell.

Henry What it's got to do with it Sir is that this proceeding will punish the officer concerned once and once only and there's no issue of floodgate.

Blanchard J Yes for that officer's default, if there was one.

Henry By her default.

Blanchard J But these cases have gone nothing to do with it. They're case is about whether you can have another go with exemplary damages at someone who has been punished by the criminal law.

Henry What we use it for Sir is we simply say that there is a clear legislative intention that they want to keep s.319 alive and clear.

Blanchard J Well that's quite clear.

Henry That's the only point we make on it Sir.

Tipping J I think much more important is the question of what approach this Court is going to take to the criteria for the award of exemplary damages and of course as I read the Crown's submissions there, they are, I'm not entirely sure, but I think it's on the table if you like as to whether we go back to the view that the Court of Appeal took in *Bottrill* as opposed to the view that the Privy Council took in *Bottrill*.

Elias CJ Well you've adopted Privy Council in *Bottrill*.

Henry We've adopted *Bottrill*. The reason we've adopted *Bottrill* is because that is the law unless Your Honours decide otherwise, but I would simply say the appropriate time to decide otherwise is once all the facts are in, not in a esoteric position where we're assuming position. I'm actually quite content I can meet the Court of Appeal *Bottrill* test and I don't believe it will be an issue in the trial.

Tipping J What the test should be doesn't really depend on the facts of an individual case. It's a conceptual, a principle policy matter.

Henry I understand and accept Your Honour it's a policy matter, but policy should be decided on the full facts not in an esoteric position where you are looking at past cases and saying well this case this way, this case that way.

Tipping J When the trial Court comes to consider whether a case for exemplary damages is made out, assuming there's a duty of care, surely it would be extremely helpful to that Court to know in advance what this Court's view is about the *Bottrill* debate, otherwise it will just come up here and maybe have to go back for reconsideration.

Henry Well I would hope Your Honour that the trial Judge having had it signalled to him that the Crown is intending to challenge *Bottrill* would provide a factual decision that when you come to this Court, would enable this Court to deal with the matter finally.

Tipping J Well naively perhaps I thought that the point of granting leave on the exemplary damages issue was to give an opportunity to ventilate that issue now.

Henry Well we're happy to ventilate it Sir and our position is a strong one that *Bottrill* should be supported.

Tipping J Would you prefer to wait until we've heard Mr Pike to counter.

Henry I was going to say that it will be more helpful for Mr Pike to argue the positive first, but I would make the point Your Honour that the common law is a very fluid thing and it's very important that we keep in step as that moves with the rest of the world. It's going to be more important for us because if you find there's a duty of care, this is our sole remedy. In the other jurisdictions compensation is the driving factor. Here this is exactly what Lord Hoffmann described in *W and W*. This is an action being brought by the victim. She wants some vindication of her version of events because she feels very let down by whoever was in control of this man. She also wants a measure of public acknowledgement that something went horribly wrong and it's not here for compensation, and again as Lord Hoffmann says, there may be a degree of therapeutic value in knowing the full story and knowing that society does not condone the failures that led to injuries. That's where she comes from. That's all we've got left in this country and there's I know a comment in my learned friend's submissions where he says that these things are best left to Commissions of Inquiry because accountability comes that way. This is not an issue of public accountability, it's an issue of the victim being able to have the wrongdoer account to her and that's what she asks. It's not a public thing, it's the failure, and we will be certainly saying at trial that this is an absolutely gross, every inflammatory words you want to use, failure. It's been a complete abrogation of their duty and it is something that she is entitled to have this Court consider and provide a measure of account to her, vis a vis, the officer who was at fault. I suspect I can't assist Your Honours much further at this stage.

Elias CJ No well you've done very well because it's the morning tea adjournment so we'll take the adjournment now and consider whether we have any further questions for you before calling on Mr Pike.

Henry Thank you.

11.36am Court Adjourned
11.59am Court Resumed

Elias CJ Mr Henry I think some of my colleagues may have some questions for you.

- Blanchard J I didn't know that I had the first question. Mr Henry I just want to explore with you a comment that you made before morning tea and if I understood rightly you were saying that in relation to exemplary damages that you believed that your client could get home even on the Court of Appeal's test.
- Henry What we say Sir is that while our pleading is negligence this breach is very much in the regard of reckless; it's very much near the verge of intentional, because this Probation Officer knew
- Blanchard J An intention to damage?
- Henry No she knew all of the natures of this man and I'm not saying she had an intent to damage but in the reckless sense absolutely closed her eyes to the consequences of what was going on because she was doing nothing.
- Blanchard J So she knew there was a risk that an employee at the RSA might get attacked and she deliberately shut her eyes to that.
- Henry That is what we say is the position because any Probation Officer who knows they're doing nothing to a man with a violent propensity; knows where the man is working; its not a very big step to say that they're being absolutely reckless.
- Tipping J So she deliberately shut her eyes to the risk created by her allowing him to work at the RSA and not warning?
- Henry We are certainly of the view that at trial we will be able to take the evidence up to that type of level simply because the failure to be there to see him repeatedly; the failure to have anything done for him over a protracted period of time, no reasonable Probation Officer wouldn't be starting to wonder what an earth this man is doing. Knows he's moved; knows she's doing nothing; just turned her back on the file. That's what we're faced with and that's why we say we believe. Look we are far better off with the Privy Council's formulation but we do believe these facts will come still well within where the Court of Appeal was before that decision by the Privy Council. And a jury properly charged I submit is quite capable in these facts of returning a factual verdict in our favour.
- Tipping J If you were to go to trial on the basis of the Privy Council's formulation and the jury be directed accordingly and later this Court were to take the view that that was not the appropriate test, then your client would be in the awkward
- Henry Your Honour's right, Your Honour's right.

Tipping J So what I'd like is your view as to whether it wouldn't be better to grapple with this at this stage so that at least the trial Judge can correct the jury if we get that far on the appropriate basis.

Henry It would be certainly far more efficient for the plaintiff not to have to come back because someone says 'no, you put the wrong test to the jury in a jury trial'.

Tipping J Well that's almost, well I won't say nothing's inevitable in the law, but it's very likely.

Henry I accept that Sir and I accept in that situation that's an appropriate point, and I'm quite happy to deal with it.

Tipping J No, no, I'm not asking you to elaborate further, I was just asking you where you stood on the question whether it should be addressed at this stage or not.

Henry The way Your Honour puts it I accept you should address it.

Tipping J No I have nothing more thank you. It's comprehended already.

Elias CJ Thank you Mr Henry. Yes Mr Pike?

Pike Yes may it please the Court the primary submission for the respondent is that tragic as the circumstances are it is appropriate to repeat what we said in the Court of Appeal about them in a sense that the Department of Corrections takes no joy whatever in these events and the failures of which we've always said there were, failures of the system of administering the parole conditions of William Bell that led to the tragic deaths of three people and the ruination of the life of the fourth who is here now. But what we say about the case is that primarily the New Zealand society addresses the immediate issues of the plaintiff by of course the Accident Compensation scheme and the services that go with the fiscal and rehabilitative services that society provides as a general comprehensive insurance scheme for these sorts of events, which of course leaves the function of tort law in this area as having one purpose only and that is the punitive purpose. It is I submit inarguable that the case is brought and a duty of care is sought to be imposed for the reason only of punishing Ms X. There's nothing else to be said for the case because no other compensation can be lawfully granted by a Court and so the action is essentially for exemplary damages. It is not the function of tort law we say to punish in these circumstances absent the egregious and witting misconduct of one person against another, that is taking it right through to the end point of our submission. We of course would seek to uphold, and I don't know what difficulties there are in terms of the fact the Privy Council's disagree with the Court of Appeal here but I suspect juridically there are none and this Court is by reason of its very constitution position they are free to depart from the Privy Council decision in *Bottrill* and if

it thought fit to restore what the Court of Appeal had thought to be the proper case in that litigation

Blanchard J Oh it wasn't just the Court of Appeal, it was the minority in the Privy Council as well, because it was essentially a 3-2 split.

Pike Yes Your Honour, certainly it's hard to see the distinction the two minority Lordships drew as between inference is to be drawn from repeatedly bad behaviour and the fact that it was intentional in any event I think. In reality I would agree that they are really saying that the conduct had to be deliberate, deliberate wrongdoing.

Tipping J Deliberate risk-running.

Pike Yes, deliberately, full witting conduct having a full view of the landscape than a witting appreciation and an absolute indifferent knowledge in reckless indifference to what was going to plainly foreseeably occur, that would occur. But that's racing ahead. What we do submit in this case is that it is not an appropriate case as the Court of Appeal and indeed the High Court Judge found. It is not an appropriate case for the imposition of a duty of care either as on an action on the case basis which is one risk that tort law is running now in negligence with simply using proximity and fairness as arbiters of imposing duty of care. If we put aside that and grapple for principle, which of course that is not to submit that case is going the other way unprincipled, but it is to say that our position is that duties of care ought to be imposed in areas of omission, and particularly in relation to areas where the omission relates to the failure to control or to do something to prevent an autonomous human being from deliberately injuring another, that in those circumstances the duty of care ought to be imposed with great caution, and we say that a rather nice balance has been struck by cases that where instant or both sides of instance where in overseas jurisdictions, particularly the cases such as *Swan* nearby, across the Tasman, where duties of care have been imposed on Probation Officers and we would find it hard to argue in a conceptual sense that those decisions were wrong. But those cases involve Probation Officers who have done one of two things. They've either caused somebody to rely on them by not answering questions or by fudging answers – that's the *Hendricks*-type of case where is this person to steal, well no, but they're likely to burn your house down which of course they immediately do because they are recidivist arsonists, in which case the Probation Officer was wrong and in breach of a duty on a reliance basis to answer a question in a candid way to say the person's not a thief but they do in fact have a propensity, and this is a true propensity case for arson.

Elias CJ Well if you don't like proximity and fairness Mr Pike which the cases which attempt to articulate principle are full of, what are the principles that you suggest are the guiding principles?

Pike Well the ones we hang our hat on and I appreciate immediately that there've been again almost superseded as these cases even flow but we had thought to argue, or we do argue for Lord Hoffmann's approach in part in *Stovin and Wise* which Your Honour to answer your question well it is proximity, of course it is. We're not saying that proximity is the wrong test or disagreeing with it. Of course it must be the arbiter. I suspect the dispute as to how was proximity decided – what are the rules for deciding proximity, if you are not to simply let tort law drift through the legal landscape as a modern form of action on the case which we submit is what's happening here and Mr Henry's is par excellence, and action on the case approach to it, that is in these circumstances on these narrow facts, on this particular day on the 8th December in the year 2001 at 7.30 in the morning a set of circumstances came together with horrible consequences. And that's all the case is about. Of course the Crown argues obviously mindful of public liability that the liability ought to be imposed on a narrower or more methodical basis, the proximity being that in a case of a breach of the statutory duty, where there seems to be no argument that a tort of breach of statutory duty cannot run as in this case, and I don't take that argument too far because the circumstances of a breach of statutory duty are now very very strict – ie, one must interpret a statute to indicate a clear intention to give damage and that will almost never be patent so there's nothing in the point against Mr Henry's claim. But what we do say in terms of a breach of statutory duty that a mere breach alone is not enough. Something more is required in the particular case and the *Stovin and Wise* approach of Lord Hoffmann gives that something more. In the two instances where His Lordship would indicate a duty to arise, there's that, and these are generalised, that in terms of one line of territory, a statutory duty is always performed in a particular way, and I recall His Lordship rationalising *Hanlon* in our earlier litigation on building inspectors which of course in England has fluctuated, but here we say that from the year dot building inspectors have always inspected buildings for the councils in a particular way. We've always relied on them. Home builders in New Zealand have always relied on council inspectors to get it right, therefore there's a pattern of habitual reliance, therefore it's right that New Zealand contrary to England should have imposed a duty of care on building inspectors because of the social picture that has emerged. So Lord Hoffmann

Elias CJ It sounds very much like an action on the case to me.

Pike Well it would have been initially, that's the difficulty.

Elias CJ It's hard to read these or re-read these cases without coming to the view that it's all forlorn unless you regard it as a question of looking at each special facts and deciding incrementally whether a duty of care arises. The quest for science is deceptive. I mean for my own part I think that Lord Nicholl's criticisms of the majority approach in *Stovin and Wise* are pretty telling.

Pike

Yes well thank you for that information. The point with respect is in terms of a breach of statutory duty or Lord Nicholls versus the Lord Hoffmann approach with respect is that it's essentially a clash of philosophies. There are those who see tort law as something that can more or less crawl across the legal landscape, imposing remedies on a rational basis on a case-by-case basis in the crudest way of putting it, and others that say that we should be able to predict with some degree of assurance it will never be complete. Before conduct is embarked that failure to do it carefully will result in damages being imposed. Well liability and loss being imposed. But what we say is that we do in New Zealand glide down the middle of these two extremes, if we can call it that, and so ever since the *Dorset Yacht* case we're in the position of arguing why it is liability shall not be imposed in a particular case. But we do that by not arguing the endless floodgates and alarm bell theories but by saying there's good reason as in policy in particular cases why liability ought not to be imposed. This is one of those cases, and I suspect all Lord Hoffmann was trying to do was to say that one helpful approach, and I suspect he would not at all say it was the only approach, or it certainly doesn't apply in every case, but it is a helpful approach to say that where somebody's charged with a statutory duty of doing something that if somebody is injured by means of a process that can be traced back to a failure for that person, usually the acts in this case, especially where there is an act of another party. I'm not talking direct of the *Bedfordshire*-type of case where the kiddies are not taken into care. Sorry it's not *Bedfordshire*, it's the later one, but never mind, the kids are not taken into care and accordingly they suffer and that's all foreseeable and questions arise as direct harm. In the cases where, as in *Stovin and Wise*, a motorist is negligent as well as the council not doing something in relation to the spot where the motorist was negligent. In those cases Lord Hoffmann, as we submit, created or identified a useful approach, which is reliance and that, has been the thread we submit that has run through the cases where liability has been imposed. On Probation Officers it turns out to be quite prophetic that cases both before and after Lord Hoffmann's speech, the Probation Officers who had been found to owe a duty of care and to have breached it have all been cases where what could be loosely called a clear and present danger case of a paedophile being in a house with small children and unsupervised, probation is told of that. These are people with propensities and this brings us I think before we leave the point to the nub. Well one of the nubs of this case is that the duty of care is said to be owed because William Bell had a propensity to be violent so such that any Probation Officer reflecting reasonably on this person, would realise that people in the community or a select group of people would be immediately at risk. Now what we say is the difficulty with that I think both counsel have access to Mr Bell's previous convictions. Mr Bell's previous convictions are remarkably devoid of violence until the aggravated robbery which preceded the homicidal outbursts in 2001. So far as can be seen by quick scan from 1992 right through to the present, excluding the aggravated robbery of

the Service Station in 1997, he has one conviction for common assault which he received non-residential periodic detention. His record, extensive, was entirely otherwise of burglary, fraud, deception, theft and so on. He was par excellence a property offender from a very young age, incidentally very little, one excess breath, indicating that his alcohol problems don't figure in his

Tipping J Do we have a description anywhere in the papers of the circumstances pertaining to the aggravated robbery?

Pike The Service Station?

Tipping J Well, yes.

Pike Of the Service Station?

Elias CJ There is in something. Is it in one of the judgments?

Pike There is, we do. I think we all agree on a very brief sketch of facts that he went into a Service Station with a lone attendant, he demanded whatever he demanded, money and so forth. He was armed with a baseball bat. He struck without provocation, without need it would seem. Without need he struck the attendant with the baseball bat. There mercifully that attendant escaped into a toilet area and locked himself in. Bell's actions then which we now see as so significant but probably didn't at that stage were to bash at the wall of the door with a baseball bat for a bit before breaking off the assault and giving up and clearing out. So there was an indication of somebody who had something lying beneath and we can see it now.

Tipping J Was he on drugs or alcohol at the time?

Pike I don't know and there's no evidence that he was at that time, no. What we do know is because Your Honour will recall, Your Honour Justice Anderson of course sat on the sentence appeal for Bell.

Tipping J Yes but I'm very anxious to rely only on what material is properly before us. That's part of the reason for asking the question Mr Pike.

Pike Yes, no I can't answer the question from the material before the Court as to whether he was on anything psycho-active or alcohol.

Tipping J It doesn't seem to be so alleged. The pleadings in relation to the aggravated robbery here as creating the fulcrum if you like of the risk are pretty spartan at the moment.

Pike Yes they are. He appeared at 7.30 in the morning. Well what is is not technology

Tipping J No I mean the previous robbery.

Pike Oh the previous robbery. No they are spartan.

Tipping J Because it's the previous robbery that gives the foundation for the suggestion that he was a risk isn't it?

Pike Yes it is. It was, and he was psychologically assessed and as is pleaded he was found to be a person who was at risk of further offending, or re-offending on release if he wasn't managed properly.

Tipping J But it was re-offending on the pleading of an unspecified kind.

Pike It is and it was in the psych report and I think both sides agree on that. There was not a psychological report saying, as there certainly is now, that he was a dangerously violent person. He was a person like so many who were released on parole without a proper enforcement of his parole conditions, there was a risk of re-offending. We accept that, yes, there was. As is the case with the something like I think there's something like 400 or 600 people – at the moment there's 684 violent offenders on parole

Tipping J But he had to be released here didn't he? There wasn't a discretionary decision to release

Pike No, no it was under that old 1995 Criminal Justice regime – 2/3rds, no parole, so yes he had to be, there was no discretion. He had to be released. He could have been recalled, there was that very awkward, horribly complicated regime for getting him back and for how long to the balance of his sentence but he certainly was not the subject of the Parole Board release decision. They had to let him go.

Anderson J According to what Mr Henry said he hadn't done anything that would make him eligible for recall.

Pike No, indeed, no indeed that is so. That's the difficulty. But the difficulty we say that while the offending for which he was convicted and on parole got him five years imprisonment which is the medium range, I mean it's moderately serious aggravated robbery. There's no question about that. Five years is, having regard to the rest of his record, that wouldn't have helped, but he certainly struck and injured the attendant, of that there is no doubt.

Anderson J You don't have the sentencing notes but my recollection is that probably about that time there was a spate of robberies of unattended, you know low attended Service Stations

Pike Yes.

Anderson J Mid 1990s.

Pike Yes that's right. There was epidemics of them through the 90s and certainly there's a deterrent element, but be that as it may the difficulty is that the Probation Service failed in the respects that my friend has pointed out. I mean it does not duck the issue of course. It sees its liability or accepts its liability as being what we thought we started off with a Probation Officer with only ten months experience who was we'd have to say was out of her depth with a person that we now know Bell to be and whose caseload was hideous, as they all were, in an under-resourced and very over-stressed Mangere Probation Centre. That was the reality of this case. Certainly we accept that.

Elias CJ Sounds like systemic failure to me Mr Pike.

Pike Yes it does.

Blanchard J Except we're being asked to look at this case on a different basis, that's the concern I have as well. It also doesn't sound like a case for exemplary damages against Ms X.

Pike Well that's the difficulty we need to come to. The trouble is that Mr Henry

Blanchard J The question of exemplary damages might look different on an allegation of systemic negligence. I don't know.

Pike It's possible we also indicate that punishing for systemic failures is possible but in a case like this it would be extraordinarily difficult to do it on a principled basis. I mean one can immediately say if you were in the United States of America and Union Carbide systemically fails in its duties and pollutes the Michigan River or whatever, that exemplary damages for systemic failure would be totally correct because the whole system can fail and we don't duck away from that, but here what we've got, what's alleged is a hopelessly under-resourced, under-trained, under-supported Probation Service with a woman who had ten months experience in charge of someone that we now know to be a cunning and manipulative psychopath. That was the difficulty. You know the Court of Appeal in dealing with Bell at his sentencing made a number of comments about that which are penetrating the relevant now, and the main one was that the offending was cold, calculated and planned. There's no suggestion that Bell arrived drunk or got drunk on the premises and tried to rob anybody. There was no connection between his alcohol problem that could ever be seen in that offence in the morning. What he wanted was money and incidentally

Blanchard J Well it's been suggested that he also wanted liquor.

Pike He took some, he took some liquor

Blanchard J So there could be allegedly a connection with his alcohol problem. He did it not because he was drunk but because he wanted to get drunk.

Pike Well the difficulty there is quite frankly he's surrounded at times when people's backs must be turned and we have to take notice of the fact that this is a bizarre way to get alcohol if you're in a place that's full of bottles of alcohol. You wait until 7.30 in the morning and rob it with a shotgun when you're working there all day. He had been indeed dismissed, I mean that's the point that we have to possibly grapple with too, which is noted in

Tipping J About three months earlier was it?

Pike It was sometime earlier, yes it was, but I can't remember how much earlier it was.

Anderson J It could be important if there was a long length of time like that and he hadn't been an employee for months. It would have some impact on the proximity argument.

Pike No, they got rid of him because I think he was just a management problem and he'd gone, we know and this is from the bar, but we know it's from the record, the Court of Appeal of the sentencing notes, he had been spoken to sharply because of the fact he'd been seen by one of the woman who is not deceased, by one of the employees looking at the safe, and he was having a look at the safe and he was trying I think probably to figure out how to get into it and she saw him there

Tipping J Can you find out for how long ago he was dismissed before because that must be common ground?

Pike I'm sorry, yes we will, sorry.

Tipping J I wrote the Court of Appeal decision but I'm studiously at the moment trying not to refer to it because I think we should confine ourselves to what's properly here.

Pike Yes, I accept that, yes Sir we will do that. So the basic way that the case unfolded as the Crown saw it was that this was a case as pleaded still, although it is now departed from, the pleading from to some manner, as systemic failures.

Elias CJ Well the pleadings we have don't depart from that. Even the draft pleading doesn't and at some stage Mr Pike I'd be grateful if you'd deal with what you say we should be dealing with because I'm bothered about the fact that there seems to have been some informal arrangement. It seems to me, although I haven't discussed this with my colleagues and they may have different views, that we really can only deal with this on the basis of what's before us

Pike Yes.

Elias CJ And that would enable both systemic liability for exemplary damages to be run as well as vicarious, and on what you've told us the Crown doesn't resist vicarious liability in this case. While wishing to perhaps preserve the opportunity to support the Court of Appeal decision in "S" in another case. Is that accurate?

Pike Yes it is, it is. No we've bobbled the ball on this and I'm conscious of the fact that I cannot cut across what I've told my friend

Tipping J You've whatted the ball?

Pike We've bobbled the ball. Sorry

Tipping J Oh bobbled the ball.

Pike Sorry it wasn't a very elegant expression, but

Elias CJ I don't know what it means, I don't bobble balls.

Pike Fumbled if I must put

Tipping J It's a little short of having dropped the ball.

Anderson J It's sort of fumbled the ball on playing the ball.

Pike Yes.

Blanchard J Well I'm again in danger of getting confused. I thought we had established earlier on that the case was going to be re-pleaded and run, provided strike-out isn't granted, on the basis that it's the negligence, if I can put it loosely, of Ms X which is at stake and that if she's found to have been in breach of duty of care, is negligent causation etc, the Crown would stand behind her. System negligence by the Crown is now creeping back in again but Mr Henry, unless I misunderstood him, and I apologise if I did, seemed to have assuaged that.

Pike Yes he has gone off that

Blanchard J Which I must say, like the Chief Justice, I worry about.

Pike It's wrong-footed

Elias CJ Wobbling.

Pike Me a little too, because I had seen it as

Blanchard J Well it might be greatly to your advantage actually.

Tipping J My note is no other person than X alleged to owe a duty of care.

Pike Yes.

Blanchard J That's why I was asking you about the mythical Mr Y, or Ms Y, and whether there could be liability via that route, and the answer was no.

Pike Yes.

Blanchard J So at some stage we've got to get it clear. What sort of case you are facing.

Pike Well as I understand it I am now facing the case that Ms X is entirely liable. It's her acts and her acts alone that are negligent and wantonly so as it were

Blanchard J Well I should signal the fact that I consider that quite apart from any question of duty of care, it's going to be exceedingly difficulty to get home on exemplary damages against Ms X.

Pike Well I would submit to the same effect, because one looks at the reasonable Probation Officer for imposing a duty, but when it comes to imposing punitive damages, one looks to the actuality of the case

Blanchard J And she's young and inexperienced and out of her depth.

Pike Well she's

Elias CJ And unsupervised and unsupported.

Blanchard J She might be quite negligent but is she deserving of being punished, because it's her that's being punished by the damages, not the Crown. The Crown merely comes along and says well we'll pick them up if you get punished.

Pike Yes.

Blanchard J It might be a different case if the allegation is of systemic negligence against the Crown.

Pike Yes I agree.

Elias CJ On the other hand this is your strike-out application which we're dealing with on the basis of a pleading and perhaps a draft pleading we've been supplied, which is why I'm concerned at informal concessions that may not be properly thought through and why we have to consider this on the basis of what may be pleaded because we may not have the pleadings in their final form.

Pike Yes, well one thing I can do perhaps here and now and Mr Henry can think about it is to say because of the difficulties we all seem to be in, certainly including counsel now, is that if the undertaking is clear that

no matter by what route damages happen to be imposed against by out of this event in favour of the plaintiff the Crown will pay them. I mean if we can do that and leave open our arguments then that's one way out of it. I can simply do that here and now without any difficulty.

Blanchard J Well it doesn't cure the whole problem because if the matter is only being approached via Ms X, there is this question of whether Ms X is a suitable candidate for exemplary damages, whereas if the damages are being approached via a systemic attack, or via an attack on the Crown's systemic failings, the Crown's position on its own liability, not Ms X's liability, for exemplary damages may be quite different.

Pike Well I accept that Your Honour.

Blanchard J I don't put it any higher than that.

Pike No I understand Your Honour's position perfectly and I accept that.

Blanchard J And I'm really speaking as much to Mr Henry as to you.

Pike I accept that. Well maybe Mr Henry

Elias CJ No I think Mr Henry needs to think about this.

Henry The reason Your Honour I want to ask my friend is Mr Justice Blanchard has to a certain pointed recorded what I said but what we said was we don't yet have discovery of files between Ms X and the rest of the office. If we identify another Officer they will be joined in.

Blanchard J Yes but in the meantime you might be struck out.

Henry I understand that Sir and this is why we're saying we need to be let go on to trial because it may well turn out exactly what Your Honour says. She's ten months, she's inexperienced, she goes to her boss and says what do I do and that Officer then becomes where we should be appropriately focused given that it is an exemplary damages position.

Blanchard J But even if you don't get evidence that she goes to her boss, the mere fact that an inexperienced person was put in this overworked position might be sufficient.

Henry I don't know who the person is who made those decision. I don't have any access to documents to show us who

Blanchard J Well does it matter?

Henry Well we'll have to identify a person. There must be a person to identify.

Elias CJ Well.

Henry That has always been the problem

Elias CJ It does strike me Mr Henry that your indication that you're not proceeding against the Attorney-General on behalf of the Department for Corrections is one that you need to reconsider.

Henry I'm certainly not in a position that we're discounting the fact that as we understand more of what's happened in the system, we will not identify specific officers.

Blanchard J But you're describing to us, and I'm simply taking this at face value, you're describing to us a system which sounds to be seriously derelict

Henry Yes.

Blanchard J And yet your saying I'm not alleging systemic negligence.

Henry In the pleading we have at the moment we are saying that the system has wholly failed. What we aren't able to do and haven't done is identified what other officer is the Officer Y, who they are. We don't know.

Blanchard J Well do you need to do that.

Henry I've assumed always that I do. A general pleading against the Department where there's punitive, was never the way I've conceived it but I may well be wrong and I certainly

Tipping J Well you've got problems on both fronts frankly but what puzzles me is that you're not covering your bases.

Henry Well we actually originally came through with a different tort which has been struck and I don't have leave it here, which was to deal wholly with we said the system and structure and by virtue of the fact that

Blanchard J What was that, misfeasance in public office?

Henry Misfeasance in public office.

Blanchard J That was rightly struck out.

Henry I understand that, and the position we'd always taken was that that would move a route through the Department. Now Your Honours may well be right, I may have to rethink the position and simply say that we will sue the Department as such for a breach of duty because it didn't supervise her properly, which of course is the basis that we stated vicariously liable.

- Tipping J I think vicariously liable because they've undertaken to be, not because they didn't supervise it properly.
- Blanchard J You've got to carefully distinguish between the two. Vicarious liability is liability for the sins of an agent in these circumstances, of an employee of the Department, but there could be theoretically at least direct liability for the Department's own sins in not having a proper structure in place. In having an inadequate system which in itself has created a breach of duty of care on the part of the Department itself. Now I'm not saying that that is the case, all I'm saying is that that is a possible route and that by focusing entirely on the sins, the alleged sins of Ms X, you may be in danger of being too narrowly focused.
- Henry I accept that Sir. Perhaps I'll take up Her Honour the Chief Justice's suggestions and come back after lunch and address that point for you.
- Elias CJ Thank you, yes Mr Pike, given what you have rather candidly said to us about the system, can you remind me why do you say the Department would not owe a duty of care in these circumstances? Is it simply the proximity issue?
- Pike Yes the arguments would run rather along the lines that there have done in *Hill and Chief Contable* and other cases which still despite criticism have been reinforced quite vigorously recently in the House of Lords as you all know. The main reason is that what we are dealing with here if it's not misfeasance in public office that people aren't wittingly sitting around and saying ha, we know that somebody is going to be injured in the RSA and we don't care and we're going to not do our duty and so on. If we are not in that territory, and we're not, then what we have is we're imposing liability for exemplary damages on the basis of a number of unrelated, oh well sorry, they're related in one sense, they're temporarily related but structurally unrelated problems. For instance there's not enough psychologists – that's not the Department of Corrections fault because that's in the private sector they contract. It needs to go to people in the private sector. There's not enough of them at the time. There are too few Probation Officers able to take the stress of the office. There are too many people on parole. There was not enough money to fund the Mangere Centre at that particular time. There was not a proper system for identifying who needed screening into the offender warning system, which there now is, and so on. So I mean the point is really Your Honour is that these are simple failings if you can call them that, that all stem from resources, from money, from management skills in some cases without a doubt, at a whole range of levels over a wide range of people including if one wants to keep on drawing the threads out, up until the allocation from the budget rounds as to how much goes into a particular pot. How much you can pay Probation Officers' stress counselling. So the point is really that if one wants to take a system like that and impose exemplary damages, this would be a rather unprecedented step for what we so-call systemic failure. We would

punish somebody for doing that if they were in a position first to do something better, and to some degree they might be but in many degrees they weren't, or at least that will be the inquiry.

Blanchard J Was that really the argument in *Hill* which I confess I haven't been back and read or was it rather that it would just make operations of the Police so difficult if they had to be continually covering themselves against this kind of claim that overall there was a real public downside that the Police wouldn't function properly.

Pike The *Hill* thing, well there were two with respect Your Honour. One was an allocation of resources and I'm relying on that more, so that in cases such as this for all we know they had much worse people to contend with on parole than Mr Bell as far as they knew, so they allocate the resources to those people, the more senior Probation Officers, because they haven't got them for somebody else. They think Bell is no great management problem and tragically they're wrong. But those are the sorts of issues that come out in this sort of litigation and the House of Lords in *Hill* and *Brooks*, I think more recently, upholding the *Hill* approach with Lord Steyn.

Anderson J It's scarcely just foreseeable questions when they invoke such broad considerations of the allocation of resources nationally.

Pike Well it can do, and I don't want to

Anderson J Across the whole spectrum

Pike Sound hysterical about this, although I am conscious that could be creeping in. There's always the floodgates alarm, but I don't want to submit that, but I do want to submit that this is particularly an area where when we look at the allegations it all stems back to resources and salaries, and training and Managers, and Managers' ability, the ability to recognise dangerous offenders, resources in the private sector, but that won't always be the case. I don't want to say that it will always be the case but Mr Henry I think would probably quite happily accept, well not happily, but he would accept that many of these areas are ones of simply the management decisions based as far as he knows on resources and competence, and competencies, which are always being improved and are always under review. So the difficulty is for the Court is to say well if we're going to hold the Crown vicariously liable and impose exemplary damages on it, the Crown must be punished for the wrongdoing in this case.

Tipping J No it's not a question of holding the Crown vicariously liable, It's a question of finding them primarily liable.

Pike Yes.

Tipping J We are tending to sort of slide between those very different conceptual approaches.

Pike Yes I'm sorry Your Honour I take the point, yes, and exactly finding it primarily liable, because it is the Crown. Well so it is with Ms X as well in a way, but the

Tipping J Well she's liable for her own actions.

Pike Yes.

Tipping J You've agreed that you will indemnify her.

Pike Yes.

Tipping J Whether the Crown is vicariously liable is an 'at large' point.

Pike Yes it is, correct.

Tipping J That's the position isn't it?

Pike It is, I agree.

Elias CJ The distinction in this area of tortious or liability and negligence between vicarious and primary liability doesn't loom very large in the overseas cases as far as I can recall. Is it important here principally because of the decision in "S"? That's just a question. Are there any overseas cases which really grapple with this distinction?

McGrath J Accident Compensation surely is the main reason. We have a statutory compensation scheme

Tipping J We have the *Kuddus* where the House of Lords or Lord Scott in particular discussed the appropriate policy bases for imposing exemplary damages on a vicarious basis.

Pike Yes.

Tipping J But the Chief Justice is right, I don't there is much conceptual discussion on this.

Pike No, the Law Commission, the English Law Commission report to which we refer in our submission, but it's extremely long and we don't have it here, it supports exemplary damages remaining as a tool for tort law. It also supports vicarious liability on the basis that it can see no reason in principle why the punitive element is watered down by reason of the fact that the actual wrongdoer or wrongdoers don't pay a bean in the vernacular which I find surprising. They find that can be insured against. They both suggest it remains, exemplary damages remain, they are vicariously to be imposed and they may be insured

against as an insurable risk. None of those features the Law Commission saw is undermining the elements of punishment in the tort which I must say is strange.

Tipping J But you can only punish the employer one would have thought if the employer as an employer has failed to act in a way which attracts exemplary damages. I mean the idea that you've got a vicarious liability for the sins of someone else where you have had no logical involvement in those sins, seems to have always struck me as being very odd.

Pike Well it is but of course part of the way of cutting through the conundrum suggested here with some hesitation however is of course it's open to the Court to say that exemplary damages is not a proper source of damage and negligence, or especially in ACC cases.

Elias CJ Or at least where the accident compensation regime applies.

Blanchard J I think we've got to be a little careful to separate our questions of liability and questions of damages.

Pike Yes.

Blanchard J We can't just assume that we can necessarily go straight to exemplary damages as being the only kind of damages ever available for personal injury because the ACC scheme has got gaps in it. Now take an example that it could have occurred here. Assume there was another person present who saw Bell doing all these horrible things and was so traumatised that they had a mental breakdown, even though they weren't physically injured themselves, they could bring a claim for compensatory damages because they're not covered by the ACC scheme. No it's not a fanciful example but it seems to me we have to look at the questions of duty of care without any great regard for the kind of damages that might then flow. First of all we determine was there a duty of care, was it breached and then we turn to the policy questions relating to exemplary damages. I'm not sure those policy questions come in at the earlier stage.

Pike No they suggestion was with respect that if the Court ever did take the step of deciding exemplary damages ought no longer be recoverable in New Zealand, at least in negligence cases, that would not however necessarily affect those nervous shot cases to which Your Honour refers because they could get right up to aggravated damages, but they are damages, they're not punishment, and it's the question of exemplary damages which of course is right such as *Todd*

Blanchard J Well you're saying that there shouldn't be any duty of care imposed because it's not appropriate to punish the Crown where this is a matter of allocation of resources. All I'm saying is I'm not sure that that's a good argument that we should look at the question of duty of care. Is it

appropriate to impose it in a situation where there is an allocation of resources problem.

Pike Oh yes I've no problem with that

Blanchard J And make that decision and if the answer is 'yes we should impose' you then move on to 'well is it appropriate to punish the Crown' and you might say 'well no'. If compensatory damages were available that would have been appropriate, but punishment isn't. But at the second stage

Pike Yes I don't deny that proposition at all Your Honour, that is the approach. In the circumstances here however the idea of imposing a duty of care on the Crown or let's just focus on Community Probation and its systems, in these circumstances I did argue however, would be inappropriate for policy reasons on the sort of analogy of *Hill and Chief Constable* and its progeny in the sense that inevitably one is drawn into what is the allocation of resources and whether they had any option for instance but to have Ms X, with only ten months experience, operating in such a meillior of dangerous offenders.

Blanchard J But would you run a similar argument if there were some parallel statutory provision as there is in s.107(c), but say it was a case against Corrections in relation to escaping prisoners and it turned out that they built the prisons with very thin walls because there wasn't enough money it was said available to be allocated to build stone walls, and so the prisoners got out? Would the Crown be able to run a similar argument that 'oh the problem is that we haven't been allocated enough money to fulfil our statutory duty'.

Pike Possibly, but obviously that

Elias CJ That is hard to accept and it is the statutory duty dimension, because if there is a duty to confine and you negligently don't confine, there's plenty of authority on

Pike Negligibly allowing to escape.

Elias CJ Yes.

Pike Yes there is.

Elias CJ The case here though is that there is a statutory system for public protection and the statutory regime identifies respects in which conditions will be imposed for that end, so it's not an area where government is totally at large and has to decide where it's going to put its resources in terms of achieving public good more generally. There is a statutory framework here of responsibility.

- Pike Well there's a set of objectives certainly and principles. The duties of the Probation Service are to ensure, and that's the words, to ensure compliance by the parolee, or anybody, but I'm talking about parolees, with the conditions of parole. But that's accepted but those are the purposes for which Probation Officers are employed and those are their duties which they owe essentially to the Chief Executive, or the Minister, the Minister in charge of Corrections and through to the
- Elias CJ But which are imposed for the public benefit, for the protection of the public.
- Pike Well certainly they're imposed with one of the features being for the protection of the public, but also it's clear that Probation Officers can make risk assessments. They do all the time. I mean we come back to those areas where
- Elias CJ Well bites on whether there's breach of any duty.
- Pike Well with respect in might also bite onto whether one would impose a duty because of the difficulties imposed in the sense that there is duty to ensure the sentence is carried out, but there's clearly also a discretion in Probation Officers, or a lack of power to do anything unless they believe on reasonable grounds there's a breach of the Act and charge them with an offence relative to it or put recall in, and what we do know, and I mean the Courts know this, and it's not just from the bar, that Probation Officers like Police Officers and everyone else with enforcement powers does use them on a discretionary basis. Does decide no in this case I'm not going to take breach action, or on balance this person's off the rails but on balance I can get them back without putting them back inside, and those risks are taken. Right through the system the risk is taken letting the person out on parole, then the risks are taken by the Probation Officer making individual judgements about it and so on, and society I would submit would say we accept those risks, we accept the fact that there are some thousand or so people amongst us who have serious criminal backgrounds, who are working away in the community, and accept the fact that greater public good is that these people get a job and get out of the criminal mellior and not thrown back into it, and that's what we all accept. And we accept the risk that we will be attacked – we all do.
- Tipping J I would be helped after the adjournment Mr Pike by your coming as you probably intend to, to address what seemed to be the colonel of Mr Henry's argument, that there was here a special and confined group of people who were particularly likely to be at risk and that there was a duty not owed to the public but to all members of this class, because unless he can sustain that he's going to get nowhere.
- Pike Yes Sir I'll do that. It's now 1 o'clock.
- Elias CJ Alright, thank you. We'll take the adjournment now.

12.58am	Court Adjourned
2.18pm	Court Resumed
Elias CJ	Yes Mr Pike.
Pike	Yes may it please the Court, the question
Elias CJ	Oh I'm sorry Mr Henry did you want to?
Henry	I was going to respond Your Honour.
Elias CJ	Yes, I'm sorry Mr Pike.
Henry	Just in answering the point of Mr Justice Blanchard, I take Your Honours to the second amended draft statement of claim, paras.25 and 26. We pleaded both as the defendant and the supervising officer, similarly in 28 and 29, so the pleading is in fact both for the Department and the Supervising Officer as primary parties.
Tipping J	In 28 it's the failure by both to give the warning.
Henry	Yes, not it's pleaded right through as both being liable on the basis that I've put forward and it's paras.13, 15, 16 and 17 that specifically set out what we say the defendant's conduct is, and in 15 we say, so we come back to 13, we plead the knowledge of what the offender was; 15 sets out the defendant and supervising officer had the duty to ensure compliance with the licence
Blanchard J	I understood what was in the statement of claim but you gave the clear impression this morning that you were going to re-plead and drop that.
Henry	No I resile back from that Sir.
Blanchard J	Right.
Elias CJ	So we should proceed on the basis of the draft amended statement of claim, subject to such future amendments as might be made?
Henry	Yes.
McGrath J	With the references to the defendant being references to the Department?
Henry	Yes, that's the Attorney-General sued in the capacity of the Department.
Elias CJ	Yes Mr Pike?

Pike Yes the question before the luncheon break was to be addressed was the question of whether could be said, arguably said that the staff then present that morning at the Panmure RSA were in a class, or a special class of persons that marked them off from other members of the public in terms of an argument presumably that a duty of care would not be owed to the public at large in respect of Mr Bell's alleged proclivities, but came home to roost because of the special danger that he posed in the circumstances of his employment at the RSA. We submit, or the Crown submission on this point is that there was nothing special about the position of the employees at that place. I think it could be accepted that any number of people could be marked off from the general public in respect of Bell, and something like that could be achieved, or attempted anyway, but in these circumstances our submission is that he was a person, sorry I'll start again, that the starting point for marking off those people in those circumstances has to be the proposition that Mr Bell had a propensity known, or ought to have been known, or known, to the Community Probation, to commit offences of the sort he committed on the 8th December 2001. And our primary argument is that there is no starting point for that proposition that he had a propensity to commit acts of violence, especially of the nature and circumstances at that place against people with whom he worked. He would be a risk by hindsight or by that sort of figuring, he would be a risk anywhere where he had access to money. I suspect there can be no real doubt that Bell was on the look-out as he went through the community on parole for opportunities to obtain money dishonestly, whether by theft, burglary or robbery. I don't know that we could really justifiably say to the contrary by what we now know, but the difficulty is for instance if one looks at it this way, if we were to say that we hadn't found the offender for the RSA homicides and ultimately did get, sorry didn't have the amount of evidence we had because there was no survivor, and we did catch Bell, with the Crown to argue that we can lead as propensity or a similar fact evidence, the robbery at the Petrol Station I think would be unwise in the extreme. The circumstances are just far too different. Certainly to the degree that similar fact evidence can be sometimes subsumed under the heading of 'admissible propensity' or 'safely admissible propensity evidence', it would not be safely admissible propensity evidence to show that he was guilty of the crimes committed in the RSA.

Elias CJ Why should that be the test?

Pike For the propensity here?

Elias CJ Yes.

Pike Well the law should at least with respect be consistent Your Honour in those regards. The fact is to say it would be a misuse of language to say that a person who had committed one aggravated robbery with a very long list of previous convictions which contains over the ten or so or more than 10 years of 15 or 16 years, one other offence of minor

violence has a propensity to commit acts of the sort that were committed in those circumstances.

Tipping J So you're suggesting that sufficient risk for tort purposes should be analogised with similar fact evidence for crime purposes?

Pike Loosely speaking, yes.

Tipping J Loosely.

Pike Loosely speaking, but not to the minutia because the test for the Crown is always going to be higher in similar fact cases and it will, but the principles should be the same. Perhaps the onus of proof would be lower, but the principles at least ought to be the same that when we talk about

Elias CJ Why?

Tipping J Why though? I'm with the Chief Justice, why, just to see it's handy or it's helpful to the Crown if it's that way, or

Pike Because there's nothing special about propensity or easing in the criminal law with respect. It is not unique to the criminal law. The idea of propensity is a wider concept. It's used in the criminal law in a particularly selective set of circumstances, but when the Courts talk about propensity reasoning in criminal case, they are using ordinary human experience about

Elias CJ But this is really about risk isn't it, and I would have thought that the Statute indicates that there is an appreciation of risk in the case of paroled prisoners.

Pike Well there always is.

Elias CJ Yes.

Pike In every case.

Elias CJ Yes.

Pike Exactly.

Elias CJ Which is why the standard conditions not monitored here are imposed.

Pike Well the standard conditions are imposed to somehow minimise the risk or to alleviate it, not to reduce it to zero because that can never be done.

Elias CJ No, well no-one would suggest that.

Pike But the

Tipping J What's wrong Mr Pike, without complicating it criminal law concepts, to simply say something like there must be a sufficient risk to a particular group to justify the imposition of the duty of care.

Pike Yes.

Tipping J Something nice and simple like that with a degree of flexibility in it. Mr Henry says there is at least arguably because he delineates geographical proximity, the nature of the enterprise in which this man was working, and there was one third point which I've got note of but I just can't recall off the cuff. And it seems to me that there may be an argument there. That that is enough to create proximity.

Pike Well what we argue with respect is that this would be true if Mr Bell went to work at McDonalds, because there there'd be the equal risk. There's nothing about this alcohol which seems to be sort of Mr Henry's focusing on with intensity, that shows that has any role in this tragedy. He happened to be working at a place where there was alcohol sold. It was a bar, or part of it, it was a social club which had a bar – not unusually. But there's nothing about that that really resonates in terms of what he later did, which was to rob a safe to get money. Nobody knows, or will ever know, whether his desire for that money was to go and buy alcohol

Blanchard J Did he take alcohol?

Pike He did take some alcohol I understand. I don't know how much.

Tipping J But the point is this is it, the alcohol dimension is not the fuel for his rage, but simply the subject of theft, and you can't extrapolate from the presence of alcohol the risk that he was going to use that alcohol to fuel himself up if you like to attack fellow employees. Is that the sort of point you're making?

Pike Well with respect perhaps not quite that sharp Your Honour. The point is made that he happens to be in a place where there is access to money. That's what we say, is the risk factor. As it now turns out

Tipping J And I'm looking at the alcohol and you're saying in effect colloquially, forget the alcohol, it wasn't really a relevant part of the causative process.

Pike Well he certainly wasn't, there's no sign he did not use the alcohol as Your Honour puts it to get what used to be called Dutch courage or to load himself into a position

Elias CJ Isn't that sort of making the whole thing much too particular and aren't we segmenting all of this? Just looking at the case at the highest as we

have to at the moment, you've got somebody who has a problem with alcohol acknowledged on the file. He's working in a place where alcohol is part of the mellior . He's not being monitored to find out whether he is still abusing alcohol. He's somebody who steals and he's a place that has money. I mean I think there's a whole range of factors which possibly bear on the whole question here.

Pike Well I understand the point Your Honour but would submit that the way this is Mr Henry's that Your Honour's recapitulating, but it is essentially a 'but for' argument. It really comes down to the fact that 'but for' the enforcement of a condition that 'oh look if you've got an alcohol problem you shouldn't be looking in the RSA', that might be a proper decision to make and one could say it was not necessarily inevitable

Elias CJ But they have no idea what's going on this man's head.

Pike No.

Elias CJ On the argument that's being put to us because none of the conditions are being supervised and they're there to minimise risk.

Pike They are there to minimise risk, yes, but risk of something, of his re-offending that's true but what I'm simply trying to get across and I'm not making a good job of it is that fact that it's almost serendipity that he happens to be in a place where alcohol is sold in terms of what actually happened, the actual risk for which the liability is sought to be imposed.

Anderson J On the pleadings themselves there's a space of two months between leaving the RSA employment and committing this terrible crime. It's in the draft statement of claim that he had been in fulltime employment with someone else since October and this had been

Pike Yes, I'm having trouble locating the exact sequence but it certain he had

Anderson J It's on the pleadings, that's what you have to go by.

Pike He'd gone from the RSA.

Anderson J So it's not a question of saying this person was allowed to work in a place where drink abounded and he got drunk on the job and smashed people up.

Pike No it's not that sort of case at all.

Anderson J So the drink is just a sidewind.

Pike Yes, well that's what I'm struggling with to get to, to convey to the Court as a submissions that it is the fact that the risk area if anything was that one would have to apply this to anywhere where money was kept. That's what we're saying.

Anderson J One has to distinguish between generally unsatisfactory performance of the supervisory functions on the one hand and on the other hand whether there's been a duty of care that has been breached by failure to warn. It's how it's pleaded.

Pike Yes.

Anderson J And it's a long bow I would have thought.

Pike Yes, the failure to warn and so the risk of him re-offending was of an inchoate nature if I can put it that way. What Probation knew that there was a heightened risk of re-offending, that's what they were told by the psychologist, there's a heightened risk of re-offending, in brackets generally, there's no specific propensity to violence identified post the aggravated robbery intriguingly enough. Notified to Community Probation. So it's true therefore that if he is not kept on the straight and narrow the risk that he will re-offend in some way, especially given this mans huge record of dishonestly, is rather obvious, that is true. The question though is whether there was a duty of care arising from the foreseeability or the general factors that he would as an ex-employee of a place he'd been and having located, knowing that there was a safe in there, knowing the safe had a desirable amount of money for him, would come back into that place and rob it in the same manner rather as he robbed the Service Station, but in a way that was critically different in as much as a degree of violence was gross compared with what he'd showed before.

Tipping J His employment relates to this perhaps only because it provided him with the opportunity of knowing that this was a target worth robbing.

Pike Yes

Tipping J After the event if you like, after his employment had ceased.

Pike Yes I would have to accept that. It is clearly arguable that he knew there was a safe there. We know from the case

Tipping J Yes, but I'm just wondering whether that's enough, because that seems to be that once you factor in the fact that he had already left and went back to rob it, the employment dimension is such that because he was employed there he knew this was a target and he perhaps had some advantages in how to get in and how to plan his robbery and so on.

Pike Well he plainly intended to get in in a way that was quite different from his propensity if you like. He just strolled in, not even disguised

particularly, I think into the Service Station, and robbed it. Here he manipulated his way in intending to pass himself off as a Police Officer. Carrying a guitar case was probably a little odd, but that's what he did, and he intended to inveigle his way into the premises and the tragedy occurred, we have to I think unflinchingly because it turned out that the people who were there were not cleaners or somebody transient, they were people who knew him and he made the callous decision that he was not going to be caught and go back to prison and his purpose was to kill them all and Susan Couch mercifully in one sense of the word survived that dreadful attack, but lived to witness it. But these are circumstances that are so different from the Service Station one, which itself shows no pattern and what we say was the cases which in their wisdom, and I would certainly say that they were unarguable, such as *Hendrick*, which we have in our cases under tab 3 and *Swan*, are cases which indicate where the balance can lie, and they are cases where we come back to Lord Hoffmann to say that a duty of care for the breach of a statutory duty where in connection with the wrongful acts of a third party will lie where there's reliance, the age-old and unarguable tort criteria of proximity, to *Hendricks* as a reliance case, or where there's clear and present danger that ought to be known to the Community Probation that a person has a true propensity and there's a serious risk of an offence occurring, pretty much at the time we speak, i.e. it's imminent, and that's *Swan*. Those two cases are principled examples of the sort of liability which might be proper to impose on the Community Probation Service, irrespective of the fact that it has conflicting statutory duties of public protection on one hand and rehabilitation and salvation of the offender on the other. To impose liability in this case is to take those criteria and to depart dramatically, not incrementally, but dramatically from a setting in which it could ever be said that on an objective analysis of what Community Probation knew there was certainly no question of reliance, there was then an imminent danger to identifiable members of the public that Bell would unleash a, it doesn't have to be a homicide, they don't have to know that, won't unleash an episode of really serious violence against a limited class of persons of whom the plaintiff was one. What we say is that there is no case on the books that goes that far and indeed they all appear to shrink from doing that on the basis that policy reasons dictate one ought not to impose a duty of care of such a generalised nature, but one ought to impose a duty of care where the Probation Officer was asked as in *Hendrick's* case, and I do, although it's a first instance case it's a useful factual instance because at page, if I can just quickly take the Court to page 731

Elias CJ Sorry, which one?

Pike It's under tab 3 of the respondents materials, it's a first instance case from Canada called *Hendrick and De Marsh* and at the foot of 730 and the top of 731 are the reasons why the trial Judge thought that the case could be lifted out of a general duty of care which he presumably would not have sought fit to impose because this man was somebody

who had both a propensity, because he had a psychiatric record which indicated he was an arsonist, had both that and the person into who's home he was let was

Tipping J They key to *Hendricks* is it 731 the paragraph starting 'I hold then' isn't it, and the Judge took this as a case of negligent mis-statement, in other words he actually said to the plaintiffs that this man, who he's putting in their house, 'this man's reliable' and therefore they relied upon that and all the criteria for negligent mis-statement one person directly to another was satisfied, so although it's close on it's facts, in one sense it's poles apart from the facts of the present case.

Pike It is and this is what we point to, because there were two features in the case. One was a clear propensity, therefore that meant that the Probation Officer should not have fudged the answer he gave. Obviously desirous of putting this man somewhere, no doubt in desperation, he fudges his answers. He clearly honestly should have said well the person's not going to steal anything and if I was only asked that I could probably say that's true, but he was asked whether he was reliable and of course at that point the Judge I think rightly replied look, you can't sort of shy away from that question. This person was known to you to have a psychiatric history and three arson events

Elias CJ I thought he didn't have any arson convictions. Oh no, that's *De Marsh*, sorry.

Pike But the psychiatrist had also said that he was a fire starter risk.

Elias CJ I'm sorry,

Tipping J He was distinct risk from the point of view of arson.

Pike Yes, but

Elias CJ *De Marsh* had no convictions for arson it says at 530.

Pike 530.

Elias CJ That's probably why

Tipping What page?

Elias CJ 730. Is that why it was decided on *Hedley Byrne*?

Pike Yes he had a history of fire staring, I'm sorry did I say convictions for arson? I shouldn't have. He had a clear history of fire starting in a psychiatric record which the Probation Officer had, indicating he was at risk of full-on propensity arsonist. The question was asked a

Probation Officer, is this man reliable, ought to have been met with the answer, 'well up to a point except he's likely to set fire to your house'.

Tipping J That would have been a most helpful observation.

Pike Yes. But the

Tipping J Well this was a one-on-one encounter

Pike Yes it was.

Tipping J Between the Probation Officer and the obvious potential victim. It's miles away from our present case.

Pike It is, it is indeed Sir, but the

Tipping J *Swan's* much closer isn't it?

Pike The reason why I instanced it is because it is miles away but it is one line of case in which one would accept, I put it as reliance rather than *Hedley Byrne* no offence here, but it's just a simple reliance case. Someone's asked for information specific, I'm relying on you for my general peace of mind about this person

Tipping J But Mr Henry doesn't say look here's *Hendrick and De Marsh*, analogise from that into the present case. I think you're knocking down a straw man Mr Pike.

Pike Your Honour he may be straw but no I'm not trying to have anyone blow at it. The real point is that

Tipping J I realised immediately I said it that I was leading myself into trouble but

Pike The point of the case simply is an illustration of one track of liability. It doesn't apply here. That's one that the Crown would have to accept as quite difficult to argue against in the circumstances. Our track of liability is the *Swan* track, but that's the other one which we say we accept as well, where somebody with a clear propensity and this is the case there, the offender regrettably was a clear and incorrigible

Tipping J Well that's very close to a one-on-one case too, because didn't they know in *Swan* that he was going into a house with some children under 14 and there was a direct and immediate risk to his

Pike He needed supervision and without supervision, yes indeed.

Tipping J I mean that again with respect isn't very close to the present.

Pike

No it's not close to the present, but that's a case where liability was imposed and we say that these two cases which are not close to the present are ones where liability is proper, come back to your routine bog standard tortious analysis on duties of care generally, which is this case, and it does not come close to the two areas where we say liability is reasonably imposed, it comes to an area where liability is unreasonably imposed because there is nothing special about Bell. There's nothing special about the circumstances of an overworked Probation Officer and Officer in probably the worst area anyone could work in New Zealand for dealing with community corrections, i.e. Mangere, or the Mangere Catchment area. This is a case where simply as we say repeatedly, is that it's a very ordinary case of a very ordinary offender, who simply has not been supervised and is not undergoing what he should be undergoing in terms of community treatment. Some of that is the possible fault of the Probation Officer involved and some isn't. But the point is with respect, in our case that what it does is increases the risk of offending. That's what Probation knows, but it does have no idea, it's not reasonably foreseeable that the risk of offending is likely to be of a violent nature again. Remember he's only got one relevantly violent previous conviction and it happens to be the last one, but after years of offending there's one relevantly violent conviction and the prognosis is he's likely to re-offend in some way if he doesn't have his conditions properly enforced. Now where and when and against who are left at large, and that's why with respect we do rely on the observation among many but we rely on para.[138] of the Court of Appeal judgment, that's Justice William Young's judgment, which generously I would submit, starts off with a proposition, given the judgment in *Akenzua v Secretary of State* which the Court may know was a misfeasance case where Mrs Akenzua's daughter I think was murdered by someone who was let into England unlawfully by an Immigration Officer who was working for the Police. So it was a misfeasance case because serendipitously he breached his statutory obligations knowingly. He had duties to get this man out of the country. He deliberately didn't undertake them because this chap was an informer so it was thought on drug cartels working from Jamaica, in fact he was a multiple murderer and rapist and he did just that when he was let loose in England, so misfeasance was seen as a preavailable tort in that case and the consequences were seen in *Akenzua* as being foreseeable, i.e., the Police knew in London that this man would likely rape and murder somebody. He had a record of doing that. So it starts off that's a misfeasance case, not a negligence one, but the learned President said 'I would be prepared to accept it is sufficient for Ms Couch to show that injury to her as a member of the public was foreseen as a probable consequence, flowing naturally from its alleged dereliction of duty, well that's a finding very favourable to my friend. But even so I do not see this element of the tort as being able to be made out. The worst, sorry, I didn't intend to quote my own submission here, I just realised that, anyway the worst that might legitimately be alleged is the Probation Officer if she thought about the fact of non-enforcement of conditions, may have accepted that there

was a possibility that William Bell would act with violence again was enhanced to an unknown degree, and the learned President said 'in my view that is not enough in the present context'.

Tipping J This is in the context of a discussion of the cause of action and breach for misfeasance isn't it?

Pike No, no, it's not.

Tipping J Is it not?

Pike No.

Blanchard J Which paragraph is it?

Pike 138.

Tipping J It's under the heading of two pages back.

Pike Oh sorry, yes we carry that through. It is I'm sorry.

Tipping J Yes. He's discussing whether or not that ingredient if it were able to be shown for misfeasance purposes

Pike Yes I'm sorry, I've skipped a reasoning block. The point of the proposition is that of course the non-enforcement, the point is that in both negligence and misfeasance which there was a discussion on, the non-enforcement of conditions may have raised a possibility that the risk would act with violence again was enhanced to an unknown degree. So that would be the same risk of course, and negligence as well

Tipping J Well he's hypothesising that the Department actually foresaw the risk.

Pike Oh indeed.

Tipping J But that's got nothing to do with the present allegation has it because no-one is suggesting you actually foresaw the risk?

Pike No not suggesting that but no one at risk suggesting foreseeability that would actually foresee that would happen but the same proposition is true we say, for what could reasonably be foreseen? What could reasonably be foreseen at the worst was that because there was a poor compliance with the supervision conditions, the risk that Bell would re-offend was enhanced to an unknown degree, but it could not be said that the risk would be such that it would fall into people who were ex-work-mates in the circumstances where he would murder them simply to prevent his robbery of the safe and the premises that they worked in and where he used to work in would go undetected and he would not return to prison.

McGrath J So come down to this Mr Pike. You say there's got to be something to lift the circumstances of the Bells of this world out of the generality of risk that's associated with a parole defender and that you want something particular that indicates that individual is a greater risk

Pike Yes even a poorly supervised parole offender.

McGrath J Is that the point of referring to the *Hendricks* and the *Swans* and perhaps *Prince and Gardener*, because in *Prince and Gardener* there was a warning you may remember actually given to the Department. Are you looking for something of a feature that points to the individual as a particular risk?

Pike Yes, indeed, as against the general risk of that will always be the case of a poorly supervised parolee who happens to have a violent propensity that nobody knows about at the time.

Tipping J Isn't with respect, isn't it more a risk to a particular person or group of persons than a particular risk? It's a sufficient risk to a particular person or class of persons?

Pike Well possibly both just to be greedy, but

Tipping J Alright.

Pike Yes.

Tipping J But the emphasis of the present discussion is on whether the person or whether she was a member of a class that before the event could have been foreseen as particularly vulnerable?

Pike Yes I would accept that quite possible she's a member of a class but it's a very large class. It's a class involving persons who are working who are likely to have a person brought into their midst as a co-employee and who are working in circumstances where sums of money, attractive sums of money are readily to hand. It might be in the same premise as it might be next door, but it's no higher than that so the class of persons at the very narrowest would be anybody in the retail sector. Anywhere Bell went would be he'd find money, the opportunity to steal money or to rob that money or to get availability to find how to rob that place.

Anderson J Or steal anything worth stealing, and portable enough to remove. And why just move?

Pike Well, why indeed?

Anderson J I mean once you look at the scope I mean it just embraces practically the whole of the community.

Pike Well it does, it

Anderson J Everyone's got something worth stealing.

Pike Yes. Well they've tried to be reasonable about it. What we can say is he went for a till, he went for a nice sum of money in a till at one stage and possibly in the Service Station

Anderson J But no allegation that he was doing that that had occurred while he was employed ?

Pike No, no, he wasn't, he just staked that place out and saw it was a sole attendant and that was good enough for him. But these were very different circumstances and there was something to be said for being particular about the sort of circumstances not generalising or extrapolating too far in these circumstances because our central proposition is that we all as members of the community understand and take the risk that all parolees will have fluctuating fortunes in terms of the enforcement of their parole conditions. Some brilliant, some poor. There's always the risk of re-offending with any parolee that's got more than a minor record, that that risk is enhanced if the parole conditions are not properly monitored. Either because of incompetence because they just don't get around to it or because of very poor decision-making, both of which have the same effect. People are at risk. What happens is that the risk of re-offending metre moves towards the out of the orange, into the red, the worse the conditions are enforced, then the worse the type of person is that you're dealing with. But these are not unique risks. They are right across the spectrum and what we keep saying, or what we constantly refrain in this case is that there was nothing particular unique about the Bell case. Now that comes as a startling proposition to some ears

McGrath J I suppose the particular circumstances would have to relate to the class though. So they might relate to the place of residence or in this case, to the place of employment, to point to a particular class wouldn't they or to an identifiable class that takes that group out of the general public area?

Pike Well it would have to be, yes indeed, it needs to be out of the general public. The difficulty is with respect is that in a sense if again it was happenstance that the employees were the people who suffered as a result of this dreadful crime, because what Bell did was in a sense was just what he did in robbing the Service Station. Ultimately he came in and he got into the place with a weapon and the rest is history as they say. But any persons could have been at risk in respect of Bell's desire for money.

McGrath J If they worked at a place where it could reasonably be expected large sums of cash would be available.

- Pike That's right, it could be McDonalds or a supermarket with liquor. There's nothing unique about the RSA of course, and I don't think Mr Henry says that. I think he's a little more selective than that, but if we get past the 'but for' reasoning, because that's how the case started and it's drifting a little. The first one was that but for the fact that he should never have been employed in the liquor industry, therefore he should have never have been at the RSA, these people would never have suffered that dreadful event. And of course that's true. If it's true that he should never have been employed in the RSA. But that's totally 'but for' and as we rely on Lord Justice Ward's short description of the difficulties with that as a causation test in all cases, and where I won't take the Court through it, but it's in *Corr and IBC Vehicles* and it's under tab 2. But the point is there that the
- Elias CJ That's causation though isn't it? I'm just wondering whether we
- Pike Well with respect
- Elias CJ Well I wonder, I wonder, and the I know it's been put on the narrowest possible basis because the plaintiff thinks that that's the best way forward, but in the United States – I don't know if you're going to take us to the US cases at all, or the French or German case law on negligence, they're not so worried and after all in an awful lot of negligence law the class is huge. Potential consumers in the case of *Manufactured Products etc.*
- Tipping J Road users.
- Elias CJ Road users. If I use my car on the roads. If you have this background of statutory authority to contain risk through particular methods and you don't actually exercise those authorities, there may be a big issue as to whether actually it's causative of loss or not, but what's the real problem with accepting that there's a duty of care to anyone who might have come in contact with someone as poorly supervised?
- Pike Well that comes back to the fact that you can't necessarily confine it to cases of poor supervision by reason of omission. It may be poor supervision by incompetent decision-making. People who think they are social workers and know better than some of the harder-nosed Probation Officers who say no, no, it's breach, others will say no it's not breach time this person is going to succeed. Those decisions can't be taken out either, and we come to a highly punitive approach to probation which is starting to happen incidentally. That is the real risk and I mean even as the Crown has greater interest as anybody in the community is keeping people free from crime, but even it does accept, and we accept, that the risks of committing offending have to be taken for the ultimate goal of keeping people out of the revolving treadmill of prison. Already we have an offender's warning system

Elias CJ But the issue of whether he should have been released isn't.

Pike No, not it's not the question. The question of whether there should be liability for people who make poor judgments,

Elias CJ But there's a lot more sophisticated analysis of when omissions to exercise discretions rightly lead to liability than simply saying it's a large class or it's a small class.

Pike Well Your Honour I can't take you far on the French cases because I don't know them.

Elias CJ Nor do I, I might say. I just know that they do take a different line as

Pike Well they do but they don't have a doctrine of precedent either as I understand it as we find hard to grapple with, nor do the Germans.

Elias CJ Well I sometimes wonder whether we do in negligence law either.

Tipping J But the appellant here does not seek a duty to the world at large.

Pike No, that's right, but we say well in fact she does. Of course she doesn't but realistically

Tipping J Well he's not asking us to say, or she, is not asking us to say because she is a member of the public, she was owed a duty. She's asking us to say because she was employed by the RSA she was owed this duty.

Pike Well indeed but that would be true if she was employed somewhere less favourable, at McDonalds or a supermarket checkout or anything of those lines at all. It's nothing of course to do with the RSA, it's not even anything to do with places where liquor might be found for sale, because there's nothing about this case that has anything to do with liquor. We've come to that and come back to that. The point is it only has to do with liquor if you accept a butt for analysis. He shouldn't have been there because he has had an alcohol problem; he shouldn't have been training for a liquor licence. I'm not sure that that follows at all, not does it mean he's more of a risk because there's no suggestion he was drinking on the job or doing anything else. This is simply a case where Bell is a person who steals and robs. He is a burglar; he is a false pretender. He's graduated up to aggravated robbery. That seemed to be one would have thought quite unusual from his background. That's what he's done. He has now gone and committed another aggravated robbery because he has found in circumstances from which he's been dismissed at sometime earlier, he knows there's money there; he knows where the safe is; he presumably, at 7.30am, he figured there were cleaners in the place. He came in to rob it and he found tragically for those people that were there that they were people he'd worked with. He knew them all and he murdered them, or tried to murder them simply avoid detention.

- Tipping J Mr Pike could you articulate whether the Crown relies on the fact that he had ceased to be an employee and if so on what basis do you rely on it?
- Pike Well we do rely on it. It's not the 'be all' and 'end all' I think of our position. What it does do is it moves the case further from a specific class of person to a more generalised person that anybody would have been at risk with whom Bell had worked or had contact with or had an ability to see where money, well in respect of whom, he could use or associate with to find or see where large sums of money might be kept and might be reasonably accessible. That's the best we can do with it. It's not a decisive point but it's a point that takes the case and take it back towards a generalised duty of care which we say is not enough. Oh sorry, a generalised risk, not a generalised duty of care. A generalised risk of re-offending. There was just simply nothing about being the RSA except the tragedy of the circumstances.
- Tipping J Well if the risk was to be people in the RSA, does it matter that he ceased to be employed there? The risk is still to the people in the RSA and so it matured.
- Pike Well the risk was to anybody who was there who recognised. It happened to be people he'd worked with.
- Blanchard J But it's not a coincidence that the robbery was in the RSA, it was because he'd had the opportunity of working there and knew about their arrangements and the fact that they held money.
- Pike That's right. I think that's a fair proposition but our submission in relation to that is that that would be true of any of a vast range of vocations that Mr Bell engaged in, in the retail sector.
- Blanchard J So if he'd gone to work in a supermarket it would have been the same. He would have known they had money
- Pike And alcohol, lots of it, yes. Or grocer shops and corner dairies that now sell alcohol.
- Blanchard J Was there a very large sum of money in the RSA?
- Pike I've actually forgotten. Do we know?
- Blanchard J I was just wondering about the analogy with the supermarket where I think they do clear the tills pretty regularly.
- Pike Yes well it's harder going there but if we say talk about smaller retail, less sophisticated retail undertakings that sell alcohol, all of those people were exactly the risk it seems with respect. Anywhere where

there was money to be reasonably accessed, burglary, or by robbery if need be. Obviously he chose robbery for obvious reasons.

Tipping J Mr Pike another question if you don't mind. If there was a risk of injury by dint of his proclivities to violence, now I hear exactly what you say about that, but if there was a risk of propensity to cause injury, does it matter that the injury here was so extreme? It's a risk of the kind but the degree in tort, the degree of harm within the foreseeable kind – *Wagon Mound*, *Hughes and the Lord Advocate* etc etc, is not generally regarded as precluding the duty running for harm of that extend.

Pike No it's not, that's true.

Blanchard J The risk is simply that he would do a robbery using violence.

Pike Yes.

Tipping J The fact that he used such extreme violence wouldn't destroy a duty that otherwise existed would it?

Pike No, no, it normally wouldn't, although that's looking for the compensatory function of the tort of negligence

Tipping J Well never mind compensatory and exemplary at the moment. It's seductive to slide into that but I agree with my brother Blanchard on that point. You've got to leave the question of what relief is available for the breach of the duty as

Pike No I wasn't using it for that purpose but, well the point needn't be advanced.

Tipping J But we mustn't be seduced must we by the horror of what happened here. If these people were within a class in respect of whom they were particularly vulnerable to injury of some kind, the fact that they've suffered so grievously, is that relevant in your submission?

Pike It's not the extent of the suffering, it's actually the nature of the victim that's relevant. No I don't think we would try to run an argument. Look with so much violence it was unforeseeable that would never do was an argument as to why in a non-ACC system the plaintiff couldn't succeed. It was

Tipping J No I just wanted to have that clearly on the

Pike For sure. What we're saying here though is what is different about this is the fact that one could say if one reasonably and calmly as a Probation Officer reflected on it, that the person who was attacked on the initial aggravated robbery was the person who was the custodian of the money, i.e. that person stood between Bell and success. In this case

the people who were killed and attacked did no such thing it would appear. They

- Tipping J They stood between Bell and success surely.
- Pike They had to open the safe for him, but the idea that you would see they had to tell him how to open the safe as I recall it, one of them, the gentleman I think. There was one who had to open it
- Tipping J You seem to me with respect to be descending into the rather fragile at the moment.
- Blanchard J The fact that somebody might have a propensity to attack a money custodian would tend to suggest that anyone who happens to be unfortunate enough to be standing alongside or between the attacker and the money is likely to get damaged.
- Pike Well with respect, I wouldn't agree Sir. The fact is that all we know that Bell achieved his purpose in the garage by attacking and injuring the sole attendant who then fled. There was then the robbery; there was then a burst at the door as he charges at the door and has another thumping effort which indicates something we know now that he's a highly dangerous person which no-one quite appreciated then. But the point here is with respect that the people, the other people, who could not assist, neither assist him in getting into the safe nor prevent him from doing so in the presence of a loaded shotgun in an armed robbery were horribly and gratuitously attacked in one case and murdered in the others. Now I don't know that any Probation Officer could reflect and think that would happen at all. What you would see is that somebody who was instrumental in getting between Bell and to the safe could well suffer injury but then the murders, the subsequent and so on were not at all foreseeable. This was something which was a dimension that succeeds almost any other case in New Zealand criminal history let alone
- Tipping J You're sliding slightly away aren't you from what you accepted a few minutes ago. If they're within the circle of risk of suffering harm, the extremity of the harm I understood you to accept was not relative.
- Pike Well I do, and I'm not sliding away from that at all Sir, no. I accept that the extremity if they were a person who was at risk of harm then the fact that there was a lot more harm than perhaps would be seen as reasonable is neither here or there to the Crown. You can't rely on it. But the question here is that the people who suffered harm here were essentially innocent bystanders to this crime.
- Blanchard J What do we make of the fact that on this occasion apparently for the first time he used a gun
- Pike Well that's different. It certainly is a difference again.

- Blanchard J Because your reasonable Probation Officer thinking about it might have thought well this is a man who has on one occasion committed violence for the purposes of a robbery using a weapon but has never used a gun and
- Pike No he has no record at all of using a firearm and I've checked through. There is I have to say to be scrupulously accurate about this, there is one offence of presenting a firearm and I don't know what the circumstances of that were, but it certainly wasn't to commit a crime. There's no indication it was to commit a crime. But that was ten years earlier or something of that nature. But certainly what we're trying to do is to not extricate oneself from liability on what could be seen as petty-fogging points about the degree of violence or even who was reasonably foreseeably likely to be injured in that narrow and grudging sense. It is done on the basis that what happened here certainly to the plaintiff and to her colleagues who were murdered, was that they were murdered as innocent bystanders once he'd achieved his purpose. That sort of activity is something which was unheralded in what he'd done. There was a slight suggestion, and I have to accept that, a slight suggestion with hindsight because in the robbery of the Service Station having got the attendant out of the way he then certainly went and bashed at the wall with a baseball bat in some sort of burst of terrible temper for some reason and then decamped, but I can't take it further than that. But there are significant differences in what he did in this case which takes it well away from what could have been said as to the 'who would be injured'. That's why we say the duty comes down to one where a large swathe of the public was at risk because of what he did.
- Tipping J Mr Pike if as a matter of policy the law doesn't recognise the risk to the public at large because there is no duty to the public at large, what do the cases say about the degree of risk that must be present in order to identify this particular or special class? Is there anything that might be helpful as to whether it's just a tangibly greater risk or has it got to be a really demonstrable risk to constitute this class, because that could be quite a significant policy issue?
- Pike Yes, we say the cases indicate the risk has to be more of a tangible nature of an imminent or reasonably imminent danger of a particular
- Blanchard J Is this the clear and present danger test?
- Pike Well that's what I've used those words, of course they come from a different area but for the sake of shorthand, yes, and that's the *Swan*
- Tipping J Well clear and present danger is quite a restrictive test. It's got to be actually a danger if you don't identify it as being present you're negligent. That would be quite a hard one you know not many people

other than someone like *Swan* would fulfil that. You're batting for a stricter test is that clear and present?

Pike Well imminent likelihood or reasonably imminent likelihood of specific behaviour in relation to people identifiably at risk, yes.

Tipping J Why the question of imminence? Why does it matter whether it happens in the day or three months?

Pike Well I suspect that the cases look at that because otherwise we're coming back to where we are now really, is that there are always risks with parolees of certain sorts regrettably. The risk needle's always hovering somewhere with a good number of people with violent backgrounds, and drug abuse backgrounds and so on, of being dangerous to other people.

Tipping J But you can always define classes with reference to perhaps a slightly greater risk than the public generally. What I'm looking for is some help as to whether that's enough or whether it has to be a substantially greater risk for example than the public generally.

Pike Well the case for seems to indicate that it has to be something more in the nature of substantial than slight. There's not enough to just to lift in barely above it and one is then struggling to identify why that person is different

Tipping J What cases would you say were particularly helpful from this particular angle of the case? The level of risk to the group or class or person that lifts them above the public generally?

Pike Well I suspect that we can find that in the *Swan* case itself, oh that was Court of Appeal wasn't it? That's in the appellant's bundle which the Court was emphatic about the factual circumstance that this person was a paedophile in close proximity unsupervised to young children.

Tipping J Would you mind just closely focusing on the point of my question, which is are there any dicta or discussions of the enhanced level of risk or is that a feature of the authorities at all?

Pike Yes

Tipping J Because from the policy point of view I can see a clear distinction between take the general risk to the public, we can't accommodate, but if there is a demonstrable and serious risk to a particular group that may be a different matter.

Pike Well it is and we accept

Tipping J But what are the tests that are applied in the authorities to delineate the enhancement of risk, or is that not the way it's looked at?

- Pike Well some of the American ones have used the imminent and possibly have got sort of trapped into those cases which mainly emanate from the State of Washington with so far as our research has shown than other States which cases I've had to do a U-turn on.
- Tipping J You see I'll tell you why because I can see that Mr Henry has a point, that this group, you could say has an enhanced risk at one level, but the question is how much is it enhanced above that of the public generally and is it enhanced enough to justify imposing a duty of care if you're not going to impose it generally.
- Pike Well we say coming back to that other side of proximity, the foreseeability, and we have to tangle these things up because the cases do now. It's proximity and foreseeability and in some ways functions of each others. In the foreseeability stakes, if we look in on that way we say here that the foreseeability of what was done was low, it was not sufficient to impose a tortious liability to get you through to proximity because what was done was in a sense an inside job that using his abilities
- Tipping J Wait a minute please. I really do want to stick to this conceptual point.
- Pike Right.
- Tipping J Proximity it is said arises because this woman was a member of an appropriate class. That's the whole foundation for proximity in the appellant's argument. Now I want to know whether the cases suggest that the class can be defined by reference to the degree of risk above that suffered by the public generally and if so what the tests are. If you can't answer this off the cuff Mr Pike perhaps you should take time on it because speaking for myself I regard this as a very important dimension of it, because the risk to the public is not enough. How much enhancement are we to ask for before we say this is a sufficient risk to this group or this person?
- Pike Well we tried to argue that part of the answer to come to starting point was of course the *Stovin and Wise* general building blocks for statutory liability. We put reliance to one side. We always accept that reliance like the *Henrick and De Marsh* case, a case where liability is properly imposed. We come to this case now and we say that the risks have to be, what we're saying in these sort of cases, that the risk is more obviously than to the public at large. Nobody's arguing about that. The question of elevating that risk goes to in our submission the cases indicate that the Probation Service knew (1) that the person was likely to commit a particular sort of offence; the offence that actually occurred was one that was likely to be committed, and (2) ought to have known that the circumstances of which they were there and then apprised was such that there was a real risk to somebody that that offence would occur. Somebody proximate.

Tipping J So the offence which occurred was one known to be likely to be committed?

Pike Yes that's the propensity argument.

Tipping J Yes, and the person was one against whom it was similarly likely that it would be committed against

Pike They're at special risk because of that propensity.

Tipping J The person is one of a class at risk from the propensity?

Pike Yes.

Blanchard J I think Lord Diplock in *Dorset Yacht Club* uses the phrase 'special risk' that my brother used a moment ago.

Tipping J Lords Reid and Morris however came at it through the concept of control and rather with great respect dodged the question of to whom the duty conceptually was owed but my brother is right about Lord Diplock.

Pike Yes.

Tipping J But my brother is right about Lord Diplock.

Pike Yes Your Honour.

Tipping J But it's that sort of help I'm looking for because my recollection was that the precedent cases, including *Dorset*, do delineate some significantly enhanced risk above that suffered by the public or occasion to the public generally. I just wanted if you could help us with what those cases are and how they formulated it.

Blanchard J Yes, at one point Lord Diplock also talks about a distinctive added risk which is a reasonably foreseeable consequence.

Tipping J He's the only one of Their Lordships in that case who assayed the exercise as I recall it of trying to delineate the class in advance.

Pike Well yes that's right, because there was recognition by Their Lordships that the case was controversial, as indeed it has proved to be.

Tipping J Well if we go into tomorrow I would like help from you Mr Pike as to what the cases say on this. My brother's referred to *Dorset Yacht*. I would be interested to know if there are other authoritative cases which follow that general approach or a higher or a lesser standard of standard of extra risk.

- Pike Well the difficulty is that we don't know of any where the duties as a Probation Officer particularly have been discussed because *Dorset*
- Tipping J I'm not interested in Probation Officers, I'm interested in the general conceptual approach to defining a special class for present purposes.
- Pike Well indeed but in the general law I don't know if we can do that simply because of the, to come-back and sorry stubbornly perhaps, the fact that the *Dorset Yacht* case was one where it's an extrapolation of the liability of Prison Officers who negligently let prisoners out, who then commit harmful acts, and certainly in the course of escaping. Now what they've done is what's accepted across the world now, that if a Prison Officer negligently lets a person go, and that's entirely foreseeable, they'll steal cars or anything else to get away with, they're liable without more, but they are the control cases. The trouble is *Dorset Yacht* is seen by many as just the wrong sort of case to go into cases where there is a breach of statutory duty and the person is not a custodian. They're special cases.
- Tipping J They're absolute control cases. Here we have a case of much more sophisticated or subtle control.
- Pike Or very little control obviously.
- Elias CJ The American cases make that point don't they? There's one in the authorities that I've read that makes that point that you are talking about Probation Officers with a power of control.
- Pike That's right, the difficulty there as we've discovered two things about the American cases just of course to make life more complicated, is that the cases that we've been looking at for some help, like *Sandau* and others of that nature, are actually all from States where there's been a waiver of Sovereign immunity, and that result of that of course is that the State is not in a position to argue that a duty of care in our terms ought not to be imposed. They accept there is a duty of care straight off. The State has no immunity
- Elias CJ It doesn't follow does it?
- Pike It does apparently. They cannot argue that there ought not to be a duty of care imposed. The only question was there a breach of it on the facts in every particular case, and that's what distinguishes their jurisprudence from ours.
- Elias CJ I find that very hard, I accept that you're right in that but it seems hard to believe. I would have thought it simply puts the State in the same position as any private individual.
- Tipping J Waiving Sovereign immunity doesn't ipso facto equal duty of care.

- Pike No they don't. Well the point is they can't argue, well the State's have a situation where the Sovereign immunity is that they're entitled to constitutional protection from official Acts in relation to almost anything they do.
- Tipping J Well those cases aren't, they're not likely to be of any help if they're decided on that
- Blanchard J But are they in a worse position in those States than a large corporation would be where it could say there's no duty of care, let alone one that's been breached? Is the State really precluded from saying that?
- Pike As I understand it the State does not contest liability for whether liability should be imposed in relation to the particular act of the parolee. What it does contest is that it was foreseeable, or that it was a duty of care in the particular case, but what we're arguing for is a wider proposition that duties of care ought not generally to be imposed as a matter of policy unless there are much more specific indicia of liability, that is the special relationship; the knowledge of the Probation Officer; the and propensity and imminence; and the reason for that is that nowhere in New Zealand is it clear that Probation Officers have a duty of protecting the public. I think is where the case has got a little skewed as well.
- Blanchard J Well would you accept the phrase 'distinctive added risk'?
- Pike Well certainly it has to be distinctive and an added risk to the general public, yes, certainly it does, but the difficulty in this case has always been that other than on this existential circumstances that existed on the morning of the 8th December, there was no greater risk in theoretical terms to the people at the RSA than had they been at another retail outlet or another form of enterprise altogether.
- Blanchard J Yes I understand that, but Justice Tipping was looking for some help with a test and I have pulled that test out of *Dorset* and I was just running it past you to see whether you accepted it. I don't know that I will or that Justice Tipping will, but
- Tipping J And it doesn't help much, doesn't add much if I can say, because obviously it's got to be something more than the public generally and I would reserve my position, but I just wanted to know what other Judges had said about other formulations, other insights.
- Blanchard J I'm not sure that the word 'added' doesn't add something. It seems to me that when you're looking at parolees there is a distinctive risk as opposed to dealing with other members of the public
- Tipping J It reinforces that it's got to be additional to the risks suffered or endured , by the public generally, I accept that,

- Pike Yes.
- Tipping J But anyway
- Pike The cases indicate all we can do is point to a case where liability has been imposed and indicate that those cases seem to follow the *Stovin and Wise* speech of Lord, I mean not deliberately, but they track down the same reasoning process that putting reliance to one side, if it's not a reliance case, it's a case where there are special circumstances where the person injured was entitled to rely upon a system working in a way that would avoid the risk to that person and it failed them.
- Elias CJ Yes well I think that the public would be surprised to know that there wasn't a system in place to protect them and I wouldn't want you to think that I am persuaded that there's need for an additional or a special risk - I'm still thinking about the proposition.
- Pike Well indeed Your Honour, the only point one can make, and of course Your Honour's question was never answered in that sense, the only point one can make about there being a risk of that nature or a liability of that nature, is it really sounds in breach of statutory which is not of course what the Act itself would ever contemplate as an assessment of damages, that Probation Officers do not have a duty to protect the public by statute as the Parole Board does as Mr Henry pointed out. The Parole Board does have, well it doesn't have a duty to protect the public, it has a function which it must exercise for the protection of the public and that's almost paramount. When it releases a person and then it gives conditions to make sure that happens, it seems perhaps ironic to say that community probation doesn't have that as a specific duty. I think what it does have is a duty to enforce the conditions of probation - the theory being if the conditions of probation are enforced, the risk of harm to the public will be reduced by a commensurate amount.
- Blanchard J Well isn't there a more direct connection with the Statute? The Parole Board may impose special conditions necessary to protect the public or any personal class of person and then later on in the Statute it's the duty of every Probation Officer to supervise persons placed under supervision and to ensure that the conditions of the sentence or of the release are complied with.
- Pike Yes, certainly Your Honour there is no difficulty with a proposition. It has to be very carefully teased out. The proposition is that probation of course are interested in the safety of the public and that is a major factor of their lives, is the safety of the public. They also have to rehabilitation of the offender at heart, as does the Parole Board. All I'm saying with respect is that in terms of imposing legal duties to protect the public, there is nothing in the Act which carries through the statutory duties to protect the public into the duties of the Probation Officer. They have to enforce it.

Blanchard J Well if the conditions are for the protection of the public or the class of the public and the duty of the Probation Officer is to ensure that the conditions are complied with, surely it follows that there is a duty of that kind on the Probation Officer, namely one that involves protection of the public.

Pike As a function Your Honour, not necessarily a duty. To jump to duty

Elias CJ But the duty is to ensure that the conditions are complied with and if that duty is not complied with and a member of the public is shown to have suffered harm, why should that member of the public not have cause of action and negligence if there was negligence in failing to comply?

Pike Well the general reason for that with respect Your Honour is that the duties are public duties not private duties. They are not duties to the public. If there are duties, and I accept there are, but they're upwards, the duties are to the employer, ultimately to the Minister in charge of Corrections.

Elias CJ Well that's the issue isn't it?

Pike And they're not for

Elias CJ It's where the tort law comes in

Pike They're not directly for the public. What we say this case is about, they may become directly for the public where the Probation Officer should have protected, gone into a different mode and become a protector of a particular member of the public. Now we have the same in the Social Welfare cases. The law bristles with these problems. The Probation Officer stops having the duties only as it were to enforce the law and to comply with their employment contracts, then to enforce the edicts of the Parole Board and all of those public law duties. It has a private law duty when something different happens from the ordinary case. That's why we're here now. Something different happens which puts a duty on them that a member of the public may enforce, not a public duty which a member of the public may not enforce. And that case is the one where there is good and proper reason for the Probation officer who has some powers, not like America, but powers that are much more liberal – our are much circumscribed. Be that as it may that where there's somebody clearly at risk from a person who was not properly complying with their conditions and is a obvious danger by reason of propensity or other indicia to a particular person, then another duty kicks in. We expect the Probation Officer to do what lawfully that Probation Officer can do to protect that person, but we say this case doesn't get to that dimension. It stops short. It's in the area where it's the usual story of under-resourcing; poor but improving management; systems that need enhancing and so on and so on and so

on. It is not simply a case of saying well there's a breach of duty here to the employer, therefore there's an action, because that is the sort of statutory duty-type of approach with respect.

Tipping J The breach of a duty to the public of a statutory kind has never traditionally sounded in damages to any member of the public affected by that breach. There has to be some indicia that if you like as a breach of statutory duty its action or by a certain member or class of the public, or through the ordinary law of tort, the same. I mean I'm interested in the debate but it would be breaking very new ground to say that this duty is owed to compensate any member of the public for breach.

Pike Well that is the argument, yes it has to lift into that special dimension where society and the Court would say Mr Probation Officer or Miss Probation Officer you knew that these facts were occurring; you knew the risks of this person or these persons; you did not step in and take enforcement powers at that point when it was clear that if you didn't do so, it was clear to a reasonable Probation Officer in your position that the sort of crime, as it were now, that has occurred, has occurred, because after all we have to keep remembering in this case that the real villain in this case is Bell, who now by dint caused by the Accident Compensation Legislation, could be sued, of course it's pointless, he has no money and never will have any, but he is now no longer able to convict. He is the person who has committed this dreadful tort. To make the Probation Officer liable for exactly the same tort in those circumstances does require that special and close relationship such that there's imminence and objective knowledge; features of proximity; features of propensity; features of foreseeability, all of which are just not quite reached in this case we say. This case does not get itself out of that ordinary area of the law. But I don't know that I can really assist the Court any more on that generalised point.

Elias CJ Yes thank you.

Pike Now I'm conscious of the time so rather than unless it's the will of the Court otherwise, we have given a substantial amount of written material, well a reasonable amount on exemplary damages and the approach to them, can we simply just colour those in quickly and indicate to the bench that we can't add anything to what's in writing except we do say that two things can occur in this Court. One is that the Court of Appeal *Bottrill* decision may be restored, which gives exemplary damages. If they are going to be punitive it seems as *Todd* argues and other learned commentators argue, if not a few Judges, if they're going to have their proper role as punishment then it should be in relation to deliberative and wilful misconduct and with respect in the *Bottrill* case what has really occurred is that not unsurprisingly given the fall-out from this man's inadequacies, was that one or two instances of apparent incompetence suddenly turned out on the re-trial situation to be hundreds of instances of incompetence, but he was nevertheless

still just incompetent. He was just incompetent for a lot more time over a lot more cases and one suspects that the drama of that and the social suffering from that has turned some heads to the proposition that it's wrong to impose too higher level of conscious wilful misdeeds, but in our submission what we do say is that exemplary damages probably can be traced back to Anglo-Saxon times to a concept called *Whirr* which was before not medieval, pre-medieval, before time when crime and tort were ever distinguished one from the other, and it is has clung in there for ever and a day since, becoming more and more redundant certainly in the areas where society has patched up tort law; it's patched up the criminal law, and certainly rehabilitation and ACC and so forth. We say there's a strong argument for saying it is so archaic, and certainly in terms of the law in negligence that it ought no longer to be available in that area and the learned author such as Todd on whom we rely strongly in his penetrating analysis of it, we think right, and we do make that submission to this Court, but the other side of the coin on exemplaries is that we certainly would support what was said by the Court of Appeal in *Bottrill* in this country, those damages only make sense given their punitive nature, if they are treated almost as they always were. This is a private crime, charged in the course of a civil proceeding by a person who is aggrieved and ordinarily to be taken against the person who has directly harmed them and not somebody else. But in those circumstances we've got it in writing and we'll need to give Mr Henry time to reply, and unless the Court's got any other issues?

McGrath J One matter Mr Pike that I'd like your help on. Is it out of the Crown's case in policy terms that the legislative object of reintegration would be harmed by the recognition of a duty of care? This was part of the reasoning of Justice William Young and I'm just really wondering if it's also part of the Crown's argument - you focus primarily in what you've been saying I feel on the proximity issues

Pike Yes I do. There is some harm to be taken from that but it's harm that been accepted I have to say immediately by community protection that there is now more defensive approach with the offender warning system that was being implemented at the time of these tragedies and has now come in to play. There is now much greater willingness or readiness to put the matter to the Parole Board to really cut back on the amount of individual discretion and to put the matter to the Parole Board and let it determine whether there should be a recall or not, which means a lot more arrests and a difference in emphasis as between rehabilitation and punitive sanctions, but certainly I accept what Justice William Young said. It does change things and a too wider recognition of a tortious liability with the ability to claim exemplaries of course in the appropriate cases will change the face of community parole and change it in a sense for the worse for average offenders who are going to be swept up in this who may not ultimately have been at risk to the community, and that's shame.

- Tipping J What do you say Mr Pike, just in summary, and I regard this as a very important point and I don't want it to be rushed. Are the policy reasons why New Zealand should revert to the Court of Appeal in *Bottrill* rather than follow the Privy Council? Why in New Zealand society do we have the need for this approach whereas in England so it would appear, at least by majority, they see it differently?
- Pike The policy in New Zealand we would submit Your Honour is that the social fabric is somewhat different from England in as much as that certainly in cases for instance take the Police, the ones that exercise English Courts greatly, are Police cases. There is just beginning now the germs of the centralised control of Police standards in England. It hasn't been the case. It is the case in New Zealand.
- Tipping J So what relevance is the Police, and I'm not saying there's none, I just want elucidation as to why you focus immediately on the Police in England. I just can't quite
- Pike Well some of the more recent expressions of exemplary damages have come from Police misconduct and they've come from misfeasance cases relating to the Police, and I see one point of distinction is that the Courts in England, and it's partly speculative, may see the need to become a central policy anchor for Police standards.
- Blanchard J But do you think that that was driving the majority in *Bottrill*?
- Pike No, it wasn't driving the majority in *Bottrill*. What was driving the majority in *Bottrill* was as far as one can ascertain, was the thought that a criminal law analysis, one can be criminally liable for crimes without full mens rea. That seemed to be driving them in a sense, because the minority looked at the point and said you can't; it's punitive; it's like a crime; a crime you need mens rea. Lord Nicholls I think the majority
- Tipping J Would it be of assistance if overnight counsel were to be able to present some or make some notes to present argument to us on your side Mr Pike why we should revert to the Court of Appeal, and on Mr Henry's side, on why we should follow the Privy Council? I feel on an important point like this, with great respect, there's very little help in either set of written submissions at the crunch policy level.
- Pike Well all we have of course is *Todd* which we haven't either attached or illuminated
- Tipping J Well other members of the Court may feel differently but I feel insufficiently assisted at the moment by learned counsel on what is a very important point of policy.
- Blanchard J We haven't got *Todd* have we?
- Elias CJ No.

Pike No, we haven't got *Todd's* article. I've got a reference to it but what I've done is simply unrepentently plagiarised his ideas in drawing together those strands. One issue is that a pure intentional standard will drive down the number of cases which are taken to circumvent the ACC Legislation. This isn't such a case I hasten to let you know. This is a case about public accountability.

Tipping J Would it be helpful for you to have overnight just to encapsulate some points on this so we can have a focused address on the policy reasons which the Crown say should lead us to take us back to the Court of Appeal in *Bottrill*, because at the moment frankly we don't have that.

Pike Certainly.

Elias CJ Can you prepare this overnight or do you want to put it in a bit longer? I'm just mindful that you haven't put the Court of Appeal position in *Bottrill* as your preferred outcome, you put the preferred outcome as being that exemplary damages shouldn't be available at all.

Pike Yes.

Tipping J Well the argument in that respect is even slender, and that would be a huge step to take.

Pike Well yes I accept it would be, well it could be seen as a huge step. It's now focused in the cases of ACC-type cases where there is an ACC bar negligence. It could be extropolated to say across the board in negligence

Elias CJ Well it might be in any case where there is a system of compensation Mr Pike, it might not just be in the ACC situation.

Tipping J And where we have a Statute that recognises the existence of exemplary damages we've got all sorts of issues in that area as to whether or not we can simply say 'well actually Parliament, you're quite wrong. You're wholly aware of the time right but we're going to undermine it'.

Pike Well that's true

Tipping J I just feel

Pike But the *Ayrshire Employers* case for once I think comes out they're in the indicia of that. The common law can shift and Parliament might at times be left high and dry.

Tipping J Yes but that's a whole fabric dimension of the problem if we're invited as you move to abolish them

Blanchard J I'm not sure that we could abolish them given the statutory recognition, but the statutory recognition is not, or would not be inconsistent with the return to the Court of Appeal's position in the *Bottrill* case.

Tipping J Well I agree entirely, but you see

Pike No I'm happy to focus on the more realistic of the options.

Tipping J Well I don't know. I don't want you to feel under pressure of time.

Pike The only difficulty is that unfortunately I've got to go to Australia tomorrow, so

Tipping J But wasn't this case set down for two days?

Pike It was one wasn't it? One day.

Tipping J What, I understood two.

Pike No it was one day.

Tipping J Am I wrong. No one told me that.

Pike But that's alright I mean I can certainly be here in the morning and I don't need to leave until mid-afternoon, but

Tipping J Well if I'm wrong I apologise, but I had a firm view that we were here for two days and I thought well that's going to be quite tight from the point of view of the very important matters that we've got to discuss.

Pike Yes, but I can do it in writing certainly.

Tipping J But I don't like that idea. I think that exchange between counsel is important.

Pike Something like this in writing.

Elias CJ It may be that we should take a short adjournment and discuss it but it may be that we will need to if this matter is to be pursued and there's been a slight difference the view expressed so far on that. It may be that we would need to reconvene.

Pike I'm sorry that I got you into this but

Elias CJ No, I would be interested in a considered response to the point made by Mr Henry that, what was the point, that exemplary damages in an ACC context may be necessary to express denunciation for conduct, in other words we used to have damages of a farthing so that people could get judgement for some sort of redress. I'm not sure that that mightn't be in part what Parliament was looking for.

Tipping J I think it's very important and there are some quite subtle strands in play here that we must not rush.

Pike No I entirely agree Sir, I don't want any party to that sort of precipitate submission making either.

Tipping J Well the only way out of it is for us simply not to deal with the point at all, but Mr Henry agreed with me – others may disagree – that it would be highly convenient for the Court to deal with it before the trial, if there is to be a trial.

Pike I think that it is irrefutable that it needs to be dealt with before a trial otherwise Your Honour's totally correct, it could come full circle.

Elias CJ I think we'll take a short adjournment and then if we are to adopt that sort of course of inviting some further submissions on the exemplary damages point, we'll invite you Mr Henry to respond on the other matters so that we have the full argument in our minds.

Henry I could just indicate I do agree with what Mr Justice Tipping is suggesting. I think that is an appropriate way.

Elias CJ Yes, well.

3.55pm Court Adjourned
4.02pm Court Resumed

Elias CJ Mr Henry we will hear you in reply on duty of care and if we get to that point we'll seek full submissions in writing and we convene to hear argument on exemplary damages.

Henry When would Your Honours intend to reconvene in that case?

Elias CJ I don't Mr Henry, it depends where we get to on duty of care.

Blanchard J You shouldn't take that as any sort of signal that we've formed a view. We haven't even discussed it amongst ourselves.

Henry Oh no I fully understand that, it's just whether tomorrow's going to be used as well.

Tipping J Oh no.

Blanchard J No, no, no. What we would envisage doing is actually determining the question of whether or not there is a duty of care, delivering judgment on that, and if there is a duty of care then reconvening to decide the other point.

Henry That's understood Sir.

Elias CJ I thought that's what I said.

Henry I wish to only deal with a few very quick points on the duty of care and the reason for that is my job is to assist you with the debate and I think the debate as always in this area of the law has run in many directions and you make a risk sometimes of confusing these. The first point we want to make is really a factual one and my client instructs me that she certainly was not aware that Mr Bell had ceased employment with the Panmure RSA and I'd like to turn to para.22 of the statement of claim because I suspect that paragraph's been relied upon to say that he'd been out of employment there for two months, because the pleading is that the Supervising Officer prior to 8th December 2001, knew that Bell had been working at three part-time jobs, so the pleading is he's had three part-time jobs. The particulars go to an on-strength report for Mr Bell because he was being sentenced on an assault charge for an assault he'd committed while on parole. And the report says since his release I cannot fault Mr Bell's compliance in terms of his reporting requirements. It is noted that Mr Bell has completed an Alcohol and Drug Programme and has remained abstinent since his release. That is an entirely false statement made to the Court by this Probation Officer. To his credit he has completed a Liquor Licensing Qualification certificate in order to advance his career options. A referral has been initiated for the next Straight Thinking programme and Mr Bell is awaiting confirmation of the initial assessment. It is envisaged that upon acceptance he would need to commence this programme January 2002. Employment: Since Mr Bell's release he has been proactive in finding employment. He has had three temporary positions and states he is now employed full-time with Action Labour since October 2001. He is not employed full-time with Action Labour. Action Labour is a labour pool. They have a diary with people's names. They ring up 'can you work for a day today'? Yes they say. Action Labour did not have a permanent job for Mr Bell. That is false.

Anderson J The problem is that the only whatever in your draft pleading to the currency or otherwise of his employment is this one that says he's been employed full-time with someone else.

Henry Well as far as my appellant client is concerned he was still employed when she opened the door.'

Anderson J Well where's the allegation if it's relevant?

Henry It's a relevant allegation Sir because it has come from the bar and the bench that apparently he wasn't employed. We did not consider that to be anything other than inherent.

Tipping J Well surely this point is capable of being determined one way or the other, and surely counsel can agree what the true position is and inform us.

Henry But he's not a paid employee. He was there for work experience. He was not being paid. There's no employment record

Tipping J But if he was still there, I won't use the word 'employed' there, but if he was still there if you like in any meaningful sense at the time of the tragedy well that's a wholly different matter from the fact that he hadn't been there for two months.

Henry The plaintiff's instructions to me, so I don't know the answer, is that as far as she was aware he was still there.

Tipping J Well this surely can be a matter of records.

Blanchard J Well presumably that's what you're going to plead.

Henry Well we're going to have to find out because clearly there's a Court record that I wasn't aware of until today that in sentencing he was saying he was no longer there and he'd been dismissed.

Blanchard J Well could counsel confer on that and send the Court a memorandum confirming the position?

Henry Oh absolutely Sir, absolutely.

Anderson J Including whether he was employed or whether he was just working there under some voluntary scheme.

Henry No, we will investigate and we can ask the management at the Panmure RSA what the position was.

Tipping J They should be able to agree what the true position is.

Henry We should be able to agree. Mr Pike and I have got a good relationship so I don't see it as a problem.

Blanchard J The real question is whether he was doing some sort of work at the RSA currently at the time of the tragedies.

Elias CJ But Mr Pike doesn't place a huge amount of reliance on whether he was or he wasn't from his submissions.

Tipping J You know I'm not sure what my view on that will be so I'd like to know what the true position is.

Henry It came out of the debate I think which is has taken us both I think by surprise. The other particular matter I wanted to address was Mr

Justice Tipping's point about what is the legal test in a theoretical view to somehow distinguish the class, and I'd simply take you Your Honours to *Hill and the Chief Constable*, and that's volume 2 of my bundle, and take you to page 261 of the bundle. Their Lordships there have considered *Dorset* and having gone through the passage of *Dorset* that Mr Justice Blanchard point out, carried on and approximately half-way down the page 'Miss Hill was one of a vast number of the female general public who might be at risk from his activities but was at no special distinctive risk in relation to them. Unlike the owners of yachts moored off Brownsea Island in relation to the foreseeable conduct of the Borstal boys'. So the Court here is rejecting, so they're coming from the opposite direction, rejecting that she is able to somehow show she's in this proximate class.

- Tipping J That's helpful Mr Henry, that's exactly what I was looking for.
- Henry Further down Sir they muddy it by using different words. At the very bottom of that paragraph they talk about Lord Diplock in the *Dorset Yacht* case, 'that in his view no liability would rest upon a prison authority, which carelessly allowed the escape of a habitual criminal for damage which he subsequently caused, not in the course of attempting to make his getaway to persons at special risk, but in further pursuance of his general criminal career to the person or property members of the general public'. So again it's a double negative but they're now talking special risk.
- Blanchard J Well I think that special risk is just a reference back to special distinctive risk.
- Henry That could well be right Your Honour. What I'm just trying to do is highlight where the words are and again at the very bottom of the page again it says 'can't be regarded as a person at special risk'. And I
- Tipping J That's in the speech of Lord Keith and basically everyone agreed with Lord Keith didn't they?
- Henry Everybody agreed, yes. For my part I hope that the way we have put it is we are saying that we are in this special risk category and that was the three propositions that I discussed with His Honour Mr Justice Tipping and I can remember the first two were but not the third.
- Tipping J I can tell you what the third was Mr Henry. It was geographical proximity; nature of business; and nature of offence, prior offence.
- Henry Prior offence, that's the bases we say that leads them into that category. Now unless there's any particular matter Your Honours are concerned about in terms of reply, I don't believe I can really assist the debate much further.

Tipping J Do you accept Mr Henry that delineating the class cannot be done with the benefit of hindsight?

Henry It's done through the eyes of the reasonable Probation Officer in the shoes before the offence. It's not a hindsight test.

Tipping J I felt sure you would confirm that but I just wanted that clear.

Elias CJ Yes thank you Mr Henry, that you counsel. We will take time to consider our decision and if necessary we'll seek further submissions and a further hearing on the exemplary damages.

4.12pm Court Adjourned