BUDDLE FINDLAY
BARRISTERS & SOLICITORS, NEW ZEALAND
AUCKLAND • WELLINGTON • CHRISTCHURCH

Clarendon Tower
78 Worcester Street
PO Box 322, DX 16805
CHRISTCHURCH
Telephone 0-3-379 1747
Fax 0-3-379 5659

TC Weston/JM Appleyard
CCC717480

16 May 1995

COPY

Mr PW Mitchell
Office Solicitor
Christchurch City Council
PO Box 237
CHRISTCHURCH

Dear Mr Mitchell

Civic Childcare Centre - Possible Causes of Action against Police and Ministry of Education

1. You have asked us to report to you regarding possible causes of action against the Police and/or the Ministry of Education arising from representations made concerning former employees of the Civic Childcare Centre.

Action against Police

2. The starting point in considering any action against the Police is the general proposition accepted by the Courts that there is no question that a Police Officer like anyone else may be liable in tort to anyone who is injured as a direct result of his acts or omissions.

3. It is for this reason that Police Officers have been found liable in damages for assault, unlawful arrest, wrongful imprisonment and malicious prosecution and also for negligence.

4. However it is probably helpful for you to appreciate that the line of cases which relates to public authorities applies equally to the Police. In particular we point out the general proposition that if damage in any particular case results from a decision of policy or discretion it is not susceptible to review by the Courts in a negligence action. In the words of Lord Wilberforce in the well known Anns case:

> *"Most, and probably all, statutes relating to public authorities or public bodies, contain in them a large area of policy. The Courts call this discretion meaning that the decision is one for the authority or body to make, and not for the Courts. Many statutes, also, prescribe or at least presuppose the practical execution of policy decisions: a convenient description of this is to say that in addition to the area of policy or discretion, there is an operational area. Although this distinction between the policy area and the operational area is convenient, and illuminating, it is probably a distinction of degree; many "operational" powers or duties have in them some element of "discretion". It can safely be said that the more "operational" a power or duty may be, the easier it is to superimpose on it a common law duty of care."*

5. A good example of a successful "policy" defence in a negligence action relating to the police is the decision of the House of Lords in Hill v Chief Constable of West Yorkshire. In that case it was assumed that in the course of the investigations into a series of crimes (the Yorkshire Ripper case) the Police made a number of mistakes which they would not have made if they exercised a reasonable degree of care and skill as would have been expected to be displayed in the circumstances by ordinary competent Police. However the claim was struck out.

6. The Court's reasoning is useful:

> *"From time to time they make mistakes in the exercise of that function but it is not to be doubted that they have applied their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of a function being carried out in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the Police cannot be excluded. ... The manner of conduct of such an investigation must necessarily involve a variety of decisions to be made on matters of policy and discretion, for example as to which particular line of enquiry is most advantageously to be pursued and what is the most advantageous way to deploy the available resources. Many such decisions would not be regarded by the Courts as appropriate to be called in question yet elaborate investigation of the facts might be necessary to ascertain whether or not this was so. A great deal of Police time, travel and expense might be expected to have to be put into the preparation of a defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of Police manpower and attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened and re-traversed, not with the object of bringing any criminal to justice but to ascertain whether or not they have been competently conducted. I therefore consider that Glidewell LJ in his judgment in the Court of Appeal was right to take the view that the Police were immune from an action of this kind on grounds similar to those which in Rondel v Worsley [1969] 1 AC 191 were held to render a barrister immune from actions for negligence in the conduct of proceedings in Court."*

7. Similarly in a Canadian case G v Superintendent of Family and Child Service for British Colombia [1989] 61 DLR (4th) 136 a decision by social workers to remove the plaintiffs' children from their home after having received information that they were at risk of sexual abuse was made in the bona fide exercise of a discretion, and although the defendants had made significant errors of judgment, it could not be said that there was a want of due care.

8. The Court there held:

> *"In an action for breach of statutory power involving the exercise of a discretion conferred by statute, liability will not be imposed on the basis of errors in judgment in exercising that discretion. There can be no liability if the discretion is exercised with due care, and there will have been a want of due care only if there has been a failure to carry out the duty to consider the matter or if the conclusion reached is so unreasonable as to show a failure to carry out the duty. Although the defendants made significant errors in judgment it could not be said that there was a want of due care. The defendants did not fail to carry out their duty to consider the matter nor did they reach a decision so unreasonable as to show failure to do their duty. The errors of judgment flowed from their belief based on grounds of some substance, that*

> *the children were in need of protection. Nor did the defendants exceed their authority by taking into account the risk of sexual abuse. It cannot be accepted that the statute authorises apprehension only for the purpose of preventing the continuation of an existing condition of abuse and not for the purpose of eliminating the risk of sexual abuse."*

9. In that case the appellant submitted that the insistence of social workers on continuing to treat the case as one of sexual abuse notwithstanding all of the contrary opinion and contrary indications must establish a degree of negligence amounting to bad faith and that liability must follow.

10. The defendants denied any negligence but also asserted that anything done or not done by them or omitted was in good faith in the exercise of the powers conferred on them by statute.

11. The Court found that it was not a case in which it could be said that the defendants in exercising the discretion imposed on them acted in abuse or excess of power. Clearly it was a case in which a discretion was vested in them. There were errors of judgment in exercising that discretion but that is not a proper basis for imposing liability.

12. Adopting the words of Lord Reid in Home Office v Dorset Yacht Co Limited [1970] 2 All ER 294 the Court found that:

> *"There could only be liability if a person entrusted with discretion either unreasonably failed to carry out his duty to consider the matter or reached a conclusion so unreasonable as again to show failure to do his duty."*

13. In the Canadian case the fault established against the social worker was that *"she cared too much"* and she got *"too close to the case"*. However, there was no absence of good faith. There was no collateral purpose and the errors of judgment flowed from their belief based on grounds of substance that the children were in need of protection.

14. It has not been possible to find a case analogous to the present situation where the Police have made statements on which a third party (the Ministry of Education) has relied. However, the analogy to Rondel v Worsley in Hill v Chief Constable of West Yorkshire indicates that the Police will not be liable for misstatements providing that they are acting in the course of their duties to suppress crime (which it is clear includes the elimination of the risk of future abuse) and that they acted in good faith.

15. In a more recent decision the English Court of Appeal has gone as far as saying that there is a *"public policy immunity"* for Police in relation to the investigation and suppression of crime - Osmon v Ferguson [1993] 4 All ER 344.

16. This is similar reasoning to that used by Williamson J in the application by the creche employees for costs in criminal cases. For example at page 10 of the judgment under the heading *"Good Faith"* he refers to:

> *"The various steps taken by the Police in response to complaints from "sincere, articulate and concerned parents" and in particular to the specialist interviewing and the fact advice was taken from the Crown Solicitor."*

17. He states

> *"In view of the evidence of the children the consultative procedures followed by the Police I consider that the only conclusion which can be reached is that the prosecution did act in good faith."*

18. In summary it is our view that provided the police are able to show grounds on which they formed the view that the children were in danger of future abuse any action in negligence is likely to founder. Based on the affidavit evidence and interviews available at the time it would be almost impossible for you to show that there was no substance for those beliefs.

Ministry of Education

19. We believe that the same considerations will apply to the Ministry of Education in the light of their statutory responsibilities in respect of childcare centres.

20. You will recall that during the trial an issue arose regarding the evidence of B Cooper. Mr Cooper prepared a brief of evidence and confirmed to us that he was happy with its contents. On that basis we informed the Court that Mr Cooper would be called to give evidence the following morning.

21. Subsequently, due to the involvement of the Crown Law Office and Mr Deaker of the Ministry of Education in Wellington, Mr Cooper's evidence was changed to reflect the official position of the Ministry in relation to the case.

22. Mr Cooper's original evidence was to the effect that before he attended the meeting with John Gray and other representatives of the Christchurch City Council on 2 September 1992 he had reached a decision that the children were at risk and on that basis the licence for the Civic Childcare Centre would be cancelled. His evidence was that the discussion with Mr Gray was a matter of mere courtesy.

23. As a result of the Crown Law Office's intervention the evidence was softened to indicate that the Ministry met with Mr Gray on 2 September in order to consult with him over the issue of suspension and/or cancellation of the licence and that no decision had been made prior to the meeting.

24. Whichever scenario is correct it is clear that the Ministry of Education will be able to point to the exercise of a discretion made on the basis of their belief that the children were at risk. It must be recalled that the Ministry of Education (unlike the Council) had access to affidavits prepared by parents which would enable them to reach a decision as to whether the children were at risk or not.

25. Indeed in Mr Cooper's evidence he was careful to say that the Ministry insisted that the Police provide them with copies of the information they had available to them so that the Ministry could make a decision on how the discretion regarding suspension/cancellation should be exercised.

26. Like the case involving the Canadian social workers we believe provided the Ministry will be able to show that they acted in good faith in relying on the information supplied to them by the Police there could be no success of claim in negligence against them. This is so notwithstanding their very unhelpful actions about Mr Cooper's brief of evidence.

Tort of Inducement of Breach of Contract

27. One other area we have also explored is the possibility of a claim against the Police and/or Ministry of Education in relation to the interference in the contractual relationship between the Council and its employees. This is commonly called the tort of inducement of breach of contract. The modern form of the tort stems from Lumley v Gye 118 ER 749 where the defendant had induced a singer to break her contract with the plaintiff and engaged to work for him by an offer of higher wages.

28. The tort has most often been applied to the inducement of a breach of an employment contract.

29. There are five elements to the tort:

    (a) There must be a legally enforceable contract in existence.

    (b) The defendant must have known of and deliberately intended to interfere with it, in order to harm or bring pressure to bear on the plaintiff.

    (c) The interference may be occasioned either by direct persuasion or interference or indirectly, but if the latter some independently unlawful means must be shown.

    (d) The interference must have been without lawful justification.

    (e) The interference must have occasioned loss to the plaintiff, or if an injunction is sought, there must be a clear indication that such loss will occur.

30. With reference to your situation the difficulties in bringing a claim against the Police/Ministry of Education also impact on element (d) that the interference must have been without lawful justification. We now consider that element further.

31. In certain circumstances the Courts have been prepared to recognise that the defendant has an interest or right equal or superior to that which the plaintiff has in having the contract protected from interference. Such a defence is clearly recognised and is rarely pleaded successfully. The range of conduct which will constitute lawful justification is very uncertainly defined and the cases simply illustrate what will not constitute justification.

32. A very general test was suggested by Romer LJ in Glamorgan Coal Company Limited v South Wales Miners Federation [1903] 2 KB 545. He said:

> *"Regard might be had to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and ... to the object of the person in procuring the breach."*

33. This passage has been widely accepted and cited. However, the factors mentioned are recognised as very general so that it has always been emphasised that the establishment of the defence will turn always on the particular circumstances of each case and that no general rules can be laid down.

34. When justification is considered the defendant's motives become relevant. It is clear that neither good faith nor an absence of malicious intent will be a sufficient defence nor is it enough that the defendant's motives were altruistic or disinterested.

35. However, a plea of justification has been successful where a shift in policy has caused the case to be taken outside the general statements listed. Thus there may be cases where the defendant can justify his or her action as a moral obligation because of the duty, for example, as a doctor or a parent to give advice in circumstances. An argument of acting in the public interest was successful in Brimelow v Casson on interference with a contract under which the low wages paid to women had forced them to resort to prostitution and in Stott v Gamble where Licensing Justices were held to be justified on banning a film, despite the consequential interference with the plaintiff's contract to hire it out.

36. It has been recognised that justification may be established on the exercise of some equal or some superior right, for example, the upholding of a pre-existing contract or right under statute. No doubt the Police and/or Ministry would merely argue that they were upholding the discretions conferred on them by statute to take action to suppress crime and to suspend and/or cancel the licence of the creche.

37. In Hawgen v Canterbury Clerical Workers IOUW (unreported, HC Christchurch, 18 February 1981) the plaintiff and her employer were covered by the clerical workers award which contained an unqualified preference clause. The plaintiff resigned from the Union after becoming involved with a rival group. Having unsuccessfully persuaded the plaintiff to comply with her legal obligations the Union wrote to her employer threatening to bring proceedings for breach of award. The plaintiff was dismissed and sued the Union for inducing breach of her contract of employment.

38. Roper J in that case alluded briefly to the possibility of the Union relying on the "public interest". It was suggested that such an argument might have been developed because of the public interest in a Union's moral obligation to its members in the enforcement of the unqualified preference clause in the award. Roper J however preferred to concentrate on the upholding of the unqualified preference clause as an exercise of an equal or superior right, in this case the existence of a prior inconsistent contractual obligation. In New Zealand such enforcement could have been classified as the upholding of a statutory right.

39. Taken in the round it is our view that the situation existing on 2 September 1992 is one where the Court would take the view that the Police's statutory duty to suppress crime but more specifically the Ministry's statutory right to suspend the licence overrode the Council's right to its contract with its employees. This is sufficient justification for their actions and the tort is unlikely to be made out. In any event we doubt that the latter part of the second element would be satisfied in this case.

Conclusion

40. Our conclusion is that the possibility of a claim against either the Police or the Ministry of Education is highly speculative and is likely to be constrained by overriding concepts of "public interest".

Yours faithfully
BUDDLE FINDLAY

T C WESTON / J M APPLEYARD (Ms)
Partner / Solicitor

F:\JXA\0010457.01