Systemic Negligence and Direct Crown Liability: Conceptualising Issues of Justiciability, Proximity and Breach

MADELEINE HAY*

In New Zealand, systemic negligence claims present a particular challenge to the Crown Proceedings Act 1950, and to the law of negligence. The Act does not provide for direct liability of the Crown, leaving plaintiffs who cannot frame their claim in terms of vicarious liability without a remedy. In this article, I argue that addressing this justice gap requires more than merely legislative change because systemic negligence claims raise significant conceptual issues in the areas of justiciability, proximity and breach. However, I conclude that none of these "doctrinal hurdles" presents a complete bar to systemic negligence claims. Justiciability will generally be available for decisions not to fix fundamental flaws in established Crown systems, while claims involving a static, physical hazard are likely to succeed on the current approach to proximity. Moreover, I argue that courts should also take an active role in shaping the law in this area by adopting a "policy approach" to proximity, and by embracing Christian List and Philip Pettit's theory of group agency. While these approaches may be novel and rather ambitious, they offer a conceptually clean way forward: towards a robust doctrine of direct liability.

I INTRODUCTION

> I should be sorry to think that, if a wrong has been done, the plaintiff is to go without a remedy simply because no one can find a peg to hang it on.
>
> —Lord Denning in *Abbott v Sullivan* (dissenting)[1]

In New Zealand, a plaintiff who wishes to sue the Crown in tort cannot sue the Crown directly. Under s 6(1) of the Crown Proceedings Act 1950, they can only sue the Crown vicariously, that is, "in respect of torts committed by its servants or agents". This provision does not appear to allow for liability according to the concept of systemic negligence: where the fault for failing to

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1 *Abbott v Sullivan* [1952] 1 KB 189 (CA) at 200 per Lord Denning dissenting.

prevent harm lies with the internal processes of the Crown as an organisation, rather than with its individual servants. In these circumstances it may be inappropriate, or even impossible, to identify a particular Crown servant whose negligence caused the harm, leaving the plaintiff with no means of redress under s 6(1).

In Part II of this article, I lay out the current law on direct liability of the Crown in negligence, highlighting the justice gap created in cases of systemic negligence. To fill this gap, it is vital that plaintiffs are allowed to sue the Crown directly in negligence; a provision for direct liability is therefore necessary. However, while a provision for direct liability is necessary, it is not sufficient to hold the Crown liable for systemic negligence claims. Such claims present a considerable challenge to the law of negligence, which has traditionally focused on questions of individual wrongdoing. There are three doctrinal hurdles that claims of systemic negligence must overcome to establish liability: justiciability, proximity and breach. In Part III, I address the first of these hurdles: justiciability. Systemic negligence claims tend to attack the policies, resourcing and priorities behind Crown systems — matters of high policy that are generally considered non-justiciable. Does this mean all systemic negligence claims will be non-justiciable? Using concepts of political interference and judicial competence to guide my analysis, I argue that decisions not to fix fundamental flaws in established Crown systems may be justiciable.

In Part IV, I move to the question of proximity, the second doctrinal hurdle. Only exceptional claims involving a static physical hazard are likely to succeed on the current approach to proximity. However, I contend that courts should adopt a "policy approach" to proximity, which reflects the reality of Crown responsibility to its constituents. On this basis, many systemic negligence claims would overcome the proximity hurdle. In Part V, I consider the difficult question of breach: how can the Crown, as a collective of government departments, breach a duty of care? Who is the reasonable person in these circumstances, especially when there is no individual Crown servant at fault? Using Christian List and Philip Pettit's theory of group agency, I demonstrate how the Crown can satisfy the mental breach element. Further, I discuss the question of moral responsibility in tort law. I conclude in Part VI that both legislative and common law reform is necessary to ensure the robust development of direct liability. Not only must Parliament amend the Crown Proceedings Act, the courts must also reconsider the current individual-centric approaches to proximity and breach.

II SYSTEMIC NEGLIGENCE AND DIRECT LIABILITY

The Current Challenge Under the Crown Proceedings Act 1950

In New Zealand, a plaintiff cannot sue the Crown directly in tort. This is because the Crown is immune from civil suit at common law:[2] "[t]he king can do no wrong".[3] Against this background, the Crown is liable only as provided in s 6 of the Crown Proceedings Act. Section 6(1) reads:

> Subject to the provisions of this Act and any other Act, and except as provided in subsection (4A) or (4B), the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject—
>
> (a) in respect of torts committed by its servants or agents;
>
> …
>
> provided that no proceedings shall lie against the Crown by virtue of paragraph (a) in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his or her estate.

In other words, the Crown is liable in tort for the actions of its servants or agents as though the Crown were a private person: it has vicarious liability. Importantly, s 6(1) does not refer to claims against the Crown for direct liability. It has been suggested that the courts might interpret s 6(1) consistently with s 27(3) of the New Zealand Bill of Rights Act 1990 (NZBORA), which requires equal treatment between the Crown and individuals in the bringing and defending of civil proceedings.[4] However, the traditional view is that only vicarious liability claims may be brought, and that the Crown remains immune from direct liability at common law.[5]

In this way, s 6(1) does not appear to allow for liability according to the concept of systemic negligence. Systemic negligence is where the fault for failing to prevent harm lies with the internal processes of the Crown as an organisation, rather than with its individual servants.[6] In such cases, it may be inappropriate or even impossible to assign blame to an individual Crown servant. The current position creates a justice gap. Victims of systemic negligence who cannot identify a particular Crown servant to establish a case for vicarious liability are left with no means of redress under s 6(1).[7]

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2 *In re M* [1994] 1 AC 377 (HL) at 395.

3 William Blackstone *Commentaries on the Laws of England: In Four Books* (Cadell, London, 1783) at [246].

4 *Strathboss Kiwifruit Ltd v Attorney-General* [2018] NZHC 1559 at [1304]–[1305]; and *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 [*Couch No 1*] at [36].

5 *Strathboss Kiwifruit*, above n 4, at [1274].

6 At [1261].

7 Stuart Anderson "'Grave injustice', 'despotic privilege': the insecure foundations of crown liability for torts in New Zealand" (2009) 12 Otago LR 1 at 3.

Consequently, plaintiffs have been forced to artificially fit their claims of systemic negligence within the constraints of vicarious liability. This problem can be illustrated by two major cases from two comparable jurisdictions: the New Zealand case of *Couch v Attorney General* (*Couch No 1*),[8] and the United Kingdom case of *Michael v Chief Constable of South Wales Police*.[9] In *Couch No 1*, Susan Couch was seriously injured in an attack by William Bell, while he was on parole.[10] While her claim focused on the parole officer responsible for Bell, I contend that a claim of systemic negligence would have been more appropriate. Evidence suggested that the parole officer had been undertrained by the Department of Corrections, which was itself underfunded and inadequately managed. [11]

Similar issues were raised in *Michael*. Joanna Michael was stabbed to death in her home by her ex-partner. She had called the police 15 minutes before she died, telling the operator that her ex-partner had threatened to kill her. Had this call been adequately handled, the police would have arrived at her house in time to save her life.[12] Instead, mechanical errors in the phoneline rerouted Michael's call to the wrong police department.[13] The system also failed to flag that Michael was on the domestic violence protection register.[14] She was already dead by the time the police realised the urgency of her situation and went to her house. Michael's representatives were forced to frame the claim in terms of vicarious liability.[15] They could not directly challenge the negligent Crown system.

Thus, I argue that the Crown Proceedings Act should be amended to allow for direct liability of the Crown. It is essential that direct liability be available in systemic negligence cases where no Crown servant is at fault, so that plaintiffs may seek redress. Further, it is worth holding the Crown directly liable for its systemic failures, even where a Crown servant has been negligent (as in *Couch No 1* and *Michael*). First, direct liability is fairer to Crown servants, who will often be less culpable than the system in which they are embedded.[16] Secondly, the deterrence and insurance functions of tort law favour direct liability. The Crown is responsible for providing and administering public services and is "best placed to prevent a recurrence".[17] Moreover, holding the Crown, rather than high-level Crown servants

8 *Couch No 1*, above n 4.
9 *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732.
10 *Couch No 1*, above n 4, at [6].
11 *Couch No 1*, above n 4, at [12].
12 *Michael*, above n 9, at [5]–[13]; and Nicholas J McBride "*Michael* and the future of tort law" (2016) 32 PN 14 at 14.
13 *Michael*, above n 9, at [5].
14 At [14].
15 As in New Zealand, s 2(1) of the Crown Proceedings Act 1947 (UK) provides only for vicarious liability.
16 Margaret Isabel Hall "Theorising the Institutional Tortfeasor" (2016) 53 Alta L Rev 995 at 998–1001.
17 Anthony W Bradley and John Bell "Governmental Liability: A Preliminary Assessment" in John Bell and Anthony W Bradley (eds) *Governmental Liability: A Comparative Study* (The United Kingdom National Committee of Comparative Law, United Kingdom, 1991) 1 at 10.

responsible, incentivises lower-level Crown servants to impose checks on higher-level organisation and decision-making.[18] Finally, direct liability is consistent with s 27(3) of the NZBORA: "the principle that the Crown be subject to the same legal rules as private individuals and should be accountable to injured citizens for its actions".[19]

The Doctrinal Hurdles

Unfortunately, amending the Crown Proceedings Act will not be enough to resolve the conceptual issues posed by systemic negligence. In 2015, the Law Commission published a report proposing that the Act be amended to allow for direct liability claims.[20] This was promptly rejected by the National Government, which expressed concerns of indeterminate liability and defensive practices by departments.[21] Nevertheless, this response highlighted a crucial point: even where direct liability exists, the courts must still run through the common law tests for negligence. The courts must determine whether the relevant organisational decision is justiciable, whether there is proximity such that a duty of care exists, and whether the duty was breached.

As I will show in the next three sections of this article, the doctrinal hurdles of justiciability, proximity and breach raise significant conceptual difficulties in the context of systemic negligence claims. However, I argue that neither justiciability nor proximity presents a complete bar to systemic negligence claims. Furthermore, group agency theory demonstrates how conceptual problems surrounding breach by the Crown as a group may be resolved.

III JUSTICIABILITY

Overview

In this section, I discuss the concept of justiciability, arguing that justiciability will often be a live issue in systemic negligence claims against the Crown. This is because systemic negligence claims tend to attack the policies, resourcing and priorities behind Crown systems — matters that are generally considered non-justiciable. I argue that the policy/operational test offers limited guidance, and that the concepts of political interference and judicial

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18 Christian List and Philip Pettit *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford University Press, Oxford, 2011) at 168–169.

19 Law Commission *The Crown in Court: A Review of the Crown Proceedings Act and National Security Information in Proceedings* (NZLC R135, 2015) at [3.27].

20 At [3.51].

21 *Government Response to the Part A of the Law Commission's Report: The Crown in Court – A Review of the Crown Proceedings Act and National Security Information in Proceedings* (2016) at 3.

competence are more helpful in resolving the justiciability question. On this basis, I conclude that decisions not to fix fundamental flaws in established Crown systems will generally be justiciable and therefore reviewable. Thus, justiciability is not a complete bar on systemic negligence claims.

What Is Justiciability?

Justiciability is a public law principle that recognises the limited capabilities of the courts.[22] In public authority negligence cases, justiciability requires the court to determine whether the authority's decision is a matter of policy "upon which 'the court cannot adjudicate'".[23] If the court answers "yes", the decision is non-justiciable and the court cannot move on to consider private law questions of duty, breach and causation. This is because a finding of "non-justiciability means the question of unreasonableness is unsuitable for judicial resolution".[24] Conversely, a finding of justiciability does not guarantee liability.[25] It simply recognises that the court can *consider* the question of reasonableness.

Why is the justiciability test necessary? There are two "overlapping reasons" why it might be inappropriate for courts to review the reasonableness of policy decisions by public authorities.[26] First, it is not the role of judges to second-guess the reasonableness of political choices made by the elected Executive.[27] I call this the political interference concept. This idea "is an integral aspect of the separation of powers",[28] as suggested by Lord Wilberforce in *Anns v Merton London Borough Council*:[29]

> … public authorities have to strike a balance between the claims of efficiency and thrift … whether they get the balance right can only be decided through the ballot box, not in the courts.

The second reason for judicial abstention in this area is the issue of judicial competency. As noted by William J in *Body Corporate No 207624 v North Shore City Council*, "the courts remain badly placed to determine policy issues. Such issues tend to lie outside core judicial competencies."[30] For

22 BV Harris "Judicial Review, Justiciability and the Prerogative of Mercy" (2003) 62 CLJ 631 at 631.

23 *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (HL) at 738 as cited in Hanna Wilberg "Public Law Tests in Negligence Claims Concerning Exercises of Discretion: A Defence" (Research Paper, University of Auckland, 2016) at 3.

24 Wilberg, above n 23, at 29.

25 See *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700 (PC) at 708; and M Kevin Woodall "Private Law Liability of Public Authorities for Negligent Inspection and Regulation" (1992) 37 McGill LJ 83 at 98.

26 Wilberg, above n 24, at 29.

27 *Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 641 (PC) at 655–656; and *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA) at [22]–[28].

28 Mark Aronson "Government Liability in Negligence" (2008) 32 MULR 44 at 57–58. See also *Pyrenees Shire Council v Day* [1998] HCA 3, (1998) 192 CLR 330 at 425.

29 *Anns v Merton London Borough Council* [1978] AC 728 (HL) at 754.

30 *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 at [237].

example, judges are not competent to decide whether to raise taxes, or whether to go to war.[31]

We can see these two concepts of political interference and judicial competency at play in the administrative law context, where justiciability is invoked to determine the availability of judicial review.[32] In *Council of Civil Service Unions v Minister for the Civil Service* (*GCHQ* case), Lord Roskill listed the following examples of non-justiciable policy decisions:[33]

> [Decisions] relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others …

Furthermore, decisions relating to budget allocation, or to the security and diplomatic interests of the Crown, are likely to be unassailable policy decisions.[34] The Court in the *GCHQ* case declined to determine whether government restriction of a trade union was justified on national security grounds.[35] Lord Diplock commented that the political issue of national security "is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves."[36]

The Problem of Systemic Negligence

Justiciability will often be a live issue in systemic negligence claims against the Crown as such claims tend to attack the policies, resourcing and priorities of Crown systems.[37] For example, a plaintiff might allege that their local police department inappropriately allocated work to overworked staff.[38] This attack on policy is understandable, given that government departments in New Zealand operate through policy decisions made by responsible ministers.[39]

However, policy decisions relating to matters such as high-level resource allocation are generally non-justiciable. Thus, systemic negligence claims against the Crown will often fail at the justiciability stage. In contrast, claims of vicarious liability that single out a negligent Crown servant tend not to raise the same justiciability issues. This is because decisions made by front-line Crown servants will not usually be high policy decisions that engage

31 These examples would also fail on the political interference front.

32 Harris, above n 22; some academics used the term "justiciable" in a narrow sense to describe amenability to judicial review, see generally Amanda Sapienza "Justiciability of Non-Statutory Executive Action: A Message for Immigration Policy Makers" (2015) 79 AIAL Forum 70 at 74.

33 *Council of Civil Service Unions v Minister for Civil Service* [1985] 1 AC 374 (HL) at 418 [*GCHQ*].

34 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 AC 453 at [58].

35 *GCHQ*, above n 33, at 375.

36 At 412.

37 *Strathboss Kiwifruit*, above n 4, at [1261].

38 *State of New South Wales v Ball* [2007] NSWCA 71, (2007) 69 NSWLR 463.

39 *Couch v Attorney-General (No 2) (on appeal from Hobson v Attorney-General)* [2010] NZSC 27, [2010] 3 NZLR 149 [*Couch No 2*] at [161].

political issues of risk and resource allocation, although there are some exceptions.[40]

The Problem of When

Before we move to the difficult issue of which justiciability test is appropriate, it is worth addressing the question of *when* the test should be applied. This question is by no means settled. Stephen Todd suggests that we should ask whether the particular question before the court is justiciable,[41] whereas MJ Bowman and SH Bailey argue that there is no reason to have a justiciability test over and above ordinary negligence principles.[42] In contrast, Hanna Wilberg contends that a justiciability test should be applied prior to, and separately from, the private law negligence inquiry.[43] I consider Wilberg's approach to be the most persuasive. Justiciability determines whether the question of reasonableness is appropriate for judicial resolution.[44] Applying this test at the same time as assessing reasonableness (breach) seems counter-intuitive. Justiciability and breach are conceptually distinct questions. It makes more sense to determine justiciability first and then, if appropriate, move on to questions of duty and breach.

The Proper Test for Justiciability

1 The Policy/Operational Distinction

We have seen that justiciability is generally concerned with issues of political interference and judicial competency and that high policy matters are typically unassailable. But what test will the courts apply to determine the question of justiciability? This, again, is a vexed topic. As BV Harris asserts, "[i]t is of primary constitutional concern" that judges get the justiciability test right.[45] Otherwise, the courts will "perform decision-making functions to which they are not suited, and fail to perform decisions-making functions to which they are suited".[46] In the public authority liability context, the policy/operational distinction has been adopted as a guide to determining justiciability. Under this test, "[t]he greater the element of policy involved … the more likely it is that the matter is not justiciable".[47] On the other hand, where a decision relates

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40 *Just v Her Majesty the Queen in right of the Province of British Columbia* [1989] 2 SCR 1228 at 1243.

41 Stephen Todd "Negligence: Particular Categories of Duty" in Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) 277 at 353. See also *Strathboss Kiwifruit Ltd*, above n 4, at [274]; and *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59, (1999) CLR 1 at 131.

42 SH Bailey and MJ Bowman "Public Authority Negligence Revisited" (2000) 59 CLJ 85 at 103.

43 Wilberg, above n 23, at 29.

44 At 29.

45 Harris, above n 22, at 634.

46 At 634.

47 *Barrett v Enfield London Borough Council* [2001] 2 AC 550 (HL) at 571.

instead to the "practical execution" of a policy decision, it is operational and therefore justiciable.[48] Mason J gave the following illustration in *Sutherland Shire Council v Heyman*:[49]

> The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognize that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care.

Therefore, where a decision relates to questions of resource or risk allocation, this points in favour of it being a matter of policy.[50] Of course, this cannot be sufficient by itself because most public decision-making impacts resource or risk allocation.[51] For this reason, Wilberg contends that "non-justiciability flows from polycentricity".[52] In non-justiciable "macro-decisions", the polycentric questions of public policy "are front and centre".[53] Obvious examples include the decision to go to war or the decision to regulate the oyster farming industry.[54]

However, the policy/operational distinction is of limited use in determining the justiciability of systemic negligence claims. This is because it is extremely difficult to apply to decisions relating to the operation of Crown systems. A ministerial decision to inspect highways for falling rocks might well be non-justiciable. But what about an organisational decision made by a small team charged with inspecting the highways — for example, only to inspect twice a week? This very fact scenario was at issue in *Just v British Columbia*.[55] While the Court of Appeal for British Columbia deemed this decision policy and non-justiciable,[56] this finding was overturned by the majority in the Supreme Court of Canada.[57]

Why are these front-line organisational decisions so difficult to categorise? In my view, it is because of their fundamentally dualistic nature. While these decisions may well engage polycentric considerations, they enforce higher policy decisions and are thus too "operational" for courts to feel comfortable excluding liability. As McLachlin CJ noted in *Her Majesty the Queen in Right of Canada v Imperial Tobacco Ltd*, the policy/operational

48 *Laurentide Motels Ltd v City of Beauport* [1989] 1 SCR 705 at 722–723.
49 *The Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424 at 469.
50 *Takaro*, above n 25, at 709 as cited in Wilberg, above n 23, at 29.
51 Wilberg, above n 23, at 29–30.
52 At 29–30.
53 At 29–30.
54 At 29–30. See also *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54, (2002) 211 CLR 540.
55 *Just*, above n 40.
56 *Just v R in Right of British Columbia* [1987] 2 WWR 231 (BCCA).
57 *Just*, above n 40, at 1229.

distinction "posits a stark dichotomy between two water-tight compartments … decisions in real life may not fall neatly into one category or the other".[58]

2 Secondary Justiciability

We have seen that the policy/operational test offers limited guidance for systemic negligence claims. Let us turn to the judicial review context to see whether the doctrine of secondary justiciability can be of any use. In judicial review, the courts have moved away from automatically refusing to decide certain cases by virtue of their subject matter (the traditional approach taken in the *GCHQ* case).[59] Rather, they apply the test of justiciability to particular grounds of review or particular issues for determination — this is known as the doctrine of secondary justiciability.[60] Only those grounds that "lack any legal yardstick for the court to apply" are considered non-justiciable.[61] On this basis, in *Curtis v Minister of Defence*, the New Zealand Court of Appeal reviewed a decision regarding "the level at which the armed forces are armed" — but only to the extent of ensuring compliance with express statutory requirements.[62] However, secondary justiciability does not allow for increased scrutiny in every area. The ground of unreasonableness, in which the court comes closest to substituting its own view on the merits of the decision, remains subject to a high level of deference.[63] It is the ground most likely to be non-justiciable in judicial review cases.[64]

Some commentators have questioned the appropriateness of categorically excluding negligence liability for high policy decisions.[65] However, Wilberg persuasively argues that there is a "good reason" for maintaining the established approach to negligence claims: it is consistent with secondary justiciability.[66] When the court determines liability in a negligence claim, it is effectively applying the ground of unreasonableness, the "least justiciable ground of review".[67] Thus, whether the court calls on principles of high policy or secondary justiciability, the bar for justiciability will be equally high. Both tests exclude "liability where the question of whether the decision was unreasonable is unsuitable for judicial determination".[68] Thus, secondary justiciability does not get us much further

58 *Her Majesty The Queen in Right of Canada v Imperial Tobacco Canada Ltd* 2011 SCC 42, [2011] 3 SCR 45 at [86].
59 *GCHQ*, above n 33.
60 Matthew Groves "Habeas Corpus, Justiciability and Foreign Affairs" (2013) 11 NZJPIL 587 at 596.
61 Wilberg, above n 23, at 30.
62 At 30. See also *Curtis*, above n 27, at [14]–[23].
63 Wilberg, above n 23, at 30–31.
64 At 30–31. See also *GCHQ*, above n 33, at 411; and *Air New Zealand Ltd v Wellington International Airport Ltd* [2009] NZCA 259, [2009] 3 NZLR 713 (CA).
65 Stephen Bailey "Public authority liability in negligence: the continued search for coherence" (2006) 26 LS 155 at 169–170; and Paul Daly "The Policy/Operational Distinction – A View from Administrative Law" (Draft Paper, University of Montreal, 2015).
66 Wilberg, above n 23, at 30.
67 At 31.
68 At 31.

than the policy/operational distinction when it comes to determining a suitable test for systemic negligence claims.

3 Political Interference and Judicial Competency: A Helpful Guide

So far, I have canvassed the policy/operational test from negligence law, concluding that it provides limited guidance on the justiciability of systemic negligence claims. I have discussed the doctrine of secondary justiciability, which is also of limited use. What, then, is the best way of determining justiciability in systemic negligence claims? The dividing line between justiciable and non-justiciable decisions becomes clear when we overlay the policy/operational test with the two concepts grounding justiciability: political interference and judicial competence. In particular, this hybrid approach solves the tricky issue of whether front-line organisational decisions (as in *Just v British Columbia*) are justiciable.[69]

I have devised three categories of Crown decisions that are commonly attacked in systemic negligence cases: decisions to implement a far-reaching government policy (category one); decisions relating to the training of staff (category two); and decisions not to fix fundamental flaws in established Crown systems (category three). Applying my hybrid test to these categories, we will see that while categories one and two will usually be non-justiciable, decisions in category three may well be justiciable.

(a) Decisions to Implement a Far-reaching Government Policy

Let us turn first to category one: decisions to implement a far-reaching government policy. Examples include the decision to promote low-tar tobacco,[70] or the decision to adopt a particular strategy for mitigating moose-vehicle collision.[71] Polycentric considerations of risk and resource management are front and centre in these decisions, pointing strongly towards non-justiciability. Yet we get even more clarity if we appeal directly to concepts of political interference and judicial competency. Judges are not well placed to determine which moose management strategy is better than another (we could even refer to a lack of legal yardstick). Further, judicial consideration of this issue would clearly amount to serious political interference. Thus, category one decisions are likely to be non-justiciable.

(b) Decisions Relating to the Training of Staff

The second category comprises decisions relating to the training of staff. Polycentric considerations are again front and centre because these decisions

69 *Just*, above n 40.
70 *Imperial Tobacco Canada*, above n 58.
71 *George v Newfoundland and Labrador* 2016 NLCA 24.

always involve assessing budgetary priorities.[72] This conclusion is reinforced when we consider the conceptual grounds for justiciability. Judicial review of the executive budget is a textbook example of inappropriate political interference.[73] Moreover, judges are clearly incompetent to determine budgetary priorities. Thus, even front-line decisions relating to training will normally be non-justiciable.

(c) Decisions Not to Fix Fundamental Flaws in an Established Crown System

Category three encompasses decisions not to fix flaws in an established Crown system that cause the system fundamentally to malfunction. Let us take lighthouse inspections as an example.[74] Imagine that the Crown has decided to implement lighthouse inspections, but that the responsible inspection group fails to fix reporting errors in the system. Consequently, the light in the local lighthouse goes out, causing ships to wreck in the harbour. Another example is the decision not to fix an electronic glitch in an emergency police phoneline.[75] Calls are consistently routed to the wrong police department, resulting in delayed response times.

Under the policy/operational test, such decisions would appear to engage issues of budget and risk allocation, pointing to non-justiciability. However, we get a fuller picture when we apply concepts of judicial competence and political interference. Judges will generally be competent to review these decisions because there exists a clear legal yardstick for reviewing them: the high-level policy decision by the Crown to create an effective system in the first place. The same cannot be said for Crown decisions to implement inspections, or to shut operations down. Furthermore, judicial review of these decisions will not raise significant issues of political interference. Pointing out where a system has fundamentally malfunctioned does not encroach into the realm of the Executive, who decided to implement the system in the first place. This is, of course, provided that the decision not to fix does not amount to a "shutting down of operations", which would constitute a new policy decision. The question of whether a Crown action or omission amounts to a new policy decision is a factual question for the court.

On this basis, I conclude that decisions not to fix systemic flaws will generally be justiciable and therefore reviewable. Consequently, justiciability is not a complete bar on systemic negligence claims.

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72 Woodall, above n 25, at 138.

73 *Bancoult*, above n 34, at [58].

74 *Just*, above n 40, at 1242–1243.

75 This scenario is inspired by the facts of the *Michael* case. Ms Michael's emergency call was routed to the wrong call centre: *Michael*, above n 9, at [5]–[11].

IV PROXIMITY

Overview

In this section, I explain the current test for duty of care, which includes a proximity requirement. I then discuss the proximity issues raised by systemic negligence claims. I conclude that only exceptional claims involving a static physical hazard are likely to succeed on the "uniform approach" to proximity often employed by the courts. However, I contend that the courts should instead apply the "policy approach" to proximity espoused by Nicolas McBride, which captures the reality of Crown responsibility to its constituents.[76] Applying this test, I argue that many systemic negligence claims would overcome the proximity hurdle.

The Current Approach to Proximity

In New Zealand, the test for whether a defendant owes a duty of care has two essential stages: proximity and policy.[77] At the proximity stage, the court asks whether there was sufficient proximity between the defendant and the plaintiff such that the defendant was "under an obligation to be mindful of a plaintiff's legitimate interests in conducting his or her affairs".[78] Reasonable foreseeability is not enough.[79] There must be a relationship of proximity. If proximity is established, the court then considers whether any public policy factors would make it not "fair, just and reasonable" to find a duty of care.[80] Proximity is an essential component of the test for duty. It acts as an "important control on indeterminate liability", ensuring that the defendant does not owe a duty to the world at large and that liability can be reasonably calculated in advance.[81]

What sort of factors determine proximity? According to the New Zealand Supreme Court in the leading case *North Shore City Council v Attorney-General* (*The Grange*), where the defendant is physically or temporally proximate to the events giving rise to the loss, this will point towards a proximate relationship.[82] In contrast, where the plaintiff could have protected themselves from harm (a lack of vulnerability), this points away from proximity.[83] In the case of public authority liability, proximity may be based either on interactions between the parties or on statutory duties, or

76 McBride, above n 12, at 16.
77 *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 [*The Grange*] at [156]; and *Anns*, above n 29, at 751–752.
78 *The Grange*, above n 77, at [153].
79 At [157].
80 At [156].
81 *Strathboss Kiwifruit*, above n 4, at [305].
82 *The Grange*, above n 77, at [179].
83 At [180].

both.[84] This is because "[a] duty of care on the part of a public authority must stem from consideration of its functions and responsibilities".[85]

The Problem with Systemic Negligence

Under the current law, the majority of systemic negligence claims will fail for lack of proximity. These claims attack the general decisions or policies behind the operation of the system. Such decisions or policies are almost always at a high level of removal from the actual events causing the harm. There will often be a lack of temporal proximity. Organisational decisions may take place years before any harm eventuates. For example, it appears the rock-scaling team in *Just v British Columbia* formulated its inspection strategy in 1971 — 10 years before a boulder came loose from slopes above Highway 99 and crashed onto the plaintiff's car, killing his daughter and causing him serious injuries.[86]

A lack of physical proximity is just as likely. Many organisational decisions made by the Crown will be made miles away from where harm actually takes place. And given the far-reaching nature of their decisions, decision-makers are highly unlikely to interact with those eventually harmed by the system they have created, let alone predict who specifically could be harmed. Let us take the example of an emergency police call service from *Michael*. A negligent operator who mishandles a call is likely to learn the identity of the caller within the first few minutes of the call.[87] Let us say that it is reasonably foreseeable that this particular caller might be harmed if, for example, the operator mislabels the call as low priority. The operator therefore owes a duty to the caller and her liability is determinate. They can predict in advance to whom they might be liable.

Next, let us imagine that the entire call service is negligently operated by the local police department. There is a technical glitch that routes calls to the wrong phone line, increasing delay and the risk of transmission error. If the department mishandles 50 calls in one day, resulting in harm to half of the callers, there will be at least 25 victims. Indeed, some may have called in on behalf of a group. Thus, there is a very large class of potential victims, the identities of which cannot be predicted at the time the system is designed. These proximity issues will be even more pronounced where the department fails to protect callers from a third party, whose movements are unknown to the department.[88] It is therefore evident that systemic negligence claims will generally fail for proximity because they create indeterminate liability.[89]

84 At [165] and [170].
85 At [170].
86 *Just*, above n 40, at 1232–1233.
87 New Zealand Police "Calling emergency 111" <www.police.govt.nz>.
88 *Couch No 1*, above n 4, at [85].
89 *Strathboss Kiwifruit*, above n 4, at [272].

The Exception: Static Physical Hazards

There is an exceptional category of systemic negligence claims that I consider capable of satisfying the current proximity test: claims concerning static physical hazards that the Crown has negligently created or failed to remove. For example, in the 1884 New Zealand case *The Queen v Williams*, the harbour authority negligently failed to remove a snag in the harbour, which the plaintiff's ship hit, causing it to sink.[90] I contend that physical and temporal proximity will be satisfied in these types of cases. Why is this? It is useful to draw on the example of a negligent driver who causes a car accident. It is uncontroversial that the driver owes a duty of care to drive carefully. But do they owe this duty to everyone on the road at the same time as them — essentially to the world at large? No. They owe a duty of care to those physically proximate to them in any given moment — those who might be hit immediately if they stop concentrating.[91]

I argue that similar reasoning applies where the Crown has negligently created or failed to remove a static physical hazard. The Crown is physically proximate to all those who come close enough to the hazard to be harmed by it. Like with road-users immediately proximate to a negligent driver, this is a reasonably foreseeable, sufficiently delineated class. Therefore, proximity is not a bar to this limited category of systemic negligence.

The Policy Approach

It should now be clear that, on the law as it currently stands, most systemic negligence claims will fail for lack of proximity. In my view, this reflects that courts have drawn the lines of proximity too narrowly in the public authority liability context. I consider that the courts should apply the broader "policy approach" to the question of duty, embraced by the minority in *Michael* and espoused by Nicolas McBride.[92]

McBride asserts that one approach to duty in public authority negligence cases asks whether "a private person equivalently situated" would owe the plaintiff a duty of care to prevent harm occurring.[93] McBride calls this the "uniform approach".[94] This was the approach taken by the majority in *Michael*, who asked whether a private person would have been obliged to protect the plaintiff from harm.[95] Similarly, in *East Suffolk Rivers Catchment Board v Kent*, the House of Lords asked whether a private person would have owed a duty to abate flooding of the plaintiff's land.[96] In contrast, the "policy

90 *The Queen v Williams* (1884) 9 App Cas 418 (PC) at 418.
91 *Best v Samuel Fox & Co Ltd* [1952] AC 716 (HL) at 73.
92 *Michael*, above n 9, at [189]; and McBride, above n 12, at 16.
93 McBride, above n 12, at 15.
94 At 15.
95 *Michael*, above n 9, at [101] as cited in McBride, above n 12, at 20.
96 *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 (HL) at 82.

approach" espoused by the minority in *Michael* presumes that a public authority owes duty of care unless public policy considerations tell against a duty.[97] In this way, it fundamentally relaxes — if not completely removes — the proximity requirement. McBride notes that both the uniform approach and the policy approach have been "equally matched" in case law, although the policy approach has found particular favour in Canada.[98] I contend that the policy approach should be preferred in the public authority liability context because it is consistent with the Crown's role as public guardian. Lord Nicholls notes in his dissent in *Stovin v Wise*:[99]

> Unlike an individual, a public authority is not an indifferent onlooker. … An authority is entrusted and charged with responsibilities, for the public good. The powers are intended to be exercised in a suitable case. Compelling a public authority to act does not represent an intrusion into private affairs in the same way as when a private individual is compelled to act.

Indeed, the Crown regulates most aspects of social life in New Zealand and its constituents rely on its protection.[100] The average citizen can do nothing to protect themselves from, for example, the Crown's failure to properly monitor air traffic control. Nor can they use unreasonable force to protect themselves from dangerous third parties.[101] The special responsibility of the Crown and the correlative vulnerability of its constituents warrants relaxing the strict proximity requirement.[102] Moreover, the uniform approach is fundamentally inconsistent with the reality of systemic negligence claims. No private person analogy can be made in these claims because private persons are never required to make decisions about the organisation of Crown systems. In contrast, the policy approach is entirely consistent with the reality of systemic Crown negligence. It acknowledges the special nature of the Crown and its decision-making powers.

It is important to acknowledge that applying the policy approach will inevitably create issues of indeterminate liability. However, as Elias CJ notes in her dissent in *Couch No 1*, negligence liability may also be properly limited by causation and remoteness requirements.[103] Furthermore, even with no further limits imposed, the benefits of the policy approach — namely its acknowledgement of Crown responsibility and its consistency with the reality of systemic negligence — outweigh the burden of indeterminate liability.

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97 *Michael*, above n 9, at [189] as cited in McBride, above n 12, at 16 and 21–22.
98 McBride, above n 12, at 17 and n 23.
99 *Stovin v Wise* [1996] AC 923 (HL) at 935.
100 GDS Taylor "The Laws of New Zealand and Australia" in John Bell and Anthony W Bradley (eds) *Governmental Liability: A Comparative Study* (The United Kingdom National Committee of Comparative Law, United Kingdom, 1991) 84 at 85.
101 Stelios Tofaris and Sandy Steel "Police Liability in Negligence for Failure to Prevent Crime: Time to Rethink" (Faculty of Law Research Paper No 39, University of Cambridge, 2014) at 18 as cited in *Michael*, above n 9, at [197].
102 See *Michael*, above n 9, at [197].
103 *Couch No 1*, above n 4, at [67].

1 Application to Systemic Failures to Protect

If we apply the policy approach to a systemic police failure to protect claim, it becomes "obvious" that the police will owe a duty of care.[104] McBride argues that once the duty presumption applies, "it is almost impossible to identify any" policy reasons telling against it.[105] Imposing a duty would not (a) require courts to second-guess difficult police decisions, (b) make call operators overly defensive, or (c) cause police resources to be "tied up in defending unmeritorious claims".[106] Thus, in cases of systemic negligence, the policy approach allows us to bypass the problem of proximity entirely. I consider this result entirely appropriate, given the immense responsibility vested in the Crown.

V BREACH

> There is a college mind, just as there is a trade union mind, or even a 'public mind' of the whole community; and we are all conscious of such a mind as something that exists in and along with the separate minds of their members, and over and above any sum of these minds.
>
> —Ernest Barker[107]

Overview

Like justiciability and proximity, breach is likely to be a difficult issue in cases of systemic negligence by the Crown. This is because the courts have traditionally couched the test for breach in individual terms. Moreover, moral luck theory suggests that moral responsibility is an essential element of negligence liability. But how can a group be morally responsible? In this section, I discuss List and Pettit's theory of group agency. I conclude that it offers a compelling way forward. It provides a strong conceptual basis for finding that the Crown, independent of its members, has breached the duty of care. Furthermore, it demonstrates how the Crown may be morally responsible for negligent decision-making.

The Law on Breach

Overseas Tankship (UK) Ltd v The Miller Steamship Co (*Wagon Mound No 2*) established that the question whether the defendant breached the duty of care

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104 McBride, above n 12, at 20.
105 At 20.
106 At 20.
107 E Barker *Political Thought in England from Herbert Spencer to the Present Day* (Williams and Norgate, London, 1915) at 74 as cited in List and Pettit, above n 18, at 78.

has two core elements.[108] First, the court must ask whether a reasonable person in the defendant's shoes would have foreseen risk of harm as a potential result of the conduct in question.[109] If so, the court must then consider how the reasonable person would have responded to this risk. This question requires considering the factors that a reasonable person would weigh, such as the likelihood of the risk, the cost or burden of prevention[110] and the seriousness of the consequences if the risk materialised.[111] A defendant who fails to appropriately respond to a reasonably foreseeable risk breaches the duty of care.

The Problem with Systemic Negligence

The problem in systemic negligence cases is this: how can the Crown, a collection of government departments, meet the mental requirements of the breach test?[112] In cases of systemic negligence, it may be inappropriate to focus on the failings of individual Crown servants. These servants are necessarily embedded in the department's institutional structure and so are far less culpable than the Crown itself.[113] Furthermore, it may be impossible to identify an individual Crown servant who has fallen below the standard of care.[114] But how can we say that the Crown group, as distinct from its individual members, should have foreseen the risk of harm? How can we conclude that it negligently failed to respond to the risk?

A similar issue is posed by the question of exemplary damages. In New Zealand, plaintiffs are barred from claiming compensatory damages for personal injury, but may claim exemplary damages.[115] Exemplary damages require subjective recklessness: a conscious appreciation of the risk that one's conduct may cause harm and a deliberate decision to run that risk.[116] This poses difficulties in the context of systemic Crown negligence. How can a group consciously appreciate risk? Who must choose to run that risk?

List & Pettit's Theory of Agency

Christian List and Philip Pettit's theory of group agency offers a compelling answer to these puzzling questions.[117] It allows us to explain, without referring to "psychologically mysterious forces", how a group can be both (a) the sum of its members, and (b) an independent agent that thinks and operates

108 *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* [1967] AC 617 (PC) [*Wagon Mound No 2*] at 629.
109 At 629.
110 At 629–630.
111 *Paris v Stepney* [1951] AC 367 at 381.
112 Similar questions are raised by an exemplary damages inquiry.
113 See Hall, above n 16, at 998–999.
114 To "fall below the standard of care" means "to breach the duty of care".
115 Accident Compensation Act 2001, ss 317(1) and 319.
116 *Couch No 2*, above n 39, at [2].
117 List and Pettit, above n 18, at 32.

distinctly from its members.[118] In the area of public authority liability, List and Pettit's theory demonstrates how group agents such as the Crown and its departments can "display a guilty mind" and thus be liable for breach of a duty of care.[119]

1 What Is an Agent?

List and Pettit define an agent as "a system with … representational states, motivational states, and a capacity to process them and to act on their basis".[120] Thus, they use the term agency in the philosophical sense (the capacity of an actor to act in a particular environment), rather than in the legal sense (a relationship in which one person has legal authority to act for another).[121]

List and Pettit illustrate this through the example of a robot tasked with tipping cylindrical objects on a table upright. The robot has representational states that depict how things are (the locations of the cylinders) and motivational states that specify how it wants things to be (all cylinders upright).[122] Moreover, because it goes around righting the cylinders lying on their sides, the robot demonstrates its capacity to process the gap between its beliefs and desires, and to act to fill the gap.[123] The same may be said of a computer programmed to play chess against a human opponent.[124] In my view, these mechanical examples emphasise the importance of logical rationality to agency. Moreover, they demonstrate that agency is not mysterious: just as we do not imagine that a robot is animated by a life force or spirit, nor should we do so with groups of people.

2 Groups as Agents

List and Pettit define a "group" as a collection of individuals with "an identity that can survive changes of membership".[125] The Crown is a good example of a group because, as Janet McLean notes, it maintains its identity across changes of government (and thus membership).[126] Groups can be agents if they exhibit the three basic features of agency discussed above. A group agent is arranged to realise certain motivations in the world based on its representations (for example, a government committed to eliminating child

118 At 6.
119 At 157.
120 At 20.
121 Matthis Synofzik, Gottfried Vosgerau and Albert Newen "Beyond the comparator model" (2012) 21 Consciousness and Cognition 1 at 1–3.
122 List and Pettit, above n 18, at 19.
123 At 19–20.
124 At 20.
125 At 31.
126 Janet McLean "The Crown in Contract and Administrative Law" (2004) 24 OJLS 129 at 138; and List and Pettit, above n 18, at 40.

poverty), with group actions aimed at satisfying the group's desires and beliefs.[127]

The Crown is clearly an agent. First, the Crown (or more specifically, Crown departments and their members) endorses certain policy goals and judgments "as to how things should be done",[128] based on its representations of how things are in the locality.[129] The Crown also has established methods of reviewing these policy goals and judgments. Finally, the Crown follows official procedures that enable it to pursue its policies. In other words, the Crown can see how things are, determine how things should be, and act to close this gap.

But who or what makes up the Crown group agent, given that the Crown is a collection of smaller departments headed by ministers? This is an important question. Peter Cane points out that group agency theories usually concern smaller collectives.[130] Commentators have therefore expressed doubts that agency can apply at the much larger state or government level.[131] However, List and Pettit suggest that "group agents may nest within one another", with members of the larger entity (the Crown) also forming smaller group agents (the Crown departments).[132] On this basis, it is possible to treat the Crown writ large as a distinct group agent. As we will see later, there is no reason to think that a very large group cannot achieve rationality through a process of holistic supervenience. Furthermore, treating the Crown as a separate group agent is consistent with the reality of Crown policy development and decision-making. While the Crown acts through its departments, it has its "own goals and commitments, which [its] subsidiary organs need not share".[133]

3 The Rationality Requirement

List and Pettit emphasise that to be an agent, an entity (in our case the "Crown group") must be rational.[134] Rationality is likely to be an issue for group agents because they comprise many parts (individual group members), who may think or act in contradiction to each other. List and Pettit assert that group agents must meet three "standards of rationality": "attitude-to-fact, attitude-to-action, and attitude-to-attitude".[135]

First, group agents must meet attitude-to-fact standards: "the group must ensure, as far as possible, that its beliefs are true about the world it

127 List and Pettit, above n 18, at 32.
128 At 39.
129 At 19.
130 Peter Cane *Responsibility in Law and Morality* (Hart Publishing, Oxford, 2002) at 166–168.
131 At 166–168; and NW Barber *The Constitutional State* (Oxford University Press, Oxford, 2010) at 130–131.
132 List and Pettit, above n 18, at 39–40.
133 List and Pettit, above n 18, at 39–40.
134 At 24.
135 At 24.

inhabits — and, ideally, that its desires are at least in principle realizable”.[136] The Crown clearly embodies attitude-to-fact standards because its servants, in carrying out policy directives, must collect evidence about the world and develop standards for “how [the Crown] respond[s] to the testimony of others”.[137] Secondly, attitude-to-action standards must be met. Group agents must ensure that whenever group action is required, “suitable members or employees … are selected and authorized to take the required action.”[138] The Crown meets this standard — it empowers suitable Crown servants to carry out its policy objectives or goals.

Finally, group agents must meet attitude-to-attitude standards. They “must ensure that whatever beliefs and desires [they] come to hold … form a coherent whole”.[139] In other words, a group may not assign values of “goodness” or “desirability” to certain objects, then act in ways that breach those values.[140] Notwithstanding the complex issue of attitude aggregation discussed in the next section, it is clear that the Crown generally meets these standards. The Crown is “held to expectations of consistency in legal and other forums”.[141] Crown members “promote consistent policies, as set out in their party programs, campaign or mission statements, or coalition agreements”.[142] Moreover, List and Pettit emphasise the political pressure on Crown servants to achieve rationality. Political group agents “could not do their job properly, or avoid electoral failure or ridicule, if they failed to achieve consistency”.[143]

Furthermore, occasional irrationality will not prevent the Crown from enjoying agent status. Where a reasoning agent fails to be rational, “that it self-corrects, recognizing its failure in a manner open only to a reasoning agent” allows us to continue “to view it as an agent”.[144] An obvious example of Crown self-correction would be the publication of an official apology.

4 Attitude Aggregation and Holistic Supervenience

We have seen that there is political pressure on the Crown to act consistently. But how can the Crown achieve consistency in practice? How can this “multi-member group move from the distinct and possibly conflicting intentional attitudes of its members to a single system of such attitudes endorsed by the group as a whole?”[145] List and Pettit argue that this is possible through a process of “attitude aggregation”.[146]

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136 At 36.
137 At 24.
138 At 37.
139 At 37.
140 At 24–25.
141 At 40.
142 At 39–40.
143 At 40.
144 At 31.
145 At 42.
146 At 42.

(a) Majoritarian Judgment Aggregation

List and Pettit dismiss the "initially plausible approach" of majoritarian judgment aggregation (majority voting) as unworkable.[147] This is because it renders group attitudes "highly sensitive" to the precise decision-making method, thereby comprising rationality.[148] This is best demonstrated by the "discursive dilemma" of a "three-member court"[149] deciding a negligence case.[150] Legal doctrine dictates that duty of care and breach are jointly necessary and sufficient for liability.[151] In other words, the conclusion (liability) is true only if both premises are true.[152] Suppose Judge 1 believes there is a duty and a breach, Judge 2 believes there is a duty but no breach, and Judge 3 believes there is a breach but no duty.[153] Vincent Chiao demonstrates the panel's beliefs in the following table.[154]

	Duty	**Breach**	**Liable**
Judge 1	Y	Y	Y
Judge 2	Y	N	N
Judge 3	N	Y	N

Table 1

The discursive dilemma of majority voting is this: "[i]f the court wishes to respect the judges' majority opinions on the *premises*", then the defendant will be liable, even though only a minority individually considers the defendant liable.[155] However, "if it wishes to respect the majority opinion on the case's *overall conclusion*", this will lead to a different verdict — a finding of no liability.[156] The inconsistency of these results prevents majority voting from meeting the requirement of rationality.[157]

147 At 46.
148 At 45–46.
149 At 45.
150 Vincent Chiao "List and Pettit on Group Agency and Group Responsibility" (2014) 64 UTLJ 753 at 756.
151 List and Pettit, above n 18, at 44.
152 At 44–45.
153 Chiao, above n 150, at 756; and see List and Pettit, above n 18, at 44.
154 Chiao, above n 150, at 756. Chiao uses List and Pettit's "discursive dilemma" table format: List and Pettit, above n 18, at 44–45. However, Chiao replaces List and Pettit's original breach of contract model with a duty-breach-liability negligence model.
154 List and Pettit, above n 18, at 44.
155 At 45 (emphasis added).
156 At 45 (emphasis added).
157 At 45; and Chiao, above n 150, at 756.

(b) Holistic Supervenience

List and Pettit argue that it is possible for group attitudes to be rational if they are determined by group member attitudes in a holistic way. This approach is called "holistic supervenience", where a group's attitudes are ascertained by taking into account individual sets of attitudes across all relevant propositions.[158] Consider Table 2, which maps out a holistic supervenience approach to negligence liability.[159]

	Duty	**Breach**	**Liable**
Judge 1	Y	Y	Y
Judge 2	Y	N	N
Judge 3	N	Y	N
Conclusion	→ Y	→ Y	→ Y

Table 2

In this situation, the panel takes the views of Judges 1 and 2 that there is a duty of care, and the views of Judges 1 and 3 that the duty was breached, and holistically finds that there is liability in negligence. How is this possible, given that the judges individually do not agree on every proposition? The panel is able to come to this conclusion by deriving its attitudes on conclusions (liability) from its attitudes on relevant, prior premises (duty and breach).[160] The panel does this in order to "collectivize reason" — to keep its attitudes consistent as well as rationally derived.[161] Therefore, the judges "agree" to impose liability to keep the panel functioning as a rational agent. While holistic supervenience appears similar to majority voting that respects majority opinions on each premises, it is fundamentally different — rather than simply tallying votes (majority voting), the panel actually works to achieve consistency by deriving its attitudes from prior premises.

I consider that holistic supervenience aligns with the reality of Crown decision-making. As I have emphasised throughout this article, Crown decisions tend to involve polycentric considerations of risk and resource allocation. Thus, most Crown policies and judgements will be based not primarily on individual attitudes towards those policies, but on individual attitudes towards a web of other factors and/or policies. This is precisely what happens during holistic supervenience.

158 List and Pettit, above n 18, at 69.
159 This table is based on List and Pettit's "holistic supervenience" table format: List and Pettit, above n 18, at 71. However, it is labelled according to Chiao's negligence model: Chiao, above n 150, at 756.
160 At 58.
161 At 58.

5 Conclusion on Breach and Exemplary Damages

It is clear that holistic supervenience has far-reaching implications for our breach inquiry. It demonstrates that the Crown can formulate decisions that are conceptually distinct from those of its servants. The Crown group "may accept a proposition that all [its] members individually reject".[162] Thus, the Crown itself can satisfy the mental requirement for breach — it is a group agent capable of foreseeing risk and acting appropriately. Similarly, the Crown itself can also be liable for exemplary damages because it is able to consciously appreciate a risk and choose to run that risk.

Groups and Moral Responsibility

In the final part of their argument, List and Pettit contend that a group agent is fit to be held responsible for a choice — that is, attract blame or approval — only if it is morally responsible.[163] It is this moral responsibility that "entails that it may be appropriate to make" group agents legally liable, for example, in tort.[164] First, it must have been faced with "a morally significant choice" (normative significance); secondly, it must have been "in a position to see what was at stake" (judgemental capacity); and thirdly, the choice must have been within its control (relevant control).[165]

1 A Controversial Claim

However, Vincent Chiao points out that this is a far more controversial claim than List and Pettit acknowledge.[166] Numerous commentators, and particularly those favouring the law and economics theory of tort law, have argued that moral responsibility is not required to establish liability in negligence.[167] Since tort law is considered with objective questions of "reasonable care" and "reasonable foreseeability", and the extent of tort liability often depends on "causal luck that has no obvious bearing on the wrongfulness... of tortfeasors' conduct", they argue that liability cannot be rooted in moral culpability.[168] Simply put, many commentators think tortfeasors do not *deserve* to be punished.

162 At 59.
163 At 154–155.
164 At 157.
165 At 155.
166 Chiao, above n 150, at 756.
167 See for example OW Holmes *The Common Law* (Little Brown, Boston, 1881) at 94–96; and WO Douglas "Vicarious Liability and the Administration of Risk I" (1929) 38 Yale LJ 584 as cited in William M Landes and Richard A Posner "The Positive Economic Theory of Tort Law" (1981) 15 Ga L Rev 851 at 852–856. See also G Calabresi *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, New Haven, 1970).
168 Benjamin Ewing "The Structure of Tort Law, Revisited: The Problem of Corporate Responsibility" (2015) 8 JETL 1 at 8–9.

2 Outcome Responsibility and Moral Luck

I will not attempt a systematic response to the difficult theoretical question of whether defendants must be morally responsible to be liable in tort. However, I will briefly discuss the theories of outcome responsibility and moral luck, which offer useful guidance in this area. According to Tony Honoré, outcome responsibility means "being responsible for the good and harm we bring about by what we do".[169] Stephen Perry builds on this conception to argue that outcome responsibility means responsibility for the consequences of one's actions that were avoidable through reasonable foreseeability.[170] This responsibility appears to be a prerequisite for tortious liability.[171] Otherwise, plaintiffs would be able to recover from society in general or anyone well-positioned to compensate them.[172]

But is outcome responsibility a form of moral responsibility? Perhaps the answer lies in Bernard Williams and Thomas Nagel's idea of moral luck: situations "[w]here a significant aspect of what someone does depends on factors beyond his control, yet we continue to treat him in that respect as an object of moral judgment".[173] Let us take Nagel's example of two equally negligent drivers: one kills a child and the other narrowly misses doing so.[174] We are likely to judge and blame the first driver more, though the only difference is their bad luck.[175] These theories suggest that outcome responsibility is a necessary condition for negligence liability and that it is a form of moral responsibility. They also explain how an unlucky plaintiff who does not seem to deserve liability may properly incur liability in tort. In my view, this is a highly persuasive account of moral responsibility in tort law. I turn now to the question of whether the Crown is morally responsible agent and capable of liability in tort law.

3 Is the Crown a Morally Responsible Agent?

It has been established that a group agent must demonstrate normative significance, judgemental capacity and relevant control to be morally responsible. The Crown satisfies all three requirements. First, the Crown is frequently faced with polycentric and morally significant choices, fulfilling the normative significance requirement. Moreover, the Crown has judgemental capacity because, in determining policy directives, members

169 Tony Honoré "Responsibility and Luck: The Moral Basis of Strict Liability" in *Responsibility and Fault* (Hart Publishing, Portland, 1999) 14 at 14.

170 Stephen R Perry "Responsibility for Outcomes, Risk, and the Law of Torts" in Gerald J Postema (ed) *Philosophy and the Law of Torts* (Cambridge University Press, New York, 2001) 72 at 91.

171 Ewing, above n 168, at 14.

172 At 7.

173 Thomas Nagel *Mortal Questions* (Cambridge University Press, Cambridge, 1979) at 26; and Bernard Williams "Moral Luck" in *Moral Luck: Philosophical Papers 1973–1980* (Cambridge University Press, Cambridge, 1981) 20 at 20–39.

174 Nagel, above n 173, at 29 as cited in Ewing, above n 168, at 18.

175 Nagel, above n 173, at 29.

consider relevant propositions (generally by way of voting), then take the prescribed steps for endorsing those propositions.[176] This allows the Crown to see what is at stake in each of its decisions.

The final and most difficult requirement to satisfy is that of relevant control.[177] It requires a group agent to exercise causal control "simultaneously at different levels".[178] How is this possible for the Crown? List and Pettit solve this problem by analogy: just as "[t]he actions of an individual are mediated by the neuronal activities in his or her brain", the Crown's "actions are mediated by the activities" of Crown servants.[179] Therefore, Crown group liability is consistent with theories of moral responsibility underpinning liability in tort law. The Crown is a morally responsible agent and can thus be liable in tort law.

VI CONCLUSION

Systemic negligence claims present a challenge to the Crown Proceedings Act and to the law of negligence. The Act does not provide for direct liability of the Crown, leaving plaintiffs who cannot frame their claim in terms of vicarious liability without a remedy. However, addressing this gap requires more than merely legislative change because systemic negligence claims raise significant conceptual issues in the areas of justiciability, proximity and breach. However, none of these doctrinal hurdles present a complete bar to systemic negligence claims. Justiciability will be generally available for decisions not to fix fundamental flaws in established Crown systems. Moreover, claims involving a static physical hazard are likely to succeed on the current approach to proximity. However, I argue that courts should also take an active role in shaping the law in this area. They should adopt a policy approach that aligns with the realities of systemic Crown negligence. Furthermore, courts can and should embrace List and Pettit's theory of group agency as a clear demonstration of how the Crown can satisfy the breach test. While these approaches may be novel and rather ambitious, they represent a conceptually clean way forward — towards a robust doctrine of direct liability.

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176 List and Pettit, above n 18, at 159.
177 At 159.
178 At 161.
179 At 161.