Dalhousie Law Journal

Volume 46 | Issue 1 Article 16

7-2023

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Recommended Citation

Irehobhude O. Iyioha, "Caesar's Gambit: Coherence, Justification of Legal Rules, and the Duty Test: Towards an Interactional Theory of Government Liability for Negligence in Disaster Management" (2023) 46:1 Dal LJ 27.

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Caesar's Gambit: Coherence, Justification of Legal Rules, and the Duty Test: Towards an Interactional Theory of Government Liability for Negligence in Disaster Management

This article examines barriers posed by the duty of care test for government liability for negligence in disaster management. It argues that various aspects of the test raise concerns about coherence, legitimacy of judicial decision-making, and ultimately how we justify liability in tort law. In examining the coherence of the duty test through multiple prisms, including through theoretical justifications for tort principles, this article contends that the duty test, in its framing and interpretations, fails to meet the formal and substantive demands of coherence, correctness and legitimacy. Arguing that justificatory theories offer necessary theoretical lenses through which to understand, critique, and reform the normative structure of legal rules such as the duty test, this article offers a different moral theory of government liability for negligence—articulated in the idea of an Interactional Theory—that gives expression to the co-efficient relationship between the formal and substantive dimensions of a legal rule.

Cet article examine les obstacles posés par le test du devoir de diligence en matière de responsabilité gouvernementale pour négligence dans la gestion des catastrophes. Il soutient que divers aspects du critère soulèvent des préoccupations quant à la cohérence, à la légitimité de la prise de décision judiciaire et, en fin de compte, à la façon dont nous justifions la responsabilité en droit de la responsabilité civile. En examinant la cohérence du critère de l'obligation à travers de multiples prismes, y compris à travers les justifications théoriques des principes de la responsabilité civile, cet article soutient que le critère de l'obligation, dans sa formulation et ses interprétations, ne répond pas aux exigences formelles et substantielles de cohérence, d'exactitude et de légitimité. Soutenant que les théories justificatives offrent des lentilles théoriques nécessaires pour comprendre, critiquer et réformer la structure normative de règles juridiques telles que le critère de l'obligation, cet article propose une théorie morale différente de la responsabilité gouvernementale pour négligence—articulée dans l'idée d'une théorie interactionnelle—qui exprime la relation co-efficiente entre les dimensions formelles et substantielles d'une règle juridique

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Introduction

The COVID-19 outbreak in early 2020 led all Canadian provinces to declare states of emergency or public health emergencies.[1] As is the case with most disasters, COVID-19 had the capacity to disrupt daily

1. Michael Watts, Susan Newell & Amanda Arella, "The Ontario State of Emergency—COVID-19" (last modified 3 April 2020), online: *Osler* <www.osler.com/en/resources/critical-situations/2020/the-ontario-state-of-emergency-covid-19> [perma.cc/2V8M-JFAG].

"conditions of living"[2] and cause excessive suffering that communities are, by themselves, unable to handle.[3] While disasters certainly include storms, wildfires, and earthquakes, public health disasters ignited by pandemic-type events are especially unsettling in their capacity to spread quickly and across borders, and in their far-reaching impact on the vulnerable. Vulnerability is often causally connected to the availability and viability of social determinants of health, such as stability of income, availability of housing, access to healthcare and employment opportunities, among others. Thus, disasters are not neutral in their impact on a population.[4]

The response of Canadian provincial governments to the COVID-19 pandemic differed in several respects, including the timing of responses to control the spread of the virus in long-term care homes and the types and scope of public health measures undertaken. Clearly, there were marked differences in attitudes to and the management of the pandemic as between liberal-leaning and conservative-leaning provinces and regions in Canada. Similarly, attitudes to and management of the pandemic in the United States fell markedly along the liberal-conservative divide; also manifestly different in several cases was the success-rate of their strategies.[5] The political discourse in more Conservative-Libertarian regions—Caesarian in style and ambitions—cast the leadership strategies as a certain type, one

2. Irehobhude O Iyioha, "Inequality, Health Determinants, and the Limits of Pandemic Law: Re-Imagining the Future of British Columbia's Pandemic Law After COVID-19" (31 March 2022), study funded by the Canadian Bar Association (CBA), Law for the Future Fund [on file with author] [Iyioha, "CBA Final Report"].

3. *Emergencies Act*, RSC 1985, c 22 (4th Supp).

4. Iyioha, "CBA Final Report," *supra* note 2. Indeed, the International Federation of Red Cross and Red Crescent Societies (IFRC) describes disasters partly as "serious disruptions to the functioning of a community that exceed its capacity to cope using its own resources" that are caused by a range of "factors that influence the exposure and vulnerability of a community." See "What is a disaster?" (last visited 17 April 2023), online: *International Federation of Red Cross and Red Crescent Societies* <www.ifrc.org/what-disaster> [perma.cc/U5KQ-CZMV]).

5. Benjamin C Ruisch, "Examining the Left-Right Divide Through the Lens of a Global Crisis: Ideological Differences and Their Implications for Responses to the COVID-19 Pandemic" (2021) 42:5 Political Psychology 795, DOI: <10.1111/pops.12740>; Javier A Granados Samayoa et al, "When does knowing better mean doing better? Trust in President Trump and in scientists moderates the relation between COVID-19 knowledge and social distancing" (2021) 31:1 J Elections, Public Opinion, & Parties 218, DOI: <10.1080/17457289.2021.1924744>; Anton Gollwitzer et al, "Partisan differences in physical distancing are linked to health outcomes during the COVID-19 pandemic" (2020) 4 Nature Human Behaviour 1186, DOI: <10.1038/s41562-020-00977-7>; Brian Neelon et al, "Associations Between Governor Political Affiliation and COVID-19 Cases, Deaths, and Testing in the US" (2021) 61:1 American J Preventative Medicine 115, DOI: <10.1016/j.amepre.2021.01.034>; Duane Bratt, "Bratt: Alberta's pandemic compliance problem is mainly self-inflicted" (8 May 2021), online: *Calgary Herald* <calgaryherald.com/opinion/columnists/bratt-albertas-pandemic-compliance-problem-is-mainly-self-inflicted> [perma.cc/AH6F-FX28]; Jason Markusoff, "What Jason Kenney's 'mission accomplished' moment has reaped for Alberta" (15 September 2021), online: *Maclean's* <www.macleans.ca/opinion/what-jason-kenneys-mission-accomplished-moment-has-reaped-for-alberta/> [perma.cc/C7LN-KBE6].

that, in the populist style of Caesar's leadership and in the limited context of this article, suggests a prioritization of the popular will, individual choice, libertarian freedoms, and the rejection, where politically expedient, of scientific advisory.[6] While these choices can have marked political consequences for the government in power, unfortunately, accountability through the electoral and broader political process is, at best, uncertain.[7] So too is the possibility of holding the government accountable through the tort of negligence.

Under Canadian tort law, it is exceedingly difficult, though not impossible, to hold governments liable for alleged negligence in the handling of their public functions. In the context of the mismanagement of a public health emergency, the challenges are particularly stark. While the Supreme Court decisions in *Just v British Columbia* and more recently in *Nelson (City) v Marchi* suggest that governments can indeed be held accountable for negligence in their public roles, claimants have been unsuccessful the majority of the time.[8] Not only do governments enjoy statutory immunity from lawsuits (though limited), claims advanced on the restrictive grounds outlined in statutes or under the common law are often impeded at the duty of care stage through the operation of the proximity analysis, or subsequently, the policy-operational test.[9]

Recognizing the consequential nature of government decision-making in a public health emergency, this article examines—through analyses of various theories for liability in tort law and through the principle of

6. Populism has been defined as: "an ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, 'the pure people' versus 'the corrupt elite,' and which argues that politics should be an expression of the *volonté générale* (general will) of the people." See Cas Mudde, "The Populist Zeitgeist" (2004) 39:4 Government and Opposition 541 at 543, DOI: <10.1111/j.1477-7053.2004.00135.x>. See also Obiora C Okafor, *Report of the Independent Expert on Human Rights and International Solidarity*, UNGAOR, 75th Sess, UN Doc A/75/180 (2020), where the author places populism in a historical context and outlines its impact on "long-held notions of the value of governance under the regime of the rule of law" (*ibid* at 5). Populist leaders often declare "economic anxiety, existential insecurity and a growing culture of fear" (See Henry A Giroux, "Neoliberalism Paved the Way for Authoritarian Right-Wing Populism," (26 September 2019), online: *Truthout* <truthout.org/articles/neoliberalism-paved-the-way-for-authoritarian-right-wing-populism/> [perma.cc/DF6X-G4TV]), while ignoring "restraints often imposed by the liberal or constitutional order" (Okafor, *supra* note 6 at 4, citing Kurt Weyland, "Populism's threat to democracy: comparative lessons for the United States" (2020) 18:2 Perspectives on Politics 389).

7. In the case of Alberta where the government's series of COVID-19 decision-making and its "Open for Summer" decision proved disastrous, the political consequences came after a leadership review in May 2022. See Nia Williams, "Alberta premier Jason Kenney resigns after party leadership review" (18 May 2022), online: *Reuters* <www.reuters.com/world/americas/alberta-premier-says-he-will-step-down-after-party-leadership-review-2022-05-19/> [perma.cc/WP4P-LT5V].

8. *Just v British Columbia*, [1989] 2 SCR 1228, 64 DLR (4th) 689 [*Just* cited to SCR]; *Nelson (City) v Marchi*, 2021 SCC 41 [*Nelson*].

9. *Crown Liability and Proceedings Act*, SO 2019, c 7, Schedule 17.

coherency in the justification of legal rules—the barriers to government liability for negligence in emergency management posed by the duty of care test. In a negligence action, the determination of whether a government owes a claimant a duty of care is based on the two-step *Anns/Cooper* test, which involves establishing foreseeability and proximity at the first stage and determining whether there are policy considerations to negate a duty of care at the second stage.[10] In negligence actions against the government, the claimant faces additional hurdles at the duty stage, including a determination that the government activity was *operational* in nature—in which case the decision is subject to review—rather than *policy-based*—a category immune from lawsuit.[11] The policy-operational distinction is difficult to draw and judicial statements on the distinction have not been of much use to scholars and analysts. In the context of a public health emergency, which serves as a case study in this article, it would be necessary to decide, for example, whether a decision to remove all COVID-19 restrictions at the early stages of vaccination or to ban vaccination mandates all together is "core policy" or whether the decision embodies operational elements.[12] Thus, the immunity of government institutions in making policy decisions is not iron-clad.

Nonetheless, the jurisprudence on government liability for negligence reveals, at many levels, the court's enduring struggle to articulate clear, guiding principles under the duty test that can be applied in different fact contexts with some level of predictability. As will be discussed in this article, this lack of clarity in interpreting the relevant principles in the duty test has led to questionable outcomes. For example, the different outcomes in the cases of *Just* and *R v Imperial Tobacco* have further contributed to unpredictability in the application of the duty test. Also problematic are the restrictive rules for determining proximity in cases involving public bodies and the impracticality of the legal requirements.

This article argues that these issues and the arbitrary outcomes in negligence cases against public bodies reflect a greater problem with the duty test for government liability that is linked to questions of coherence and legitimacy of judicial decision-making, and ultimately to the question of how we justify liability in the field of tort law. As a concept that animates the legitimacy of law, coherence is defined by such qualities as certainty, clarity, consistency, non-arbitrariness, constancy and congruity—all elements that contribute to law's effectiveness and correctness. This article

10. *Nelson*, *supra* note 8 at para 17 discussing the *Anns/Cooper* test.
11. *Just*, *supra* note 8 at para 14; *R v Imperial Tobacco*, 2011 SCC 42 at para 72 [*Imperial*].
12. This is the language used by then Chief Justice, Beverley McLachlin, in *Imperial*, *supra* note 11.

contends that the duty formula for government liability for negligent actions fails to meet the requirements of these underlying concepts of coherence and are, therefore, consequential problems of legitimacy.

Legitimacy of judicial adjudication is necessarily contingent on the correctness of legal rules and their interpretation, or put differently, on the internal and external rationality of legal principles and decisions. The correctness of law (or the internal and external rationality of law) addresses, firstly, the need for law to be internally coherent as measured by the aforementioned qualities of certainty, clarity, consistency, and congruity, among others. Secondly, law's correctness also underscores the importance of external coherence of legal rules as determined by their moral quality and the instrumental goals they serve. The quality of coherence captures both the *formal* requirements for law to be internally rational, as well as the *substantive* goal of external rationality of legal rules. Thus, discussions of coherence necessarily engage the broader discourse on the theoretical justifications for tort principles; that is, whether by design tort law possesses its own internal, self-referential logic that explains liability and compensation (non-instrumental theory) or whether its organizing logic is explained by the instrumental goals it serves (instrumental theory). This discourse affords the necessary theoretical lenses through which to understand, critique, and possibly reform the normative structure of legal rules, such as the duty test, which impede a finding of liability for government negligence in a broader context, as well as in the particular context of public health emergencies.

Specifically, this discourse asks: what explains or justifies the nature of liability in torts? How might a justificatory theory of torts—or even a sub-area of torts, such as government liability for negligence—shed light on not just the problems with the common law and statutory concepts that are used to determine liability, but also on feasible approaches to understanding and reforming impugned legal concepts, such as the duty test for government liability? Scholars of jurisprudence and torts—from Ernest Weinrib to Lawrence Rosenthal and to Allan Hutchison—offer and critique various theories to explain the basis for liability in tort law. While one school of thought suggests that the inward-looking and *non-instrumental* theory of "Corrective Justice"—which mirrors the tradition of legal formalism—sufficiently explains tort liability, the other school of thought supports an *instrumental* theory of tort liability. A body of scholarship, of which Canadian Scholar Ernest Weinrib is the lead proponent, posits that the Aristotelian theory of corrective justice provides an internally coherent justification for a defendant's liability in tort law—a

justification that Weinrib bases on a theory of correlativity of rights and wrongs as supported by moral norms derived from Kantian ethics.[13]

In this postulation, external rationalizations of a defendant's liability have no place in a theory of tort liability. According to the theory, external justifications for liability ought to be excluded from a valid theory of tort liability because the theory of corrective justice that is built on the correlativity of the actions of two *equal* parties to a tort dispute and on Kant's ethical theory, which posits that it is *impermissible* for a party (the defendant) in a tort action to act in a *self-preferential* way, offers a supposedly self-contained moral content for the theory of corrective justice.[14] On the other hand, instrumental theories suggest that tort law serves broader efficiency-based and distributive goals beyond resolving the dispute between the parties to the case, such as, for example, deterrence of unsafe, and ultimately, costly behaviours. While the concept of corrective justice has found relative support in Canadian courts, including at the Supreme Court of Canada, neither of these theories provides a complete explanation for government liability for negligence.[15]

This article contends that the conceptual framework of corrective justice, as well as the Kantian ethics that support it, fails to accommodate the particularities of tort liability of public bodies. It argues that the assumptions inherent in the concept of correlativity, when assessed in the context of government liability for negligence, raise several substantive problems that resurrect old anxieties about formalism and its treatment of socio-scientific facts that imbue law with its capacity for justice, especially for equity-seeking groups. In fact, when the formal theory of corrective justice is applied to government liability for negligence, it fails in both its form and elucidation to offer a justificatory theory for government liability because, as will be explained, it retells a familiar but much debunked story of neutrality of legal rules and of formal equality as foundational to the character of law—qualities that highlight the formal and substantive problems with the duty test. The problems of formalism

13. See Ernest Weinrib, "Towards a Moral Theory of Negligence Law" (1983) 2 Law & Phil 37 at 37 [Weinrib, "Negligence Law"]; see e.g. Derek McKee, "The Responsibility of Common Law Scholarship: A Case Study" (2016) 118 R du N 283 at 304, DOI: <doi.org/10.7202/1043452ar> [McKee, "Responsibility of Common Law"]; See Lawrence Rosenthal, "A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings" (2007) 9:3 U Pa J Const L 797 at 823, online: <scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1251&context=jcl> [perma.cc/TVJ7-4VRQ].

14. These two concepts that constitute the organizing frames of Weinrib's theory of corrective justice summarily are: *Equality of Parties and Impermissibility of Self-Preferential Treatment*. See Weinrib, "Negligence Law," *supra* note 13 at 37.

15. McKee, "Responsibility of Common Law," *supra* note 13 at 798.

and the assumed neutrality of law are particularly resonant in the area of public body liability for negligence, and call into question the very foundations of form-based, non-instrumental justifications for liability in tort law. The resultant questions are even more significant in the context of public health disasters and the disproportionate impact of disasters and of government mismanagement of emergencies on disadvantaged groups.

Thus, in this familiar retelling of legal neutrality and formal equality, are new pointers to the sometimes-underrated capacity of law—even one that is as ostensibly neutral as the legal principles governing the duty of care of public bodies—to ignore the social impact of structural inequality on those most vulnerable and marginalized. These especially include women in their socially-constructed roles, racialized groups in their persistent exclusion from legal benefits, Indigenous communities in their historical and continuous marginalization, elderly residents, and impoverished populations with their limited access to social goods. Fundamentally, the claims of Aristotelian corrective justice and Kantian ethics make the case for a new theoretical approach to understanding government liability for negligence that can support judicial reform of the duty test—one that draws on public health data, such as on the experiences of female (and largely racialized immigrant) health workers in the long-term care sector, as well as elderly residents in the sector, and on the impact of governmental action on Indigenous communities.

The above issues and thesis are discussed in the following four sections of this article. Section I offers a summary outline of public health and emergency powers in a public health emergency in three select provinces (Ontario, Quebec and Alberta); it also discusses the Crown's statutory immunity from liability and the bad faith/irrationality exceptions to immunity. Section II examines Crown immunity under the common law and discusses the components of the duty test, including the requirements of foreseeability and proximity, residual policy concerns, and the policy-operational distinction; it further examines the articulation of bad faith and irrational decision-making in the Canadian courts' jurisprudence.

Section III examines the centrality of coherence to the justification of legal rules. It sets out the various ways in which the duty formula in the context of government liability for torts fails to reflect the qualities of certainty, clarity, consistency, non-arbitrariness, constancy and congruity—the central criteria of coherence. Further, it describes how in this failure, the duty formula ultimately fails the test of moral correctness—the organizing concept that imbues law with its capacity for justice. The section also addresses the implications for law's correctness and legitimacy of a government's failure to fulfill the objectives of the public health and

emergency statutes that authorize its actions. In this light, it discusses how the framing of the duty test, which ignores these implications, and the resultant arbitrary outcomes of the current framing of the test, defeat the overarching objectives of correctness and legitimacy of a system of legal rules.

Section IV takes the conclusions in the preceding section—that the duty test, in its framing and interpretations, fundamentally does not meet the formal and substantive demands of coherency, correctness and legitimacy—and asks whether a pathway for reform of the duty test might be fashioned from a theoretical understanding of tort liability that recognizes the manifold substantive, systemic and equity-based facets of the action on government liability for torts that are typically repudiated in the traditional formalist frames of corrective justice. To accomplish this, the section engages with the two organizing frames of Weinrib's moral theory of tort liability—*correlativity of equal parties* and *impermissibility of self-preference*—and applies these concepts to the case of government liability. Through an explication of the limits of these concepts, the section makes the case for a different moral theory of government liability for negligence—one expressed in the idea of an "Interactional Theory"—framing the mutual or co-dependent relationship between the formal and substantive dimensions of a legal rule.

I. *Public health disasters and emergency powers*

1. *Emergency powers in a public health emergency*

Public authorities have complex responsibilities set out by their governing statutes that require difficult decisions to be made. The uncertainty caused by the rapidly changing nature of events in a public health emergency makes decision-making even more complicated. Emergencies and the governmental powers required to curtail the disasters that give rise to them are typically urgent, provisional, and have the potential for serious consequences. From the closure of businesses and schools to the restriction of movements and other required behavioural changes enacted through various laws, orders and policies, emergency actions in a public health emergency aim to protect lives and property, as well as business and economic interests.

The exigent and temporal nature of emergency powers—and by implication the gravity of the circumstances and the governmental actions that are taken to ameliorate their impact—can be gleaned from statutory definitions of an emergency.[16] Due to the capacity for quick transmission

16. Under the *Emergencies Act*, a national emergency is an "urgent" and "critical" state of affairs

and the imminent threat to human life, public health emergencies pose additional complications for governments, creating rapid shifts in law and policy development. The COVID-19 pandemic has created such shifts in legal and policy frameworks in and beyond the health sector, as well as in academic fields, such as public health law, compelling a reexamination of rights, duties, and the limits of governmental powers.

The powers of the executive branch of government to act under an emergency and to take extraordinary measures to contain the emergency is granted by statute. Emergency powers across the provinces and territories differ in their provisions, the process for invocation, and the public officials that can execute them.[17] Governments may also act in an emergency on the basis of powers granted under provincial public health laws and specific orders and laws made in relation to the given public health emergency, as may be seen in the case of specific COVID-19 legislation.[18] Often, in the case of an infectious disease outbreak of public health concern, the provinces and territories would trigger their emergency powers—upon the recommendation of the chief medical officer of health—by declaring a public health emergency.[19] Provincial governments are empowered to declare states of emergencies and act under emergency powers granted under statute to address emergencies, such as a public health disaster.[20] While such statutes partly lay the foundation for the federal and provincial governments' response to the COVID-19 pandemic, they also constitute the basis for limitation of government liability in negligence for mismanagement of public health emergencies.[21] In this context, statutory limits shed light on the rationale (such as limiting indeterminate liability

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that is temporary in nature, which "seriously endangers the lives, health or safety of Canadians" to such an extent that surpasses the "capacity or authority" of a territory or province to manage the crisis, or significantly threatens the Canadian Government's capacity to "preserve the sovereignty, security and territorial integrity of Canada" that cannot otherwise be "effectively" addressed through any other Canadian law. See *Emergencies Act*, *supra* note 3. See generally Irehobhude O Iyioha, "Not Just Heroes, Humans Too: Inequality, Vulnerability, and the Limits of Pandemic Law and Policy (A Survey of Nursing Home Health Workforce Experience)" (31 December 2021), study funded by the Canadian Bar Association (CBA) Law for the Future Fund [unpublished] [Iyioha, CBA Summary Report] and Iyioha, "CBA Final Report," *supra* note 2.

17. Marie-Eve Couture-Ménard et al, "Answering in Emergency: The Law and Accountability in Canada's Pandemic Response" (2021) 72 UNBLJ 1 at 6.

18. *Ibid* at 18.

19. *Ibid* at 6. This declaration could be made by Cabinet or the minister with the relevant portfolio.

20. See e.g. Ontario's *Emergency Management and Civil Protection Act*, RSO 1990, c E9; Quebec's *Public Health Act*, CQLR 2001, c S-2.2; Quebec's *Civil Protection Act*, CQLR 2001, c S-2.3; Alberta's *Public Health Act*, RSA 2000, c P-37 [*PHA*]; Alberta's *Emergency Management Act*, RSA 2000, c E-6.8 [*Alberta Emergency Management Act*]. The Canadian federal government may act under emergency powers granted in three key pieces of legislation. See the *Quarantine Act*, SC 2005, c 20; *Emergency Management Act*, SC 2007, c 15; *Emergencies Act*, *supra* note 3.

21. See generally *supra* note 20.

and deference to decision-making by the executive branch given the comprehensive and sometimes-complicated nature of state responsibilities) that support the policy-operational distinction in the duty of care analysis. The next sub-section reviews relevant statutory provisions that grant and limit government immunity for negligent actions.

2. *The Crown's liability for public health emergencies: statutory immunity and bad faith/irrationality clauses*

With extensive emergency powers comes the propensity for misuse, mismanagement, and negligence. As noted, aggrieved citizens who believe they have been harmed by government action have a limited right to seek accountability through a civil action in tort. As will be discussed in the next section, there are significant doctrinal barriers to finding a government liable for negligence under the common law; but the extensive immunity afforded to governments under statutory law also constitutes barriers.

Federal and provincial governments enjoy immunity from lawsuits under various laws that are limited only by *good faith* or *rationality* requirements.[22] For example, under Quebec's *Public Health Act* ("*PHA*"), the government, Minister of Health, or such other authority enjoy immunity from lawsuits for actions taken in good faith in the performance of their functions carried out in the context of or upon the declaration of a public health emergency.[23] In the case of Ontario, multiple statutes, including the *Emergency Management and Civil Protection Act* ("*EMCPA*"), offer immunity protection to the government. While the Ontario government may be subject to vicarious liability for the actions of public officials who are otherwise protected by the immunity provisions under the EMCPA, the Act protects Crown officials and other public servants from lawsuits for their actions in an emergency as long as they acted in good faith.[24]

A number of other provinces have similar laws or have passed COVID-19-specific legislation to protect public servants, Crown officials, and other individuals from lawsuits based on particular areas or institutions of healthcare practice, such as long-term care homes. These latter statutes, which prohibited COVID-19-related lawsuits in relation to the devastating impact of the pandemic in long-term care homes, limited the liability of individuals in the sector to instances of demonstrable "gross negligence" and operation in "bad faith." For example, the Ontario government granted such immunity to nursing and retirement homes through the *Supporting*

22. Marie-France Fortin, "Liability of the Crown in Times of Pandemic" in CM Flood et al, eds, *The Law, Politics and Ethics of COVID-19* (Ottawa: University of Ottawa Press, 2020) at 225.
23. See Couture-Ménard et al, *supra* note 17 at 15.
24. *Ibid* at 17-18.

Ontario's Recovery and Municipal Elections Act, *2020*; similar protections were granted by British Columbia and Nova Scotia.[25]

The *Proceedings Against the Crown Act*[26] of Alberta outlines the scope of liability of the Crown for tortious actions. Section 5 provides that *"*the Crown is subject to all those liabilities in tort to which, if it were a person of full age and capacity, it would be subject."[27] However, the *Public Health Act*, like similar Acts in the provinces discussed above, protects the Crown from liability for acts or omissions undertaken in good faith.[28] In the case of a public health emergency, the Act absolves the Crown, persons, and other public health actors and organizations acting under the direction of the Crown from liability for acts carried out in good faith in relation to their responsibilities during the emergency.[29] Similarly, Part 3 of Alberta's *Emergency Management Act* ("*EMA*") protects emergency service providers from liability.[30] Notably, bad faith/irrationality clauses

25. See *Supporting Ontario's Recovery and Municipal Elections Act*, SO 2020, s 2(1) [*Supporting Ontario Act*]; British Columbia's *COVID-19 Related Measures Act*, SBC 2020, c 8, ss 5(1), 5(2)); Ministerial Order 20-013, (2020) NS Gaz I, 1677, online: <novascotia.ca/just/regulations/rg1/RG1-2020-09-30.pdf> [perma.cc/MQA3-FLZK]. These offer similar protections from lawsuits to retirement homes and nursing homes—that is, institutions that were not "grossly negligent" and that had acted in "good faith." See *Supporting Ontario Act*, supra note 25, s 5(1)(a)-(d). See also Lad Kucis, "Canada: Proposed Legislation Would Shield Retirement Homes and Long-Term Care Homes from COVID-19 Lawsuits" (21 October 2020), online (blog): *Gardiner Roberts* <www.mondaq.com/canada/operational-impacts-and-strategy/997184/proposed-legislation-would-shield-retirement-homes-and-long-term-care-homes-from-covid-19-lawsuits> [perma.cc/G2MM-YFWR]. See also Laura Stone, "Ontario legislation would make it harder to hold long-term care operators accountable: Lawyers," (22 October 2020), online: *The Globe and Mail* <www.theglobeandmail.com/canada/article-ontario-legislation-would-make-it-harder-to-hold-long-term-care/> [perma.cc/R7TE-WKUZ].

26. RSA 2000, c P-25.

27. *Ibid*, s 5(1). These include matters "(a) in respect of a tort committed by any of its officers or agents, (b) in respect of any breach of those duties that a person owes to that person's servants or agents by reason of being their employer, (c) in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property, and (d) under any statute or under any regulation or bylaw made or passed under the authority of any statute" (*ibid*, ss 5(1)(a)-(d)).

28. *PHA*, *supra* note 20, s 66.1(1). Under this section, the PHA provides that the government is immune from actions commenced against a number of public officials, including a Minister of the Crown, a regional health authority, employee or agent of a regional health authority or under the administration of the Minister, the Chief and Deputy Medical Officer, health practitioners, teachers, among others "for anything done or not done by that person in good faith while carrying out duties or exercising powers" under the Act.

29. See *ibid*, s 66.1(2), which provides: "(2) No action for damages may be commenced against any person or organization acting under the direction of the Crown, a Minister of the Crown, the Chief Medical Officer, the Deputy Chief Medical Officer or a medical officer of health for anything done or not done by that person or organization in good faith directly or indirectly related to a public health emergency while carrying out duties or exercising powers under this or any other enactment."

30. This protection stipulates that no action may be brought against the minister or persons acting under their authority or direction "for anything done or omitted to be done in good faith while carrying out a power or duty under" the Act or accompanying regulations. See *Alberta Emergency Management Act*, *supra* note 20, s 27.

make it more difficult for a claimant to succeed in a negligence action against government.

Beyond these statutory restrictions on lawsuits against governments for their handling of a public health emergency, claimants must contend with doctrinal challenges under the common law. The next section examines the common law on the subject.

II. *Government immunity against liability for negligence under the common law*

1. *Liability under negligence law: an overview*

The jurisprudence of the court on governmental liability for negligence in Canada has created a set of principles that have given rise to much uncertainty in their interpretation. To understand these complications, it is necessary to start with the basic elements of a negligence action: *duty of care*—the requirement that plaintiff establish that the defendant owed them a duty of care; *standard of care*—that the defendant breached the required standard of care; and *causation*—that the breach of the standard of care caused the plaintiff's injury.[31] Thus, the actuality of an injury is an essential part of the negligence action. Plaintiffs must also prove that their injury is not too remote under the principles of *legal causation* or *remoteness of damages*. In the context of a negligence action against a public authority, there are several additional requirements that a claimant must establish to succeed, and these requirements have come to constitute near-insurmountable hurdles for claimants seeking to build a case based on government mismanagement of a public health crisis. The additional requirements engage the first element of the negligence action—the *duty of care*, a new test of which was set out in the Canadian Supreme Court cases of *Cooper v Hobart* and *Edwards v LSUC*.[32]

The cases *Just* and *Imperial* outline the operation of this rule in cases involving government liability for tortious actions. A claimant seeking damages for breach of the duty of care by a government must, as part of the traditional requirements under duty of care, establish foreseeability and proximity. Essentially, the court establishes that the harms a claimant has suffered based on the government's actions were reasonably foreseeable and that a close and direct or "proximate" relationship exists between the government and claimant such as to bring it within the reasonable

31. *Odhavji Estate v Woodhouse*, 2003 SCC 69.
32. *Cooper v Hobart*, 2001 SCC 79 [*Cooper*]; *Edwards v Law Society of Upper Canada*, 2001 SCC 80.

contemplation of the government that the actions they took would have the effect that it allegedly had on the claimant:

> In determining whether a duty of care exists the first question to be resolved is whether the parties are in a relationship of sufficient proximity to warrant the imposition of such a duty.[33]

A proximate relationship between the government and the claimant may be established either through an empowering statute that explicitly or impliedly creates a relationship of proximity between the government and the claimant and therefore gives rise to a prima facie duty of care, or through the history of the relationship or interactions between the parties that is not negated by the empowering statutory scheme.[34] In addition, the court in *Cooper* refines the duty test by including the need to evaluate the closeness of the relationship between plaintiff and defendant to determine whether it is just and fair to impose a duty of care on the defendant.

Once a claimant succeeds at this first stage of analysis and demonstrates a prima facie duty of care, the evidentiary burden shifts to the defendant.[35] The defendant must—as part of the second stage of the duty of care test in Canada—establish that there are "countervailing policy considerations"[36] to negate a finding of the duty established at the first stage:

> The plaintiff bears the ultimate legal burden of establishing a valid cause of action, and hence a duty of care: *Odhavji*. However, once the plaintiff establishes a prima facie duty of care, the evidentiary burden of showing countervailing policy considerations shifts to the defendant, following the general rule that the party asserting a point should be required to establish it.[37]

In the context of government liability for torts, a defendant would need to show that the impugned government conduct was a policy decision which, when taken in good faith, is immune from liability, and not an operational decision that is subject to judicial oversight.[38] These requirements—foreseeability, proximity and bad faith policy or operational decision—are infinitely difficult for claimants to prove. Many of these actions fail at the first stage where claimants must establish proximity because plaintiffs are

33. *Just*, *supra* note 8.
34. *Imperial*, *supra* note 11. See also Lewis N Klar, "R v Imperial Tobacco Ltd: More Restrictions on Public Authority Tort Liability" (2012) 50:1 Alta L Rev at 157, DOI: <10.29173/alr272> [Klar, "Imperial Tobacco"].
35. *Childs v Desormeaux*, 2006 SCC 18 at para 13.
36. *Ibid.*
37. *Ibid.*
38. *Nelson*, *supra* note 8 at para 86.

often unable to establish a proximal relationship with the government.[39] In their decision-making, public authorities must consider the interests of the public at large; therefore, finding that a specific duty of care is owed to a subset of individuals in society may be difficult. The next subsection engages with each aspect of this two-stage duty test.

2. *Duty of care: foreseeability and proximity*

The duty test set out in the British case of *Anns v Merton London Borough Council* ("Anns Test") for the determination of a duty of care, which was subsequently refined in the *Cooper* and *Edwards* cases, inquires at the first stage whether the nature of the relationship between the parties gives rise to a prima facie duty of care.[40] At the second stage, the test asks whether there are residual policy concerns to negate that duty of care.[41] To establish a prima facie duty of care, a plaintiff must show that the harm suffered by the plaintiff was the reasonably foreseeable consequence of the government's actions, and that there was a proximal relationship (or proximity) between the parties.[42]

Foreseeability in this context is nebulous and difficult to define, though it appears to be a low bar to satisfy. The Supreme Court decision in *Imperial* attempted to clarify, and indeed further restricted, the elements to be established for government liability for regulatory disasters. Chief Justice McLachlin stated that this element of the duty test is satisfied as long as some sort of foreseeability of harm was present. Thus, what is required is the foreseeability of harm in "a general way" and not necessarily the specific injury suffered by the plaintiff.[43]

A much more difficult challenge is the requirement of proximity between a plaintiff and the government defendant. Plaintiffs must establish that beyond reasonable foreseeability of the risk of harm befalling the plaintiff based on the government's actions, there was a relationship of proximity between the defendant and the plaintiff.[44] A finding of proximity is based on the existence of a sufficiently close and direct relationship between the plaintiff and defendant. Foreseeability and proximity are "two aspects of one inquiry" seeking to determine whether there is a relationship

39. Bruce Feldthusen, "Public Authority Immunity from Negligence Liability: Uncertain, Unnecessary, and Unjustified" (2013) 92:2 Can Bar Rev at 211, DOI: <10.2139/ssrn.2433058> [Feldthusen, "Public Authority Immunity from Negligence Liability"].
40. *Anns v Merton London Borough Council*, [1977] UKHL 4, [1978] AC 728.
41. *Ibid.*
42. *Cooper*, *supra* note 32 at para 31.
43. *Imperial*, *supra* note 11; Klar, "Imperial Tobacco," *supra* note 34 at 160.
44. *Ibid.*

between the parties that should give rise to a presumptive or prima facie duty of care.[45]

Proximity can be established by the existence of a recognized category of cases that provide the precedential basis for a finding of duty as was the case in *Just* and, more recently, in *Nelson v Marchi.*[46] Where there are no case precedents, the court must analyze the matter before it as a novel case applying the full duty test in *Cooper*. The determination of whether a case is novel or belongs to an established duty category is not only "a highly arbitrary exercise,"[47] but one that increasingly appears to be part of the judicial arsenal for uncoupling cases, such as those in the public health context, from established, and therefore successful, duty categories, and for engaging in a full *Cooper*-based duty analysis that will predictably fail.

The determination of proximity where the defendent is a public authority has largely focused on the statutory scheme and whether it explicitly or implicitly creates proximity between plaintiffs and public authorities.[48] On its face, therefore, the requirement that proximity between the parties be established—in the particular context of government liability for regulatory failures—through the prism of the statutory provisions that authorized the impugned governmental action or through the history of the relationship and interactions between the parties to the dispute,[49] would (erroneously) seem like a straightforward exercise. As noted, the determination of proximity also entails a consideration of whether, in light of the relationship between the plaintiff and defendant, it is just and fair "to impose an obligation on one party to take reasonable care not to injure the other."[50] In order to conduct this assessment, a number of considerations are relevant; for example, the relationship and expectations between the parties, reliance on those expectations, and the interests involved in the matter. The court's jurisprudence suggests that reliance on statements made by a public authority to the general public regarding matters such as the safety of products will not satisfy the requirement of proximity in this regard.[51]

Since *Cooper*, Canadian courts have more often than not found no relationship arising out of a statute, finding instead—as did the court in *Imperial*—"only general duties to the public, and no private law

45. See *Imperial*, *supra* note 11 at para 41.
46. *Just*, *supra* note 8; *Nelson*, *supra* note 8.
47. See Klar, "Imperial Tobacco," *supra* note 34 at 159.
48. Bruce Feldthusen, "Please Anns—No More Proximity Soup" (2018), University of Ottawa Faculty of Law Working Paper No 2018-21 [Feldthusen, "Please Anns"].
49. *Ibid* at 23-24.
50. *Imperial*, *supra* note 11 at para 41.
51. Klar, "Imperial Tobacco," *supra* note 34 at 163; *Imperial*, *supra* note 11.

duties to consumers."[52] This semantically incongruous statement sets an unreasonable and unachievable precedent. As statutes are by their nature designed to address matters of general public concern, such as the regulation of goods and services, for a population of rights-holding individuals, the supposition that the very real harm done to individual citizens by the negligent actions of a body entrusted with responsibility for their care (which ought to give rise to a private law duty) should or can be theoretically subsumed under a notional general duty to a faceless, unnamed "public" (from which no private law rights arise) is disingenuous. Indeed, the court in *Imperial* admits this much in observing that "[i]t may be difficult to find...a statute [that] creates sufficient proximity to give rise to a duty of care," given that "more often, statutes are aimed at public goods, like regulating an industry, or removing children from harmful environments."[53]

While this position—that "only general duties to the public, and no private law duties to consumers" arise from most enabling statutes—might be understood as useful for addressing locus standi and indeterminate liability concerns, these concerns could be better addressed through other tools in the cache of barriers that are embodied in the duty test. For example, the issue can be dealt with through an analysis under residual policy considerations (if appropriately refined),[54] or through other elements of the action, such as causation.[55] Neither the reference to enabling statutes nor the examination of the specific interactions between public authorities

52. See *Imperial*, *supra* note 11. See also Klar, "Imperial Tobacco," *supra* note 34 at 161.

53. See *Imperial*, *supra* note 11.

54. This is another near impossible requirement inserted into the proximity analysis that raises concerns that these successive insoluble requirements are intended to achieve a pre-determinate outcome. I discuss this argument fully in section IV.

55. The grant of the Crown's motion to strike at the duty stage—and through a layered legal test that several academics agree are unwarranted and unjustified (see e.g. Feldthusen, "Public Authority Immunity from Negligence Liability," *supra* note 39)—precludes the subsequent assessment of the Crown's conduct through the standard of care or causation principles. While generally less onerous than the duty test, the standard of care analysis, or the equally taxing factual causation principle of negligence law also serve as control mechanisms for weeding out undeserving claims, and as such can serve the same goals sought to be accomplished through the duty requirement. Nonetheless, even a case that fails under the factual causation stage of the negligent action, but successfully establishes a breach of the standard of care, is significant for policy reform and standards setting. A finding that a government is in breach of its obligations to its citizenry—even though not found liable due to the constraints of the causation requirement—serves an important regulatory role in public health governance. See e.g. Lorian Hardcastle, "Government Tort Liability for Negligence in the Health Sector: A Critique of the Canadian Jurisprudence" (2012) 37:2 Queen's LJ 525 at 569, online: <journal.queenslaw.ca/sites/qljwww/files/Issues/Vol%2037%20i2/5.%20Hardcastle.pdf> [perma.cc/X3XB-JYGX].

and plaintiffs has enhanced the likelihood of a finding of proximity for claimants suing the government.[56]

Eliopoulos and *Abarquez*—two cases that have dealt with whether a private duty of care exists in government's management of a public health infection in the context of the West Nile Virus and SARS—were struck down following a finding that no duty of care could be established.[57] Mismanagement of the West Nile virus that may have adversely affected a small group of individuals was not sufficient to create a finding of proximity when a greater duty was said to be owed to the public as a whole. Even in *Abarquez*, where a particular group of nurses were affected by decisions related to the imposition, lifting, or re-introduction of measures to combat SARS, a finding of proximity could not be found. A greater duty to the public, which engages with the executive arm's broader responsibility to weigh economic, social and political considerations, has often been found to outweigh the interests of any particular set of individuals. Similarly, cases regarding government liability for the management of COVID-19 face the challenge of establishing proximity.

3. *Residual policy considerations*

The finding of a prima facie duty of care in the first stage of the *Anns/Cooper* test may be negated by "residual policy concerns" external to the relationship between the plaintiff and defendant. In this regard, the court assesses whether the recognition of a duty of care might impact other existing legal obligations, the legal system, and society generally. Some traditional considerations pertinent to this assessment include the impact of a finding of duty on pre-existing legal principles,[58] the likelihood that a finding of duty would lead to indeterminate liability, the impact on the integrity and coherence of the legal system, and other general policy reasons.[59]

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56. Klar, "Imperial Tobacco," *supra* note 34 at 160. See also Lewis Klar, "Tort Liability of the Crown: Back to Canada v Saskatchewan Wheat Pool" (2007) 32:3 Adv Q 293; Lewis Klar, "Syl Apps Secure Treatment Centre v. B.D.: Looking for Proximity within Statutory Provisions," Case Comment, (2007) 86:2 Can Bar Rev 337, online: <cbr.cba.org/index.php/cbr/article/view/4079/4072> [perma.cc/9YPT-SE4T]; Lewis Klar, "The Tort Liability of Public Authorities: The Canadian Experience" in Simone Degeling, James Edelman & James Goudkamp, eds, *Torts in Commercial Law* (Pyermont, NSW: Thomson Reuters Australia, 2011).

57. *Eliopoulos et al v Ontario (Minister of Health & Long-Term Care)* (2006), 276 DLR (4th) 411, 82 OR (3d) 321 (ONCA) [*Eliopoulos*]; *Abarquez v Ontario*, 2009 ONCA 374 [*Abarquez*]. In *Eliopoulos*, *supra* note 57, the defendants were granted a pre-trial motion to strike as the government was held not to owe any particular individuals a duty of care.

58. For example, the impact on a woman's legal right to autonomy and privacy of finding that she owes a duty of care to an unborn fetus. See e.g. *Dobson (Litigation Guardian of) v Dobson*, [1999] 2 SCR 753, 174 DLR (4th) 1 [*Dobson* cited to SCR].

59. See Hardcastle, *supra* note 55.

Notably, the assumption that a finding that a government owes a prima facie duty of care to the plaintiff would raise the spectre of indeterminate liability is difficult to support. One reason for this is that the legal requirements for a finding of duty are already onerous—and these occur before the residual policy stage; thus, the likelihood of success on these requirements, as the jurisprudence shows, is infinitely slim. As Klar puts it succinctly, "it is difficult to see how indeterminate liability can ever be a problem."[60]

In the case of actions alleging negligence against a public authority, the main focus at this stage of the analysis is usually the policy/operational distinction in relation to the relevant government activity. The next subsection takes up this discussion.

4. *Policy versus operational decisions*

As noted, the essence of the residual policy analysis at the second stage of the duty test in actions against a public authority for negligence is often characterized by the policy/operational distinction in relation to the relevant government activity. Under this requirement, public authorities or government actors are not liable in negligence for policy decisions; they may only be liable for operational decisions.[61] However, the distinction between a policy decision and an operational decision "is notoriously difficult, if not impossible, to draw."[62]

A series of cases before the Supreme Court of Canada have tried to deconstruct the distinction between a policy decision versus an operational decision. In *Just v British Columbia*, where the Supreme Court first examined the policy/operational distinction, the court distinguished the decision to inspect a highway, which it categorized as a policy decision, from the nature and manner of the inspection, which it classified as an operational decision.[63] Subsequently, the Supreme Court revisited the policy defence in *Brown v British Columbia*, another highway maintenance case.[64] The summer schedule of maintenance to inspect the highway, which resulted in an icy patch that caused a crash, was held to be a policy decision based on budgetary and financial constraints. The

60. Klar, "Imperial Tobacco," *supra* note 34 at 169. See also Feldthusen, "Please Anns," *supra* note 48.

61. See *Cooper*, *supra* note 32 at para 38.

62. Feldthusen, "Public Authority Immunity from Negligence Liability," *supra* note 39 at 215.

63. In that case, the failure of the provincial government to maintain a highway, which resulted in a great boulder coming loose from the slopes, injuring the appellant and killing his daughter, was held to be an operational decision as it involved the implementation of a policy decision. See *Just*, *supra* note 8 at 13.

64. *Brown v British Columbia (Minister of Transportation and Highways)*, [1994] 1 SCR 420, 112 DLR (4th) 1.

third case in the trilogy of highway maintenance decisions at the Supreme Court was *Swinamer v Nova Scotia*, where the government was not held liable for failing to survey trees adjacent to a highway that were dead and dangerous.[65] The decision not to survey the trees was found to be a policy decision that was immune from liability. The outcome of the cases of *Just*, *Brown* and *Swinamer* are difficult to reconcile and contribute to the ambiguity inherent in distinguishing a policy decision from an operational decision.[66]

In *Imperial*, Chief Justice McLachlin attempted to clarify the scope of policy decisions that were to be immune from liability. The court observed that policy decisions immune from judicial review include discretionary and policy decisions. Public bodies should be exempt from liability if acting within their discretion, unless the challenged decision is irrational. Policy decisions, which are sometimes called "true" or "core" policy decisions—conceived as a subset of discretionary decisions—and are "protected" from legal challenge are "decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith."[67] McLachlin took the view that to regard all "discretionary" decisions made by public authorities as matters of policy that cannot be legally challenged "would be to cast the immunity too broadly."[68] Unfortunately, neither this auspicious statement nor McLachlin's elucidation on the policy/operational dichotomy has done much to expand the tools necessary to draw the distinction required by the court. Indeed, as Lewis Klar observes, the *Imperial* decision "extends significantly the policy aspects of governmental conduct, making it even more difficult for plaintiffs to succeed in these cases."[69]

Most recently, the Supreme Court of Canada revisited the issue of core policy in *Nelson v Marchi*, acknowledging the continued confusion surrounding core policy in the decade since Imperial was decided.[70] The

65. *Swinamer v Nova Scotia (Attorney General)*, [1994] 1 SCR 445, 112 DLR (4th) 18.
66. Karen Horsman & Gareth Morley, *Government Liability: Law and Practice* (Toronto: Carswell, 2021). On this point, Horsman and Morley have aptly noted, "It is difficult to reconcile the results in *Just*, *Brown* and *Swinamer*, or to appreciate the qualitative difference between a decision to implement a visual inspection system on a highway slope and a decision to implement a summer schedule or to inspect and identify dead trees adjacent to a highway" (*ibid* at 6.20).
67. *Imperial*, *supra* note 11 at para 90.
68. *Ibid;* Klar, "Imperial Tobacco," *supra* note 34 at 167.
69. Klar, "Imperial Tobacco," *supra* note 34 at 169. See also Feldthusen, "Public Authority Immunity from Negligence Liability," *supra* note 39.
70. See *Nelson*, *supra* note 8.

Court in *Nelson* identified four factors to look at when analyzing whether a decision is operational or policy:

> (1) [T]he level and responsibilities of the decision-maker; (2) the process by which the decision was made; (3) the nature and extent of budgetary considerations; and (4) the extent to which the decision was based on objective criteria.[71]

These factors were intended to help clarify the distinction between a policy and an operational decision. It remains to be seen what impact, if any, this elucidation would have on the capacity of the courts to properly identify the nature of the relevant government decision. At face value, however, the *Nelson* factors suggest the likelihood that a government decision would, more often than not, be found to be a policy rather than an operational decision. Further, the requirement that the decision be based on objective criteria appears to leave much discretion to the courts on what constitutes objective criteria. In the context of COVID-19 or other public health emergency management, the courts must decide whether the rejection of scientific advisory around the introduction or lifting of measures or the timing of such decisions are objective in light of all other factors. These are manifestly difficult decisions that further pose challenges for proving government liability in the context of public health emergency mismanagement.

5. *Bad faith and irrationality*

As discussed in the foregoing, legislation that grants public health emergency powers often provides immunity for good faith decisions made under those powers.[72] Much like the other requirements under the duty of care for public bodies, the bad faith and irrationality exemptions to the operation of immunity provisions have not been easy to define.

The Supreme Court of Canada considered the concept of bad faith under a statutory immunity clause in *Finney v Barreau du Quebec*.[73] The Court held that "gross or serious carelessness" could be equated to bad faith in the context of statutory immunity provisions. Thus, *Finney* broadens the scope of bad faith decisions from the classic case of *Roncarelli v Duplessis*, which involved intentional fault and malice.[74] Importantly, *Finney* also clarifies that the role of immunity provisions is to allow governmental

71. *Nelson*, *supra* note 8 at para 3.
72. Similarly, government policy decisions are protected from lawsuits under the common law provided they are not taken irrationally or in bad faith. I discuss this further below.
73. *Finney v Barreau du Quebec*, 2004 SCC 36 [*Finney*].
74. *Roncarelli v Duplessis*, [1959] SCR 121, 16 DLR (2d) 689 [*Roncarelli*].

authorities "the scope, latitude and discretion" necessary to carry out important public responsibilities, rather than to eliminate liability for gross negligence.[75]

While there is no single test for whether a decision is made in bad faith, it has been described as a decision so irrational or unreasonable as to constitute an improper use of government discretion, or a decision so patently unreasonable as to exceed government discretion.[76] Further, reviews of statutory immunity clauses protecting decisions in good faith suggest that serious carelessness or recklessness may constitute bad faith.[77] The court in *Finney* did not accept the submission that plaintiffs must establish malice or intent to harm to prove bad faith; "serious carelessness or recklessness" was sufficient to ground a finding of bad faith:[78]

> …[T]he concept of bad faith can and must be given a broader meaning that encompasses serious carelessness or recklessness. …[R]ecklessness implies a fundamental breakdown of the orderly exercise of authority, to the point that the absence of good faith can be deduced and bad faith presumed. The act, in terms of how it is performed, is then inexplicable and incomprehensible, to the point that it can be regarded as an actual abuse of power, having regard to the purposes for which it is meant to be exercised…[79]

Authors Horsman and Morley have noted that good faith clauses do not protect "inexplicable and incomprehensible" actions or behaviour that may be cast as "gross carelessness."[80] They further note that the goal to be served by the protections afforded by the immunity clause "disappears where the decision-maker acts in a manner that is foreign to the terms and objects of the statute."[81] Thus, good faith immunity does not apply where conduct is decidedly "inconsistent" with the objectives of the enabling legislation such that "a court cannot reasonably conclude that they were performed in good faith."[82] The concept of bad faith may also include

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75. Freya Kristjanson & Stephen Moreau, "Regulatory Negligence and Administrative Law" (2011) at 112, online (pdf): *Canadian Institute for the Administration of Justice* <ciaj-icaj.ca/wp-content/uploads/documents/import/RT/R29.pdf?id=551&1552128564> [perma.cc/A962-YCB8].
76. See Horsman & Morley, *supra* note 66.
77. *Ibid* at 6.23. It may also include intentional fault, as was the case in *Roncarelli*, *supra* note 74.
78. See Horsman & Morley, *supra* note 66, ch 6.
79. *Finney*, *supra* note 73 at para 39. The court's statement bears an eery similarity to the political chaos that followed Alberta's open for summer decision and overall handling of the pandemic.
80. Horsman & Morley, *supra* note 66 at 6.31.
81. *Ibid.*
82. David Stratas, "Civil Liability in Administrative Law: Recent Developments and Prospects for the Future" at 10-11, online (pdf): *David Stratas* <www.davidstratas.com/6.pdf> [perma.cc/AM5Q-V6CS] [Stratas, "Civil Liability"].

conduct that is intended to harm.[83] Marie Deschamps J re-echoed the *Finney* statement that an act performed recklessly and that is "inexplicable and incomprehensible" in the way it is performed "to the point that it can be regarded as an actual abuse of power, having regard to the purposes for which it is meant to be exercised," may constitute bad faith.[84] These enunciations of the concept of bad faith appear to draw clear lines around the type of government conduct that may be deemed unacceptable; yet bad faith/irrationality clauses and the evidentiary burdens they pose constitute additional challenges for government liability for negligent conduct. This problematic state of the law necessitates a critical review of the duty test against the standards expected of a legal rule. Through an examination of the centrality of coherence in the justification of legal rules, the next section examines the duty formula in the context of government liability against the qualities that are central to the ideal of coherence and, more broadly, to the legitimacy of a system of legal rules.

III. *Correctness and the duty test for government liability in negligence*

1. *Coherence, correctness and legitimacy in the justification of legal rules*

A principal issue that animates principles of legal reasoning is "the legitimacy of judges' decisions"—an important feature of adjudication that is evident in law's inclination towards moral correctness.[85] Moral correctness traditionally refers to the "ideal" aspect of law that "requires the content of law to be correct" and expresses law's inherent aspiration to fulfill the demands of justice.[86] It represents one aspect of law's dual character which, as Robert Alexy's "Dual Nature" thesis of law submits, comprises of a real/factual dimension and an ideal dimension.[87] The real dimension of law, on the other hand, represents the formal elements of official passage of law and social efficacy.[88] Notably, however, law's claim to correctness presupposes that law necessarily aspires in its design and interpretation to coherence in judicial reasoning—that is, to the qualities of certainty, clarity, consistency, non-arbitrariness, constancy, and congruity,

83. *Ibid.*
84. *Finney*, *supra* note 73. See also Stratas, "Civil Liability," *supra* note 82 at 11.
85. See Hanns Hohmann, "The Nature of the Common Law and the Comparative Study of Legal Reasoning" (1990) 38:1 Am J Comp L 143 at 146, DOI: <10.2307/840258>. See also Robert Alexy, "The Dual Nature of Law" (2010) 23:2 Ratio Juris 167 at 171, DOI: <10.1111/j.1467-9337.2010.00449.x> [Alexy, "Dual Nature of Law"].
86. Robert Alexy, "Legal Certainty and Correctness" (2015) 28:4 Ratio Juris 441, DOI: <10.1111/raju.12096> [Alexy "Legal Certainty"].
87. Alexy, "Dual Nature of Law," *supra* note 85 at 167.
88. *Ibid*. See also Alexy, "Legal Certainty," *supra* note 86 at 442.

which are the defining qualities of coherence. In this sense, the pursuit of coherence captures both the centrality of correctness to positive law and more broadly the importance of legitimacy in judicial reasoning.

A similar set of values—"certainty, accessibility, intelligibility, clarity and predictability"—animates the associated concept of the rule of law. While the rule of law is predicated on these qualities as an idea that demands that "the law must be accessible and so far as possible intelligible, clear and predictable,"[89] the concept of coherence further advances standards pertinent to judicial decision-making and offers guideposts to enable correct and more effective judicial interpretation of legal principles.[90] In its multifarious roles—that is, its particular formulations about the form and quality of law, its contributions to the ideal of legitimacy in legal interpretation, and its ultimate advancement of the rule of law—lies the appeal of coherence within the context of the arguments in this article.

Coherence reflects a central concern of law expressed in the need for harmony within a system of legal norms or a set of legal rules.[91] This harmony requires that legal prescriptions, including rules, standards, and normative principles, be in agreement.[92] Explanations of coherence advance "ideas of what makes a judicial decision correct or what makes a legal proposition true," and the concept of coherence—or at least theories of coherence—traditionally reveals much "about the nature of law and adjudication."[93]

Coherence invokes the qualities of intelligibility and rationality. Joseph Raz describes coherence partly through a juxtaposition of coherence with the opposite value: "incoherence is unintelligible, because it is self-contradictory, fragmented, disjointed," and that which is coherent is "intelligible, makes sense, is well-expressed, with all its bits hanging together."[94] Thus, as a principle of law's legitimacy, coherence has intrinsic

89. Lord Bingham, "The Rule of Law" (2007) 66 Cambridge LJ 67 at 69; *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385.

90. Julie Dickson, "Interpretation and Coherence in Legal Reasoning" (last modified 10 Feb 2010), online: *Stanford Encyclopedia of Philosophy* <plato.stanford.edu/entries/legal-reas-interpret/> [perma.cc/PJS9-N6ST].

91. See generally Julie Dickson, "Interpretation and Coherence in Legal Reasoning" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Stanford: Stanford University, 2016). See also Joseph Raz, "The Relevance of Coherence," (1992) 72 BUL Rev 273, online: <scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1989&context=faculty_scholarship> [perma.cc/CXR6-A7BJ].

92. See Raz, *supra* note 91 at 284.

93. *Ibid* at 282.

94. *Ibid* at 276.

value and plays an important role in the legal justification advanced for a judge's decision.[95]

Importantly, the coherence of a system of rules also reflects the moral dimension of law.[96] This thesis is based on the fact that while coherence focuses on and demands that law's positive aspects—its rules, promulgation, and social efficacy—be certain, non-arbitrary and clear, it also demands correctness of the normative content of law if social efficacy is to be achieved.[97] Social efficacy, which refers to law being acceptable and therefore effective in its goals, necessarily relies on acceptance of its content as rational for it to influence human behaviour. The correctness and legitimacy that positive law aspires to is thus fulfilled not only by the coherence of its particular form, but also by the quality of its content. Thus, coherence addresses the goals of positive law (positivism) as well as the idea of the moral correctness of law (non-positivism). Indeed, in its pursuit of coherence and ultimately legitimacy, the construction of the legal justification for a judicial decision draws on authoritative, precedential considerations, such as statutes and settled precedents, as well as on moral and "social propositions"—a framing of law rejected in the formalist theory of corrective justice that some scholars, including its leading theorist, Ernest Weinrib, suggest as the definitive theory of the tort of negligence.[98]

These constitutive aspects of the tools of legal justification and their contributions to the ideal of coherence that ought to animate Western jurisprudence from a non-positivist perspective may further be understood through the notion of *internal* and *external rationality* of a system of legal rules.[99] Internal rationality, which is entrenched in formalist reasoning, refers to the necessity for legal rules to be non-contradictory and follow soundly from "basic preferences held by the legislator"; it also requires consistency in the application of rules.[100] Internal rationality presupposes freedom from instrumentalism and political ideology and emphasizes law's supposed "immanence"—that is, the idea that law constitutes a "rational"

95. Barbara Baum Levenbook, "The Role of Coherence in Legal Reasoning" (1984) 3:3 Law & Phil 355 at 355, DOI: <10.1007/BF00654833>.
96. Luc J Wintgens, "Coherence of the Law" (1993) 79:4 Philosophy L & Soc Philosophy 483.
97. See generally Alexy, "Legal Certainty," *supra* note 86.
98. See *ibid*. See also John P Dawson, *The Oracles of the Law* (Ann Arbour: University of Michigan Law School, 1968) at 392ff, 450ff; W Wilhelm, Zurjuristischen Methodenlehre im (Jahrhundert 80ff, 1958); Melvin Eisenberg, *The Nature of the Common Law* (First Harvard University Press, 1991) at 1-3; Hohmann, *supra* note 85 at 147.
99. See Wintgens, *supra* note 96 at 488. See generally J Wroblewski, *inführung in die Gesetzgebungstheorie* (Vienna Manzsche Verlag, 1984).
100. Wintgens, *supra* note 96 at 487.

epitome of an inherent, inalienable "necessity."[101] External rationality, on the other hand, refers to the logic or purpose of a system of legal rules, their capacity to achieve the goals for which they were formulated, as well as their "moral acceptability."[102] The concepts of internal and external rationality of law are akin to the internal and external elements of law.[103] While, therefore, the quality of internal rationality is evocative of Fuller's *internal morality of law* and his eight procedural qualities of an effective system of rules,[104] external rationality reflects the substantive principle of correctness or "moral correctness."[105] Both of these aspects of rationality are foundational to law and legal adjudication.

Fuller's *internal morality of law*, which he describes as "principles of legality," serve as "measures of law's effectiveness."[106] These formalist qualities of internal rationality—similar in several respects to Hadfield and Weingast's principles of universality/generality, stability, openness, impersonality, promulgation, prospectivity, clarity, non-contradiction, and feasibility[107]—are: *generality, publicity, non-retroactivity, clarity, non-contradiction, non-absurdity, constancy, and congruity*.[108] According to Fuller, legal rules must be explained in a manner that allows for general application (generality); the "mandates" of the legal rule must be "communicated" to the subjects of the law (publicity); except in extraordinary circumstances, the application of new legal doctrines should be "prospective" (non-retroactivity); the "standards of action and inaction" should be clearly specified (clarity); the entirety of a law should be "as free as possible from contradictory mandates" (non-contradiction); legislators must desist from enacting unreasonable standards that are impossible

101. See generally Allan C Hutchinson, "The Importance of Not Being Ernest" (1989) McGill LJ 233 at 235, online: <digitalcommons.osgoode.yorku.ca/ > [perma.cc/L967=HE56].
102. *Ibid.*
103. These terminologies are expounded in my work on *substantive legal effectiveness*. For further discussion, see Irehobhude Iyioha, ed, *Women's Health and the Limits of Law: Domestic and International Perspectives* (London, UK: Routledge, 2021) [Iyioha, *Limits of Law*].
104. Lon L Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1965). Fuller describes these qualities as "procedural natural law."
105. See Wroblewski, *supra* note 99. See also Irehobhude O Iyioha, "Law, Normative Limits and Women's Health: Towards a Jurisprudence of Substantive Effectiveness" in Iyioha, *Limits of Law*, *supra* note 103 [Iyioha, "Normative Limits"], where I include within the concept of correctness the specific categories of "factual and scientific correctness." This specificity further highlights the fact that the substantive concept of correctness applies as much to the moral character of law as it does to the formal aspects of law.
106. Iyioha, "CBA Final Report," *supra* note 2. See Fuller, *supra* note 104.
107. These characteristics also include an agreement between "rules as announced and rules as applied." See Gillian K Hadfield & Barry R Weingast, "What is Law? A Coordination Model of the Characteristics of Legal Order" (2012) 4:2 J Leg Analysis 471 at 475, 500, DOI: <10.1093/jla/las008>.
108. Fuller, *supra* note 104.

to comply with or execute (non-absurdity); frequent changes in a legal rule weaken the effectiveness of the rules (constancy); and consistency "between official action and declared rule"—that is, between legal rules and their enforcement, is a virtue of law (congruity).[109]

While the application of law—at least from the notional prism of formalism—is "based on well-reasoned and logical decision-making that is grounded on pre-set and tested legal rules,"[110] the notion of *correctness* or the view from outside—that is, the external estimations of how well a judicial decision fulfils the purpose of a law and how well it reflects the conception of justice embodied within it or rationally expected from its application—matters just as much as, if not more than, the assessment of law's internal rationality. While on one hand internal rationality rejects such factors as contradictions, uncertainty and absurdity, and extols constancy and congruity, external rationality on the other hand draws on these qualities as fodder in its illumination of law as morally correct or incorrect. Thus, not only are rules that meet these internal qualities most likely to be received and accepted by legal subjects, law—given as law "bends towards justice"[111]—that both fulfils its purpose and reflects accepted socio-moral virtues attains the hallmark of both internal and external rationality.[112]

Therefore, the failure of a legal rule or system of rules to reflect internal rationality can impact the quality of law's external rationality; in other words, it can breed disrespect for the law. As theorist Peter Schuck observes of complex legal rules, the qualities of uncertainty and indeterminacy that are integral to complexity in law tend to "mystify and alienate" everyday individuals, and when these types of rules originate from legal systems that are themselves complex, the "legitimacy" of the legal rule is "diminished."[113] The jurisprudence of the Canadian court

109. *Ibid*. As I have noted elsewhere (See Iyioha, "CBA Final Report," *supra* note 2), there are debatable limits to these qualities as criteria for effectiveness, but they are discussed here without much more to highlight important similarities in the qualities of law enunciated by different scholars on the subject. See also James W Harris, *Legal Philosophies* (London: Butterworths, 1980) at 130-131.

110. Iyioha, "CBA Final Report," *supra* note 2 at 82. See also Irehobhude O Iyioha, "Within and Beyond the Hedge: Form, Substance and the Limits of Laws on Women's Health" in Iyioha, *Limits of Law*, *supra* note 103 at 4; Margot Stubbs, "Feminism and Legal Positivism" (1986) Australian J L & Society 3 at 65, online: <classic.austlii.edu.au/au/journals/AUJlLawSoc/1986/6.pdf> [perma.cc/R7L5-36L3].

111. Iyioha, *Limits of Law*, *supra* note 103.

112. I will return to this subsequently as I explore the building blocks of a moral theory of government liability for negligence.

113. Peter H Schuck, "Legal Complexity: Some Causes, Consequences, and Cures" (1992) 42:1 Duke LJ 1 at 22-23, DOI: <10.2307/1372753>.

on governmental liability for tort actions is not far-removed from these outcomes—disrespect, diminishment, and a lack of legitimacy. Indeed, the language and descriptions used in the body of academic work to describe the Canadian court's jurisprudence are telling. They have included "uncertain, unnecessary, unjustified," "impossible,"[114] "troublesome,"[115] "a sham" and "shape-shifter,"[116] "[entailing] the disintegration of duty,"[117] "arbitrary," "inconsistent," "incoherent," "breaking point,"[118] and "a ramshackle enquiry, composed of mutually alien parts."[119]

While law by design can in certain circumstances "tolerate a considerable amount of incoherence"[120] whether due to necessary democratic concessions, competing moral values, or other competing demands, the type of incoherence produced by the duty test and associated jurisprudence that casts even bad faith or irrational decision-making as unimpeachable policy decisions ought not be caught within any liberal understanding of the occurrence of a certain level of incoherence in rulemaking. The qualities of law's internal and external rationality, when considered against the jurisprudence of the Canadian court, raise legitimate concerns around the clarity, non-contradiction, constancy, non-absurdity, and congruity of the duty test in the context of government liability, as well as other substantive, equity-based concerns, which are worthy of closer examination. These problems extend beyond the necessary incoherence that the democratic process sometimes requires, and are not, as I argue below, sufficiently addressed by the court's uncomfortable attempt to balance legal accountability for government negligence against indeterminate liability and other values underpinning its uncompromising stance on government liability.

2. *Incoherence, indeterminacy and the duty test for public bodies: the spectre of pre-determinacy*

Much academic criticism has been directed at the duty test for public bodies, especially the restrictions in the determination of proximity and the difficulty of interpreting the policy versus operational distinction.[121] For Bruce Feldthusen, the public authority negligence immunity is an

114. Feldthusen, "Public Authority Immunity from Negligence Liability," s*upra* note 39 at 215.
115. Weinrib, "Negligence Law," *supra* note 13 at 232.
116. According to Feldthusen, *supra* note 48 at 9: "As it stands, proximity is a shape-shifter and the two-step Anns/Cooper template is a sham."
117. *Ibid* at 11.
118. Stratas,"Civil Liability," *supra* note 82 at 8.
119. Weinrib, "Negligence Law," *supra* note 13 at 238.
120. Andrei Mamore, "The Rule of Law and Its Limits" (2004) 23:1 Law & Phil 1 at 28-29.
121. Hardcastle, *supra* note 55 at 562.

uncertain tool at the courts' disposal that serves a limited, if any, purpose; the distinction between a policy or operational function, argues Feldthusen, is practically impossible to define, absent a rare degree of precision in legislation or high-level decision making.[122] Similarly, Klar has observed that governmental undertakings cannot be tidily split into policy decisions on the one hand, and policy implementation on the other hand, as elements of policy decisions and operational decisions are intrinsic in each other.[123]

The application of the multi-layered requirements embodied in the duty test for impugned government actions has produced sometimes inexplicable, and other times conflictual outcomes. Equally confusing is the court's streamlining of the types of requirements necessary to establish a given subset of the duty test. Take, for example, the factors necessary for a determination of proximity between plaintiffs and defendants. While the *Cooper* court asserts that the proximity analysis entails evaluating the particular relationship of the parties to determine whether it is just and fair to impose a duty of care—with the knowledge that such evaluation necessitates an expectedly "broad contextual analysis" of the relationship between the parties,[124] the court subsequently and quite significantly narrows the factors that might give rise to proximity in the context of government liability for negligence. The factors, the court states, "must arise from the statute" itself as a "statute is the *only* source of duties, private or public."[125] Where justice and fairness in relation to parties' relationships might involve the assessment of such factors as nature and history of the relationship, the likely disruption of extant legal obligations arising from the nature of that relationship, and the burdens a presumptive duty might impose on those obligations, as was the case in *Dobson v Dobson,*[126] these types of contextual evaluations of what decision is "just and fair" disappear in the context of government liability for torts.

This flux in the rules (whether in reference to the differences in its application to private parties versus public bodies, or its evolution in its application to public bodies) begets unpredictability—a characteristic that violates the quality of constancy and diminishes the utility of the test. Furthermore, the limiting requirement that the factors determining what is "just and fair" in the proximity analysis in the case of government defendants are to arise mandatorily from statute ignores a number of pertinent facts. These include the fact that statutes, as highlighted above,

122. Feldthusen, "Public Authority Immunity from Negligence Liability," *supra* note 39 at 215.
123. Klar, "Imperial Tobacco," *supra* note 34 at 166.
124. Hardcastle, *supra* note 55 at 559.
125. *Cooper*, *supra* note 32 at para 43.
126. *Dobson*, *supra* note 58.

are inherently incompatible with the nature of the relationship between the parties that traditionally circumscribes the finding of duty in a negligence action, and that the relationship between citizens and their government are circumscribed by numerous "policies, agreements, reports, speeches, news releases and direct interactions that take place between citizens and governmental agents or employees."[127] The relationship cannot, therefore, be limited to statutory provisions or *direct interactions* between the parties and reliance on those interactions by a citizen, especially in the context of government and citizens. Besides falling too far afield from the original *Donoghue*[128] standard and truly throttling traditional understandings of the proximal relationship,[129] this aspect of the test has clearly been a near impossible hurdle for claimants—an outcome of the court's jurisprudence that violates the principle of non-absurdity.

Further, the requirement that plaintiffs show that there are no residual policy considerations to negate the finding of a presumptive duty renders the duty test for public bodies an unbalanced and unfair rule as it fails to invite a submission on policy considerations that, as Weinrib notes, "might confirm liability."[130] Indeed, in the case of populist regimes that successively rejected the evidence-based guidelines of public health experts in favour of what was in the government leader's personal political interest,[131] there is much evidence of a breach of the purpose of enabling public health and emergency statutes that should confirm, in the context of these facts, rather than negate, liability.[132]

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127. Hardcastle, *supra* note 55 at 559-560.

128. *Donoghue v Stevenson*, [1932] UKHL 100, [1932] AC 562.

129. I make this claim notwithstanding the concerns of indeterminate liability, which were influential in the restrictions introduced into the *Donoghue* test in subsequent cases. Proximity in the case of public body liability simply bears little resemblance to the ideas of expectations, reliance, and forbearance that animate the foreseeability and proximity requirements. The formulation of the test in the case of public bodies removes outright the accountability that was entrenched in the originating principles.

130. Ernest J Weinrib, "The Disintegration of Duty" (2006) 31:2 Adv Q 212 at 235. Weinrib's argument here eloquently captures the unfairness inherent in this "one-sided" policy requirement: "From the plaintiff's point of view, the denial of recovery, operating (as the Court says) extrinsically to simple justice, amounts to the judicial confiscation of what was rightly due to the plaintiff in order to subsidize policy objectives unilaterally favourable to the defendant and those similarly situated" (*ibid*).

131. This can be categorized as "self-preferential treatment" that violates one aspect—*impermissibility of self-preferential treatment*—of the normative content of Weinrib's moral theory of negligence law. See Weinrib, "Negligence Law," *supra* note 13. I review the inherent substantive problems with Weinrib's moral theory below.

132. This, notably, also confirms bad faith conduct—which neutralizes government immunity even in the case of core policy decisions—and which the court has suggested is at play when the government's actions are "inexplicable and incomprehensible" or reflect "gross carelessness" (Horsman & Morley, *supra* note 66 at 6.31), and most importantly in the context of the present discussion, when the actions are manifestly "inconsistent" with the objectives of the enabling legislation (Stratas, "Civil Liability,"

Also relevant is the recurrent disparity in the courts' application of the test. Scholars have highlighted the lack of consistency between judicial application and the tenets of the test, as is obvious in any objective assessment of *Imperial* and *Just*, for example. While some scholars have tried to rationalize the test[133] and others[134] reject outright the court's supposition that a clear distinction emerged from its decision, what emerges from any keen evaluation of the case law is, firstly, a disconnect between the "declared" rule and the application of the rule—a problem that engages with the principle of congruity—and, secondly, an apparent intentionality in the court's rejection of the manner of application in established precedents as may be gleaned from the *Imperial* decision.

Simply, the plethora of problems with the duty test in the context of government liability for torts tapers into incoherence in the application of the test, and raises the problem of indeterminacy. Indeterminate legal rules are typically "open-textured, flexible, multi-factored, and fluid;" they tend to be based on a "diverse" combination of "fact and policy" and their "outcomes are often hard to predict."[135] This description of indeterminacy in legal rules of itself says little, if anything, about the failings or value of policy determinations in legal rules; what it does bring to the fore is the mutability of such rules which, I argue, ought to influence the crafting of the applicable rules, especially in terms of the certainty of their meanings, requirements or expectations, and in a manner that is cognizant of the values to be protected. Peter Schuck outlines the problems with rules that do not meet this level of certainty:

> When rules are indeterminate, their precise meanings cannot be easily grasped, nor can their applications be readily predicted. Confusion and uncertainty follow. …When this Delphic law also emerges from an institutional black box that is itself dense and difficult to comprehend, its legitimacy—the sense of "oughtness" that the lawmakers hope will attach to it—is diminished.[136]

However, while the problems with the duty test in the case of government liability for torts clearly raise the spectre of indeterminacy, I suggest that they also raise legitimate questions about what I would like to describe here as "pre-determinacy"—by which I mean conclusivity in

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supra note 82 at 10-11).

133. See generally Klar, "Imperial Tobacco," *supra* note 34.

134. See generally Feldthusen, "Public Authority Immunity from Negligence Liability," *supra* note 39.

135. Schuck, *supra* note 113 at 4. See also Herbert L A Hart, *The Concept of Law* (Oxford: Clarendon Press, 1964).

136. Schuck, *supra* note 113 at 22-23.

decision-making that is based on restrictive, often rigid categories that allow little or no room for reasonable outcomes that reflect the justice of the case. The problem of indeterminacy, which arguably births the problem of pre-determinacy, often turns on whether a given law provides "sufficient guidance and direction" in a given matter "so that their resolution can be claimed to be that of the law and not the lawyer or the judge."[137]

There is sufficient evidence—arising from the problems outlined in the foregoing and as specifically captured by the conceptual qualities embodied in the principle of incoherence—to assume that decisions in government liability cases, especially those pertaining to public health, have a predictable, pre-determined conclusion. Put, perhaps more charitably, there appears to be little judicial interest in allowing claimants to fit their cases successfully within the extremely limited scope of government liability for torts or in advancing the discourse on the subject. Clearly, the pattern suggests a closed debate—one that eliminates outright any utility for Crown liability statutes, limited as these already are. The problem at the heart of this subject is not the lack of a duty in itself as the courts would have us believe, but the artificial test imposed by the court. The Honourable Justice David Stratas—along with other scholars—has acknowledged this troubling limitation:

> But surely at some point we must realize that the problem is with the basic test. Surely at some point, we must concede that public authorities and private entities are simply different, and so, no matter how much tinkering we do, the basic test cannot be suitable for both.[138]…The current approach—to alter the fundamentally different cause of action for the liability of private parties and then to alter it and alter it and alter it again—is leading to *arbitrariness, inconsistency and incoherence*.[139]

Indeed, it is clear that "we are at a breaking point" in this area of law, and it would appear that the Supreme Court of Canada in the *Imperial* case, where its analysis and decision fostered further confusion in this area, implicitly acknowledges that a new Canadian approach is desperately needed.[140] Unfortunately, without further insights from the courts, the

137. Hutchinson, *supra* note 101 at 251-522.
138. David W Stratas, "The Liability of Public Authorities: New Horizons" (2015) 69 SCLR (2nd) 1 at 2. On the critical point of the inaptness of the foreseeability and proximity tests, Stratas further notes: "In the case of foreseeability and proximity, the public authority's constituency is bogglingly large and diverse. For the purposes of determining foreseeability and proximity, when your constituency is over 35 million people in various circumstances and you must serve them all, do foreseeability and proximity have any real meaning?" (*ibid*).
139. *Ibid* at 8 [emphasis added].
140. *Ibid*.

Nelson factors do not appear at this time to hold out much promise for a simplified jurisprudence.

3. *Public policy objectives and ineffectiveness*

Beyond the traditional organizing concepts of law's legitimacy and correctness, which are violated by the duty test, an assessment of the political nature of COVID-19-related decision-making of populist leaders is imperative in light of the objectives of both the enabling public health and emergency legislation as well as the immunity clause. A discrepancy between legislative goals and the impugned action, while contributing to our understanding of bad faith conduct and irrationality, also highlights the importance of law's external rationality or correctness to its legitimacy, and why law (as in the case of the duty test) ought not be so restrictively framed as to defeat the purpose for which it was created, that is, defeat its external rationality.

It is hardly debatable that governments must manage a number of competing considerations—whether these are political, economic, social, or fiscal—in their decision-making, and a pandemic presents the archetypical situation where all of these considerations are often simultaneously at play. To the extent that a government must consider the economic or fiscal impact of its decision-making on society at large—with due consideration to budgeting limits, constraints on government resources, and the limitations imposed by a political timetable, the court's reluctance to interfere in the decisions of public authorities reflects judicial deference to the executive arm's decision-making, with due recognition of the manifold and momentous responsibilities that governments are besieged with in a time of disaster.

Yet, these types of considerations—economic, fiscal, budgetary, health-related, and the political—were manifestly not at play in the impugned decisions of several conservative provinces. In fact, in the case of political and health-related factors, the decision-making more often than not seemed to prioritize personal, political advantages (such as pandering to their supporters based on anticipated electioneering gains), rather than genuine political and procedural constraints (in the form of pledged political agenda, the legislative calendar, and electioneering cycle), and displayed a near-total disrespect for the science that ought to guide government decision-making in a pandemic.[141]

141. An example is the case of Alberta where the Premier declared Alberta to be "Open for Summer" by 1 June 2021. It must be recalled that the science was much more stable later in the crisis, that a body of experts were in agreement about what needed to be done, and that medical experts largely disagreed with the premier's decision; for example, as only a limited percentage of the population had

In light of the public health data following Alberta's declaration that it was open for summer and the removal of all COVID-19 restrictions or other problematic actions by the Ontario government,[142] it is difficult not to classify this and similar decisions that worsened the health crisis in certain regions, as reflecting the gross carelessness captured in the Canadian court's definition of bad faith decision-making.[143] The self-interested politics at the heart of several consequential decisions made by the premiers are conceivably not the type of political considerations envisaged by the Supreme Court in its elucidation of the factors that should give rise to deference to government decision-making. We must draw a line between the reasonable, logical constraints that a government faces in the political process and the neglect, irrationality, and dereliction of duty under the *PHA* and the *EMA* that have become evident in ideologically-grounded pandemic decision-making. Thus, although the decisions necessary for managing a public health emergency—for example, availability and distribution of personal protective equipment or mandates regarding the use of masks—are indeed such as may easily be categorized as policy decisions that are grounded in public policy considerations,[144] it is imperative that the court circumscribes its assumptions that government policymaking always serves competing health goals that benefit society at large or a part thereof.[145]

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been vaccinated in Alberta as of July 2021, it was commonly understood that public health restrictions needed to remain in place. Both the Alberta Premier, Jason Kenney, and Chief Medical Officer, Deena Hinshaw, would admit this much with an apology that acknowledged the "confusion, fear, or anger" caused by the decision. See "Dr. Deena Hinshaw apologizes for 'confusion, fear or anger' caused by new COVID-19 plan announcement," (4 August 2021), online: *CBC News* <www.cbc.ca/news/canada/calgary/hinshaw-covid-apology-confusion-1.6129785> [perma.cc/M57V-SDBQ].

142. See Trevon Dunn, "Who calls the shots in Ontario's COVID-19 response? Premier insists top doctor is 'riding shotgun'" (26 November 2020), online: *CBC News* <www.cbc.ca/news/canada/toronto/who-calls-the-shots-in-ontario-s-covid-19-response-premier-insists-top-doctor-is-riding-shotgun-1.5816708> [perma.cc/X7PJ-ABKU], noting that Ontario's COVID response seemed to be led by politicians rather than doctors.

143. See Markusoff, *supra* note 4, where one writer captures starkly the state of the crisis in Alberta and the decision-making that led there: "It's not only the near-total abandonment of public health precautions that has embittered much of Alberta toward its premier, though the outcome of Jason Kenney's decision led to an unfettered fourth wave, and unleashed the Delta variant with the effect of record-busting pressure on ICUs and the postponement of hundreds of surgeries. The thing that more profoundly enrages folks in Edmonton, Calgary and elsewhere in the province is the brazen certainty with which he unilaterally lowered Alberta's defences against COVID. He declared a newly liberated public would enjoy the 'best summer ever'—his party sold ballcaps with that slogan—and was fond of adding that Alberta was not just open for summer, but 'open for good.' A senior aide boasted to doubters on Twitter: 'The pandemic is ending. Accept it.'"

144. Fortin, *supra* note 22 at 228.

145. Hardcastle, *supra* note 55 at 567. This type of reasoning is commonplace in judicial pronouncements on the public and aggregative nature of government's role versus the private interests of individuals. For example, the court in *Abarquez* with regard to the SARS outbreak stated:

These assumptions about the supposedly altruistic functions of the government in relation to the broader interests of the general public appear to presuppose that the elaborate test that the court must apply easily maps onto the facts of public health mismanagement claims, and that the test once applied—even in the confusing and elusive way that various Canadian courts have attempted to apply it with differing outcomes—achieves the goals of separation of powers and deference to government decision-making. There are several problems with this line of reasoning, a key one of which, as I have discussed above, is the underlying assumptions it makes, the fact that it ignores the manner in which many conservative-leaning governments actually handled the pandemic, and the anti-scientific logic and political interests that underlay that approach to decision-making.

At face value, it may seem that the conservative-libertarian prioritization of individual choice, as well as freedom of movement, association, and economic liberties over public health safety are ostensibly a competing set of values that a government is entitled to choose. It may be argued that the court's policy-operational dichotomy and judicial deference to the executive arm are intended to apply to decisions such as these. Yet, this argument must be tempered by the clear line that must be drawn—blurry as that line may sometimes be—between the need to ensure that governments are, in a time of crisis with significant implications for massive loss of life, executing evidence-based decisions that reflect the best interest of an aggregate of societal members, rather than pandering to, or politicking based on, a certain ideological mindset. Indeed, providing oversight over conduct that crosses the line in this manner into gross negligence, bad faith or irrational conduct, and holding public officials accountable for abuse of power, falls within the role of the courts—safeguards that are in place to ensure that public institutions are implementing their statutory mandates. Evidently, the policy-operational distinction is not designed to shield the public defendant when their actions contravene statutory mandates and clearly endanger the lives of a significant proportion of a population.[146]

"Decisions relating to the imposition, lifting or re-introduction of measures to combat SARS are clear examples of decisions that must be made on the basis of the general public interest rather than on the basis of the interests of a narrow class of individuals. Restrictions limiting access to hospitals or parts of hospitals may help combat the spread of disease, but such restrictions will also have an impact upon the interests of those who require access to the hospital for other health care needs or those of relatives and friends. Similarly, a decision to lift restrictions may increase the risk of the disease spreading but may offer other advantages to the public at large including enhanced access to health care facilities." See *Abarquez*, *supra* note 57 at para 31.

146. In an ongoing SSHRC-funded research on legal compliance where I examine reasons for non-compliance with public health regulations (including individual choice, historical disadvantage,

A second and perhaps more problematic outcome of this reasoning is that it fails to recognize that the lack of accountability in the courts endorses the mismanagement of public health disasters, and ignores the government's neglect of legislative goals. Simply, gross mismanagement of the COVID-19 pandemic in conservative-leaning provinces resulted in ineffective policies and unmet public health goals. In fact, in the case of the COVID-19 pandemic, government negligence has had an extensive and enduring impact on the healthcare profession itself, as for example, its impact on the nursing profession.[147] This type of extensive, systemic effect of government mismanagement ought to lead, some scholars have argued, to the court's recognition of a duty owed to a smaller, defined class of individuals.[148] For example, deserving cases such as those reflected in the arguments of the nurses in the SARs case presented the type of facts that should have set these types of cases apart from the line of cases in which the courts have been compelled to apply the traditional type of deferential reasoning. The SARs case offers a number of arguments for why a finding of duty of care would serve the very interests sought to

political unrest and government management of state resources, freedom of movement and association, and economic liberties, among others), I argue for temperate societal and governmental response to vaccine hesitancy and disobedience to public health regulations more broadly for a number of policy and principled reasons, even where disobedience manifests as far-right (and non-violent) extremism. However, this temperance has no place in the context of government leadership in the time of a deadly pandemic where governments are required to implement evidence-based best practices given the important interests involved and the life-and-death implications of negligence. See Irehobhude O Iyioha, *Obedience to Law and Public Health Restrictions: Exploring the Case for a New Theory of Legal Compliance* (Forthcoming Report funded by the Social Sciences and Humanities Research Council (SSHRC)).

147. See generally Iyioha, "CBA Final Report," *supra* note 2. As I have outlined in a report based on a study of healthcare workers in the Long-Term Care industry in BC, the crisis of mismanagement in the sector has already led, and will lead many more, healthcare professionals, especially nurses and care aides, many of whom are experiencing burnout and mental health challenges, to leave the health professions. See Iyioha, "CBA Final Report," *supra* note 2 and Iyioha, "CBA Summary Report," *supra* note 16. There are studies that underscore the real implications of government mismanagement of the Long-Term Care sector where the impact of COVID-19 was most felt, and categories such as nurses, or even high-risk patients with particular pre-existing vulnerabilities, ought at least to be considered as having a proximal relationship with the government. For further discussion, see Ontario's Long-Term Care COVID-19 Commission—Final Report, (Queen's Printer for Ontario, 2021) (Chair: The Honourable Frank N Marrocco), online (pdf): <files.ontario.ca/mltc-ltcc-final-report-en-2021-04-30.pdf> [perma.cc/J5C3-AFWN]. See also Canadian Institute for Health Information, The Impact of COVID-19 on Long-Term Care in Canada: Focus on the First 6 Months (Ottawa: CIHI, 2021), online (pdf): <www.cihi.ca/sites/default/files/document/impact-covid-19-long-term-care-canada-first-6-months-report-en.pdf> [perma.cc/UEU9-CWUN].

148. Hardcastle notes in relation to the SARs case: "On this analysis, finding that the government owed a duty to nurses infected with SARS may have been congruent with the public interest, rather than in conflict with it, given the crucial role of nurses in controlling a disease outbreak, the risk that providers might refuse to work if the government does not adequately protect their health, and the broader difficulties in retaining health care workers" (Hardcastle, *supra* note 55 at 570-571).

be protected by both public health legislation and even the irrationality exception in immunity clauses.

Similarly, the fact that vulnerable populations, such as Indigenous communities, typically experience disparate outcomes during disasters also flags the importance of holding governments accountable in the event of a failure to meet public policy objectives. A systems-wide decision to remove all COVID-19 restrictions is deeply flawed in light of the different needs of diverse communities. Such a decision must reflect recognition that the needs of Indigenous communities are distinctive, and that a sweeping policy bringing an end to COVID-19 restrictions is clearly irrational if it fails to take into consideration factors that could increase the morbidity of members of Indigenous communities, such as the level of vaccinations in remote Indigenous communities, vaccine hesitancy due to historical ethical violations by the government, limited access to health professionals, small hospitals, and high mortality and morbidity rates due to the lack of social determinants of health, such as adequate and decent housing and clean water supply.[149] Indeed, in April 2021, as the Alberta government geared up to announce its "Open for Summer" plan, eleven First Nations and Métis communities in the municipality of Wood Buffalo released a statement that indicted the government for its mismanagement of COVID-19 and called for stricter COVID-19 measures in their communities.[150] Only the day before, the municipality announced a state of emergency.[151] Even in February 2022, the Ermineskin Cree Nation in Alberta raised concerns about the province's removal of COVID-19 restrictions, citing worries about its likely impact on "the health and safety of their members."[152]

Furthermore, the research and data are clear on the fact that the government's mismanagement of the COVID-19 crisis and, importantly, its long-term negligent regulation of long term care homes, led to the

149. In Iyioha, "Normative Limits," *supra* note 105, I discuss the importance of "needs" and other equity-based criteria in the determination of legal effectiveness, and as elements of the theory of Substantive Legal Effectiveness (SLE).

150. James Keller & Kelly Cryderman, "Indigenous leaders near Fort McMurray call for strict COVID-19 measures from Alberta government" (27 April 2021), online: *The Globe and Mail* <www.theglobeandmail.com/canada/alberta/article-indigenous-leaders-near-fort-mcmurray-call-for-strict-covid-19/> [perma.cc/QR8Q-SVQE].

151. *Ibid.*

152. Lenard Monkman, "Alberta dropping COVID-19 restrictions too early, say chiefs" (11 February 2022), online: *CBC News* <www.cbc.ca/news/indigenous/alberta-chiefs-covid-19-restrictions-1.6345811> [perma.cc/3Z29-KJYD]. The statements of the Chief of the Ermineskin Cree Nation reflect the concerns expressed here: "I know the reports said that in the major centres they've got control of it [COVID], but the First Nations are kind of next in line to see a surge." He further stated, "We want to assert our own sovereignty and say we understand where they make decisions, but we have to look after our own people and our own health and well-being" (*ibid*).

unfortunate deaths in LTCs.[153] Hence, the traditional logic that there are important public goals to be served through the onerous test that limits liability in the way that the current duty test does actually fails against the stark facts of the politically-influenced (mis)management that became evident during the COVID-19 pandemic. While ideological differences in approaches to governance are expected, a pandemic by its nature deserves a standard of care that is based on evidence-based guidelines, even when these guidelines are evolving. When such guidelines are manifestly and recklessly ignored repeatedly, there is what the *Finney* Court described as a "fundamental breakdown of the orderly exercise of authority."[154]

The political chaos following Alberta's "Open for Summer" decision—which subsequently led to a leadership review—and the multiple levels of failures that led to four waves of the pandemic in that province reflect a breakdown or failure of "the orderly exercise of authority," as well as to an "inexplicable and incomprehensible" performance of the public duty set out in the *PHA* and the *EMA*.[155] As authors Horsman and Morley note, the goals to be served by the protections afforded by the immunity clause are defeated when a policy-maker acts inconsistently with the purpose of the enabling law.[156] Not only have those goals—deference, separation of powers, and recognition of the complexity of government decision-making, among others—taken flight in this case, judicial adherence to the failed duty test for government bodies entrenches a judicial approach that rubber-stamps government decision-making regardless of how grossly negligent. This judicial approach—itself seemingly limitless, unreasonable, and ultimately unconscionable—stands definitively against the principles of correctness and legitimacy in the justification of legal rules that undergird our system of justice. If statutory immunity provisions with their bad-faith/irrationality clauses have left the door open for

153. Iyioha, "CBA Final Report," *supra* note 2; Iyioha, "CBA Summary Report," *supra* note 16.

154. *Finney*, *supra* note 73 at para 39. The *Finney* Court stated, "Such conduct is an abuse of power for which the State, or sometimes a public servant, may be held liable. However, recklessness implies a fundamental breakdown of the orderly exercise of authority, to the point that the absence of good faith can be deduced and bad faith presumed. The act, in terms of how it is performed, is then inexplicable and incomprehensible, to the point that it can be regarded as an actual abuse of power, having regard to the purposes for which it is meant to be exercised (Dussault and Borgeat, *supra,* vol 4, at p 343)" (*ibid*).

155. Reassuring as a leadership review may be to those who wish to see accountability, the fact is that the landscape of modern politics is unpredictable and populism continues to hold a strong sway in many regions; thus, the political process may not offer aggrieved citizens an effective process to obtain some form of recompense for the negligence of political leaders. Electioneering outcomes are uncertain, the same leaders and/or their political parties can find their way back into public office, and citizens are left with neither compensation nor a promise of reform.

156. Horsman and Morley, *supra* note 66 at 6.31.

accountability—narrow as this door may be, tort law cannot close that door through onerous, unnecessary, and deliberately ineffectual legal tests that fail the test of correctness that imbues law with legitimacy. The following section explores reform of the duty test through theories of tort liability.

IV. *The case for an interactional theory of government liability for negligence*

1. *Correlativity and morality in the theory of corrective justice*

As a central tenet in the legitimacy of judicial reasoning, coherence plays an important role in the internal rationality of legal rules and, indeed, in philosophical expositions on the organizing theories of law or fields of law.[157] In the area of private law, theoretical accounts of an organizing principle for tort law have largely reflected two differing accounts: that tort law owes its internal logic to the idea of corrective justice on the one hand, and that tort law serves instrumental goals, on the other hand. While the former theory envisions an autonomous field of study that is bound by its own logic of correlative interactions that give rise to legal obligations, the latter assumes that tort law is defined by its social consequences and is tethered to a necessary extrinsic rationalization of its merits and purpose. The implications of this struggle between internal and external rationality are exemplified in the area of negligence law, where it is particularly magnified by the relative profusion of policy considerations enmeshed in the doctrinal aspects of the duty test.

In the context of the task of this article, the question is how might a hybridized account of tort law as embodying both formal and instrumental aspects—as dependent on both internal and external rationality for its coherence and legitimacy—ground the need for a moral theory that delimits the liability of public bodies in tort law? While this article does not purport to explicate fully the range of postulations and critiques of the concepts of corrective justice and instrumentalism, some concrete observations about the underpinnings of these theories, and their particular contributions to the foregoing discussion about coherence and law's rationality, are necessary for any discussion about a moral theory for governmental liability in torts.

157. Take, for example, Weinrib's formal theory of corrective justice: It proposes a particular form of justice that frames an inherent "moral coherence" of law, where coherence is expressed by the correlativity of the plaintiff's injury and the defendant's harm. See Hutchinson, *supra* note 101 at 239; see generally Weinrib, "Negligence Law," *supra* note 13. Alexy's dual nature thesis of law, which begets a non-positivist theory of law, presupposes a real dimension of law, as well as an ideal dimension expressing the importance of moral correctness (and its associated quality of coherence) to law's validity. See Alexy, "Legal Certainty," *supra* note 86 at 442.

Those observations must necessarily begin with Ernest Weinrib's account of corrective justice as its leading Canadian exponent. In his moral theory of negligence law, Weinrib conceives tort law as based on the idea of corrective justice, described as a representation of correlative transactions between two equal parties in which one, the plaintiff, who has suffered a wrong initiated by the other party, the defendant, is to be reinstated to their original position, or in Weinrib's words, their "antecedent equality."[158] Corrective justice is therefore built on a structural coherence reflected in the correlativity of the plaintiff's right and the defendant's wrong. Weinrib's idea of corrective justice, which draws on Aristotle's account in *Nicomachean Ethics*, is a "form" rather than a "principle" of justice that offers "its own structure of justification"; thus corrective justice, as a form of Aristotelian justice, contains no inherent normative conditions to be fulfilled.[159] Those normative conditions—that is, the substance or content of corrective justice—are supplied by an appeal to a Kantian morality that propounds that it is impermissible for an individual to treat themselves preferentially in a manner that jeopardizes the interest of another—a precept expressed as the *impermissibility of self-preferential treatment*.[160]

This dual Aristotelian and Kantian thesis frames Weinrib's rejection of distributive and aggregative accounts of tort law, which involve the maximization of the wellbeing of others on a merit-based principle.[161] A merit-based principle, being a standard external to law, would assess a legal precept through the lenses of instrumental goals that bear no relation to the internal logic that supposedly governs torts, such as negligence law.[162] In Weinrib's account, this justificatory structure for distributive justice—that is, the reliance on an external "criterion of merit"—sets it apart from the relational framework of corrective justice defined by formal equality and correlativity. The problem with instrumentalism or distributive justice as, for example, exemplified in utilitarianism, argues Weinrib, is that these notions of justice regard individuals "merely as sources of a collective and aggregate good rather than as bearers of intrinsic worth," and that instrumentalism seeks to "maximize the good of all members of the collectivity who are affected" by a given decision.[163]

158. Weinrib, "Negligence Law," *supra* note 13 at 37.
159. *Ibid* at 39.
160. *Ibid* at 37.
161. *Ibid* at 38.
162. See generally Hutchinson, *supra* note 101 at 239.
163. Weinrib, "Negligence Law," *supra* note 13 at 40-41.

Importantly, in rejecting the utilitarian morality that generally defines the tort of negligence[164] and replacing it with a *form* of justice in which the return of an individual to their antecedent *equality* gains primacy, Weinrib necessarily borrows the normative content of his formalistic notion of corrective justice from Kant's two-part thesis of *impermissibility of self-preferential treatment*. The first part of the thesis comprises *self-preference in action* and the second, *self-preference in conception.* The former, *self-preference in action*, concerns the notion that an actor's purposive actions necessarily require "forebearance or consideration of others" and an expectation that the actor extends to others an equal forebearance or consideration as they would extend to themselves.[165] This aspect of Kant's impermissibility of self-preference requires that an actor refrain from arrogating to themselves an "advantage" that the actor "would deny to others."[166] In the context of the negligence action, corrective justice, which involves "the cancellation of gains and losses which have occurred through the violation of equality in transactions,"[167] reflects the righting of the wrong expressed in Kant's admonishment against self-preference in action. Thus, self-preference in action is also iterative of the correlativity inherent in corrective justice in which the defendant infringes the plaintiff's antecedent equality by acting in a manner creating risk and losses to the plaintiff—a manner that is less than the way they (the defendant) would have treated themselves.[168]

On the other hand, *self-preference in conception* prohibits the application or adoption of an individualized or "idiosyncratic" version of a traditional rule or standard of conduct where the individualized application of the rule would, if applied universally, eliminate the traditional rule.[169] Weinrib explicates this concept partly using the court's rejection of the subjective standard of care in *Vaughan v Menlove*, a case in which the defendant argued that, rather than apply the objective test of the reasonable person standard, the limits of his intellect ought to guide determination

164. See *ibid* at 43, where Weinrib notes that "Negligence is generally considered to be a utilitarian concept by contemporary theorists."
165. *Ibid* at 50.
166. *Ibid*. Weinrib asserts that "The rationality" of the actor's "own purposive actions must mesh with the equality of persons generally" (*ibid*).
167. *Ibid* at 53.
168. *Ibid* at 54.
169. *Ibid* at 50, 53. In Weinrib's statement of the rule, *self-preference in concept* refers to: "The use of a concept in a manner whose idiosyncracy would destroy the very concept being used if such use were to be universal"; he states further: "Invocation of a concept in itself imposes constraints, and the actor must attorn to the concept which, expressly or by implication, is an element in the maxim being universalized" (*ibid*).

of his liability for harm done to the plaintiff.[170] Weinrib argues that the subjectivity in the defendant's contention in that case, which forces a contraction of the plaintiff's rights, reflects the "immorality of self-preference in conception."[171] The offspring of the above Aristotelian logic of corrective justice and Kant's formal equality is a moral theory of negligence that Weinrib argues is self-sufficient, relies on its own internal logic, and does not depend on extrinsic instrumental gains for its coherence.

This derivative philosophy of justice has not been received with open arms by the courts even though Weinrib's ideas about corrective justice have been referenced favourably by the Supreme Court of Canada. While there has been wide-ranging criticism of Weinrib's adoption of Kantian ethics to supply the substantive content of his moral theory of negligence, there are several specific challenges with his conceptual framework that are relevant in the context of government liability for tort actions. These challenges raise questions about the capacity of the duty test—when understood through the formal corrective justice framework currently accepted by the Canadian Supreme Court—to meet the goals of substantive justice. The next subsection engages with these concerns.

2. *The limits of form: corrective justice and the case of public health emergencies and disaster management*

Beyond the problems associated with the outright rejection of any role for distributive justice in the justification of tort law,[172] authors have pointed out,

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170. *Vaughan v Menlove* (1837), 132 ER 490 (CP) [*Vaughan*]. In this case, the jury rejected the defendant's submission that the objective test of the standard of care ought not be applied to a person, such as himself, who did not possess the "highest order of intelligence," suggesting instead that the right standard was whether "he had acted bona fide to the best of his ability." Using the thesis of *self-preference in conception*, Weinrib argues that the defendant's argument "that the standard should not be set beyond the limits of his ability constituted a claim that the boundary between the defendant's right to act and the plaintiff's right to freedom from the effects of that action is marked by the defendant's subjective powers of evaluation. By this claim the ambit of the plaintiff's right is confined to, and thus defined by, the space remaining after the defendant's occupation. The defendant is thus, the sole determinant of the plaintiff's rights, and the plaintiff's right is dependent on the defendant's subjectivity" (Weinrib, "Negligence Law," *supra* note 13 at 51-52).

171. Weinrib, "Negligence Law," *supra* note 13 at 52.

172. There are legitimate concerns that could be raised about the expanding role of policy and specifically of the utilitarian considerations that Weinrib problematizes. In the admittedly different area of policy evaluation and legislative impact assessment, one can certainly accept that an overriding focus on utilitarian concerns, with its connections to consequentialist and economic analysis, can impede attention to other equally important social values or considerations and may not sufficiently address "individualistic ethical precepts such as liberty and autonomy." See Irehobhude O Iyioha & Renee Rogers, "Consequentialism, Equity and COVID-19 in Canadian Long Term Care Homes: Shifting the Focus from Efficiency to Effectiveness in Governance Regimes" [CBA funded draft research on file with author]. In the context of the current discussion on public health regulation, the concept of instrumentalism and its embodied concept of utilitarianism are herein applied simply as

and in several respects rightly so, the near impossibility of disentangling instrumental goals from a theory of torts, and specifically, negligence law. This difficulty is particularly evident in the area of public body liability for torts, especially in the context of liability for disaster management. By its very nature, public health emergencies necessarily involve matters of public welfare that extend beyond the interests of the plaintiff. While, of course, this partly explains judicial deference to executive decision-making, the importance of public welfare and population health, as well as the interests of a general aggregate of individuals who belong to vulnerable minority groups, equally provide reasons to demand greater accountability from a defendant public body.

Weinrib particularizes the case of public body liability for negligence law as an atypical category that should not be "regarded as the *germ* of a comprehensive theory of negligence."[173] However, this is based on reasons that neither consider the bad-faith context nor are truly reflective of the character of government liability for negligence. For example, the normative concepts of *equality of parties* and *impermissibility of self-preference* created to sustain the theory of corrective justice preclude, by their own inherent and flawed restrictiveness, their applicability to the public body liability context. As I explain below, while a more egalitarian conception of these ideas could easily accommodate the case of public body liability, and in fact, serve its instrumental goals, these ideas as formulated fall short of providing sustainable justification for public body liability, especially in the context of disasters, such as pandemics.

First, as explained, corrective justice presupposes correlativity of rights and wrong between two *equal* parties. The notion of equality of persons requires fairness in treatment and prohibition against self-preferential treatment. In the reality of human relationships, the notional idea of equality is a principled affirmation of "*what ought to be*." In actuality, "*what is*" comprises of inequality created and sustained by imbalances in social status, differences in identity, and associated variations in the treatment of persons based on the immutable fact of their identity. The *equality* of status that is embedded in the idea of correlativity and that forms the substratum upon which the correlative relationship between a wronged plaintiff and an offending defendant is built is clearly incompatible with

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referencing the maximization of the general welfare, which is at the core of public health emergency actions.

173. Weinrib, "Negligence Law," *supra* note 13 at 56. Also, missing from Weinrib's analysis are the many instances where judges have applied utilitarian or policy reasons in the determination of liability and compensation.

the status of a plaintiff and the defendant in a public body liability case.[174] In fact, the very idea of correlative rights and wrongs as between two equal parties is incongruous with the reality of litigants in most tort cases.

In the case of public body liability, the public status of the defendant comes with certain powers such as expert knowledge and vastness of resources that place it in a position of power in relation to the plaintiff. This hegemonial status of the parties necessitates—more so in the public health context where the consequence of negligence is loss of life or health generally—a responsibility of caution reflecting the very real harms that can happen to the weaker party where a defendant maximizes their interest above that of the plaintiff. An artifact of formal equality—and one that needs no further elucidation of its pitfalls, the notion of formal equality entrenched in the idea of correlative rights and wrongs ignores the contextual factors that result in the vulnerability of some members of society to disasters, such as pandemics. The level of suffering encountered by vulnerable and historically marginalized members of society, as is the case with members of Indigenous communities who are harmed disproportionately from the mismanagement of disasters in their communities, most certainly demands consideration as part of the policy framework for determining the existence of a duty of care. In light of a historical record of neglect, mismanagement, and outright discounting of the interests and rights of vulnerable populations, especially Indigenous communities, there is no defensible explanation for a legal test that requires a policy determination prioritizing the well-recognized balancing act that governments must engage in as large bureaucracies, while excluding the interests of vulnerable communities from the equation.

A second, though related, point is that, as with the formalist's vision of positive law, the normative content of corrective justice presumes not just universality, but the sister ideals of objectivity and neutrality in their justification of legal rules. Imbued with these qualities, the canons of corrective justice would envision complex rules of law, such as the duty test, as capable—in their pure doctrinal form, detached, of course, from the policy aspects—of delivering compensation to aggrieved claimants and returning them to their original positions. Yet, complex legal rules do not beget objectivity and neutrality in their effect; in fact, the fruit of complexity is often inequality, wherein some groups earn an advantage

174. Beyond the case of public bodies, clearly litigants are rarely ever equal. As McKee notes in this regard, "Insisting on the formal equality of plaintiff and defendant is all very well in theory,…but in practice, plaintiffs and defendants seldom appear in court on an equal footing. In tort lawsuits on topics such as defective products or medical malpractice, there are important differences in the parties' abilities to press their claims" (McKee, "Responsibility of Common Law," *supra* note 13 at 293).

and others are disadvantaged.[175] Consider, for example, the people who suffer the most during disasters and public health emergencies. Frontline workers, such as nurses and care aides, many of whom are women and immigrants with precarious residency privileges, often bear the overwhelming burden of the impact of public health emergencies.[176] During the COVID-19 pandemic in Canada, vulnerable elderly residents of nursing homes or LTCs and the predominantly female staff who care for them bore the brunt of the pandemic. Indeed, as of November 2020, this sector recorded the highest number of deaths in the pandemic—with at least seventy-five per cent of pandemic deaths having occurred in LTCs.[177] Further, Blacks and other racialized groups represented an overwhelming proportion of COVID-19 cases in a major Canadian city. As I note in a recent report based on socio-scientific surveys and in-depth interviews with members of the health workforce in BC:

> Alongside vulnerable elderly Canadians and Canadian residents who lost their lives in nursing homes were healthcare workers, many of them women, members of ethnic minorities and immigrants. Data from some Canadian provinces suggest that up to 50% of LTC caregivers are immigrants,[178] and a July 2020 report by Public Health Ontario highlights the toll that this state of affairs has taken on racialized communities. The Report reveals that people of colour accounted for 83% of reported COVID-19 cases though they make up only half the population of Toronto.[179]

Unfortunately, these outcomes were not surprising. Often, socio-scientific research points to social determinants of health (SDH) to explain the variable outcomes between population groups. However, the above cited study concludes that beyond SDH, key factors that accounted for the disparate impact of the pandemic on the vulnerable were government mismanagement of the LTC sector and, in the case of provinces where

175. Schuck, *supra* note 113 at 23.

176. Iyioha, "CBA Final Report," *supra* note 2; see also Iyioha, "CBA Summary Report," *supra* note 16.

177. "Long-Term Care Homes in Canada—The Impact of COVID-19" (24 November 2020), online: *HillNotes* <hillnotes.ca/2020/10/30/long-term-care-homes-in-canada-the-impact-of-covid-19/#:~:text=As%20noted%20above%2C%20the%20NIA,were%20in%20Ontario%20and%20Quebec.> [perma.cc/8856-VDL5].

178. Lena Gahwi & Margaret Walton-Roberts, "Migrant care labour and the COVID-19 crisis: how did we get here?" (23 June 2020), online: *Balsillie Papers* <balsilliepapers.ca/bsia-paper/migrant-care-labour-and-the-covid-19-long-term-care-crisis-how-did-we-get-here/> [perma.cc/VWE4-S3M7].

179. See Iyioha, "CBA Final Report," *supra* note 2 at 11. See also Jessica Cheung, "Black people and other people of colour make up 83% of reported COVID-19 cases in Toronto" (30 July 2020), online: *CBC News* <www.cbc.ca/news/canada/toronto/toronto-covid-19-data-1.5669091> [perma.cc/7Q53-C2W3].

populism and economic consequentialism held sway,[180] careless policies and actions in the management of the pandemic and the regulation of the sector that endangered the health of marginalized and vulnerable groups. Specifically, the report traces the high infection rates in LTCs and the impact of the pandemic on racialized and historically marginalized groups to shortcomings in Canada's disaster law framework:

> The high rate of infections that occurred in LTC facilities and the impact of COVID-19 generally on minority and equity-seeking groups in Canada are not anomalous outcomes, but rather, are reflective of the inadequacies of the emergency and disaster laws in Canada and their inherent incapacity to respond to the needs of Canada's heterogeneous demographic population. The death rate in LTCs may also be traced to insufficient government prioritization of vulnerable communities, including elderly people, low-income earners, and women.[181]

The report further draws attention to the interplay of sexism, racism and ageism in the impact of the pandemic. Negligent governmental action that ignores these variables inadvertently results in localized harm—one in which clearly defined target groups suffer disadvantages more than other members of society.[182] The report highlights the lack of focus, at both the federal and provincial levels, on the importance of race, gender, and age to the governance and management of LTCs and the day-to-day care of the elderly:

> [M]ore than 90% of unregulated LTC workers are women, and approximately 60% speak English as their second language.[183] Women make up more than 75% of long-term care residents,[184] while over half of residents in Ontario LTCs are over the age of 85.[185] These data reveal important facts about the centrality of gender, race, and age to discourses around elder care and the demographic and institutions that provide the services. Simply, there is an insidious inattention to the intersection of racism, sexism, ageism and classism in the management of LTCs at both federal and provincial levels of government even as these facilities

180. See Iyioha & Rogers, *supra* note 172.
181. Iyioha, "CBA Final Report," *supra* note 2 at 11.
182. As discussed above, this reality ought to make nurses, who make up the plaintiffs in the SARs case of *Abarquez*, a group to which a duty of care could have been found to be owed. See *Abarquez*, *supra* note 57.
183. "Restoring Trust: COVID-19 and The Future of Long-Term Care" (2020), online (pdf): *The Royal Society of Canada Working Group on Long-Term Care* <rsc-src.ca/sites/default/files/LTC%20PB%20%2B%20ES_EN_0.pdf> [perma.cc/532M-ZZBS].
184. Beverley Baines, "Long-term care homes legislation: Lessons from Ontario" (2007) 10:1 Can Women's Health Network 7 at 8.
185. Ontario Long Term Care Association, "This is long-term care 2019" (2019) at 3, online (pdf): *OLTCA* <https://directory.oltca.com/Documents/Reports/TILTC2019web.pdf> [perma.cc/J3CL-YSQQ].

> disproportionately serve and employ women, elderly people, racialized people, and immigrants – all historically devalued communities.

The combined effects of sexism, racism, ageism, and classism contribute greatly to vulnerability, placing women, racialized individuals, and the elderly in the pathway of disaster when it strikes. When government mismanagement contributes markedly to the harm these groups experience, as it has demonstrably done in Canada during the now three-year pandemic, it underscores the need for an ethic of care and of accountability, in which the standard test of the duty of care makes room for egalitarian considerations beyond the non-instrumental idea of correlative rights and harms. Thus, in ignoring the reality of the non-linear relationship between plaintiffs and the public body defendant, the equal status thesis of the concept of correlativity fails to capture the contextual difficulties, including socio-cultural expectations, and economic, political and historical factors, that further amplify the hegemonial relationship between the plaintiff and the defendant public body, which ought to entrench an expectation that the latter exercise due care in relation to the former.

Not only would such considerations build into the duty test the outer layers of law—moral correctness/external rationality—that give as much attention to the interests of vulnerable claimants as it does to government bureaucracies, it could also resolve the duty test's violation of coherence/internal rationality of law—the rule of non-absurdity—by allowing a closed category of claimants to succeed on the duty element when they successfully establish that they belong to a foreseeable category whose proximity to the defendant is further affirmed by the nature of the responsibilities owed by the defendant to those within the claimants' group as may be discerned, for example, from enabling public health or other statutes.[186] In these, the *just and fair* requirement of the duty test could thus be interpreted to truly protect those—the victims of *self-preferential treatment* according to Weinrib's moral theory, or the bearer of violated *rights* according to the principle of *correlativity* accepted by the Canadian Supreme Court—whom the field of torts claims to protect.[187]

Third, while Weinrib's corrective justice does not envision the *inequality* that in reality defines the experience of the plaintiff in relation to the defendant's activities, the first form of impermissibility of self-

186. So far, statutes—problematic as they are as sources of a duty of care—are held to create general duties to the public and not a private law right of action for any particular individual.

187. I revisit this point more substantively below in the context of the discussion of Weinrib's *self-preference in conception* and its possible contributions to a justificatory theory of government liability.

preference—self-preference in action—could have the potential to contribute to a justificatory theory for government liability, though, unfortunately, Weinrib excludes public body liability from its purview. As will be recalled, Weinrib applies Kant's idea of *self-preference in action* to develop the normative *content* for the *form* of justice that is represented by the principle of correlativity. Thus, *self-preference in action* reflects the second notion of equality of persons, which is violated when an actor (defendant) acts in a self-preferential way that harms another (plaintiff).

When extended to the duty of care analysis for public officials, self-preference in action appears to capture fittingly the decision-making of populist government leaders whose administrative actions repeatedly rejected rational, scientific and even statutory guidelines on the management of the pandemic. Those actions fit the typology, expressly captured in Kant's self-preference in action, of an actor whose purposive conduct exalted considerations of the self above those of others; in the case of unequal parties, where much of the scientific and expert knowledge and the resources for effective action are overwhelmingly on the side of the defendant, the violation ought to be regarded as more serious than in the case of parties with relative symmetry of information. However, Weinrib excludes public body liability from the horizon of its requirement on the argument that governmental action is not self-interested, but directed to the fulfilment of public goals. Unfortunately, in an effort not to complicate the thesis of correlativity with the atypical demands of public body liability, Weinrib's argument misses the category of bad faith and irrational government actions that can be self-preferential in nature.

Fourth, the second instance of the prohibition of self-preference—*self-preference in conception*, which Weinrib particularizes through the example of the restrictive argument of the defendant in *Vaughan v Menlove*, also has sufficient correlation to the problems with the duty test to allow for application as a justificatory theory, though it ultimately requires an intentional interpretive expansion to accommodate government liability for negligence. As will be recalled, the rule against *self-preference in conception* prohibits the application of a traditional rule or standard in a particularized manner where the particularization or "idiosyncratic" application of the rule, if applied as a universal concept, would eliminate the very goals of the rule or standard.

When we apply the rule of *self-preference in conception* to the duty test as it relates to public bodies, there is a compelling argument to be made that the duty test falls short of the morality inherent in this second prohibition. Recall that the first stage of the duty test requires a court to consider factors related to the relationship between the parties that would

negative the finding of a presumptive duty of care.[188] A related analysis is to be conducted at the second stage where a court must consider residual policy concerns in relation to legal obligations and the legal system as a whole that would negate the duty of care. Recall also that there are no concomitant policy considerations either at the first or second stage to support the *affirmation* of a duty of care under the common law. These considerable burdens—impossible for most plaintiffs to surmount—are complicated by the fact that government bodies, though generally subject to judicial review, enjoy broad immunity limited only by bad faith or irrational decision-making.

These restrictive rules are evocative of the type of prohibition, if not in its exact form but at least within its ambit, embodied in *self-preference in conception*, especially when considered within Canada's particular political landscape as a parliamentary system of government where the executive arm is part of the legislative body that enacts the immunity that it enjoys. Specifically, the subjective arguments made by the defendant in *Vaughan* amounted to the defendant arrogating to himself the role of "sole determinant" of the ambit of the plaintiff's entitlements. This entitlement was to be determined by the defendant's "subjective" and limited "powers of evaluation."[189] In a similar vein, the duty test for public bodies limits the domain within which the plaintiff may exercise a right of action for negligent government conduct to a narrow context involving the case of bad-faith or irrational conduct. Thus, the conception of the rule or standard to be applied in the given case is subjectively and self-preferentially defined by the defendant and amplified by the courts through a range of principles, including the proximity test and policy considerations, the determination of which are restricted to the provisions of statutes created by the defendant.

Indeed, it is important to return to the fact that further smothering the ambit of the plaintiff's right is the fact that the duty test, as currently formulated, largely restricts the determination of whether it is just and fair to impose a duty of care on the defendent to the content of the statute that empowered the impugned actions of the defendant public body. A relationship of duty or the right of a private law action must be based on the often limited to non-existent interaction between the parties or arise from the enabling statute, which in a parliamentary system, is the creation of the defendant. Interestingly, therefore, in the present context

188. The test at the first stage requires a consideration of reasons to determine whether it would be *just* and *fair* to find the defendant owes a duty of care to the plaintiff.
189. *Vaughan*, *supra* note 170 at 51.

of liability for public health emergency mismanagement, an aggrieved plaintiff's potential gains under the Kantian prohibition against self-preference in action based on bad faith/irrational conduct—a very limited statutory right of action created by the defendant—are limited by the steep legal barriers under statute and the common law duty test, which breach Kant's prohibition against self-preference in conception, thus leaving the plaintiff worse off (and indeed far from their original position) under this formalistic and bounded scheme of corrective justice.

When the corrective justice framework and its embodied principles of correlativity of equal parties and impermissibility of self-preference are assessed even through the limited prism of the form-based justification that Weinrib's preference for a self-referential theory demands, we find that the structure of correlativity—that is, B's wrongs directly infringe on A's rights where A and B are equal agents—is not supported by the substantive content of the theory. In other words, Weinrib's form-based or structural theory of correlativity which, as he posits, frames the rights and duties that constitute the normative content of the theory,[190] begins to unravel under the weight of its own restrictive normative assumptions, thus making the case for a more egalitarian approach to defining the rights and duties embodied in the theory. In the following subsection, I argue that the elements of the normative theory (*correlativity of equal persons* and *impermissibility of self-preference*) intrinsically invite into their application value considerations that are necessarily instrumental and can be aggregative,[191] and that are the starting points for a revised moral theory of tort liability, especially in the area of negligence by a public body.

3. *Towards an interactional theory of government liability for tort actions*

To understand the manner in which Weinrib's corrective justice theory itself compels a different theorization of government liability for torts, we must return to the ideal of coherence that circumscribes the legitimacy of judicial reasoning, which requires a complementary relationship between law's internal and external rationality—a relationship that affects, or

190. Jared Marshall, "On the Idea of Understanding Weinrib: Weinrib and Keating on Bipolarity, Duty, and the Nature of Negligence" (2010) 19 S Cal Interdisciplinary LJ 385 at 395, online: <gould.usc.edu/why/students/orgs/ilj/assets/docs/19-2%20Marshall.pdf> [perma.cc/DR55-SEQ3].

191. For example, if the defendant's disruption of the plaintiff's antecedent equal status is sufficient grounding for liability, how do we ground liability in the case of unequal parties where there is a breach of other animating principles of the theory? If equality of parties is read to mean equality of interests, should the public status of the defendant and the asymmetry of information as between the defendant and the plaintiff not ground a duty to take extra care to protect the interest of the public, and therefore form the basis of liability in its breach?

ought to affect, the formation and interpretation of legal rules. As further explained below, this understanding of the negligence action as reflecting both corrective and instrumental justice goals has implications for the interpretation and application of legal rules, such as the duty test.

As discussed at the outset, coherence reflects both the need for positive law to be clear and certain, among other qualities, and the need for it to be morally correct. As noted, the theory of corrective justice rejects this latter quality, that is an external explanation of, or justification for negligence law based on law's supposed instrumental goals. Corrective justice relies instead on an assumed internal coherence expressed in the correlativity of the plaintiff's rights and the defendant's wrongs, and grounded on the normative rules based on Kantian ethics. The justification for this theoretical edifice must be found in the *structure* of the form of justice represented by the idea of corrective justice (that structure being *correlativity*), as supported by its normative claims (represented by the *impermissibility* thesis). However, in this arrangement, there is no actual normative justification for the prescriptive content (or normative claims) of the theory. There are no measures or standards—internal or external—to justify the substantive content of the corrective justice theory. The normative principles are said to be internally coherent in themselves without recourse to external sources of evaluation.

The normative content of the theory simply constitutes rules of action. Both aspects of the normative content of the theory—self-preference in action and self-reference in conception—do not supply their own justification for their validity or correctness. While they are admittedly moral in nature (and by this are labeled with the moniker of a "moral" theory), they do not subscribe to any external measures of assessment of their quality or their morality: that is, in terms of whether they are themselves coherent, equitable, and effective.[192]

To imply, as is the case with positive law's formalist tradition, that a theory is self-sufficient and internally coherent or logical, and that it cannot draw its validity from any external source, is to assume its correctness. As Alexy puts it in the context of positive law generally, "the necessity of positivity implies the correctness of positivity."[193] If there is no persuasive basis for insulating a given theory from legitimate assessment, it implies, therefore, that the quality of the internal or normative content of law—or

192. Even using the example of the critique against the principle of equality above, the rule's starting assumption regarding an equal status of the parties in tort suits constitutes a legitimate query which, when assessed against the reality that parties to a lawsuit are rarely ever equal, also sheds light on the weakness of the corrective justice theory.

193. Alexy, "Legal Certainty," *supra* note 86 at 444.

of a theory of an aspect of law, such as negligence law—can, and should be amenable to some form of evaluation. While the foregoing discussion of the limits of the normative content of Weinrib's corrective justice theory has attempted to do so, as have other legitimate scholastic critiques, an important extrapolation from the discussion that deserves further attention (in the interest of a new theory of public body liability) is that the validity of law's internal "morality" is to be assessed not just through form-based requirements of coherence (which includes such qualities as certainty, congruity, and non-absurdity), but also through the principle of moral correctness.

As explained by Alexy, while correctness requires coherence as expressed through its animating qualities, it demands "above all" justice—a concept that is inherently distributive and instrumental:

> The correctness of content concerns, above all, justice, for justice is nothing other than correctness with respect to distribution and balance (Alexy 1997a, 105) and distribution and balance present the central concern of law. Questions of justice, however, are moral questions. For this reason, it is possible to speak of moral correctness or, simply, of justice instead of correctness of content.[194]

In the context of the duty test, this article has outlined the several ways in which the test has failed the procedural/formal aspects of legal validity that legitimates judicial reasoning, and thus lacks internal rationality. The foregoing also explains that the duty test falls short of the demands of external rationality in its failure to give weight to the important instrumental goals that underlie it. In this light, the duty test, including when assessed through the expanded prisms of Weinrib's *self-preference in action and conception* principles, fails even the basic expectations of a legal rule. The bad faith decision-making that grounds liability of public bodies, the inequality of the parties, and the instrumental aggregation of individual welfare that is critical to public health policymaking throw into sharp relief the impropriety of the defendant's arbitrary self-preference that was evident in populist pandemic decision-making. These factors, while simultaneously legitimating an aspect of Weinribian theory of negligence law and refuting other aspects, speak to the inability of the current duty test to meet the demands of external rationality or moral correctness. The "correctness" of the current duty test cannot simply be limited to policy considerations that protect powerful governments from liability and de-prioritize the harm suffered by clearly defined members of the public,

194. *Ibid* at 441. Cited within the quotation is Robert Alexy, "Giustizia come correttezza" (1997) 5 Ragion Pratica 103.

some of whom are historically marginalized, and who bear the weight of government's politicized decision-making.

Importantly, the above factors serve a greater theoretical purpose: they shed light on the interconnectedness between normative and instrumental accounts of tort law. The considerations embodied within Kantian ethics and on which Weinrib's corrective justice is based are themselves oriented towards recompense for conduct that involve the types of immoral governmental actions that the theory prohibits. The theory recognizes even at this level of abstraction the importance, if not primacy, of ethics in the content of a legal rule, even as it rejects the assessment of its ethical prescriptions through equity-based evaluative models. In this is clearly the interplay of internal and external rationality. Even as Weinrib labels this interplay of the form of justice (correlativity) and the content of justice (impermissibility) as *form*/*structure* and *normative content* without more, the content of the social facts that animate his theory by their nature invite evaluative judgments. These judgments, which are an assessment of correctness, are particularly apposite in the case of disasters where it is legitimate to question a government's handling of its statutory responsibilities broadly, as well as specifically in relation to vulnerable groups. Therefore, the normative content of Weinrib's corrective justice theory, contrary to some scholastic assertions, can be aggregative in their ethical demands. The fact of this interaction of internal and external rationality contributes to, if not affirms, a conceptual interconnectedness between non-instrumental and instrumental ideals in a theory of liability for negligence.

Not only is this hybrid understanding of the negligence action as embodying instrumental/internal and non-instrumental/external dimensions that draw on each other for their legitimacy truly reflective of the jurisprudence and the practice, acceptance of an interconnectedness between the instrumental and non-instrumental dimensions of tort law makes certain demands on our system of justice: that the interpretation and application of legal rules reflect both the formal and substantive principles of coherence which animate the moral ideal of correctness. In the case of the duty of care test, it requires that the tools of adjudication—the procedural and doctrinal rules of the test—support, rather than defeat, the realization of the ultimate instrumental objectives inherent in it. As currently applied, the duty test fails to accomplish many of the instrumental goals it embodies, and thus ultimately fails the test of moral correctness.

For example, the deferential treatment of public policymaking in the duty of care jurisprudence ignores the accountability role of tort law in relation to the conduct of public officials. Governmental actions ought

rightly to be assessed for breach of standards if the facts support such a finding.[195] Further, the judicial precedents on the duty test generally pay less attention to the broader policy goals of public health statutes that require certain standards of conduct for the effectiveness of the legislation or the realization of legislative goals. In the particular context of bad faith and irrational conduct, the liability of government officials reinforces the fact that a functional and morally conscious society ought to be guided by certain values—respect for law, good faith performance of official obligations, including fulfillment of the objectives of a law, avoidance of self-preferential conduct that injures others, and paramountcy of citizens' welfare, among others. These types of goals ground the external morality of the tort of negligence in the case of government liability for torts.

Therefore, a moral theory of negligence law—such as is captured in the above explication of the co-dependency or interaction between internal and external rationality—must account for the dependency of law's legitimacy and more specifically the legitimacy of judicial reasoning on the correctness of both its form and content. The interconnectedness of both the form and content of law advances the goal of coherence and ultimately moral correctness. In this relationship, as noted, the formal qualities of law inspire acceptability and legitimacy even as acceptability of a law's content is necessarily dependent on both the formal and moral qualities of its legal norms.[196] The duty test does not reflect this interactional relationship or mutual dependence between internal and external rationality based on the aforementioned failure to meet even the formal tests of coherency, and due to the discrepancy between its postulations and instrumental goals that address the rights of plaintiffs.

This theory of interactionism or mutuality recognizes that the correctness of positive law requires both the force of its own internal logic as well as the influence of external rationality, which tests a rule's purpose, effectiveness, and whether it meets instrumental goals mandated by law, as for example, the effective protection of citizens in a time of disaster.

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195. As will be recalled, this role is contrarian to the normative content of the corrective justice theory of negligence law in its exclusion of the case of government liability. With regard to the "intrusion" of public policy considerations into doctrinal principles of tort law, Weinrib has more recently acknowledged that the internal logic and "purity" of the field of private law, of which tort law is a part, could be tainted by the requirements of publicity and systematicity, which are normative requirements of a system of positive law, based on the fact that private law is adjudicated through the formal, public structure of the judicial system. See Ernest Weinrib, "Private Law and Public Right" (2011) 61 UTLJ 191 at 192, DOI: <10.3138/utlj.61.2.191>. See also McKee, "Responsibility of Common Law," *supra* note 13 at 298-300.

196. This interactive or mutual relationship has further resonance when we consider Alexy's definition of the real/formal aspect of law; he defines it to include "social efficacy," that is whether a law accomplishes its prescribed goals. See generally Alexy, "Legal Certainty," *supra* note 86.

As I have argued in a recent CBA Report, the state's responsibility (or duty) to protect must apply to *all* citizens and cannot be so designed as to create unreasonable risks for citizens whose vulnerability arises from a combination of deprivations based on immutable personal characteristics and historical government mismanagement of critical sectors and disasters.[197] Thus, the coherence of legal rules, such as the duty test, not only requires external rationality in which rules or principles are to be judged by their achievement of instrumental goals (such as ensuring government accountability for failure to fulfill legislated public health objectives due to self-preferential behaviour), whether the content of legal rules are themselves popularly accepted or effective depends on the correctness of their proclamation and whether they reflect the qualities of coherence (for example, clarity, congruity, non-absurdity, etc.)—qualities that instill trust in and respect for law.[198] Therefore, correctness engages both the factual and moral aspects of law. This entrenched mutuality between the formal and substantive dimensions of law—which may be denoted as an "Interactional Theory," of government liability for negligence—holds lessons for reform of the duty test.

Conclusion

This article has discussed the challenges imposed by the duty of care test for government liability for negligence in the management of emergencies and disasters. The article discusses the problems of coherence and legitimacy of judicial decisions regarding the duty test, as well as complications in how liability in tort law—especially in the context of government liability for negligence—may be justified. This article has further outlined the ways in which the structure and application of the duty test do not meet the formal and substantive demands of coherence, correctness and legitimacy. It contends that theories of justification of tort law offer pathways to critical analysis and reform of the test. Building on these arguments, the Interactional Theory proposed in this article emerges as a moral theory of government liability for negligence with the potential to advance the correlative relationship between the formal and substantive aspects of any legal rule, and especially of the duty test.

197. Iyioha, "CBA Final Report," *supra* note 2.

198. In other words, it also depends on the way those who receive the law perceive its promulgation (whether a law is properly passed) and its quality (whether it is clear, certain, non-congruous, etc.). See Iyioha, "Normative Limits," *supra* note 105.