Class Actions, Crown Negligence, Immunities and Epidemics on Trial: *AG v Strathboss* [2020] NZCA 98

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Might the Crown be held liable for permitting the incursion of a contagious disease into New Zealand, resulting in epidemic spread and significant economic loss? *Should* it be liable? While these questions might attract interest due to New Zealand's COVID-19 response, and on-going outbreaks related to border controls, the Court of Appeal recently answered this question regarding a bacterial disease (Psa3) affecting kiwifruit in *Attorney-General* v *Strathboss Kiwifruit Ltd* [2020] NZCA 98. In *Strathboss* the Court of Appeal found that the Crown was immune from liability in tort for the spread of the Psa3 bacterium amongst kiwifruit orchards in New Zealand, from 2010.

This case is foremost a consideration of Crown immunity in tort, and secondarily an analysis of negligence. Yet it raises significant and broader issues, such as statutory interpretation of Parliamentary intention, class actions, public authorities, cost-shifting, suing the proper defendant, and border security. Many of those issues cannot be fully analysed here. Given the factual density, the complex legal issues, and the length of the High Court and Court of Appeal decisions, this case note briefly summarises the key issues under consideration by the Court of Appeal and its findings. As the Supreme Court has granted leave to appeal on broad grounds (*Strathboss Kiwifruit Ltd v Attorney-General* [2020] NZSC 68), we highlight aspects of the decision that require further scrutiny and clarification.

Background

A class action of kiwifruit growers represented by the named plaintiff Strathboss and a Post-Harvest Operator (PHO) Seeka Ltd sued the Attorney-General for pre-border negligence and negligence at the border. On the plaintiffs' case, a consignment from China containing kiwifruit anthers had been negligently permitted to enter New Zealand and caused the epidemic outbreak of Psa3. The facts of the case are set out below, following an overview of the salient requirements of the key legislation - the Biosecurity Act 1993 (the Act) - as it was at the time of the events. Pinpoint references are made to the Court of Appeal decision unless otherwise indicated.

After its passage in 1993, the Act was amended in 1997 to emphasize the concept of "import health standards" (IHSs). IHSs could take weeks or years to develop, and were developed in consultation with affected persons. They set out risk assessment requirements for "risk goods" (including plants and plant products) to be allowed to be imported and ultimately receive biosecurity clearance. At the border, before Ministry of Agriculture and Fisheries (MAF) personnel could grant biosecurity clearance to risk goods, they were obliged to ensure that relevant IHS requirements were satisfied, including checking consistency of relevant documentation ([21]-[23], [50]-[55]). The most relevant IHS to *Strathboss* was the "Nursery Stock" IHS, which had been amended in 2004 with specific requirements relating to *Actinidia* (i.e. kiwifruit) species ([30], fn 14, [56]). More generally, the Nursery Stock IHS required an import permit to be obtained from MAF for all pollen imports, as well as a period of post-entry quarantine (PEQ) to check for the presence of regulated pests and/or diseases ([61], [57]-[58]). In 2004-2005, import permits had been granted for non-kiwifruit pollen with a PEQ period of

3 months. A proposed 2005 kiwifruit pollen import would have been subject to 6 months of PEQ ([29]). However, in July 2006, MAF initiated a literature review concerning plant pests and diseases associated with pollen. The literature review stated that "there are no recorded pests or pathogens that are pollen transmitted in *Actinidia* species." ([31]: In 2010-2011 the scientific community discovered this not to be true - [388]). That said, the review had been prepared on the basis that it concerned pure pollen (free of all contaminants) for breeding purposes, which differs from artificial pollination purposes ([315] and [290], [310], [321] citing discussion in the decision below - *Strathboss* v *Attorney-General* [2018] NZHC 1559 – at [805], [777]-[781], and [810]). The review did not consider the position in relation to either "rough pollen" (anthers – plant material which contains pollen), or to milled pollen, which was produced using processes that presented a risk of non-pollen plant material being included in the final milled product (see [310], [313], [343], [345]-[348], and the discussion of the review's limitations in *Strathboss (HC)*). It was known that Psa3 and its spread were associated with infected plant material ([343]).

The Court provides an overview of the key facts from [32]-[48]. In sum, in November 2006, a small company called Kiwi Pollen Ltd asked MAF about how it could import frozen kiwifruit pollen from Italy and China for commercial artificial pollination purposes. Pollen importation was unusual, and prior import permits had been for breeding (in PEQ) rather than direct pollination in the field ([29]). In considering the proposal, MAF personnel sought input from an author of the 2006 literature review. Without appreciating that Kiwi Pollen's application related to pollination, and without clarifying the limitations of the literature review, the response simply referred to that review and stated "As you will see there are no pests or diseases known to be associated with pollen of Actinidia spp" ([32], see also [302]-[316]). MAF personnel then told Kiwi Pollen Ltd that an import permit would be granted for "hand-collected, unopened male flower buds of kiwifruit", that were to be collected, milled and imported ([308], [33]). No mention was made of the IHS that required PEQ ([34]).

Kiwi Pollen applied for a permit to import kiwifruit nursery stock from China accordingly. MAF granted the permit without requiring any PEQ, and included a special condition that the pollen be milled, expressed in the form "[t]he milled pollen has been sourced from…" ([368]). The permit was renewed in 2009, but the requirement to mill the pollen had, for no clear reason, become ambiguously expressed as "[t]he pollen may be milled prior to import" ([369]-[370]). A consignment of kiwifruit pollen from China was imported pursuant to the 2009 permit in June that year. The June consignment was not inspected as required by the IHS (these findings below were not appealed – [391], fn 319 and fn 320). It was nonetheless cleared and delivered to Kiwi Pollen in Te Puke. The High Court judge accepted testimony from the managing director of Kiwi Pollen that the consignment contained anthers instead of the fine, milled pollen that she expected. The High Court did not accept testimony that she had "probably thrown it out", finding instead that "it was highly likely" that Kiwi Pollen kept the pollen ([43]).

Although it is not clear how that pollen was used or what happened to it, in October 2010, diseased kiwifruit was noted at two Te Puke orchards, one of which was owned and managed by a Kiwi Pollen shareholder. In November 2010, it was confirmed that the disease was Psa3. The disease rapidly spread. In response, private industry and government, including MAF, co-funded a compensation scheme for growers affected by Psa3 ([47]; *Strathboss (HC)* at [114]-[126]). In doing so, the government relied on s 162A, one of the miscellaneous provisions in Part 9 of the Act, which establishes a compensation regime where statutory powers are used to manage or eradicate an organism ([204]-[214]; *Strathboss (HC)* at [119], fn 25). Both courts found that s 162A applies generally to all introduced pests and has explicit exclusions, but does

not exclude private law remedies resulting from MAF or its personnel's acts or omissions. Other provisions in Part 9 provide for civil immunity for the Crown while any imported goods are in custody of the Crown, and s 163 confers immunity for the exercise of powers, functions or duties under the Act ([67]). The s 163 immunity, which the appeal turned on, is discussed further below.

Given these facts, the plaintiffs' claim was that the Crown, via MAF, is liable to kiwifruit growers and PHOs for negligence on two grounds ([1], [7]). The first was pre-border negligence stemming from MAF's permit-granting conduct (in 2007, and the 2009 renewal) that facilitated the import of the June consignment of kiwifruit pollen from China. The second was negligence at the border based on MAF's border-clearance conduct - resulting from non-inspection of the consignment upon arrival in New Zealand.

In summary of the decision below (see generally *Strathboss (CA)* at [3], [7]-[8], and [68]-[69]) the High Court had held the Crown liable for the pre-border conduct of granting the import permit (first cause of action), but not for conduct at the border for failing to inspect the pollen consignment (second cause of action). Under the Act, MAF personnel owed a duty of care in exercising their biosecurity risk-management functions to kiwifruit growers with "property rights" in their vines/crops, but not to PHOs like Seeka. MAF personnel had breached that duty in granting the 2009 import permit, and in the related handling of the June consignment at the border. The High Court accepted that the June consignment had caused the Psa3 outbreak. The immunity provided for by s 163 of the Act did not apply to the pre-border conduct of the relevant personnel, rendering the Crown vicariously liable. However, the High Court found that the at-border personnel fell within the s 163 immunity, foreclosing vicarious Crown liability for the at-border conduct.

The Crown appealed the 'permit liability' finding, and the respondents cross appealed the High Court's conclusions on liability and scope of duty.

The Court of Appeal was tasked with addressing six issues ([69]):

1. Whether the Crown can be directly liable in tort (rather than vicariously liable);
2. Whether the Biosecurity Act 1993 immunises the Crown and MAF personnel from liability occurring pre-border or at the border;
3. Whether there was pre-border negligence;
4. Whether there was negligence at the border;
5. Whether Psa3 entered NZ in June 2009; and
6. The respondents' cross-appeals: did the growers have to show that they had property rights in the vines and crops and did the MAF personnel owe a duty of care to PHOs, like Seeka?

Kós P authored a unanimous opinion on behalf of the Court of Appeal, allowing the Crown's appeal and dismissing the respondents' cross-appeals. The decision is based on the holding that statutory immunity under s 163 of the Act precludes any Crown liability for either the pre-border or at-border conduct. Despite finding that the Crown was immunised from these causes of action, the Court addresses in detail its hypothetical position on the other issues in case the matter proceeds further ([7]). The group representing the plaintiffs (the Kiwifruit Claim) quickly announced an intention to appeal, and leave was granted on 22 July 2020.

Below, we summarise the Court of Appeals findings and reasoning on the core issues, noting areas that are likely to be subject to further scrutiny on appeal.

Statutory limitation on/immunity from liability

Direct Crown liability

The respondents asserted both direct and vicarious liability of the Crown ([73]-[76]). On appeal, the Crown asserted that the Crown Proceedings Act prevents it from being sued for direct liability ([70]-[71]). On its face, s 6(1)(a) limits Crown liability in tort for actions or omissions of its servants or agents to circumstances where those servants or agents of the Crown would be individually liable. If that reading is correct, then s 6(1) prevents direct Crown liability but allows the Crown to be vicariously liable.

In considering whether s 6(1) prohibits direct liability, the Court of Appeal traversed the unusual procedural history of the Crown Proceeding Act ([83]-[99]). Unlike the United Kingdom, New Zealand developed Crown liability in tort at common law in the late 19th century. However, and despite the Crown in New Zealand already being liable both directly and vicariously, in 1950 New Zealand Parliament imported verbatim wording of the UK Crown Procedure Act, which had been designed to create vicarious liability for the Crown in that jurisdiction. While (New Zealand) parliamentary material makes no mention of a shift from direct to vicarious liability, the Court considered that "[w]hether or not the legislators entirely appreciated the point in 1950" it *should* have been appreciated, and was, by 1953, appreciated in a treatise on the subject ([97]). The Court also referred to academic criticism of barring direct Crown liability in New Zealand: "an embarrassment … a distortion … no principled justification … the result of accidents of English history" (at [98] citing Stuart Anderson "'Grave injustice', 'despotic privilege': the insecure foundations of crown liability for torts in New Zealand" (2009) 12 Otago LR 1 at 21). The Court nonetheless considered New Zealand's Crown Procedure Act to entirely embrace the effect of the English Act "whatever the rights or wrongs … as a matter of policy" ([99]). Hence, it barred direct Crown liability.

The Respondents argued that there was a lack of legislative intent for the deprivation of their legal rights, and that such a deprivation was inconsistent with s 27(3) of the New Zealand Bill of Rights Act 1990 and its "… right to bring civil proceedings against … the Crown … according to law…"). On the respondents' argument, s 6(1)(a) was directed solely to the Crown's *vicarious* liability in tort ([82], [106]).

However, the Court rejected that "adventitious" argument ([108]). In support of this view, the Court highlighted the fact that *Todd on Torts* concludes strongly against direct Crown liability ([101]). It also held that the "according to law" clause in the s 27(3) right embraced the "regulatory legislation" in the Crown Proceedings Act rather than reforming it, citing the Bill of Rights Act's White Paper ([107]-[108]). Further, the Court noted, neither the Law Commission in *The Crown in Court* (NZLC R135, 2015) nor *The New Zealand Bill of Rights Act: A Commentary* had adopted a reading that the effect of s 6(1) had been ameliorated by s 27(3) ([102]-[105], [108]). Nonetheless, there is certainly interest in torts case law and scholarship on the impact of human rights on the development of private, common law remedies (See, e.g., Stephen Todd et al, *Todd on Torts* (Thomson Reuters, 8th ed, 2019) at 352, fn 443). Finally, the Court noted that direct Crown liability was not one of the options countenanced in Cooke P's (pre Bill of Rights Act) analysis of the Crown Proceedings Act in *Crispin v Registrar of District Court* [1986] 2 NZLR 246.

The question of direct Crown liability had been addressed, albeit briefly and in passing, by the Supreme Court in the *Couch* litigation, in which the Court dealt with a strike-out application on two main grounds: no duty of care being owed – *Couch* v *Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725; and non-availability of exemplary damages/immunity – *Couch* v *Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149. Despite s 6(1), the Court in those cases appeared to have envisaged the possibility of direct Crown liability (see *Couch (No 1)* at [6]-[7], [9]-[10], [30], [36]; *Couch (No 2)* at [71], [173] and fn 264; and the discussion of the *Couch* litigation in *Strathboss (HC)* at [1304]-[1308] and [1376]). Blanchard J in *Couch (No 2)* specifically noted that the law on direct Crown liability or holding the Crown liable through attribution was "uncertain". His Honour was not persuaded that the Crown Proceedings Act necessarily precluded a claim for direct liability "when read against a background of prior statutory history unique to this jurisdiction." ([71]).

The Court of Appeal considered *Couch (No 2)* in detail, but not on this point. The Supreme Court's approach to this issue will be of particular interest, especially given the fact that Parliament declined the Law Commission's recommendation, after the *Couch* litigation, to clarify direct Crown liability in tort through appropriate legislation.

Vicarious Crown liability

After finding that the Crown Procedure Act only enabled the Crown to be vicariously liable in negligence, the Court of Appeal considered whether any MAF personnel were liable. This was a necessary step towards finding the Crown vicariously liable, as the respondents alleged. The Crown argued that s 163 of the Act immunised MAF personnel from direct liability in negligence, and, hence, immunised the Crown from vicarious liability, which the respondents disputed.

Affecting the Court's conclusions on this issue was the Supreme Court's consideration, in *Couch (No 2)*, of the more narrowly framed, but more generally applicable, immunity for public servants in s 86 of the State Sector Act 1988. The Court in *Couch (No 2)* unanimously agreed that s 86 did not preclude vicarious Crown liability via s 6(1) of the Crown Proceedings Act. A majority found that s 86 only immunised state sector employees from internal liability (to the relevant Department), and did not affect their personal liability to third parties (per Elias CJ, Blanchard and Tipping JJ, for the reasons given by Tipping J). The Crown would only have had immunity under s 86 if that section immunised such direct personal liability of employees to third parties. Conversely, the minority on this point found that s 86 *did* immunise employees against external third parties (per McGrath and Wilson JJ). However, taking into account s 27(3) of the New Zealand Bill of Rights Act, the Crown could not obtain the benefit of its servants' immunity via s 6 of the Crown Proceedings Act if it arose "on account of being a Crown servant" (see McGrath J at [189] and Wilson J at [250]).

The government disagreed with the majority view of the s 86 immunity in *Couch (No 2)*. Accordingly, it amended s 6 of the Crown Proceedings Act and s 86 of the State Sector Act in 2013 – after the events at issue in *Strathboss* – explicitly because of *Couch (No 2)*, and to restore the policy that was said to have always been behind s 86 (see State Sector and Public Finance Reform Bill (55-1) (explanatory note) at 15). The amendments provided for public servants to have personal external immunity under s 86; but at the same time allowed the Crown to be, potentially, vicariously liable despite this immunity (Crown Proceedings Act, s 6(4A)). With the repeal, in August, of the State Sector Act 1988, s 104 of the Public Service Act 2020

now provides a similarly worded immunity which has replaced references to s 86 in s 6(4A) of the Crown Proceedings Act.

In the High Court, Mallon J considered that the 2013 legislation could be used as an interpretive guide to the intent of s 86 at the time of the relevant conduct in 2009 and 2010, regardless of the majority approach to s 86 in *Couch (No 2)* ([1356], fn 683). Although the Court of Appeal suggested that the majority's conclusions on this point in *Couch (No 2)* were arguable ([127]), it disagreed with Mallon J. The Court held that it was bound by the majority reasoning in *Couch (No 2)* because the events at issue in *Strathboss* occurred before the amendment and there was no retroactive intention in the 2013 amendments ([125]). In effect, any external immunity conferred by s 163 would result in concomitant Crown immunity.

On its face, the Court of Appeal found s 163 to be a "complete exclusion of personal liability", with no reason to limit its application to internal liability ([131]). Enacted 5 years after s 86 of the State Sector Act 1988, "it may be inferred that it probably does something else" and goes beyond internal protection ([131]). Provided that certain occupational and functional criteria were met by MAF personnel, s 163 removed "any civil or criminal liability" subject to the proviso that the qualifying conduct not occur "in bad faith or without reasonable cause" ([130]-[131]).

The High Court had held that some MAF personnel would not be protected by the Act's s 163 immunity, which extended only to persons acting "… in pursuance of … functions, powers or duties *conferred on that person by or under this Act* …". The High Court found that s 163 immunised only those who were formally (specifically, directly) appointed ([115]). The Court of Appeal disagreed. It considered that the phrase "under this Act" contemplated the *in*direct grant of functions, which included administrative functions performed by MAF personnel in order to assist with the performance of Ministerial functions ([136]). Otherwise, the protections afforded to Ministerial responsibilities would be hollowed out by the simple expedient of identifying non-formally appointed delegates as defendants ([135]). The Court of Appeal read s 163 more widely because of what it saw as the limited backstop protection then provided by s 86 of the State Sector Act given *Couch (No 2)* ([133]).

The question then was whether the limitation created in the s 163 immunity applied: precluding immunity if "… the person has acted, or omitted to act, in bad faith or without reasonable cause" ([137]). The Court of Appeal agreed with the High Court that, unlike an analysis of "reasonable care" which goes to the performance of the action and a want of due care, "reasonable cause" invokes purpose rather than performance ([137]-[140]). Each of the alleged negligent actions/omissions (pre-border and at-border) had occurred in situations where the actors had a statutory basis for their conduct and, hence, those personnel acted with reasonable cause and were immunised by s 163 ([140]-[142], upholding the High Court's conclusions on this point).

Overall, Crown immunity in tort is a complex, and potentially inconsistent area. For example, the Supreme Court in *Couch (No 2)* unanimously considered that Crown immunity from vicarious liability did not follow from the s 86 statutory immunity. But the majority on this point reasoned by adopting the 'arguable' position that s 86 covered only internal liability, on the premise (rejected by the minority) that public servants could not be immunised from personal external liability while preserving the Crown's vicarious liability (see [175]-[177]). Given the *Strathboss* decision, this reasoning appears to have made it easier to argue that other immunities enacted after s 86 of the State Sector Act 1988, and without an obvious internal

focus, "do something else" and operate externally - potentially to wide effect. (This is particularly so on facts where, as in *Strathboss*, the pre-2013 amendment, narrow version of s 86 also applies.) Then, as the Court of Appeal saw it, that same majority approach mandates extending the benefit of the external immunity to the Crown.

This reasoning may also have force concerning events occurring after the post-*Couch (No 2)* 2013 amendments and others to similar effect (see Crown Proceedings Act s 6(4A) and (4B)). These are directed only to preserving Crown liability in the face of two specified external immunities, despite the many that exist (as discussed at [146]), rather than establishing a general approach to be applied should another external immunity exist. In effect the presence or absence of protection from external liability simpliciter operates in a binary fashion, precluding or permitting vicarious Crown liability.

Arguably the majority's position in *Couch (No 2)* on that issue is obiter, because finding s 86 provided no 'external' immunity was sufficient to decide the issue. For other statutory immunities providing (some) external protection, there may be more scope to apply an approach like the minority's in *Couch (No 2)*, which considers how the immunity and the Crown Proceedings Act are to be reconciled with interpretive obligations under the New Zealand Bill of Rights Act. Given the explicit rejection of this approach by the majority, clarification could usefully be given by the Supreme Court in its decision on the appeal. Clarification on whether the 2013 legislation could be used as an interpretive guide to the intent of s 86 at the time of the relevant conduct in 2009 and 2010 would also be welcome. As noted above, there is also scope for further analysis of potential direct Crown liability. This may include consideration of whether Parliament can be said to have intended the Crown Proceedings Act to remove direct Crown liability when its wholesale importation was perhaps unintentional; and the effect of the Bill of Rights Act.

Hypothetical duty and breach

Although the Court of Appeal determined the claims on the basis of the s 163 immunity, most of the *Strathboss* judgment is nonetheless devoted to the necessarily lengthy, hypothetical questions of duty and breach. This note does not seek to summarise the detailed analysis undertaken.

In short, regarding the duty of care, the Court differed from Mallon J in considering that policy reasons were sufficient to militate against a duty of care (that would otherwise have been owed) being owed at both the pre-border risk assessment and border-clearance stages to the grower-respondents property rights in the affected vines/crops. Most significantly, the liability at issue for MAF's border control function was considered too broad and indeterminate in scale ([260], [273]-[275], [411]-[417]). The Court declined, however, to accept the Crown's submission that the pre-border conduct amounted to non-justiciable quasi-legislative activity ([186]-[191]). It also rejected the respondents' submissions that a private law duty owed by MAF would have obliged it to conduct public law-like consultation of affected parties ([276]-[282]) and that a duty of care was owed in relation to the preparation of the literature review – an internal MAF resource ([283]-[297]).

Assuming that the Crown was not immunised and a duty of care was owed, the Court would have found failures to take reasonable care at both the pre-border and border-clearance stages. For the former, members of the relevant team had failed to undertake an effective risk assessment of the unusual import permit application ([349]-[351]). In short, MAF's approach

did not deal adequately with the potential Psa3 risk posed by other plant material being imported with the pollen in the June consignment. For the latter, and differing from the High Court's conclusions, a legally required pre-clearance inspection did not take place, amounting to a lack of reasonable care ([391], [439], [445]). However, the failure to inspect the consignment had no causative effect because an inspection would not have revealed any discrepancy given the 2009 permit's substance ([446]). In particular, the ambiguity introduced by the condition that the pollen "may be milled" meant that any inspector who saw anthers in the June consignment would not have discerned an inconsistency with the documentation.

One consequence of the clear rejection of potential direct Crown liability in tort is that the respondents had to narrowly focus on the conduct of individuals to prove they were negligent and thus establish the Crown's vicarious liability. On this approach, the various, but ever-important "background" systemic issues are noted but not directly related to the breach issue. These include MAF staff being overburdened ([316]), significant backlog in the overall border risk-management system (e.g. [54]), and government responsibilities and limitations under international law ([18], [181]). These systemic concerns raise tensions while limiting the reach of contemporary tort practice.

For instance, as the Law Commission has noted (see *Strathboss (CA)* at [102]-[104]) when a department as a whole is alleged to have breached its obligations, requiring a plaintiff to identify a negligent individual creates difficulties. It is clear that the Crown should not be held liable in tort for understaffing, backlog, and budgetary constraints which are the result of policy decisions, voter preference or the will of the people, even where those policy decisions impact operations. This then makes the operation/policy distinction relevant to justiciability (see [184]-[187]), as well as potentially unwieldly. Regardless, it indicates that there are strong policy reasons and conceptual limitations weighing against the use of tort actions to force public officials to perform their roles in a way that any private individuals, even a class of private individuals, desire.

Causation

Assuming that the Court had found the Crown vicariously liable for breached a duty of care in granting the permit or allowing the 2009 consignment to enter New Zealand, it would have found have found that the 2009 consignment caused the Psa3 bacterial infection at issue in this case. Fundamentally, the Court rejected the Crown's suggested "links in a chain" approach to causation. It upheld the cumulative circumstantial assessment below, based on a "strands in a cable" or "strands of a rope" approach to causation ([462], [465]-[470]), despite ruling in favour of the Crown on discrete matters.

Regarding the factual findings on causation, the Court rejected the most direct evidence supporting the respondents' position: whole genetic sequencing did not support the finding below that the New Zealand Psa3 strain came from Shaanxi, China, where the June 2009 consignment likely originated ([482]-[484], ([495]-[499], [510]). The High Court was, however, entitled to conclude, based on other genetic evidence, that the New Zealand and China strands of Psa3 were more closely related to each other than to Chilean or European strands ([500]-[502]). With regard to timing, the Court agreed with the Crown that the "weight of the evidence does not support a conclusion that spring 2009 pollination activities [one of the respondents' postulated infection pathways] provided a possible means of infection in this case" ([540]). That did not, however, rule out infection through contaminated equipment or some other means.

Overall the Court found that epidemiological evidence and other circumstantial factors were consistent with the respondents' theory, and would have been sufficient to meet the burden of proof on causation ([546]-[547]). The Crown argued that there was no clear reason why the respondents' theory is more likely than the sum probability of any other infection pathway(s) against the background of a statutory system of risk management (not elimination) susceptible to incursion via, for example, unknown inadvertence or smuggling ([458]-[464]). The High Court responded that the Crown position sought a level of certainty that was simply beyond the applicable civil standard ([1250]). In being prepared to uphold the High Court's conclusions on this point, the Court of Appeal has emphasised the level of uncertainty tolerable on this standard and in this context – consistently with its conclusions on indeterminate liability negating a duty of care.

Respondents' cross-appeals on duty of care

The last issue was the respondents' appeal from the High Court's finding that MAF owed a duty of care to kiwifruit growers, those who held property rights as a basis for establishing a close enough relationship, but not to Seeka, the PHO. Although the Court of Appeal noted that there was a "somewhat arbitrary line drawn" among those to whom a duty was owed ([556]), it refused to explore this issue for several reasons, including the lack of comprehensive submissions received and superfluity ([553]-[555]).

Conclusion

The essence of the respondents' claim is threefold: first, that MAF personnel failed to appropriately permit a consignment pre-border; second, that MAF failed to inspect it at the border; and, finally, that the consignment caused the Psa3 infestation. The respondents' appeal will face significant hurdles.

The Court of Appeal's decision clarified that the breadth of existing statutory immunity provisions may render detailed analysis of duty of care considerations strictly unnecessary. However, there remains lingering uncertainty post-*Couch* as to how immunities ought to be approached. Even if the immunities hurdle is surmounted, the duty of care and causation analysis remain problematic. If the Supreme Court were to find that the Crown is liable in this context, it would trigger significant cost-shifting and accountability consequences that would likely impact policy decisions. The merits of which are contestable, especially given the significant causative role played by the importer. Further, as the Court noted, other accountability mechanisms including public law actions remained open to persons in the respondents' position.

Strathboss is a case, essentially, that seeks to shift costs from kiwifruit growers and PHOs to the government. It is always easy to claim that the Crown, its agents and employees should simply enforce and uphold the laws, rules and regulations that are on its books. Failure to do so does not itself, however, constitute negligence. The perennial issue of Crown responsibility to constituents is always tempered by concerns about where the government resources are to be invested. If the government does not have all of the resources necessary to enforce rules and regulations as constituents desire or demand, private law proves, once again, that it is a poor mechanism for effecting change.