IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA128/2020
[2021] NZCA 552

BETWEEN	MICHAEL JOHN SMITH Appellant
AND	FONTERRA CO-OPERATIVE GROUP LIMITED First Respondent
	GENESIS ENERGY LIMITED Second Respondent
	DAIRY HOLDINGS LIMITED Third Respondent
	NEW ZEALAND STEEL LIMITED Fourth Respondent
	Z ENERGY LIMITED Fifth Respondent
	NEW ZEALAND REFINING COMPANY LIMITED Sixth Respondent
	B T MINING LIMITED Seventh Respondent

Hearing:	9 and 10 February 2021 (further material received 23 June 2021)
Court:	French, Cooper and Goddard JJ
Counsel:	D M Salmon and D A C Bullock for Appellant D R Kalderimis and N K Swan for First Respondent S J P Ladd and B A Keown for Second Respondent A Hill for Third Respondent D T Broadmore for Fourth Respondent T D Smith and A M Lampitt for Fifth Respondent A J Horne and O K Brown for Sixth Respondent R J Gordon and A M B Leggat for Seventh Respondent
Judgment:	21 October 2021 at 9 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The cross-appeal against the High Court's refusal to strike out the third cause of action pleaded as "breach of duty" is allowed. That cause of action is struck out.

C There is no award of costs.

REASONS OF THE COURT

(Given by French J)

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Introduction

[1] What should be the response of tort law to climate change? That starkly put is the key issue raised by this appeal.

[2] Climate change is commonly described as the biggest challenge facing humanity in modern times. Its causes and its effects are now widely recognised, with scientists predicting that if greenhouse gas emissions keep increasing, the planet will eventually reach a point of no return.

[3] The appellant Mr Smith is an elder of Ngāpuhi and Ngāti Kahu and the climate change spokesperson for the Iwi Chairs Forum. He contends that too little is being done in the political sphere and that the crisis calls for a bold response from the common law. To that end, he has issued proceedings in the High Court against seven New Zealand companies, the respondents. Each of them is either involved in an industry which releases greenhouse gases into the atmosphere or manufactures and supplies products which release greenhouse gases when they are burned.

[4] Mr Smith alleges in the statement of claim that the release of greenhouse gases by the respondents is human activity that has contributed and will continue to contribute to dangerous anthropogenic interference with the climate system and to the adverse effects of climate change. These are particularised as increased temperatures, loss of biodiversity and biomass, loss of land, risks to food and water security, increasing extreme weather events, ocean acidification, geopolitical instability, population displacement, adverse health consequences, economic losses and an unacceptable risk of social and economic loss and mass loss of human life. It is also alleged that poor and minority communities will be disproportionately burdened by the adverse effects of climate change.

[5] In a proposed amendment to the statement of claim, Mr Smith further alleges that each of the respondents knows or ought reasonably to know about the harmful impact of their continued emissions or their enabling of emissions on people in the same or similar position to him.

[6] The statement of claim pleads three causes of action in tort: public nuisance, negligence and a proposed new tort described as breach of duty. The remedies sought in respect of each cause of action are declarations that each of the respondents has unlawfully caused or contributed to the effects of climate change or breached duties said to be owed to Mr Smith. Mr Smith also seeks injunctions requiring each

respondent to produce or cause zero net emissions from their respective activities by 2030.

[7] In another proposed amendment to the statement of claim, Mr Smith seeks the addition of a clause referencing tikanga Māori. The proposed new clause reads:

> Kaitiakitanga as a principle of tikanga Māori incorporates concepts of guardianship, protection and stewardship of the natural environment including recognising that a right in a resource carries with it a reciprocal obligation to care for its physical and spiritual welfare as part of an ongoing relationship.

[8] As is apparent from the wording and confirmed by counsel, this proposed amendment is not intended to assert a separate cause of action but rather to plead a principle and value that should infuse the court's consideration of the issues in relation to all three causes of action.

[9] The respondents filed applications to strike out the proceeding on the grounds that the statement of claim discloses no reasonably arguable cause of action. They contend the various matters raised by Mr Smith are non-justiciable and beyond the purview of the Court. In support of their strike out application, they filed undisputed affidavit evidence that each of them is operating within all relevant statutory and regulatory requirements.

[10] The strike out application was heard by Wylie J. The Judge struck out the claims in nuisance and negligence but declined to strike out the claim based on a proposed new tort.[1]

[11] Mr Smith now appeals that decision in relation to the nuisance and negligence causes of action. The respondents cross-appeal the decision declining to strike out the novel tort claim.

[12] For reasons we go on to explain, we have concluded that the appeal should be dismissed and the cross-appeal allowed.

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1 *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419, [2020] 2 NZLR 394 [High Court judgment].

Analysis

Are common law tort proceedings an appropriate response?

[13] We begin our analysis by discussing at a general level whether common law tort claims are as a matter of principle and policy an appropriate vehicle for addressing the problem of climate change.

[14] In support of the appeal, counsel Mr Salmon urged us to be bold. He submitted it was part of the tradition and strength of the common law that it is responsive to changing times. He likened the case to other watershed moments in the development of the law such as *Donoghue v Stevenson*[2] where courageous Judges were prepared to extend the existing law in order to address a significant problem.

[15] Mr Salmon's plea was an eloquent one. However, we consider that to accede to it would in fact be contrary to the common law tradition which is one of incremental development and not one of radical change, especially when that change would involve such a major departure from fundamental principles as to subvert doctrinal coherence.

[16] In our view, the magnitude of the crisis which is climate change simply cannot be appropriately or adequately addressed by common law tort claims pursued through the courts. It is quintessentially a matter that calls for a sophisticated regulatory response at a national level supported by international co-ordination.

[17] We say that for the following reasons.

[18] First, no other tort claim recognised by the courts has involved a scenario in which every person in New Zealand — indeed, in the world — is (to varying degrees) both responsible for causing the relevant harm, and the victim of that harm.

[19] This claim is brought against a small subset of those responsible for the harm that is being suffered by Mr Smith and those he represents. Mr Salmon was not able to identify any principled basis for singling out the seven defendants in these

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2 *Donoghue v Stevenson* [1932] AC 562 (HL).

proceedings. If their contribution to climate change is an actionable wrong, the logic underpinning that finding would apply to every individual and every business that has not achieved net zero emissions. Mr Salmon said that the defendants had been selected as "major profit-seeking entities that emit or enable emissions". But as he accepted, none of these defendants standing alone makes a material contribution to climate change. The scale of their businesses, and of their contribution to global warming, does not provide a principled distinction on which liability could turn. Nor does the fact that they are "profit-seeking" entities — the basis on which their activities are alleged to be wrongful does not turn on the reasons for which they engage in those activities. If the courts were to accept the argument that the emitting activities of the defendants amount to a tort, it would follow that every entity (and individual) in New Zealand that is responsible for net emissions is committing the same tort. That is, all of those individuals and entities would be acting unlawfully, and could presumably be restrained from continuing to do so. That would be a surprising conclusion to say the least, with sweeping social and economic consequences.

[20] A second fundamental conceptual problem with the claim is reflected in the way in which it relies on the concept of "net zero" emissions by a defendant. Mr Smith pleads that it is possible for each of the defendants to achieve net zero emissions of greenhouse gases by 2030. The relief sought includes an injunction requiring each of the defendants:

> … to produce (or contribute to, in the case of BT Mining, NZ Refining and Z Energy) zero net emissions by 2030, by linear reductions in net emissions each year until that time (to be supervised by the Court), or to otherwise cease their emissions creating activities immediately;

[21] We explored with Mr Salmon whether the claim was that all emitting activity was wrongful, or only activity that results in net positive emissions.

[22] Mr Salmon accepted that the focus of the claim was on requiring net zero emissions, rather than immediate cessation of all emitting activity. That concession was inevitable — it could not seriously be suggested that all activity in New Zealand that produces greenhouse gas emissions is tortious, and thus unlawful, and must stop. It would be nothing short of absurd for a court to find that the common law proscribes

most economic activity, and many of the activities that form an integral part of every individual's daily life.

[23] However if the claim is that it is wrongful to engage in activities that produce emissions that are not fully offset, then this is a tort like no other. To say that a defendant's activity is tortious is to say that it is unlawful, and can be (and usually will be) restrained by the grant of an injunction. But in this case, the claim is not that the activity is inherently unlawful, or even that it is unlawful unless carried on in a particular manner. Rather, that activity will be lawful provided the defendant engages in some other activity (such as planting trees) that offsets the harm: an offset that may be wholly unrelated to the activity that is alleged to be wrongful. And presumably (as Mr Salmon accepted in argument) a defendant could also avoid liability by purchasing offsets (carbon credits) from a third party to achieve net zero emissions.

[24] In order to determine claims of this kind the courts would need to establish a mechanism for assessing the adequacy of offsets, and determining which offsets a defendant can claim as their own. That is, some sort of common law emissions offset and trading regime parallel to the statutory regime. We return to the workability of such a regime, and the capacity of the courts to develop it, below. But the more fundamental point is that tort law is concerned with activities that are unlawful, and should not be permitted to continue. It is implicit in the way this claim has been framed that the defendants' activities may be lawful, and may continue, provided they offset their emissions. Their activities are not wrongful activities, to be prohibited by the common law — rather, they are activities which are lawful and may continue, provided the defendants comply with certain conditions established by an appropriate regulatory framework (to be fashioned by the courts). This is not the domain of tort law.

[25] Third — a closely related point — there is no remedy available to the Court in private civil proceedings which can meaningfully address the harm complained of. Mr Salmon accepted that this was true of a damages award against the respondents. But, in our view, the injunctive relief sought in this case also illustrates the ineffectiveness of orthodox tort remedies.

[26] In effect Mr Smith is seeking a court-designed and court-supervised regulatory regime. The design of such a system requires a level of institutional expertise, democratic participation and democratic accountability that cannot be achieved through a court process. Courts do not have the expertise to address the social, economic and distributional implications of different regulatory design choices. The court process does not provide all affected stakeholders with an opportunity to be heard, and have their views taken into account. Climate change provides a striking example of a polycentric issue that is not amenable to judicial resolution.[3]

[27] Fourth, bringing proceedings against subsets of emitters is an inherently inefficient and ad hoc way of addressing climate change. It is likely to result in arbitrary outcomes and ongoing litigation that lasts many years. As the respondents submitted, regulation by the courts would not begin and end with this case. The courts would be drawn into an indefinite, and inevitably far-reaching, process of line drawing.

[28] For these reasons, among others, the issue of climate change cannot be effectively addressed through tort law. Rather, this pressing issue calls for a sophisticated regulatory response at a national level, supported by international co-ordination.

[29] As is well known, relevant international agreements include the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement.

[30] In New Zealand, the key regulatory instrument is the Climate Change Response Act 2002. It was amended in 2019 to establish the Climate Change Commission, and to provide for a process under which the Commission prepares a draft report on emissions, budgets and other matters, engages in consultation on the draft and then provides a final report to the Minister. The Minister is then required to set emission budgets.[4]

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3 Lon L Fuller "The Forms and Limits of Adjudication" (1978) 92(2) Harv L Rev 353. See also *North Shore City Council v Body Corporate 188529* [2010] NZCA 64, [2010] 3 NZLR 486 per Arnold J at [211]–[212].

4 Climate Change Response (Zero Carbon) Amendment Act 2019.

[31] In 2020, there was a further substantial amendment to the Act in the form of the Climate Change Response (Emissions Trading Reform) Amendment Act 2020. The amendment introduced detailed provisions regarding the reduction of emissions over time including mechanisms for the issue and surrender of emissions units.

[32] As at the time of the hearing, the emissions trading regime was in operation and the Commission process underway.

[33] Significantly for present purposes, the claims made in this proceeding are not consistent with the policy goals and scheme of the legislation and in particular the goals of ensuring that this country's response to climate change is effective, efficient and just. Private litigation against a small subset of emitters, requiring them to comply with requirements that are more stringent than those imposed by statute, will not be effective to address climate change at a national level, let alone globally. It will be costly and inefficient. And it will be arbitrary in its application and impact.

[34] Nor in our view can it be suggested, as was submitted by Mr Salmon, that striking out these claims against private commercial entities would be a breach of the Treaty of Waitangi. On the contrary, we consider the Treaty underlines the need for shared action and a common approach that pays attention to distributional effects, not a piecemeal one. Similarly, we consider that controlling climate change through regulatory means is consistent with kaitiakitanga.

[35] All of that is not to suggest the courts have no meaningful role in responding to the exigencies of climate change. They do in fact have a very important role in supporting and enforcing the statutory scheme for climate change responses and in holding the Government to account. Our point is simply that it is not the role of the courts to develop a parallel common law regulatory regime that is ineffective and inefficient, and likely to be socially unjust.

[36] We would add that similar claims to those advanced by Mr Smith have been advanced in the United States but not upheld for essentially the same reasons[5] as have

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5 *American Electric Power Co Inc v Connecticut* 564 US 410 (2011); *City of New York v Chevron Corp* 993 F 3d 81 (2nd Cir 2021); *Native Village of Kivalina v ExxonMobil Corp* 696 F 3d 849 (9th Cir 2012); and *City of Oakland v BP PLC* 325 F Supp 3d 1017 (ND Cal 2018).

led us to conclude that none of the three claims in tort pleaded by Mr Smith can succeed. They are not consistent with the fundamental conceptual framework of the common law of torts. It would be unprincipled and incoherent to extend the law of nuisance or negligence, or to recognise a new tort, in the manner contemplated by this proceeding. It should be struck out in its entirety.

[37] However in deference to the detailed argument we heard about the specific causes of action which Mr Smith seeks to advance in this case, we address each cause of action in more detail below.

[38] We do so through the lens of well-established strike out principles.[6] That is to say, we assume the pleaded material facts are true save for those that are entirely speculative and without foundation and we also bear in mind that the strike out jurisdiction is to be exercised sparingly and only in clear cases. We must be certain the claim is so untenable it cannot succeed and slow to strike out claims in any developing area of law. The fact a claim involves a complex question of law which requires extensive argument should be no bar provided we have the requisite materials and assistance to determine the matter.[7] We must also be mindful of the well established principle that if any deficiencies can be cured by an amendment to the pleadings, allowing the claim to proceed on condition the necessary amendments are made, is preferable to strike out.[8]

Claim in public nuisance

The tort of public nuisance

[39] In order to understand the issues, it is necessary to provide a brief explanation about the origins and development of the law of public nuisance.

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6 The authority for the Court to strike out a pleading or cause of action derives from r 15.1 of the High Court Rules 2016 and under its inherent jurisdiction which in unaffected by r 15.1. See *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316 (CA) at 323.

7 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267, endorsed in *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33] and *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 at [146].

8 *Marshall Futures Ltd v Marshall*, above n 6, at 324; and *Westpac Banking Corp v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) at [66].

[40] There are two types of nuisance actions: private nuisance and public nuisance, and although the same conduct can amount to both a public nuisance and private nuisance, they are distinct.[9] The key distinction between the two is the rights they are designed to protect. Private nuisance is concerned with protecting the right of an occupier or owner of land to the quiet use and enjoyment of their land free from unreasonable interference.[10] In contrast, public nuisance is primarily concerned with the protection of public rights, that is to say with rights enjoyed by all members of the public, not specific individuals.[11]

[41] In both private and public nuisance however, the interference with the right must be both substantial and unreasonable before it will be actionable.[12] That is to say the rights and obligations created by nuisance are not framed in absolute terms. Not every interference is actionable. An interference is unreasonable if in all the circumstances "an ordinary person could not reasonably be expected to put up with it".[13] There has to be an element of give and take, live and let live.[14]

[42] Public nuisance started off life in the 12th and 13th centuries as a common law crime consisting of conduct that "obstructs or causes inconvenience or damage to the public in the exercise of rights common to all His Majesty's subjects".[15] It was not necessary that all of the King's subjects be obstructed or inconvenienced. It was sufficient that some of them were. The central feature was the suffering of common

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9 *In re Corby Group Litigation* [2008] EWCA Civ 463, [2009] QB 335 at [29]–[30]; and *Colour Quest Ltd v Total Downstream UK plc* [2009] EWHC 540 (Comm), [2009] 2 Lloyd's Rep 1. See generally Michael Jones (ed) *Clerk & Lindsell on Torts* (23rd ed, Sweet & Maxwell, London, 2020) at [19-03].

10 At [19-24]. Reaffirmed by the House of Lords in *Hunter v Canary Wharf Ltd* [1997] AC 655 (HL).

11 Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [10.3.01]; and *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169 (CA) at 184.

12 Carolyn Sappideen and Prue Vines (eds) *Fleming's: The Law of Torts* (10th ed, Thomson Reuters, Sydney, 2011) at [21.50], [21.80] and [21.90]. Private nuisance — *Benjamin v Storr* (1874) LR 9 CP 400 (Comm Pleas) at 407; and for public nuisance — *Harper v G N Haden & Sons Ltd* [1933] Ch 298 (CA) at 303–304.

13 James Goudkamp and Donal Nolan *Winfield & Jolowicz on Tort* (20th ed, Sweet & Maxwell, London, 2020) at [15-016] citing *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312, [2013] QB 455 at [74].

14 *Harper v G N Haden & Sons Ltd*, above n 12; *Trevett v Lee* [1955] 1 WLR 113 (CA); *Maitland v Raisbeck* [1944] KB 689 (CA); and *Bamford v Turnley* (1862) 3 B & S 66, 122 ER 27 at 83–84 (B & S), 32–33 (ER).

15 James Fitzjames Stephen *A Digest of the Criminal Law* (8th ed, Sweet & Maxwell, London, 1947) at 184, cited with approval in *Attorney-General v PYA Quarries Ltd*, above n 11, at 181 and *R v Rimmington* [2005] UKHL 63, [2006] 1 AC 459 at 470 and 484. See generally Todd, above n 11, at [10.3.01].

injury by members of the public as the result of interference with the exercise of their rights as members of the public. Hence the terms "common nuisance" and "public nuisance" were used interchangeably.[16]

[43] Typically, the cases involved obstructions of the highway and navigable waterways which constituted an interference with the right of the public to pass and repass.[17] As well as detriment to a public right, there were also cases involving detriment to a neighbourhood. The crime was further held to encompass a miscellany of other behaviours seen as socially objectionable and having adverse public effects such as keeping a disorderly house, being "a nightwalker" or "a common scold".[18] The offence was commonly used as a catch all, invoked in order to prosecute acts that were harmful to the community but would not otherwise have been punishable.[19]

[44] Redress for public nuisance by way of indictment or abatement at the instance of the appropriate authority remained exclusively criminal until the 16th century when it was held that conduct which could found a criminal prosecution for causing a common or public nuisance could also found a civil action.[20] Since no member of the public had any better ground for action than any other member, the Attorney-General assumed the role of plaintiff acting on the relation of the community who had suffered from the interference with the public right.[21]

[45] However, as early as 1536, it was also held that an individual member of the public could sue personally for common nuisance if they could show they suffered "greater hurt or inconvenience than any other man had", that is to say over and above the harm suffered by the general or local public. This became known as the special damage rule.[22]

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16 *R v Rimmington*, above n 15, at [6]–[7]. See generally Sappideen and Vines, above n 12, at [21.20].

17 English and Welsh Law Commission *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (LC 358, 2015) [Law Commission Report] at [2.21].

18 Sappideen and Vines, above n 12, at [21.20]; and English and Welsh Law Commission *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency: A Consultation Paper* (CP 193, 2010) [Law Commission Consultation Paper] at [1.12], [2.11] and [5.39]. See generally Jones, above n 9, at [19-04].

19 John Murphy *The Law of Nuisance* (Oxford University Press, Oxford, 2010) at 138.

20 Sappideen and Vines, above n 12, at [21.20].

21 At [21.40]; and *R v Rimmington*, above n 15, at [7].

22 Cited in William Prosser "Private Action for Public Nuisance" (1966) 52(6) Va Law Rev 997 at 1005. See also *R v Rimmington*, above n 15, at [7].

[46] Special damage in this context was not limited to special damages in the form of pecuniary loss. It was held to consist of proved general damage such as inconvenience and delay, provided it exceeded in degree what was suffered by the community at large.[23] Absent special damage, a claimant seeking civil redress in public nuisance was dependent on the Attorney-General agreeing to bring a relator action.[24]

[47] Over the years, public nuisance has continued to include a range of diverse activities such as blasting and quarrying near built-up areas,[25] allowing land to be used as a dump creating a dangerous or noxious environment,[26] exposing a person suffering from an infectious disease in the street,[27] or obstructing a navigable river by lowering its depth.[28]

[48] In the United Kingdom, causing a public or common nuisance is still treated as both a crime and a tort, the ingredients of both being the same.[29] For this reason, the tort of public nuisance is often described as a hybrid tort. In New Zealand all common law crimes were abolished in 1893, but the tort of public nuisance has survived as part of our law.[30]

[49] A decision of this Court in 1869 confirmed, following English authority, that in order to have standing to sue in public nuisance a private individual must have sustained damage that is "particular, direct and following upon the individual immediately from the [interference]."[31] It was also said that the right of action did not depend on the quantum of damage.[32]

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23 Goudkamp and Nolan, above n 13, at [15-007]; and Sappideen and Vines, above n 12, at [21.40].
24 Amanda Stickley *Australian Torts Law* (4th ed, LexisNexis, Chatswood, 2016) at [25.79]; and Todd, above n 11, at [10.3.03].
25 *Attorney-General v PYA Quarries Ltd*, above n 11.
26 *Attorney-General v Tod Heatley* [1897] 1 Ch 560 (CA).
27 *Managers of the Metropolitan Asylum District v Hill* (1881) 6 App Cas 193 (HL) at 204.
28 *Tate & Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509 (HL). See generally Jones, above n 9, at [19-04].
29 *R v Rimmington*, above n 15, at [7] and [36].
30 Public nuisance as a tort has been recognised in New Zealand: *Attorney-General v Abraham and Williams Ltd* [1949] NZLR 461 (CA); *Hankins v R* (1905) 25 NZLR 787 (CA); *Lower Hutt City Council v Attorney-General ex rel Moulder* [1977] 1 NZLR 184 (CA); and *Darroch v Carroll* [1955] NZLR 997 (SC). See generally Todd, above n 11, at [10.3.01].
31 *Mayor of Kaiapoi v Beswick* (1869) 1 NZCA 192 at 207.
32 At 208.

[50] The fact the English courts regard the ingredients of the crime and the tort as the same means that English authorities concerning the crime of public nuisance remain relevant in New Zealand tort law including the important 2004 House of Lords decision in *R v Rimmington* and *R v Goldstein*.[33] In that decision, the Law Lords canvassed the history of public nuisance and the authorities. They concluded that the most accurate definition of public nuisance and its elements was as follows:[34]

> A person is guilty of a public nuisance (also known as common nuisance), who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, … or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all her Majesty's subjects.[35]

[51] That definition (which we will call the *Rimmington* definition) was relied on by the High Court[36] in this case and by all parties. It is the most authoritative modern definition.[37]

[52] Although the tort is one of strict liability in the sense of not being dependent on proof of negligence, it is nevertheless well established under the rubric of remoteness of damage that a defendant can only be liable if the particular harm suffered by the claimant was reasonably foreseeable in the sense of there being a real risk of it occurring.[38]

[53] As to remedies, there are three private law remedies available for nuisance: a common law action for damages for past harm, equitable relief by injunction for continuing harm and abatement without recourse to legal process.[39] Sometimes

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33 Above n 15. The conduct at issue in *Rimmington* involved a campaign of sending racially abusive hate mail and in *Goldstein* putting salt in a letter as a joke causing an anthrax scare at a post office. Neither was held to constitute public nuisance. In *Rimmington* that was because of the absence of injury to the public generally as opposed to an individual, and in *Goldstein* because the defendant did not reasonably foresee the consequences of his actions.

34 At [10] and [45].

35 The definition was derived from the 2005 edition of Archbold's Criminal Pleading, Evidence and Practice with the deletion of the word "morals" which the House of Lords considered archaic.

36 High Court judgement, above n 1, at [58].

37 Jones, above n 9, at [19-03].

38 *Hamilton v Papakura District Council* [2002] UKPC 9, [2002] 3 NZLR 308 at [39] citing *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound) (No 2)* [1967] 1 AC 617 (PC) at 639–640.

39 Sappideen and Vines, above n 12, at [21.250].

instead of granting an injunction, a court may issue a declaration that a defendant is not entitled to commit the act complained about.[40]

[54] Finally, for completeness in this brief exposition of public nuisance we note the existence of an affirmative defence of statutory authority.[41] As pointed out by the authors of *Clerk & Lindsell on Torts*, statutory authorisation should not be confused with the widespread regulation of much modern industrial activity. Compliance with complex requirements which may be imposed by statutory regulatory bodies does not in itself enable defendants to resist common law nuisance claims. Thus, in this case, the fact each of the respondents is operating within all relevant statutory and regulatory requirements does not mean the defence is available. The defence requires a clear statutory mandate, either express or necessarily implied, to commit the nuisance in question.[42]

Mr Smith's claim in public nuisance

[55] In this case, the public rights alleged to have been interfered with by the respondents' conduct are pleaded as rights to public health, safety, comfort, convenience and peace. Mr Smith who has brought the proceedings in his own name further contends that the interference with these public rights has caused or is likely to cause him special or particular damage. That is said to be because of his interest according to custom and tikanga in a block of land situated on the coast at Wainui Bay. The land and nearby land contain customary sites and resources (such as waka landing places, burial caves, pā sites, battle sites and seasonal food gathering camps) that are of customary, cultural, nutritional, historical and spiritual significance to Mr Smith. Most of these customary sites are situated in close proximity to the coast and other waterways. This, as Mr Salmon put it, makes Mr Smith more vulnerable to climate change than "the average person".

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40 At [21.270] citing *Batcheller v Tunbridge Wells Gas Co* (1901) 84 LT 765 (Ch).
41 Jones, above n 9, at [19-87]; and Todd, above n 11, at [10.3.05].
42 At [19-87]. See *Barr v Biffa Waste Services Ltd*, above n 13, at [94].

The High Court decision

[56] In striking out the public nuisance claim, Wylie J identified three key difficulties each of which in his view meant the claim was clearly untenable and could not succeed even if the proceedings were to go to trial. Those difficulties were:

(a) The damage claimed by Mr Smith was not capable of amounting to special damage so as to give him standing to sue as a private individual.[43]

(b) There is no sufficient relational or causal link between any of the defendants' activities and the claimed damage.[44]

(c) The fact the respondents are acting in accordance with all relevant statutory and regulatory requirements was fatal to the claim.[45]

(d) There were significant problems with the remedies sought.[46]

[57] On appeal, all those findings are challenged. Mr Salmon contends that in applying the special damage rule the Judge failed to take into account Mr Smith's interest in the land, as well as tikanga Māori and Mr Smith's kaitiaki responsibilities, all of which set him apart from the public at large. It is further contended the Judge erred in failing to leave contested matters of fact for trial and misapplied the law of public nuisance. It is also submitted that even if the Judge did correctly apply the special damage rule to deny Mr Smith standing to sue, then this Court should revisit the rule.

Public nuisance: our analysis

[58] It is fair to describe the law of public nuisance as lacking some precision. There have been many attempts to define its scope[47] and it is not always easy to

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43 High Court judgment, above n 1, at [62]–[65].
44 At [67].
45 At [68]–[71].
46 At [72] and [105]–[106].
47 *R v Rimmington*, above n 15, at [11]–[27].

reconcile some of the cases. As pointed out by Lord Rodger in *Rimmington*, this is essentially the result of its history and its application to a number of disparate situations at a time when there was no perceived need to define its boundaries with any precision.[48]

[59] That inherent fluidity is of course something that in a strike out context is important for us to bear in mind. And it is because of this that we do not agree with all of the reasons given by the Judge and/or advocated by the respondents for striking out Mr Smith's claim. We address those first before turning to what we do agree is a fundamental problem warranting strike out.

(i) No actionable public right pleaded?

[60] This issue was not considered in the High Court but was raised by the respondents.

[61] As mentioned, the public rights that Mr Smith alleges to have been interfered with are pleaded as the right to public health, safety, comfort, convenience and peace.

[62] The respondents contend that those are not the sort of "rights" which as a matter of law are capable of founding a claim in public nuisance. In their submission, the tort requires the right interfered with to be an established free standing public right with an independent juridical foundation. By that, they mean a right already recognised in the common law in other ways, for example through limits on actions in trespass. In their submission, none of the so-called rights pleaded by Mr Smith as public rights satisfy that requirement and therefore the claim in public nuisance must be struck out for that reason alone.

[63] For his part, Mr Salmon submits that the public rights engaged by the tort can be broad and expansive. He acknowledges the classic examples are interference with the public right to pass and re-pass a highway or river but contends the case law shows a qualifying public right is not limited to those categories and that for this Court to

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[48] At [45].

recognise a public right to the availability of a safe and habitable climate system is entirely consistent with the case law.

[64] In support of that central contention, Mr Salmon points to cases where the right not to be subjected to excessive noise[49] has been held to found a claim in public nuisance as has the right not to be subjected to excessive odour[50] or dust,[51] or pollution,[52] including pollution by oil.[53] All these rights, he says, are engaged in the present climate case — the right to take clean water, breathe clean air, and to fish in tidal waters.

[65] In our view, the fact that both parties are able to cite authorities that support their respective positions is explained by a 2015 report of the English and Welsh Law Commission.[54]

[66] It will be recalled that the *Rimmington* definition specifies two alternatives — the effect of the defendant's conduct must be to endanger the life, health, property or comfort of the public *or* obstruct the public in the exercise of public rights. In contrast, some earlier definitions made the two conditions cumulative. The Commission says (and we agree) the cumulative approach is defensible but it does depend on interpreting the reference to "public rights" very widely as extending beyond enforceable rights such as public rights of way.[55]

[67] The better view, and the one we adopt, is to treat them as two categories of public nuisance. Thus, a nuisance is public if either or both of the following conditions are satisfied:

(a) The nuisance must affect a class of the public such as the inhabitants of a local neighbourhood or a representative cross-section of them. The adverse effects need not extend to a public place.

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49 *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd* [1993] QB 343 (QB).
50 *Attorney-General v Abraham and Williams Ltd*, above n 30.
51 *Bamford v Turnley*, above n 14.
52 *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch 149 (CA).
53 *Southport Corp v Esso Petroleum Co Ltd* [1954] 2 QB 182 (CA) at 571.
54 Law Commission Report, above n 17.
55 At [3.36].

(b) The nuisance must infringe rights belonging to the public as such.

[68] Seen in that light, the "rights" pleaded in the statement of claim appear to be consistent with general formulations of the tort of public nuisance. It is not necessary to plead them as established public rights as such. This argument is not a reason to strike out the claim.

(ii) No independent illegality?

[69] The Judge held it was a necessary ingredient of the tort that the interference with the public right must be independently unlawful, in addition to interfering with public rights.[56] Hence the reason why he considered it was fatal to the claim that the respondents were acting lawfully in accordance with all regulatory and statutory requirements.

[70] Again, we turn to the *Rimmington* definition and the first two lines:

> A person is guilty of a public nuisance (also known as common nuisance), who *(a) does an act not warranted by law*, *or (b) omits to discharge a legal duty*,
> …
>
> (Emphasis added.)

[71] As noted by the English and Welsh Law Commission, the italicised words can be interpreted as importing a requirement of illegality independent of the common injury caused, an interpretation advocated by the respondents and adopted by the Judge in this case.[57] That interpretation has gained some credence from the fact that in many cases the facts happen to have involved underlying illegality. For example, in a case concerning the obstruction of a street, the obstruction involved the commission of an offence under the Police Offences Act 1927.[58] In another case about odours, there was a breach of the Health Act 1920.[59]

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56 High Court judgment, above n 1, at [68] and [71].
57 Law Commission Report, above n 17, at [2.4].
58 *Amalgamated Theatres Ltd v Charles S Luney Ltd* [1962] NZLR 226 (SC).
59 *Attorney-General v Abraham and Williams Ltd*, above n 30.

[72] But that is not true of all public nuisance cases and in those cases where there was on the facts underlying illegality, there is almost always no discussion of that being a pre-requisite to liability in tort. The weight of authority is to the contrary, that is to say, it is not necessary for the act or omission to be in itself a legal wrong separate from nuisance.[60] That position in our view is more consistent as a matter of principle with the essence of the tort. What matters is that the act or omission causes common injury. To put it another way, the focus as a matter of principle is not on the legal character of the act or omission complained of but rather its adverse effect.

[73] In coming to a contrary view, the Judge considered that to allow a public nuisance to arise absent an unlawful act or omission would mean the tort was "pulling itself up by its own bootstraps".[61] But that is true of other civil wrongs and no impediment. For example, liability in negligence does not require there to be breach of any legal obligation other than the one the court recognises by recognising the tort.

[74] For completeness we would add (contrary to a submission made by the respondents) that the fact the respondents are acting in accordance with all applicable regulatory constraints does not of itself preclude the interference being held unreasonable. The reasonableness assessment is claimant-focused.[62] As already mentioned, an interference is unreasonable if a person cannot be expected to tolerate it.

(iii) Inability to satisfy the special damage rule?

[75] There does not appear to be one universally accepted formulation of the special damage rule. Some formulations say to qualify as special damage, the harm suffered by the individual must not only be appreciably different in degree but also different in kind from that shared by the general public.[63] Other formulations say that all that matters is for the injury and inconvenience to be appreciably "more substantial, more direct and immediate" than that suffered by the general public without necessarily

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60 *Halsbury's Laws of England* (5th ed, 2018, online ed) vol 78 Nuisance at [105]. See also Murphy, above n 19, at 138; Law Commission Consultation Paper, above n 18, at [2.9]–[2.18]; Law Commission Report, above n 17, at [2.4]; and JR Spencer "Public Nuisance — a critical examination" (1989) 48(1) CLJ 55 at 61–64.

61 High Court judgment, above n 1, at [71].

62 Goudkamp and Nolan, above n 13, at [15-017].

63 See Sappideen and Vines, above n 12, at [21.40].

differing in its nature.[64] The latter appears to have been the approach adopted by this Court in the 1869 decision quoted above at [49].[65]

[76] The respondents say a direct connection requirement is a necessary control on the scope of the tort, preventing indeterminate liability and allowing reasonable latitude for activities in society to occur subject to controls imposed by Parliament.

[77] However, importing an added requirement to the special damage rule that the harm be direct and not consequential has been described by at least one standard text as misleading. According to the authors of *Fleming's The Law of Torts*, "direct" only came into use as a synonym for "particular" or "special". The authors further point out that in nuisance "directness" is not the test for remoteness either.[66]

[78] In this case, the Judge did not address differences in the various articulations of the special damage rule. However, had he done so, it is clear he would have held that regardless of which test was adopted, Mr Smith did not satisfy it.

[79] The Judge found the harm pleaded by Mr Smith as a result of climate change was not appreciably more serious or substantial in degree than that suffered by the public generally and no different in kind to the damage suffered or likely to be suffered by other New Zealanders who live in or use the coastal/marine area. The impacts of climate change were, the Judge said, all pervasive and not confined to individuals or to specific pieces of land or areas or resources. The damage was neither particular nor direct to Mr Smith. Rather it was a manifestation of the effects of climate change not only on Mr Smith but also on countless others.[67]

[80] The Judge went on to say that the pleaded harm is consequential and not the direct result of the respondents' activities. As pleaded, it followed not from the activity attributed to and admitted by each respondent but rather from a number of

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64 At [21.40].

65 Although Wylie J footnotes two paragraphs in *R v Rimmington* as authority for the proposition that it must not be "a mere consequential injury", the paragraphs in question do not actually contain those words. They only refer to requiring particular damage over and above that suffered by the public at large.

66 Sappideen and Vines, above n 12, at [21.40].

67 High Court judgment, above n 1, at [62].

consequential and indirect steps. That was true not only of the respondents who were only suppliers to emitters, but it was also true of those who were themselves emitters. As the statement of claim necessarily pleads, there is a series of consequential and indirect steps involving the combined global emission of greenhouse gases, the warming of the planet and sea levels rising.[68]

[81] The Judge also held that the lack of a sufficiently direct connection was demonstrated by the fact that Mr Smith did not and cannot plead that but for the defendants' activities he would not suffer the claimed damage.[69]

[82] For the purposes of a strike out, we are willing to adopt the most liberal formulation of the special damage rule and therefore only look to see whether the pleaded harm is capable of being viewed as appreciably exceeding that suffered by the general public. We approach this claim on the basis that Mr Smith represents the interests he identifies in the pleadings, and has standing or status as a representative. However, any claim he may have is only as good as the claims of those he represents. In our view the harm suffered by those interests does not sufficiently exceed the degree of harm to very many other people in New Zealand (or elsewhere in the world) who suffer the same interference, including landowners, other iwi and hapū. In very many places throughout New Zealand there will be sites of historical, nutritional, spiritual and cultural significance that are at risk or under threat. Their harm is substantially the same. That we consider is not a contestable fact and it is not something that can be overcome by re-pleading or invoking concepts of tikanga.

[83] In the event we were to come to that conclusion, Mr Salmon asked us to consider abolishing the special damage rule, something Wylie J was unable to do being bound by the 1869 decision of this Court. Alternatively, Mr Salmon asked us to grant Mr Smith leave to apply to the Attorney-General to bring a relator claim.

[84] We acknowledge the special damage rule has been criticised by some commentators.

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68 At [63].
69 At [67].

[85] The usual justification for the rule is that unless the injury suffered by the plaintiff is in some way distinguishable from that sustained by other members of the public, redress in respect of the wrong done to the community is more appropriately left to the Attorney-General as the representative of the community. Otherwise, a wrongdoer is at risk of being subjected to multiple suits for the same cause. The critics however point out that multiplicity of actions is permitted in other areas of law including private nuisance and that the rule ill befits our renewed consciousness for safeguarding the environment and the desirability of encouraging private initiatives against polluters.[70]

[86] An arguably more compelling reason for the special damage rule is that advanced by the respondents relying on the constitutional role of the Attorney-General to represent the public interest.

[87] However, it has not proved necessary for us to decide whether we should retain the special damage rule. That is because we are satisfied that even were the special damage rule abolished, or the Attorney-General to bring a relator action, a claim in public nuisance is still doomed to fail and should therefore be struck out.

(iv) The lack of a sufficient connection between the pleaded harm and the respondents' activities

[88] As will be apparent, although the Judge's reasoning regarding the need for a direct connection was part of his analysis of the special damage rule, it was essentially in substance a causation analysis.

[89] Mr Salmon contends concepts of causation such as the "but for" test applied by the Judge have no place in the law of nuisance. In his submission the Judge wrongly imported them from the tort of negligence and it was an error of law to do so.

[90] There are, we accept, a number of English authorities which are often cited in textbooks under the heading "Nuisance due to many."[71] These cases are authority for the proposition that a defendant will not be exempted from liability on the grounds

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70 Sappideen and Vines, above n 12, at [21.40].

71 At [21.240(iii)]; Goudkamp and Nolan, above n 13, at [15-068]; and Jones, above n 9, at [19-111].

that they were simply one of many causing a nuisance. This will be so even if the defendant's actions in isolation would not amount to a nuisance or of itself cause any harm. The nuisance consists in the aggregation. The "but for" test is not applied. Each defendant is amenable to the remedy against the aggregate cause of complaint. According to one text, where damages are awarded, each defendant is held liable only to the extent of their contribution and if there is no satisfactory basis on which to apportion responsibility the liability is divided equally.[72]

[91] Although Mr Salmon incorrectly (in our view) states that similar principles have been "explicitly endorsed" in two New Zealand cases,[73] we have no difficulty in a strike out context in accepting these principles may well be part of New Zealand law.

[92] We do not however accept that applying those principles to the present case would be a natural and rational extension of them. Quite the contrary. All of the cases which have invoked this aggregation principle have involved a finite number of known contributors to the harm, all of whom were before the Court. That is no accident. It is a critical factor. None of the cases involved the sort of situation before us where there is in fact no identifiable group of defendants that can be brought before the Court to stop the pleaded harm. In none of the "Nuisance due to many" cases did the Court grant the claimant or the Attorney-General an injunction knowing it would do nothing to stop or even abate the nuisance. Indeed, we know of no public nuisance case where an injunction has been issued in those circumstances. And none was cited to us.

[93] We therefore agree with the High Court that the claim in public nuisance is clearly untenable and should be struck out. To allow it to proceed would not extend the existing law but distort it.

Negligence cause of action

[94] The statement of claim pleads that each of the respondents owed Mr Smith (and persons like him) a duty to take reasonable care not to operate its business in a

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72 Goudkamp and Nolan, above n 13, at [15-068].

73 *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 (HC) at 582; and *Deloitte Haskins & Sells v National Mutual Life Nominees* CA217/90, 14 November 1991. Both involved the application of traditional tests of causation.

way that would cause him loss by contributing to dangerous anthropogenic interference with the climate system.

[95] It goes on to plead that the respondents have breached that duty by doing acts that contributed to and will continue to contribute to dangerous anthropogenic interference in the climate system, and the adverse consequences of climate change for persons including Mr Smith.

[96] The duty of care as pleaded is a novel one. That, as the Judge recognised, requires the court to undertake a two-stage proximity and policy inquiry in order to decide whether it would be just, fair and reasonable to recognise the duty.[74] At the first stage, the court considers whether the claimed harm was a reasonably foreseeable consequence of the alleged wrongdoer's actions and also considers the degree of proximity between the alleged wrongdoer and the claimant. At the second stage, the court considers matters external to the parties, namely the effect imposition of the claimed duty would have on society and the law generally.[75] Resolution of the second stage depends ultimately on judicial conceptions of desirable policy.[76]

[97] In this case, the Judge held that the claim failed at each stage and should be struck out. The harm was not reasonably foreseeable, proximity was lacking and there were compelling policy considerations militating against recognising a duty.[77]

[98] On appeal, Mr Salmon challenges all of those conclusions.

Reasonable foreseeability and proximity

[99] The Judge held that because the respondents' collective emissions are "miniscule in the context of the global greenhouse gas emissions" (identified as the cause of the harm to Mr Smith), his pleaded damage was such an unlikely or distant result of the respondents' emissions that it could not be reasonably foreseeable.[78]

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74 High Court judgment, above n 1, at [76].
75 *North Shore City Council v Attorney-General*, above n 7, at [157]–[160]; and *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78 at [14].
76 Todd, above n 11, at [5.4].
77 High Court judgment, above n 1, at [81], [92] and [98]–[99].
78 At [82].

[100] However, as Mr Salmon points out, what is pleaded is that the respondents are or ought reasonably to be aware of the adverse climate effects on coastal areas caused by greenhouse gas emissions. If knowledge and foreseeability are pitched at that more general level, then we agree that reasonable foreseeability of harm is arguably a trial issue and not of itself a ground for striking out.

[101] Proximity however is a different concept to foreseeability. It concerns the closeness of the connection between the parties in terms of their physical, temporal, relational and causal proximity. The notion of proximity requires the isolation of facts that in Lord Atkin's words indicate that the defendant's act or omission closely and directly affected the plaintiff and that the parties are in this sense neighbours.[79]

[102] Mr Salmon submits there is a tenable basis for a sufficiently proximate relationship between Mr Smith and the respondents. He says knowledge of actual risk is a significant indicator of sufficient proximity as is vulnerability. He further contends Mr Smith forms part of an identifiable class of plaintiffs, namely coastal Māori in Northland.

[103] However, like the Judge, we are not persuaded there is a close connection between the parties. There is no physical or temporal proximity. There is no direct relationship and no causal proximity.

[104] It is accepted by Mr Salmon that in a negligence action there must be a causal nexus between the alleged wrongdoer's actions and the pleaded harm. He also accepts that Mr Smith will be unable to establish at trial that but for the respondents' activities he would never have suffered the harm.

[105] However, Mr Salmon also (correctly) points out that there are exceptions to the "but for" causation test and that there is no fundamental legal impediment to a collective approach to causation. He identifies three such approaches in the case law, each of which he submits provides legally tenable grounds on which Mr Smith could establish causation at trial. According to Mr Salmon, the case law in question shows a modern aversion to allowing negligent defendants to escape liability by hiding

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[79] Todd, above n 11, at [5.3.02].

behind the collective harmful actions of others to obscure their own contribution. It thus reflects principles of corrective justice and least-cost avoidance of harm which underpin the tort of negligence.

[106] Mr Salmon says further that whether these various alternative methods of establishing causation are applicable or appropriate will depend heavily on the evidence. For strike-out purposes, he says it must be sufficient that there is no doubt that the respondents in this case *have* contributed to climate change and continue to do so.

[107] The first approach Mr Salmon relies on is derived from two House of Lords decisions: *Fairchild v Glenhaven Funeral Services Ltd* and *Barker v Corus UK Ltd*.[80] In *Fairchild*, according to the scientific evidence, there was no way of knowing in which period of employment the claimants had inhaled the fatal asbestos fibre(s) which led to them developing mesothelioma. It could have been in any one of them. The House of Lords held in those circumstances the claimants had a claim against each of their previous employers despite being unable to prove which one had caused the harm.[81] *Barker* was a subsequent decision in which the House of Lords clarified the extent of the liability of each employer. It was held that when liability was exceptionally imposed on a defendant because they *might* have caused harm, liability should be divided according to the probability the particular defendant caused the harm.[82] In determining the apportionment, it was suggested that relevant factors would include the period of exposure, the intensity of exposure and the type of asbestos involved.[83]

[108] The second approach suggested by Mr Salmon is the Canadian formulation of the "material contribution to risk test" as explained in *Clements v Clements.*[84]

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80 *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32; and *Barker v Corus UK Ltd* [2006] UKHL 20, [2006] 2 AC 572.

81 *Fairchild v Glenhaven Funeral Services Ltd*, above n 80, at [34] per Lord Bingham, [42] per Lord Nicholls, [47] per Lord Hoffmann, [116] per Lord Hutton, and [168] per Lord Rodger.

82 *Barker v Corus UK Ltd*, above n 80, at [43] per Lord Hoffmann, [62] per Lord Scott, [109] per Lord Walker, and [126]–[127] per Baroness Hale. The United Kingdom Parliament subsequently enacted legislation that reinstated joint and several liability: Compensation Act 2006 (UK).

83 At [62] per Lord Scott.

84 *Clements v Clements* 2012 SCC 32, [2012] 2 SCR 181; and *Resurfice Corp v Hanke* 2007 SCC 7, [2007] 1 SCR 333.

It applies where although a plaintiff can establish their loss would not have occurred but for the negligence of one or more defendants, they are unable to prove a particular defendant's negligence caused the loss because each tortfeasor can blame the other as the possible but for cause.

[109] The third approach advanced is the "market share liability" approach. That approach is derived from a landmark Californian products liability decision, *Sindell v Abbott Laboratories*.[85] The plaintiff, who developed cancer as a result of her mother taking a drug during pregnancy, was unable to prove which of a large number of manufacturers who had manufactured the drug in question had manufactured the particular batch ingested by her mother. This was held not to be fatal to her claim. The Court found it could hold each defendant liable in proportion to its share of the market.[86]

[110] We accept that at a superficial level Mr Smith's claim has some similarities with these cases relied on by Mr Salmon. Like them, it too involves a single causative agency (greenhouse gas emissions) and multiple tortfeasors.

[111] But the similarities end there. In all these cases, as in the public nuisance cases, the individual tortfeasors making up the group were known or readily identifiable and all before the Court as defendants. Any one or more of them was responsible for all the harm suffered by the claimant. Even in the most liberal of the approaches, the market share liability case, the prerequisites to liability include that a substantial share of the manufacturers who produced the product must be named as defendants in the action.[87]

[112] In contrast in this case, the class of possible contributors is virtually limitless and on any view it cannot be said that Mr Smith would not have been injured but for the negligence of the named defendants viewed globally.

[113] In our assessment, the inability to join to the proceeding all material contributors or a substantial share of contributors is an insuperable problem. It is not

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85 *Sindell v Abbott Laboratories* 26 Cal 3d 588 (Cal 1980).
86 At 612.
87 At 612.

a trial issue. And nor is it a pleading issue. It can only be overcome by the Court agreeing to abolish the relational underpinnings that are fundamental to tort law. And that in our view is something the Court should not countenance in the interests of preserving a coherent body of law.

[114] Turning then to the second external stage of the duty inquiry.

[115] We accept that the vulnerability of a person in the same position as the claimant is a relevant factor in favour of recognising a duty. But in our assessment in the circumstances of this case it is far outweighed by other policy considerations.

[116] These include the consideration that recognition of a duty would create a limitless class of potential plaintiffs as well as a limitless class of potential defendants. Defendants would be subjected to indeterminate liability and embroiled in highly problematic and complex contribution arguments on an unprecedented scale potentially involving overseas emitters as well as New Zealand emitters. Another crucial factor telling against a duty is the existence of international obligations and a comprehensive legislative framework. To superimpose a common law duty of care is likely to cut across that framework, not enhance or supplement it. Further for the reasons already canvassed we consider the courts are in any event ill-equipped to address the issues that the claim raises. Finally, there is the impact on the coherence of the law generally.

[117] All of these factors were also identified by the Judge and we agree with his conclusion that the duty of care alleged by Mr Smith would have wide effects on society and the law generally.[88] We agree too that were the action allowed to proceed, Mr Smith would be unable to establish a duty of care in the terms alleged and that the negligence claim is clearly untenable.

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[88] High Court judgment, above n 1, at [99].

The proposed new tort — breach of duty

[118] The pleading of the proposed new tort consists of repeating all the previous paragraphs including those relating to public nuisance and negligence followed by a single paragraph:

> The defendants owe a duty, cognisable at law, to cease contributing to damage to the climate system, dangerous anthropogenic interference with the climate system, and the adverse effects of climate change through their emission of Greenhouse Gases into the atmosphere (or their production or exportation of coal in the case of BT Mining; and their production and supply of Fuel Products in the case of NZ Refining and Z Energy).

[119] The remedies sought in respect of this new tort are the same as sought in public nuisance and negligence.

[120] As the Judge noted, the pleading makes no attempt to refer to existing legal obligations nor to incrementally identify a new obligation by analogy to an existing principle.[89] This, the Judge suspected, was because such an attempt could not readily be made. The claimed duty was not in his view sufficiently analogous to any existing duty of care and he doubted its recognition could be regarded as a gradual or step-by-step extension of negligence liability.[90]

[121] Despite this and the public policy concerns he had identified in discussing the negligence claim, the Judge went on to say that he was nevertheless reluctant to conclude that the recognition of a new tortious duty which makes corporates responsible to the public for their emissions is untenable.[91] He considered that it "may be" a novel claim such as that filed by Mr Smith could result in the further evolution of the law of torts, stating:[92]

> It may, for example, be that the special damage rule in public nuisance could be modified: it may be that climate change science will lead to an increased ability to model the possible effects of emissions. These are issues which can only properly be explored at trial. I am not prepared to strike out the third cause of action and foreclose on the possibility of the law of tort recognising a new duty which might assist Mr Smith.

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89 At [102].
90 At [102].
91 At [103].
92 At [103].

[122] In this Court, Mr Salmon strongly supported the Judge's conclusion on the third cause of action. He pointed to other cases where new torts have been recognised and submitted that the gravity of the climate change problem justified the development of a new tort.

[123] The respondents who challenge the Judge's conclusion by way of a cross-appeal contend the conclusion is irreconcilable with the Judge's reasoning in relation to the other two causes of action.

[124] We agree with the respondents. The bare assertion of the existence of a new tort without any attempt to delineate its scope cannot of itself be sufficient to withstand strike out on the basis of speculation that science may evolve by the time the matter gets to trial. Yet that is the effect of the decision. The purpose of the strike-out jurisdiction is to ensure that parties are not put to unnecessary expense and precious court resources are not squandered by claims that have no chance of success. It demands an element of rigour in the interests of justice. The mere fact of novelty cannot be enough. Otherwise any claimant would be able to proceed to trial simply by asserting a new tort.

[125] In our view, the fundamental reasons set out above for not extending tort law to a claim of the kind pleaded by Mr Smith apply equally to the claims in nuisance and negligence and to the proposed new tort.

[126] We therefore allow the cross-appeal and order that the third cause of action, "breach of duty", is also struck out.

Costs

[127] Mr Smith has brought this proceeding to test the legal boundaries of tort law in the public interest and with the assistance of pro bono legal representation. His concerns about climate change are genuine and strongly felt. They are concerns shared by the large majority of New Zealanders.

[128] In those circumstances, the respondents very responsibly accepted that costs should lie where they fall. We agree that this is the just outcome in this case. We therefore make no award of costs.

Outcome

[129] The appeal is dismissed.

[130] The cross-appeal against the High Court's refusal to strike out the third cause of action pleaded as "breach of duty" is allowed. That cause of action is struck out.

[131] There is no award of costs.

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