IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 149/2021
[2024] NZSC 5

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
	CHANNEL INFRASTRUCTURE NZ LIMITED Sixth Respondent
	BT MINING LIMITED Seventh Respondent

Hearing:	15–17 August 2022
Further Submissions:	2 September 2022
Court:	Winkelmann CJ, Glazebrook, Ellen France, Williams and Kós JJ
Counsel:	D M Salmon KC, D A C Bullock, N R Coates and N T Sussman for Appellant D R Kalderimis, N K Swan and T A T K Dewes for First Respondent S J P Ladd and T M J Shiels for Second Respondent B G Williams and J P Papps for Third Respondent D T Broadmore and C T Ottow for Fourth Respondent T D Smith and A M Lampitt for Fifth Respondent A J Horne and J S Hofer for Sixth Respondent

R J Gordon and A S Dawson-Swale for Seventh Respondent
J S Cooper KC, J D Every-Palmer KC and J P Cundy for Lawyers for Climate Action NZ Incorporated as Intervener
M K Mahuika and H K Irwin-Easthope for Te Hunga Rōia Māori o Aotearoa | The Māori Law Society as Intervener
A S Butler, R A Kirkness and H Z Yang for Human Rights Commission | Te Kāhui Tika Tangata as Intervener

Judgment: 7 February 2024

JUDGMENT OF THE COURT

A The appeal is allowed.

B The appellant's claim is reinstated.

C There is no order as to costs.

REASONS
(Given by Williams and Kós JJ)

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Introduction

[1] This appeal concerns strike out of a claim in tort (comprised of three causes of action) relating to damage caused by climate change. The question is whether the plaintiff's claim should be allowed to proceed to trial, or whether, regardless of what might be proved at trial, it is bound to fail and should be struck out now.

[2] The Court of Appeal considered the claim bound to fail. Differing from that Court, we consider the application of orthodox, long-settled principles governing strike out means this claim should be allowed to proceed to trial, rather than being struck out pre-emptively. As we observe later in the judgment, reinstatement of the claim and allowing it to proceed to trial is not a commentary on whether or not it will ultimately succeed.

[3] The plaintiff, Mr Smith, is an elder of Ngāpuhi and Ngāti Kahu, and a climate change spokesperson for the Iwi Chairs Forum, a national forum of tribal leaders. In August 2019 he filed a statement of claim in the High Court, against the seven

respondents. Each is a New Zealand company said to be involved in an industry that either emits greenhouse gases (GHGs) or supplies products which release GHGs when burned.[1] Mr Smith alleges that the respondents have contributed materially to the climate crisis and have damaged, and will continue to damage, his whenua and moana, including places of customary, cultural, historical, nutritional and spiritual significance to him and his whānau.

[4] Mr Smith raises three causes of action in tort: public nuisance, negligence and a proposed new tort involving a duty, cognisable at law, to cease materially contributing to: damage to the climate system; dangerous anthropogenic interference with the climate system; and the adverse effects of climate change.[2] He seeks a declaration that the respondents have (individually and/or collectively) unlawfully either breached a duty owed to him or caused or contributed to a public nuisance, and have caused or will cause him loss through their activities. Injunctions also are sought requiring the respondents to produce or cause a peaking of their emissions by 2025, a particularised reduction in their emissions by the ends of 2030 and 2040 (by linear reductions in net emissions each year until those times), and zero net emissions by 2050. Alternatively, a (potentially suspended) injunction requiring the respondents to immediately cease emitting (or contributing to) net emissions is sought.[3]

[5] A distinctive aspect of the proceeding in this Court is that Mr Smith pleads that tikanga Māori should inform the reach and content of his causes of action, this in accordance with the general proposition that tikanga should inform the common law of New Zealand generally. He does not allege that the respondents directly owed, or violated, any obligations under tikanga Māori.

[6] The respondents applied to strike out the proceeding. Each broadly argued that Mr Smith's statement of claim raised no reasonably arguable cause of action. The claim related to complex policy matters best addressed by Parliament (and having been addressed by Parliament). As part of their application, the respondents filed affidavit

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1 The sixth and seventh respondents, Channel Infrastructure NZ Ltd and BT Mining Ltd, filed separate submissions, claiming that they are differently placed to the other respondents.

2 We will refer to the last of these as the "proposed climate system damage tort".

3 This language comes from Mr Smith's amended draft statement of claim. It differs from his written submissions, which refer to (potentially suspended) "injunctions requiring the respondents to *cease their emissions-creating activities* immediately" (emphasis added).

evidence that each is operating within the relevant statutory and regulatory requirements. That is not disputed by Mr Smith.

[7] In the High Court, Wylie J determined that the claims in public nuisance and negligence were not reasonably arguable and struck them out.[4] He declined to strike out the claim based on the proposed climate system damage tort.

[8] Mr Smith appealed and the respondents cross-appealed. The Court of Appeal struck out all three causes of action.[5] Its overarching view was that:[6]

> … 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.

[9] The Court nevertheless addressed each cause of action in more detail. For various reasons, the Court concluded that the causes of action in public nuisance and negligence could not be made out. In relation to the proposed climate system damage tort, the Court's view was that the "bare assertion of the existence of a new tort without any attempt to delineate its scope" was insufficient to withstand strike out "on the basis of speculation that science may evolve by the time the matter gets to trial".[7]

[10] Mr Smith appeals. He submits his claim fits within the traditional role of the courts, the common law and the law of torts. As he puts it, the respondents are wronging him, and he seeks the courts' aid to have them stop. No re-invention of tort law is required. The questions raised warrant a trial and determination upon evidence.

[11] The respondents submit that Mr Smith's claim requires this Court to stretch, bend and invent tort law to injunct sectors of the New Zealand economy.[8] The respondents say that while the common law may be flexible, it cannot and ought not

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4 *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419, [2020] 2 NZLR 394 [HC judgment].
5 *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552, [2022] NZLR 284 (French, Cooper and Goddard JJ) [CA judgment].
6 At [16].
7 At [124].
8 As noted above at n 1, the sixth and seventh respondents filed separate submissions (arguing they were differently placed to the other respondents) but otherwise adopted the submissions of the first to fifth respondents.

to respond to this situation. They say climate change raises insurmountable problems for liability—particularly ones of standing and causation—where everyone both contributes to, and is adversely affected by, GHG emissions, and where it is not possible to link, evidentially, emissions to the harm suffered by plaintiffs. They say that for the law to evolve in the way advanced by Mr Smith would introduce open-ended liability for defendants and dramatically disrupt economies. They also say the courts are ill-suited to deal with a systemic problem of this nature with all the complexity entailed. Instead, it is best left to Parliament; indeed, Parliament can be seen already to have addressed the situation and settled upon a detailed and coherent legislative response.

[12] We also received submissions from Lawyers for Climate Action NZ Incorporated, Te Hunga Rōia Māori o Aotearoa | The Māori Law Society, and the Human Rights Commission | Te Kāhui Tika Tangata as interveners. The former aligned itself substantially with Mr Smith; the latter two made submissions on discrete issues. We were assisted by receipt of all these submissions.

Climate change

[13] The following points may be taken as common ground or indisputable.[9]

[14] Climate change threatens human well-being and planetary health.[10] As the Intergovernmental Panel on Climate Change (IPCC) observes, the window of opportunity to ensure a liveable and sustainable future for all is rapidly closing.[11] The choices made, and actions implemented, in this decade will have impacts both now and for thousands of years.[12]

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9 This section draws on the Intergovernmental Panel on Climate Change's (IPCC's) Sixth Assessment Report [AR6], which summarises the current state of knowledge of climate change, its widespread impacts and risks, and the areas of mitigation and adaptation. The reports of the three Working Groups that contributed to AR6 were admitted into evidence by minute of this Court dated 28 June 2022. Two of the three Special Reports that contributed to AR6 were admitted into evidence by minute of this Court dated 3 August 2022. The other was admitted into evidence at the High Court hearing. Following a minute of this Court dated 1 June 2023, the parties confirmed that the AR6 Synthesis Report (both the Summary for Policymakers and the Longer Report) could also be admitted into evidence.

10 IPCC *Climate Change 2023: Synthesis Report – Summary for Policymakers* (20 March 2023) [AR6 Synthesis Report Summary] at [C.1]. The IPCC uses calibrated language to express a level of confidence in statements of facts; this was said with very high confidence.

11 At [C.1] (very high confidence).

12 At [C.1] (high confidence).

[15] A recent IPCC report summarised its findings in this way:[13]

> The report confirms the strong interactions of the natural, social and climate systems and that human-induced climate change has caused widespread adverse impacts to nature and people. It is clear that across sectors and regions, the most vulnerable people and systems are disproportionately affected and climate extremes have led to irreversible impacts. The assessment underscores the importance of limiting global warming to 1.5°C if we are to achieve a fair, equitable and sustainable world. While the assessment concluded that there are feasible and effective adaptation options which can reduce risks to nature and people, it also found that there are limits to adaptation and that there is a need for increased ambition in both adaptation and mitigation. These and other findings confirm and enhance our understanding of the importance of climate resilient development across sectors and regions and, as such, demands the urgent attention of both policymakers and the general public.

[16] The evidence is "unequivocal" that humans have warmed the atmosphere, ocean and land, principally through the emission of GHGs.[14] The best estimate of global surface temperature increase from 1850–1900 to 2010–2019 is 1.07°C.[15] Atmospheric concentrations of carbon dioxide (CO_2) in 2019 were higher than at any point in the last two million years.[16] Concentrations of methane (CH_4) and nitrous oxide (N_2O) were higher than at any time in at least the last 800,000 years.[17]

[17] Human-caused climate change is the "consequence of more than a century of net GHG emissions from unsustainable energy use, land-use and land use change, lifestyle and patterns of consumption and production".[18] Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have already occurred.[19] Human-caused climate change is already "affecting" climate and weather extremes in

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13 IPCC *Climate Change 2022: Impacts, Adaptation and Vulnerability – Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 28 February 2022) [AR6 Working Group II] at vii.

14 At [A.2.1] (high confidence). See also IPCC *Climate Change 2021: The Physical Science Basis – Working Group I Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 9 August 2021) [AR6 Working Group I] at [A.1], ch 3 and ch 5.

15 AR6 Synthesis Report Summary, above n 10, at [A.1.2.]. See also AR6 Working Group I, above n 14, at [A.1.3].

16 AR6 Synthesis Report Summary, above n 10, at [A.1.3] (high confidence). See also AR6 Working Group I, above n 14, at [A.2.1].

17 AR6 Synthesis Report Summary, above n 10, at [A.1.3] (very high confidence). See also AR6 Working Group I, above n 14, at [A.2.1].

18 IPCC *Climate Change 2022: Mitigation of Climate Change – Working Group III contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 4 April 2022) [AR6 Working Group III] at [D.1.1].

19 AR6 Synthesis Report Summary, above n 10, at [A.2] (high confidence).

every region in the world.[20] It has caused widespread adverse impacts, losses and damage to nature and people.[21] Indeed, evidence of observed changes in extremes—such as heavy precipitation, droughts, heatwaves and tropical cyclones—and in particular their attribution to human influence, strengthened since the IPCC's Fifth Assessment Report, released in 2014.[22]

[18] Between 3.3 and 3.6 billion people "live in contexts that are highly vulnerable to climate change".[23] Vulnerable communities, which historically have contributed the least to the problem, are being "disproportionately affected" by climate change.[24] Many of the impacts of warming, and some of the potential impacts of mitigation actions required to limit warming, "fall disproportionately on the poor and vulnerable".[25] Between 2010 and 2020, for example, human mortality resulting from droughts, storms and floods was 15 times higher in highly vulnerable regions than in regions with very low vulnerability.[26]

[19] Some of the impacts of climate change are locked in; "[m]any changes due to past and future greenhouse gas emissions are irreversible for centuries to millennia, especially changes in the ocean, ice sheets and global sea level."[27]

[20] The IPCC recently summarised the impact of continued warming in the near term:[28]

> Continued greenhouse gas emissions will lead to increasing global warming, with the best estimate of reaching 1.5°C in the near term in considered scenarios and modelled pathways. Every increment of global warming will intensify multiple and concurrent hazards (*high confidence*).

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20 At [A.2] (high confidence). See also AR6 Working Group I, above n 14, at [A.3].

21 AR6 Synthesis Report Summary, above n 10, at [A.2] (high confidence). See also AR6 Working Group II, above n 13, at [B.1].

22 AR6 Working Group I, above n 14, at [A.3].

23 AR6 Synthesis Report Summary, above n 10, at [A.2.2] (high confidence).

24 At [A.2] (high confidence). See also AR6 Working Group II, above n 13, at [B.1].

25 IPCC *Global Warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (Cambridge University Press, October 2018) at 31 (high confidence, said in the context of limiting warming to 1.5°C).

26 AR6 Synthesis Report Summary, above n 10, at [A.2.2] (high confidence).

27 AR6 Working Group I, above n 14, at [B.5]. See also AR6 Synthesis Report Summary, above n 10, at [B.3] (high confidence).

28 AR6 Synthesis Report Summary, above n 10, at [B.1] (emphasis in original).

[21] Such future warming would have widespread impacts:[29]

> In the near term, every region in the world is projected to face further increases in climate hazards (*medium* to *high confidence*, depending on region and hazard), increasing multiple risks to ecosystems and humans (*very high confidence*). Hazards and associated risks expected in the near term include an increase in heat-related human mortality and morbidity (*high confidence*), food-borne, water-borne, and vector-borne diseases (*high confidence*), and mental health challenges (*very high confidence*), flooding in coastal and other low-lying cities and regions (*high confidence*), biodiversity loss in land, freshwater and ocean ecosystems (*medium* to *very high confidence*, depending on ecosystem), and a decrease in food production in some regions (*high confidence*). Cryosphere-related changes in floods, landslides, and water availability have the potential to lead to severe consequences for people, infrastructure and the economy in most mountain regions (*high confidence*). The projected increase in frequency and intensity of heavy precipitation (*high confidence*) will increase rain-generated local flooding (*medium confidence*).

[22] Moreover, as the planet continues to warm, climate change risks "will become increasingly complex and more difficult to manage".[30] The probability of "abrupt and/or irreversible changes" increases with higher global warming levels,[31] as does the probability of low-likelihood outcomes that have potentially "very large adverse impacts".[32]

[23] Limiting human-caused global warming requires net zero CO_2 emissions combined with strong reductions in other GHG emissions.[33] Cumulative CO_2 emissions before reaching this point, and the level of GHG emissions reductions made this decade, will "largely determine whether warming can be limited to 1.5°C or 2°C".[34]

[24] All global modelled pathways that involve limiting warming to 1.5°C with no or only limited overshoot, and those that involve limiting warming to 2°C, involve "rapid and deep and, in most cases, immediate greenhouse gas emissions reductions in all sectors this decade".[35] On these pathways, net zero CO_2 emissions are reached

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29 At [B.2.1] (footnote omitted and emphasis in original).
30 At [B.2.3] (high confidence).
31 At [B.3] (high confidence).
32 At [B.3] (high confidence).
33 At [B.5] and [B.5.1] (high confidence).
34 At [B.5] (high confidence).
35 At [B.6] (high confidence).

in the early 2050s and around the early 2070s respectively.[36] The following table from the IPCC (beginning at the year 2019) summarises the position:[37]

		Reductions from 2019 emission levels (%)			
		2030	2035	2040	2050
Limit warming to1.5°C (>50%) with no or limited overshoot	GHG	43 [34-60]	60 [49-77]	69 [58-90]	84 [73-98]
	CO_2	48 [36-69]	65 [50-96]	80 [61-109]	99 [79-119]
Limit warming to 2°C (>67%)	GHG	21 [1-42]	35 [22-55]	46 [34-63]	64 [53-77]
	CO_2	22 [1-44]	37 [21-59]	51 [36-70]	73 [55-90]

[25] The respondents emphasise that responding to climate change requires profound societal transformation: "having depended on carbon for all aspects of our social and economic life, we must now transition to low-carbon societies". The IPCC has described the drivers for, and constraints on, "low-carbon societal transitions" as comprising:[38]

> … *economic and technological* factors (the means by which services such as food, heating and shelter are provided and for whom, the emissions intensity of traded products, finance and investment), *socio-political issues* (political economy, equity and fairness, social innovation and behaviour change), and *institutional factors* (legal framework and institutions, and the quality of international cooperation).

[26] The IPCC has also reported on the specific effects of climate change in New Zealand.[39] Mr Smith's submissions summarised those findings in this way:

> Temperatures have increased by 1.1°C over the last 110 years with more extreme hot days. Oceans have risen, acidified and warmed significantly with longer and more frequent marine heat waves. Snow depths have declined and glaciers have receded. Most of northern New Zealand (where Mahinepua C [the land block in question] is situated) has become drier, while also seeing more extreme flooding. Wildfire conditions have increased. Effects on marine, terrestrial and freshwater ecosystems are already evident, including the expansion of invasive plants, animals and pathogens. Erosion, coastal flooding and insurance losses for floods have all increased.

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36 At [B.6] (high confidence).
37 At 21.
38 AR6 Working Group III, above n 18, at [TS.2] (emphasis added).
39 AR6 Working Group II, above n 13, at ch 11.

Statutory response to climate change

[27] The United Nations Framework Convention on Climate Change (UNFCCC), which was opened for signature at the Rio de Janeiro United Nations Conference on Environment and Development (Earth Summit) in 1992, is the foundational international treaty on climate change.[40] Its "ultimate objective" is:[41]

> … to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

[28] The Kyoto Protocol to the UNFCCC was adopted at the third session of the Conference of the Parties (COP 3) in 1997 and came into force on 16 February 2005.[42] For the first time, legally binding limits were placed on "developed" countries' GHG emissions.[43]

[29] The Paris Agreement is a binding international treaty that came into force on 4 November 2016.[44] It "aims to strengthen the global response to the threat of climate change" by, among other things:[45]

> Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change …

Under the Agreement, party countries are to communicate a Nationally Determined Contribution (NDC) to the global response to climate change every five years.[46]

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40 United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994).

41 Article 2.

42 Kyoto Protocol to the United Nations Framework Convention on Climate Change 2303 UNTS 162 (opened for signature 16 March 1998, entered into force 16 February 2005).

43 For Annex I countries, which includes New Zealand: see art 3(1).

44 Paris Agreement 3156 UNTS 79 (opened for signature 22 April 2016, entered into force 4 November 2016).

45 Article 2(1)(a).

46 Articles 3, 4(2) and 4(9).

[30] In December 2020, Parliament passed a motion declaring a climate emergency in New Zealand. New Zealand's first NDC, required under the Paris Agreement, was updated in October 2021. It sets a headline target of a 50 per cent reduction of net emissions below gross 2005 levels by 2030.

[31] Parliament, through legislation, has put in place measures which seek to regulate New Zealand's GHG emissions.[47] The essential purpose of this legislation is to limit GHG emissions in order to contribute to the global effort to limit global temperature increase to 1.5°C above pre-industrial levels.

Climate Change Response Act 2002

[32] The Climate Change Response Act 2002 (CCRA) is the centrepiece of Parliament's response. The CCRA provides the legal framework for New Zealand to meet its international emissions reduction obligations.

[33] The CCRA has been through of series of amendments as Parliament has developed and tweaked New Zealand's climate change framework and policies. As Wylie J said in the High Court, these amendments collectively:[48]

> … represent the balance that Parliament has struck, and continues to strike, between environmental, technical, social and economic considerations, and the anticipated effects, costs and benefits of various alternative options considered in the process.

[34] The purpose of the CCRA—updated by one of those amendments, the Climate Change Response (Zero Carbon) Amendment Act 2019, which passed with cross-party support—is set out in s 3. In short, it is to provide a framework by which New Zealand can develop and implement clear and stable climate change policies that contribute to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5°C above pre-industrial levels, and allow New Zealand to prepare for, and adapt to, the effects of climate change; enable New Zealand to meet its international obligations; provide for the implementation, operation, and

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47 We draw hereafter on the summary given by Wylie J in the High Court, updated to take account of subsequent developments: HC judgment, above n 4, at [34]–[52].

48 At [35].

administration of a GHG emissions trading scheme; and provide for the imposition, operation, and administration of specific levies.

[35] The CCRA establishes targets for emissions reductions requiring the net accounting of GHGs in a calendar year (excluding biogenic methane) to be zero by the calendar year beginning on 1 January 2050 (and for each subsequent calendar year); and requiring the yearly emissions of biogenic methane to be (i) 10 per cent less than 2017 emissions by 2030 and (ii) 24 per cent to 47 per cent less than 2017 emissions by 2050 (and for each subsequent calendar year).[49] No remedy or relief is available for failure by the government to meet the 2050 target (or an emissions budget), but a court may make a declaration to that effect.[50]

(a) The Climate Change Commission

[36] The Climate Change Commission, established by the 2019 Amendment Act, is a Crown entity, which is required to act independently.[51] Its purposes are to provide independent, expert advice to the government on mitigating climate change (including through reducing GHG emissions) and adapting to the effects of climate change; and to monitor and review the government's progress towards its emissions reduction and adaptation goals.[52]

(b) Emissions budgets

[37] The responsible Minister is required to set economy-wide, mandatory emissions budgets for each emissions budget period (beginning with the period 2022–2025, and then for five-yearly periods until 2050).[53] Each emissions budget must state the total GHG emissions permitted for the budget period, expressed as a net quantity of CO_2 equivalent.[54] Budgets are to be met, so far as is possible, through domestic emissions reductions and removals.[55] Budgets can be understood as

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49 Climate Change Response Act 2002 [CCRA], s 5Q.
50 Section 5ZM.
51 Sections 5A, 5C and 5O.
52 Section 5B.
53 Section 5X. The Minister must also have regard to particular matters set out in s 5ZC.
54 Section 5Y. "Permitted" is not used here in the sense of "authorised": see [45] and [99] below.
55 Section 5Z(1). Offshore mitigation may be used in particular circumstances: s 5Z(2).

"stepping stones" to the 2050 target.[56] The Commission must advise the Minister on matters relevant to setting an emissions budget.[57]

(c) Emissions reduction plans

[38] For each emissions budget period, the Minister must prepare and make publicly available an emissions reduction plan (ERP) setting out the policies and strategies for meeting the relevant emissions budget.[58] The plan must include sector-specific policies; a multi-sector strategy; a strategy mitigating the impacts that reducing emissions and increasing removals will have on employees and employers, regions, iwi and Māori, and wider communities; and any other policies or strategies the Minister considers necessary.[59] The Commission must provide the Minister with advice on the direction of the policy required in an ERP.[60] In May 2022 the Government published the first three emissions budgets (2022–2025, 2026–2030 and 2031–2035), and published its first ERP, setting the direction for climate action for the next 15 years in New Zealand.

(d) Monitoring

[39] The CCRA contains comprehensive monitoring and enforcement provisions. The Commission, for example, performs a monitoring role, regularly monitoring and reporting on progress regarding national adaptation plans,[61] emissions budgets and the 2050 target.[62] It can recommend changes or amendments to the 2050 target and emissions budgets.[63] The Act also provides for an inventory agency,[64] with inspectors holding comprehensive powers to enter land or premises to collect information to estimate emissions or removals of GHGs.[65]

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56 Climate Change Response (Zero Carbon) Amendment Bill 2019 (136-1) (explanatory note) at 3.
57 CCRA, s 5ZA(1). The Commission must also have regard to particular matters set out in s 5ZC.
58 Section 5ZG.
59 Section 5ZG(3).
60 Section 5ZH. The matters that the Commission is required to have regard to in providing advice on emissions budgets also apply to advice on ERPs: s 5ZH(3).
61 See ss 5J(h), 5ZS, 5ZT and 5ZU. The first national adaptation plan was published in August 2020.
62 Sections 5ZJ, 5ZK and 5ZL.
63 Section 5J(a) and (c).
64 The inventory agency means the chief executive of the Ministry for the Environment: ss 4(1) and 9A(b).
65 Part 3.

(e) The Emissions Trading Scheme (ETS)

[40] The ETS, established by the Climate Change Response (Emissions Trading) Amendment Act 2008, was the result of an extensive process of policy formulation and consultation.[66] A range of options, including a carbon tax, were considered.[67] The ETS emerged as the "consensus solution".[68] It is New Zealand's "main tool" for reducing GHG emissions.[69] Most of the key CO_2-emitting sectors of New Zealand's economy are subject to the ETS, including liquid fossil fuels, stationary energy (including importing and mining coal), industrial processes (such as producing iron or steel) and agriculture (although agricultural emissions do not at present trigger surrender obligations).[70]

[41] The architecture of the ETS is found in Part 4 of the CCRA. "Participants" must notify the Environmental Protection Agency (EPA) that they are required to participate in the ETS and then open a holding account.[71] That account is used to surrender, repay and receive emissions "units".[72] An emissions unit represents a metric tonne of CO_2 equivalent.

[42] Participants in the scheme are liable to surrender one unit for each whole tonne of emissions from listed activities that the participant carries out.[73] Conversely, participants are entitled to receive one unit for each whole tonne of removals from removal activities.[74] Participants are required to submit annual emissions returns to the EPA.[75] Those returns must contain an assessment of the participant's liability to surrender units and/or entitlement to receive units.[76] Participants must then, if

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66 See, for example, Catherine Leining *Time-travelling on the New Zealand Emissions Trading Scheme* (Motu Economic and Public Policy Research, Note 22, 2016) at 2.
67 At 2.
68 HC judgment, above n 4, at [51].
69 Climate Change Response (Emissions Trading Reform) Amendment Bill 2019 (186-1) (explanatory note) at 1.
70 HC judgment, above n 4, at [44]. Schedule 3 of the CCRA lists the activities with respect to which persons must be participants. Schedule 4 lists activities with respect to which persons may be participants.
71 Section 56.
72 Section 61.
73 Section 63.
74 Section 64.
75 Section 65(1).
76 Section 65(2)(c).

necessary, surrender the required number of units to the government to cover their emissions.[77] Failure to do so results in liability for penalties.[78]

[43] The ETS is a market-based scheme. Units are tradeable, and participants with insufficient units must purchase units from other participants to cover their emissions. The price of units, often referred to as the carbon price, is broadly set by supply and demand. The government, however, allocates emissions units to industry for activities that are emission-intensive and trade-exposed (an industrial allocation).[79]

[44] The ETS attempts to drive efficient behaviour change. The logic is that sellers of surplus units are rewarded and further encouraged to reduce emissions or increase removal activities to obtain more sellable units. Buyers, on the other hand, are encouraged to reduce emissions to limit the number of units they must buy to cover their emissions. It is expected that the price signal the scheme sends should lead to emissions reductions that may not otherwise occur.[80]

[45] Importantly, and as Mr Salmon submitted for Mr Smith, the CCRA does not "permit" emissions or create a "right to emit". It neither authorises nor immunises. Instead, it places obligations on ETS participants who emit, requiring them to surrender units matching their emissions.[81] Mr Salmon submitted the distinction is subtle, but important. The respondents did not contend to the contrary but submitted that for the common law to intervene in controlling GHGs would create a parallel and inconsistent regulatory regime. Their point is that Parliament has *not prohibited* GHG emissions and has thus allowed emitting activities to continue. We will return to this issue.[82]

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77 Section 65(4).

78 Section 134.

79 Ministry for the Environment | Manatū Mō Te Taiao "Overview of industrial allocation" (10 October 2023) <https://environment.govt.nz>. See also CCRA, ss 80, 81 and 85. The Climate Change Response (Late Payment Penalties and Industrial Allocation) Amendment Act 2023 introduced changes to the industrial allocation policy in the ETS.

80 Alastair Cameron *Climate Change and Emissions Trading: Environmental Handbook* (online ed, Thomson Reuters) at [CC3.01].

81 CCRA, s 63.

82 See below at [99].

Other statutory responses

[46] The CCRA is part of a broader regulatory structure, which includes the Resource Management Act 1991[83] (RMA) and more specific Acts such as the Crown Minerals (Petroleum) Amendment Act 2018 (which banned new offshore oil and gas exploration) and the Land Transport (Clean Vehicles) Amendment Act 2022 (which aims to achieve a rapid reduction in CO_2 emissions from light vehicles imported into New Zealand).[84]

[47] The relationship between the RMA and climate change is complex.[85] Since 2004, climate change has been an express relevant consideration for RMA decision-makers. For example, s 7(i) of the RMA provides that decision-makers must have "particular regard to … the effects of climate change".[86] But until relatively recently, environmental regulation of GHG discharges was solely a matter for central government via the promulgation of National Environmental Standards (NES) under s 43 of that Act.[87] Local and regional councils regulated human interaction with the effects of climate change—for example, sea level rise—but they had no direct role in controlling GHG emissions.[88] With effect from 2022, that constraint was removed and replaced with a requirement on local and regional councils to have regard to CCRA emissions reduction plans and national adaptation plans when exercising their own

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83 The new resource management legislative framework will also form part of this matrix.

84 We note that while the current Government has discussed the potential repeal of the ban on offshore oil and gas exploration, as at the date of judgment a ban is still in force. The clean vehicle discount scheme introduced by the Land Transport (Clean Vehicles) Amendment Act 2022 was repealed on 1 January 2024 by the Land Transport (Clean Vehicle Discount Scheme Repeal) Amendment Act 2023, but other sections relating to clean vehicle standards remain in force.

85 For more on the Resource Management Act 1991 [RMA] see below at [95]–[96].

86 Inserted by s 5(2) of the Resource Management (Energy and Climate Change) Amendment Act 2004 [RMA 2004 Amendment].

87 Until recently, no comprehensive NES for climate change had been promulgated. In June 2023 a NES for GHG emissions from industrial process heat was made under s 43: Resource Management (National Environmental Standards for Greenhouse Gas Emissions from Industrial Process Heat) Regulations 2023 [GHG emissions NES]. That will be binding notwithstanding anything in CCRA plans and targets.

88 See RMA, ss 70A, 70B, 104E and 104F (all now repealed). See also *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32, in which this Court considered the effect of the RMA 2004 Amendment on the content and structure of the RMA's rulemaking and consenting functions. The majority held that the effect of these sections was to remove from regional councils the ability to control GHG emissions via the discharge to air controls referred to in s 15 (see [160] and [168] per McGrath, William Young and Glazebrook JJ). See also *Genesis Power Ltd v Greenpeace New Zealand Inc* [2007] NZCA 569, [2008] 1 NZLR 803. The repeal of ss 70A, 70B, 104E and 104F restored the status quo ante, subject to the amendments referred to in the following footnote which brought the RMA and CCRA closer together.

rulemaking and consenting functions.[89] It may be noted that, in contrast to the relationship between NES and regional or local planning instruments, these CCRA plans are relevant for RMA decision-makers but not expressly binding. But while they remain in place, the practical effect of the GHG emissions NES, emissions budgets and the ERP will be that GHG emissions will be managed to a significant extent through planning instruments and resource consents.[90]

[48] We will address later the interrelationship between statute and common law.[91]

The claim

[49] We summarise here the claim made by Mr Smith. We do so by reference to a draft amended statement of claim tendered by his counsel.[92] The draft amended claim differs in certain respects from the pleading considered in the Courts below, particularly as regards the alleged consequences of the release of GHGs into the atmosphere, the tikanga pleading and the relief sought.

Parties

[50] Mr Smith claims customary interests in lands and other resources and sites situated in or around Mahinepua in Northland. In particular, he claims an interest according to custom and tikanga in the Mahinepua C block, an approximately 91-ha block of Māori freehold land situated on the coast of Wainui Bay, Northland. He says he is a representative of the interests of his whānau and descendants in that land. He says that this land and its surroundings possess sites of customary, cultural, historical, nutritional and spiritual significance to him, including tauranga ika (fishing places), tauranga waka (landing places), ara moana (pathways to the ocean), wāhi tapu (burial

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89 See ss 61(2)(d)–(e), 66(2)(f)–(g) and 74(2)(d)–(e), inserted by the Resource Management Amendment Act 2020. RMA plans and policies drafted in light of CCRA emissions reduction plans and national adaptation plans would then be reflected in resource consent decisions.

90 For example, the GHG emissions NES will render GHG discharges from fossil fuel industrial heat processes ("heat devices" such as furnaces) either prohibited activities or restricted discretionary activities for which discharge consent applicants must prepare emissions plans by which GHG emissions are reduced and managed.

91 See below at [92]–[101].

92 This was furnished in sufficient time ahead of the hearing, and there was no substantive objection by counsel for the respondents. That is appropriate: strike out is more concerned with what can and will be pleaded, rather than what has been pleaded: *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [123] per Blanchard, Tipping and McGrath JJ.

caves, cemeteries and sacred trees), rivers, streams, wetlands, seasonal food gathering camps, pā sites, battle sites, and other sites of historical significance. Many of these sites are situated in close proximity to the coast and waterways or are in the sea itself.

[51] Mr Smith alleges that:[93]

(a) Fonterra owns and operates eight dairy factories in New Zealand that burn coal (in excess of 520,000 tonnes per annum) to generate energy. Fonterra will continue to burn coal in its factories for the foreseeable future, and the combustion of coal releases GHGs.

(b) Genesis operates the Huntly Power Station, the largest thermal power station in New Zealand. It is fuelled by the combustion of coal and natural gases, which releases GHGs.

(c) Dairy Holdings Ltd operates 59 dairy farms in the South Island, with some 50,000 milking cows. These cows release methane as a result of enteric fermentation, and nitrogen dioxide is also released from nitrogen-based fertiliser use on the farms.

(d) New Zealand Steel Ltd operates the Glenbrook Steel Mill, which is primarily fuelled by the combustion of coal and has the capacity to burn 800,000 tonnes of coal per annum. The combustion of coal releases GHGs.

(e) Z Energy Ltd supplies retail and commercial customers with petroleum-related fuel products. It knows that these products are burned by its customers, resulting in the release of GHGs.

(f) Channel Infrastructure NZ Ltd (previously known as The New Zealand Refining Company Ltd) operates the Marsden Point oil refinery and import terminal, and the Refinery to Auckland Pipeline. It imports and

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93 We omit from this summary pleaded mitigations engaged or intended by the respondents—for instance as to reduction in consumption of fossil fuels by certain dates.

supplies the majority of petroleum-related fuel products consumed in New Zealand. The refining process at Marsden Point causes the release of GHGs.[94] Channel Infrastructure knows that its products are burned by others to power combustion engines, or to generate electricity, resulting in the release of GHGs.

(g) BT Mining Ltd owns and operates the Stockton Mine, north of Westport, the largest opencast mine in New Zealand. It produces bituminous, coking and thermal coal,[95] the majority of which is exported, much of it to China, where it is primarily burned in the production of steel. BT Mining knows that the burning of the coal it produces releases GHGs.

Alleged consequences of the release of GHGs into the atmosphere

[52] Mr Smith next alleges that:

(a) In 2020–2021, the respondents were together responsible for more than one-third of New Zealand's total reported GHG emissions (and that just 15 companies were responsible for more than 75 per cent).

(b) The release of GHGs into the atmosphere from human activities (including the respondents' activities) increases the natural greenhouse effect, and causes, among other things, the warming of the planet.

(c) Climate change from the release of GHGs into the atmosphere from human activities (including the respondents' activities) will result in the additional warming of the Earth's surface and atmosphere, and will adversely affect natural ecosystems and humankind.

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94 Channel Infrastructure's submissions state that: "On 31 March 2022, Channel closed its refining operations permanently. In doing so, by its estimate, Channel reduced its CO_2 emissions by 98% – or by more than 1 million tonnes per annum – from its 2019 levels."

95 It is alleged that the Stockton Mine produced and exported approximately 0.8 million tonnes of coal in 2018, and 1.1 million tonnes was forecast to be produced and exported in 2019.

(d) The release of GHGs into the atmosphere from human activities (including the respondents' activities) will result in dangerous anthropogenic interference with the climate system and adverse effects—including increased temperatures; a loss of biodiversity and biomass; a loss of land (including as a result of sea level rise); risks to food and water security; increased extreme weather events; ocean acidification; geopolitical instability and population displacement; adverse health consequences; economic losses; the reaching of tipping points which may cause the catastrophic breakdown of crucial environmental systems; and an unacceptable and escalating risk of social and economic collapse and mass loss of human life.

(e) Poor and minority communities will be disproportionately burdened by the adverse effects of climate change.

(f) The current scientific consensus as to the nature, effects and mitigation requirements of climate change is set out in recent reports of the IPCC from between 2014 and 2022, which are relied upon by Mr Smith.

(g) It is necessary to limit warming caused by climate change to 1.5°C to avoid dangerous anthropogenic interference with the climate system and to minimise the long-term and irreversible adverse effects from climate change.

[53] Mr Smith then alleges that, according to the most recent science from the IPCC, to avoid dangerous climate change:

(a) By 2025, at the latest, global GHG emissions must peak.

(b) By 2030, global CO_2 emissions must be reduced by 48 per cent, and global CH_4 emissions by 34 per cent, compared to 2019 levels.

(c) By 2040, global CO_2 emissions must be reduced by 80 per cent, and global CH_4 emissions by 44 per cent, compared to 2019 levels.

(d) By 2050, global GHG emissions must be net zero (meaning that after 2050 no more net anthropogenic emissions can be added to the atmosphere anywhere in the world).

[54] Mr Smith pleads that it is possible for the respondents to reduce the emissions from their activities and products to reflect these required reductions, and that requiring them to cease or reduce their GHG emissions (or contribution to emissions from producing and selling fossil fuels) will materially reduce the adverse effects of climate change. He pleads that these reductions cannot be achieved without the contribution of non-state actors, including the respondents.

[55] Mr Smith then pleads that despite enacting the CCRA, since 2002 New Zealand's net and gross GHG emissions have increased and not reduced. Current and proposed measures under that Act will not result in New Zealand achieving reductions in GHG emissions, or the respondents being required to reduce emissions, in line with a proportionate contribution to minimum required reductions.

[56] Mr Smith pleads that the respondents have variously:

(a) failed to credibly commit to voluntary measures that would see them contribute proportionately (or better) to the minimum required reductions; and

(b) actively lobbied against regulatory measures that would require them to reduce their emissions to contribute proportionately (or better) to the minimum required reductions.

[57] Mr Smith further pleads that the GHG emissions of several of the respondents are actually or effectively unconstrained by the current regulatory regime. Agricultural GHG emissions are not part of the ETS; BT Mining exports coal to jurisdictions where there is no credible regulation of GHG emissions; some respondents (including NZ Steel) have received substantial allocations of "free" units under the ETS, impeding a reduction in their emissions; and aspects of the ETS do not

incentivise or require the respondents participating in that scheme to reduce their emissions in a manner consistent with the minimum reductions required.

[58] Mr Smith pleads:

> The consequence, in fact and law, of the [respondents'] actions is that Mr Smith, his wh[ā]nau, his descendants and others will bear the cost of dealing with harms contributed to by the [respondents'] historical, current and future [GHG] emissions.

He further pleads that:

> The orders sought in this proceeding will cause rapid sectoral change that will lead to other major New Zealand emitters taking similar steps to reduce their emissions in a manner that will materially mitigate the harm faced by Mr Smith, his wh[ā]nau and his descendants.

Tikanga pleading

[59] Mr Smith relies on principles of tikanga Māori to "inform the legal basis of the pleaded causes of action and the development of the common law of New Zealand".

[60] The principles pleaded are that tikanga Māori has its own system of obligations and recognition of wrongs arising from those obligations; that such obligations are grounded in whakapapa (genealogical) and whanaungatanga (kinship) relationships; that these relationships include a connection to whenua (land and the environment) through whakapapa, giving rise to corresponding obligations of kaitiakitanga (loosely, to care for or nurture); and that breaching tikanga creates a hara or take (issue or cause) requiring utu (compensatory action) to restore ea (a state of harmony or balance).

[61] He further claims that, under tikanga, environmental harm is a harm in and of itself, creating corresponding harm to those who have interests in the environment, including kaitiaki (loosely, those whose role it is to care for the environment) and mana whenua (again loosely, those with traditional authority in the particular environment). Where the environment has suffered damage, the principle of kaitiakitanga requires steps to be taken to restore balance, such as imposing rāhui (traditional use and impact controls). Finally, Mr Smith argues, tikanga Māori recognises that hara (in this context, environment-damaging wrong) has both a collective and an individual dimension as to those responsible for it and those who suffer it.

First cause of action: public nuisance

[62] The first cause of action pleaded is public nuisance.

[63] Mr Smith claims that he will suffer harm from the effects of dangerous anthropogenic interference with the climate system caused or contributed to by the respondents jointly and separately. In particular, he pleads that climate change will:

(a) result in increasing sea levels, irrevocably damaging his family land at Mahinepua C by the physical loss of land from erosion and inundation, the loss of productive land, the loss of economic value, and the loss of sites of cultural and spiritual significance;

(b) irrevocably damage customary resources and sites, including traditional or customary fisheries, landing sites and burial caves and cemeteries;

(c) result in ocean warming and acidification which will adversely impact coastal and freshwater fisheries he customarily uses;

(d) result in the irrevocable and irreplaceable loss of land, resources and species that are economically, culturally and spiritually significant to him as tangata whenua; and

(e) result in increasing adverse health impacts to which he and Māori communities have particular vulnerability.

[64] It is then said that the respondents' actions have interfered with or will interfere with the following public rights: the rights to public health, public safety, public comfort, public convenience, public peace, and a safe and habitable climate system. Mr Smith pleads that the respondents' interference with these public rights is substantial, material and unreasonable and that they knew, or ought reasonably to have known, since at least the release of the IPCC's Fourth Assessment Report in 2007, that (a) their activities were contributing to dangerous anthropogenic interference with the climate system and (b) it was necessary for them to immediately and significantly

reduce their GHG emissions (or production and supply of products which result in GHG emissions) in order to avoid causing or contributing to dangerous anthropogenic interference in the climate system and the adverse consequences of climate change. He pleads that despite that knowledge, the respondents have continued to emit GHGs into the atmosphere (or to produce and supply products which result in GHG emissions) and have failed to significantly reduce their GHG emissions (and have, in some instances, increased them). He further pleads that requiring the respondents to reduce, or cease, their GHG emissions (directly or arising from their fossil fuel products) will reduce the injury that will otherwise be suffered by him and his descendants as a result of the adverse effects of climate change.

[65] We set the relief sought out in full, which is essentially the same in each cause of action:[96]

> **Relief sought**
>
> (a) A declaration that the defendants have (individually and/or collectively) unlawfully caused or contributed to a public nuisance through their emitting activities (or their production of coal in the case of BT Mining; and their production or supply of [f]uel [p]roducts in the case of Channel and Z Energy);
>
> (b) An injunction requiring … each of the defendants to produce (or cause in relation to the products they sell, in the case of BT Mining, Channel and Z Energy):
>
> (i) A peaking of their emissions by 2025; and
>
> (ii) A reduction in their emissions in the amount of the Minimum 2030 Reductions[97] by the end of 2030, by linear reductions in net emissions each year until that time (to be supervised by the Court);
>
> (iii) A reduction in their emissions in the amount of the Minimum 2040 Reductions[98] by the end of 2040, by linear reductions in net emissions each year until that time (to be supervised by the Court);
>
> (iv) [Z]ero net [GHG] emissions from their activities by 2050 by continued linear reductions (to be supervised by the Court);

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96 Emphasis in original. The negligence prayer for declaration is cast in terms of the loss caused by unlawful breach of a duty (the proposed climate system damage tort claim is also cast in terms of unlawful breach of a duty).

97 See above at [53](b).

98 See above at [53](c).

(c) Alternatively, an injunction (which may be suspended) requiring the defendants to immediately cease emitting net [GHG] emissions, or contributing to the net emission of [GHGs] through the sale of their products;

(d) Such other relief as the Court determines appropriate to enable the mitigation of or [adaptation] to damage to climate systems contributed to by the [respondents];

(e) [Mr Smith] brings this proceeding in the public interest, and with the assistance of *pro bono* legal representation, and for that reason does not seek costs.

Second cause of action: negligence

[66] The second (additional or alternative) cause of action is negligence.

[67] Mr Smith alleges that the respondents owe him, and persons like him, a duty to take reasonable care not to operate their businesses in a way that will cause him loss by contributing to dangerous anthropogenic interference in the climate system.

[68] He claims that the respondents have breached this duty by doing acts that have contributed to, and will continue to contribute to, dangerous anthropogenic interference in the climate system; that they knew, or ought reasonably to have known from 2007, that their activities would contribute to such interference; that they then knew, or ought reasonably to have known, that it was necessary for them to immediately and significantly reduce their GHG emissions; and that, despite that knowledge, they have continued to emit GHGs into the atmosphere (or to produce and supply products which result in the emission of GHGs) and have failed to significantly reduce their GHG emissions (and have, in some instances, increased them).

[69] Mr Smith claims that the respondents' breach of duty has or will cause him harm; that the respondents' contribution to that harm is material; and that requiring cessation or reduction of the respondents' GHG emissions will reduce that harm.

[70] The relief sought is cast in similar terms to that sought for the first cause of action.

Third cause of action: proposed climate system damage tort

[71] The third cause of action advances the novel, proposed climate system damage tort. We set the draft amended pleading out in full:

> The defendants owe a duty, cognisable at law, to cease materially contributing to damage to the climate system, dangerous anthropogenic interference with the climate system, and the [a]dverse [e]ffects of climate change through their emission of [GHGs] into the atmosphere (or their production or exportation of coal in the case of BT Mining; and their production and supply of [f]uel [p]roducts in the case of Channel and Z Energy).
>
> The defendants have breached, and will continue to breach, the duty by [emitting GHGs] into the atmosphere (or [causing] the emission of [GHGs] through the sale of fossil fuel products) for their own profit and knowing that those emissions will contribute to damage to the climate system, dangerous anthropogenic interference with the climate system, the [a]dverse [e]ffects of climate change, and injury to the plaintiff and people like him.

[72] The relief sought is cast in similar terms to that sought for the first cause of action.

Strike out

[73] As we have noted, the respondents applied to strike out Mr Smith's proceeding on the basis that it raises no reasonably arguable cause of action.

General principles

[74] Rule 15.1(1)(a) of the High Court Rules 2016 provides that the court may strike out all or part of a pleading if it "discloses no reasonably arguable cause of action". Addressing that provision, the Court of Appeal said:[99]

> [38] We [address each cause of action] through the lens of well-established strike out principles. 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. We must also be mindful of the well established principle that if any deficiencies can be cured by an amendment to the

[99] Footnotes omitted.

> pleadings, allowing the claim to proceed on condition the necessary amendments are made, is preferable to strike out.

[75] Mr Smith accepts that to be a correct statement of principle, drawing as it does directly on the decision of the Court of Appeal in *Attorney-General v Prince*, delivered a quarter-century ago.[100] But he complains the Court did not apply it correctly.

[76] Our focus here is on this passage in the reasoning above: "We must be certain the claim is so untenable it cannot succeed and slow to strike out claims in any developing area of law." In *Prince*, the Court of Appeal explained that last principle as follows:[101]

> It is only where, on the facts alleged in the statement of claim, and however broadly they are stated, no private law claim of the kind or kinds advanced can succeed that it is appropriate to strike out the proceedings at a preliminary stage. And in that assessment the public policy considerations must be solidly founded in the relevant legislation, other relevant material, or the experience of the Courts.

As the Court went on to say, in some cases aspects of policy may require the kind of analysis and testing of expert evidence, including evidence of economic and social analysis, that is available only at trial. In other cases, however, policy considerations are patent—explicit or implicit in the relevant legislation or reflected in other areas of the law.[102] Alternatively, a court may feel the considerations are readily identifiable and capable of evaluation without the testing of evidence at trial.[103]

[77] In some cases, summary resolution may be appropriate, despite the novelty of the claim. In *Burns v National Bank of New Zealand Ltd*, the Court of Appeal felt able to strike out a novel claim for "spoliation".[104] This cause of action, concerning alleged destruction or concealment of documentary evidence in litigation, found some support in Canada and some states in the United States. It had not been recognised in either the United Kingdom or Australia. In declining to recognise it in this jurisdiction, the Court of Appeal noted that remedies already exist to address the same conduct—under the High Court Rules, law of contempt of court, professional disciplinary rules and

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100 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA).
101 At 267 per Richardson P, Thomas and Keith JJ, 285 per Henry J and 291 per Tipping J.
102 At 267 per Richardson P, Thomas and Keith JJ, 285 per Henry J and 291 per Tipping J.
103 At 267–268 per Richardson P, Thomas and Keith JJ, 285 per Henry J and 291 per Tipping J.
104 *Burns v National Bank of New Zealand Ltd* [2004] 3 NZLR 289 (CA).

criminal law—and the case for recognition of the new tort was not made out.[105] The Court noted:[106]

> This case is distinct from, say, a negligence claim alleging a novel duty of care where the exact relationship between the parties is required to be determined in order to decide whether a duty should be imposed.

[78] A decade after *Prince* this Court endorsed the approach taken in that case. *Couch v Attorney-General* dealt with a relatively novel duty of care alleging responsibility on the part of the Department of Corrections for the supervision of a paroled violent offender who had been assessed by the Probation Service psychologists as having a high risk of reoffending.[107] The Attorney-General's strike out application succeeded in the Court of Appeal. This Court unanimously allowed the plaintiff's appeal.

[79] Blanchard, Tipping and McGrath JJ concluded that "the case should be allowed to go to trial, unless as a matter of law the pleaded facts are incapable of giving rise to the duty of care asserted".[108] Discussing the relevance of policy matters at this point of the proceedings, they said:[109]

> The claim should be struck out on the ground that policy militates against a duty of care only if, at this stage of the proceedings, it can be said that this is undoubtedly so. Claims in tort relying on breach of a duty of care have of course been struck out in the past on this basis. But everything depends on the circumstances and, in particular, on whether it is necessary or desirable for the case to go to trial to enable a fair and fully informed policy determination to be made.

[80] That case involved a balance between two main policy considerations: protection of citizens and rehabilitation of offenders.[110] While the policy arguments against imposing a duty of care had force, they could not be said to preclude a duty of care pre-emptively.[111] Even though the policy arguments for both sides were capable of being weighed up on an abstract basis, it was "necessary and, if not necessary,

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105 At [74], [80] and [91].
106 At [89].
107 *Couch*, above n 92.
108 At [118].
109 At [126].
110 At [128] per Blanchard, Tipping and McGrath JJ.
111 At [129] per Blanchard, Tipping and McGrath JJ.

desirable to make the ultimate determination when all relevant facts ha[d] been examined and conclusions [could] be reached upon them".[112]

[81] Concurring, but writing separately, Elias CJ and Anderson J noted that:[113]

> [32] It is often not easy to decide whether a duty of care not previously recognised by authority is owed to the plaintiff, as Woodhouse J in *Takaro*[114] acknowledged and as is amply demonstrated on the authorities. It may be unrealistic to expect that the pleadings and arguments to support a claim will always be adequate at an early stage of the proceedings. Caution in disposing of such cases on a summary basis is necessary both to prevent injustice to claimants and to avoid skewing the law with confident propositions of legal principle or assumptions about policy considerations, undisciplined by facts.
>
> [33] It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed. The case must be "so certainly or clearly bad" that it should be precluded from going forward. Particular care is required in areas where the law is confused or developing. …

[82] Elias CJ and Anderson J referred to the decision of the House of Lords in *X (Minors) v Bedfordshire County Council* where Lord Browne-Wilkinson (with whom the other Judges agreed) observed that where "the law is not settled but is in a state of development … it is normally inappropriate to decide novel questions on hypothetical facts"—and particularly so where the question is whether a common law duty of care exists.[115] Lord Browne-Wilkinson went on to note it might be otherwise if evident that, whatever the facts, no duty could exist. But if, on the facts alleged, it was not possible to give a certain answer whether the claim was maintainable, it would not be appropriate to strike it out.[116]

Our approach

[83] These authorities articulate what are long-established principles: a measured approach to strike out is appropriate where a claim—whether in negligence, nuisance or otherwise—is novel, but at least founded on seriously arguable non-trivial harm. That is so even if attribution to individual respondents remains difficult. In such a

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112 At [130] per Blanchard, Tipping and McGrath JJ.
113 Footnotes omitted.
114 *Takaro Properties Ltd (in rec) v Rowling* [1978] 2 NZLR 314 (CA).
115 *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (HL) at 740–741.
116 At 741.

case the common law should lean towards receipt of the claim, and full evaluation based on evidence and argument at trial, over pre-emptive elimination.

[84] Such an approach is consistent with fully informed access to civil justice by those who have a tenable case that they have been harmed, and who will otherwise go without remedy based on a pre-emptive evaluation only. And, as was observed in *Couch*, a refusal to strike out a cause of action "says little about its eventual merit".[117] That is to say, it is not a commentary on whether or not the claim will ultimately succeed.

[85] Pre-emptive elimination is only appropriate where it can be said that whatever the facts proved, or arguments and policy considerations advanced at trial, a case is bound to fail.

Are common law actions over GHG emissions excluded by statute?

[86] We deal with this question first, because if the respondents are correct that the statutory scheme displaces the operation of the common law, that is dispositive of the appeal—none of the causes of action could succeed and the claim would have to be struck out.

[87] The High Court Judge considered one of the policy factors that negated the imposition of a duty of care was that the alleged duty was "inconsistent with Parliament's regulation of emissions".[118] The Judge continued:[119]

> Recognising a liability in negligence would potentially compromise Parliament's response, and would require the Courts to engage in complex polycentric issues, which are more appropriately left to Parliament. It is an area where the authority of Parliament should be respected. This is not to say that climate change is a "no go" area. Rather, the better course is for aggrieved victims of climate change to seek to hold the Government responsible. The provisions of s 5ZM of the [CCRA] … are directly in point.

[88] The Court of Appeal agreed, holding that a critical factor telling against the imposition of a duty of care was the "existence of international obligations and a

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117 *Couch*, above n 92, at [37] per Elias CJ and Anderson J.
118 HC judgment, above n 4, at [98](e).
119 At [98](f) (footnotes omitted).

comprehensive legislative framework", and that to "superimpose a common law duty of care [was] likely to cut across that framework, not enhance or supplement it".[120]

[89] Speaking more generally, the Court of Appeal was also of the view that Mr Smith's claims were "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".[121] Private litigation could mean emitters are required to "comply with requirements that are more stringent than those imposed by statute".[122] The Court's role was instead to "[support] and [enforce] the statutory scheme for climate change responses and [hold] the Government to account".[123]

Submissions

[90] Counsel for Mr Smith submitted that his claim does not cut across New Zealand's international commitments or domestic climate policies but rather supports them. A finding that there can never be tortious liability connected to GHG emissions cuts across the statutory scheme because it takes away a mechanism that could contribute to those reductions. There is nothing uncommon in using tort law to support statutory regulation.[124] Moreover, the CCRA and ETS do not "permit" emissions, a point we will discuss further below.[125] And finally, a number of the respondents do not have obligations, or have limited obligations, under the ETS. This means the CCRA is not a complete answer.

[91] Mr Kalderimis and Ms Swan, for the respondents, submitted that the pleaded claim invites judicial criticism of the efficacy of that statutory framework, and requires the creation of a parallel, and inconsistent, regulatory regime. Mr Smith's claim would render some respondents liable in tort despite compliance with the ETS, or despite not

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120 CA judgment, above n 5, at [116]. These sentiments were also reflected by the United States Federal Court of Appeals (2nd Circuit) in *City of New York v Chevron Corp* 993 F 3d 81 (2d Cir 2021), where that Court found that the Federal Clean Air Act 42 USC § 7401 displaced the common law in so far as control of GHGs was concerned.

121 At [33].

122 At [33].

123 At [35].

124 Mr Smith gives the example of tortious liability running alongside the disciplinary regime in the Lawyers and Conveyancers Act 2006.

125 See below at [99].

being subject to the ETS. And, they say, it risks distorting the market-based operation of the ETS by targeting only selected emitters.

Our assessment

[92] Statute law has been active in New Zealand in displacing or modifying the application of the common law of torts.[126] To state the obvious, statutory reform alters context, and may thereby necessitate reform of existing and related common law principles.[127] In that instance, statute's impact is indirect. Some statutory reforms may however displace tort directly.

[93] The best-known (and most dramatic) example is the Accident Compensation Act 2001 (and its predecessor Acts) proscribing claims for damages for personal injuries covered by the legislative compensation scheme. Exemplary damages were retained to perform tort law's deterrent function, and in the workplace context, the Health and Safety at Work Act 2015 supplies the missing deterrent function in the absence of workplace personal injury liability.[128]

[94] There are also other important, targeted examples: statutory immunities in the Biosecurity Act 1993 in favour of biosecurity officials barred the claim by kiwifruit growers against the Crown in *Attorney-General v Strathboss Kiwifruit Ltd.*[129] Statutory immunities of varying extent in favour of persons undertaking statutory functions can be found throughout New Zealand legislation.[130] A rather different example of a proscriptive statutory provision is to be found in the Harmful Digital

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126 Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at 19. Professor John Burrows KC has observed that the common law and statute occasionally overlap, sometimes with a "jagged and awkward" interface, and at other times they run in parallel. The common law has shown "remarkable vitality" in the face of areas already regulated by statute: John Burrows "Common Law among the Statutes: The Lord Cooke Lecture 2007" (2008) 39 VUWLR 401 at 410–411.

127 Lord Sales "Exploring the Interface Between the Common Law of Tort and Statute Law" (Annual Richard Davies Lecture, London, 29 November 2023).

128 Early on, the Court of Appeal determined that personal injury claims for exemplary damages could still be brought: *Donselaar v Donselaar* [1982] 1 NZLR 97 (CA). See now: Accident Compensation Act 2001, s 319.

129 Section 163; and *Attorney-General v Strathboss Kiwifruit Ltd* [2020] NZCA 98, [2020] 3 NZLR 247 at [124]–[147].

130 See the discussion in *Strathboss Kiwifruit Ltd*, above n 129, at [138].

Communications Act 2015, which prevents civil (and criminal) actions being brought against an online content host if it takes certain action in responding to a complaint.[131]

[95] But statutory reform may also supplement common law causes of action in a way that has a partial but significant displacement effect. The RMA is a good example of this effect, and, as summarised above, it has particular relevance to climate change issues. The RMA regulates the environmental effects of human activity and, conversely, mitigation of the effects of environmental processes on humans. It does this through environmental policies, standards, and rules, and through local authority consenting functions. These controls tend to reduce, but not completely remove, the potential for nuisance and the need for resort to environmental tort actions. The RMA also provides enforcement controls in relation to environmental effects. These perform the same function as actions in nuisance did historically. For example, s 17 entitles local authorities and the EPA (through abatement notices) or the Environment Court (through enforcements orders) to prevent any person from doing anything where its effect on the environment "is or is likely to be noxious, dangerous, offensive, or objectionable". Only enforcement officers[132] can issue abatement notices, but private parties may apply to the Environment Court for an enforcement order under ss 17 and 316(1).

[96] Yet, although Parliament saw fit to make the RMA enforcement regime accessible to public authorities and private citizens, s 23 expressly preserves access to common law rights of action:

> **23 Other legal requirements not affected**
>
> (1) Compliance with this Act does not remove the need to comply with all other applicable legislation and other rules of law.
>
> (2) The duties and restrictions described in this Part shall only be enforceable against any person through the provisions of this Act; and no person shall be liable to any other person for a breach of any such duty or restriction except in accordance with the provisions of this Act.

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131 Section 24.

132 An "enforcement officer" is defined in s 2(1) (so far as is relevant for the purposes of s 17) as an "enforcement officer authorised under section 38 or 343I". Section 38 empowers local authorities to authorise their officers to carry out the functions and powers of an enforcement officer. Section 343I empowers the EPA to authorise a person to be an enforcement officer for the purpose of carrying out its enforcement functions under the RMA.

> (3) Nothing in subsection (2) limits or affects any right of action which any person may have independently of the provisions of this Act.

This is perhaps unsurprising given the antiquity of environmental nuisance actions and the continuing resort to them.[133]

[97] What then is the effect of the CCRA on tort actions? Was the former intended to exclude the latter? Unless there is reasonably clear language in the CCRA to that effect, or it is a necessary implication of the CCRA's operation, that seems inherently unlikely for two reasons.

[98] First, as this Court said in the *Sunset Terraces* case, in the context of the Building Act 1991:[134]

> [25] Nothing in the 1991 Act signalled with the necessary clarity that the Act was intended to remove the common law duty affirmed in *Hamlin*. … What is clear is that the common law duty was not expressly removed. Nor can it be said that the duty was removed by necessary implication. If Parliament had meant to achieve the outcome for which the Council contended, it would have done so in clear and unmistakeable terms.

Similarly, Tipping J remarked in *Hosking v Runting*, in the context of the Privacy Act 1993:[135]

> [228] If Parliament wishes a particular field to be covered entirely by an enactment, and to be otherwise a no-go area for the Courts, it would need to make the restriction clear. I am unpersuaded by the view that if Parliament has only gone so far, this is an implicit message to the Courts to stay their hands. Any such implication would have to be both clear and necessary … Here the posited implication is far from clear or necessary.

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133 See, for example, *Hawkes Bay Protein Ltd v Davidson* [2003] 1 NZLR 536 (HC); and *Semple v Wilson* [2018] NZHC 992, [2018] NZAR 1025.

134 *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 [*Sunset Terraces*] per Blanchard, Tipping, McGrath and Anderson JJ. See also *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

135 *Hosking v Runting* [2005] 1 NZLR 1 (CA). In Andrew Burrows "The Relationship Between Common Law and Statute Law in the Law of Obligations" (2012) 128 LQR 232 at 239, he observed that, "given that the common law is a carefully developed evolutionary system of law, the default position should be that, unless the exclusion of the common law is express or is very clearly implied, there should be no such exclusion".

This is entirely orthodox. Lord Reid expressed the point in similar terms in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG*:[136]

> There is a presumption which can be stated in various ways. One is that in the absence of any clear indication to the contrary Parliament can be presumed not to have altered the common law further than was necessary to remedy the "mischief."

[99] Second, as we have noted, the ETS neither authorises nor immunises GHG emissions. It merely facilitates state-introduced market signals via a trading scheme in emissions units. There is provision in the CCRA for fines and other sanctions for failing to register as a participant, for under reporting emissions or for holding insufficient emissions units,[137] but there is no power in the EPA or any other CCRA agency to forbid an emitter from discharging GHGs for want of emissions units. In fact, as already discussed, policing the actual environmental effects of the activities of individual emitters is primarily the province of the RMA, not the CCRA.

[100] The last point is important to grasp. The CCRA does not purport to cover the entire field. It is a companion measure designed to operate alongside the RMA in relation to GHG emissions. As we noted at [47], RMA amendments in 2004 and 2022 required all decision-makers to have particular regard to the effects of climate change, and regional and local authorities to have regard to CCRA emissions reduction plans and national adaptation plans. We also referred to the recent NES on GHG emissions, which provides for consent authority control of GHGs emitted by industrial process heat devices such as boilers and furnaces.[138] At the risk of labouring the point, resort to common law actions in relation to adverse environmental effects is expressly preserved in the RMA within this overlapping system of legislative controls. Parliament has not pre-emptively excluded a common law response to damage caused by GHG emissions. On the contrary, it has retained that possibility.

[101] There is therefore no basis to conclude that Parliament has displaced the law of torts in the realm of climate change in New Zealand. Rather, it has left a pathway

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136 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 (HL) at 614. See also Lord Hutton's observations in *Regina (Rottman) v Commissioner of Police of the Metropolis* [2002] UKHL 20, [2002] 2 AC 692 at 720.

137 See generally s 129 of the CCRA and the Climate Change Response (Infringement Offences) Regulations 2021, made under s 30M of the CCRA.

138 GHG emissions NES, above n 87.

open for the common law to operate, develop and evolve (if that is thought to be required in this case) amid a statutory landscape that does not displace the common law by the interposition of permits, immunities, policies, rules and resource consents.[139]

Is the public nuisance claim bound to fail?

[102] The question we address here is whether it can be said that, whatever the facts proved or policy arguments advanced at trial, the pleaded public nuisance claim is bound to fail.

Evolution and elements of the tort

[103] In the early years of the common law, it became clear that there were socially objectionable actions and omissions that could not found a private nuisance action because the harm was suffered by a "community as a whole rather than by individual victims and because members of the public suffered injury to their rights as such rather than as private owners or occupiers".[140] As a result, conduct of this nature began to be treated as criminal.[141] The Star Chamber, and later the King's Bench and its successors, held the "residual power to punish any misconduct that threatened the public good".[142] Thus the term "public nuisance" (or common nuisance) came to be used to describe the power of these courts to punish behaviour which was harmful to the public.[143]

[104] The offence of public nuisance was concerned with actions or omissions that obstructed or caused "inconvenience or damage to the public in the exercise of rights

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139 That is not to say that the statutory regime cannot be called upon by the parties at trial in framing the common law pathway and its remedies.

140 *Regina v Rimmington* [2005] UKHL 63, [2006] 1 AC 459 at [6] per Lord Bingham.

141 At [6] per Lord Bingham. The "court leet" was one forum in which this assortment of offences was dealt with: JR Spencer "Public Nuisance—A Critical Examination" (1989) 48 CLJ 55 at 59–60.

142 Spencer, above n 141, at 61.

143 At 63. The examples referred to by Spencer (at 63, n 32) include "concealment of treasure trove, digging up the wall of a church, making off with the property of a Royal foundation; and also stopping up the highway". See also William Hawkins *A Treatise of the Pleas of the Crown: Or a System of the Principal Matters relating to that Subject, digested under their proper Heads* (printed by Eliz Nutt for J Walthoe, London, 1716) vol 1. Hawkins defined a common nuisance as "an offence against the public, either by doing a thing which tends to the annoyance of all the King's subjects, or by neglecting to do a thing which the common good requires" (at 197, spelling and grammar updated to reflect modern usage).

common to all His Majesty's subjects".[144] It was traditionally used to deal with the obstruction of public highways and rivers, and activities that caused a loss of amenity in a neighbourhood (for example through noises or smells).[145] It was often invoked to prosecute harms to the community that were otherwise not punishable.[146]

[105] The reach of public nuisance remained "exclusively criminal" until the 16th century.[147] The transformative case, an anonymous 1535 decision published in the Yearbooks, involved a plaintiff who could not access his close due to a blocked highway.[148] Fitzherbert J concluded that a plaintiff who "has suffered greater hurt or inconvenience than the generality have … can have an action to recover the damage which he has by reason of this special hurt".[149] This approach to public nuisance, which became known as the "special damage" rule, was adopted expressly in New Zealand in 1869 in *Mayor of Kaiapoi v Beswick*.[150]

[106] The first reported attempt to obtain an injunction to restrain a public nuisance seems to have occurred in the 1752 decision *Baines v Baker*.[151] There, the plaintiff sought to stop the building of an inoculation hospital for smallpox. He lived nearby and was concerned about catching the disease. The Lord Chancellor denied the injunction, in part because the case should have been an "information in the name of the Attorney-General".[152] Leaving redress for public nuisances to the

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144 James Fitzjames Stephen and Lewis Frederick Sturge *A Digest of the Criminal Law (Indictable Offences)* (9th ed, Sweet & Maxwell, London, 1950) at 179 (cited with approval in *Rimmington*, above n 140, at [10] and [36] per Lord Bingham and [45] per Lord Rodger). This definition is unchanged from the original definition provided in the first edition published in 1877: *Rimmington*, above n 140, at [10] per Lord Bingham. See also Bill Atkin "Nuisance" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) 579 at 644–645.

145 Law Commission (of England and Wales) *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com No 358, 4 June 2015) at [2.21].

146 John Murphy *The Law of Nuisance* (Oxford University Press, Oxford, 2010) at [7.14] citing, among other things, *Rex v Crunden* (1809) 2 Camp 89, 170 ER 1091.

147 Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (10th ed, Thomson Reuters, Sydney, 2011) [Fleming] at [21.20].

148 *Anonymous* (1535) YB Mich 27 Hen 8, f 27, pl 10 (cited in CHS Fifoot *History and Sources of the Common Law: Tort and Contract* (Stevens & Sons, London, 1949) at 98).

149 Fifoot, above n 148, at 98. Baldwin CJ denied the claim but it was Fitzherbert J who was later followed: William L Prosser "Private Action for Public Nuisance" (1966) 52 Va L Rev 997 at 1005 citing, among other things, *Rose v Miles* (1815) 4 M & S 101, 105 ER 773 (KB).

150 *Mayor of Kaiapoi v Beswick* (1869) 1 NZCA 192. Arney CJ, for instance, canvassed the English case law before summarising it in this way (at 207): "In all these examples the damage was particular, direct, and following upon the individual immediately from the obstruction".

151 Spencer, above n 141, at 67. See *Baines v Baker* (1752) 3 Atk 750, 27 ER 105 (Ch) at 106.

152 *Baines*, above n 151, at 106. See also Spencer, above n 141, at 67.

Attorney-General as the public representative was historically justified on the basis that:[153]

> … common [nuisances] are such inconvenient or troublesome offences, as annoy the whole community in general, and not merely some particular person; and … it would be unreasonable to multiply suits, by giving every man a separate right of action.

[107] Common law crimes were abolished in New Zealand in the Criminal Code Act 1893.[154] The statutory offence of criminal nuisance established by that same Act was significantly retrenched by the addition of a knowledge requirement in the Crimes Act 1961.[155] Neither development was "treated as removing the jurisprudential foundation of the tort of public nuisance" in New Zealand, which survives as a "self-sustaining common law action".[156]

[108] The leading authority in New Zealand on public nuisance—*Attorney-General v Abraham and Williams Ltd*, which concerned noise, odour and pests emitted from a long-established insanitary stockyard in a once-rural, suburbanised location—was delivered by the Court of Appeal almost 75 years ago.[157] Most of the case law cited within it was English. O'Leary CJ posed the core issue on appeal in these terms:[158]

> … whether the yards do constitute a public nuisance, which, of course, in brief terms means that there are acts or omissions which endanger the lives, safety, health, property, or comfort of the public. The escape of deleterious things, such as smells, noxious air, noises, and the like, clearly constitutes a nuisance.

[109] The principal English authority on public nuisance is now *Regina v Rimmington*.[159] Lord Bingham gave the leading speech, in which he canvassed a variety of different formulations of the criminal offence of public nuisance

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153 William Blackstone *Commentaries on the Laws of England: Book the Fourth – A Reprint of the First Edition with Supplement* (Dawsons of Pall Mall, London, 1966) at 167.

154 Criminal Code Act 1893, s 6. See now s 9(1) of the Crimes Act 1961.

155 Compare Crimes Act 1961, s 145 with Criminal Code Act, s 140; and Crimes Act 1908, s 158.

156 Atkin, above n 144, at [9.3.1]. See, for example, *Attorney-General v Abraham and Williams Ltd* [1949] NZLR 461 (CA); *Amalgamated Theatres Ltd v Charles S Luney Ltd* [1962] NZLR 226 (SC); *Hankins v The King* (1905) 25 NZLR 787 (CA); and *Lower Hutt City Council v Attorney-General ex rel Moulder* [1977] 1 NZLR 184 (CA).

157 *Abraham and Williams Ltd*, above n 156.

158 At 473.

159 *Rimmington*, above n 140. See also *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169 (CA), which Lord Bingham in *Rimmington* called the "leading modern authority on public nuisance" (at [18]); and *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* [1967] 1 AC 617 (PC) [*The Wagon Mound (No 2)*].

before arriving at the definition in *Archbold: Criminal Pleading, Evidence and Practice*:[160]

> … 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 action 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 …

Although expressed in a criminal context, it is now widely acknowledged that the analysis applies also to civil claims.

[110] Thus stated, the tort of public nuisance is subject to a number of important limits particular to it. First, while the tort is one of strict liability, meaning negligence is not required, a defendant will only be liable if the kind of harm suffered was a reasonably foreseeable consequence of the defendant's conduct, meaning there was a real risk of damage.[161]

[111] Second, the defendant's act or omission must substantially and unreasonably interfere with public rights.[162] As to the need for an unreasonable interference, Romer LJ observed, in the context of a footpath obstruction case, that the "law relating to the user of highways is in truth the law of give and take".[163] The Court of Appeal in the present case observed that the two elements—"substantially and unreasonably"—are conjunctive,[164] a point also made by this Court in *Wu v Body*

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160 This is from the current edition: see Mark Lucraft (ed) *Archbold 2024* (Sweet & Maxwell, London, 2024) at [31-40]. At the time of *Rimmington*, the *Archbold* formulation was identical save that it read "life, health, property, *morals* or comfort". The House of Lords rejected the reference to morals (at [10] and [36] per Lord Bingham and [45] per Lord Rodger), and it is no longer included in the *Archbold* formulation. The remainder of the formulation was described as "clear, precise, adequately defined and based on a discernible rational principle" (at [36] per Lord Bingham).

161 *Hamilton v Papakura District Council* [2002] UKPC 9, [2002] 3 NZLR 308 at [39] per Lord Nicholls, Sir Andrew Leggatt and Sir Kenneth Keith referring to *The Wagon Mound (No 2)*, above n 159, at 639–640.

162 *Harper v G N Haden and Sons Ltd* [1933] Ch 298 (CA) at 304 per Lord Hanworth MR; Fleming, above n 147, at [21.50]; and Allen M Linden and others *Canadian Tort Law* (12th ed, LexisNexis, Toronto, 2022) at 573–574.

163 *Harper*, above n 162, at 320.

164 CA judgment, above n 5, at [41].

Corporate 36661, a private nuisance case.[165] But in *Fearn v Board of Trustees of the Tate Gallery*, the United Kingdom Supreme Court held, in the context of private nuisance at least, that the unreasonableness element added nothing of substance to the evaluative process.[166] The leading public nuisance cases, *Rimmington* and, in New Zealand, *Abraham and Williams Ltd*, remain opaque on whether an unreasonableness requirement adds ballast or not. That question remains one for judicial determination in New Zealand in due course.

[112] Third, the tort does not generally depend on any particular person suffering damage. However, private actionability may be limited to persons who can demonstrate they have suffered some damage particular to them arising from the interference. This is the so-called "special damage" rule, and we return to it later in this judgment.[167]

[113] A fourth particular limit arguably may exist: that of independent illegality (that is, illegality apart from the tort itself). For reasons given later, we conclude that limit does not apply in New Zealand.[168]

High Court and Court of Appeal

[114] In the High Court, Wylie J concluded four fundamental obstacles lay in the way of the tenability of the public nuisance claim. First, the damage claimed by Mr Smith was neither particular nor direct, and not appreciably more serious or substantial in degree than that suffered by the public generally.[169] It may be suffered by many others, including iwi, hapū and other landowners and members of the public who live in or use the coastal marine area around New Zealand. Second, the pleaded harm was consequential and not the direct result of the respondents' activities.[170] As the Judge put it, even if Mr Smith were to obtain the relief he sought, it would not

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165 *Wu v Body Corporate 366611* [2014] NZSC 137, [2015] 1 NZLR 215, where it was noted that "[o]ften the concepts of substantial and unreasonable will overlap" (at [130], n 117 per Elias CJ, McGrath, Glazebrook and Tipping JJ).

166 *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4, [2024] AC 1 at [18]–[21] per Lord Leggatt SCJ (with whom Lord Reed P and Lord Lloyd-Jones SCJ agreed).

167 See above at [105] and below at [148]–[152].

168 See below at [146]–[147].

169 HC judgment, above n 4, at [62].

170 At [63].

prevent the damage he claimed he would suffer. Mr Smith did not and could not plead that but for the respondents' activities, he would not suffer the claimed damage.[171] Third, the underlying acts or omissions of the respondents were lawful, because they complied with all relevant statutory and regulatory requirements.[172] Contrary to Mr Smith's submission, there was a requirement for independent unlawfulness. Finally, there were also significant problems with the relief sought.[173]

[115] The Court of Appeal analysed Mr Smith's public nuisance claim by reference to four questions:

(a) whether actionable public rights were pleaded;

(b) whether independent illegality was required;

(c) whether the special damage rule was met or required; and

(d) whether there was a "sufficient connection" between the pleaded harm and the respondents' activities.

Ultimately it found for Mr Smith on the first two questions, and for the respondents on the last two. As we consider those were the correct questions to address, we will apply the same framework later in this judgment.[174]

[116] The Court of Appeal's analysis began with the observation that it was "fair to describe the law of public nuisance as lacking some precision".[175] This was 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".[176]

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171 At [67].
172 At [69].
173 At [73] and [105]–[108].
174 Beginning below at [143].
175 CA judgment, above n 5, at [58].
176 At [58] (footnote omitted).

[117] On the first question, the Court concluded that a nuisance was public if either or both of the following conditions were satisfied:[177]

(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.

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

The former, particularly, related to acts which endangered the life, health, property, or comfort of the public. On that basis, the rights pleaded in the statement of claim appeared to be consistent with the tort of public nuisance, and it was not necessary to plead them as established public rights.

[118] On the second question, the Court of Appeal disagreed with the High Court Judge's assessment that the interference with the public right must be independently unlawful, in addition to interfering with public rights.[178] It said:[179]

> 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.

[119] On the third question, the Court of Appeal said that it was willing to adopt the "most liberal formulation of the special damage rule" and therefore only looked to see whether the pleaded harm was capable of being viewed as appreciably exceeding that suffered by the general public.[180] The Court concluded:[181]

> In our view the harm suffered by those interests [Mr Smith claims to represent] 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.

The Court went on to observe that in very many places throughout New Zealand there would be sites of historical, nutritional, spiritual and cultural significance at risk or

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177 At [67]. See generally at [60]–[68].
178 See generally at [69]–[74].
179 At [72].
180 At [82]. See generally at [75]–[87].
181 At [82].

under threat, and the harm there was substantially the same. That was not a contestable fact, and not something that could be overcome by re-pleading or involving concepts of tikanga.

[120] The Court acknowledged that the special damage rule had been criticised by some commentators but did not reach a conclusion as to whether it should be retained. That was because it was satisfied that, even if the rule were abolished, the claim in public nuisance was "still doomed to fail" and should therefore be struck out for reasons we now explain.[182]

[121] Finally, the Court of Appeal concluded that a fatal obstacle lying in the path of Mr Smith was the lack of a sufficient connection between the pleaded harm and the respondents' activities.[183] The Court continued:

> [92] … All of the cases which have invoked this aggregation principle [the proposition that a defendant will not be exempted from liability on the grounds that they were simply one of many causing a nuisance] 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.
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> [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.

Submissions

[122] We now review the key submissions made to us.

(a) For Mr Smith

[123] In terms of the first question, Mr Bullock argued that the Court of Appeal was right to find that Mr Smith's claim involved a tenable interference with public rights. Further, it was also right to find that interferences with rights pleaded in the claim were

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182 At [87].
183 See generally at [88]–[93].

tenable foundations for a claim in public nuisance and consistent with general formulations of the tort of public nuisance. He submitted that the pleaded conduct is tenably a public nuisance either because it unreasonably causes or contributes to widespread harm that materially affects the reasonable comfort or convenience of the public (including Mr Smith)—a question of fact and tenable on the pleaded claim—and/or that there is a common law public right "requiring those using the atmosphere to dispose of their GHGs in a manner that does not interfere with the continued existence of a safe and habitable climate system". This latter option was said to be a logical extension of recognised common law public rights to access roads, fisheries and watercourses.[184] Protection of a safe and habitable climate system was also said to be essential to, and a prior condition of, the exercise of all other common law rights.

[124] On the second question, Mr Bullock submitted that the Court of Appeal was plainly right to reject a requirement for independent illegality. Such a requirement was said to have been rejected by leading texts and the England and Wales Law Commission.[185]

[125] On the third question, Mr Bullock noted that the common law has confined standing to bring private claims in public nuisance to only those who suffered a particular (or "special") injury from an interference with rights.[186] The concern was to ensure that only plaintiffs who had suffered an actual injury (including property damage and economic loss) from an interference with the public right could bring a claim. All a plaintiff must show is an injury that is "more than mere infringement of a theoretical right which the plaintiff shares with everyone else".[187] In view of these "well-established" principles, Mr Smith's claim to standing was said to be plainly tenable. Physical damage to property has always been sufficient particular damage to found standing for a claim in public nuisance. In the alternative, Mr Bullock submitted that this Court should either abolish or relax the special damage rule in this context.

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184 This submission drew on the scholarship of Arthur Ripstein *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press, Cambridge, 2009); and also JW Neyers "Reconceptualising the Tort of Public Nuisance" (2017) 76 CLJ 87.

185 Counsel cited, among other things, Murphy, above n 146, at 138; *Halsbury's Laws of England* (5th ed, 2018, online ed) vol 78 Nuisance at [105]; and Law Commission, above n 145, at [2.4].

186 Counsel cited, among other things, *Anonymous*, above n 148.

187 Counsel cited Fleming, above n 147, at 491.

[126] On the fourth question, Mr Bullock submitted that public nuisance is a tort engaging collective action problems. It often arises where the injury at issue was caused by "very many people in a small amount much like the case before the Court now". Mr Bullock submitted that it was important to recall that a public nuisance is established by a defendant's material contribution to a state of affairs that amounts to an unreasonable interference with a public right or with the comfort or convenience of a class of subjects. The relevant causal question is whether the defendant contributed to that rights-interfering state of affairs. A plaintiff does not need to prove that they were harmed *by the defendant* directly. All a plaintiff must establish is that they suffered a particular injury from the state of affairs to which the defendant contributed. Asked where this approach left the *de minimis* principle,[188] Mr Bullock submitted that only unreasonable users commit public nuisances.

[127] The Court of Appeal had acknowledged that there were a number of English cases standing for the proposition that a defendant will not be exempted from liability on the grounds that they were simply one of many causing a nuisance. That would be so even if the defendant's actions in isolation would not amount to a nuisance or of itself cause any harm—the nuisance consisting "in the aggregation".[189] The Court of Appeal accepted those principles could be part of New Zealand law, albeit they had not been explicitly endorsed.

[128] But Mr Bullock submitted that the Court of Appeal then erred in distinguishing those cases on the basis that they involved a finite number of known contributors to the harm, all of whom were before the Courts. He submitted that distinction does not bear scrutiny. There are numerous cases where defendants have been found to have caused a public nuisance for discharges into rivers, despite individual householders being the actual contributors of the discharge or the waterways having been polluted

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188 "De minimis", or "de minimis non curat lex", is a legal doctrine that translates as "the law cares not for small things". In the context of tort law, it means that a defendant cannot be said to have caused a harm if their contribution was so small as to be considered trivial: see Todd, above n 126, at [19.2.2].

189 CA judgment, above n 5, at [90].

by numerous other non-party sources (including other industrial users).[190] Mr Bullock submits that it is irrelevant that there are other contributors not before the Court, and that, if the respondents consider others should be put before the Court, it is open to them to join them. He concluded, on this point, "Mr Smith is entitled to restrain anyone doing him wrong, and he is not required to identify and restrain *everyone* doing so".

[129] Finally, on relief, counsel for Mr Smith submitted that the injunctions sought are effective and open to the court, the relief sought still enables policy questions to be left to the policy-makers, and declaratory relief is important even if an injunction is not granted.

[130] Ultimately, Mr Bullock submitted that policy concerns have never been a reason to deny a plaintiff recourse to the courts where public nuisance is alleged. The courts have long used the tort to address complex, polycentric and regulation-laden problems. The proper approach is to identify whether the plaintiff has been wronged and to grant relief. Policy implications can be tackled by the executive and the legislature. Injunctive relief might be suspended in anticipation of such action. But that is a matter for the trial judge.

(b) For the respondents

[131] We start by noting that, at a broad level, counsel for the respondents, led by Mr Kalderimis, submitted that the Court ought not to engage in a judicial response to climate change, because it is not equipped to design or implement one. The problem is polycentric and political; there are a broad range of interests and trade-offs at issue; and complex scientific and economic judgements are required.[191] They submit that

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190 Mr Bullock cited, for example, *Attorney-General v Leeds Corp* (1870) LR 5 Ch App 583 (Court of Appeal in Chancery); *Attorney-General v Colney Hatch Lunatic Asylum* (1868) LR 4 Ch App 146 (Court of Appeal in Chancery); *Rex v Neil* (1826) 2 Car & P 485, 172 ER 219; *Woodyear v Schaefer* 57 Md 1 (Court of Appeals of Maryland 1881); *Blair v Deakin* (1887) 57 LT 522 (Ch); *Crossley and Sons Ltd v Lightowler* (1867) LR 2 Ch App 478 (Court of Appeal in Chancery); *The Attorney-General for the Dominion of Canada v Ewen* (1895) 3 BCR 468 (BCSC); *Thorpe v Brumfitt* (1873) LR 8 Ch App 650 (Court of Appeal in Chancery); and *Lambton v Mellish* (1894) 3 Ch 163 (Ch).

191 Among other authorities, the respondents refer to the decision of the Federal Court of Australia, Full Court in *Minister for Environment v Sharma* [2022] FCAFC 35, (2022) 291 FCR 311 at [228] and [253]—a claim in negligence.

Mr Smith's claim is legally incoherent and would damage the integrity of tort law. Tort law is founded, they say, on a relational connection between plaintiff and tortfeasor.[192] Mr Smith's claim, involving no relationship with the respondents, "would do violence to New Zealand's law of obligations". It would abrogate "the relational underpinnings that are fundamental to tort law".[193] They argue that the fact that the appeal is to the courts' rights-protection function, rather than to the executive or legislative branches, should of itself be a warning sign. It is a departure from the common law's "incremental method of development", and an invitation to the judiciary to "rewrite the foundations of tort law, and to step beyond tort law and into the domain of the political branches". They contrast the development of the common law in invasion of privacy in *Hosking v Runting*,[194] which they say was a "logical development" from United States and British jurisprudence.

[132] Taking the first and second questions together, on the basis that they are related issues, Mr Kalderimis and Mr T D Smith submitted the Court of Appeal was wrong to accept that interests in "public health, property or comfort" are public rights protected by the law of public nuisance, without an identified, independent illegality. The cases involving a public nuisance are said to fall into two categories: (1) those involving a specific established public right, such as to navigation of the highway; and (2) those involving independently *unlawful* interferences to public health, safety or comfort. The latter also involve public rights, "as the public have a right in common to be free of the effects of unlawful conduct". The cases relied on by Mr Smith were said to involve interference with the use of a public highway or widespread private nuisances, themselves independently unlawful, or cases of public mischief.

[133] On the third question, counsel for the respondents submitted that the special damage rule is a long-established requirement and should be retained. Public rights are vested in the Attorney-General, which is a constitutional protection. They submit that although Mr Smith asserts that it is sufficient for him to have suffered an actual injury, that does not constitute special damage if others suffer the same harm, because

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192 Counsel cited *MacPherson v Buick Motor Co* 217 NY 382 (Court of Appeals of New York 1916) at 385, referred to in *M'Alister v Stevenson* [1932] AC 562 (HL) (commonly known as *Donoghue v Stevenson*).

193 Citing CA judgment, above n 5, at [113].

194 *Hosking v Runting*, above n 135, at [117] per Gault P and Blanchard J.

it is insufficiently particular. They submit Mr Smith's pleaded damage is not sufficiently particular or direct; it is no different in kind from damage that will be suffered by many thousands of others—and nor is it significantly different in degree. The respondents submit that if any public rights require vindication here, this should be done by the Attorney-General or through a relator action with the Attorney-General's consent.

[134] On the fourth question, Mr Kalderimis and Mr T D Smith submitted that the core of public nuisance lies where there is a clear analogy with private nuisance.[195] In this context, the requirement for "emanation"—transferral of the nuisance—creates a relational and causal connection between plaintiff and defendant, while enabling identification of a finite class of defendants over which the court could have jurisdiction.[196] Those defendants must have made a direct and serious contribution to the relevant harm. As climate change is a "phenomenon caused by the global combination of all emission activities over decades", the respondents' future net emissions, either individually or collectively, cannot be said to "cause the nuisance".

[135] Counsel for the respondents submitted that the factual and legal analogy between the 19th-century sewage cases and climate change is untenable. Counsel submitted those cases involved an emanation (1) physically traceable to the defendant, reflecting a close analogy with private nuisance or a direct obstruction of a right of way, so that an injunction would remove the emanation or obstruction; and (2) which was either itself a nuisance or substantially aggravated the interference with the plaintiff's rights.

[136] In contrast, the effects of climate change are the products of emissions from millions of sources, located globally, over many decades. The sewage cases involved established private or public rights, discrete and identifiable defendants subject to the courts' jurisdiction, a simple physical connection between the activities of the

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195 Counsel submitted that courts draw heavily on the more frequent private nuisance cases in considering public nuisance cases, citing as authority Spencer, above n 141, at 58; and Law Commission, above n 145, at [3.12].

196 Counsel emphasised the discussion of emanation by this Court in *Wu*, above n 165, at [122]–[124] per Elias CJ, McGrath, Glazebrook and Tipping JJ. Counsel also submitted that exceptions to a requirement for emanation were rare and concerned direct obstruction to the use and enjoyment of land.

defendant and the interference with the established rights, and a simple relationship between relief and abatement of the harm. None of these qualities, the respondents say, exist in the case of climate change and public nuisance.

[137] Counsel for the respondents submitted that indeterminacy issues arise by the very vagueness of a "materiality" threshold. The respondents are not responsible for at least 99.8 per cent of global emissions. Harm to Mr Smith will not be avoided if emitters elsewhere are permitted to emit at levels above the reductions said to be essential.[197] They submit there is no principled reason why materiality should be assessed by reference to New Zealand, rather than global, emissions. As Mr Kalderimis put it, none of the respondents are among the world's major emitters, and to capture them, Mr Smith would need to bring his claim against foreign corporations and state entities.

[138] Relatedly, counsel submitted that public and private nuisance claims do not extend to *suppliers* of products used to create a nuisance. In the present case those suppliers (and/or producers) are the respondents Z Energy, Channel Infrastructure and BT Mining. In this instance, the alleged nuisance is said to be caused by users of the products, rather than those respondents.[198] The respondents rely on overseas authorities that have struck out public and private nuisance claims in such cases.[199]

[139] Finally, on relief, the respondents submitted that the relief sought is contrived, which points to deeper problems with Mr Smith's claim. The fact that, on examination, the claim boils down to essentially symbolic relief indicates that the rights sought to be created are inconsistent with the law of private obligations.

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197 See above at [53].

198 BT Mining also made the point that the emissions complained of in relation to them occur exclusively overseas and that they did not exist until 2016. Channel Infrastructure argued that it was further removed than the other parties because it is simply a carrier of products.

199 Counsel cited, among other things, *Budden v BP Oil Ltd* (1980) 124 SJ 376 (CA); *Hoffman v Monsanto Canada Inc* 2005 SKQB 225, (2005) 15 CELR (3d) 42 (affirmed in 2007 SKCA 47, (2007) 283 DLR (4th) 190, and leave to appeal refused in [2007] SCCA 347); and *Re Syngenta AG Mir 162 Corn Litigation* 131 F Supp 3d 1177 (D Kan 2015).

(c) For the interveners

[140] On behalf of Lawyers for Climate Action, Ms Cooper KC submitted that Mr Smith's claims are arguable and should therefore go to trial. His claims were said to be based on the "unremarkable proposition" that those causing him harm should be held responsible. Ms Cooper submitted that one of the functions of tort law is to promote efficiency by requiring people to internalise the costs of harms from accidents and pollutants. To that end, holding a polluting factory owner responsible for damage the factory causes to the environment will encourage appropriate steps to be taken to reduce that damage. Absent liability, the factory owner would likely continue to damage the environment because the costs are externalised. There is an argument, it was said, that climate change is a paradigmatic case for tort law to make emitters bear the true costs of their GHG emissions and drive necessary steps to reduce GHG emissions.

[141] Ms Cooper submitted that climate change has much in common with the pollution nuisance cases relied on by Mr Smith, and that his claim falls within the orthodox principles of public nuisance. As to causation, Ms Cooper submitted that this Court should now recognise an alternative approach to causation whereby multiple contributors who factually contribute to a harm bear causal responsibility even if the harm would have occurred without that contributor's particular contribution. Ms Cooper submitted that even if this Court considers that "but for" causation is a requirement of the current law, it should expressly recognise that it is no longer required in cases such as Mr Smith's. Those who materially contribute to environmental harm should be responsible even if the harm would still have been suffered but for their individual contributions.

[142] Finally, on behalf of the Human Rights Commission, Mr Butler first submitted that development of the common law torts is an act done by the judicial branch of government of New Zealand, within the meaning of s 3(a) of the New Zealand Bill of Rights Act 1990 (NZBORA). The courts are therefore required to ensure that those torts are developed in a manner not inconsistent with the rights and freedoms protected by NZBORA. Here, at least the right not to be deprived of life in s 8 and the right of minorities to enjoy their culture in s 20 of NZBORA appeared to be engaged. Second,

Mr Butler submitted that even if s 3(a) is not engaged (or neither of the two rights is directly implicated), as a matter of common law methodology, the courts apply a strong presumption that New Zealand's domestic law, including the common law of torts, should be compatible with New Zealand's international obligations, including under both international human rights law and the international law of environmental protection. Third, Mr Butler submitted that, in any event, the Court might also have regard to relevant international materials and comparative jurisprudence relating to human-induced climate change, to the extent it assists the Court with its consideration of the present claim, particularly in considering a potential novel duty of care and potential recognition of a new tort.

Our assessment

[143] As noted earlier, we are satisfied that the four questions posed by the Court of Appeal—see at [115] above—are the right questions to address on strike out. But we are not satisfied that the Court reached the right conclusion on each of them. In the end, we consider the standard for strike out of this cause of action—the standard prescribed at [83]–[85] above—is not met. Because the matter must now proceed to trial and may yet return to us with the benefit of evidence and fuller argument, we must express our reasons succinctly. The test for strike out is either met or it is not. Here it is not, and Mr Smith now gets his day in court. Were this a substantive judgment, rather than an interlocutory appeal, we would say more. But we reiterate the point made above at [84]—a refusal to strike out a cause of action is not a commentary on whether or not the claim ultimately will succeed.

(a) The "first question": actionable public rights tenably pleaded

[144] We agree with the Court of Appeal's approach to the first question—whether actionable public rights are tenably pleaded. The Court concluded that a nuisance is public if it (1) affects 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); and/or (2) infringes rights belonging to the public as such.[200] That analysis drew on the approach taken by the House of Lords in *Rimmington*—

[200] CA judgment, above n 5, at [67].

which in turn drew on a definition of the "cognate offence" given by *Archbold.*[201] Thus expressed, they are alternative formulations.[202]

[145] For present purposes it is sufficient to observe that rights pleaded by Mr Smith—the rights to public health, public safety, public comfort, public convenience and public peace—fall tenably within (or bear sufficient relation to) the particular rights identified in *Rimmington* as providing foundation for a public nuisance pleading: i.e. public rights to life, health, property or comfort. Similar rights were relied on by our Court of Appeal in *Abraham and Williams Ltd*.[203]

(b) The "second question": independent illegality not required

[146] We turn now to the second question posed by the Court of Appeal—whether independent illegality is required. It will be recalled that the Court of Appeal concluded that it was not necessary for the act or omission to be in itself a legal wrong separate from the alleged nuisance, and that what mattered was that the act or omission caused common injury. This raises a question of law.

[147] Here English law is less relevant to the analysis, for the tort of public nuisance there arose (as we noted earlier) largely in lockstep with the parallel common law criminal offence. The criminal law of this country has been codified by statute for 130 years, since the Criminal Code Act 1893. We consider that parallel unlawfulness is not a prerequisite in New Zealand, and it may be doubted that it still is in England.[204] Nor is it readily apparent why, as a matter of policy, liability in tort for public nuisance—i.e. a substantial common injury to rights to life, health, property or comfort of the public—should need to be dependent on an alternative underlying illegality. The primary limit noted at [111] above still applies: the defendant's act or omission must substantially and unreasonably interfere with public rights before it is actionable. We agree, therefore, with the Court of Appeal's observation that what really matters is that the act or omission causes common injury. As that Court put it, "the focus as a

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201 *Rimmington*, above n 140, at [10] and [36] per Lord Bingham and [45] per Lord Rodger. See above at [109].

202 See Law Commission, above n 145, at [3.36].

203 *Abraham and Williams Ltd*, above n 156, at 484 per Gresson J.

204 *Halsbury's Laws of England*, above n 185, at [105]; Murphy, above n 146, at 138; and Law Commission, above n 145, at [2.4].

matter of principle is not on the legal character of the act or omission complained of but rather its adverse effect".[205] The tort can stand on its own two feet. Its development in New Zealand does not require the act or omission complained of to be independently unlawful.

(c) The "third question": special damage rule requires reconsideration

[148] We turn now to the special damage rule. Correctly for a strike out, the Court of Appeal said that it was willing to adopt the "most liberal formulation of the special damage rule" and would only look to see whether the pleaded harm was "capable of being viewed as appreciably exceeding that suffered by the general public".[206] However, the Court then took the view that the harm suffered by Mr Smith's interests did 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.[207]

[149] The special damage rule is a rule of standing. It is said to come down to a "simple question": whether the damage suffered by the plaintiff is different from that suffered by other members of the community.[208] Its justifications are broadly two: a proposition that relief for common injury should be in the hands of the Crown, and a concern about potential multiplicity of actions.[209] The former is logically connected to the 18th- and 19th-century connections made between the tort and crime of public nuisance, which no longer apply in New Zealand, and the latter concern predates 20th-century developments in class actions and case management. As the authors of *Fleming's The Law of Torts* suggest, the rationales for the standing rule are not now particularly convincing:[210]

> The mere fact that a great number of people have cause to complain is not otherwise recognised as a disqualification from bringing suit; indeed, if the complainants could establish their standing to sue for private nuisance, it would not matter how many there were who shared the same plight. Besides, the requirement ill befits our renewed consciousness for safeguarding the

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205 CA judgment, above n 5, at [72].
206 At [82].
207 See above at [119].
208 *Stein v Gonzales* (1985) 14 DLR (4th) 263 (BCSC) at 267–277.
209 See, for example, Fleming, above n 147, at 490.
210 At 490 (footnote omitted). See also Murphy, above n 146, at 144–147.

> environment and the desirability of encouraging private initiative against polluters.

[150] Modern authority suggests a rather more nuanced question than the "simple" question suggested above lies at the heart of the special damage rule. *Fleming's The Law of Torts* identifies a "clear modern tendency to reject the elusive distinction between difference in kind and in degree, and to allow recovery if the obstruction causes more than mere infringement of a theoretical right which the plaintiff shares with everyone else".[211] A similar point is made by the authors of *Fridman's The Law of Torts in Canada*:[212]

> Although arguments can be made in support of each view [whether difference in kind or in degree is required], [a] liberal approach to the special damage requirement [where a difference in degree suffices] is preferable. This is because it coheres better with the traditional understanding of the requirements of particularity and directness. The particularity requirement is best interpreted as requiring that an individual plaintiff bringing an action for public nuisance has suffered some loss over and above the mere interference with his or her rights as a member of the public, and this is captured by a difference in degree or extent rather than by a difference in kind. And the directness requirement, which can be traced back to *Ricket v Directors of the Metropolitan Railway Company*, is nothing but the requirement that the damages in question must flow from an interference with the plaintiff's exercise of his or her public rights, rather than from an interference with the public rights of somebody else. The directness requirement, in short, is a matter of privity.

[151] As noted, the authoritative requirement for special damage in New Zealand dates back to a 19th-century decision of the Court of Appeal, *Mayor of Kaiapoi v Beswick*.[213] Even then the Court of Appeal observed that "[t]o reconcile the authorities [on the special damage rule] would be difficult, perhaps impossible".[214] We consider the special damage rule requires reconsideration in a 21st century context, in which the implications of ubiquitous harms such as pollution (including from GHGs) are more evident and better understood, and in which class actions and active judicial case management have developed and are better able to meet fears of an oppressive multiplicity of actions. In public law, for instance, New Zealand takes a

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211 Fleming, above n 147, at 211.

212 Erika Chamberlain and Stephen GA Pitel (eds) *Fridman's The Law of Torts in Canada* (4th ed, Thomson Reuters, Toronto, 2020) at 238 (footnotes omitted) citing *Ricket v Metropolitan Railway Co* (1867) LR 2 HL 175 (HL).

213 *Beswick*, above n 150, at 207 per Arney CJ. Mr Bullock submitted that it is far from clear that *Beswick* remains good law, if it ever was.

214 At 206 per Arney CJ.

liberal approach to standing in cases involving the public interest.[215] Whether the special damage requirement, if such it be, should remain part of New Zealand law, and whether it should require difference in kind and/or degree from damage suffered by other members of the community generally, needs review in the context of full evidence and associated argument (including, as we note later, as to the implications of tikanga on such a requirement).[216]

[152] However, regardless of whether the standing rule is revoked, retained or reformed, we consider Mr Smith has a tenable claim to meeting its present requirements because of his pleading of damage to coastal land at Mahinepua C in which he and others he represents claim both a legal interest and distinct tikanga interests. If the interests of many others, whether proprietary or tikanga, are likewise affected, that may say more about the gravity of the alleged tort than the propriety of entertaining it. While the effects of human-caused climate change are ubiquitous and grave for humanity, their precise impact is distributed and different. The pleaded effects, including inundation of coastal land and impacts on fishing and cultural interests, go beyond a wholly common interference with public rights.

(d) The "fourth question": sufficient connection, or causation

[153] Finally, we turn to the question of sufficient connection, or causation. The Court of Appeal's conclusion on this issue—which it said presented a fatal obstacle for Mr Smith—is set out at paragraph [121] above.

[154] Ultimately, the Court of Appeal considered that "climate change simply cannot be appropriately or adequately addressed by common law tort claims". It was, it said, "quintessentially a matter that calls for a sophisticated regulatory response at a national level supported by international co-ordination".[217] It may indeed be beyond the capacity of the common law to resolve climate change in fact, but we are not presently convinced, at this stage of the proceeding, addressing only strike out, that the common law is incapable of addressing tortious aspects of climate change.

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215 See, for example, *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 3)* [1981] 1 NZLR 216 (CA); and *Budget Rent-A-Car Ltd v Auckland Regional Authority* [1985] 2 NZLR 414 (CA).

216 At [182] below.

217 CA judgment, above n 5, at [16].

[155] Climate change was described to us as an existential crisis, and the respondents would have it that its range and diffuse and disparate causes exceed the capacity of the common law for response. The Court of Appeal appeared to share that view. Another assessment, that might arise after the benefit of evidence and a full trial, may be that climate change is different in scale, but a consequence of a continuum of human activities that may or may not remain lawful depending on whether the harm they cause to others is capable of assessment and attribution. It is here beyond question that the respondents are either very substantial emitters of GHGs or are (or have been) very substantial suppliers of fossil fuels that release GHGs when burned by others. Further, as we are dealing with a strike out application, where pleaded facts are assumed to be capable of proof, we have been required to assume for present purposes that the consequence of those emissions attributable to the respondents' activities is harm to the land and other pleaded interests held by Mr Smith.

[156] The common law has not previously grappled with a crisis as all-embracing as climate change. But in the 19th and early 20th centuries it had to deal with another existential crisis, albeit one of lesser scale, when the industrial revolution dramatically enlarged the risk of accidents through the mechanisation of factories, transportation and mining.[218] The law's response was a mixture of the flawed (e.g. the common employment rule restricting claims by employees for injury)[219] and the inspired (e.g. the duty of care based on neighbourhood, expounded by Lord Atkin in *Donoghue v Stevenson*).[220] Importantly, where the common law's response proved flawed, it was revised by the legislature either enlarging or limiting its reach (e.g. via the Factory Acts, workers' compensation and ultimately in this country by the accident compensation scheme).

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218 See, for example, WR Cornish and G de N Clark *Law and Society in England 1750–1950* (Sweet & Maxwell, London, 1989) at 483–541.

219 See, for example, Ken Oliphant "Tort Law, Risk and Technological Innovation in England" (2014) 59 McGill LJ 819; and Michael Ashley Stein "Victorian Tort Liability for Workplace Injuries" [2008] U Ill L Rev 933. Oliphant observes (at 834, footnotes omitted) that "claims by injured workers ran into an obdurate judiciary that contrived to insulate employers from the costs of workplace accidents through the application of an 'unholy trinity' of defences: contributory negligence (which was then a complete defence), *volenti non fit injuria* (voluntary acceptance of risk) and common employment. … Essentially, the common employment rule provided that an employer could not be held vicariously liable for tortious injury caused by one employee to another, as every employee is deemed to accept the risk of negligence by a fellow servant."

220 *Donoghue v Stevenson*, above n 192.

[157] As a consequence of the long, global industrial revolution, the common law had to deal with new, widespread risk and damage caused by air and water pollution and the escape of biohazards.[221] We note two well-known, mid-19th-century examples.[222] First, *Attorney-General v Council of the Borough of Birmingham*, in which a wealthy landowner obtained an injunction against the local authority in Birmingham restraining it from discharging the town's sewage into the River Tame, despite the difficulties that might cause the city.[223] Seven years later, in *St Helen's Smelting Co v Tipping*, the House of Lords held a factory owner liable in private nuisance for noxious discharges from a copper smelting chimney that diffused over the plaintiff's country estate on the outskirts of the heavily industrialised town of St Helens.[224] An injunction was ultimately granted in separate Chancery proceedings.[225] In these activities (sewage disposal and smelting) there is a mix of public and private harm and public and private good, and the common law (revised sometimes by statute) has had to mediate liability for the former. Climate change engages comparable complexities, albeit at a quantum leap scale enlargement.

[158] In the appeal now before us, the Court of Appeal said that:[226]

> 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.

[159] As Mr Bullock submitted, however, there are numerous cases where defendants have been found to have caused public nuisances by discharging into

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221 The efficacy of the common law's response to these harms is often debated: see, for example, Joel Franklin Brenner "Nuisance Law and the Industrial Revolutions" (1974) 3 JLS 403; John PS McLaren "Nuisance Law and the Industrial Revolution—Some Lessons from Social History" (1983) 3 Oxford Journal of Legal Studies 155; Ben Pontin "Nuisance Law and the Industrial Revolution: A Reinterpretation of Doctrine and Institutional Competence" (2012) 75 MLR 1010; and David Bullock "Public Nuisance and Climate Change: The Common Law's Solutions to the Plaintiff, Defendant and Causation Problems" (2022) 85 MLR 1136 at 1159–1160.

222 Other examples include *Bamford v Turnley* (1862) 3 B & S 66, 122 ER 27 (KB); *Crossley and Sons Ltd*, above n 190; *Colney Hatch Lunatic Asylum*, above n 190; *Leeds Corp*, above n 190; *Blair*, above n 190; *Pride of Derby and Derbyshire Angling Association LD v British Celanese LD* [1953] Ch 149 (CA); *Southport Corp v Esso Petroleum Co Ltd* [1954] 2 QB 182 (CA) (reversed on appeal in *Esso Petroleum Co Ltd v Southport Corp* [1956] AC 216 (HL)); and *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683 (QB).

223 *Attorney-General v Council of the Borough of Birmingham* (1858) 4 K & J 528, 70 ER 220 (Ch) at 225–226.

224 *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642 (HL).

225 Ben Pontin *Nuisance Law and Environmental Protection: A study of nuisance injunctions in practice* (Lawtext Publishing, Oxfordshire, 2013) at 88–94.

226 CA judgment, above n 5, at [92].

rivers, despite individual householders being the actual contributors to the discharge or the waterways having been polluted by numerous other non-party sources (including other industrial users). As he says, in these cases not all of the contributing polluters were before the court, and nor was it realistic to identify any meaningful finite number of known contributors. It will suffice to refer to four authorities.

[160] In *Crossley and Sons Ltd v Lightowler*, the plaintiff was a manufacturer claiming that the waters of the River Hebble, on which it depended, had been polluted by the defendant's dye works upstream.[227] One defence advanced was that the water had already been fouled by other manufacturers, so an injunction would be immaterial and would not stop the harm experienced by the plaintiff.[228] An injunction having been issued at first instance, Baron Chelmsford LC said on appeal: "Where there are many existing nuisances, either to the air, or to water, it may be very difficult to trace to its source the injury occasioned by any one of them."[229] The defendant could not "add to the former foul state of the water" and then assert that they "are not to be responsible on account of its previous condition".[230] As the Lord Chancellor noted, that would effectively make the defendant's pollution lawful, so that it might continue even if the plaintiff succeeded in getting the other polluters to stop.[231] As a matter of evidence, the Court was satisfied that non-parties had not polluted to the extent alleged by the defendant, meaning the defendant was a significant cause, but not necessarily the exclusive cause of the nuisance.[232]

[161] *Blair v Deakin* was another case of a dye works upstream impacting upon plaintiffs' factories downstream.[233] Opposing an injunction and damages, the defendants argued that its pollution was diluted to the point of being innocuous by the

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227 *Crossley and Sons Ltd*, above n 190.
228 At 478.
229 At 481.
230 At 481.
231 At 481–482.
232 *Crossley & Sons Ltd v Lightowler* (1866) LR 3 Eq 279 at 289–290 (seemingly unchallenged on appeal).
233 *Blair*, above n 190.

time it reached the plaintiffs' intakes, and that the effect experienced by the plaintiffs was caused by other factories along the brook. Granting an injunction, Kay J asked:[234]

> … is it the law that, supposing it is impossible to say that any one of those persons pours into this stream foul matter enough by itself to create a nuisance, but that what they all pour in together does create a nuisance, that the plaintiffs cannot sue any one of them? If that were so I suppose a plaintiff who lost that which is his natural right—namely, to have the water of the stream pass in its original pure condition—might lose that right entirely by the combined action of a number of manufacturers above him. They might all laugh at him and say, "You cannot sue any one of us because you cannot prove that what each one of us does would of itself be enough to cause you damage." All I can observe is that, in my opinion, it would be a most unjust law if there were such a law.

[162] In *The Attorney-General for the Dominion of Canada v Ewen*, the defendant's canning factory was depositing fish waste material into a river to, as the plaintiffs claimed, "the detriment of navigation and the annoyance of the public".[235] The defendant contended the waste material only became a nuisance (if at all) because of a number of other factories doing the same thing. The Supreme Court of British Columbia held, following, among other cases, *Blair*, that "[everyone] who contributes to a nuisance is liable, if in the aggregate a nuisance is proved".[236]

[163] Finally, in *Woodyear v Schaefer* the Court of Appeals of Maryland issued an injunction restraining a slaughterhouse from dumping blood products in a river, despite the defence run that many other slaughterhouses were contributors.[237] Relying in part on *Crossley*, the Court held:[238]

> It is no answer to a complaint of nuisance that a great many others are committing similar acts of nuisance upon the stream. Each and every one is liable to a separate action, and to be restrained.

[164] There are several other authorities to the same effect.[239] It is not, therefore, the case that all defendants causing or contributing to a nuisance must be before the court

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234 At 525.

235 *Ewen*, above n 190, at 468.

236 At 471.

237 *Woodyear*, above n 190.

238 At 9 (citations omitted).

239 See, for example, *Leeds Corp*, above n 190; and *Colney Hatch Lunatic Asylum*, above n 190, where the fact there were other contributors did not prevent an injunction being issued. See also, in the private nuisance context, *St Helen's Smelting Co*, above n 224, where the defendants unsuccessfully submitted that no material damage was done by whatever the defendants might be doing (such being the district) and that other chimneys were contributory.

(or capable of being so). Further, the waterway cases suggest it is certainly arguable that in the case of public nuisance, a defendant must take responsibility for its contribution to a common interference with public rights; its responsibility should not be contingent on the absence of co-contribution or be in effect discharged by the equivalent acts of others.[240]

[165] As noted earlier, the respondents submit that an emanation, in the form of a physical, traceable transferral of the nuisance, is required in most public nuisance cases. Mr T D Smith gave the example, in the context of the historic waterway cases, of taking a particle of effluent discharged from a defendant's sewer outlet and tracing it all the way down the waterway to where it interfered with the plaintiff's rights. Whether this is so, or should as a matter of principle remain so, is open to argument. It does not follow that the "but for" causation reasoning that dominates the tort of negligence should serve the same function in the tort of public nuisance.

[166] How the law of torts should respond to cumulative causation in a public nuisance case involving newer technologies and newer harms (GHGs, rather than sewage and other water pollution) is a matter that should not be answered pre-emptively, without evidence and policy analysis exceeding that available on a strike out application. Accordingly, suppliers of fuels producing GHGs—here the fifth, sixth and seventh respondents, who supply retail and commercial customers with fuel products; operate a shipping terminal, storage tanks and a pipeline that carries fuel; and who mine coal principally for export, respectively—should not in our view be eliminated as parties until these difficult but fact- and policy-driven questions have been resolved by full trial and (potential) appeal.[241]

[167] In any case, and as we have already said, we must assume for present purposes that the consequence of those emissions attributable to the respondents' activities is harm to the land and other pleaded interests held by Mr Smith. Likely evidence at trial will include evidence as to the scientific attribution of climate change to the

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240 See, for example, Jane Stapleton "Unnecessary Causes" (2013) 129 LQR 39 at 60–61 and 64–65; and Jane Stapleton "An 'Extended But-For' Test for the Causal Relation in the Law of Obligations" (2015) 35 Oxford Journal of Legal Studies 697.

241 See also above at [138].

respondents' activities,[242] bearing in mind that Mr Smith submits that these contributions collectively represent about one-third of New Zealand's total reported GHG emissions, but that New Zealand's GHG emissions are a fractional proportion of the global total and that historic emissions remain substantially contributory. One question that will need to be considered at trial, on the basis of evidence and policy analysis, is whether New Zealand's law of public nuisance should sanction GHG emissions here, given this state of affairs.

[168] It is also the case, as we have already established, that a defendant's actions or omissions must amount to a substantial and unreasonable interference with public rights. Even allowing for the uncertainty noted there as to the impact (if any) of the unreasonableness element, this limit still creates a significant threshold for plaintiffs. Only some emitters will cross it. Patently, ordinary domestic activities involving individuals travelling, warming their houses and cooking food, will not do so and may be *de minimis*, albeit collective actions of individuals are causative of climate change. As Romer LJ said, there must be "give and take".[243] Such actions, undertaken by individuals, may simply be a part of the price of living in society.

[169] Whether the respondents' actions amount to a substantial and unreasonable interference with public rights remains a fundamental issue of fact for trial. We do not prejudge that issue here. As just noted, it will depend on evidence, including (as we note shortly) of tikanga, and also analysis of policy factors and consideration of the human rights obligations Mr Butler referred to in his submissions on behalf of the Human Rights Commission. These last-mentioned obligations may be found, it was submitted, in both domestic rights legislation and international instruments such as the International Covenant on Civil and Political Rights and the United Nations Declaration on the Rights of Indigenous Peoples.[244] It would be inappropriate to express any view at this stage on the possible merits of the propositions advanced by

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242 For the developing literature on attribution science see, for example, Sophie Marjanac and Lindene Patton "Extreme weather event attribution science and climate change litigation: an essential step in the causal chain?" (2018) 36 JERL 265; and Michael Burger, Jessica Wentz and Radley Horton "The Law and Science of Climate Change Attribution" (2020) 45 Colum J Envtl L 57.

243 See above at [111].

244 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976); and *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007).

Mr Butler, except to suggest that these too will be matters with which the court will be required to grapple, as have courts in other jurisdictions.[245]

[170] Logic and experience suggest the fundamental battleground between the parties lies in this part of the case: causation, substantiality and unreasonableness, and (by association) remedy—to which we now turn.

[171] As to remedy, we acknowledge that Mr Smith may face obstacles in obtaining any remedy requiring cessation (by injunction). But on the other hand, it might also be thought that closer, more conventional examination of causation is commanded by a claim for compensation, requiring attribution of particular loss to a particular action or omission. A claim for damages is not a feature of this proceeding. Injunctive relief involves a rather different inquiry: if liability for public nuisance is established (including sufficient connection, substantiality and unreasonableness), the question turns to whether such rights-infringing activity may continue at all, and if so, on what terms.[246] As an equitable remedy involving a substantial measure of discretion in the calibration of remedial impact, a somewhat different approach to connection and causation may be available, as compared to a common law claim for compensatory damages. Nor do we overlook the declaratory remedy sought. The utility of the declaration of inconsistency jurisdiction in public law suggests the court should not dismiss the power of purely declaratory relief in private law. That itself was a motivating factor in the enlargement of remedies created by the Defamation Act 1992.[247]

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245 See, for example, the cases referred to in United Nations Environment Programme *Global Climate Litigation Report: 2023 Status Review* (2023) at 50–53; and *Vereniging Milieudefensie v Royal Dutch Shell plc* (District Court, The Hague, C/09/571932, 26 May 2021) (decision under appeal).

246 As, for example, in *Abraham and Williams Ltd*, above n 156, where injunctive relief against the public nuisance was suspended for 12 months to permit the operators "to rectify the position" of the stockyard, so as to avert further nuisance to the plaintiff, and with leave to apply to extend further (at 476 per O'Leary).

247 In *Recommendations on the Law on Defamation: Report of the Committee on Defamation* (December 1977) (often called the McKay Committee Report), which preceded the current legislation, it was said at [401] that: "Although the court already possesses the power to make a declaratory judgment, it is a discretionary remedy and is so far untried as a remedy for defamation. There is considerable doubt whether a judge would be prepared to grant it. We consider that use of this avenue by plaintiffs who merely sought to clear their name would be encouraged by making specific statutory reference to it as a remedy for defamation." A draft declaration provision was included in the McKay Committee Report which formed the basis of s 24 of the Defamation Act 1992: at 158.

Concluding observations

[172] As we have said already, real caution is necessary before pre-emptively disposing of a claim where seriously arguable non-trivial harm is in issue. The courts in New Zealand have barely touched (let alone grappled with) the law of public nuisance in the last century.[248] The leading authority in this country—*Abraham and Williams Ltd*—was delivered by the Court of Appeal almost 75 years ago, and most of the case law cited within it was English.[249] The principles governing public nuisance ought not to stand still in the face of massive environmental challenges attributable to human economic activity. The common law, where it is not clearly excluded, responds to challenge and change in a considered way, through trials involving the testing of evidence.

[173] In sum, we do not consider the obstacles are so overwhelming as to meet the standard for strike out stated at [83]–[85] above. The courts must be measured as to the pre-emptive denial of access to justice where it is incontestable that the respondents' actions form a part of a collective activity causing a plaintiff substantial harm. The consequence, therefore, is that they must now submit to argument, and evidence, at trial. In this area, the common law must develop, if at all, in the fertile fields of trial, not on the barren rocks of a strike out application.

What about the remaining causes of action?

[174] Where the primary cause of action is not struck out, the authorities generally discourage striking out any remaining causes of action as a point of principle, unless it can be said they both meet the criteria for striking out *and* are likely to add materially to costs, hearing time and deployment of other court resources.[250]

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248 For a rare excursion see, for example, *Coldicutt v Ffowcs-Williams* HC Auckland AP 130-SW00, 8 February 2001.

249 *Abraham and Williams Ltd*, above n 156.

250 See, for example, *Jull v Little* [2012] NZCA 364 (affirming *Little v Jull* [2012] NZCCLR 3 (HC)); *Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368 (HL); *Lonrho plc v Fayed* [1992] 1 AC 448 (HL); *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 (HL); *Sun Earth Homes Pty Ltd v Australian Broadcasting Corp* (1990) 98 ALR 101 (FCA); and *John Holland Pty Ltd v Maritime Union of Australia* [2009] FCA 437.

[175] In this case, there are good reasons to follow that approach. As the pleading itself demonstrates, the same facts are alleged, and are alleged to be relevant, in all three causes of action. Striking out the remaining claims in negligence and the proposed climate system damage tort would be unlikely to produce a material saving in hearing time or other court resources. And, although each cause of action has its own doctrinal underpinning, the deeper questions of necessary relationship, proximity, causation, disproportionality and indeterminacy raise issues common to all. Any added burden the respondents may be required to bear in confronting two additional causes of action will not be significant. Counsel for the respondents did not suggest otherwise.

[176] It follows that it is neither necessary nor appropriate that this Court traverse the remaining claims struck out in the Courts below, and we do not do so.

Can tikanga inform the formulation of tort claims?

[177] Mr Smith claims, in accordance with tikanga, a whakapapa (genealogical) and whanaungatanga (kinship) connection to the subject whenua (land), wai (fresh water) and moana (sea) in and around Mahinepua C. He claims that the respondents have contributed to climate change effects that are causing ongoing injury to the customary, cultural, historical, spiritual and nutritional values associated with these places. He alleges that his tikanga-based connection to the subject environment provides a foundation for the claim that the injury to place is also an injury to himself, his whānau (extended family) and descendants. It is alleged that the respondents must bear some responsibility for these harms.

[178] The Court of Appeal found these matters did not assist in formulating a claim in tort. To the contrary, the Court considered that "controlling climate change through regulatory means [such as the CCRA] is consistent with kaitiakitanga".[251] In other words, legislative regulation was already consistent with the responsibility, according to tikanga, of traditional owners to care for their lands and, implicitly, tort-based controls were not. The Court also commented, in relation to the special damage rule,

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[251] CA judgment, above n 5, at [34]. The Court also rejected Mr Smith's argument that striking out his claims would be a breach of the Treaty of Waitangi.

that Mr Smith could not overcome this by "re-pleading or invoking concepts of tikanga".[252]

Submissions

[179] For Mr Smith, Ms Coates submitted that caution should be exercised in striking out claims that involve the application of tikanga to areas of law to which it has not previously been applied. Expert evidence will generally be required. She argued that the essence of Mr Smith's case is not that tikanga Māori creates direct obligations on the parties to this case; rather it is that its principles must inform tort law's development in New Zealand in relation to climate change. There are aspects of tikanga, she submitted, that speak to the existing torts of public nuisance and negligence but, in particular, tikanga principles would assist in framing the proposed climate system damage tort. For example, she argued, tikanga would push against a narrow conception of proximity founded on individualism.

[180] Mr Kalderimis submitted that Mr Smith's generalised references to tikanga principles do not, any more than generalised allusions to values underlying the English common law, salvage Mr Smith's claim. What is missing from Mr Smith's claim is any adequate articulation of how tikanga principles work coherently within the framework and principles of tort law to bridge the gaps to an arguable claim. For example, there is no existing principle of tikanga, he argued, that imposes obligations on one party where they have no relational proximity to the alleged wrongdoer.

[181] On behalf of Te Hunga Rōia Māori o Aotearoa, Mr Mahuika submitted that the common law must evolve within the context and needs of New Zealand, of which tikanga forms a part. He submitted that tikanga was clearly relevant to the development of the common law, and to the development of any new tort, although it may also have relevance to the application of the established torts of public nuisance and negligence. Further, assessing the application of tikanga and its precise relevance will require an evidentiary inquiry, and evidence (including tikanga evidence) would be critical at trial. A broad approach, he argued, that accords with principles of tikanga

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252 At [82].

Māori, should be applied to standing, including in respect of public nuisance—that being a reference to the special damage rule in that context.

Our assessment

[182] It is important to keep to the fore that the specific loss pleaded by Mr Smith in this case is in part tikanga-based. Since that form of loss is an essential fact, in addressing this part of the claim the trial court will be required to engage with tikanga. Apart from any more conceptual impact tikanga may be argued to have on the framing of particular causes of action, that engagement will need to consider the potential effect of tikanga on any special damage requirement in public nuisance (if in fact special damage is required) and, with regard to all causes of action, whether tikanga-related harm is a cognisable form of loss.

[183] This is not a new phenomenon. Tikanga has in fact been applied to tort actions as required by the case and the evidence since the early days of the common law's operation in this country. Two examples will suffice: one concerning pounamu (greenstone) and the other about whales.

[184] In the 1866 case of *Reynolds v Tuangau*, there was a dispute over title to a pounamu boulder weighing "considerably more than a ton".[253] Mr Reynolds said that he had found it in a West Coast river. He broke the boulder up and had it removed in 16 bags by horse and boat to the mouth of the Taramakau river. The bags were seized by the police at the direction of the local mining warden who considered the pounamu belonged to one Simon Tuangau.

[185] Mr Reynolds sued Mr Tuangau in the Hokitika Supreme Court in trover, detinue and conversion, seeking return of the pounamu. Mr Tuangau contended the pounamu was his according to tikanga as he had worked the boulder and had left his mark on it to render it tapu (restricted) to him alone. Counsel for Mr Reynolds argued that evidence of tikanga was inadmissible "on English territory". Gresson J

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253 "James Reynolds v Simon Tuangau" *West Coast Times* (New Zealand, 8 August 1866) at 2–3. It was common in the 19th century for newspapers to report court proceedings in detail. A summary of this case is provided in *Reynold v Tuangau* SC Wellington, 7 August 1866 available at www.wgtn.ac.nz/law/nzlostcases/.

nonetheless admitted independent evidence about tikanga rendering objects tapu to their owner in this way. He directed the jury that this tikanga had been proved for the purpose of their consideration of the case.[254] While the first jury was unable to reach a verdict, a second returned a "special verdict", finding that Mr Tuangau was the "first discoverer" of the pounamu, had worked it, and had not abandoned it by the time Mr Reynolds claimed it. Mr Reynolds' claim was summarily dismissed by a five-judge appellate bench (which included Gresson J).[255]

[186] Better known is the 1910 case of *Baldick v Jackson*.[256] In that case Stout CJ dismissed an appeal by Mr Baldick and others, who were whalers, against a judgment in the Magistrate's Court in Blenheim in favour of the plaintiff, Mr Jackson, also a whaler. Mr Jackson had filed a plaint note in conversion. He claimed that Mr Baldick and company had converted the carcass of a right whale belonging to him, valued at £200. In response, the appellants argued that a 14th-century statute affirmed that the King owned all whales, meaning Mr Jackson could not establish a proprietary interest in the whale sufficient to maintain an action in conversion.[257] Stout CJ held that this statute did not apply to the circumstances of the colony of New Zealand because "Maoris … were accustomed to engage in whaling" and such activity was protected by Article Two of the Treaty of Waitangi.[258] Judgment was entered for Mr Jackson.

[187] In more recent times, the common law has re-engaged with tikanga. For example, in 2003, a five-judge bench in the Court of Appeal affirmed that Māori land rights (including in the foreshore and seabed) derived from tikanga were cognisable at common law.[259] Citing extensive authority, the Court found that this had been the position since the common law's arrival in 1840. And in *Takamore v Clarke*,[260] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*[261] and

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254 "The Supreme Court" *West Coast Times* (New Zealand, 11 August 1866) at 5.

255 See "Court of Appeal" *Daily Southern Cross* (New Zealand, 9 November 1866) at 6.

256 *Baldick v Jackson* (1910) 30 NZLR 343 (SC).

257 It is unclear whether the statute was enacted in 1322: Statute of the King's Prerogative (Eng) 15 Edw II c 2; or 1324: Statute of the King's Prerogative (Eng) 17 Edw II c 2. But in any event, s 13 provided that "the King shall have" shipwrecks, sturgeons and whales taken in the sea.

258 *Baldick*, above n 256, at 344–345. The other ground of appeal, that Mr Jackson had abandoned the whale, also failed.

259 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

260 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

261 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801.

Ellis v R (Continuance)[262] this Court considered the relationship between tikanga and the common law as it operates outside the sphere of customary title.[263] To summarise the essential conclusions reached, tikanga was the first law of New Zealand, and it will continue to influence New Zealand's distinctive common law as appropriate according to the case and to the extent appropriate in the case.[264] The respondents do not challenge these propositions. As noted, their argument is not with the relationship between tikanga and the common law, but with its practical utility in the circumstances of this case.

[188] So, to return to the starting point, whatever the cause of action, the trial court will need to grapple with the fact that Mr Smith purports to bring proceedings not merely as an alleged proprietor who has suffered loss, but as a kaitiaki acting on behalf of the whenua, wai and moana—distinct entities in their own right.[265] And it must consider some tikanga conceptions of loss that are neither physical nor economic. In other words, addressing and assessing matters of tikanga simply cannot be avoided.

[189] The analytical methodology outlined in *Ellis (Continuance)* will assist the court in this respect,[266] but more neither can nor need be said at this early stage since all we have are factual assertions that must be accepted for strike out purposes. Mr Smith's ultimate prospects at trial will depend, in part, on the quality of the evidence, including that in relation to tikanga.

Conclusion

[190] For the above reasons, the appeal is allowed and the appellant's claim is reinstated.

[191] Mr Smith is represented on a pro bono basis and does not seek costs. Whatever the outcome, he sought that costs lie where they fall in this Court, as they have done

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262 *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239.

263 Customary title is also known as "native title" in Australia and "aboriginal title" in Canada.

264 The past and present interface of tikanga and the common law was recently discussed in: Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023).

265 We note that a proprietary interest in the affected land is not an element of public nuisance: see Kit Barker and others *The Law of Torts in Australia* (5th ed, Oxford University Press, Melbourne, 2012) at 219–220.

266 See *Ellis (Continuance)*, above n 262, at [121]–[125] per Glazebrook J, [181] per Winkelmann CJ and [261]–[273] per Williams J.

in the Courts below, because the proceeding is brought on a public interest basis and has wider implications beyond the case at hand. We agree.

Result

[192] The appeal is allowed.

[193] The appellant's claim is reinstated.

[194] There is no order as to costs.

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