I Te Kōti Mana Nui | In the Supreme Court of New Zealand

SC 149/2021

between

MICHAEL JOHN SMITH
Appellant

and

FONTERRA CO-OPERATIVE GROUP LIMITED
First Respondent

and

GENESIS ENERGY LIMITED
Second Respondent

and

DAIRY HOLDINGS LIMITED
Third Respondent

and

APPELLANT'S SYNOPSIS OF SUBMISSIONS ON APPEAL

15 June 2022

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NEW ZEALAND STEEL LIMITED
Fourth Respondent

and

Z ENERGY LIMITED
Fifth Respondent

and

CHANNEL INFRASTRUCTURE NZ LIMITED
Sixth Respondent

and

BT MINING LIMITED
Seventh Respondent

APPELLANT'S SYNOPSIS OF SUBMISSIONS ON APPEAL

MAY IT PLEASE THE COURT

INTRODUCTION

1. Mr Smith says that the respondents have, by their material contributions to climate change, damaged, and will continue to damage, his whenua (property in which he has an interest) and sites of cultural and historical significance to him and his whānau (family). He seeks to restrain the respondents' ongoing direct and indirect greenhouse gas emissions. On applications to strike out Mr Smith's claim, the courts below held that they are certain that Mr Smith's claim is legally untenable (albeit the High Court would not have struck out the third cause of action), meaning that Mr Smith is denied an opportunity to prove his claims with evidence at a trial.

2. Mr Smith says that his claim in public nuisance is not only legally tenable, but an orthodox application of well-established common law principles. He submits that his negligence claim is also a legally tenable novel duty, pointing to the pleaded allegations of the respondents' knowledge and control, and his vulnerability. In the alternative, he submits that if neither of these established causes of action apply, then a new tort should be recognised drawing on common law principles and tikanga Māori. He says that these questions warrant a trial and determination upon evidence.

3. The pleaded facts are clear. The respondents are material contributors to climate change by emitting greenhouse gases, or by producing and/or suppling products that do. The adverse effects of climate change have harmed, and will continue to harm, Mr Smith's whenua and other sites of significance to him, his whānau and his descendants. It is pleaded that the respondents knew, or ought to have known, of the harmful effects of their emissions, including on vulnerable people like Mr Smith. They chose to continue to emit and sell fossil fuels regardless, to make a profit from those emissions while externalising the costs to others. They chose to actively lobby against meaningful climate action. It is pleaded that the New Zealand government will not achieve through regulation a sufficient reduction in greenhouse gas emissions to avoid the harms to Mr Smith, his whānau and his descendants: political imperatives tell against meaningful action.

4. In this context, the courts—free from the myopic electoral focus of politicians—have a part to play. Mr Smith says that the respondents are

wronging him, and he seeks the courts' aid to have them stop. Such a claim is within the traditional role of the courts, the common law, and the law of torts. Mr Smith's claim does not cut across New Zealand's international commitments or domestic climate policies: it supports them. The respondents seek to be able to continue to foist the harms of their emissions-causing profit-making enterprises onto others. Mr Smith's claim does not seek, nor does it require, the reinvention of tort law. Nor does it ask the courts to go beyond the role that they have performed for centuries in remedying private wrongs. Mr Smith is not arguing that the law of torts can, will, or should "solve" the problem of climate change. Rather, Mr Smith calls upon the courts to perform their proper role: to remedy the wrongs being done to him. In doing so, the courts may provide part of the solution to the most significant and pressing problem facing New Zealand and the world.

The Plaintiff

5. Mr Smith (Ngāpuhi, Ngāti Kahu) is the climate change spokesperson for the Iwi Chairs forum. He has an interest, according to tikanga Māori, in the Mahinepua C block near Kaeo, in Northland. Mahinepua C is situated on the coast at Wainui Bay. On that land, and around it, are numerous sites of deep customary, cultural, historical, nutritional and spiritual significance to Mr Smith and his whānau. Mr Smith pleads that Mahinepua C, and these surrounding resources and sites of significance have been, and will be, harmed by climate change.

6. Mr Smith sues to restrain the respondents' ongoing contributions to this harm. He proposes an amended statement of claim, discussed below, which is **annexed** to these submissions (showing changes tracked).

The Respondents

7. The respondents are some of the biggest emitters and fossil fuel suppliers in New Zealand. They represent a range of different sectors of the economy. In total they are responsible for about one third of New Zealand's greenhouse gas (**GHG**) emissions.[1] Fonterra burns large volumes of coal to make dairy products for export, and its milk suppliers (farmers like Dairy Holdings) emit vast amounts of methane (**CH_4**) and nitrous oxide (**N_2O**) from farming animals and fertilising land. These agricultural CH_4 emissions are not regulated by

[1] Marc Daalder "Revealed: New Zealand's worst climate polluters" *Newsroom* (online ed, 15 November 2021), https://www.newsroom.co.nz/revealed-new-zealands-worst-climate-polluters.

New Zealand's emissions trading scheme (**ETS**). Genesis runs a coal fired power plant. NZ Steel burns coal to make steel, while receiving so many free units under the ETS that it does not materially bear the costs of its emissions. Channel used to emit GHGs by refining oil; now it imports petroleum products and supplies them to retailers like Z Energy, which sells them to consumers. BT Mining digs coal and supplies it to heavy industry, primarily in China, where it is burned with little regulatory oversight. The respondent fuel suppliers know, intend and encourage end use consumers to burn their products, and know that this results in the emission of GHGs.

8. It is pleaded that the respondents have known since at least 2007 that their emissions are contributing to harming people like Mr Smith. It is also pleaded that the respondents have actively lobbied against policies that would require them to reduce their emissions to the extent required to avoid harm to Mr Smith and people like him. In part as a result of those lobbying efforts, an effective regulatory response has not developed in New Zealand or internationally, and it will not develop or achieve the level and speed of reductions needed to avoid harm to Mr Smith (which is already occurring).

9. It is pleaded that an injunction requiring the respondents to reduce or cease their emissions would directly and materially reduce the harm Mr Smith, his whānau, and his descendants are facing. It is also pleaded that it will have wide reaching effects beyond this case, including leading to market adjustments that are likely to result in even greater emission reductions.

The courts below

10. The respondents applied to strike out Mr Smith's claims. In the High Court, Wylie J struck out the first two causes of action (public nuisance and negligence) but did not strike out the third, novel, cause of action.[2]

11. The Court of Appeal struck out all causes of action, primarily on what amounted to a finding that tort claims connected to climate change and GHG emissions were non-justiciable and beyond the courts' institutional competence.[3] This Court granted leave on the question of whether the Court of Appeal was correct to have struck out the claims.[4]

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2 *Smith v Fonterra Co-Operative Group Ltd* [2020] NZHC 419, [2020] 2 NZLR 394. **[101.0141]**
3 *Smith v Fonterra Co-Operative Group Ltd* [2021] NZCA 552, [2022] 2 NZLR 284 (**Court of Appeal Judgment**). **[05.0001]**
4 *Smith v Fonterra Co-Operative Group Ltd* [2022] NZSC 35. **[05.0039]**

THE NATURE AND IMPACTS OF CLIMATE CHANGE

12. Mr Smith pleads as fact the scientific consensus on the causes, impacts, risks and options for mitigation of climate change are set out in the reports of the Intergovernmental Panel on Climate Change (**IPCC**). These reports are accepted by member states of the United Nations Framework Convention on Climate Change (**UNFCCC**), including New Zealand. The IPCC publishes periodic Assessment Reports (**ARs**) summarising the current state of scientific knowledge on aspects of climate change. It also publishes Special Reports on discrete topics. The following facts are contained in the IPCC's Fifth and Sixth Assessment Reports (**AR5** and **AR6**)[5] as well as its Special Report on the impacts of global warming of 1.5°C above pre-industrial levels. AR6 will comprise four reports. The first three reports have been published. There is not space in these submissions to canvass the reports in detail; they are pleaded in full, and Mr Smith asks that they are considered closely as they form the factual foundation for his claims.

Causes

13. There has been warming of the earth's surface since at least the 1950s. It has been unprecedented in terms of speed and significance. This warming has been caused by human ("anthropogenic") influence on the climate system, predominantly by the release of GHGs into the atmosphere.[6] Atmospheric concentrations of key GHGs (CO_2, CH_4 and N_2O) are unprecedented in at least the last 800,000 years.[7] About half of the anthropogenic CO_2 emissions between 1750 and 2011 have occurred in the last 40 years. The concentration of CO_2 in the atmosphere would be higher, but the ocean has absorbed about 30 per cent of anthropogenic emissions, causing ocean acidification, which threatens many marine species and those who rely on them for food.

14. Emissions of CO_2 from combusting fossil fuels and industrial processes contributed about 78 per cent of total GHG emissions between 1970 and

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5 Affidavit of Michael John Smith exhibit MS-A-01 (subsequent references are to the Summary for Policymakers (**SPM**)); and affidavit of Kayleigh Heather Devane exhibit A. **[301.0254]**

6 AR5 SPM at 1–1.2; AR6 Working Group I (**WGI**) SPM at A.1. **[301.0311] ; [401.0060]**

7 AR6 WGI SPM at A.2. **[401.0064]**

2010.[8] GHG emissions have continued to increase since the 1970s, despite humanity's knowledge of their effects on the climate and states' efforts to mitigate emissions.[9]

15. A report by the Climate Accountability Institute identified 100 individual entities (primarily fossil fuel producers) as responsible for the majority of global emissions.[10] While none of the respondents are those top 100 global entities (unsurprisingly given New Zealand's size), it is clear that it is large emitting companies operating for profit that are primarily responsible for the vast majority of global emissions. This is an important point, as it demonstrates that material responsibility for emissions is not as diffuse as it might seem. New Zealand Government data shows that just 15 companies, including a number of the respondents, are responsible for more than 75 per cent of New Zealand's emissions.[11]

Impacts

16. The effects of anthropogenic emissions are already being observed.[12] The temperature of the earth has increased to an unprecedented extent. Anthropogenic emissions have likely affected earth's water cycle and the retreat of glaciers since at least the 1960s, and the surface melting of the Greenland ice sheet since the 1990s. Soil moisture is reducing in key environments. Since the 1970s emissions have very likely caused Arctic sea-ice loss, increases in upper ocean heat content, and global mean sea level rise. There is growing confidence that the increasing frequency and intensity of extreme weather events is directly connected to anthropogenic emissions, including extreme sea levels from storm surges.[13]

17. The future effects of climate change will depend on a combination of historical anthropogenic emissions, future anthropogenic emissions, and natural climate variability. Unless substantial and rapid reductions in anthropogenic emissions occur, average global temperature increases will exceed 2°C and likely substantially more. This will mean that it is very likely that heat waves will occur more often and last longer, extreme precipitation events will become

8 AR5 SPM at 1.2. **[301.0315]**
9 AR5 SPM at 1–1.3. **[301.0313]**
10 Affidavit of Michael John Smith exhibit MS-A-04. **[302.0543]**
11 Daalder, above n 1.
12 AR6 WGI SPM at A.3.**[401.0064]**
13 AR5 SPM at 1.2–1.4. **[301.0315]**

more intense and frequent, and oceans will continue to warm, acidify and rise.[14] Temperature increases beyond 1.5°C are dangerous.

18. Without urgent and significant mitigation, climate change will result in the creation of new risks, and amplification of existing risks, for human and natural systems. These risks are not evenly distributed and are greater for disadvantaged people and communities in countries of all levels of development.[15] The effects of climate change threaten terrestrial and oceanic plant and animal species, global human food and water security, and human health. They will exacerbate poverty and displace populations. There is the risk of significant loss of life and geopolitical instability.

19. Ultimately, many of those most vulnerable to climate change have contributed and will contribute little to the GHG emissions causing climate change. This includes indigenous peoples. Delaying mitigation action today shifts the burden from the present (and from those actually contributing to the effects of climate change) to future generations. Delaying additional mitigation activities to 2030 "will substantially increase the challenges associated with limiting warming to below 2°C relative to pre-industrial levels".[16]

20. The effects of GHG emissions on the climate lag behind the release of emissions into the atmosphere. The consequence is that the effects of emissions caused by the respondents today are locked in and will inevitably have effects in the future,[17] including on Mr Smith's descendants. All future emissions will have compounding effects with historical emissions, such that the degree of harm already caused is much greater than the effects presently observable. For example, even if pledged emissions reductions under the Paris Agreement occur, sea level rise in the order of 1 metre is "locked in".[18]

New Zealand

21. The IPCC has reported specific effects of climate change in New Zealand.[19] Temperatures have increased by 1.1°C over the last 110 years with more

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14 AR5 SPM at 2–2.4. **[301.0327]**
15 AR6 WGII SPM at B.1; SR1.5 at 51. **[401.1883]; [303.0927]**
16 AR5 SPM at 2–2.4. **[301.0327]**
17 AR6 WGI SPM at B.5. **[401.0077]**
18 Alexander Nauels et al "Attributing long-term sea-level rise to Paris Agreement emissions pledges" (2019) 116(47) PNAS 23487. In the New Zealand context see the reports of the Parliamentary Commissioner for the Environment "Changing climate and rising seas: Understanding the science" (November 2014) and "Preparing New Zealand for rising seas: Certainty and Uncertainty" (November 2015).
19 AR6 WGII at 11.1. **[401.3908]**

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 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.

22. As recognised in AR6,[20] Māori are particularly exposed to climate change impacts because they rely on the environment as a cultural, social and economic resource. For example, the marae, cultural heritage and food gathering sites of many Māori communities, including Mr Smith's, are situated along coastal margins.[21] They are at risk of erosion and inundation.[22] Many Māori communities have already been affected.[23] To the extent that this coastal land is a community's major asset holding, they are distinctly vulnerable. Māori communities are also at risk of a disproportionate burden of the adverse health impacts of climate change.[24]

Limiting warming to 1.5°C

23. Anthropogenic warming reached approximately 1°C above pre-industrial levels in 2017 and is increasing at 0.2°C per decade.[25] Limiting warming to 1.5°C will require ambitious mitigation actions,[26] including marked shifts in investment patterns, particularly in relation to fossil fuels, and a substantial reduction in the use of fossil fuels to create energy.[27] It will also involve substantial mitigation of the effects of climate change compared to greater warming.[28]

24. To have a better than even chance of limiting warming to 1.5°C with no or limited overshoot, global GHG emissions must peak by 2025.[29] Further, compared to 2019 levels, global CO_2 emissions must be reduced by 48 per

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20 AR6 WGII at 11.4.2. **[401.3973]**
21 Affidavit of Michael John Smith exhibit MS-A-07 at 107. **[301.0249]** **[401.3973]**
22 Affidavit of Michael John Smith exhibit MS-A-06 at 11 and 39; AR6 WGII at 11.4.2. **[302.0437], [302.0465]**
23 Affidavit of Michael John Smith exhibit MS-A-06 at 40. **[302.0466]**
24 Affidavit of Michael John Smith exhibit MS-A-08 at p 19-20; AR6 WGII at 11.4.2. **[301.0228] ; [401.3973]**
25 Affidavit of Michael John Smith exhibit MS-A-02, **SR1.5** at ch 1, p 51. **[303.0927]**
26 At ch 1, p 51. **[303.0927]**
27 At ch 2, p 97. See also ch 4, pp 315 to 318. **[303.0973], [303.1191]**
28 At chapter 3, pp 177 to 181. **[303.1053]**
29 AR6 WGIII SPM at C.1. **[401.5572]**

cent by 2030 and 80 per cent by 2040,[30] and global CH_4 must be reduced by 34 per cent by 2030 and 44 per cent by 2040.[31] Global GHG emissions must be net zero by 2050.[32]

25. These points of reference are used for convenience given the early stage of the proceeding. Ultimately expert evidence will be required.

THE COURT OF APPEAL'S ERRORS IN ITS APPROACH TO STRIKE OUT

26. One of the issues raised on this appeal is the lower courts' failure to proceed on the pleaded facts. Frequently, the High Court and Court of Appeal ventured their own assessment of factual matters far beyond what is proper on a strike-out application in the absence of evidence. The Court of Appeal recognised the factual complexities associated with climate change as well as the limitations of the summary procedure in a strike-out application, yet had confidence Mr Smith's claim could not succeed without hearing any evidence.

Threshold for strike out

27. To strike out a claim under r 15.1 of the High Court Rules 2016, the Court must be satisfied the statement of claim discloses no reasonably arguable cause of action. The Court of Appeal set out the well-established principles applicable in determining applications for strike-out.[33] The Court correctly stated that the strike-out jurisdiction is to be exercised sparingly, especially in relation to novel causes of duties and developing areas of the law.[34] Further, to strike out, the court "must be certain the claim is so untenable it cannot succeed". The Court also recognised that the pleaded material facts are taken to be true, and that the applicant bears the onus.

28. Despite setting out the principles correctly, the Court of Appeal, like the High Court, regularly failed to apply them. Throughout its judgment, the Court of Appeal wrongly strayed into areas of disputed facts, and on numerous occasions made what amounted to factual findings—often contradicting the pleaded allegations—to assert that Mr Smith's claims were untenable. This was the wrong approach, and caused the Court's analysis to misfire. This

30 AR6 WGIII SPM at C.1.2. **[401.5573]**
31 AR6 WGIII SPM at C.1.2. **[401.5573]**
32 AR6 WGIII SPM at C.2. **[401.5581]**
33 At [38], referring to *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267, endorsed in *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 (***The Grange***) at [146].
34 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33] per Elias CJ and Anderson J.

Court will form its own views, so it is unnecessary to identify all instances where the Court of Appeal erred in this regard. Some notable factual findings include those as to the materiality of the respondents' contributions to climate change,[35] the comprehensiveness and effectiveness of domestic regulations, and the efficiency of a tortious regime.[36]

29. Although tikanga is part of the laws of New Zealand, it has been compared to foreign law that must be proven as fact unless the specific custom has become so 'notorious' that judicial notice can be taken.[37] Courts have recently placed particular emphasis on tikanga being established by expert evidence and pūkenga commentary.[38] Given this, Mr Smith submits that caution should be exercised in striking out claims that involve the application of tikanga to areas of law that it has not previously been applied to. This will generally require expert evidence at a substantive trial. The onus should therefore be on the respondents to show either that tikanga can have no direct application, or that its application is irrelevant to the development of tort law in New Zealand and the plaintiff's claim.

30. Mr Smith annexes to these submissions a draft amended statement of claim. It endeavours to address concerns raised by the courts below and this accords with the usual principle that proceedings will not be struck out where amendments can rectify issues. Mr Smith invites this Court to review the draft amended statement of claim closely. Mr Smith is entitled to have the legal tenability of his claim assessed against the facts he has pleaded. The pleaded facts include matters of physical and political science, and economics, that require expert evidence. Absent evidence the Court must take care not to dismiss pleaded facts as impossible or unlikely, or to reach its own factual assessments without evidence.

THE FUNCTION OF TORT LAW

31. The Court of Appeal determined the appeal on the bold finding that tort law, and the courts, can do nothing about GHG emissions or climate change.[39] The Court's analysis did not accurately characterise the nature of Mr Smith's

35 Court of Appeal Judgment, above n 3, at [113]. **[05.0028]**
36 Court of Appeal Judgment, above n 3, at [27], [28], [33] and [35]. **[05.0008], [05.0009]**
37 See for example, *Angu v Attah*, unreported, as cited *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843 at [385], and *Ngāti Hurungaterangi v Ngāti Wahiao* [2016] NZHC 1486, [2016] 3 NZLR 378 at [176].
38 *Ngāti Whātua Ōrākei,* above n 37, at [383]–[386].
39 At [16] and [28]. **[05.0005], [05.0008]**

claim or the function of common law tort claims. Rather, it perceived Mr Smith to ask the courts to: proscribe most economic activity and many of the activities that form an integral part of every individual's life;[40] abolish the relational underpinnings fundamental to tort law;[41] and address the global climate change crisis with a court-designed and court-supervised regulatory regime.[42]

32. However, Mr Smith's claim does none of those things. Rather, Mr Smith's primary claim is that he has been wronged by the respondents, and that absent court intervention they will continue to injure him, his whānau and his descendants. He says that the respondents should stop their emissions, and they should not be allowed to externalise to cost of those onto him and his whānau.

Tort law addresses "wrongs"

33. Tort law addresses those activities which the state, through its courts, has deemed to be private wrongs. The Court of Appeal was wrong to describe the activities governed by tort law as those that are "inherently" wrong or unlawful.[43] Unlawfulness is a status created by the arms of the state. Whether a tort arises always depends upon circumstance. A kiss is affection. A kiss is a battery. Writing is informative. Writing is defamatory. A car crash is an unfortunate accident. A car crash is negligence. A court does not look to the inherent qualities of the conduct, rather it looks to the legal and factual context of the conduct.

34. The Court of Appeal's response to Mr Smith's request that the Court address the lawfulness of the respondents' emission of GHGs is curious in the light of its acknowledgement that climate change is "the biggest challenge facing humanity in modern times."[44] That the global community, of which the courts of New Zealand form part, needs to contribute to mitigating emissions is precisely the message scientists strive to convey.

35. The common law, and specifically tort law, has never been static. Tort law has evolved to meet the changing needs of society in the past. Its common law foundations make it especially apt to do so. In describing the rise of the

40 At [22]. **[05.0006]**
41 At [113]. **[05.0003]**
42 At [24] and [26]. **[05.0007]**
43 At [23]. **[05.0007]**
44 At [2]. **[05.0003]**

fault principle in negligence, Professor Fleming observed that the negligence concept, in little more than a century's development, completely transformed the basis of tort liability:[45]

> Neither society nor law is static. The forces that moulded nineteenth century thought have long been spent, and the assumptions underlying the negligence concept are increasingly subjected to challenge. The individualistic fault dogma has been replaced by the mid-twentieth century quest for social security.

36. And, as Gault J noted in *Hosking v Runting*:[46]

> From time to time … there arise in the Courts particular fact situations calling for determination in circumstances in which the current law does not point clearly to an answer. Then the Courts attempt to do justice between the parties in the particular case. In doing so the law may be developed to a degree. It is because the legislative process is inapt to anticipate or respond to every different circumstance that some developments in the law result from such case-by-case decisions. That is the traditional process of the common law.

37. Here too, the legislative process is inapt to respond to Mr Smith's claim. He pleads as much.[47] Parliament is handicapped by the combination of a three-year electoral term and the features of human psychology[48] which inhibit most electors from acting upon problems at once overwhelming and presently "invisible". Parliament, and the executive, have failed to act to avoid harm to Mr Smith. Mr Smith pleads as fact that they will continue to fail to act as needed. It is precisely because the courts are the non-elected, non-political guardians of the rule of law that they are suited to address Mr Smith's claim. This is the same role the courts have served time and time again, including in cases protecting fundamental rights or in recognising the constitutional and legal significance of Te Tiriti o Waitangi.[49] At this critical juncture it is within the common law's scope to continue to develop. This development, however, does not require a sea change. Rather, the evolution required in this case turns on the development of well understood common law principles to apply

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45 John Fleming *Law of Torts* (3rd ed, The Law Book Company of Australasia, Sydney, 1965), as cited in the Royal Commission of Inquiry *Compensation for Personal Injury in New Zealand* (1967) (the Woodhouse Report) at [67].

46 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [4].

47 See draft amended statement of claim.

48 See Richard Lazarus "Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future" (2005) 94 Cornell L Rev 1153 from 1173–1178. These include that: "we are a species characterized by myopia… [thinking] mostly in physiological time"; that we have a "tendency to judge the likelihood of an occurrence based on the relative ability to imagine its happening"; and that "people can more readily discern cause and effect if the effect of a given action seems logically related to the assigned cause."

49 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801; *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210.

to new social circumstances. At a minimum, in this case it cannot be said with certainty, on a strike-out application, that the law will not develop when furnished with evidence to be presented at trial.

The relational underpinnings fundamental to tort law

38. The Court of Appeal's preoccupation with the "relational underpinnings … fundamental to tort law" indicates its preference to see tort law as manifesting corrective justice.[50] Theories of corrective justice are often set against the foil of distributive justice. While "there is no universal theory or aim underlying all tort law",[51] these are perhaps the two most "dominant" theories.[52] Justice Mallon summarised them recently as follows:[53]

> (a) Corrective justice: where a wrong is done by one person to another, it must be corrected by compensation to equalise the "moral" balance between the two parties. This is about making good certain alterations to the distribution of wealth or benefits in society. The person causing the alteration is held responsible.
>
> (b) Distributive justice: the law should allocate risks and losses according to broader utilitarian goals. This is about the way wealth and other benefits are distributed throughout society.

39. Mr Smith's claim does not require this Court to stray outside the bounds of corrective justice. But in any event, Mr Smith reminds the Court not only that it has regularly used tort law to issue distributive justice, but also that it is reductive to see corrective and distributive justice as presenting a dichotomy or a constraint.

Corrective justice

40. Mr Smith pleads that the way in which the respondents conduct their business activities interferes with the rights of the public, or breaches legal duties owed to him. Further, he pleads that these activities have caused and will cause him, and people like him, loss and harm.

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50 At [113]. **[05.0029]**

51 *Strathboss Kiwifruit Ltd v Attorney-General* [2018] NZHC 1559 at [232]. See also Thomas J in *Daniels v Thompson* [1998] 3 NZLR 22 (CA) at 68: "The function of the law of torts is far from being one-dimensional. As Linden states in his text, *Canadian Tort Law* (5th ed - 1993) at p 2, tort liability serves a number of functions. Of course, the obvious is to be acknowledged. Compensation is the first and foremost function. But this function is not the sole or exclusive function. Other objectives such as deterrence, vindication, condemnation, education, the avoidance of abuses of power, appeasement of the victim and the symbolic impact of a decision as an expression of society's disapproval of certain conduct all have a role to play."

52 *Strathboss*, above n 51, at [232].

53 *Strathboss*, above n 51, at [232].

41. The present claim is brought in the interconnected world of 2022 and can be located alongside other responses to a "polycentric" global climate crisis. But in that respect, it is not materially different from any other private law claim advanced after the advent of transnational communication and travel. That a claim sits within a polycentric landscape does not require the court to resolve the morass to address the claim. Lon Fuller, upon whose writings the Court of Appeal relied,[54] accepted that the mere fact a matter requiring adjudication affects and engages with a polycentric problem does not mean a court moves out of its "proper sphere" by dealing with it.[55]

42. When the courts of New Zealand began to adjudicate on the duties of care owed by builders and councils to homeowners,[56] they were not hamstrung in the face of polycentricity. Undoubtedly the problems in the building cases were polycentric ones. Yet the courts were able to navigate this polycentricity. The courts identified the multifarious actors (engineers, architects, builders, private certifiers, building inspectors, local bodies, insurers, ratepayers, body corporates) meeting at the cross-roads of the Building Act 1991, welfare politics, and a culture of living in small free-standing homes constructed by small building outfits.[57] Only William Young J saw polycentricity as a fetter.[58] Whereas the Supreme Court majority in *Sunset Terraces* took the view that:[59]

> … the fact that there might be overlapping duties owed by different potential defendants was no answer to a claim based on a loss by the Council's distinct fault.

43. Just as the building owner plaintiffs in the building cases did not seek to use the law of negligence to solve Aotearoa's leaky building crisis, Mr Smith does not seek to harness public nuisance, negligence, or tort law generally, to "solve" climate change. The courts in the leaky building cases used tort law to resolve the cases before them. Developments in policy resulted. In the climate context, this case might well contribute to a policy solution, or the impetus for

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54 At [26]. **[05.0008]**

55 Lon Fuller "The Forms and Limits of Adjudication" (1978) 92(2) Harv L Rev 353 at 403.

56 *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) (***Hamlin Court of Appeal***); *Invercargill City Council v Hamlin* [1996] AC 624, [1996] 1 NZLR 513 (PC) (***Hamlin Privy Council***); *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 (***Sunset Terraces Supreme Court***); *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 (***Spencer on Byron***).

57 See for example: *Hamlin Court of Appeal*, above n 56, at 524–529; *Sunset Terraces Supreme Court,* above n 56, at [19]–[22], [25], [49], [50]; and *Spencer on Byron,* above n 56, at [7], [9], [12], [18], [187]–[214].

58 *North Shore City Council v Body Corporate 188529* [2010] NZCA 64, [2010] 3 NZLR 486 at [211] (***Sunset Terraces Court of Appeal***); and *Spencer on Byron*, above n 56, at [240].

59 Elias CJ in *Spencer on Byron*, above n 56, at [9], describing the majority's approach in *Sunset Terraces*, above n 56, at [8] and [47]–[48].

one, but there is little doubt that a problem of the magnitude of climate change can only be addressed with action from all branches of government. The leaky building crisis was not much different. The nature of climate change does not mean the emission of GHGs cannot constitute a wrong, nor does it mean that the courts cannot, or should not, provide redress for wrongs associated with it as they would for other private wrongs.[60]

44. The claim pleaded is relational. It is pleaded that the respondents knew or ought to have known that their emissions would harm Mr Smith and people like him. It is pleaded that, despite that knowledge, they continue to externalise the harm of their emissions on to people like Mr Smith for their own profit. It is alleged that the respondents' emissions contribute to adverse environmental effects that did, do and will harm Mr Smith, his whānau and his descendants. Mr Smith seeks relief requiring the respondents to cease their contributions to these harms. Mr Smith is not asking the Court to fix climate change. There is nothing in the claim which called for the Court of Appeal's concern that Mr Smith's claim required the relational underpinnings of the corrective justice theory to be disregarded. On the contrary, Mr Smith says the respondents have wronged, and will wrong, him and should be made to stop. It was not Mr Smith that asked the Court of Appeal to stray into complex questions of policy and the balancing of different economic and social interests: that was the Court's own choice. To the extent these issues might need to be addressed as context, they require evidence and a trial.

Distributive justice

45. Further, it is misconceived to think that by dismissing claims for lack of standing, legal tenability or justiciability, the courts thereby stay out of the policy fray. On the contrary, by refusing to determine a question of rights

[60] Much is often made of Kysar's observation that climate change is a "paradigmatic anti-tort" (Douglas A Kysar "What Climate Change Can Do About Tort Law" (2011) 41 Env L 1 at 4). But that comment must be considered in light of the balance of his article, which is not so pessimistic. Kysar goes on to argue that negligence arguments are tenable ("Make no mistake: a conceivable set of arguments on behalf of climate change tort plaintiffs *does* exist" (at 44)), albeit that he considers they would require tort law to develop and that "Judges are unlikely to follow plaintiffs down this gauntlet" (at 44). Kysar's argument is not that tort law *cannot* respond to climate change, it is a doubt that judges will have the courage to do so. Indeed, he proceeds to argue that judges need to learn to see the world through an ecological lens, as they already do an economic lens, and that this would be welcome development in the law (at 45-46). He counsels against judicial retrenchment into "a narrow, classical liberal conception of tort" in the face of climate change and argues that do so would be "at the long-term risk of the social relevance and viability of the tort system". This, Mr Smith submits, is advice the Court of Appeal did not heed. In later writings Kysar has presented an argument for tort law as a principled and effective response to climate change: Douglas A Kysar "The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism" (2018) 9 Eur J Risk Reg 48.

falling within the judiciary's ordinary competence, the courts implicitly elect to make a policy decision: that a plaintiff should be denied the opportunity to seek and receive recourse for a wrong it says it has suffered. When it comes to policy, the choice not to decide is itself a decision.

46. To put it another way, the Court of Appeal made a policy choice that Mr Smith and others should bear the costs of the respondents' emissions, rather than the respondents. It variously asserted that what Mr Smith sought was likely to be "costly and inefficient"; "arbitrary in its application and impact"; and "ineffective, inefficient, and … socially unjust".[61] Mr Smith contests all of these points as matters of fact and intends to call evidence to the contrary. He says that the policy decision made by the Court of Appeal to strike out his claim is ineffective, inefficient and socially unjust. The effect of its decision is that the mitigation of GHG emissions will be delayed, with the result that Mr Smith will be made to bear even more of the harms externalised by the respondents' activities. By contrast, the respondents will continue to profit from their delay and ongoing political inaction.

47. As Peter Cane explains, "when courts make rules about the circumstances in which tort liability to repair harm will arise … they contribute to the establishment of a pattern of distribution of that resource and burden within society."[62] Whether or not one understands that as a *purpose* of tort law, it is a consequence. John Gardner elaborates:[63]

> It is part of the nature of a tort that designating some wrong as a tort – classifying it as a legal wrong under the 'tort' heading – entails creating a legal right to corrective justice in favour of those who are wronged. This legal right is a complex one. Its incidents include not only the wrongdoer's legal duty to repair, but also a largely undirected legal power for the person wronged to determine whether that legal duty is concretized and enforced through the courts, with a consequent duty on the courts to assist, when that power is validly exercised by the issue of proceedings. When this right is conferred, public authority (the authority of the court) is put at the disposal of the wronged person. When the rule of law prevails, moreover, the authority is laid partly at public expense … The wronged person, in short, is given a right not only against the wrongdoer but also against the court, a right to conscript the court … in his or her quest for corrective justice against the wrongdoer … In deciding whether something should be a tort, then, … the question that must be confronted, in addition, is whether the law should give it this kind of recognition – the tort law kind of recognition – complete with its generous terms for power-sharing and cost-sharing as between the aggrieved party and the legal system. That question is a question of distributive justice.

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61 At [33] and [35]. **[05.0009]**

62 Peter Cane "Distributive Justice and Tort Law" [2001] NZ L Rev 401 at 404.

63 John Gardner "What is Tort Law For? The Place of Distributive Justice" in *Torts and Others Wrongs* (Oxford University Press, 2019) 79 at 85–86.

48. The Court of Appeal's concern not to stray into policy-ridden distributive justice turns a blind eye to the distributive justice lurking beneath any adjudication it makes in the name of doing corrective justice between parties. It is moreover out of step with the courts' *explicit* acknowledgment of distributive justice priorities in leading New Zealand tort cases. For example, Elias CJ's reflection in *Spencer on Byron* that "it is a respectable function of tort law, in appropriate circumstances, to facilitate loss-spreading".[64] Or see any of the many tort cases in which the court has found a defendant to be vicariously liable, all the while acknowledging that in so finding, the court was waist-deep in policy.[65] If ever there was an appropriate case to consider fair distributions of loss, it is in the case of climate change, where those who have contributed the least to anthropogenic climate transformation are likely to be the first to suffer its life-threatening impacts.[66] Of course, these questions cannot be answered on a strike-out application without evidence.

Tikanga

49. The essence of Mr Smith's submission on tikanga is not that tikanga Māori creates direct obligations on the parties to this case, rather that its principles must inform how tort law develops in Aotearoa in relation to climate change. There are aspects of tikanga that speak to the existing torts of public nuisance and negligence but, in particular, tikanga principles would assist in the framing of the alternative novel tort.

50. It is well-established that the English common law only applies in New Zealand "insofar as it is applicable to the circumstances of New Zealand". Accordingly, courts have recognised that it is critical for our tort law to reflect the specific circumstances of Aotearoa.[67] These circumstances include tikanga.

51. Mr Smith did not initially "plead" tikanga Māori on the understanding that, as it forms part of the laws of New Zealand, there was no need to do so. To the extent evidence was necessary as to its content, that would be a matter for trial. However, during the hearing before the Court of Appeal, the view was expressed that tikanga Māori needed to be pleaded by Mr Smith if he intended to argue that it could inform the principles of tort law. Accordingly, Mr Smith has included such a pleading in the draft amended statement of claim.[68]

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64 *Spencer on Byron*, above n 56, at [52], quoted at [473] of *Strathboss*, above n 51.
65 *S v Attorney-General* [2003] 3 NZLR 450 (CA); *Couch,* above n 34.
66 Lazarus, above n 48, at 1160.
67 *Hamlin Privy Council* above n 56.
68 At [81].

52. Tikanga Māori is a system of law that includes obligations owed by people to others (and the natural world) and wrongs arising from those obligations. Under tikanga Māori these obligations are primarily grounded and informed by the relational underpinnings of whakapapa and whanaungatanga (kinship and relationships).

53. A breach of tikanga results in a hara or take (an issue or a cause). This requires utu and that appropriate steps are taken to restore ea (a state of harmony or balance). In respect of damage to the environment, measures such as rahui, the prohibition of specific human activity through the use of a tapu (making something sacred) is a common response. There is both an individual and collective intergenerational dimension to hara as to who is responsible for causing harm and as to who suffers harm.

54. Tort law and tikanga each have a long independent whakapapa of dealing with wrongs. As discussed above, this case does not require the courts to abolish the traditional relational underpinnings of tort law. This Court may nonetheless consider whether those relational underpinnings still serve us and may be informed by tikanga in that reflection. Although there is some alignment between tort law and tikanga, tikanga would push against a narrow conception of proximity founded on an individualistic epistemology. Tikanga concepts of interconnectedness ask us to think differently about harm and the restoration of that harm. Tikanga is part of the specific circumstances of Aotearoa, and accordingly must inform the common law's view of wrongs, wrongdoing and remedy.[69]

55. The relevant tikanga principles and the implications of those will be addressed in the substantive arguments below, particularly in relation to the third novel tort.

The common law and statute law

The Court of Appeal's judgment

56. The Court of Appeal held that common law tort proceedings were an inappropriate response to harm occasioned by climate change in part because Mr Smith's common law tort claim was said to be "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

[69] See Mihiata Pirini and Rhianna Morar "Climate Change and the Claiming of Tino Rangitiratanga" [2021] NZWLJ 86.

and just."[70] Further, it held that Mr Smith seeks to hold the respondents to standards "more stringent than those imposed by statute."[71] It concluded that the courts' role is not "to develop a parallel common law regulatory regime that is ineffective and inefficient, and likely to be socially unjust", but rather to "[support] and [enforce] the statutory scheme for climate responses and [hold] the Government to account."

57. As argued above, the Court of Appeal was not being asked to divine "a response to climate change". Nor it is clear how, in the absence of hearing evidence on the subject, the Court of Appeal was able to form a view on the efficacy of a common law response to claims such as this one.[72] That is something on which Mr Smith intends to lead evidence at trial. For now, he has proposed an amended pleading that pleads as fact the inability of the political branches to respond to climate change in a way that will meaningfully address the harm the respondents are causing him, and the ineffectiveness of the statutory scheme.

The Climate Change Response Act and emissions trading scheme

58. More generally, the Court of Appeal's holding that tortious liability would cut across, and would not support, the purpose of the statutory scheme is wrong. The purposes of the Climate Change Response Act include contributing to limiting warming to 1.5˚C and enabling New Zealand to meet its international obligations under the UNFCCC, the Kyoto Protocol and the Paris Agreement. Put another way, the purpose of the CCRA is to limit GHG emissions to prevent dangerous climate change of greater than 1.5˚C.

59. Mr Smith's claim is grounded in the same idea. He proposes amending his pleading to expressly reflect the IPCC's most recent science on what is required to achieve 1.5˚C. Mr Smith submits that his claim supports the statutory scheme. Ironically, the Court of Appeal's decision, by ruling out the possibility of any tortious liability, will make it harder for New Zealand to achieve reductions consistent with 1.5˚C and to meet its international commitments, and for the world to avoid dangerous anthropogenic climate change. 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.

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70 At [33]. **[05.0009]**
71 At [33]. **[05.0009]**
72 See above at [28].

60. There is nothing at all uncommon in tort law supporting statutory regulation. The Lawyers and Conveyancers Act 2006 is an Act to "protect the consumers of legal services". It establishes an extensively regulatory apparatus both directed at consumer protection and professional discipline. Yet, consumers retain the right to sue in negligence where their lawyers breach duties of competence.

61. The Court of Appeal appears to have laboured under a misapprehension that the purpose of the CCRA (and the ETS it establishes) is to expressly *permit* or *facilitate* some GHG emissions while stopping others. That is not correct. The CCRA and ETS do not "permit" emissions. Rather, they create *obligations* on ETS participants who emit, requiring them to surrender units matching their emissions.[73] A failure to meet those obligations gives rise to penalties under the Act.[74] A holder of an emissions unit does not have a "right to emit". Rather, an emitter uses units to meet liabilities arising from their emissions. The distinction is subtle, but important. While the ETS allows for units to be traded to create a market price, it regulatory effect is more akin to an excise tax.

62. The Court of Appeal also failed to have regard to the fact that a number of the respondents do not have obligations, or have limited obligations, under the ETS. Or that some respondents receive so many free units under the ETS that the scheme has little material effect on them. Or that some respondents create all or most of their emissions exporting products to jurisdictions where emissions are not meaningfully regulated. These are matters Mr Smith will lead evidence on at trial, but the short point is that the CCRA is not a complete answer. Again, these are the perils of deciding factually nuanced cases like this on a strike-out application and without evidence.

The relationship between common law and statute

63. Professor John Burrows QC reviewed the relationship between common law and statute in his 2007 Lord Cooke Lecture.[75] He observed that the common law has a varied interaction with statute, sometimes running in parallel, other times "jagged and awkward".[76] He provides more detail on this untidiness in

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73 Climate Change Response Act 2002, s 63.
74 Climate Change Response Act 2002, s 134.
75 John Burrows "Common Law among the statutes: The Lord Cooke Lecture 2007" (2008) 39 VUWLR 401.
76 At 410.

his consideration of the modern tendency for judges to refer to statutes as part of the contextual material informing their adjudications, noting:[77]

> [T]here are some risks in the practice. Statutes can change with changing governments. They can… "fade like shadows". There is little point in aligning common law with a particular statute if that statute is going to disappear in the next Parliament. There needs to be a trend of statute law and a probability of continuity. One must also be cautious about the inferences we draw from statutes, because sometimes there can be an argument both ways. When the majority of the Court of Appeal in *Hosking v Runting* confirmed that there is a tort of invasion of privacy in this country, they were fortified by the number of recent statutes here which recognise aspects of privacy. They regarded those statutes as setting the scene. Yet, Keith J, one of the dissenters in *Hosking*, drew exactly the opposite conclusion. Parliament, he said, had deemed those and only those aspects of privacy worthy of protection, and it was not for the courts to proceed beyond the point where Parliament had decided to stop by.

64. Those recent statutes recognising aspects of privacy in force at the time of *Hosking* were numerous. They included: the Privacy Act 1993, the Broadcasting Act 1989, the Harassment Act 1997, the Postal Services Act 1998, the Telecommunications Act 2001, the Summary Offences Act 1981, the Crimes Act 1961, the Private Investigators and Security Guards Act 1974 and the Official Information Act 1982. And, as Professor Burrows noted, the majority of the Court of Appeal saw those statutes as recognising the privacy value and entitlement to protection. The majority found the statutory landscape could not be regarded as so comprehensive as to preclude common law remedies.[78] Further, the majority acknowledged the Court of Appeal's reminder in *R v Hines*, that it must always carefully consider the relative institutional capacities of the Courts and Parliament.[79] It did not consider itself to have overstepped its institutional capacity in accepting the existence of a tort of invasion of privacy in New Zealand. Recall that the Court was considering the concept of privacy, a concept that is axiomatically "large, unwieldy and elusive."[80] Yet, as recorded by Tipping J:[81]

> In the absence of any express statement that the Privacy Act was designed to cover the whole field, Parliament can hardly have meant to stifle the ordinary function of the common law, which is to respond to issues presented to the Court in what is considered to be the most appropriate way and by developing or modifying the law if and to the extent necessary.
>
> 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.

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77 At 407 (citations omitted).
78 *Hosking,* above n 46, at [108].
79 *Hosking,* above n 46, at [119]–[120], citing *R v Hines* [1997] 3 NZLR 529 (CA) at 538–539.
80 Stephen Penk "Thinking About Privacy" in Stephen Penk and Rosemary Tobin (eds) Privacy Law in New Zealand (Brookers, Wellington, 2010) at 1, as cited in *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672 at [72].
81 *Hosking,* above n 46, at [227] and [228].

65. Parliament has not signalled that the CCRA was designed to cover the whole field of law touching upon climate change, and it demonstrably does not. Indeed, the nature of climate change is such that this would be a remarkable proposition: the very international instruments that the CCRA seeks to enable recognise that climate action is needed at all levels of government and society. The CCRA cannot be understood as having stifled the courts' function so completely as to preclude this Court from responding to Mr Smith's claim. However, the CCRA does involve recognition of the need for urgent and significant reductions in GHG emissions to avoid dangerous anthropogenic interference with the climate system, and tort liability is entirely consistent with that goal.

66. As Lord Burrows has observed, in the context of the law of obligations judges should not abdicate their judicial role by leaning too heavily on statute (and especially statutes yet to be passed—a profound point in the context of the CCRA which largely sets up a framework for future plans or regulations):[82]

> … the existence of a statute is rarely a good reason for denying a natural development of the common law. Reasoning to that effect has seriously tarnished some areas of the law. While factors such as impracticability and inconsistency would justify not developing the common law, it is misguided to see a statute as reflecting Parliament's intention that the law should be frozen as is. Leading on from that, it is an abdication of judicial responsibility for judges, at least in the law of obligations, to decline to develop the common law on the grounds that legislation is more appropriate. Even if a statutory solution would be better; no-one can predict whether legislation will, or will not, be passed. It is therefore preferable for judges to proceed as they think fit, whether the decision be in favour or against a development, knowing that the Legislature is free to impose a statutory solution if the common law position is thought unsatisfactory or incomplete.

67. Moreover, the Court of Appeal did not just hold that the CCRA precluded the development of a new tort; it held that it somehow precluded the operation of the centuries' old torts of public nuisance and negligence. As will be discussed, this is not the effect of the CCRA and the Court of Appeal's conclusion to that end was wrong and unprincipled.

[82] Andrew Burrows "The relationship between common law and statute law in the law of obligations" (2012) 128 LQR 232 at 258.

FIRST PLEADED CAUSE OF ACTION (PUBLIC NUISANCE)

What is public nuisance?

68. Like many torts (including assault, battery and defamation[83]) public nuisance began as a common law crime. In 1535 it was recognised that a person who suffered particular injury from an interference with a public right had standing to sue in tort for damages or to restrain that interference.[84]

69. In *R v Rimmington*, the House of Lords affirmed the elements of the common law crime of public nuisance to be an act or omission, not warranted by law, that has the effect of endangering the life, health, property, morals or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects.[85] As such, a public nuisance can arise from:

(a) An activity that causes or contributes to a widespread public harm. So, in *Attorney-General v PYA Quarries*, the blasting, dust and vibration of a quarry was held to be a public nuisance because it materially affected the reasonable comfort and convenience of a class of Her Majesty's subjects.[86]

(b) An interference with a right common of all citizens (recognised rights include the right to pass and repass on a public road; the right of passage over navigable waters or waterways; the right to fish in tidal waters; and the right to receive the natural flow and quality of a flowing watercourse). In this connection, public nuisances have been

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83 See, for example, FA Trindade, "Intentional Torts: Some Thoughts on Assault and Battery" (1982) 2:2 Oxford J of Legal Stud 211 (as to assault and battery); and WS Holdsworth, *A History of English Law, Volume VIII* (Methuen & Co Ltd, London, 1925) at 333–334 (as to defamation).

84 *Anonymous* (1535) YB 27 Hy VIII, Mich, pl 10. The key passage from the decision can be found in William Prosser "Private Action for Public Nuisance" (1966) 52 Va L Rev 997 at 1005. Albert Kilfray's (still) leading study of the history of actions on the case observes "since a public nuisance was a crime it seemed reasonable that any person damaged by it could prove both wrong and damage and bring an action on the case" AK Kiralfy, *The Action on the Case* (Sweet & Maxwell Ltd, London, 1951) at 69. In New Zealand the common law crime of public nuisance was abolished, but the tort remains.

85 *R v Rimmington* [2005] UKHL 63, [2006] 1 AC 459.

86 *Attorney-General v PYA Quarries Ltd* [1957] 2 WLR 770 (CA) at 780 and 785; *Wandsworth London Borough Council v Railtrack plc* [2001] EWCA CIV 1236, [2002] QB 756 at [19] and [30]. In *Corby Group Litigation Plaintiffs v Corby BC* [2008] EWCA Civ 463; [2009] QB 335 at [29]–[30] the Court of Appeal observed that "the essence of the right that is protected by the crime and tort of public nuisance is the right not to be adversely affected by an unlawful act or omission whose effect is to endanger the life, safety, health etc of the public" and that its purpose is to "protect the public against the consequences of acts or omissions that do endanger their lives, safety or health".

recognised in cases involving the obstruction of roads or waterways, harming fisheries, and the pollution of rivers and streams.[87]

70. A defendant's wrong is their conduct which substantially or unreasonably contributes to the interference with the public right or the creation of the state of affairs which materially affects the reasonable comfort and convenience of the community.[88] The wrong does not depend on any particular person suffering an injury,[89] rather it arises from the interference and state of affairs contributed to by the conduct. However, private actionability is limited to persons who can show that they have actually suffered some injury particular to them arising from the interference with public rights, or to the Attorney-General (suing personally or on a relator basis).

An interference with public rights

71. The Court of Appeal was correct to find that Mr Smith's claim involves a tenable interference with public rights. *The Law of Torts in New Zealand* recognises that the "concept of 'public rights' is an expansive one" embracing passage along highways and navigable waters, rights to fish in public waters, "as well as broad interests in public health and safety, public morality, and the general comfort and convenience of members of the public".[90] Case law also refers to interferences with "comfort and convenience" and "widespread" and "indiscriminate" nuisance.[91] That is apt to describe climate change.

72. The Court of Appeal was also correct to find that interferences with rights pleaded in the claim were tenable foundations for a claim in public nuisance, were consistent with the general formulations of the tort of public nuisance,

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87 See, for example, Carolyn Sappideen and Prue Vines *Fleming's The Law of Torts* (10th ed, Thomson Reuters, Sydney, 2011) at 488 and following.

88 Whether the interference is substantial or unreasonable turns on a notion of reciprocity: we are expected to accommodate from others what we expect them to accommodate of us. So, to use the paradigm case of the right to pass and repass on the highway: a car temporarily broken down on the highway is not a public nuisance, but a car permanently abandoned on high may be. The same with temporary scaffolding over a footpath, or a vehicle temporarily stopped for unloading. See, for example, *Harper v Haden* [1933] Ch 298 and Sappideen and Vines Fleming's, above n 87, at 492–493.

89 *Jan de Nul (UK) Ltd v Axa Royal Belge* [2000] 2 Lloyd's Rep 700 (QB) at [41]; *Tate & Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509 (HL); *Attorney-General v PYA Quarries*, above n 86, at 785 per Denning LJ ("Take the blocking up of a public highway … It may be a footpath very little used except by one or two householders. Nevertheless, the obstruction affects everyone indiscriminately who may wish to walk along it.").

90 Stephen Todd (ed) *The Law of Torts in New Zealand* (8th ed, Thompson Reuters, Wellington, 2019) at 587.

91 See, for example, *Attorney-General v PYA Quarries Ltd,* above n 86, at 780 and 785; *Nottingham City Council v Zain* [2001] EWCA Civ 1248, [2002] 1 WLR 607 at 610; *Wandsworth London Borough Council v Railtrack plc,* above n 86, at [19] and [30].

and were not a basis to strike out the claim.[92] Mr Smith submits that the pleaded conduct is tenably a public nuisance either because:

(a) The respondents' conduct unreasonably causes or contributes to a widespread harm that materially affects the reasonable comfort or convenience of Her Majesty's citizens, including Mr Smith, through the respondents' contribution to the adverse effects of climate change. This is ultimately a question of fact, and is tenable on the pleaded claim.

(b) Alternatively, or additionally, 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 is a logical extension of recognised common law public rights to roads, fisheries and watercourses. Mr Smith submits that the courts recognising public rights to clear air and clean water in the midst of the Industrial Revolution would have also recognised a public right to a safe and habitable climate system, had the harms of GHG emissions been known then.

(c) A compelling explanation of the common law's protection of these rights is that they are connected to the preservation of freedom by creating and protecting public resources upon which the exercise of other common law rights depend, and which absent a public right would create circumstances in which each person's freedom would be systematically subject to the will of others.[93] In the same way, protection of a safe and habitable climate system is essential to, and a prior condition of, the exercise of all other common law rights. Absent a public right preserving a safe and habitable climate system, that state of affairs is systematically subject to the will of major

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92 Court of Appeal Judgment, above n 3, at [68]. **[05.0019]**

93 Arthur Ripstein has argued that the common law's protection of passage over roads and navigable watercourses is necessary to enable citizens to freely participate in society free. Without public roads, one would need to obtain permission of each landowner between points A and B, with the result that each person's freedom would be systematically dependant on the will of others. See *Force and Freedom: Kant's Legal and Political Philosophy*, (Cambridge: Harvard University Press, 2009) from 232. Jason Neyers has used a similar logic to explain the common law's protection of the right to fish in tidal waters. That is that the law allows people the opportunity to sustain themselves from public resources so that they are not systematically dependant on the will or charity of others. See JW Neyers, "Reconceptualising the Tort of Public Nuisance" [2017] 76:1 Cambridge L J 87.

polluters who have the power, through their emissions, to control whether that safe state of affairs continues.[94]

No need for an "independently unlawful act"

73. The respondents persist with an argument that public nuisance requires some "independently unlawful act", a requirement found by Wylie J in the High Court but rejected by the Court of Appeal. The Court of Appeal was plainly right to reject it. Leading texts[95] and the English Law Commission[96] confirm that no independently unlawful act is required.

Standing requirement satisfied, or unnecessary

74. Public nuisance involves an interference with a public right, being a right held in common by all members of the community. An interference with such a right creates a *theoretical* injury to each member of the community. For that reason, the common law limited standing to bring private claims in tort to only those who had suffered a particular (or "special") injury from the interference with rights.[97] The concern was to ensure that only plaintiffs who had suffered an *actual injury* (including property damage and economic loss) from the interference with the public right could bring a claim. So, for example, an obstruction of a navigable waterway impedes the right of every person to use the waterway, but only those who show they actually needed to use that waterway suffer a privately actionable wrong.[98]

75. While some earlier Anglo-Commonwealth and United States case law suggested that this test required the plaintiff to show an injury different in kind to that suffered by the public generally, modern case law and academic

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94 See, for example, Aravind Ganesh, *Rightful Relations with Distant Strangers: Kant, the EU and the Wider World* (Oxford: Hart Publishing, 2021) at 128–130.

95 John Murphy *The Law of Nuisance* (Oxford University Press, 2010) at 138; *Halsbury's Laws of England* (online ed, 2018) vol 78 at [105] ("Public Nuisance").

96 Law Commission *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com No 358, June 2015) at [2.4] and *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency—A Consultation Paper* (Law Com CP 193, 2010) at [2.9]. The Commission correctly observed that the statement in *R v Rimmington,* above n 85, at [10] that public nuisance involves an "act not warranted by law" concerns only whether or not there is a lawful excuse for the injury, not whether there was an independently unlawful act. This is consistent with numerous authorities in which public nuisances were found despite there being no unlawful conduct, and expressly recognising the underlying conduct as being lawful except to the extent it caused a nuisance. See, for example, *Crowder v Tinkler* (1815) 19 Ves Jun 618 at 623; *Lower Hutt City Council v Attorney-General ex rel Moulder* [1977] 1 NZLR 184 (CA) at 190; *Attorney-General v The Council of the Borough of Birmingham* (1858) 4 K & J 528, (1858) 70 Eng Rep 220; *Gillingham Borough Council v Medway (Dock) Co Ltd* [1992] 3 All ER 923 at 932.

97 See, for example, *Anonymous*, above n 84; *Williams's Case* (1592) 5 Co Rep 72a, 77 ER 163 at 73a; *Walsh v Ervin* [1952] VLR 361 (VSC) at 367.

98 As in *Rose v Miles* (1815) 4 M & S 101, 105 ER 773.

commentary confirms that 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".[99] It is far from clear that the New Zealand Court of Appeal's 1869 decision in *Mayor of Kaiapoi v Beswick*, on which the courts below relied, remains good law, if it ever was.[100]

76. The approach of the courts to standing is liberal.[101] So long as the plaintiff can show more than a theoretical, or *de jure*, injury to rights, then they may bring an action in tort. Physical damage to property is always sufficient,[102] as is depreciation of land value,[103] pecuniary loss in the form of loss of custom and profit,[104] or increased expenditure.[105] Harm does not need to be economic or quantifiable, and harm in the form of particular delay, inconvenience or loss of enjoyment can suffice.[106]

77. In view of these well-established principles, Mr Smith's claim to standing is plainly tenable. Mr Smith pleads, among other things, that the respondents' interference with public rights has damaged and will damage land that he has an ownership interest in (with others) at Mahinepua. At common law physical damage to property (including land) has always sufficed to ground standing for a private claim in public nuisance, and the finding in the High Court (and suggestion in the Court of Appeal) that there was no legally tenable basis on which Mr Smith could establish standing is directly contrary to established principle. That other people, owning other land, might also be injured by rising seas is irrelevant.[107] The standing rule has never operated to prevent a multiplicity of claims simply because a defendant has actually injured many

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99 Sappideen and Vines *Fleming's*, above n 87, at 491; *George v Newfoundland and Labrador* (2016) 399 DLR (4th) 440 at [115] citing with approval the quoted statement from AM Linden and BP Feldthusen *Canadian Tort Law* (LexisNexis Canada, Markham, Ontario, 2011, 9th ed) at 575-576; JW Neyers and A Botterell "*Tate v Lyle*: Pure Economic Loss and the Modern Tort of Public Nuisance" (2016) 53 Alberta L Rev 1031 at 1042-1043; David Bullock "Public Nuisance and Climate Change: The Common Law's Solutions to the Plaintiff, Defendant and Causation Problems" (2022) MLR 1 at 3–12.

100 *Mayor of Kaiapoi v Beswick* (1869) 1 NZCA 192. Indeed, and worryingly, the Court of Appeal in *Kaiapoi* observed at 208 that it was "difficult, perhaps impossible" to reconcile the then authorities on what constituted particular damage. In the more than 150 years that have passed since that decision, the position is now clear.

101 See Todd, above n 90, at 589.

102 *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd [The Wagon Mound (No 2)]* [1967] 1 AC 617 (PC); *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683 (QB).

103 *Caledonian Railway Co v Walkers Trustees* (1882) 7 App Cas 259 (HL); *Walsh v Ervin*, above n 97, at 368.

104 *Amalgamated Theatres Ltd v Charles S Luney Ltd* [1962] NZLR 226 (SC).

105 *Tate & Lyle Industries,* above n 89.

106 *Walsh v Ervin*, above n 97, at 371; *Coldicutt v Ffowcs-Williams* HC Auckland AP130-SW00, 8 February 2001 at [14].

107 David Bullock "Public Nuisance and Climate Change", above n 99, at 7–12.

people.[108] Harms to Mr Smith's mana and his ability to practice culture are also actual, not theoretical, injuries and can also be understood as a distinct and sufficiently special type of harm.

78. The Court of Appeal, like the High Court, fell into an unprincipled trap of trying to perform some abstract comparison of the relative harm climate change will cause to Mr Smith's interests and to the interests of other people owning other land. That is the wrong question. The right question is, "Does Mr Smith rely on an actual injury to him, rather than the same theoretical interference with his legal rights that is suffered by all?" The answer to that question is: "Yes, he relies on an actual injury being the pleaded damage to the land in which he has an interest". Mr Smith submits that his standing is not only tenable, but also made out on the pleadings.

79. In the alternative, and without resiling from the principal submission that Mr Smith has pleaded facts sufficient to establish a tenable basis for standing, Mr Smith says this Court should either abolish or relax the standing rule in this context.

80. Such relaxation (or abolishment) is appropriate in this case. If, somehow, the standing rule excludes someone in Mr Smith's position—a Māori leader coming to court alleging that the respondents are causing the loss of his whenua and harm to a taonga of his whānau —then the rule is over-exclusory, inconsistent with Mr Smith's mana and kaitiaki status, and lacking in any countervailing principled justification.[109] Mr Smith is a proper person to bring such a claim. To the extent that the historical justification of the rule, being to prevent a multiplicity of trivial cases,[110] remains (which is far from clear) then the court can relax or abolish the rule in cases like this where only injunctive and/ or declaratory remedies are sought.

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[108] *Ashby v White* (1703) 2 Ld Raym 938, 32 ER 126.

[109] The standing rule has long been criticised with adjectives including "unfair", "unjust", "unduly restrictive", "anomalous", "illogical" and "paradoxical". See, for example, Jeremiah Smith "Private Action for Obstruction to Public Right of Passage" (1915) 15 Colum L Rev 1 at 7; William L Prosser "Private Action for Public Nuisance", above n 84, at 1010; Comment "Private Remedies for Water Pollution" (1970) 70 Colum L Rev 734 at 740; Mark A Rothstein "Private Actions for Public Nuisance: The Standing Problem" (1974) 76 W Va L Rev 453 at 456; Denise E Antolini "Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule" (2001) 28 Ecology LQ 755 at 761.

[110] This is the earliest rational given for the rule. See *Williams's Case*, above n 97. See also Jane Stapleton "Comparative Economic Loss: Lessons from Case-Law-Focused 'Middle Theory" (2002) 50 UCLA L Rev 531 at 567.

81. A restricted approach to standing would also be difficult to reconcile with the United Nations Declarations on the Rights of Indigenous Peoples (**the Declaration**),[111] to which New Zealand is a signatory.[112] Article 25 provides that indigenous peoples have the "right to maintain and strengthen their distinctive spiritual relationship" with their land and other resources and to "uphold their responsibilities to future generations in this regard". The Declaration also affirms that:[113]

> Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights.

82. Taking these proceedings is consistent with Mr Smith's role and obligations as kaitiaki of his whenua and with his intergenerational responsibility. A narrow approach to standing would not accord with the principles expressed by the Declaration.

Causation

83. Public nuisance is a tort that engages upon collective action problems. The nature of those problems is such that the courts have frequently had to grapple with issues of determining causation where there are multiple concurrent contributors to the harm. In that context, the courts developed and preferred a contribution to harm approach in public nuisance cases over a cause in fact (or "but for") approach.[114]

84. It is 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 Her Majesty's subjects. As such, 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.

85. The Court of Appeal recognised that there are numerous authorities finding defendants liable for being one of multiple contributors to a public nuisance

111 United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295, A/Res/61/295 (2007).
112 (20 April 2010) 662 NZPD 10229–10237.
113 Art 40.
114 David Bullock "Public Nuisance and Climate Change", above n 99, at 19–32.

consisting of an aggregation of effects.[115] The Court of Appeal also correctly recognised that these principles—many of which have existed in English common law for centuries—might well exist in New Zealand law.[116]

86. However, the Court of Appeal purported to distinguish these principles from the case at hand on the basis that: "All of these 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".[117] Having reached this definitive conclusion, it is surprising that the Court of Appeal did not identify, or analyse, any of the cases on which it relied.

87. Counsel have been unable to identify authority supporting the distinction drawn by the Court of Appeal, and the Court did not cite any. On the contrary, the Court of Appeal's conclusion does not bear scrutiny upon a review of the authorities. For example, there are numerous cases where local authorities were found to have caused public nuisances from discharging sewage into rivers, despite individual householders being the actual contributors of the sewage discharged, and the waterways involved having been polluted by numerous other non-party sources (including industrial and manufacturing uses). In these cases, not all of the contributing polluters were before the court, nor was it realistic to identify any meaningful "finite number of known contributors".

88. Consider, for example, *Attorney-General v Leeds*.[118] The plaintiff sought to restrain the city's sewer outlet into the river Aire. The first defence advanced by the city was that the Aire "was a polluted stream, from the drainage of a large district including several manufacturing towns, before it reached Leeds, and that the nuisance was only partially due to the drainage operation of [Leeds]".[119] Nevertheless, an interim injunction issued and was then sustained, with this defence being expressly rejected.[120] The decision directly contradicts the conclusion of the Court of Appeal in the present case because it did not matter that others, who were not before the Court, had also polluted the river. It supports the tenability of Mr Smith's arguments.

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[115] Court of Appeal Judgment, above n 3, at [90]. **[05.0023]**
[116] Court of Appeal Judgment, above n 3, at [91]. **[05.0024]**
[117] Court of Appeal Judgment, above n 3, at [92]. **[05.0024]**
[118] *Attorney-General v Leeds* (1870) LR 5 Ch App 583.
[119] At 586.
[120] At 595.

89. In *Attorney-General v Colney Hatch Lunatic Asylum*, the defendant argued that the polluted state of Pymm's Brook was principally caused by "the great number of new houses which had been built both above and below the grounds of the asylum, and which were all drained into the brook".[121] The evidence was that the stream was "considerably polluted with sewage before it receive[d] the asylum sewage" and although the asylum "considerably increased" the pollution "it is quite certain that if the whole of the asylum sewage were removed from *Pymm's Brook*, that brook would still remain seriously polluted with sewage".[122] On the Court of Appeal's analysis in the present case, this ought to have seen the claim against the asylum fail because there were other unknown contributors not before the court, but it did not fail.

90. *R v Neil* concerned a prosecution for public nuisance caused by the defendant's slaughterhouse "to the annoyance of persons passing along a road leading from Battle Bridge to Highgate".[123] The defendant argued that there were "a number of other offensive trades … carried on near this place, knackers, melters of kitchen &c [sic]" and that this was a defence.[124] None of those parties were before the Court. Nevertheless, Abbott CJ rejected the defendant's arguments, holding that "the presence of other nuisances, will not justify any one of them; or the more nuisances there were, the more fixed they would be; however, one is not less subject to prosecution because others are culpable".[125]

91. In *Woodyear v Schaefer*, the defendant slaughterhouse sought to escape liability for its discharges on the basis of discharges from a "large number of [other] slaughter-houses … breweries, soap and other factories, and the cattle scale … and other offensive matter from various other sources" along the watercourse.[126] It said that its contribution was such that, if it were enjoined, the pollution by others would continue. This argument was rejected by the Court of Appeals of Maryland, which held that "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."[127]

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[121] *Attorney-General v Colney Hatch Lunatic Asylum* (1868) LR 4 Ch App 156 at 148.
[122] At 150.
[123] *R v Neil* (1826) 2 Car & P 485, 172 ER 219 at 485.
[124] At 485.
[125] At 485.
[126] *Woodyear v Schaefer* (1881) 57 Md 1 at 6.
[127] At 7.

92. *Blair v Deakin* involved the pollution of a stream known as the Eagley brook, upon which the plaintiffs relied for their respective bleach works.[128] The plaintiffs alleged that the discharges from the defendants' works had diminished the quality of the water in the brook. It was alleged that although there were several other upstream manufacturers, some of which had endeavoured to reduce their discharges after the plaintiffs' complaints, the defendants had not. Accordingly, the plaintiffs sought both an injunction to restrain the defendants from discharging into the brook, and damages.[129] The defendants argued that any pollution from its works was so diluted by the time it reached the plaintiffs' works that it was "innocuous", and that the effect experienced by the plaintiffs was created by other manufactories along the river.[130]

93. In a detailed and considered judgment, reviewing extensive authorities, Kay J held that it was no defence for a defendant to say that their pollution alone was not a nuisance, that it was only a minor contribution, or that there were other contributors. Accordingly, so long as the plaintiff could establish that some pollution from the defendants' works reached the plaintiffs, the plaintiffs would have a right of action to restrain the contribution to the nuisance.[131]

94. In *Crossley v Lightowler*, the plaintiff, a large carpet manufacturer on the banks of the river Hebble, claimed that the river had been fouled by the defendant's dye-works some distance upstream.[132] One of the defendant's arguments was that the water in the river had already been so fouled by other manufactories on the river that an order stopping any additional pollution from the defendant's works would be immaterial and would not stop the harm being experienced by the plaintiff.[133] This was a case in which, to adopt Kay J's description of it in *Blair v Deakin*, "it [was] impossible to trace any evil at all to the particular defendant".[134] Nevertheless, an injunction issued and was upheld on appeal, where Lord Chelmsford LC considered the House of Lords' decision in *St Helen's*[135] to be a complete answer to the issue of multiple causes of a nuisance, observing: "Where there are many existing nuisances,

[128] *Blair v Deakin* (1887) 57 LT 522 (Ch).
[129] At 523.
[130] At 525.
[131] At 526.
[132] *Crossley and Sons Ltd v Lightowler* (1867) L R 2 Ch App 478.
[133] At 478. The argument is recorded in the report of the case in the following terms "secondly, that there were many other manufactories on the river by which the river was so fouled as to make the fouling by the Defendant's immaterial".
[134] *Blair v Deakin*, above n 128, at 526.
[135] *St Helen's Smelting Co v Tipping* [1861-73] All ER Rep Ext 1389.

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". Further, that it could not be the case that the defendant could "add to the former foul state of the water" and assert that they "are not to be responsible on account of its previous condition".[136] If that were the law, he observed, it would effectively make the legality of the defendant's pollution dependant on the pollution of others, meaning that if the plaintiffs were to succeed in getting other polluters to stop their pollution (by suing them or by buying them out) then the plaintiff could not object to the defendant continuing.[137] Lord Chelmsford concluded that could not be law: every contributor to the nuisance was liable to be restrained.

95. There are other examples.[138] In sum, there is ample authority demonstrating the Court of Appeal erred in distinguishing Mr Smith's case on the basis he could not establish legal causation if there were other contributors to the wrong not before the court or who could not be readily identified. On the contrary, the authorities provide clear support for the tenability of Mr Smith's public nuisance claim despite the diffuse and multicausal nature of GHG emissions.

96. Moreover, Mr Smith says that the Court of Appeal's reasoning and conclusions are deeply imbued with inappropriate assertions of fact. Mr Smith pleads that the cessation of the respondents' emissions will materially reduce the harm he faces from climate change. It is irrelevant that there are other contributors who are not before the Court. If the respondents consider that there are other people who should be before the court, then it is open to them to join them. Mr Smith is entitled to restrain anyone doing him wrong, and he is not required to identify and restrain *everyone* doing so.

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136 *Crossley and Sons Ltd v Lightowler*, above n 132, at 481.

137 At 481–482.

138 For example, *Canada (Attorney-General) v Ewen* [1895] BCJ No 11 where the British Columbia Supreme Court rejected the defendant cannery's argument that its pollution of the Fraser River should not be restrained because the pollution of the river was caused by "the number of canneries all doing the same thing". The Court held that "[e]veryone who contributes to a nuisance is liable, if in the aggregate a nuisance is proved" (at [6]-[7]). See also *Thorpe v Brumfitt* (1873) L R 8 Ch App 650 and *Lambton v Mellish* (1894) 3 Ch 163. In *Thorpe* the Court gave the illustration, at 656-657: "Suppose one person leaves a wheelbarrow standing on a way; that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent and it is no defence to any one person among person among the hundred to say that what he does causes of itself no damage to the complainant".

Public nuisance and statute

97. If a nuisance is "warranted", or authorised, by law—whether expressly or by necessary implication—then a defendant causing a nuisance will have a defence.[139] The defendant bears the burden of proof,[140] so the argument is inapt for a strike-out application. The courts have required a high level of precision before finding that a legislature or other public authority has permitted a defendant to commit a nuisance, given the potential for authorisation to leave those harmed by the nuisance without remedy.[141] Absent statutory authorisation, the public benefit of the nuisance causing activity is legally irrelevant.[142] The courts' reasoning in this area is consistent with a wider approach which recognises that the legislature cannot override common law rights with general or ambiguous language, and that it must instead use express language or necessary implication.[143] The threshold is high because the consequence is that the defendant is thereby permitted to interfere with the rights of individuals and the public.

98. The courts have long been slow to find nuisances to be authorised by legislation or the holding of necessary planning or regulatory permissions. There are numerous examples, including:

    (a) In *R v Cross*, the defendant's slaughterhouse produced "very offensive smells … to the annoyance of those who lived near it, and also of persons who passed along a turnpike road".[144] The defendant had the necessary statutory "certificate and licence … authorising him to keep a house for the slaughtering of horses".[145] However, Abbott CJ held that "this certificate is no defence; and even if it were a licence from all the magistrates in the county to the defendant to slaughter horses in this very place, it would not entitle the defendant to continue

[139] Sappideen and Vines *Fleming's*, above n 87, at [21.220]; Edwin Peel and James Goudkamp, *Winfield and Jolowicz on Tort* (19th ed, Sweet & Maxwell, London, 2014, 19th ed) at [15-063].

[140] *Manchester Corp v Farnworth* [1930] AC 171 (HL).

[141] Sappideen and Vines *Fleming's*, above n 87, observe at [21.220] that while it might be readily inferred from a statute that a particular activity is to be tolerated it is much more difficult to infer a legislative intention that those harmed by the activity should lose all right to remedy.

[142] See, for example, *Munro v Southern Dairies* [1955] VLR 332 at 337. See also *Attorney-General v Birmingham* above n 96, *Attorney-General v Leeds* above n 118, and *Attorney-General v Colney Hatch Lunatic Asylum* above n 121.

[143] This principle is typified by the decision of the House of Lords in *R v Secretary of State of the Home Department, ex parte Simms* [1999] UKHL 33, [2000] 2 AC 115. See generally, Jason N E Varuhas, "The Principle of Legality" (2020) 79:3 CLJ 578.

[144] *R v Cross* (1826) 2 Car & P 484, 172 ER 219.

[145] At 484.

the business there, one hour after it becomes a public nuisance to the neighbourhood".[146]

(b) In *Attorney-General v Forbes*, the Lord-Chancellor referred to two early cases on this issue.[147] In *Box v Allan*,[148] the court intervened to stop the Commissioners of Sewers acting to occasion a public nuisance despite them otherwise acting within the scope of their statutory authority. In *Attorney-General v Johnson*,[149] the defendants, the Corporation of the City of London, were authorised by statute to do all that was necessary in exercise of the duties as conservators of the River Thames, but this did not imply a power to cause a nuisance through their sanitation operations.

(c) In *Crowder v Tinkler*, it was held that a powder mill could still be a public nuisance even if lawfully authorised to manufacture gunpowder at a particular location.[150]

(d) In *Attorney-General v Council of the Borough of Birmingham*, the local authority's statutory power and duty to construct a sewer did not extend to authorising the nuisance created by their decision to drain that sewer into the River Tame.[151]

(e) In *R v Bradford Navigation Co*, the proprietors of a polluted industrial canal were successfully prosecuted for public nuisance despite having statutory authority to operate the canal and to take water from it.[152]

(f) In *Metropolitan Asylum District v Hill*, the House of Lords confirmed the courts will only recognise implied legislative authorisation where that is "the imperative orders of the Legislature" and where one "cannot possibly obey those orders without infringing private rights".[153] And so, in *Allen v Gulf Oil Ltd*, the House of Lords held that although Parliament had authorised the construction of a refinery at a particular location, that was not a defence to a nuisance claim unless

146 At 484.
147 *Attorney-General v Forbes* (1836) 2 My & Cr 124, 40 ER 587.
148 *Box v Allan* (1727) 1 Dick 49 (cited in *Forbes*, above n 147).
149 *Attorney-General v Johnson* (1819) 2 Wils C C 87 (cited in *Forbes*, above n 147).
150 *Crowder v Tinkler*, above n 96.
151 *Attorney-General v Borough of Birmingham*, above n 96, at 543.
152 *R v Bradford Navigation Co* (1865) 6 B & S 631, 122 ER 1328.
153 *Metropolitan Asylum District v Hill* (1881) 6 App Cas 193 at 212.

the defendant could prove that it was impossible to construct a refinery at that location without creating a nuisance.[154]

99. More recently, in *Lawrence v Fen Tigers*, the United Kingdom Supreme Court held that the existence of planning permissions did not authorise a nuisance, rather the granting of planning permission means nothing more than "a bar to the use, imposed by planning law, in the public interest, has been removed".[155] Similarly, Carnwarth LJ in *Barr v Biffa Waste Services Ltd*,[156] held that the courts were jealous guardians of the common law and would not readily interpret a statute as authorising something that would otherwise be a tort. He observed that nuisance has co-existed with statutory controls since the nineteenth century and there was no principle that the common law of nuisance should "march with" a statutory scheme covering similar subject matter.[157] The Supreme Court of Canada has also confirmed that that "[s]tatutory authority provides, at best, a narrow defence to nuisance".[158]

100. The Court of Appeal below relied on *American Electric Power v Connecticut*.[159] Care is required in considering that judgment because it is particular to the constitutional peculiarities of the United States and the interface of the federal common law and federal statute. While the Supreme Court found that the Clean Air Act had displaced the federal common law of public nuisance, it is unlikely that an Anglo-Commonwealth court would have reached that conclusion.

101. In the Anglo-Commonwealth common law world, the courts will require a clear indication by Parliament that it intends to displace the common law, with an expectation that this is done deliberately and not casually.[160] Absent express displacement of the common law in the words of an Act or an alternative and

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154 *Allen v Gulf Oil Ltd* [1981] AC 1001 (HL) at 1012.
155 *Lawrence v Fen Tigers Ltd* [2014] UKSC 13, [2014] 2 All ER 622 at [89].
156 *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312, [2012] 3 All ER 380.
157 At [146].
158 *Ryan v Victoria (City)* [1999] 1 SCR 201 at [54]. See also *Grace v Fort Erie (Town)* [2003] OJ No 3475 at [74] citing LN Klar et al, *Remedies in Tort* (Carswell: Toronto, 1987) at [53].
159 *American Electric Power Co Inc v Connecticut* (2011) 564 US 410 (SC).
160 See, for example, *National Assistance Board v Wilkinson* [1952] 2 QB 648 at 661. See also *Goodyear Tire & Rubber Co of Canada v T Eaton Co* [1956] SCR 610 at 614; *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038 at 1077; *Parry Sound (District) Social Services Administration Board v Ontario Public Services Employees Unions, Local 324* [2003] 2 SCR 157 at [39]; *Bryan's Transfer Ltd v Trail* (City) 2010 BCCA 531, [2010] BCJ No 2329 at [44]; *Southport Corporation v Esso Petroleum Co Ltd* [1954] 2 All ER 561 (CA) at 571.

inconsistent remedial regime, the courts will be slow to find the common law has been displaced.[161]

102. In the present case this leads to three key conclusions. First, if the respondents have a defence by way of statutory authorisation then they bear the onus. That question cannot be determined on a strike-out application, and summary judgment has not been sought. Ultimately, it is question for trial. Second, it is highly unlikely that the Climate Change Response Act or the Resource Management Act have authorised any nuisance by the respondents. The CCRA is an Act designed to help facilitate the reduction of GHG emissions to mitigate the harms of climate change. It is not intended to permit continued emissions or to authorise the harms of those emissions. Nor does the CCRA provide Mr Smith with any alternative remedial framework. Planning permission does not generally authorise nuisances and there is no reason to think that consents under the RMA (which prohibits consideration of the effects of an activity on climate change)[162] could authorise any nuisance connected to emissions. Third, there is no basis to conclude that the CCRA has displaced common law claims of public nuisance in New Zealand.

Public nuisance, justiciability, remedy and the judicial function

103. As noted earlier, the Court of Appeal effectively held that tort claims related to climate change are non-justiciable because they involve complex polycentric problems beyond the institutional competence of the courts.

104. That is not a reason to strike out a claim in public nuisance. The courts have long used the tort to address complex, polycentric and regulation-laden problems. A useful illustration of this is the courts' use of public nuisance to restrain river pollution in Victoria England. While obviously not a problem of comparable scale to climate change, viewed in the context of its time, the problem of river pollution shared many parallels. River pollution was factually complex and involved many and diffuse contributors. It was a problem of enormous scale and was seen as arguably the greatest social problem facing England as it industrialised.[163] The pollution problem was not localised, rather

[161] See, for example, *Bodo Community v Shell Petroleum Development Company of Nigeria* [2014] EWHC 1973 (TCC); *Gendron v Supply & Services Union of the Public Service Alliance of Canada, Local 50057* [1990] 1 SCR 1298 at 1319-1320; *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2010] UKSC 54, [2011] 2 AC 15 at [27]-[35].

[162] Resource Management Act 1991, s 104E as interpreted by this Court in *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32.

[163] Pontin has described the problem of sewage pollution between the 1850s and 1870s as the "gravest nationwide environmental challenge" to have faced Victorian Britain – Ben Pontin, *Nuisance Law and Environmental Protection* (Lawtext Publishing Ltd, Oxford, 2013) at 51.

the nature of flowing rivers created spatial and temporal challenges for courts. Often the pollution was caused by socially beneficial or necessary activities, including manufacturing and the draining of sewers (the latter having contributed to the resolution of public health problems), creating distributive difficulties. The problem was addressed by law makers at the highest level, and the subject of numerous commissions of inquiry and various attempts at legislative regulation (often without much success).

105. In amongst all of this, parties who were harmed by river pollution sought the aid of the courts. The courts did not shy away from the problem. Rather, courts approached the issue as one squarely invoking the core judicial function of identifying whether the defendant has committed a wrong and, if so, providing the plaintiff a remedy. If performing the judicial role had policy implications, then that would ultimately require the attention of the legislature, but the potential for policy implications was not a proper reason for judges not to do what judges were there to do: identify and remedy wrongs.

106. In *Attorney-General v Borough of Birmingham*, the plaintiff (proceeding in public nuisance on a relator basis) sought to restrain the city of Birmingham draining its sewers into the river Tame, upstream of his estate. The city pleaded that such an order would cause a public health catastrophe in the city. The Vice-Chancellor, Page-Wood, rejected the city's pleas. The question for him was whether the city had wronged the plaintiff, and if it had then his role was to grant relief. He observed that it was "a matter of almost absolute indifference whether the decision [would] affect a population of 25[0],000, or a single individual" because it was not for the court to conclude that the benefits of the activity justified the city interfering with the plaintiff's rights. That was a question for the legislature and, as such, if "after all possible experiments, [the defendants] cannot drain Birmingham without invading the Plaintiff's private rights, they must apply to Parliament for power to invade his rights".[164]

107. So too in *Attorney-General v Leeds*, where the city argued that the social benefit of a sewer system was a reason why an injunction should not issue requiring it to seal its sewers. Lord Hatherley, having found discharges by the

[164] *Attorney-General v the Council of the Borough of Birmingham*, above n 96, at 539–542. The reference to "private rights" here is used in a general sense of the plaintiff's right to be free from the nuisance causing conduct. The case is undoubtedly one where the action is in public nuisance as there is no other explicable reason for it to have been brought on a relator basis.

city to constitute a nuisance, left the city with two options: "The Defendants must either abate the evil—whatever difficulties may be imposed in their way—or they must go to the Legislature; and, no doubt, the Legislature will be ready to afford a remedy if they find the evil is such as is deserving of it".[165]

108. What is clear from these cases is that the courts saw policy as a matter for the legislature and the executive. It was not for the courts to pre-empt policy decisions by making their own. Rather, the courts should perform *their function* of determining the case before them and leave policy for the policy-makers. Often, as in *Leeds*, injunctions would be suspended to allow the defendant time to make their case for legislative authorisation of the wrong.

109. These cases were not isolated examples. Despite earlier studies suggesting that this sort of litigation was rare in Victorian England,[166] more recent research into unreported cases has shown that most major English urban centres faced actual or threatened litigation connected with sewage pollution at some point between 1850 and 1889.[167] The result was that nuisance litigation, and especially the use of suspended injunctions, played a significant role in forcing local authorities to increase spending on sewage treatment infrastructure and to invest in developing and implementing new technologies across England.[168] Similar research has described how public nuisance was effective at regulating industrial smoke pollution in the United States, supporting its application to the problem of GHG emissions.[169]

110. Here, the Court of Appeal decided it could not exercise its ordinary judicial functions on policy grounds. In so finding, it nonetheless did make a policy decision – that Mr Smith could have no recourse to the courts for the wrong he says he is suffering. The river pollution cases demonstrate that the courts have an important role to play even in complex problems *by performing the judicial role*. Policy should be left to the policy-makers, but that is not a reason for judges to not judge.

111. If Mr Smith were to succeed, it would be open to the respondents to make their case to the legislature for why they should be allowed to continue to

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[165] *Attorney-General v Leeds Corporation*, above n 118, at 595.
[166] John P S McLaren, "Nuisance Law and the Industrial Revolution—Some Lessons from Social History" (1983) 3:2 OJLS 155.
[167] Pontin, above n 163, at 53.
[168] At 55.
[169] Kate Markey "Air Pollution as Public Nuisance: Comparing Modern-Day Greenhouse Gas Abatement with Nineteenth-Century Smoke Abatement" (2022) 120:1 Mich L Rev 1535.

pollute despite the harm that causes to Mr Smith and others. Any injunction might be suspended to allow time for that. In doing so, the court is able to leave the policy questions for the political realm without abdicating its judicial role or denying the plaintiff recourse to the court. All of this reinforces the submission that the Court of Appeal erred in its non-justiciability finding generally, but especially in connection to the public nuisance pleading.

Conclusion on public nuisance: the claim is not untenable

112. Mr Smith submits that his public nuisance claim is tenable on orthodox and longstanding common law authority. There is no basis to strike it out and the Court of Appeal's decision to do so was unprincipled and inconsistent with authority. Mr Smith has pleaded that he will suffer property damage. That has always been a sufficient basis for standing at common law. Mr Smith has pleaded that the adverse effects of climate change will materially affect the comfort and convenience of all or a class of Her Majesty's citizens. That is plainly tenable. Mr Smith has pleaded that the respondents have materially contributed to the interference. That is ultimately a question of fact and evidence, but the authorities show that it is legally tenable even if there might be other contributors. Whether the respondents can make out their defence is a question of fact, and there is nothing in the statutory scheme clearly displacing public nuisance or authorising/ immunising the respondents' contributions to a public nuisance.

113. Policy concerns are not, and have never been, reason for the courts to deny a plaintiff recourse to the courts where public nuisance is alleged. The proper judicial approach is to identify whether the plaintiff has been wronged and to grant relief. Any resulting policy implications can then be tackled by the executive and New Zealand's 'sovereign' legislature. To that end it might well be appropriate for any injunctive relief to be suspended to allow the respondents time to seek legislative authorisation, or to modify their activities so that they do not cause a nuisance. These are eminently matters for a trial judge, not a court deciding a strike-out application. However, they can give this court comfort that Mr Smith's public nuisance claim can be heard and determined in way that is consistent with the judicial role and without creating absurd or oppressive outcomes.

Who are proper parties?

114. A matter that appeared to trouble the Court of Appeal, and expressly troubled the High Court, was a conception that tort liability for climate change might make everyone a potential plaintiff and a potential defendant.

115. As to plaintiffs, the concern is readily answered. First, tort has mechanisms to define proper plaintiffs (the standing rule in public nuisance, and the foreseeability, proximity and causation/loss requirements in negligence). Second, it is possible that emitting defendants have harmed many people. A defendant does not cease to be liable in tort because they have many victims. The possibility that the respondents have wronged a large number is not a reason to say that Mr Smith's claim is untenable, nor is it a principled basis on which to deny any plaintiff a remedy.

116. As to defendants, a line must be drawn. Every person causes some level of emissions, but it cannot be the case that all those emissions are legally relevant. However, Mr Smith says that, based on the nature and extent of emissions, some emissions are legally relevant. There are numerous ways in which a court might draw a line between emissions that are truly *de minimis* and those which are not.[170] Something is truly *de minimis* when it is too trivial to concern the law.

117. One approach might be to simply look at how much a defendant emits in aggregate or relatively. When one does that, the concern about an overbroad defendant class becomes more illusory than real. Mr Smith says that the respondents make up about a third of New Zealand's emissions. Government data suggests that just 15 companies are responsible for about 77 per cent of New Zealand's emissions. All of those companies release GHGs to make a profit, including by externalising the costs of their emissions (or emissions from their products) to everyone else.

118. Wherever the line may be drawn as to what is, and what is not, *de minimis*, this case involves emissions that are not *de minimis*. Mr Smith pleads that stopping the respondents' emissions will materially reduce the damage he will suffer from climate change. He intends to lead evidence on that at trial. Where the margins of that line are drawn will need to be developed over successive cases on the basis of evidence in those cases, and in accordance with the usual common law method. For present purposes it suffices that it is

[170] David Bullock "Public Nuisance and Climate Change", above n 99, at 12–18.

not untenable that the respondents' emissions are more than *de minimis* and that the question must be one requiring evidence, and therefore one requiring a trial.

SECOND PLEADED CAUSE OF ACTION (NEGLIGENCE)

Approach of the courts to novel duties of care

119. The approach to determining whether a novel duty of care exists was set out by this Court in *North Shore City Council v Attorney-General (The Grange)*.[171] There are two stages. The first concerns foreseeability and proximity – everything bearing on the relationship between the parties. In novel cases foreseeability is "at best a screening mechanism, to exclude claims which must obviously fail because no reasonable person in the shoes of the defendant would have foreseen the loss".[172] It is not necessary that the defendant should have foreseen the precise risk of injury, nor how it would occur.[173]

120. The Court must then consider whether the foreseeable loss was sufficiently proximate. This inquiry focuses on the "closeness of the connection between the parties".[174] "Closeness" refers to a broad range of matters bearing on the nature of the relationship between the plaintiff and the defendant, with a particular focus on the nature of the risk posed (the more specific and obvious the risk, the greater the proximity).[175] This is a multifactorial test, and involves the balancing of the moral claims of the parties (such as the plaintiff's claim for compensation for avoidable harm and the defendant's need to be protected from an undue burden of legal responsibility").[176]

121. The second stage concerns policy features which mean that it is not fair, just and reasonable to impose a duty despite the "internal" factors pointing to a duty of care at the first stage. Here the court looks at "external" factors, such as the effect on third parties, the structure of the law, and the effect on society generally.[177] It will only be a "relatively small number of cases" where the court will find no duty of care existed even though the loss was foreseeable

[171] *The Grange*, above n 33.
[172] *The Grange,* above n 33, at [157].
[173] *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54, (2002) 211 CLR 540 at [87] per McHugh J.
[174] *The Grange,* above n 33, at [158].
[175] Couch, above n 34, at [48]–[50] per Elias CJ and Anderson J; at [85] per Tipping, Blanchard and McGrath JJ.
[176] *The Grange,* above n 33, at [159] referring to *Fleming v Securities Commission* at 532.
[177] *Strathboss*, above n 51, at [225].

and the relationship sufficiently proximate.[178] "Very potent counter-considerations" are required to overcome the more general principle that wrongs should be remedied.[179] The "intensely fact-specific" nature of the proximity inquiry[180] cannot be overstated – none of the matters listed are either necessary or sufficient, they are best understood as indicia that aid the overall inquiry.

Foreseeability

122. It is pleaded that the respondents are, or ought reasonably to have been aware, of the effects of their GHG emissions on Māori and coastal landowners. The Court of Appeal correctly identified this as a trial issue.[181]

Proximity

123. Mr Smith submits that there is a tenable basis for a sufficiently proximate relationship between him and the respondents. Mr Smith forms part of an identifiable group (coastal Māori in Northland) subject to some "particular" or "distinctive" risk to that faced by the general public.[182] Moreover, the pleaded knowledge of actual risk is a significant indicator of sufficient proximity.[183] He will prove these matters at trial.

124. On the pleadings in this case:

(a) The respondents knew, or ought to have known, that their activities were causing or contributing to dangerous anthropogenic interference with the climate system, and the adverse consequences of those emissions for persons including Mr Smith;

(b) The respondents knew that it was necessary for them (and others) to immediately and significantly reduce GHG emissions in order to avoid causing or contributing to dangerous anthropogenic interference with the climate system, and the adverse consequences of those emissions for persons including Mr Smith;

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178 *The Grange,* above n 33, at [160].

179 *Couch*, above n 34, at [69] per Elias CJ and Anderson J, referring to *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (HL) at 749 per Lord Browne-Wilkinson, at 663 per Lord Bingham and *Barrett v Enfield London Borough Council* [2001] 2 AC 550 (HL) at 568 per Lord Slynn. See also *Spencer on Byron*, above n 56, at [54] per Tipping J.

180 *Couch*, above n 34, at [53] per Elias CJ and Anderson J.

181 At [100]. **[05.0026]**

182 *Couch*, above n 34, from [87].

183 *The Grange,* above n 33, at [75] per Elias CJ, *Couch*, above n 34, at [38] and [68] per Elias CJ and Anderson J.

(c) Indigenous peoples are particularly vulnerable to the effects of climate change caused by or contributed to by the respondents, and this was known by the respondents;

(d) People inhabiting coastal or low-lying areas are particularly vulnerable to the effects of climate change caused by or contributed to by the respondents, and this was known by the respondents; and

(e) It is the respondents, and not Mr Smith or persons like him, who have complete control over the GHG emissions they cause (including fuel suppliers, who know and intend their products to be burned). Mr Smith has no ability to protect himself or to insure against the negligence of the respondents.

125. Vulnerability is a factor particularly relevant to the proximity inquiry. Mr Smith is one of a class (Māori whose traditional lands and cultural sites are in coastal and low-lying areas) particularly vulnerable to harms contributed to by the respondents. A key aspect of vulnerability is the availability of other means of protection that a plaintiff might realistically have used to protect her or his interests.[184] The respondents have knowledge of, and control over, their emitting activities. Mr Smith has none. Where it is not possible (or simply inefficient) for a plaintiff to have done anything but rely on the defendant to exercise reasonable care in respect of a risk in question, such reliance is relevant to proximity.[185]

Policy

126. Where the court finds that reasonably foreseeable loss occurred within a proximate relationship, it will then assess whether a factor or factors external to the relationship between the parties would make it not fair, just or reasonable to impose liability on the defendant.[186] In doing so, the court examines "any wider effects of its decision on society and the law generally".[187] This may include the capacity of the parties to insure against the liability in question, the likely behaviour of other potential defendants, the

[184] *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) at [62].
[185] *Spencer on Byron*, above n 56, at [33] per Tipping J; *The Grange*, above n 33, at [78] per Elias CJ.
[186] *The Grange,* above n 33, at [160], approved in *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78 at [57].
[187] *The Grange,* above n 33, at [160].

possibility of indeterminate liability, and the consistency of the imposition of liability with the legal system more generally.[188]

127. First, the Court of Appeal considered that recognition of a duty would create a "limitless class of potential plaintiffs as well as a limitless class of potential defendants".[189] It is accepted that the class of potential plaintiffs may be broad, but that is a consequence of the widespread harm caused by the respondents. It would be perverse, and would subject the law to ridicule, if the fact that a defendant harmed a very large number of people meant that it was able to avoid liability. As discussed earlier, it is not accepted that the class of potential defendants is limitless. The Court is able to fashion a threshold of defendants whose emissions are legally materially, or more than de minimis, for the purposes of liability in negligence. Given so few companies contribute such a large proportion of New Zealand's emissions, it is conceivable that a proper defendant class might comprise fewer than 100 companies. Ultimately, these matters require evidence. As Justice Gault expressed in *Hosking v Runting*:[190] "No Court can prescribe all the boundaries of a cause of action in a single decision, nor would such an approach be desirable. The cause of action will evolve through future decisions as Courts assess the nature and impact of particular circumstances".

128. Second, the Court of Appeal held that the respondents would be "subjected to indeterminate liability and embroiled in highly problematic and complex contribution arguments … potentially involving overseas emitters".[191] This claim seeks only injunctive and declaratory relief. Indeterminacy concerns do not arise in cases not involving economic loss. If the Court was troubled by indeterminacy concerns, then it would be open to the Court to conclude that damages are not an available remedy in the climate change context, or that damages were limited to claims for property damage and not economic loss. These issues would be better addressed in a claim where damages were actually sought. In the same way, no issues of contribution arise in the present case because all that is sought is that the respondents reduce (or stop) their emissions.

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[188] At [160].
[189] Court of Appeal Judgment, above n 3, at [116]. **[05.0029]**
[190] *Hosking,* above n 46, at [118].
[191] Court of Appeal Judgment, above n 3, at [116]. **[05.0029]**

129. Third, the Court of Appeal held that the existence of international obligations and a "comprehensive legislative framework" told against a duty.[192] This reasoning is misconceived:

(a) New Zealand's international obligations require a reduction in emissions, and call for action at all levels of society (not just central government). The science produced under those international agreements explains the extent of reductions required, and is pleaded and relied upon by Mr Smith. A duty is consistent with New Zealand's international obligations.

(b) New Zealand does not have "a comprehensive legislative framework" regulating emissions. The CCRA, including the Zero Carbon amendments and the recent Emissions Reduction Plan, are *framework* instruments. Large amounts of the regulatory infrastructure remain to be developed. It remains possible that may never happen, including following a change of government (one of the first acts of the National-led government following the 2008 election was to implement policy changes significantly undermining the effectiveness of the CCRA and ETS). Emissions of agricultural CH_4 are not within the scheme. Those who make emissions producing products and export them overseas, like BT Mining, are not regulated. The regime does not provide recourse and compensation for those who are, and who will be, adversely affected by climate change. The Court of Appeal's assessment of the New Zealand regulatory regime as "comprehensive" is misconceived and wrong. Mr Smith pleads the inadequacies of the New Zealand regulatory regime and its political instability, and will lead evidence on that at trial.

130. Fourth, the Court considered that tort was ill-equipped to address the issues in the claim and that a duty could lead to wider incoherence in the law.[193] See discussion above; on the contrary, it was the Court of Appeal's decision to find there could not be any tortious liability associated with GHG emissions that undermines the coherence of the law.

131. Mr Smith submits there are no policy factors that the Court can safely conclude, without hearing any evidence, show Mr Smith's claim to be legally

[192] Court of Appeal Judgment, above n 3, at [116]. **[05.0029]**
[193] Court of Appeal Judgment, above n 3, at [116]. **[05.0029]**

untenable. Mr Smith intends to call evidence on matters of policy, political science and economics, which he considers will address the Court of Appeal's policy concerns. Policy factors are not a basis to strike out the claim.

Causation

132. When the lawyer uses the concept of causation, they are not bound to use it in the same way as a philosopher, or a scientist, or an "ordinary" person.[194] Causation in law has never been strictly concerned with the movement of atoms through space, nor about theories of free will. Physics and philosophy play a role in determining causation in law, but only to the extent that they are considered useful touchstones for its principal concern – the fair attribution of responsibility.

133. Traditionally, the lawyer bringing a claim in negligence was bound to use the concept of causation in terms of necessity. A factor caused a result if "but-for" the factor, the result would not have occurred. In this way, the law has manifested its commitment to "outcome responsibility". The law cares less about inchoate wrongdoing, less about the person who fails to take sufficient care but by some luck brings about no unfortunate consequence.

134. However, the courts now recognise "but-for" causation is both an under- and over-exclusionary rule. In cases of multiple tortfeasors, it may be that no single tortfeasor's action can be described as having been necessary to bring about the result. In these cases, scholars and judges have recognised that it is important to set aside strict notions of causation in favour of concepts of contribution. For example, in *Financial Conduct Authority v Arch Insurance*, the United Kingdom Supreme Court quotes with approval Professor Richard Wright's consideration of the teaspoon of water added to a flooding river or the match added to a raging forest fire:[195]

> [T]he teaspoon of water and the match contributed to and are part of the flood and forest fire, respectively. What if the same flood or fire were caused by a million (or many more) different people all contributing a teaspoon of water or a single match? Denying that any of the teaspoonfuls or matches contributed to the destruction of the property that was destroyed by the flood or fire would leave its destruction as an unexplained, non-caused miracle.

135. Similarly, Professor Jane Stapleton considers a scenario where several factories each independently and in breach of duty discharge oil into a bay frequented by commercial fishers. By the time the pollution is detected, the

[194] Glanville Williams, as quoted in Jane Stapleton "Unnecessary Causes" (2013) LQR at 41.
[195] *Financial Conduct Authority v Arch Insurance* [2021] UKSC at [189].

oil concentration exceeds the regulatory threshold for permissible fishing. No one contribution of oil was necessary or sufficient to meet the threshold. Stapleton observes:[196]

> [I]f we require a factor to be necessary for an outcome before we are prepared to recognise it as "causal", we would have the striking situation of knowing exactly what happened and by what agency but the law would not identify any of the polluters as a "cause" of the economic injury to the fishermen.

Stapleton's scenario is akin to the facts before the Supreme Court of Oklahoma in *Northup v Eakes.*[197] In that case, the injury resulting from oil discharged into a river was that a barn was destroyed when the oil ignited. The court held each polluter liable in negligence.

136. Mr Smith might not establish that but for the respondents' activities he would never have suffered the pleaded harms (although he does plead a "tipping points" theory). However, before the Court of Appeal, he highlighted two different ways in which courts have established causation to recognise unnecessary causes:

(a) The "material contribution to risk" approaches of the courts in *Fairchild v Glenhaven Funeral Services Ltd* (and *Barker v Corus UK Ltd*),[198] and *Clements v Clements* (and *Resurfice Corp v Hanke*).[199]

(b) The "market share liability" approach in *Sindell v Abbott Laboratories*.[200]

137. The Court of Appeal accepted that Mr Smith's claim had similarities with these authorities, involving a single causative agency (GHG emissions) and multiple tortfeasors. However, the Court distinguished these authorities on the bases that:

(a) "[i]n all these cases…the individual tortfeasors making up the group were known or readily identifiable and all before the Court as defendants;"[201] and

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196 Stapleton, Unnecessary Causes (2013) LQR January at [p42].
197 *Northup v Eakes* 178 P.266 at 268 (Okla 1919).
198 *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32; and *Barker v Corus UK Ltd* [2006] UKHL 20, [2006] 2 AC 572.
199 *Clements v Clements* 2012 SCC 32, [2012] 2 SCR 181; and *Resurfice Corp v Hanke* 2007 SCC 7, [2007] 1 SCR 333.
200 *Sindell v Abbott Laboratories* Cal 607 P 2d 924 (Cal 1980).
201 At [111]. **[05.0028]**

(b) "[i]n contrast in this case, the class of possible contributors is virtually limitless."[202]

138. The first distinction is factually wrong. In *Fairchild*, the claimants only brought before the court as defendants some of the former employers who had exposed them to asbestos.[203] Further in *Sindell*, the majority noted there was a ten per cent chance the offending manufacturer of the harmful drug would escape liability by virtue of not having been joined as a defendant.[204] Mr Smith pleads that the second distinction is also factually wrong, but in any event, cannot be determined by a court in a strike-out application (see also the *de minimis* analysis, above).

139. In summary, the modern law of negligence manifests a commitment to outcome responsibility and the courts have held that recognising *contribution* to harms is necessary to maintain that commitment. As noted by McLachlin CJ in *Clements*, "the goals of tort law … require that the defendant not be permitted to escape liability by pointing the finger at another wrongdoer".[205] There are several legally tenable grounds on which Mr Smith could establish causation. Whether these various methods of establishing causation are applicable or appropriate in this case will depend on the evidence. The pleading is clear that the respondents have contributed to climate change and are continuing to do so, and that they have caused Mr Smith harm through those contributions. These matters will be best addressed on evidence at trial and a court cannot be certain that Mr Smith's claim will fail on causation. Generally, it will be rare for a court to strike out a claim for breach of duty on the basis of causation because it is ultimately a question of fact.[206]

Overseas examples of tort liability

140. At first instance, in *Sharma v Minister for the Environment*, the Federal Court of Australia held that the Minister owed the plaintiff (and other young persons) a duty of care when considering whether to approve the expansion of a coal

[202] At [112]. **[05.0028]**
[203] In addition to the two defendants, Waddington and Leeds City Council, Mr Fairchild had been exposed to asbestos by two other employers, GH Dovener & Son and B Slack & Sons. Mr Fox had been exposed to asbestos by the defendant, Spousal (Midlands) Ltd, but also during his work for many different shipping lines. And Mr Matthews only brought Associated Portland Cement Manufacturing Ltd and British Uralite plc before the court, leaving the third employer, Maidstone Sack & Metal.
[204] At 937
[205] At [13].
[206] *Sew Hoy & Sons Ltd (in rec and in liq) v Coopers & Lybrand* [1996] 1 NZLR 392 (CA).

mine.[207] The decision was overturned on appeal.[208] The duty of care framework used in Australia is materially different to that in New Zealand, and it is significant that both decisions followed a trial with evidence. The case is different to the present, including because the control and culpability of an administrative decision-maker exercising a public power is distinct from those directly emitting or making/selling emissions-causing products.

141. In *Milieudefensie v Royal Dutch Shell*, the Hague District Court ordered Royal Dutch Shell—a manufacturer of fossil fuels—to reduce its worldwide emissions by 45 per cent by 2030 (compared to 2019 levels).[209] Liability was grounded in a duty under Dutch tort law not to act in conflict with "what according to unwritten law has to be regarded as proper social conduct". The content of the duty derived from a range of international environmental and human rights instruments. The Court was clear that Shell's liability existed independently of state action. Importantly, the orders extended to all of Shell's so-called "Scope 1, Scope 2 and Scope 3" emissions. Scope 1 and 2 being direct emissions and emissions from production inputs, while Scope 3 emissions were those arising from its customers consuming its fuel products. The Court rejected various arguments advanced by Shell relating to causation, other contributors, domestic regulating including the EU Emissions Trading Scheme, and proportionality.

142. In *VZW Klimaatzaak v Kingdom of Belgium*, the Brussels Court of First Instance found the Belgian state to have been negligent in breaching the general duty of care recognised in Article 1382 of the Belgian Civil Code.[210] However, the Court determined that it could not, by injunction, require the state to set particular emissions reduction targets.

143. The *Royal Dutch Shell* case is particularly significant because it is very similar to Mr Smith's claim. The Dutch courts accepted very similar arguments to those made by Mr Smith in this proceeding following an evidential hearing. The decision lends support to the tenability of Mr Smith's claim at all levels.

[207] *Sharma v Minister for the Environment* [2021] FCA 560.
[208] *Minister for the Environment v Sharma* [2022] FCAFC 35.
[209] *Vereniging Milieudefensie v Royal Dutch Shell Plc* ECLI:NL:RBDHA:2021:5339 dated 26 May 2021 [***Royal Dutch Shell***].
[210] *VZW Klimaatzaak v Kingdom of Belgium* 2015/4585/A, 17 June 2021.

THIRD PLEADED CAUSE OF ACTION (BREACH OF DUTY)

144. Mr Smith pleads a novel cause of action arising from a duty to avoid contribution to dangerous anthropogenic interference in the climate system. The pleaded cause of action leaves room for the trial judge to develop the common law should they consider the recognised causes of action ill fitting. The novel tort is drawn by analogy to the existing torts pleaded and the recognition in statute and international law of the need to avoid dangerous anthropogenic interference with the climate system.

145. The Court of Appeal referred to this cause of action as a "bare assertion of the existence of a new tort without any attempt to delineate its scope",[211] and appeared to endorse the criticism of the High Court Judge that no effort had been made to analogise the cause of action to any existing principle. However, in both those courts Mr Smith did explain the basis of the novel duty in terms that went beyond "bare assertion". He does so again here.

What are the elements of the proposed tort?

146. The proposed tort has the following elements:

(a) Liability is strict and arises from proof of the identified conduct, being a material[212] contribution to dangerous anthropogenic interference with the climate system and the adverse effects of climate change. What amounts to such a contribution is ultimately a matter for evidence and judicial assessment. As the contribution must be material, it is not the case that all emitting activities will breach the duties (see also the discussion of proper defendants, above). It may also be a relevant criterion for liability that the defendant know that their emissions are contributing to harm yet carry on emitting, or causing emissions, to generate a profit.

(b) Mr Smith only seeks injunctive or declaratory relief, and it may be appropriate that only injunctive or declaratory relief issues for breach of the duty (i.e. not damages). Alternatively, it would be necessary for the plaintiff to establish the defendant's relative contribution for the purposes of determining damages, and that question would have to be assessed in a case where damages were sought.

[211] At [124].
[212] The draft amended statement of claim proposes adding a materiality threshold.

(c) As with other torts, a defendant who can show that they have received clear legislative authorisation to breach the duty will have a defence. Total absence of fault may also be a defence in the usual way for strict duties. That would mean, for example, that a large forest owner who, despite taking all reasonable precautions, was the victim of arson causing a major forest fire, would not be liable.

The common law develops as society faces new problems

147. The great strength of the common law is its ability to adapt to changing social circumstances. In recent years the common law has developed new torts of invasion of privacy[213] and intrusion upon seclusion,[214] and remedies for infringements of rights.[215]

148. The development of the rule in *Rylands v Fletcher*[216] is an example of the law developing a new, strict duty in the face of what was then a new menace. The Court recognised that where persons keep things on their land that are liable to cause harm to others upon escape, they will be subject to a strict duty to ensure that others are not harmed. *Rylands* was a case where the court recognised that the existing law of torts could not respond to a pressing social problem. A response was required, and one was provided by the courts and the common law. The decision is one of numerous examples of the courts altering a common law rule that had developed for a slow-moving agricultural society to one that was fast-paced and industrial.[217] The court is well placed to do so again.

149. The moral imperatives for the recognition of a tort are clear. The actions of a small group of major emitters operating for commercial gain (including the respondents) are responsible for the vast majority of emissions of GHGs into the atmosphere. They do so for private profit and, Mr Smith alleges, with knowledge of the harms they cause. Those harms are externalised to the poor, vulnerable and to future generations.

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[213] *Hosking,* above n 46. In England, see *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.

[214] *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672.

[215] *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213; *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA).

[216] *Rylands v Fletcher* (1868) LR 3 HL 330 (HL).

[217] See, for example, Ken Oliphant "Tort Law, Risk, and Technological Innovation in England" (2014) 59 McGill LJ 820; Donald G Gifford "Technological Triggers to Tort Revolutions: Steam Locomotives, Autonomous Vehicles, and Accident Compensation" (2018) 11 JETL 71.

150. While, ideally, significant developments in the law should be left to the legislature, that does not mean that courts cannot or should not act. They have before. The courts, even absent judicial supremacy, are able to perform a constitutionally important counter-majoritarian function and can often take a wider, longer term view than many political institutions. This is the essence of judicial independence, the rule of law, and rights protection.

151. It is pleaded that the respondents are knowingly causing harm to others for profit. It is pleaded that democratic and international institutions have been, and will continue to be, unable to implement the substantial changes required by science to mitigate these harms. It is appropriate and necessary for the courts to fill the void and to vindicate individual and community interests in being protected from harm. Moreover, New Zealand retains a sovereign legislature. If Parliament disapproves of judicial developments in this area, then it can legislate and change direction.

152. When considering the potential imposition of a new tort as a means of allocating losses, the courts consider:[218]

(a) The type of interest at stake. Interests already protected by the law of torts include bodily integrity; real property; personal property; intellectual property; financial well-being; and reputation. The law will more willingly protect against physical harm and bodily injury than financial detriment. In the present case issues of physical harm, damage to real property and bodily integrity are at the fore.

(b) The degree of fault.[219] The respondents have moral responsibility for the harms caused by their actions, and it is pleaded that they had knowledge of the relevant science on climate change since at least 2007 (a matter that is, broadly, admitted). Indeed, the idea that the "polluter pays" is already well embedded in our legal, political and moral systems.

153. The Ontario Court of Appeal in *Merrifield v Canada (Attorney General*) recently reinforced the need for caution before recognising new torts (there, a claimed tort of harassment). But the Court recognised that in some cases the "facts cry out for the creation of a novel remedy".[220] It referred to the case of

[218] *Strathboss,* above n 51, at [231].
[219] Todd*,* above n 90, at 12.
[220] *Merrifield v Canada (Attorney General)* 2019 ONCA 205 at [41].

Jones v Tsige[221] where the defendant's "deliberate, prolonged, and shocking" use of a computer to access banking records and personal information of her partner's ex-wife drove the development of a tort of intrusion upon seclusion in Canada.[222] The Court of Appeal in *Tsige* held that "the law of this province would be sadly deficient if we were required to send [the plaintiff] away without a legal remedy".[223] Importantly, the Court of Appeal considered that the law should be developed because a tort of intrusion was consistent with values of privacy underlying traditional causes of action, and because technological change necessitated the evolution of the common law.[224]

154. Mr Smith says that if the facts of *Tsige* were sufficiently shocking to justify the development of a tort, then the facts of this case are too. At the least, he submits that he should be allowed to test his claim at trial, and to have the question decided by the court on the basis of evidence and argument. The issue is simply too important to be left to a summary procedure. Moreover, Mr Smith submits that the only reason that GHG pollution was not recognised as a potential tort (in contrast to other forms of air or water pollution) is that the harms of GHGs were unknown in the 19th Century.

155. A tort would also be consistent with New Zealand's international obligations and a framework of international law that identifies the importance of action by non-state actors. In this connection, it is notable that the Supreme Court of Canada, in *Nevsun Resources v Araya*, recently refused to strike out a claim that breaches of customary international law may give rise to a novel cause of action in tort (arising from alleged human rights violations at an Eritrean mine owned by a Canadian company).[225]

156. Where the recognition of a new tort has been declined, as in *Merrifield* or *Burns v National Bank of New Zealand Ltd*,[226] it has often been because the law already recognises sufficient existing causes of action or remedies. If Mr Smith succeeded on either of his first two causes of action, it may be unnecessary for the Court to consider the third. If those causes of action are struck out, then he has no other remedy. Again, these matters turn on the same facts and are best left to trial.

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221 *Jones v Tsige* 2012 ONCA 32, 108 OR (3d) 241.
222 *Merrifield,* above n 220, at [41].
223 *Jones v Tsige,* above n 221, at [69].
224 At [65]–[69].
225 *Nevsun Resources Ltd v Araya* 2020 SCC 5. .
226 *Burns v National Bank of New Zealand Ltd* [2004] 3 NZLR 289 (CA) (seeking to establish a tort of spoliation of evidence, by destroying or withholding evidence relevant to the plaintiff's case in existing or forthcoming litigation).

157. It is also notable that there has been recent academic discussion of the potential development of a tort to the environment as natural evolution from existing tort principles.[227] Mr Smith's third cause of action is not explicitly framed in these terms, but this is academic support for the legal tenability of principled tort developments in this area.

Development of a new tort is consistent with principles of tikanga Māori

158. Tikanga Māori focuses on what is "tika" or right. It is both deeply principled as well as pragmatic. When climate change is looked at through the lens of tikanga, the frame would not be a narrow correctional approach that is focused on the idea of individual harm to Mr Smith. Instead, the core question would go to the action and whether it is tika.

159. The simple answer is that the action in question in these proceedings is not tika. The emission of GHGs causes unequivocal and significant harm to the environment that manifests itself in a multiplicity of ways that disproportionately impact vulnerable populations such as Māori. These emissions not only result in an ecocentric harm directly to Papatuanuku, Ranginui and their descendants (the personified atua of the natural world) but they also harm those that have interests in the environment including kaitiaki and mana whenua such as Mr Smith. This creates hara.

160. Given the centrality of the concepts of whakapapa and whanaungatanga, that emphasise relational connections, the tikanga approach to proximity between the perpetrator and victim of "hara" is more expansive than that traditionally adopted by common law torts. Under tikanga both individuals and collectives that have a consequential connection with the damaged natural world can be considered to be harmed by emissions. This supports the approach taken in the new tort which focuses less on the specific person and their individual harm but the hara itself and addressing the action that has a dangerous widespread public impact.

161. When a hara occurs, steps are required to restore balance. This includes through measures such as rāhui, being the prohibition of specific human activity through the use of tapu (making something sacred). In connection with the environment, a rāhui allows sufficient time for a resource to recover

[227] Maria Hook et al "Tort to the Environment: A Stretch Too Far or a Simple Step Forward" (2021) 33 JEL 195.

and be re-generated. The concept of a rahui supports the idea that a Court, particularly at the request of kaitiaki such as Mr Smith, might issue an injunction restraining emissions.

162. In terms of where to draw the line between restricting different emitters we can learn from a te ao Māori example. Generally, when a conservation rāhui is placed it acts as a blanket of prohibition over an area or an action (such as taking shellfish). However, there are also examples where tikanga-based restrictions have been applied to particular people or groups who have disproportionately had a negative impact on a resource. In Te Whānau a Apanui some hapū have placed restrictions on commercial fisheries whilst continuing to permit a customary and recreational take. This was done as an exercise of their mana and rangatiratanga. The principled and pragmatic distinction in this instance was related to the nature and extent of the harm or impact caused by distinct parties engaged in the taking of kaimoana. Similarly, a line will be drawn over time between those that materially contribute to (and profit from) dangerous anthropogenic interference with the climate system and the adverse effects of climate change.

163. Finally on tikanga, Mr Smith highlights the following comment from the IPCC in AR6, Working Group II:[228]

> Tangata Whenua Māori in New Zealand are grounded in Mātauranga Māori knowledge which is based on human-nature relationships and ecological integrity and incorporates practices used to detect and anticipate changes taking place in the environment. Social-cultural networks and conventions that promote collective action and mutual support are central features of many Māori communities and these customary approaches are critical to responding to, and recovering from, adverse environmental conditions. Intergenerational approaches to planning for the future are also intrinsic to Māori social-cultural organisation and are expected to become increasingly important, elevating political discussions about conceptions of rationality, diversity and the rights of non-human entities in climate change policy and adaptation.

RELIEF

164. Mr Smith seeks three forms of relief:

(a) Declarations.

(b) As proposed in the draft amended claim, injunctions requiring the respondents to achieve emissions reductions by 2025, 2030, 2040 and 2050 in line with minimum global emissions reductions identified

[228] AR6 WGII at 11.3. **[401.4001]**

by the IPCC by linear reductions in emissions each year (to be supervised by the Court).

(c) In the alternative, injunctions requiring the respondents to cease their emissions-creating activates immediately (accepting that such injunctions may be suspended for a period to allow the respondents modify their activities or to lobby Parliament to pass legislation authorising their nuisances).

165. The courts below were sceptical about the availability of the relief sought, and this was a factor in the decisions to strike out Mr Smith's claims. In their reasoning, both courts focused on the injunction requiring specified reductions in emissions. However, neither mentioned the alternative relief sought in the form of declarations, or an injunction requiring the nuisance contributing activities to cease. Mr Smith submits that there is no basis to strike out the claim on the basis of the relief sought.

The injunctions sought are effective and open to the court

166. The Court of Appeal asserted that there was "no remedy available … which can meaningfully address the harm complained of" and that "the injunctive relief sought in this case also illustrates the ineffectiveness of orthodox tort remedies".[229] It is not clear how the Court of Appeal could reach this conclusion absent evidence. While it is obviously true that an injunction in this case will not, by itself, stop all the adverse effects of climate change, Mr Smith intends to lead evidence showing that it will contribute to a material reduction in those adverse effects (and he now makes this point explicit in his draft amended claim). The Court of Appeal's assertion had no place in a strike-out application.

167. The Court of Appeal then stated that Mr Smith was seeking "a court-designed and court-supervised regulatory regime".[230] That is incorrect. Mr Smith is seeking to have the respondents stop their contributions to the harm he is facing. He has sought to give the respondents the benefit of achieving that outcome over time, but in the alternative, he has sought relief that they be required to stop now. The Court does not need to "address the social, economic and distributional implications of different regulatory design choices" to grant the relief Mr Smith seeks, nor does it need to design a

[229] Court of Appeal Judgment, above n 3, at [25]. **[05.0007]**
[230] At [26]. **[05.0008]**

regulatory regime. It can simply make the respondents stop (albeit Mr Smith recognises that such an injunction might be suspended for a period).

168. Moreover, relief like that sought by Mr Smith was recently granted in the Netherlands in the *Royal Dutch Shell* case.[231] Similar judicially supervised relief can even be seen in the older common law cases referred to in these submissions: a combination of injunctions and judicial monitoring in the *Attorney-General v Birmingham* litigation, along with ancillary and related litigation, meant that it did not finally conclude for more than 50 years.[232] While the relief sought by Mr Smith might be uncommon, there is no basis to conclude that it is legally untenable.

169. The Court of Appeal then observed that "climate change provides a striking example of a polycentric issue that is not amenable to judicial resolution".[233] But Mr Smith's claim is not seeking, and does not require, the Court to find a "judicial resolution" to climate change. He is seeking to have the Court require the respondents to stop their contributions to climate change and its harms. He has pleaded that this will reduce the injury he is facing. Granting Mr Smith that relief is something the Court can do without resolving difficult polycentric questions.

Relief sought enables policy questions to be left to the policy-makers

170. The courts below operated under a misapprehension that because a dispute arises out of a complex policy problem, resolving that dispute requires the courts to resolve that policy problem. That is not so, and it never has been. While a decision in this case may have policy implications, those matters can be properly left for the policy-making branches of government as part of the ordinary institutional dialogue reflected in the separation of powers.

171. As noted earlier, the problem of river pollution in Victorian England was also a polycentric problem of the highest order for its time. Nuisance litigation, especially the use of suspended injunctions and judicial supervision, helped drive a reduction in river pollution notwithstanding numerous legislative interventions and the extremely complex factual, social and economic

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[231] *Royal Dutch Shell Plc,* above n 209. The United States Supreme Court, in *American Electric Power v Connecticut,* above n 159, found a similar relief was unavailable, but the case is distinguishable because there the plaintiff had not proposed any specific emissions reductions, nor did it seek alternative relief requiring an immediate cessation.

[232] Leslie Rosenthal, "Economic Efficiency, Nuisance, and Sewage: New Lessons from *Attorney-General v. Council of the City of Birmingham*, 1858–95" (2007) 36 JLS 27 at 54–55.

[233] Court of Appeal Judgment, above n 3, at [26]. **[05.0008]**

challenges it posed.[234] In numerous cases the courts were presented with arguments that relief should not issue because the defendant's polluting activities were socially beneficial, or that the pollution could not be stopped without stopping those necessary and important activities. The courts did not blink from their judicial role of doing justice in the case before them.

172. In *Attorney-General v Colney Hatch Lunatic Asylum* the Lord Chancellor observed that while the Court will not "pronounce an idle and ineffectual order"—such as a mandatory injunction that is impossible to comply with by any means (the example given is an order requiring trees to remain standing after they have already been cut down)—this "has no application … where there is no impossibility in the persons who are committing a wrong ceasing to commit that wrong, though it may subject them, and I agree it would in this case, to very considerable inconvenience".[235] Apart from a situation of true impossibility "it is no part of the duty either of those who make the complaint or of the Court to find out how that order can be best obeyed".[236] In such cases, he held, the proper approach was not to deny relief, rather it was to allow the defendant sufficient time (usually by suspending the operation of the injunction) to resolve the issue.[237] The Court, having found a wrong, cannot countenance its continuance. Doing so would effectively be to allow for the taking of the plaintiff's rights by the defendant: a matter than can only be done by the legislature.[238] In *Colney Hatch* it was not impossible for the asylum to stop its contribution to the nuisance by diverting its sewage away from the brook, rather "it is only a question of expense, and this Court is not in the habit of listening to any argument on the ground of expense when it restrains the doing of a wrong".[239]

173. In a similar way, and as noted above, in the cases *Attorney-General v Birmingham* and *Attorney-General v Leeds*, the courts rejected arguments that the social utility of the polluting sewage systems should tell against relief. In both cases the courts were willing to grant injunctive relief (albeit suspended for a period) on the basis that whether the social utility of the defendants' activities meant their wrong to the plaintiff should continue was a question for the legislature. The practical onus was on the defendants to seek out

[234] Pontin, above n 163.
[235] *Attorney-General v Colney Hatch Lunatic Asylum,* above n 121, at 154.
[236] At 157.
[237] At 154.
[238] At 155.
[239] At 158.

Parliament's fiat, and it was not a reason for an injunction to be withheld. As Lord Hatherley observed in *Leeds*, having found discharges by the city to constitute a nuisance, the city was left with two options: abate the nuisance or go to Parliament.[240]

174. Pontin's historical account of the use of suspended injunctions to deal with river pollution compellingly concludes that suspended injunctions allowed the courts to remedy wrongs while ensuring "that no party was treated harshly".[241] He concludes that, through suspended injunctions, nuisance law "is demonstrably able to accommodate the interests of both claimant and defendant, and thus to preserve the common law's fundamental concern with reciprocity".[242]

175. As in the river pollution cases, the injunctive relief sought in the present case does not call upon the court to resolve difficult questions of policy. Nor does it call upon the court to abdicate its core judicial function of remedying civil wrongs. Rather, it is for the court to decide the case before it, and for the legislature to work out any policy implications of that decision. If liability is found, the respondents can make their case to Parliament for legislative authorisation of their wrongdoing. The remedial flexibility of suspending injunctions allows the courts to do justice to Mr Smith while allowing the respondents and the legislature to tackle any issues of policy that might arise from the decision. Contrary to the decision of the Court of Appeal in this case, such an approach is orthodox, well grounded in common law authority, and judicial. It is certainly not a reason to strike out Mr Smith's claim.

Declaratory relief important

176. Even if the trial judge ultimately considered that the equitable relief sought by Mr Smith should not be granted, it would be open to the trial judge to grant declarations recording the illegality of the respondents' conduct. This Court has identified the important role that declarations can play in the context of the New Zealand Bill of Rights Act 1990.[243] Additionally, the Court of Appeal has recognised that a "declaration serves an important purpose: it vindicates

[240] *Attorney-General v Leeds,* above n 118, at 595.
[241] Pontin, above n 163, at 187. See also Ben Pontin "The Common Law Clean Up of the 'Workshop of the World': More Realism About Nuisance Law's Historic Environmental Achievements" (2013) 40:2 J of L & Soc 173 at 197, noting that nuisance litigation was a major driver of technological innovation and investment, leading to a "multi-million-pound market in pollution abatement technology" in nineteenth-century Britain.
[242] At 187.
[243] *Attorney-General v Taylor*, above n 215, at [53]–[56], and [95].

the interests of the applicant, others adversely affected by the [conduct] … and the rule of law more generally".[244] In the circumstances of the present case, a declaration may have extremely significant consequences. At the very least, it is important to Mr Smith and his whānau.

177. The use of declarations has a provenance in public nuisance cases too. For instance, in the *Colney Hatch* case, the Lord Chancellor held that, having established a nuisance, the plaintiff was entitled to "that remedy which is always accorded to those who have established their case, namely, a declaration of right, and an injunction to restrain the wrong from being committed", continuing "it cannot be right that [the Relators] should have no declaration of what that right is".[245]

No basis for strike-out

178. Ultimately, questions of appropriate relief must be left to the trial judge, on the basis of evidence. It is unusual to strike out a claim based on relief. For present purposes it suffices to conclude that Mr Smith is not asking the Court to do anything that it cannot do, or that it has not done before.

COSTS

179. Mr Smith is represented on a *pro bono* basis and does not seek costs. He submits that costs should lie where they fall in this Court, as they have done in the courts below, including because the proceeding is brought on a public interest basis and has wider implications beyond the case at hand.

Dated 15 June 2022

_____

D M Salmon QC / D A C Bullock / N R Coates
Counsel for the Appellant

Counsel certify, in accordance with the Supreme Court Submissions Practice Note (24 November 2021), that these submissions are suitable for publication (and do not contain any information that is suppressed).

[244] *Middeldorp v Avondale Jockey Club Inc* [2020] NZCA 13 at [44].
[245] *Attorney-General v Colney Hatch Lunatic Asylum,* above n 121, at 156.

I Te Kōti Matua O Aotearoa | In the High Court of New Zealand
Tāmaki Makaurau Rohe | Auckland Registry
CIV-2019-404-1730

between

MICHAEL JOHN SMITH climate change spokesperson, of Mahinepua
Plaintiff

and

FONTERRA CO-OPERATIVE GROUP LIMITED
a duly incorporated company having its registered office at 109 Fanshawe Street, Auckland
First Defendant

and

GENESIS ENERGY LIMITED
a duly incorporated company having its registered office at 660 Great South Road, Greenlane, Auckland
Second Defendant

and

[DRAFT] AMENDED STATEMENT OF CLAIM

15 June 2022~~27 August 2019~~

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DAIRY HOLDINGS LIMITED
a duly incorporated company having its registered office at 243 Tancred Street, Ashburton
Third Defendant

and

NEW ZEALAND STEEL LIMITED
a duly incorporated company having its registered office at 131 Mission Bush Road, Glenbrook, Auckland
Fourth Defendant

and

Z ENERGY LIMITED
a duly incorporated company having its registered office at 3 Queens Wharf, Wellington Central, Wellington
Fifth Defendant

and

~~**THE NEW ZEALAND REFINING COMPANY LIMITED**~~**CHANNEL INFRASTRUCTURE NZ LIMITED**
a duly incorporated company having its registered office at Marsden Point, Whangarei
Sixth Defendant

and

BT MINING LIMITED a duly incorporated company having its registered office at Level 12, 1 Willeston Street, Wellington
Seventh Defendant

[DRAFT] AMENDED STATEMENT OF CLAIM

The plaintiff says—

Parties

1. The plaintiff is of Ngāpuhi and Ngāti Kahu descent.

2. The plaintiff is the climate change spokesman for the Iwi Chairs Forum, and has customary interests in land and other resources and sites situated in and around Mahinepua, Northland, New Zealand.

3. The first defendant (**Fonterra**) is a company that is in the business of producing and exporting the majority of New Zealand's dairy products.

4. The second defendant (**Genesis**) is a company that is majority owned by the Crown and is in the business of generating and selling electricity in New Zealand.

5. The third defendant (**Dairy Holdings**) is a company that is in the business of operating dairy farms in New Zealand.

6. The fourth defendant (**NZ Steel**) is a company that is in the business of producing steel in New Zealand.

7. The fifth defendant (**Z Energy**) is a ~~publically~~publicly listed company that is in the business of distributing fuel in New Zealand.

8. The sixth defendant (~~**Refining NZ**~~**Channel**) is a publicly listed company that is in the business of importing ~~refining oil~~ petroleum products into New Zealand and which was formerly known as The New Zealand Refining Company Limited and was in the business of importing and refining oil.

9. The seventh defendant (**BT Mining**) is a company that owns and operates the Stockton Mine and produces coal for export.

The Plaintiff's interests

10. The plaintiff has an interest according to custom and tikanga in the Mahinepua C block located at Mahinepua, north east of Kaeo, in Northland (**Mahinepua C**), and is a representative of the interests of his whaānau and descendants in that land.

11. Mahinepua C is situated on the coast at Wainui Bay.

12. Situated on Mahinepua C, and upon nearby lands and waters, are sites of customary, cultural, historical, nutritional and spiritual significance to the plaintiff, including Tauranga ika (fishing places), Tauranga waka (landing places), ara moana (pathways to the ocean), Wahi Tapu (burial caves, cemeteries and sacred trees), rivers, streams, wetlands, seasonal food gathering camps, pā sites, battle sites, and other sites of historical significance (**Customary Sites and Resources**).

13. Many of the Customary Sites and Resources are situated in close proximity to the coast, waterways or low lying land, or are in the sea.

Fonterra's emitting activities

14. Fonterra owns and operates 8 dairy factories in New Zealand that burn coal to generate energy for the production of dairy products including milk powder (**Dairy Factories**).

Particulars

(a) Fonterra operates a factory at Edendale in Eastern Southland, which operates 4 coal fired boilers and consumes approximately 180,000 tonnes of coal per annum.

(b) Fonterra operates a factory at Clandeborne in South Canterbury, which operates 5 coal fired boilers and consumes approximately 130,000 tonnes of coal per annum;

(c) Fonterra operates a factory at Darfiled, near Christchurch, which operates 2 coal fired boilers and consumes approximately 90,000 tonnes of coal per annum;

(d) Fonterra operates a factory at Te Awamutu, in Waikato, which operates 5 coal fired boilers and consumes approximately 55,000 tonnes of coal per annum;

(e) Fonterra operates a factory at Waitoa, in Waikato, which operates 3 coal fired boilers and consumes approximately 55,000 tonnes of coal per annum;

(f) Fonterra operates a factory at Hautapu, in Waikato, which operates 2 coal fired boilers and consumes approximately 10,000 tonnes of coal per annum;

(g) Fonterra operates a factory at Takaka, in Golden Bay, which operates 1 boiler fired by coal chip and fines;

(h) Fonterra operates a factory at Studholm, Waimate, which operates 2 coal fired boilers.

15. Fonterra will continue to burn coal in the Dairy Factories for the foreseeable future.

Particulars

(a) Fonterra retains consents that will allow it to continue to burn coal in the Dairy Factories for a number of decades;

(b) Fonterra ~~publically~~publicly stated in 2017 that it intends to divest any coal mining interests by 2025;

(c) In 2017 Fonterra stated ~~publically~~publicly that it intends to achieve net zero emissions by 2050, and to reduce its emissions by 30 per cent by 2030 (from a 2015 base year).

(d) In 2017 Fonterra stated publicly that it does not intend to install any more coal boilers in the Dairy Factories or any other dairy factories from 2030.

(e) In May 2019, Fonterra stated publicly that it may have to review its plan to reduce emissions from coal by 2030 in view of the Government's decision to halt further natural gas exploration.

(f) In July 2019, Fonterra stated ~~publically~~publicly that:

(i) it targeted a reduction in emissions by 30% across all its manufacturing operations by 2030 and net zero emissions by 2050;

(ii) it will not be installing any new coal boilers or increasing capacity to burn coal.

16. The combustion of coal at the Dairy Factories releases greenhouse gases into the atmosphere including carbon dioxide, methane, and nitrous oxide (**Greenhouse Gases**).

~~17. It is possible for Fonterra to achieve net zero emissions of Greenhouse Gases by 2030.~~

Genesis' emitting activities

~~18.~~17. Genesis operates the Huntly Power Station in Huntly, New Zealand.

~~19.~~18. The Huntly Power Station is the largest thermal power station in New Zealand.

~~20.~~19. The Huntly Power Station is fuelled by the combustion of coal and natural gas.

~~21.~~20. In August 2015 Genesis stated publicly that it would close the two coal-burning electricity generators at the Huntly Power Station by December 2018.

~~22.~~21. In February 2018 Genesis stated publicly that it would not close the coal burning generators at the Huntley Power Station by December 2018 but would instead stop using coal to generate electricity, expect in exceptional circumstances, by 2025.

~~23.~~22. In the last quarter of 2018, Genesis burned more coal at the Huntly Power Station than it had in any quarter since mid-2013.

~~24.~~23. In May 2019 Genesis stated publicly that its "intent is to remove coal by 2030 if we can".

~~25.~~24. The combustion of coal and natural gas at the Huntly Power Station releases Greenhouse Gases into the atmosphere.

~~26. It is possible for Genesis to achieve net zero emissions of Greenhouse Gases by 2030.~~

Dairy Holdings' emitting activities

~~27.~~25. Dairy Holdings operates 59 dairy farms in the South Island, producing 17 million kilograms of milk solids from 50,000 milking cows.

26. Dairy Holdings' dairy farms release Greenhouse Gases into the atmosphere, including by releasing methane as a result of enteric fermentation and nitrogen dioxide from nitrogen-based fertiliser use.

~~28.~~27. Dairy Holdings does not need to surrender emissions units under the Emissions Trading Scheme in respect of its agricultural methane emissions.

~~29. It is possible for Dairy Holdings to achieve net zero emissions of Greenhouse Gases by 2030.~~

NZ Steel's emitting activities

~~30.~~28. NZ Steel operates the Glenbrook Steel Mill.

~~31.~~29. The Glenbrook Steel Mill is primarily fuelled by the combustion of coal.

~~32.~~30. The Glenbrook Steel Mill has the capacity to burn 800,000 tonnes of coal a year.

~~33.~~31. The combustion of coal at the Glenbrook Steel Mill releases Greenhouse Gases into the atmosphere.

~~34. It is possible for NZ Steel to achieve net zero emissions of Greenhouse Gases by 2030.~~

Z Energy's emitting activities

~~35.~~32. Z Energy is a ~~publically~~publicly listed company that supplies retail customers and commercial customers, including in the aviation and maritime industries, with petrol, diesel, jet fuel and petroleum-related fuel products (**Fuel Products**).

~~36.~~33. The Fuel Products supplied by Z Energy are burned resulting in the release of Greenhouse Gases into the atmosphere.

~~37.~~34. Z Energy knows that the Fuel Products it supplie~~d~~s are burned resulting the release of Greenhouse Gases into the atmosphere.

~~38. It is possible for Z Energy to achieve net zero emissions of Greenhouse Gases by 2030, including accounting for the emissions of the end users of the Fuel Products that it supplies.~~

~~NZ Refining~~Channel's emitting activities

~~39.~~35. ~~NZ Refining~~ Channel is a publicly listed company whose major shareholders include Mobil Oil New Zealand Limited, Z Energy and BP New Zealand Holdings Limited.

40.36. NZ Refining Channel operates the Marsden Point Oil oil Rrefinery and import terminal (**Marsden Point**) and the Refinery-Auckland Pipeline.

41.37. NZ Refining Channel produces or imports the majority of the Fuel Products consumed in New Zealand.

42.38. The process of refining of crude oil by NZ Refining Channel at Marsden Point directly causes the release of Greenhouse Gases into the atmosphere.

43.39. The majority of the Fuel Products imported and supplied by NZ Refining Channel are burned to power combustion engines for land, maritime and air transportation, or to generate electricity.

44.40. The burning of the Fuel Products imported and supplied by NZ Refining Channel causes the release of Greenhouse Gases into the atmosphere.

45.41. NZ Refining Channel knows that the Fuel Products it imports and supplies are burned and that this releases Greenhouse Gases into the atmosphere.

46. It is possible for NZ Refining to achieve net zero emissions of Greenhouse Gases by 2030, including accounting for the emissions of the end users of Fuel Products that it supplies.

BT Mining's activities

47.42. BT Mining owns and operates the Stockton Mine, north of Westport.

48.43. The Stockton Mine is the largest opencast mine in New Zealand and produces bituminous, coking and thermal coal.

49.44. The majority of the coal produced at the Stockton Mine is exported.

50.45. In 2018 approximately 0.8 million tonnes was produced and exported from the Stockton Mine.

51.46. In 2019 approximately 1.1 million tonnes of coal is forecast to be produced and exported from the Stockton Mine.

47. The majority of the exported coal is sent to China, where it is primarily burned in the production of steel.

52.48. The Greenhouse Gas emissions arising from the burning of coal to produce steel in China are not materially regulated.

53.49. The burning of coal produced at the Stockton Mine (whether in New Zealand or overseas) releases Greenhouse Gases into the atmosphere.

54.50. BT Mining knows that the coal it produces is burned, and that this results in the release of Greenhouse Gases into the atmosphere.

55. It is possible for BT Mining to achieve net zero emissions of Greenhouse Gases by 2030, including accounting for the emissions of end users of the coal it produces.

Consequences of the release of Greenhouse Gases into the atmosphere

51. In 2020-2021 the defendants were together responsible for more than one third of New Zealand's total reported Greenhouse Gas emissions.

52. In 2020-2021 just 15 companies were responsible for more than 75 per cent of New Zealand's total reported Greenhouse Gas emissions.

~~56.~~53. The release of Greenhouse Gases into the atmosphere from human activities (including the defendants' activities) increases the natural greenhouse effect, which causes, among other consequences, the warming of the planet.

~~57.~~54. Climate change from the release of Greenhouse Gases into the atmosphere from human activities (including the defendants' activities) will result on average in an additional warming of the Earth's surface and atmosphere, and will adversely affect natural ecosystems and humankind.

~~58.~~55. The effect of the release of Greenhouse Gases into the atmosphere from human activities (including the defendants' activities) will result in dangerous anthropogenic interference with the climate system.

56. The current scientific consensus as to the nature, effects, and mitigation requirements of climate change is represented by the most recent reports of the Intergovernmental Panel on Climate Change (**IPCC**), which are relied upon as if pleaded in full:~~.~~

(a) *AR5 Synthesis Report: Climate Change 2014* (October 2014)

(b) *Special Report: Global Warming of 1.5°C* (October 2018)

(c) *Special Report: Climate Change and Land* (August 2019)

(d) *Special Report: The Ocean and Cryosphere in a Changing Climate* (September 2019)

(e) *AR6 Climate Change 2021: The Physical Science Basis* (August 2021)

(f) *AR6 Climate Change 2022: Impacts Adaption and Vulnerability* (March 2022)

~~(a)~~(g) *AR6 Climate Change 2022: Mitigation of Climate Change* (April 2022)

~~(b) The IPCC's AR5 Synthesis Report of October 2014 is relied upon as if pleaded in full.~~

~~(c) The IPCC's Special Report: Global Warming of 1.5°C of October 2018 is relied upon as if pleaded in full.~~

~~59.~~57. 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 of climate change.

~~60. Limiting the warming caused by climate change to 1.5°C requires a global net reduction in human-caused emissions of carbon dioxide by 45 percent from 2010 levels by 2030, reaching net zero by around 2050, and substantial and fast reductions of other Greenhouse Gases.~~

~~61.~~58. The release of the Greenhouse Gases by the defendants is human activity that has contributed, and will continue to contribute, to dangerous anthropogenic interference with the climate system and the adverse effects of climate change (**Adverse Effects**).

Particulars of dangers

(a) Increases in temperatures;

(b) Loss of biodiversity and biomass;

(c) Loss of land and productive land (including as a result of sea level rise);

(d) Risks to food and water security;

(e) Increasing extreme weather events;

(f) Ocean acidification;

(g) Geopolitical instability and population displacement;

(h) Adverse health consequences;

(i) Economic losses as a result of all of the above;

~~(i)~~(j) The reaching of "tipping points" which may cause the catastrophic breakdown of crucial environmental systems;

(k) An unacceptable and escalating risk of social and economic collapse and mass loss of human life; and

~~(j)~~(l) As further described in the reports of the IPCC.~~.~~

~~62.~~59. Poor and minority communities will be disproportionately burdened by the ~~a~~Adverse ~~e~~Effects of climate change.

60. According to the most recent science from IPCC, to avoid dangerous climate change (including to have a better than even chance of limiting warming to 1.5˚C with no or limited overshoot):

(a) By 2025, at the latest, global Greenhouse Gas emissions must peak;

(**Minimum 2025 emissions**)

(b) By 2030:

(i) Global CO_2 emissions must be reduced by 48% compared to 2019 levels;

(ii) Global CH_4 emissions must be reduced by 34% compared to 2019 levels;

(**Minimum 2030 reductions**)

(c) By 2040:

(i) Global CO_2 emissions must be reduced by 80% compared to 2019 levels;

(ii) Global CH_4 emissions must be reduced by 44% compared to 2019 levels;

(**Minimum 2040 reductions**)

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

(**Minimum 2050 reductions**)

(together **Minimum Global Reductions**)

61. It is possible for the defendants to reduce the emissions from their activities and products to reflect the Minimum Global Reductions (as to timing and amount) directly and from the activities of those to whom they supply fossil fuels.

62. Requiring the defendants to cease, or to reduce, their Greenhouse Gas emissions (or contribution to emissions from producing and selling fossil fuels) will materially reduce the Adverse Effects of climate change.

Particulars

(a) The defendants are material contributors to New Zealand's total Greenhouse Gas emissions;

(b) Requiring the defendants to stop emitting or selling emissions creating products (or to otherwise take steps to reduce downstream emissions from the products they sell) will have flow on effects of requiring other emitters to stop (whether voluntarily or by orders in other proceedings);

(c) Climate inaction across the globe is interlinked. Liability and relief in this case will result in very substantial emissions reductions being made in other countries (through one or more of inspiration, precedent and adoption of similar judicial responses, or political steps becoming unavoidable or more normalised).

63. In the Paris Agreement (2016), 196 countries urged themselves and society to take urgent measures to reduce Greenhouse Gas emissions to avoid the Adverse Effects of climate change. This followed similar commitments in the United Nations Framework Convention on Climate Change (1992) (**UNFCCC**) and the Kyoto Protocol to that Convention (1997).

64. Despite states urging immediate and significant reductions in Greenhouse Gas emissions in various international agreements and forums, between 2010 and 2019 global Greenhouse Gas emissions increased by 12 per cent (2019 being the latest date in the IPCC data) and the defendants contributed to this increase.

65. Given the lagged effects of Greenhouse Gas emissions on warming, achieving the Minimum 2025 Emissions and the Minimum 2030 Reductions are particularly important if warming is to be limited to below 2˚C or 1.5˚C.

66. Given global economic inequality it is necessary for developed countries, including New Zealand, to achieve proportionally greater and faster reductions in Greenhouse Gas emissions than the Minimum Global Reductions.

67. The Minimum Global Reductions cannot be achieved without the contribution of non-state actors including the defendants.

68. The New Zealand Parliament enacted the Climate Change Response Act 2002 which has purposes that include enabling New Zealand to meet its international obligations under the UNFCCC, the Kyoto Protocol and the Paris Agreement.

69. Despite enacting the Climate Change Response Act, since 2002 New Zealand's net and gross Greenhouse Gas emissions have increased and have not reduced.

70. Current and proposed measures under the Climate Change Response Act, including its emissions trading scheme, proposed carbon budgets, and the 2022 "Emissions Reduction Plan", will not result in New Zealand achieving reductions in Greenhouse Gas emissions, or the defendants being required to reduce emissions, in line with a proportionate (or better) contribution to the Minimum Global Reductions as to timing or amount.

Particulars

(a) The Emissions Trading Scheme is demonstrably ineffective at achieving meaningful reductions in Greenhouse Gas Emissions, and its flaws enable a cover for continuing emissions (and increases of emissions);

(b) The Emissions Reduction Plan largely provides a framework for further planning, rather than providing measures for concrete emissions reductions, and imagines that inventions will be discovered enabling reductions in net emissions without any proper basis to believe that will eventuate;

(c) Proposed carbon budgets are logically flawed, inadequate, and not commensurate with achieving limiting warning to 1.5˚C. They will see New Zealand's emissions continue to increase over the next decade;

(d) New Zealand intends to rely on the possibility of obtaining offshore credits to meet its international obligations rather than actually reducing emissions, in circumstances where offshore credits may

not be available and actual emissions reductions consistent with the Minimum Global Reductions are required to avoid dangerous climate change;

(e) The Emissions Trading Scheme does not include agricultural greenhouse gas emissions, which comprise the majority of New Zealand's greenhouse gas emissions;

(f) The legislation and associated plans rely significantly upon the planting of forests (in New Zealand and to support offshore credits) where those offsets are unlikely to be real or secure, not least because predicted climate and moisture changes will result in widespread and uncontrollable levels of forest fires.

71. Despite the UNFCCC, the Kyoto Protocol and the Paris Agreement, effective governmental action at a global and national level (including in New Zealand) has not occurred and will not result in the Minimum Global Reductions being achieved.

72. Even if the commitments of various states under the Paris Agreement to reduce their emissions by 2030 are met, those commitments are inadequate such that the IPCC considers that it is likely that warming in excess of 1.5˚C will nevertheless occur.

73. Political imperatives and short election cycles have impeded central governments taking effective action to require the reduction of Greenhouse Gas emissions in accordance with the Minimum Global Reductions.

74. Political imperatives and short election cycles will continue to impede central governments taking effective action to require the reduction of Greenhouse Gas emissions in accordance with the Minimum Global Reductions.

75. New Zealand's central government and legislature will not take effective action to reduce Greenhouse Gas emissions in time to achieve the Minimum Global Reductions, or in time to otherwise avoid the Adverse Effects including Adverse Effects that will impact Mr Smith and his descendants.

76. The defendants have variously:

(a) failed to credibly commit to voluntary measures that would see them proportionality contribute to, or better, the Minimum Global Reductions as to timing or volume; and

(b) actively lobbied against regulatory measures that would require them to reduce their emissions to proportionately contribute to, or better, the Minimum Global Reductions as to timing or volume.

Particulars

(a) Fonterra has lobbied extensively and continues to lobby to avoid or minimise regulation of agricultural emissions;

(b) The lobbying steps taken by the defendants are within their knowledge and further particulars will be given following discovery.

77. The Greenhouse Gas emissions of several of the defendants are actually, or effectively, unconstrained by the current regulatory regime.

Particulars

(a) Agricultural greenhouse gas emissions are not part of the emissions trading scheme;

(b) It is unlikely that agriculture greenhouse emissions will be regulated in a manner which would see a reduction in emissions consistent with the Minimum Global Reductions;

(c) BT Mining produces coal and exports it to jurisdictions where there is no, or no credible, regulation of Greenhouse Gas emissions such that its continued production and export of coal is inconsistent with the achievement of the Minimum Global Reductions and those emission are not regulated in New Zealand;

(d) A number of defendants, including NZ Steel, have received substantial allocations of "free" units under the emissions trading scheme such that they have not, and will not, reduce their emissions in a manner consistent with the Minimum Global Reductions;

(e) The availability of fixed price options, price caps, the cost containment reserve and similar mechanisms in the emission trading scheme artificially suppress the carbon price meaning that those defendants who are participants in the emissions trading scheme are not incentivised or required to reduce their emissions in a manner consistent with the Minimum Global Reductions;

(f) The New Zealand regulatory regime does not place hard limits on the amount of Greenhouse Gases that may be emitted by an individual or in total including due to the existence of a substantial stockpile of existing units (approximately 150,000,000), additional auction volumes, free allocation, and the cost containment reserve.

78. By their continued Greenhouse Gas emissions the defendants knowingly externalise both the harms of their Greenhouse Gas emissions, and the costs of otherwise achieving a reduction in Greenhouse Gas emissions sufficient to achieve the Minimum Global Reductions, onto others including Mr Smith, his whanau, and his descendants.

79. The consequence, in fact and in law, of the defendants' actions is that Mr Smith, his whanau, his descendants and others will bear the cost of dealing with harms contributed to by the defendants' historical, current and future Greenhouse Gas emissions.

80. There are multiple options available to the defendants to achieve, and better, the Minimum Global Reductions and to achieve the reductions sought by Mr Smith in this proceeding.

81. 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 whanau, and his descendants.

Tikanga Māori

82. Mr Smith does not allege that the defendants directly owed, or violated, any obligations under tikanga Māori, but he does rely on principles of tikanga Māori to inform the legal basis of the pleaded causes of action and the development of the common law of Aotearoa New Zealand. On the basis that the Court of Appeal considered that Mr Smith was required to plead those principles of law if he was to rely on them, he says:

(a) tikanga Māori has its own system of obligations owed to others and wrongs arising from those obligations;

(b) under tikanga Māori, obligations are grounded in whakapapa and whanaungatanga (kinship and community relationships);

(c) these relationships include a connection with the whenua (land and the environment), as humans are genealogically descendants of the natural world, giving rise to corresponding obligations of kaitiakitanga (obligations to care for the environment and resources);

(d) a breach of tikanga gives rise of a hara or take (an issue or a cause), requiring utu (an appropriate response or steps to be taken) in order to restore ea (a state of harmony or balance);

(e) harm to the environment is a harm in and of itself and can create a corresponding harm to those who have interests in the environment including kaitiaki and mana whenua (because it directly impacts their mana and their relationship with the whenua);

(f) where the environment or a resource is out of balance, including through human induced activity, kaitakitanga requires steps to be taken to restore balance, including through measures such as rāhui, being the prohibition of specific human activity through the use of tapu (making something sacred) and, in connection with the environment, to give a period of time to allow a resource to be re-generated;

(g) tikanga Māori recognises that hara has both a collective and an individual dimension both as to who is responsible for causing harm and as to who suffers harm.

~~(a)~~

FIRST CAUSE OF ACTION: PUBLIC NUISANCE

~~63.~~83. The plaintiff will suffer harm from the effects of dangerous anthropogenic interference with the climate system and the ~~a~~Adverse ~~consequences~~

Effects of climate change caused or contributed to by the defendants jointly and separately.

Particulars

(a) Climate change will result in increasing sea levels, causing increased coastal erosion, inundation, flooding and storm surges. This will irrevocably damage the plaintiff's family land at Mahinepua C resulting in:

(i) A physical loss of land from erosion and inundation;

(ii) A loss of productive land from saltwater intrusion;

(iii) A loss of economic value as a result of the same;

(iv) A loss of sites cultural and spiritual significance that cannot be compensated by money or the substitution of different land, or remedied by relocation to a different area.

(b) Climate change will result in increasing sea levels, causing increased coastal erosion, inundation, flooding and storm surges. This will irrevocably damage the Customary Resources and Sites of customary, cultural, historical, nutritional and spiritual significance to the plaintiff including as a result of:

(i) The loss or impairment of traditional or customary fisheries as a result of sea level rise, ocean warming and ocean acidification;

(ii) The physical loss and impairment of traditional or customary coastal landing sites for waka, and access to those sites;

(iii) The physical loss of burial caves and cemeteries from erosion or inundation;

(c) Climate change will result in ocean warming and acidification which will adversely impact specific coastal and freshwater fisheries which the plaintiff customarily uses.

(d) Climate change will result in the irrevocable and irreplaceable loss of land, resources, and species that are economically, culturally and spiritually significant to the plaintiff as tangata whenua (including interests protected under the Te Tiriti o Waitangi).

(e) Climate change will result in increasing adverse health impacts in respect of which the plaintiff and Māori communities have a particular vulnerability.

~~64.~~84. By releasing Greenhouse Gases into the atmosphere (or producing or exporting coal, in the case of BT Mining; and producing or supplying Fuel Products in the case of Channel ~~NZ Refining~~ and Z Energy), the defendants have interfered with, or contributed to interference with, and will

in the future interfere with or contribute to interference with, the rights of the public.

Particulars

(a) The release of Greenhouse Gas by the defendants (or, in the case of BT Mining, ChannelNZ Refining, and Z Energy as a result of their production or supply of coal and Fuel Products) has or will contribute to interference with public health.

(b) The release of Greenhouse Gas by the defendants (or, in the case of BT Mining, ChannelNZ Refining, and Z Energy as a result of their production or supply of coal and Fuel Products) has or will contribute to interference with public safety.

(c) The release of Greenhouse Gas by defendants (or, in the case of BT Mining, ChannelNZ Refining, and Z Energy as a result of their production or supply of coal and Fuel Products) has or will contribute to interference with public comfort.

(d) The release of Greenhouse Gas by defendants (or, in the case of BT Mining, ChannelNZ Refining, and Z Energy as a result of their production or supply of coal and Fuel Products) has or will contribute to interference with public convenience.

(e) The release of Greenhouse Gas by defendants (or, in the case of BT Mining, ChannelNZ Refining, and Z Energy as a result of their production or supply of coal and Fuel Products) has or will contribute to interference with public peace.

~~(e)~~(f) The release of Greenhouse Gas by defendants (or, in the case of BT Mining, Channel, and Z Energy as a result of their production or supply of coal and Fuel Products) has or will contribute to an interference with a public right to a safe and habitable climate system.

~~65.~~85. The defendants' interference with public rights is substantial, material and unreasonable both as to the level of their contribution and the consequences of their contribution.

~~66.~~86. The defendants knew, or ought reasonably to have known, since at least the release of the IPCC's Fourth Assessment Report in 2007, that their activities would contribute to dangerous anthropogenic interference in the climate system.

~~67.~~87. The defendants knew, or ought reasonably to have known, since at least the release of the IPCC's Fourth Assessment Report in 2007, that it was necessary for them to immediately and significantly reduce their Greenhouse Gas emissions (or their production or exportation of coal, in the case of BT Mining; and or their production or supply of Fuel Products in the case of ChannelNZ Refining and Z Energy) in order to avoid causing or contributing to dangerous anthropogenic interference in the climate system and the adverse consequences of climate for persons including the plaintiff.

88. Despite this knowledge, the defendants have continued to emit Greenhouse Gases into the atmosphere (or produce or export coal, in the case of BT Mining; and produce or supply Fuel Products in the case of Channel ~~NZ Refining~~ and Z Energy) and have failed to significantly reduce their Greenhouse Gas emissions (or their production or exportation of coal, in the case of BT Mining; and production or supply of Fuel Products in the case of Channel ~~NZ Refining~~ and Z Energy) and have instead increased gross emissions (or production of coal, in the case of BT Mining; and production or supply of Fuel Products in the case of Channel ~~NZ Refining~~ and Z Energy) since 2007.

89. Requiring the defendants to reduce, or cease, their Greenhouses Gas emissions (directly or arising from their fossil fuel products) will reduce the injury that will otherwise be suffered by the plaintiff and his descendants as a result of the Adverse Effects of climate change.

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 Fuel Products in the case of Channel ~~NZ Refining~~ and Z Energy);

(b) An injunction requiring the each of the defendants to produce (or cause in relation to the products they sell, in the case of BT Mining, Channel ~~NZ Refining~~ 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 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 by the end of 2040, by linear reductions in net emissions each year until that time (to be supervised by the Court);

(iv) ~~zero net emissions from their activities by 2030, by linear reductions in net emissions each year until that time (to be supervised by the Court),~~zero net Greenhouses Gas emissions from their activities by 2050 by continued linear reductions (to be supervised by the Court);

~~(b)~~(c) Alternatively, an injunction (which may be suspended) requiring the defendants to immediately~~or to otherwise~~ cease ~~their nuisance creating or contributing activities~~ emitting net Greenhouses Gas emissions, or contributing to the net emission of Greenhouse Gases through the sale of their products~~immediately~~;

~~(c)~~(d) Such other relief as the Court determines appropriate to enable the mitigation of or adaption to damage to climate systems contributed to by the defendants;

~~(d)~~(e) The plaintiff 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 (IN ADDITION OR IN THE ALTERNATIVE)

The plaintiff repeats paragraphs [1] to [~~69~~82] above, and says further —

~~68.~~90. The defendants owe the plaintiff (and persons like him) a duty to take reasonable care not to operate their business in a way that will cause the plaintiff loss by contributing to dangerous anthropogenic interference in the climate system.

~~69.~~91. The defendants have breached their duty by doing acts that have contributed to, and will continue to contribute to, dangerous anthropogenic interference in the climate system.

~~70.~~92. The defendants knew, or ought reasonably to have known, since at least the release of the IPCC's Fourth Assessment Report in 2007, that their activities would contribute to dangerous anthropogenic interference in the climate system.

~~71.~~93. The defendants knew, or ought reasonably to have known, since at least the release of the IPCC's Fourth Assessment Report in 2007, that it was necessary for them to immediately and significantly reduce their Greenhouse Gas emissions (or their production or exportation of coal, in the case of BT Mining; and or their production or supply of Fuel Products in the case of Channel ~~NZ Refining~~ and Z Energy) in order to avoid causing or contributing to dangerous anthropogenic interference in the climate system and the adverse consequences of climate for persons including the plaintiff.

~~72.~~94. Despite this knowledge, the defendants have continued to emit Greenhouse Gases into the atmosphere (or produce or export coal, in the case of BT Mining; and produce or supply Fuel Products in the case of Channel ~~NZ Refining~~ or Z Energy) and have failed to significantly reduce their Greenhouse Gas emissions (or their production or exportation of coal, in the case of BT Mining; and their production or supply of Fuel Products in the case of Channel ~~NZ Refining~~ and Z Energy) and have instead increased gross emissions (or production of coal, in the case of BT Mining; and production or supply of Fuel Products in the case of Channel ~~NZ Refining~~ and Z Energy) since 2007.

95. The defendants' breach of their duty has or will cause the plaintiff loss.

96. The defendants' contribution to the injury that has been or will be suffered by the plaintiff is material.

~~73.~~97. Requiring the defendants to reduce, or cease, their Greenhouses Gas emissions will reduce the injury that will otherwise be suffered by the plaintiff as a result of the Adverse Effects of climate change.

Relief sought

(a) A declaration that the defendants have (individually and/or collectively) unlawfully breached a duty owed to the plaintiff and have caused, or will cause him loss through their emitting activities (or the production and/or exportation of coal in the case of BT Mining; and the production or supply of Fuel Products in the case of Channel ~~NZ Refining~~ and Z Energy);

(b) An injunction requiring the each of the defendants to produce (or cause in relation to the products they sell ~~contribute to~~, in the case of BT Mining, Channel ~~NZ Refining~~ 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 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 by the end of 2040, by linear reductions in net emissions each year until that time (to be supervised by the Court);

(iv) ~~zero net emissions by 2030, by linear reductions in net emissions each year until that time (to be supervised by the Court),~~ zero net Greenhouses Gas emissions from their activities by 2050 by continued linear reductions (to be supervised by the Court);

~~(b)~~(c) Alternatively, an injunction (which may be suspended) requiring the defendants to immediately cease emitting net Greenhouses Gas emissions, or contributing to the net emission of Greenhouse Gases through the sale of their products~~or to otherwise cease their emissions activities immediately~~;

~~(c)~~(d) Such other relief as the Court determines appropriate to enable the mitigation of or adaption to damage to climate systems contributed to by the defendants;

~~(d)~~(e) The plaintiff brings this proceeding in the public interest, and with the assistance of *pro bono* legal representation, and for that reason does not seek costs.

THIRD CAUSE OF ACTION: BREACH OF DUTY (IN ADDITION OR IN THE ALTERNATIVE

The plaintiff repeats paragraphs [1] to [~~75~~82] above, and says further —

98. 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~~Adverse ~~e~~Effects of climate change through their emission of Greenhouse Gases into the atmosphere (or their production or exportation of coal in the case of BT Mining; and their production and supply of Fuel Products in the case of Channel ~~NZ Refining~~ and Z Energy).

~~74.~~99. The defendants have breached, and will continue to breach, the duty by emit Greenhouse Gases into the atmosphere (or to cause the emission of Greenhouse Gases 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 Adverse Effects of climate change, and injury to the plaintiff and people like him.

Relief sought

(a) A declaration that the defendants have (individually and/or collectively) unlawfully breached a duty through their emitting activities (or their production or exportation of coal in the case of BT Mining; and their production and supply of Fuel Products in the case of Channel~~NZ Refining~~ and Z Energy);

(b) An injunction requiring the each of the defendants to produce (or ~~contribute to~~cause in relation to the products they sell, in the case of BT Mining, ~~NZ Refining~~ 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 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 by the end of 2040, by linear reductions in net emissions each year until that time (to be supervised by the Court);

(iv) ~~zero net emissions by 2030, by linear reductions in net emissions each year until that time (to be supervised by the Court)~~ zero net Greenhouses Gas emissions from their activities by 2050 by continued linear reductions (to be supervised by the Court).

~~(b)~~(c) Alternatively, an injunction (which may be suspended) requiring the defendants to immediately cease emitting net Greenhouses Gas emissions, or contributing to the net emission of Greenhouse Gases through the sale of their products~~, or to otherwise cease their emissions creating activities immediately~~;

~~(c)~~(d) Such other relief as the Court determines appropriate to enable the mitigation of or adaption to damage to climate systems contributed to by the defendants;

~~(d)~~(e) The plaintiff brings this proceeding in the public interest, and with the assistance of *pro bono* legal representation, and for that reason does not seek costs.

This document is filed by Michael Heard solicitor for the plaintiff of the firm LeeSalmonLong.

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