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

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: **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

Synopsis of submissions for first to fifth respondents

Dated: 20 July 2022

Reference: D R Kalderimis (daniel.kalderimis@chambers.co.nz) (Counsel)
S J P Ladd (simon.ladd@shortlandchambers.co.nz) (Counsel)
N K Swan (nicola.swan@chapmantripp.com)
T D Smith (tim.smith@chapmantripp.com)
A Lampitt (alana.lampitt@chapmantripp.com)

chapmantripp.com
T +64 4 499 5999
F +64 4 472 7111

PO Box 993
Wellington 6140
New Zealand

Auckland
Wellington
Christchurch

chapman tripp

TABLE OF CONTENTS

I.	**INTRODUCTION AND OVERVIEW**	**2**
II.	**CLIMATE CHANGE IS A COLLECTIVE THREAT THAT REQUIRES A COLLECTIVE SOLUTION**	**5**
	The CCRA	6
III.	**CLAIM IS AN INVITATION TO OVERREACH**	**10**
	Claim invites courts to exceed institutional competence	10
	Claim is legally incoherent and would damage integrity of tort law	13
	Claim is constitutionally inappropriate	15
IV.	**PRINCIPLES OF TIKANGA MĀORI**	**21**
V.	**PUBLIC NUISANCE CAUSE OF ACTION IS NOT TENABLE**	**24**
	Justiciability, remedy and statute	24
	Absence of a public right	26
	Absence of causal link	31
	Class of defendants: Materiality	34
	Class of plaintiffs: Special damage rule	36
VI.	**NEGLIGENCE CAUSE OF ACTION IS NOT TENABLE**	**38**
	Duty of care	38
	Causation	40
VII.	**NOVEL TORT SHOULD NOT BE INVENTED**	**43**
VIII.	**RELIEF IS CONTRIVED, WHICH POINTS TO DEEPER PROBLEMS**	**44**
IX.	**CONCLUSION**	**45**

I. INTRODUCTION AND OVERVIEW

1 Mr Smith's claim is a call to arms, inviting this Court to stretch, bend and invent tort law to injunct sectors of the New Zealand economy because the courts, "*free from the myopic electoral focus of politicians*", must act now to mitigate impacts of climate change on vulnerable communities.[1] Mr Smith suggests that if the opportunity presented by his claim is lost, so too will be the chance for the courts to "*provide part of the solution to the most significant and pressing problem facing New Zealand and the world*".[2]

2 The rhetoric is beguiling. No-one doubts the danger of climate change, the importance of responding, or that the courts play an important role. But this private law claim is a policy position overlaid by the language of legal rights and duties, and cannot be the vehicle for that response. Allowing it to proceed would not prevent the pleaded harm to Mr Smith. Instead, it would only create new and serious problems – institutionally, constitutionally and for the integrity of tort law itself. The claim is, as the Court of Appeal recognised,[3] legally untenable and must be struck out.

3 Although the argument is of broad compass, the first to fifth respondents advance what is in essence a single point: this case is an overreach of:

3.1 the institutional competency of the courts;

3.2 the coherence of tort law and limits of individualised litigation to resolve collective action problems; and

3.3 the legitimate role of the courts.

4 Contrary to Mr Smith's submissions, there is nothing orthodox about this claim. It is not based on any meaningful relationship between plaintiff and alleged tortfeasors. It is also why the remedies sought – expressed in this Court as a form of suspended injunction, supposedly in order to create a form of constitutional dialogue between the courts and Government – are so contrived. For this claim, the concepts and structures of legal responsibility are a veneer applied in order to ask the courts, rather than Parliament and the Government, to direct New Zealand's climate change policy.

---

1 Appellant Submissions, [4].

2 *Ibid*.

3 Court of Appeal Judgment [2021] NZCA 552 (*CA Judgment*).

5 This invitation to re-allocate constitutional power by 'rightsifying' lawful conduct should attract the utmost judicial caution. The respondents agree that we need to transition to a net zero economy, and they are an important part of this transition, but there are different legitimate policy views as to how this target is best achieved, each with different costs and different distributional consequences. These are rightly matters for the Government, with the benefit of independent expert advice from the Climate Change Commission, in accordance with the regulatory regime established by the Climate Change Response Act 2002 (the *CCRA*).

6 This case is not about whether torts can exist alongside regulation, or whether tort law can have regulatory objectives. Those questions arise only where a genuine correlative claim arises between plaintiff and tortfeasor, arising from real rights and duties based in the relationship between those two parties. This abstracted claim does not get into that ballpark. Instead, it seeks judicial regulation on the basis that the CCRA does not go far enough or fast enough.

7 Nor is the case about the role of tikanga in the law of torts. The respondents agree with Te Hunga Rōia Māori o Aotearoa's (*THRM's*) submissions that principles of tikanga are relevant to the development of tort law in Aotearoa New Zealand. However, Mr Smith does not plead any specific tikanga to justify what he asks this Court to do and instead relies broadly on principles or values underlying tikanga in arguing for the creation of a new tort.

8 Such generalised references to tikanga principles do not, any more than generalised allusions to values underlying English common law, salvage Mr Smith's claim. That is because they beg, rather than solve, the same questions as the rest of the claim. There is still no explanation as to why *these respondents* in particular owe a duty to *this appellant* in particular that is enforceable by him. No principle of tikanga is invoked for the invitation to create within the common law a new public right to be free from the effects of climate change. The principles and values underlying tikanga are relevant matters to consider within the framework of a common law claim. But here, that framework itself is lacking.

9 Mr Smith's primary attempt to present his call to arms as a form of common law claim is by reference to nineteenth century nuisance cases against local authorities relating to sewage discharge into rivers and lakes. These analogies to historical, localised claims are entirely insufficient for what is asked of this claim, which is not logically restricted to this plaintiff or these defendants, but would create a charter for litigants to transcend national borders in order

to ask New Zealand courts to blame selected defendants for the adverse effects of global climate change experienced in this country.[4] Such finger-pointing might create headlines but would achieve nothing to prevent the pleaded harm.

10 The right question, however – as the appellant himself recognises – is not who is to blame, but how we respond to climate change. In the context of his work with the Iwi Chairs Forum on the Government's Emissions Reduction Plan (*ERP*),[5] Mr Smith says "*[e]ach and every New Zealander has to understand that this is something that's going to affect us all. We need to be a team of 5 million on this*".[6] We all need to act and that action needs to be coordinated, effective and enduring. The courts should not accept Mr Smith's invitation to end-run the political component of this challenge. It is through democratic political mechanisms that competing interests are balanced, international relations are settled, and domestic action is legitimately determined.

11 As Mr Smith puts it, "…*if our people own the problem they will own the solution. It ensures that the social licence required for these quite dramatic changes is maintained. These changes are too politically vulnerable to survive a massive pushback*…".[7] This observation is insightful. A collective action problem of this complexity and magnitude demands a solution with the collective support and efforts of society, not the creation of atomised rights and duties pitting members of the community against each other.

12 None of this is to say that tort law duties with respect to climate change cannot arise in any circumstances.[8] It is to say only that this claim does not disclose any such duties, because it is, by design, too abstracted to meaningfully determine fault as between plaintiff and defendant using common law mechanisms. The Court need not close the door on future tort claims. It need only confirm the obvious: the claim before it is not tenable.

---

4 Leave to serve out of the jurisdiction would not be needed for a New Zealand plaintiff against a foreign defendant (as the alleged damage would have been sustained here: HCR 6.27(2)(a)(ii)) or for a foreign plaintiff against a New Zealand defendant.

5 Ministry for the Environment "Aotearoa New Zealand's First Emissions Reduction Plan", May 2022 (*ERP*).

6 Stuff "Iwi and experts warn against division in fight against climate change" https://www.stuff.co.nz/environment/climate-news/300589907/iwi-and-experts-warn-against-division-in-fight-against-climate-change.

7 *Ibid*.

8 Kysar's conclusions on this issue, whether tort law duties can arise, are instructive: Douglas Kysar "What Climate Change can do about Tort Law" (2011) Environmental Law 1, 44-47.

II. CLIMATE CHANGE IS A COLLECTIVE THREAT THAT REQUIRES A COLLECTIVE SOLUTION

13 Before going further, it is important to outline the global and national architecture addressing the threat of climate change.

14 The IPCC's *AR5 Synthesis Report: Climate Change 2014* (the *Synthesis Report*) observes:[9]

> Climate change has the characteristics of a collective action problem at the global scale because most GHGs accumulate over time and mix globally, and emissions by any agent (e.g., individual, community, company, country) affect other agents. Cooperative responses, including international cooperation, are therefore required ….

15 Climate change is a problem with no equivalent in our history. Its scale, complexity and pervasiveness are immediately self-evident from the IPCC reports pleaded by Mr Smith.[10] It is driven by humanity's very existence: "*[a]nthropogenic GHG emissions are mainly driven by population size, economic activity, lifestyle, energy use, land use patterns, technology and climate policy*".[11] It is a consequence of more than a century of global emissions.[12] The effects of climate change are not direct or local but reflect the accumulation of emissions: they are "*diffuse and disparate in origin, lagged and latticed in effect*".[13]

16 It is also self-evident from the IPCC reports that responding to climate change requires profound societal transformation: having depended on carbon for all aspects of our social and economic life, we must transition to low-carbon societies. The *Mitigation of Climate Change Report* describes changes needed in all aspects of life:[14] energy, industry, urban areas, buildings, transport, and agriculture, and forestry. It also describes the drivers for and constraints on "*the low carbon societal transition*" as comprising:[15]

---

9 *Synthesis Report*, 3.1. See also the IPCC AR6 Report Working Group III, *Climate Change 2022: Mitigation of Climate Change* (April 2022), TS-106 (the *Mitigation of Climate Change Report*).

10 Draft Amended Statement of Claim, [56].

11 *Synthesis Report,* above n 9, SPM2.1.

12 *Mitigation of Climate Change Report*, above n 9, D.1.1. See also *Minister for the Environment v Sharma* (2022) 400 ALR 203, 272 per Allsop CJ.

13 Kysar, above n 8, 4. See also Justice Glazebrook, "The Role of Judges in Climate Governance and Discourse", paper for Asia-Pacific Judicial Conference on Climate Change, November 2020, 21.

14 *Mitigation of Climate Change Report*, above n 9, C.4.3 (energy), C.5 (industry), C.6 (urban areas), C.7.1 and C.7.3 (buildings), C.8. and C.8.2 (transport) and C.9 and C.9.1 (agriculture, land-use and forestry).

15 *Ibid.*, TS-6.

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

17 No one should doubt the difficulties of making this unprecedented transition. Collectively, the IPCC reports highlight the complexities of decision-making to achieve the transition. There are both "*synergies*" and "*trade-offs*" between climate action and the pursuit of other goals.[16] There can be both "*co-benefits*" and "*adverse side effects*" from climate policies on overall social welfare.[17] There are significant distributional consequences,[18] with the resulting risk of inequalities.[19] These tensions are reflected in commentaries and judicial authorities on responses to climate change.[20]

18 Against that backdrop, the Synthesis Report describes the foundations of decision-making as co-operative, recognises that analytical methods cannot identify a single best balance between mitigation, adaptation and residual impacts, and says that effective decision-making must be iterative.[21] Political processes, both global and local, remain indispensable to the necessary collective action.

The CCRA

19 As the Court is aware, the international response is governed by the UN Framework Convention on Climate Change and the Paris Agreement, by which State parties set their Nationally Determined Contributions (*NDCs*).[22] New Zealand's international commitments are reflected in legislation.[23] As Mr Smith recognises in his parallel proceedings against the Attorney-General, "*…New Zealanders have*

---

16 *Ibid*, D1.1.

17 *Ibid*, Box 3.4 (page 3-82).

18 *Ibid*, D.3.2.

19 *Ibid*, at D.3.3. This point is made specifically, in the New Zealand context, in Bennett, Jones et al "Health and equity impacts of climate change in Aotearoa-New Zealand, and health gains from climate action" (2014) 127 NZMJ 16 at 19-20.

20 See, e.g., "The Role of Judges in Climate Governance and Discourse", above n 13, 20; *American Electric Power Co v Connecticut* 564 US 410 (2011), 8.

21 *Synthesis Report*, above n 9, 3.1. The *Synthesis Report* also recognises the importance on well-designed systemic and cross-sectorial mitigation strategies, rather than a focus on individual technologies and sectors: at 4.3.

22 New Zealand's NDC was updated on 4 November 2021 and commits New Zealand to a 50% reduction of net GHG emissions below gross 2005 levels by 2030: https://unfccc.int/sites/default/files/NDC/2022-06/New%20Zealand%20NDC%20November%202021.pdf.

23 CCRA, ss 3(1)(aa)(i), 3(1)(a), (3)(1)(b), 3(1)(c), and 5W(a), linking New Zealand's contribution under the Paris Agreement to limiting global average temperature increases to 1.5 degrees.

created a state with the powers it has for the very purpose of addressing collective action problems like climate change".[24]

20 The heart of the domestic response is the CCRA, which focusses on an orderly, transparent and clearly-signalled transition.[25] The Act employs economy-wide policy settings, as set out in the ERP and including the Emissions Trading Scheme (*ETS*) which uses markets to drive efficient behaviour change. At its core, the CCRA's primary statutory purpose is to enable New Zealand to develop and implement "*clear and stable*" climate change policies to meet its obligations under the Paris Agreement, including the 1.5 degree limit.[26] The statutory 2050 net zero targets for all long-lived greenhouse gases correspond directly to the IPCC's 2018 Special Report stating that emissions must fall to net zero by 2050 and that agricultural emissions must reduce by 24 – 47%.[27]

21 The CCRA is part of a broader regulatory structure, including the recent amendments to the Resource Management Act 1991,[28] sector-specific policies, national climate adaptation planning,[29] and the creation of multiple substantial funds to support emission reduction actions.[30]

---

24 Mr Smith's submissions dated 24 March 2022 in opposition to the Crown's application to strike out, *Smith v Attorney-General* (CIV-2019-485-384), [77].

25 The CCRA encompasses the Zero Carbon Amendment Act amendments brought in with broad cross-party support in 2019.

26 CCRA, s 3(1)(aa)(i), referring to art 2(1)(a) of the Paris Agreement.

27 CCRA, s 5Q. The IPCC recommended that to support a 1.5 degree maximum warming scenario CO_2 emissions should fall to net zero by around 2050 (specifically, 2045-2055), and agricultural methane emissions reduce by between 24-47% by 2050 (relative to 2010 levels): IPCC, 2018, *Global Warming of 1.5°C Summary for Policy Makers.* https://www.ipcc.ch/sr15/ at 11 and 14, respectively. See also First Reading, Rt Hon Jacinda Ardern (21 May 2019) 738 NZPD 11029 which confirmed that the intention behind the s 5Q, CCRA was to implement the IPCC recommendations.

28 Resource Management Amendment Act 2020, ss 17, 18, 21 and 35: these amendments include obligations to take into account ERPs when preparing planning documents and the repeal of the prohibition on considering the climate change effects of GHG emissions when assessing resource consents See also Final Report (Resource Management Amendment Bill) 180-2 (Select Committee Report), 30 March 2020, 17.

29 For example, Ministry for the Environment "National Climate Change Risk Assessment", August 2020; and Ministry for the Environment "Draft National Adaptation Plan", June 2022.

30 For example the Government has created New Zealand Green Investment Finance, the Government Investment in Decarbonising Industry Fund and Climate Emergency Response Fund (CERF), all of which fund emissions reduction actions and the latter two of which are supported by the hypothecated revenues from the ETS. For example the CERF which had an initial fund volume of $4.5 billion was announced in 2021. In Budget 2022 investments made via the CERF were expected to drive between 52-70% of the reduction anticipated in the first emissions budget: see *Wellbeing Budget 2022: Climate Emergency Response Fund* (16 May 2022) https://www.beehive.govt.nz/sites/default/files/2022-05/CERF%20investments.pdf, 5.

22 Clarity and stability are achieved via the CCRA's architecture, which mandates the release, usually 10 years in advance,[31] of five-yearly emissions budgets and accompanying ERPs.[32] Government must do so "*to provide greater predictability for all those affected, including households, businesses and investors",* and by "*giving advance information"* on the emissions reductions required.[33] ERPs must include strategies and funding to mitigate impacts on employees, employers, regions, communities, iwi and Māori – recommended by the Commission and then determined by Government.[34]

23 The CCRA deliberately does not set sector (or entity) specific emissions budgets, but economy-wide budgets.[35] This approach reflects Parliament's recognition – demonstrated in the Commission's advice and the first ERP – that certain high-emitting activities that are hard to abate but critical to the New Zealand economy must continue during the wider transition.[36]

24 In the Commission, Parliament has created an independent institution to weigh the required emissions reductions alongside specified policy factors. The Commission has a science-based but comprehensive mandate, encompassing economic, social and cultural impacts and cross-generational costs.[37] The Commission's purpose is not only to provide independent advice, but also to monitor the Government's progress.[38]

---

31 CCRA, s 5X(3). Emissions budgets for 2022–2025, 2026–2030 and 2031–2035 were to be set (and were set) by 31 May 2022. Emissions budgets for periods from 2036 onwards must be set at least 10 years in advance.

32 CCRA, Part 1B (ss 5Q – 5ZOB).

33 CCRA, s 5W.

34 CCRA, s 5ZG(3)(c).

35 CCRA, s 5ZG.

36 As per the Commission's advice: "*We have used all the considerations set out in the Act to develop emissions budgets that balance ambition with what is achievable now*": Climate Change Commission "Advice to the New Zealand Government on its first three emissions budgets and direction for its emissions reduction plan 2022-2025", 31 May 2021 https://ccc-production-media.s3.ap-southeast-2.amazonaws.com/public/Inaia-tonu-nei-a-low-emissions-future-for-Aotearoa/Inaia-tonu-nei-a-low-emissions-future-for-Aotearoa.pdf (*Commission advice*), [78]. See also IPCC *Mitigation of Climate Change Report*, above n 9, C.10 (page SPM-44): "*Demand-side mitigation encompasses changes in infrastructure use, end-use technology adoption, and socio-cultural and behavioural change… some regions and socio-economic groups require additional energy and resources. Demand side mitigation response options are consistent with improving basic wellbeing for all*." Similarly, *Climate Change and Land: An IPCC Special Report* (2019) https://www.ipcc.ch/srccl/, identifies the need for both incremental and transformational adaptation measures: 466.

37 CCRA, s 5M: In recommending emissions targets, the Commission must consider likely economic effects, social and cultural circumstances, distribution of benefits, costs and risks between generations, the Crown-Māori relationship, te ao Māori, and specific effects on iwi and Māori alongside scientific and international developments.

38 CCRA, ss 5B(b), 5J(f).

25 The Government's initial emissions budgets and first ERP published in May 2022 are a multifaceted response to reduce emissions while seeking to maintain economic productivity, preserve security of energy supply, empower Māori, and ensure a just transition.[39] ERP settings respond directly to each of the Commission's recommendations, and in the present case do not require any of the respondents' activities to cease.[40]

26 For example, the ERP adopts the Commission's recommendation of strengthening market incentives, including the ETS, to drive low-emissions activities.[41] The ETS does not prohibit emitting activities or demand linear reductions to net zero: it creates a market that prices emissions to drive reductions at the point of greatest efficiency.[42] The ERP and ETS operate on the basis that certain activities that generate emissions have value and in some cases are essential, including energy, transport, food production and industry. Only in specific instances is Parliament or the Government prohibiting activities, e.g. the 2018 ban on new offshore fossil fuel exploration,[43] the phase-out of coal fired boilers,[44] and mandated landfill gas capture by 2026.[45] The regulatory response is designed "*to work with our key emissions-intensive industries and sectors to support them to both cut emissions and find new opportunities*".[46]

27 The statutory scheme and its regulatory response respectively recognise and prioritise the disproportionate impact of climate change on Māori and the importance of te ao Māori and mātauranga Māori in the transition.[47] The legislation incorporates te ao Māori in

---

39 ERP, above n 5, at 5. The Secretary for the Environment's Message reiterates: "*There is a role for all of us in making this plan succeed, and Government will work alongside our communities, businesses and the private sector, and all New Zealanders as we take action*".

40 See ERP, 8. See also the Government's response to each of the Commission's specific recommendations in Ministry for the Environment "Aotearoa New Zealand's first emissions reduction plan: The Government's response to He Pou a Rangi – Climate Change Commission's recommendations", May 2022 https://environment.govt.nz/assets/publications/Files/The-Governments-response-to-He-Pou-a-Rangi-Climate-Change-Commissions-recommendations.pdf (*ERP Response*).

41 ERP Response, 19.

42 ERP Response, 17-20. The ERP specifically recognises the importance of "*finding the right balance of emissions pricing through the NZ ETS, regulation, and supporting policies*": 20.

43 Crown Minerals (Petroleum) Amendment Act 2018. See Crown Minerals Act 1991, s 36(2A).

44 ERP, 202.

45 ERP, 313 (Action 15.5.1).

46 ERP, 21.

47 ERP, 50-51 and Chapter 2; National Climate Change Risk Assessment, above n 29, [3.1].

its key entities;[48] in its decision-making process;[49] and in its mandatory outputs.[50] Consistent with this, the National Climate Change Risk Assessment, the Commission's advice and the ERP *all* recognise that tangata whenua are vulnerable to climate change, that Māori are kaitiaki of their whenua,[51] and that central and local government must work with iwi to develop climate policy.[52]

III. CLAIM IS AN INVITATION TO OVERREACH

Claim invites courts to exceed institutional competence

28 It ought to be uncontroversial that courts are not equipped to design or implement a sophisticated policy response to climate change. As Justice Ginsberg wrote in the *AEP* case:[53]

> It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.

29 Internationally, courts have recognised the difficulties inherent in regulating climate change by judicial decision: the polycentric and political nature of the problem, the broad range of interests and trade-offs at issue, and the complex scientific and economic judgements required.[54]

---

48 CCRA, s 5G(2)(b)(i): Before nominating a Commissioner, the Minister must consult iwi and Māori representative organisations; CCRA, s 5H(1)(d)(ii): Commissioners are to have an understanding of approaches relevant to te ao Māori.

49 CCRA, ss 5M, 5ZI(b).

50 CCRA, ss 57G(3)(c), 5ZS.

51 Commission advice, 327-333; ERP, 15 and Chapter 2.

52 Commission advice, recommendation 26. See also ERP, 15 and Chapter 2. This responds specifically to the Commission's recommendation that central and local government work with Iwi/Māori to recognise and actively protect Iwi/Māori rights and interests (see ERP, 59). The Draft National Adaptation Plan also includes the establishment of a platform for work with Māori on climate actions focussed on partnership and representation, implementation of a national Māori climate strategy and community activation: above n 29, 29.

53 *American Electrical Power Co (AEP) v Connecticut* 564 US 410 (2011), 131 S Ct 2527, 14. That observation remains accurate notwithstanding the Supreme Court's recent decision in *West Virginia v EPA* 597 US (2022), 11-12, finding that Congress needs to speak clearly on 'major questions' in delegating regulatory power to federal agencies.

54 See, e.g., *Native Village of Kivalina v ExxonMobil Corporation* 696 F.3d 849, 2012 WL 4215921 (9th Cir 2012); *Comer v Murphy Oil USA Inc* 607 F.3d 1049 (5th Cir 2010); *City of New York v BP PLC* 325 F.Supp.3d 466, 476 (SDNY, 2018); *City of Oakland v BP PLC* (2018) 325 F. Supp. 3d 1017 (ND Cal, 2018); *Sharma*, above n 12, [228] and [253]; *Misdzi Yikh v Canada* 2020 FC 1059, [2020] FCJ 1109, [77]. See generally, Jacqueline Peel "Issues in Climate Change Litigation" (2011) 1 Carbon and Climate Law Review 15, 24; "The Role of Judges in Climate Governance and Discourse", above n 13, 19-20.

30 It is instructive to break down the elements of the regulatory process for reducing carbon emissions into its component parts:

30.1 international negotiations as to climate change targets and setting New Zealand's commitment to those targets;

30.2 designing domestic policy that is effective, coherent, and equitable to build a comprehensive emissions reduction strategy that identifies where and how emissions reductions will be achieved;

30.3 consulting with the very many affected people, iwi, businesses and organisations, as well as consulting between different governmental departments and Crown entities;[55]

30.4 technical policy design – including assessing potential regulatory methods for measuring emissions, registry set-up, and avoiding emissions leakage overseas,[56] and setting emission reduction requirements for different actors within the value chain;[57]

30.5 providing operational resources to enable regulatory mechanisms (such as the ETS) to function well and to implement policy measures consistently; and

30.6 providing ongoing fiscal funding of the regulatory system to ensure that emissions are measured, unit surrenders are recorded, and ongoing budgets and regulatory settings are regularly reviewed for efficacy and updated.

Each of these stages reflects extensive consultation, consensus building, and iterative reform and refinement.

---

55 These consultations have included a number of significant reports from cross-departmental teams, multiple discussion documents; examination by Select Committees; and a Government initiated review of the ETS; resulting in multiple amendments, as described at n 100, below.

56 That is, the risk of New Zealand emissions regulation triggering the shift of emissions-intensive production overseas with no corresponding drop in domestic consumption or global emissions.

57 Taking the steelmaking sector as an example, the technical policy design includes calculations for emissions unit surrender liabilities as set out in the Climate Change (Stationary Energy and Industrial Processes) Regulations 2009, and assessments of the necessary unit allocation to avoid risk of emissions leakage as set out in the Climate Change (Eligible Industrial Activities) Regulations 2010. The mechanics of acquiring and surrendering units is controlled by the Climate Change (Unit Register) Regulations 2008 and Climate Change (Auctions, Limits, and Price Controls for Units) Regulations 2020. These regulations all contain detailed and interlinked methodologies which create a finely balanced and interlinking regulatory response.

31 As the Court of Appeal recognised, the courts are not set up to carry out any of these steps. The design of such a system requires a level of institutional expertise, democratic participation and democratic accountability that cannot be achieved through a court process.[58]

32 The IPCC reports are also instructive.[59] While the science of climate change is clear, and the need for urgent and concerted action is obvious, the focus for the global transition to a low carbon economy is on collective action, while recognising that processes of mitigation and adaptation are necessarily context-specific for each country. Both mitigation and adaptation require trade-offs between different actors and different values, including the economic and social implications of different choices about how to transition.

33 It is too simplistic to claim (as Mr Smith does) that it is self-evidently good policy that the emissions of particular large New Zealand emitters need to peak by 2025 or reach certain defined levels via linear reductions by 2030 or 2040, or be net-zero by 2050, or else cease their activities right now.[60] Emissions are not absolute, but rather by-products of productive social and economic activity: supplying goods and services – dairy products (food), electricity (energy for our houses, businesses, schools and hospitals), fuel (for our cars, buses, trains and airplanes), steel (for our buildings, infrastructure and industry) – that are integral to our lives. Although Mr Smith makes an overt moral argument that the respondents are emitters who make profits, supplying goods and services demanded and used by all of us is not immoral. To the contrary, the respondents' activities are part of the fabric of our economic and social systems.

34 The transition we are engaged in requires a coordinated and enduring shift of activity from fossil-fuel to renewable sources. The process of achieving this transition is quintessentially suited to the resources of Government, its policy expertise, and its democratic processes, which inform the judgements and choices needed to ensure that the transition is just. The democratic legislative and regulatory process provides society with a steady and signalled policy direction. It allows households, businesses and communities to make decisions about investment and lifestyle changes that support the transition in a planned way. By contrast, judicial interventions that permit unexpected and *ad hoc* actions against

---

58 CA Judgment, [26].

59 See, e.g., the *Mitigation of Climate Change Report*, above n 9, TS-106.

60 Abstracted from the IPCC's conclusions that global GHG emissions must peak by 2025, reduce by particular proportions by 2030 and 2040, and reach net zero by 2050: Appellant Submissions, [24].

individual actors would directly undermine this policy signalling, as well as the society-wide approach.

Claim is legally incoherent and would damage integrity of tort law

35 The impracticability of New Zealand courts resolving a claim as abstracted as Mr Smith's claim is a function of the fact that it is not a coherent tort claim at all, but one individual's policy preferences dressed in the clothing of legal rights.

36 As the Court of Appeal rightly identified, tort law is concerned with corresponding rights and duties between persons by virtue of their relationship to each other.[61] "*A tort action is, by its nature, a private right of action in which someone seeks redress for having been wronged*".[62] A plaintiff must prove they have suffered an actionable or legally recognisable wrong at the hands of the defendant.[63] Absent this, there is no basis for a claim.

37 This approach to tort law is not the province of niche theory. It is broadly shared by corrective justice scholars,[64] legal recourse theory scholars,[65] and by Peter Cane in his seminal work on correlativity.[66] It is fundamentally what explains the difference between the decisions of Cardozo and Andrews JJ in *Palsgraf*.[67] The path taken in *Donoghue v Stevenson* importantly aligns with Cardozo J's reasoning in *Palsgraf* (and cites with approval Cardozo J's earlier

---

61 CA Judgment, [19], [103], [113]; John Gardner "Tort Law and its Theory" University of Oxford Legal Research Paper Series 2/2018 (January 2018), 9 and 12.

62 Benjamin Zipursky "Civil Recourse and the Plurality of Wrongs: Why Torts are Different" [2014] NZ Law Rev 145, 149 (originally presented at the 2012 LRF Conference). See also John Goldberg and Benjamin Zipursky *Recognizing Wrongs* (Harvard University Press, Cambridge, Massachusetts, 2020), 346: "*[a]s a body of law that tracks, refines, and revises norms of interpersonal interaction, tort law… builds on and reinforces rights and duties that people tend to recognize when they deal with each other*" (see also 362). See also John Gardner *Torts and Other Wrongs* (OUP, 2019), 2-3, discussing Zipursky & Goldberg.

63 See Stephen Todd (ed) *The Law of Torts in New Zealand* (8th ed, Thomson Reuters, Wellington, 2019), 3.

64 See Robert Stevens *Torts and Rights* (OUP, 2017), 4; Stephen Smith *Rights, Wrongs and Injustices: The Structure of Remedial Law* (OUP, 2019), 75-76 and Donal Nolan and Andrew Robertson *Rights and Private Law* (Hart Publishing, 2012), 13.

65 See above n 62.

66 See Peter Cane *The Anatomy of Tort Law* (Hart Publishing, 1997), 12-13 and 18; and Christina Beuermann "Tort Law Beyond the Forms of Action: Achieving the Goal of *The Anatomy of Tort Law*" in James Goudkamp, Mark Lunney and Leighton McDonald (eds) *Taking Law Seriously: Essays in Honour of Peter Cane* (2022, Hart Publishing, Oxford), 11, observing the "*bilateralness*" noted by Professor Cane as a distinguishing attribute of tort law.

67 *Palsgraf v Long Island Railroad Co*. 248 NY 339, 162 NE 99 (1928). Justice Cardozo held that "*negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. Proof of negligence in the air, so to speak, will not do*": 341. Andrews J, dissenting, held that a carelessly dangerous act "*itself is wrongful. It is a wrong not only to those who happen to be within the radius of danger but to all who might have been there – a wrong to the public at large*": 349.

decision in *MacPherson*), namely that tort law is founded on a relational connection between plaintiff and tortfeasor.[68] Mr Smith's claim, which involves no relationship with the respondents, would do violence to New Zealand's law of obligations. It would abrogate what the Court of Appeal rightly described as the "*relational underpinnings that are fundamental to tort law*".[69]

38 Policy considerations are part of the duty of care enquiry.[70] But these matters are considered within an established framework of coherent rights and duties between plaintiff and tortfeasor, rather than as an alternative to it.[71] Economic, social and other policy factors factor into that analysis.[72] But the common law method proceeds cautiously and by analogy for good reason.[73] In this way, the common law, even as it evolves, nurtures the rule of law.[74]

39 The problem with this claim is more profound than the indeterminacy problem addressed by the Court of Appeal in *Strathboss*.[75] In indeterminacy cases, there is a good claim between plaintiff and defendant, but it is hard or impossible to know where or how to draw the line. Here, there is no meaningful relationship between plaintiff and defendant in the first place. Mr Smith's approach – making purported neighbours of Mr Smith and disparate companies chosen by him, and logically encompassing any number of other unnamed plaintiffs and defendants – is a matter not of drafting but of concept. Mr Smith has confirmed this

---

68 *MacPherson v Buick Motor Co* (1916) 217 NY 382, 385, referred to in the judgments of Lords Atkin (577) and MacMillan (618) in *Donoghue v Stevenson* [1932] AC 562.

69 CA Judgment, [113].

70 Mr Smith's claim is also contrary to a law and economics understanding of nuisance liability: see Guido Calabresi and Douglas Melamed "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral", (1972) 85 Harvard Law Review 1089.

71 See Goldberg and Zipursky *Recognizing Wrongs*, above n 62, 357.

72 As Richardson J observed extrajudicially of *Fleming v Securities Commission* [1995] 2 NZLR 514, efficiency was not determinative: Sir Ivor Richardson "Law and Economics – and Why New Zealand Needs It" (2002) 8 NZBLQ 151, 160. Richardson J also applied economic considerations in the relational duty of care analysis in *South Pacific Manufacturing Co Ltd v NZ Security Consultants & Investigations Ltd* [1992] 2 NZLR 282, 308–309.

73 See, e.g., the examination of the House Of Lords' decisions in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, *Pepper v Hart*, and *Attorney-General v Blake* in Richard Buxton "How the common law gets made: Hedley Byrne and other cautionary tales" (2009) 125 LQR 60.

74 Lord Bingham *The Rule of Law* (Allen Lane, 2011), 38.

75 *Attorney-General v Strathboss Kiwifruit Limited* [2020] NZCA 98, [2020] 3 NZLR 247, [251]-[260], citing *Ultramares Corp v Touche* 174 NE 441 (NY Ct App 1931), 444. See also *Fleming v Securities Commission*, above n 72, 520 and 533 per Richardson J; and *Attis v Canada (Minister of Health)* 2008 ONCA 660, (2008) 300 DLR (4th) 415, [74].

choice and its consequence: that delineating the contours of responsibility would be left to courts to work out, case by case.[76]

40 It follows that this claim's very serious indeterminacy problems are a symptom, rather than the cause, of the fatal flaw in the claim. Here, both plaintiff and defendant eligibility would be oversubscribed and attempts to reduce each of them through line-drawing would be artificial and malleable. New Zealand's procedural rules would extend these difficulties to overseas plaintiffs suing New Zealand defendants and New Zealand plaintiffs suing overseas defendants.[77] New Zealand would become a destination for private law claims brought by plaintiffs seeking to allocate responsibility for emissions reductions to individual defendants differently to national regimes.

Claim is constitutionally inappropriate

41 Mr Smith appeals to the Court's counter-majoritarian rights-protection function to justify the claim, arguing that a legislative process is "*inapt*" and that the policy implications of judicial intervention can be left to the legislature "as part of the ordinary institutional dialogue reflected in the separation of powers".[78]

42 This kind of challenge should, in itself, be a warning sign. The departure of this claim from the common law's incremental method of development is an invitation both for the judiciary to rewrite the foundations of tort law, and to step beyond tort law and into the domain of the political branches.[79] What is asked of the courts goes well beyond "*ordinary institutional dialogue*".

43 The first point here is a short, but important, one. The common law method has evolved to ensure that the law that emerges from the judicial branch is a genuine development of common law rights and duties. It is judicial care, rather than inherent concept, that protects the legitimacy of the common law. Conceptually, many desired outcomes could be redefined as 'rights', which could then be used to preclude many forms of action. Applied without rigour and discipline, the common law would lose its legitimacy.

---

76 Appellant Submissions, [127].

77 HCR 6.27(2)(a)(ii).

78 Appellant Submissions, [37], [150] and [170].

79 See, e.g., *Ririnui v Landcorp* [2016] NZSC 62, [89]-[98]; and *Misdzi Yikh*, above n 54, [56] – [57]. See also "The Role of Judges in Climate Governance and Discourse", above n 13, 24-25.

44 The legitimacy problem remains regardless of the effectiveness of the particular regulatory scheme.[80] That is because the types of regulatory decisions that the Court is being asked to make inevitably involve political judgement and trade-offs between different groups and interests. This problem was an important strand of the Court of Appeal's decision,[81] and has been recognised again and again by the international jurisprudence.[82]

45 This claim is nothing like *Hosking v Runting,* cited in Mr Smith's submissions.[83] The tort of invasion of privacy was considered to be a "*natural progression of the tort of intentional infliction of emotional distress*",[84] a "*logical development*" from the United States and United Kingdom jurisprudence.[85] Relational principles are inherent in the tort, which is founded on the wrongful act of giving publicity to facts in which there is a reasonable expectation of privacy, where doing so would be highly offensive to a reasonable person.[86]

46 In terms of distributive justice, the warning in *Strathboss* that determining who bears large-scale liability should be done through legislation rings true.[87] Mr Smith asserts that the Court of Appeal's judgment is effectively a policy choice that Mr Smith should bear the costs of the respondents' emissions, and that this will delay

---

80 *Sharma*, above n 12, [255]-[256] (citing with approval [26] and [116] of the CA Judgment).

81 CA Judgment, [26], citing Lon L Fuller "The Forms and Limits of Adjudication" (1978) 92(2) Harv L Rev 353.

82 *Friends of the Irish Environment CLG v Government of Ireland* [2020] IESC 49, [8.9]: "*[w]hat needs to be guarded against is allowing for a blurring of the separation of powers by permitting issues which are more properly political and policy matters… to impermissibly drift into the judicial sphere*." See also *AEP v Connecticut*, above n 53, 428; *City of New York*, above n 54; *Kivalina*, above n 54; *Juliana v United States* 947 F 3d 1159 (9th Cir 2020), 32; *Misdzi Yikh*, above n 54, [47] and [72]; *Sharma*, above n 12, [247]-[256] per Allsop J.

Cases relied upon by the appellant and LCANZI are readily distinguishable: *Vereniging Milieudefensie v Royal Dutch Shell Plc* ECLI:NL:RBDHA:2021:5339 (26 May 2021) (under appeal), which was focussed on corporate duties under the Dutch Civil Code and draws heavily on the European Convention on Human Rights and international law; *Urgenda Foundation v Kingdom of the Netherlands* 19/00135, 20 December 2019 (Supreme Court of the Netherlands), asking for reduction of domestic emissions targets, not cessation of particular activities. The same is true for other cases not cited by the respondents: *Neubauer v Germany* [2021] 2 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, 24 March 2021 (Federal Constitutional Court of Germany), where the Court ordered the government to set clear goals for reducing GHG emissions; and *City & County of Honolulu and BWS v. Sunoco, LP.* Civ. No. 1CCV-20-0000380 (First Circuit Court, State of Hawai'i), refusing to strike out claims which sought damages for harm, and presupposed that emissions would otherwise continue.

83 *Hosking v Runting* [2005] 1 NZLR 1 (CA).

84 *Tucker v News Media Ownership Ltd* HC Wellington CP 477/86, 22 October 1986, 731, as cited in *Hosking*, [78] per Gault P and Blanchard J.

85 *Hosking*, [117] per Gault P and Blanchard J.

86 *Ibid*.

87 Above n 75, [260].

emissions reductions.[88] But this is entirely the wrong way around. The Court properly declined to fashion complex policy under the guise of recognising novel legal rights and duties.[89]

47 As Allsop CJ recent held in *Sharma*:[90]

> the duty must be coherent with the underlying constitutional system of federally structured democratic responsible government and the domain of the Judicature therein in the quelling of controversies between subjects and subjects….

48 This approach is no different in New Zealand, where the weave of the common law, as developed by the warp and weft of its different influences, proceeds by analogy and degrees rather than lurches. "*[D]evelopment of the common law, as a response to changed conditions, does not come like a bolt out of a clear blue sky*", but proceeds based on established principle.[91] The common law methodology exists for good reason, as Lord Reed PSC says (emphasis added):[92]

> I fully accept that the common law is subject to judicial development, but such development builds incrementally on existing principles. That follows from two considerations. The first is that judicial decisions are normally backward-looking in the sense that they decide what the law was at the time which is relevant to the dispute between parties. **In order to preserve legal certainty, judicial development of the common law must therefore be based on established principles, building on them incrementally rather than making the more dramatic changes which are the prerogative of the legislature….**

49 The relationship between the coherence of tort law and constitutional principle is exemplified by *Budden,* where the English Court of Appeal correctly held that it would result in a "*constitutional*

---

88 Appellant Submissions, [46].

89 CA Judgment, [35]. See also the Court of Appeal's concerns that ad hoc proceedings would be inherently inefficient and likely to result in arbitrary outcomes: [27], [33]. See also Arnold J in the Court of Appeal in *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZSC 158, [2011] 2 NZLR 289, [212(b)] and [213] (cited in CA Judgment, [26]) and [135] per William Young P.

90 Above n 12, [245] per Allsop CJ.

91 In *re Spectrum Plus (in liq)* [2005] UKHL 41, [2005] 2 AC 680, per Lord Nicholls, [33]. See also the Rt Hon Dame Sian Elias "Judicial Review and Constitutional Balance" (Address to the New Zealand Centre for Public Law, Victoria University of Wellington, 28 February 2019), 4.

92 *R (Elgizouli) v Secretary of State for the Home Department* [2020] UKSC 10, [2020] 2 WLR 857 (SC), [170] per Lord Reed PSC, with whom Lady Black and Lord Lloyd-Jones JJSC agreed.

anomaly which would be wholly unacceptable"[93] for a court to specify through common law negligence a generic level of lead content in petrol that was lower than the level permitted by the applicable regulations. To do so would bring judicial functions into collision with those of the legislature and executive. The Court drew an analogy with speed limits: although one can be negligent while driving at a speed lower than the prescribed limit, that must be because there were other circumstances that made it negligent to drive at that speed; if, however, Parliament has provided by statute that the maximum permissible speed is 30 miles per hour, it would not be right for a court to hold that it was per se negligent to drive at more than 20 miles per hour.[94]

50 The CCRA regime is the statutory framework by which New Zealand is meeting its Paris Agreement obligations and delivering the commitments made in its NDC. That legislation is the product of iterative reform and refinement, as well as extensive domestic consultation, political compromise and consensus building.

51 As Mr Smith's submissions make very clear,[95] the pleaded claim invites judicial criticism of the efficacy of that statutory framework, and requires creation of a parallel – and inconsistent – regulatory regime. While Mr Smith suggests that these proceedings complement the statutory framework,[96] that cannot be reconciled with his draft pleading that "*New Zealand's central government and legislature will not take effective action to reduce GHG emissions*" in time to meet Mr Smith's pleaded targets.[97] (The argument that a private law claim seeking injunctive relief against the respondents is complementary is also inconsistent with what is implicit in the CCRA regime: the respondents' activities are lawful and may continue provided they comply with their ETS obligations).[98]

---

93 *Budden v BP Oil* [1980] EWCA Civ J0502-6, 2 May 1980, 7. See also *Environmental Defence Society (Inc) v Auckland Regional Council* [2002] NZRMA 492, recognising that climate change issues are most appropriately dealt with by Parliament; *Oakland*, above n 54, 1028; and *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 2 AC 264 (HL), 305.

94 *Budden*, above n 93, 6-7. Similarly the New Zealand Court of Appeal and Privy Council have held that "*special circumstances*" would be required before it could find a duty on water supply authorities which extended beyond reasonable compliance with existing New Zealand drinking water standards. *Hamilton v Papakura District Council* [2000] 1 NZLR 265 (CA), [61] and [2002] 3 NZLR 308 (PC), [25]. Similarly in *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743 (HL), 756, Lord Keith considered that where regulation required the provision of suitable protective clothing, employers could not have a further private law duty to "*pressure*" employees to use it.

95 Appellant Submissions, [37].

96 Appellant Submissions, [59].

97 Draft Amended Statement of Claim, [75].

98 See e.g. *AEP v Connecticut*, above n 53, 12.

52 Mr Smith proceeds to assert a number of deficiencies with the current regulatory regime, including that "*several of the respondents are actually, or effectively, unconstrained*" in their release of GHG emissions.[99] Without addressing the material errors in the pleading,[100] this Court will recognise that it is being asked directly to pass judgment on the effectiveness of New Zealand's legislative response to climate change. That is inappropriate.[101]

53 As an approach, it also cannot withstand strikeout. While the courts generally proceed on the basis that the pleaded allegations are true, that is not the case where pleaded allegations are entirely speculative or cannot possibly be proved.[102] That is the case for a pleading as to future government action.

54 This claim would set up a competing accountability regime, not grounded in New Zealand's NDC, or domestic framework for achieving it, but in Mr Smith's conception of an appropriate climate response. Mr Smith seeks reductions in emissions for each defendant in the amount of the "*Minimum 2030 Reductions*" by 2030, by linear reductions in net emissions each year until then. He seeks further specified reductions for 2040, down to each respondent having net zero emissions by 2050.[103] That flatly contradicts the legislative scheme, which requires long-lived GHG net zero emissions *across the economy* by 2050, specific targets for biogenic methane, with different intermediate economy-wide

---

99 Draft Amended Statement of Claim, [77].

100 The Draft Amended Statement of Claim incorrectly states that: agricultural emissions are not part of the ETS, when in fact those emissions are included within the ETS and surrender obligations commence from no later than 31 December 2024: [70](e) (see CCRA, s 219); the ETS includes price caps, when in fact price caps were removed in 2019 and 2020 by the Climate Change Response (Emissions Trading Reform) Amendment Act 2020: [77](e) (see CCRA, s 178C); the cost containment reserve supresses ETS unit prices, when in fact the reserve is only released at the market-established auctioning clearing price and has a modest annual volume limit: [77](e) (see Climate Change (Auctions, Limits, and Price Controls for Units) Regulations 2020, r30(2), and Sch 3); there is a substantial presumptively problematic stockpile of NZUs, when in fact stockpiled units are managed by the Climate Change (Auctions, Limits, and Price Controls for Units) Regulations 2020 with historically high unit prices (above $70/unit): [77](f).

101 See eg *West Coast ENT Inc v Buller Coal Limited* [2013] NZSC 87, [2014] 1 NZLR 32, [169] which cautioned against an approach that would "*subvert the scheme of the legislation which leaves climate change effects to the national government*." See also *Sunset Terraces*, above n 89, [213] per Arnold J.

102 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725, citing *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA), 267.

103 Amended Statement of Claim, [89(b)], [97(b)], [99(b)]. This relief is different again to the relief that Mr Smith pleads in his parallel claim against the Crown, where he pleads that emissions should be less than half of 2010 emissions by 2030 and should be "*zero by sooner than 2050 at a better than linear rate between 2030 and 2050*": Amended Statement of Claim *Smith v Attorney-General* (CIV-2019-485-384), 23 June 2021, "relief sought" (c)(ii).

emissions budgets established for 2021–2025, 2026–2030 and 2031–2035.

55 Mr Smith's concession that his claim is "*grounded in the same idea*" is telling:[104] in fact the timeframes for requiring action are different, the parties he is requiring to take action are selective, the levels of emission reductions reflect implicit but unarticulated policy judgements, and the processes for assessing efficient action to support a just transition are entirely absent.[105]

56 The claim asks the Court to dismiss the operation of the ETS and ERP and to introduce prohibitions where Parliament has allowed activities to continue. Mr Smith would render some respondents liable in tort despite their ETS compliance, others liable for emissions related to the same product (the alleged liability of Channel Infrastructure and Z Energy could relate to the same fuel) and others liable without any ETS responsibility.[106] Emitters would be injuncted solely on the basis of their selection by a plaintiff (as illustrated by Mr Smith not having brought his claim against all 15 of the emitters he identifies as responsible for 75% of New Zealand's GHG emissions or against any of the global "carbon majors").

57 In addition, Mr Smith's regime would require selected defendants to secure large volumes of offset units to achieve a net zero position, reducing supplies for other ETS participants who have statutory unit surrender compliance obligations. His approach would distort the ETS's market-based approach by imposing obligations on some ETS participants but not on others.

58 Mr Smith's claim also looks past the ERP's emphasis on a transition that is fair, just and inclusive for all New Zealanders.[107] It ignores the need for informed public participation,[108] clarity, stability, and

---

104 Appellant Submissions, [59].

105 Mr Smith's analogy with the Lawyers and Conveyancers Act 2006 is inapt: the ability to sue a lawyer in negligence does not impact on New Zealanders throughout the country, it is particular to a relationship between client and lawyer, and sits appropriately alongside the legislative scheme without the broad, societal concerns implicated by this claim.

106 Appellant Submissions, [62]: Mr Smith claims that the CCRA and ETS cannot be a complete answer, because some entities are not subject to the ETS, and others' emissions are offshore and unregulated in New Zealand. That is a direct challenge to the choices Parliament has made as to how the ETS should operate.

107 ERP, 16.

108 ERP Response, 16: The Government agreed with the Commission's recommendation to develop more effective mechanisms to incorporate public views on determining how to prioritise climate actions, to create more inclusive policy development.

proactive transition planning,[109] in favour of reactive, claimant-driven injunctions.

59 It may be that Mr Smith disagrees with the ERP. But the appropriate way to challenge the policy decisions in the ERP is judicial review, *not* seeking to create private law liability in tort.

IV. PRINCIPLES OF TIKANGA MĀORI

60 Mr Smith does not allege that the respondents directly owed, or violated, any obligations under tikanga Māori.[110] Instead, he relies on principles of tikanga to "*inform the legal basis of the pleaded causes of action*", in particular the novel tort.[111]

61 The respondents accept that tikanga Māori is an "*integral strand*" of the common law,[112] and an important part of the values of our common law.[113] They agree with the submissions of THRM in this respect.[114]

62 But this is not an appropriate case in which to explore how tikanga can inform the development of the common law. The gaps to be filled in Mr Smith's claim are simply too large. As THRM's submissions observe, "*tikanga shouldn't be seen as providing an easier route for these matters to be considered*".[115]

63 Mr Smith pleads seven principles of tikanga.[116] The respondents do not dispute that they are principles of tikanga that can inform the development of the common law.[117] What is missing, however, in Mr Smith's pleading and submissions – and was missing before the High Court and Court of Appeal also – is any adequate articulation of

---

109 ERP, 229 (and see 242, Figure 12.2): "*The Government must provide clear and consistent signals about how Aotearoa will transition to low emissions, and how quickly. Signalling the speed and direction of travel well in advance will help to provide as much certainty as possible. This will help New Zealanders, businesses, industries, communities and regions make informed decisions that align with climate change goals*".

110 Draft Amended Statement of Claim, [82]; Appellant Submissions, [49].

111 *Ibid*.

112 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation* Board [2020] NZCA 86; [2020] NZRMA 248, [177]-[178], cited in *Ngāti Whātua Orākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [347](d).

113 See *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733, [150] per Tipping, McGrath and Blanchard JJ, [94] per Elias CJ; and *Trans-Tasman Resources*, above n 112, [169] (cited in *Ngāti Whātua Ōrākei* above n 112, [349]). See also *Ngāti Whātua Ōrākei*, [358]: "*Tikanga…is recognised by New Zealand common law today*".

114 THRM Submissions, [4(a) and (b)], [14], [15].

115 THRM Submissions, [30].

116 Draft Amended Statement of Claim, [82](a) – (g).

117 Similarly, THRM confirm that these principles are central to tikanga Māori (THRM Submissions, [25]).

how these principles work coherently with the framework and principles of tort law to bridge the gaps to an arguable basis for the duties asserted by Mr Smith.

64 There are no clear examples in the principles of tikanga pleaded and articulated in the appellant's submissions of individualised claims that are effectively by all against all. In this context of a communally shared problem, it seems unlikely that tikanga would support such an atomised approach, rather than providing a pathway to an effective, collective, and holistic solution.

65 First, while tikanga Māori recognises obligations at both a community and individual level,[118] there is no existing principle of tikanga that imposes obligations on one party where they have no relational proximity with another. As this Court has confirmed, "[tikanga] *values – mana, whanaungatanga and kaitiakitanga – are relational".*[119] Mr Smith submits that tikanga would "*push against a narrow conception of proximity*",[120] but it would push just as strongly against liability without connection. Whakapapa and whanaungatanga, as the boundaries of tikanga, must be respected so as to avoid a development of common law which purports to reflect, but fundamentally contradicts, the philosophical underpinnings of tikanga.[121] Mr Smith's overly-broad approach threatens to harm the tapu, mana, and integrity of tikanga itself.[122]

66 Similarly, achieving ea (a form of equilibrium) does not mean presuming that everyone may have responsibility as committers of hara but only some must change their behaviour.[123] The principles of tikanga pleaded do not justify a claim by all against all.

---

118 See, e.g. Sir Hirini Moko Mead, "*Some tikanga are very public and involve up to hundreds of people and some are more private. As stated above, tikanga Māori applies to groups and to individuals"*: Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised edition, Huia Publishers, Wellington, 2019), 18.

119 *Trans-Tasman Resources*, above n 112, [297]. See also Mihiati Pirini and Anna High "Dignity and Mana in the "Third Law" of Aotearoa New Zealand" (2021) 29 NZULR 623, 626.

120 Appellant Submissions, [54].

121 In addition, the ideas and beliefs about a particular tikanga are "*carried in the minds of individuals*", which build up over lifetimes of accepting, practicing, and living out tikanga, and ultimately crystallise within the collective (bound by whakapapa and whanaungatanga) through social validation: Hirini Moko Mead, above n 118, 16-17.

122 According to Professor Tā Pou Temara, because certain tikanga originate from the iho matua, those tikanga are imbued with tapu, due to their divine origins from atua Māori as well as tūpuna Māori: Tā Pou Temara "Te Tikanga Me Ngā Kawa" Te Kōtihitihi: Ngā Tuhinga Reo Māori 1 (Waikato University Press, 2011) 9 at 11 https://www.waikato.ac.nz/__data/assets/pdf_file/0004/309154/1_Te-tikanga-me-ng-kawa.pdf (as interpreted by Eru Kapa-Kingi).

123 See the commentary on addressing breaches of tikanga in Hirini Moko Mead, above n 118, 31.

67 Second, while utu may require an appropriate response to restore ea, the obligation to seek and restore that balance is a community response.[124] The respondents respectfully submit that tikanga would not impose such an obligation on some individuals (the defendants chosen by a plaintiff) but not others with the same responsibility.

68 Third, the draft proposed pleading provides a general definition of kaitiakitanga, but does not plead the particular relationship of the respondents to Mr Smith which justifies a tortious obligation on the basis of kaitiakitanga. Asserting kaitiakitanga in general terms cannot be sufficient to found the expansion in tort liability required by the pleading. That is particularly so where kaitiakitanga itself requires a balancing of the use of resources, and differing values and priorities for those uses.[125]

69 Fourth, where the courts are evaluating the role of tikanga as a source of common law, they must consider its interaction with other sources of law, including the existence of the statutory regulatory architecture (giving rise to the same incoherency and inconsistency issues discussed at paragraphs [41] to [59] above).[126]

70 Finally, the appellant's submissions indicate that the real focus for tikanga is to aid the creation of the third cause of action, an entirely novel strict liability tort triggered by emitting a "*material*" quantity of GHGs. Mr Smith suggests that liability might be limited to those profiting from their emissions and doing so with the knowledge that they are contributing to harm.[127] This approach lacks any rational connection with whakapapa and whanaungatanga or any of the other pleaded principles of tikanga. The logical extension of Mr Smith's submission is that all businesses above a certain size are generating hara that must be addressed to restore ea.[128] The rāhui

---

124 See Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, Te Taumata Tuarua (Volume 1), 2011) at [3.2.1], 237: *"In this context,* ***kaitiakitanga is a community-based concept****. It is not the obligation of an individual but of an entire tribal community. While the community exists, the obligation exists"* (emphasis added).

125 *Ibid*.

126 As Elias CJ held in *Takamore v Clarke*, above n 113, [94]–[95]: *"[A]s in all cases where custom or values are invoked, the law cannot give effect to customs or values which are contrary to statute or fundamental principles and policies of the law."* Justice Williams concluded in Lex Aotearoa at 16 that "*…tikanga is no longer seen as an independent source of law but rather as a flavour in the common law of stronger or weaker effect, depending on the subject matter and context.*"

127 Appellant Submissions, [146(a)].

128 Mr Smith suggests that "over time" a line will be drawn over those that materially contribute to (and profit from) climate change: Appellant Submissions, [162].

that Mr Smith seeks[129] would be an economy-wide, Aotearoa-wide rāhui on commercial activity. This is quintessentially a form of community response, not individualised liability.

V. PUBLIC NUISANCE CAUSE OF ACTION IS NOT TENABLE

71 Public nuisance originated as a criminal action,[130] to plug gaps "*in an unpoliced and unregulated society, in which local government was rudimentary or non-existent*".[131] The tort, which has the same elements,[132] developed later to enable the injunction of the nuisance.[133] The Court of Appeal rightly held, consistent with the rejection of similar claims in other jurisdictions,[134] that the transformation of the tort into a parallel emissions regulatory system must fail. The Court of Appeal's decision relied primarily on causation. However, Mr Smith's case fails on broader grounds.[135]

Justiciability, remedy and statute

72 A core proposition of Mr Smith's submissions is that public nuisance has been and is appropriately used by the courts to address complex, polycentric and regulation-laden problems.[136] The appellant relies on an analogy with nineteenth century nuisance claims in which plaintiffs were able to enjoin industrial and civic works that introduced pollutants into waterways, which transferred downstream to interfere with the exercise of riparian rights.[137]

73 As with much of the case law associated with public nuisance, these cases are a product of a time both when the courts did not perceive a need to define the boundaries of liability very precisely,[138] and prior to the growth of modern regulatory regimes. More fundamentally, there is no legal analogy between the pleaded claim

---

129 Appellant Submissions, [161].

130 John Spencer "Public Nuisance: A Critical Examination" (1989) 48 CLJ 55, 59-61 and 65-66.

131 *R v Rimmington* [2005] UKHL 63, [2006] 1 AC 259, [6].

132 *Ibid,* [7].

133 Heuston and Buckley *Salmond & Heuston on the Law of Torts* (21st ed, Sweet & Maxwell, London, 1996), 54–55; FH Newark "The Boundaries of Nuisance" [1949] LQR 480, 482 - 483; Spencer, above n 130, 66-70.

134 See for example *AEP v Connecticut*, above n 53, and *Kivalina*, above n 54; *City of New York*, above n 54; *City of Oakland*, above n 54. See also summary in Chief Justice Winkelmann, Justice Glazebrook and Justice Ellen France "Climate Change and the Law" (paper prepared for the Asia Pacific Judicial Colloquium held in Singapore 28-30 May 2019), [101]-[107].

135 Memorandum of Counsel for the first to seventh respondents notifying intention to support decision appealed against on other grounds dated 14 April 2022: [**05.0041**].

136 Appellant Submissions, [104].

137 See *Attorney-General v Council of the Borough of Birmingham* (1858) 4 K & J 528, 540, (1858) 70 Eng Rep 220; *Attorney-General v Leeds Corporation* (1870) 5 Ch App 583, 595.

138 *Rimmington*, above n 131, [45]. Cited with apparent approval in CA Judgment, [58].

and the historical injunctions to prevent discrete, localised interferences with established rights traceable to emanations by identified defendants within the jurisdiction of the courts.

74 And although Mr Smith asserts a factual analogy between the nineteenth century cases and climate change, the reality is otherwise. As the IPCC reports record,[139] the current and future effects of climate change are a function of emissions from millions of sources, located globally, over many decades. The combined effects of the emissions are also felt around the globe. There is no suggestion anywhere in the IPCC reports that the respondents' emissions in New Zealand contribute any more to ocean acidification or sea level rise than emissions that occurred 50 years ago or emissions occurring now in the United States or China or Australia.

75 In summary, the nineteenth century cases involved:

75.1 established private or, in some cases, public rights with independent juridical existence: typically riparian rights to take water established in custom;

75.2 discrete and identifiable defendants subject to the court's jurisdiction. Thus, while the sewerage in both *Borough of Birmingham* and *Leeds Corporation* was generated by thousands of households, it was controlled and deposited into the relevant waterways by the defendant city corporations;

75.3 a simple physical connection between the activities of the defendant and the interference with the established rights, reflecting a close analogy with private nuisance: a traceable transference of the pollutant particles placed in the waterway by the defendant to the water used by the plaintiff;

75.4 as a result, a simple relationship between the relief against the named defendants and abatement of the harm: if the sewerage was not placed in the river, the sewerage particles would not appear in the water downstream.

76 In contrast, the pleaded case in public nuisance involves:

76.1 an absence of an established public right with any independent juridical existence;

[139] See Part II, above.

76.2 an absence of a simple physical connection between the pleaded emissions and the pleaded interference with rights;

76.3 an indefinite class of defendants (all emitters), many of whom are not subject to the Court's remedial jurisdiction; and

76.4 as a result, an absence of a simple relationship between injunctive relief against the named respondents and the pleaded harm to the plaintiff, such that reducing the respondents' emissions will not prevent the harm to Mr Smith (and he does not plead that it would do so).

77 Unlike the binary contest between competing users in the river cases (typically, an established rights holder and a new user of the resource), the climate change policy choices that Parliament has made, and which Mr Smith invites this Court to remake, concern how to achieve a just transition for a society built upon established, lawful emitting activities contributed to by all (the food we eat; energy for our houses, businesses, schools, hospitals; fuel for transportation; steel for our buildings, infrastructure and industry). This requires polycentric policy judgements.

78 The same points also answer Mr Smith's submissions on the relationship between public nuisance and statute. The respondents accept that the classic position is that express or implied statutory authorisation is required to interfere with established common law rights.[140] But the position is different where the pleaded case involves a request to extend the common law to new "rights". In that context, it is appropriate and necessary to consider whether the development will support or undermine existing legislative choices. This is as much the case for public nuisance as for other torts. And that is particularly so where a necessary element of the plaintiff's causal claim is that the enacted legislation will fail to meet its objective. This directly raises constitutional questions of comity.[141]

Absence of a public right

79 The Court of Appeal held that a nuisance may be public *either* if the defendant's conduct endangers the life, health, property or comfort of a class of the public, *or* infringes rights belonging to the public;[142]

---

140 *Barr v Biffa Waste Services* Ltd [2013] QB 455, [146]; *Lawrence v Fen Tigers Ltd* [2015] AC 106, [92]. But following *Fen Tigers*, injunctive relief may be withheld in the public interest: [119]-[124]; [158]-[161]; [240] – [244]. The position is the same in Canada: *Canada Paper Co v Brown* (1922) 63 SCR 243, 252; *Bottom v Ontario Leaf Tobacco Co* [1935] 2 DLR 699, [1935] OR 205, [3].

141 *Budden*, above n 93. See generally Part III, above.

142 CA Judgment, [67].

and no independent unlawfulness was required.[143] With respect, that approach is incorrect.

Independent juridical right required

80 The Court of Appeal was wrong to accept that the interests in "*public health, property or comfort*" pleaded by the plaintiff are "public rights" protected by the law of public nuisance, absent independent illegality. Interference with a public right with an independent juridical foundation is the essence of the tort; a public right does not exist solely to found a public nuisance claim.[144]

81 The Court of Appeal treated independent unlawfulness as a separate issue from an actionable public right. However, on a proper analysis they are related. That is because the cases involving public nuisance fall into two categories: those involving a *specific established public right*, such as navigation of the highway, and those involving *unlawful interferences* with public health, safety or comfort. The latter also involves a public right as the public have a right in common to be free of the effects of unlawful conduct.[145]

82 The Court of Appeal placed significant reliance on the analysis of the English and Welsh Law Commission. The Law Commission was heavily influenced by its view of the core scope of the offence:[146] where there was a clear analogy with private nuisance – either of detriment to a neighbourhood generally or to a public right such as a highway. A second, broader category of cases was miscellaneous public mischiefs which were only classified with public nuisance for convenience of exposition.[147] It appears the Commission considered that this category fell outside the proper scope of the tort.

83 However, as the Commission recognised, abandoning a requirement for interference with a public right is not necessary to avoid excluding interferences with the public's use and enjoyment of public spaces. Earlier definitions required both interference with public health, safety or comfort *and* a public right, and this is defensible so long as the reference to "rights" is interpreted as

---

143 CA Judgment, [72].

144 *Ball v Consolidated Rutile Ltd* [1991] 1 Qd R 524, 542; see also JW Neyers "Reconceptualising the Tort of Public Nuisance" [2017] 76(1) Cambridge LJ 87, 96-97.

145 See, for example, *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2013] NZCA 278, [299]-[300], in which Chambers J (writing for the Court on this issue) held that s 36 of the Commerce Act 1986 created a right common to all members of the public to be free from anti-competitive conduct.

146 English and Welsh Law Commission *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (LC358, 2015) (*LC358*), [3.12].

147 English and Welsh Law Commission *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (CP193, 2011) (*CP193*), [2.11].

including "*the general right of the public to enjoy public spaces without danger, interference or annoyance*".[148]

84 It is respectfully submitted that this is the better approach. We can readily conceptualise a "*right of the public to enjoy public spaces"*, which captures the core conduct that the Commission was concerned about. Such a right is closely analogous to (if not already captured by) established public rights to use and navigate the highway or public waters.[149] As with those rights, a right to use public space is recognised in the common law in other ways: for example, through limits on actions in trespass. There can also be no doubt that such conduct would be captured by the New Zealand offence.[150] Cases of widespread private nuisance can be classified as tortious (and hence unlawful) conduct, and therefore an interference with a common right to be free from such conduct.[151]

85 Conversely, the Court of Appeal's preferred approach captures conduct beyond that which concerned the Law Commission. As this case demonstrates, lawful conduct can be argued to interfere with public health, safety or comfort where it has no relationship to interference with use of public spaces and where the analogy with private nuisance is absent. On this approach, the scope of attempted regulation through public nuisance claims would be commensurate with the concerns of society.

86 The most recent United Kingdom appellate authority is consistent with a requirement of unlawful conduct, in the absence of interference with an established public right.[152] The secondary authorities cited by the Court of Appeal to the contrary do not withstand scrutiny.[153] These primarily refer to cases dealing with interference with the public highway or widespread private nuisance,

---

148 LC358, above n 146, [3.36]. For an example of such a definition, see Edmund Garrett, *The Law of Nuisances* (2nd ed, 1897), 4.

149 See, eg, *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty (The Wagon Mound No 2)* [1967] AC 617, 639; *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683; *DPP v Jones* [1999] 2 AC 240, 253-255.

150 That is because the conduct that may unreasonably interfere with use of a public space is generally independently unlawful: for example, see Crimes Act 1961, s 86 (unlawful assembly); s 87 (riot); s 90 (riotous damage).

151 See *Attorney-General v PYA Quarries* [1956] 2 QB 169, 184-185, which should be seen as a widespread aggregate of private nuisances, albeit one which engaged the common right to be free of unlawful conduct such that the Attorney-General was able to bring proceedings. While blasting and quarrying are not themselves unlawful acts (see footnote 11 of LC358, above n 146), they are where when they amount to a private nuisance. See also *Attorney-General v Abraham and Williams* [1949] NZLR 461 (HC & CA), 473. This should also be seen as a widespread aggregate of private nuisances, but the conduct was also unlawful conduct under the Health Act 1920.

152 *In Re Corby Group Litigation* [2008] EWCA Civ 463, [27] and [29] per Dyson LJ.

153 *Halsbury's Laws of England* (5th ed, 2018, online ed) vol 78 Nuisance [105]; John Murphy *The Law of Nuisance* (2010), 138; CP193, above n 147, [2.9]–[2.18]; LC358, above n 146, [2.4]; and Spencer, above n 130, 61–64.

itself conduct that is either criminal, or tortious because it involves private nuisance – or cases of public mischief.[154] The latter should be disregarded in formulating the modern tort. Similarly, the authorities cited by Mr Smith concern either interference with a highway,[155] or widespread private nuisance.[156]

Harmonisation between common law and statutory codification

87 Finally, the Court of Appeal's approach failed to give appropriate weight to the desirability of harmony between the common law tort and codification of the offence of public nuisance in New Zealand. Since 1893, New Zealand has codified the criminal offence of public nuisance based on Sir James Stephen's formulation.[157] At all times, the New Zealand offence has required an independent unlawful act that interferes with life, safety or health of the public.[158]

---

154 *Halsbury's*, above n 153, cites *Gillingham Borough Council v Medway Dock Co Ltd* [1993] QB 343 and *Halsey*, above n 149.

Gillingham was a nuisance claim relating to noise from heavy goods vehicles on a public road. Buckley J records that he had "always assumed" that no unlawful act was required (at 357), but otherwise cites Spencer, 76 (as to which, see below) and Lord Denning's dictum in *PYA Quarries* for the proposition that there is a type of public nuisance arising out of private nuisance which affects a sufficiently large number of people that it would not be reasonable to expect one person to take proceedings on his own responsibility: *PYA Quarries*, above n 151, 191. That dicta was doubted by Lord Rodger in *Rimmington*, above n 131, [44], but in any event involves independently tortious conduct (private nuisance).

Halsey was primarily a private nuisance case; public nuisance formed the ratio only in respect of damage from acid smuts to a car parked on a public right of way: see 690. It is therefore a case involving interference with an established public right of way.

Murphy, above n 153, at 138 cites competing first instance authority in the United Kingdom: *Gillingham*, above, and *News Group Newspapers v SOGAT'82 (No 2)* [1987] ICR 181, 202, in which Stuart-Smith J thought that a public nuisance necessarily required an unlawful act. Murphy prefers the view that an unlawful act is not required on the basis of two criminal cases: *R v Manley* [1933] 1 KB 529 and *R v Crunden* (1809) 170 ER 1092. These cases are described by Spencer as examples of the English courts' inherent jurisdiction to create new offences: Spencer, 61. Spencer notes that, in modern times, these tend to be considered separate offences but judges in the past talked about *inherent* jurisdiction to punish public mischief: 61 – 62. *Manley* was a case of public mischief, and *Crunden* a case of nude bathing. These are examples of what the English and Welsh Law Commission described as the second category of cases (public mischief), are not core to the concept of public nuisance, and therefore do not justify the extension of the tort proposed by the Court of Appeal.

Finally, at 77-78, Spencer cites examples of criminal cases "where the defendant's behaviour was not obviously criminal at all and the prosecutor could think of nothing else to charge him with": *R v Wheeler* (1971) Times, 17 December; *R v Madden* [1975] 1 WLR 1379; and *R v Holme* [1984] CLY 2471, cited in *Gillingham*, 932. These cases are cases either of private nuisance or public mischief.

155 *Lower Hutt City Council v Attorney-General ex rel Moulder* [1977] 1 NZLR 184 (CA).

156 *Crowder v Tinkler* (1815) 19 Ves Jun 618; *Birmingham*, above n 137.

157 See Criminal Code 1893, ss 140 – 142; Crimes Act 1908, ss 158 – 160; Crimes Act 1961, s 145.

158 See *Police v Dalley* [2005] DCR 682, [34] – [35]. The New Zealand position is consistent with the position in Canada, also based on Stephens' formulation: Canadian Criminal Code RSC 1985 C-46, s 180. The Supreme Court of Canada has extended the concept of an unlawful act to breach of a common law duty of care: *R v Thornton* [1991] 1 OR (3d) 480, where the defendant knowingly donated HIV-contaminated blood to Red Cross, was decided on the basis that the defendant owed an independent duty at common law to refrain from conduct which could reasonably foreseeably cause serious harm: affirmed in *Thornton* [1993] 2 SCR 445. No issue is taken with this. See generally CP193, above n 147, [2.65-2.66].

88 The common law should, where possible, develop in harmony with legislation occupying the same space. That principle applies with particular force where the modern statement of the tort in *Rimmington* is itself based on Stephen's formulation,[159] and given the historical nature of the tort as an exceptional mechanism for obtaining civil enforcement, via injunctive relief, of otherwise criminal conduct.[160]

A novel public right to a 'safe and habitable climate system'

89 In the alternative, Mr Smith contends that the Court should recognise a newly pleaded public right: the right to a "*safe and habitable climate system*".[161] Such a right is different in kind from the rights of use and take that characterise other public rights recognised by the tort. Describing them as rights of "*clean air*" or "*clean water*" is an incorrect abstraction; the rights are to *take* clean water from rivers, or to *use* highways without interference.

90 Rights of passage over public lands, to take fish from certain waters or to use public land free of interference are defined with particularity, reflecting custom.[162] Extension by analogy is exercised cautiously.[163]

91 The only authorities cited by Mr Smith in support of the new right are two academic articles.[164] Neither article directly supports the right.[165] Neither has been cited with approval by any court. Indeed, they appear to have been largely ignored. They do not provide a foundation for recognising a significant new public right. Nor is the proposed right properly based in legislation or international treaties. To the contrary, the legislation and treaties relevant to climate change demonstrate that climate change is a systemic risk ("a

---

159 *Rimmington*, above n 131, [11]; Hon Judge Mark Lucraft, QC *Archbold: Criminal Pleading, Evidence and Practice 2021* (2021 ed, Sweet & Maxwell, London), [31-40].

160 Cf CP193, above n 147, [5.41]. The Law Commission's account that the tort is "fundamental" is ahistorical: as Spencer, above n 130, 66-71 explains, the civil action was first seen as a supplement to, rather than a substitute for, criminal proceedings, and had supplanted prosecutions by the end of the nineteenth century for pragmatic reasons.

161 Appellant Submissions, [72(b) – (c)].

162 Garrett *The Law of Nuisances* (2nd ed, 1897) describes the historic source of public rights as encroachments on the King's right: at 1. Spencer, above n 130, at 58-59 describes the relationship between public rights and private rights as extension of private rights to areas of public spaces.

163 *Ball*, above n 144, 541.

164 Appellant Submissions, [72(c)].

165 Nor does the methodology advanced in the articles support Mr Smith's proposed public right. Neyers, above n 144, 97 argues that a public right that coheres with the existing rights protected by public nuisance would have to be (1) recognised by the common law, (2) share the same analytical structure as the right of passage – that is, be a right to make use of the land of another granted by the proprietor of that land to members of the public, and (3) be consistent with equal freedom and rightful honour.

common concern of humankind") to which the response is legislative.[166]

92 Finally, the proposed right is impermissibly vague: what constitutes safe and habitable? Are only impacts on human health relevant? What is the relationship to property and cultural impacts? These concerns have lead other jurisdictions to reject assertions of a freestanding private or public right to a sustainable environment.[167]

Absence of causal link

93 The Court of Appeal rightly held that, even if a public right was adequately pleaded, the absence of a causal relationship between the conduct of the respondents and the pleaded harm was fatal.[168]

94 Mr Smith suggests that a public nuisance is established by "*a defendant's material contribution to a state of affairs that amounts to an unreasonable interference with … the comfort or convenience of a class of Her Majesty's subjects*".[169] That formulation wrongly diminishes the causal relationship required by an action in nuisance (whether public or private).

95 This Court has previously addressed the relational or causal requirements of private nuisance in *Wu v Body Corporate 366611*: an emanation involving "*transposition of the alleged nuisance*" is generally required to establish a private nuisance;[170] exceptions to this are rare, and concern direct obstruction to use and enjoyment of a plaintiff's land (such as where access is prevented).[171] These requirements apply equally in public nuisance; as the English and Welsh Law Commission stated, the core of public nuisance is where there is a clear analogy with private nuisance.[172] And the established categories of public nuisance are consistent with this: they either concern emanations (e.g., the widespread private nuisance cases, the river pollution cases), or direct obstruction (e.g., of a highway). The requirement of an emanation – a transferral of the nuisance – creates a relational and causal connection between the plaintiff and defendant, while at the same

---

166 See Part II, above.

167 *Friends of the Irish Environment*, above n 82, [8.10] – [8.11]. See also *Greenpeace Nordic Association v Ministry of Petroleum and Energy (People v Arctic Oil)* [2020] HR-2020-2472-P, [138] – [145]; *Neubauer*, above n 82, [135] – [138], where the Courts held that constitutional protections of the right to a healthy environment generally did not provide an enforceable right before the Courts.

168 CA Judgment, [88] – [93].

169 Appellant Submissions, [84].

170 *Wu v Body Corporate 366611* [2014] NZSC 137, [2015] 1 NZLR 215, [122]-[124].

171 *BEMA Property Investments Ltd v Body Corporate 366611* [2018] 2 NZLR 514, [58].

172 LC358, above n 146, [3.12].

time enabling a finite class of defendants over which the court has jurisdiction to be identified.

96 Mr Smith's claim does not and cannot plead any transposition of the alleged nuisance or other direct obstruction. This would be inconsistent with the pleaded nature of climate change.[173]

97 Indeed, the absence of a relational connection between the activities of the respondents and the pleaded harm is even more significant. Mr Smith does not, and cannot, plead that the respondents' future net emissions individually or collectively will cause the nuisance or harm to him sought to be prevented by an injunction, as climate change is a phenomenon caused by the global combination of all emission activities over decades.[174]

98 Mr Smith instead relies upon a series of (primarily obiter) statements in the river pollution cases for the proposition that liability for nuisance only requires the plaintiff to establish a material contribution to the interference. The Court of Appeal was prepared, in a strike-out context, to accept that this principle may be part of New Zealand law, but declined to extend it outside the circumstances of the river cases, involving a finite number of known contributors that, enjoined by the Court, could abate the harm.

99 The major texts on nuisance do not support Mr Smith's proposed rule. There, the cases relied upon are explained as examples of a court assessing the reasonableness of the defendant's conduct in light of the surrounding circumstances, including the conduct of others.[175] That is, an emanation that might not in isolation be considered to be an unreasonable interference may be unreasonable when viewed in the context of other's activities (i.e., where the defendant is a necessary member of a sufficient set).

100 In any event, the Court of Appeal's characterisation of the case law relied upon by Mr Smith in that Court was accurate. In this Court Mr Smith relies on an alternative series of cases (some, but not all, of which were before the Court of Appeal), which all have the following features:

---

173 Draft Amended Statement of Claim, [53] – [54].

174 Draft Amended Statement of Claim, [53].

175 Sappideen and Vines *Fleming's The Law of* Torts (10th ed, Thomson Reuters, Sydney, 2011), [21.240]; Peel and Goudkamp *Winfield & Jolowicz on Tort* (19th ed, Sweet & Maxwell, London, 2014, 19th ed), [15-068]; Jones, Dugdale and Kenny *Clerk & Lindsell on Torts* (23rd ed, Sweet & Maxwell, United Kingdom), [19-111].

100.1 an emanation was physically traceable to the defendant, reflecting a close analogy with private nuisance, or a direct obstruction to a right of way. The Court could be confident that an injunction against a defendant or defendants before the court would remove the emanation/obstruction; and

100.2 the defendant's emanation was, in isolation or in the context of other emanations, either itself a nuisance or substantially aggravated the interference with the plaintiff's rights.[176]

101 The broadest statements of principle on which Mr Smith relies are obiter.[177] The Court of Appeal was correct to consider those statements cautiously, when abstracted away from simple emanation/direct interference cases involving interferences traceable to identifiable and discrete defendants. Unlike the cases relied upon, the present case does not involve all defendants that contribute to the pleaded nuisance, or defendants that are pleaded to have substantially aggravated the nuisance (discussed further

---

[176] *R v Neil* (1826) 2 Car & P 485, 485: if the defendant's business itself produced smells offensive to persons passing along the highway, presence of other nuisances did not justify defendant's nuisance; *Crossley v Lightowler* (1866) LR 3 Eq 279, 289-290: the decision at first instance included the factual finding, not contradicted on appeal, that the nuisance could be traced to the dye-works and it was those works that rendered the water intolerable.

The appellant wrongly suggests that this is a case where it was impossible to trace any evil to a particular defendant: Appellant Submissions, [94]): Kay J in *Blair v Deakin* (1887) 57 LT 522, 526 (Ch) was there citing the obiter statement in *Tipping v The St Helens Smelting Company* [1861-73] All ER Rep Ext 1389, cited in *Crossley*, 289, that in these circumstances a claim in nuisance might not be actionable; *Attorney-General v Colney Hatch Lunatic Asylum* (1868) LR 4 Ch App 156, 154-155 per Lord Hatherley LC: the defendant created a "*vast amount of sewage*" which "*greatly aggravates the evil*"; *Attorney-General v Leeds* (1870) LR 5 Ch App 583, 595: 15 m gallons of sewerage were deposited into waterway. It is clear that the Court regarded this in isolation as a nuisance: "*the evil was seriously aggravated*" by the city's sewer, and the nuisance might terminate if the injunction was granted; *Woodyear v Schaefer* (1881) 57 Md 1, 11-12: the blood runoff of the slaughterhouse was a nuisance in context of the other forms of pollution from other businesses that were identifiable and could be joined if necessary; *Lambton v Mellish* (1894) 3 Ch 163, 165 – 166: the Court considered that the sound of one organ played *separately* amounted to a nuisance; in obiter remarks it is suggested that one organ would also constitute a nuisance in the context of the other; *Blair v Deakin* (1887) LR 2 Ch App 478, 525-526: discharge of ferric oxide could be traced to defendant, which in context of discharges of other identifiable manufacturers, caused nuisance; *Canada (Attorney-General) v Ewen* [1895] BCJ No 11, 469: the evidence was that the defendant's contribution was one-third of the total pack, which was substantial.

Before the Court of Appeal Mr Smith relied on *Hill v Smith* (1867) 32 Cal 166 and *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch 149 (CA). *Hill* was dismissed due to doubt about whether the activities alleged to be a nuisance had any material effect on a stream: 167. In *Derby*, the defendant Council had substantially contributed to the nuisance created with two other identified defendants: 179 – 180.

[177] A number of the cases cited above refer to the obiter comments in *Thorpe v Brumfitt* (1873) LR 7 Ch App 650, 656, which involved an access way which was blocked by five identified defendants; the case turned on the point that the defendants' business did not give them a right to occupy a passage appurtenant to the plaintiff's property. Mr Smith also relied on *Sadler v Great Western Railway Co* [1895] 2 QB 688 before the Court of Appeal. Justice Rigby's endorsement at 695 of the obiter comments in *Thorpe v Brumfitt* was in dissent.

below) or even a subset that could remove any part of the harm pleaded (the latter because there is no emanation – there is nothing transferred to be removed). In the case of the supplier respondents (Z Energy, BT Mining, Channel Infrastructure), the relief sought would not even have any appreciable impact on *the emissions* caused by the ultimate consumers of their products. Drivers of cars and operators of trucks, trains, ferries and airlines would purchase fuel from alternative suppliers, and continue to cause emissions.

102 For these reasons, the relief that Mr Smith seeks is unresponsive to the alleged harm and not legally meaningful. There is no pleading, nor could there be, that compliance with the pleaded relief by the respondents will itself avoid the harm. This point is made directly by Mr Smith's pleading of *materiality* (discussed further below).

Class of defendants: Materiality

103 Mr Smith accepts that there is a "*materiality*" threshold for contribution liability in public nuisance. However, he does not plead that the respondents' individual or collective emissions materially *contribute* to the adverse effects of climate change. Instead, he relies on a highly attenuated logic to plead that an injunction will materially *reduce* the adverse effects of climate change because:[178]

103.1 other emitters will be required to stop emissions (whether voluntarily or by orders in other proceedings); and

103.2 very substantial emissions reductions will be made in other countries through one or more of "*inspiration, precedent, and adoption of similar judicial responses, or political steps becoming unavoidable or normalised*".

104 In addition to noting the degree of speculation that must be drawn to contend that there would be "similar judicial responses" and "political steps' in other countries, this pleading creates an indeterminacy problem. It can be replicated against any individual, corporate or state defendant. On its own logic, an injunction against any person will materially reduce emissions because other emitters may be subject to orders in other proceedings and there will be inspirational effects, judicial responses and political steps in other countries.

105 Mr Smith's response is to submit that "*de minimis*" levels of emissions are not "*legally relevant*"[179] because the absolute or

[178] Draft Amended Statement of Claim, [62].

[179] Appellant Submissions, [116].

relative emissions of an individual are small. Conversely, Mr Smith says that the respondent's emissions are not de minimis, because they comprise about a third of New Zealand's emissions.[180] That submission is flawed, for three reasons.

106 First, the proposed de minimis rule is logically inconsistent with Mr Smith's claim that his action will prevent the pleaded harm. Mr Smith pleads that to avoid the adverse effects of climate change, the Minimum Global Reductions must be achieved,[181] and he seeks orders requiring the respondents to achieve equi-proportionate reductions in their emissions with the Minimum Global Reductions. However, because the respondents are not responsible for at least 99.8% of global emissions,[182] it follows that, in order for the Minimum Global Reductions to be achieved (and harm to Mr Smith avoided), *all* other emitters must also collectively achieve equivalent reductions. Accordingly, harm to Mr Smith will not be avoided if *any* emitters are permitted to emit above their contribution to the Minimum Global Reductions.

107 Second, Mr Smith's claim that the respondents comprise a third of New Zealand's emissions demonstrates how the claim will invariably draw the Court into making policy choices, and require material departures from established principle. The attribution of emissions to particular entities is itself a contestable area. The respondents apprehend that Mr Smith relies on attribution rules developed under the CCRA (despite otherwise criticising that legislation). But this is not the only choice of attribution methodology (consumption-based methodologies could also be applied) and, in attributing emissions of consumers of fuel products to suppliers, it is inconsistent with established principles in public nuisance.

108 To elaborate on the latter point, Mr Smith's claim against Z Energy, Channel Infrastructure and BT Mining is as producers and/or suppliers of coal and fuel product products.[183] However, public and private nuisance claims do not extend to suppliers of products used to create a nuisance. In reliance on this principle: the English Court of Appeal struck out a public nuisance claim for lead poisoning caused by inhalation of petrol supplied by defendants;[184] Canadian

---

180 Appellant Submissions, [117].

181 Draft Amended Statement of Claim, [60].

182 New Zealand's total gross emissions from all sources are 0.17% of total global emissions: Ministry for the Environment "New Zealand's Greenhouse Gas Inventory 1990-2019 Snapshot" https://environment.govt.nz/publications/new-zealands-greenhouse-gas-inventory-1990-2019-snapshot/how-new-zealand-compares-to-other-countries/.

183 Draft Amended Statement of Claim, [32] – [50].

184 *Budden*, above n 93.

courts have struck out private nuisance claims by organic farmers for crop contamination caused by genetically modified seeds supplied by producers and suppliers;[185] and US courts have held that a seller of a product is not liable for a private nuisance caused by the use of that product after it has left the seller's control.[186]

109 Third, given the pleaded global nature of climate change and mechanism of harm, Mr Smith does not give any principled reason why materiality – if that is the test – would be assessed by reference to New Zealand emissions, rather than global emissions. None of the respondents are among the world's major contributors to emissions. To capture major emitters, Mr Smith would need to bring the claim against foreign corporations and State-entities, but has not done so.

Class of plaintiffs: Special damage rule

110 An individual bringing a public nuisance claim must show special damage flowing from the interference with the public right.[187] The classic statement of what is required for special damage is that it must be "*particular … beyond that which is suffered by the rest of the public"*, "*direct*" and "*substantial*".[188]

111 The special damage rule is a long-established requirement of the tort.[189] The rule exists because public rights vest, not in individual members of the public, but in the Attorney-General.[190] This is a constitutional protection. The rule can also be justified on pragmatic terms to prevent multiplicity of actions.[191]

112 As a corollary to this, it is *not* for any individual private citizen to seek to enforce their own conception of the public interest against a particular set of respondents. Doing so would inevitably lead to a

---

185 *Hoffmann v Monsanto Canada Inc* 2005 SKQB 225, [118]–[122] aff'd 2007 SKCA 47, 283 DLR (4th) 190, leave to appeal refused [2007] SCCA 347.

186 *In re Syngenta AG Mir 162 Corn Litigation* 131 F Supp 3d 1177 (D Kan 2015) [GM seeds], 1214 - 1215; *City of Bloomington, Ind v Westinghouse Elec Corp,* 891 F 2d 611, 615 (7th Cir 1989) [PCB contamination]; *Tioga Pub Sch Dist No 15 v US Gypsum Co* 984 F 2d 915, 920 (8th Cir 1993) [Asbestos]; *StarLink Corn Products Liability Litigation, Marvin Kramer v Aventis Cropscience USA Holding Inc* 212 F Supp 2d 828 (ND Illinois 2002) [GM seeds] distinguished on the basis that ongoing control existed.

187 *Mayor of Kaiapoi v Beswick* (1869) 1 NZCA 192, 207; *Rimmington*, above n 131, [7], [44]; *Murray v Wellington City Council* [2013] NZCA 533, [2014] NZAR 123, [32]; Todd, above n 63, [10.3.03].

188 *Benjamin v Storr* (1874) LR 9 CP 400, 406-407. See also *The Wagon Mound (No 2),* above n 149, 635, citing *Benjamin v Storr*.

189 *Walsh v Ervin* [1952] VLR 361 (VSC), 368; *McFadzean v CFMEU* (2007) 20 VR 250, [131]-[132]; *Benjamin v Storr*, above n 188, 407; *Rimmington*, above n 131; *Mayor of Kaiapoi v Beswick*, above n 187, 207; *Ryan v Victoria* [1999] 1 SCR 201, 236; *British Columbia v Canadian Forest Products* [2004] 2 SCR 74, 109.

190 *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL), 477. See similarly *Canadian Forest Products*, above n 189, [66]-[67].

191 CP193, above n 147, [5.41].

multiplicity of perspectives on what the public interest requires. Mr Smith has already advanced three inconsistent reduction proposals across two proceedings;[192] and other potential plaintiffs may wish to bring different claims. It would be unworkable for all plaintiffs to be able to pursue different emissions reductions.

113 In response, Mr Smith submits that it is sufficient for him to suffer an actual injury, rather than a theoretical or *de jure* infringement of the right;[193] it is therefore irrelevant whether or not a wide class of the public have suffered the same injury. Mr Smith responsibly acknowledges that this is contrary to authority,[194] but relies on obiter statements in a single case from Canada[195] and academic writings.[196] However, the context for those statements is a narrow approach to other elements of the tort that would exclude the pleaded claim.

114 The distinction between *de jure* and actual damage should therefore be rejected.

115 It follows that, while Mr Smith is correct that property damage will often be sufficient to found special damage,[197] this is not necessarily so; if a subset of the public suffers the same harm, that harm will not qualify as special damage as insufficiently particular.[198] The cases cited by Mr Smith in support of his proposition are cases in which an interference with the public right of navigation caused

---

192 Statement of Claim dated 27 August 2019, "relief sought", (b); Draft Amended Statement of Claim, "relief sought", (b) – (c); *Smith v Attorney-General* (CIV-2019-485-384) statement of claim, "relief sought", (c).

193 Appellant Submissions, [74]-[76].

194 Appellant Submissions, [75]; see *Hickey v Electric Reduction Co of Canada Ltd* (1970) 21 DLR (3d) 371, 371-372; *Ball*, above n 144, 537; *Mayor of Kaiapoi*, above n 187, 207; *Murray*, above n 187, [32].

195 *George v Newfoundland and Labrador* (2016) 399 DLR (4th) 440. This Court found that the Province had not caused a public nuisance by releasing moose which then interfered with the public highway. The statement on special damage relied upon was therefore obiter. The Court concluded by citing with approval an earlier decision of the Ontario Court of Appeal that "*there are no doubt strong arguments for imposing strict liability on certain inherently dangerous activities. In our view, however, that is fundamentally a policy decision that is best introduced by legislative action and not judicial fiat":* [107], citing *Smith v Inco Ltd* (2011) 107 OR (3d) 321 at [93].

George cites *Gagnier v Canadian Forest Products* (1990) 51 BCLR (2d) 218 (SC). The discussion in that case was also obiter, as the Court declined strike out on the basis that it was not yet known whether the plaintiffs had suffered differently from others (at 19). However, while suggesting that *Hickey* was too narrow an approach, the Court would still have required a "*significant difference of degree of damage between the plaintiff and members of the public generally*": 19-20.

196 Neyers and Botterell "Tate & Lyle: Pure Economic Loss and the Modern Tort of Public Nuisance" (2016) 53 Alberta L Rev 1031, 1038-1039: the authors' view on standing cannot be separated from their view that the "rights base" of the tort is limited to three public rights: the right to navigate public highways; the right to navigate navigable waters; and the right to fish in the high seas and other public bodies of water. If this view was accepted, Mr Smith's case would plainly fail.

197 Appellant Submissions, [76].

198 *Hickey*, above n 194, 371-372, cited in *Ball*, above n 144, 537.

the plaintiff property damage – a different kind of damage from the interference with the right of navigation suffered by the public.

116 In contrast, the nature of the pleaded public right and interference is that all coastal property owners will suffer the same damage. And, inevitably, non-coastal properties will be affected by other climate mechanisms (flooding, drought, fire). An interference with public health is also pleaded; by definition the same damage will affect all those who suffer health effects as a result of climate change. In those circumstances, as the Court of Appeal rightly recognised,[199] Mr Smith's pleaded damage is not sufficiently particular or direct: it is no different in kind from the damage that is or will be suffered by many thousands of others, nor is it even significantly different in degree.

117 None of this is to diminish Mr Smith's pleaded position in relation to tikanga. If established, that position would give Mr Smith standing to claim on behalf of his hapū.[200] But the public rights sought to be enforced by Mr Smith are not particular to his hapū or iwi, and the interference pleaded affects most of the public in similar and substantially the same ways. Accordingly, if any public rights require vindication, this should be done by the Attorney-General or through a relator action with the Attorney-General's consent.

VI. NEGLIGENCE CAUSE OF ACTION IS NOT TENABLE

Duty of care

118 The Court of Appeal applied well-established principles to determine whether to impose a novel duty of care in this case.[201] It concluded that the degree of proximity was insufficient to establish a duty of care: there was no physical or temporal proximity; no direct relationship; and no causal proximity.[202]

119 None of the appellant's complaints about the Court of Appeal's analysis are well founded:

119.1 The Court did not fail to have regard to the respondents' pleaded knowledge and control, or Mr Smith's pleaded membership of a vulnerable class. The knowledge, control

---

199 *CA Judgment* at [82].

200 THRM submissions at [31], citing *Proprietors of Wakatū v Attorney-General* [2017] 1 NZLR 423, [490].

201 *Carter Holt Harvey v Minister of Education* [2016] NZSC 95; [2017] 1 NZLR 78, [14]; *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 [*The Grange*], [149].

202 CA Judgment, [103]. This finding is reinforced by the observations of the Full Federal Court of Australia in *Sharma*, above n 12, [695] – [700].

and vulnerability pleaded were considered in the Court's discussion of proximity.[203] As Allsop CJ found in *Sharma*, a Minister making a decision whether or not to approve a coal mine had no control over the relevant harm, being worldwide global climate catastrophe. The relationship between the Minister and the plaintiff class was indirect, and mediated by the intervening conduct of countless others.[204] The respondents are in the same position.

119.2 The Court did not fail to consider the potential role of tikanga: it addressed Mr Smith's re-pleading earlier in its judgment and concluded that this did not solve the abstraction flaws with the claim.[205]

119.3 The Court was correct in accepting the pleaded duty would create a limitless class of claimants and defendants.[206] Mr Smith says that it would be perverse that wrongdoers who harm a large number of people should avoid liability.[207] But that complaint does not grasp the core concern, which was that litigation between unlimited plaintiffs and unlimited emitters is ineffective to respond to climate change, and would draw the Courts into "*an indefinite, and inevitably far-reaching, process of line drawing*."[208] The Court of Appeal's finding reflects the established position that a duty will not be imposed where it gives rise to disproportionate and indeterminate liability.[209] (Mr Smith's and LCANZI's proposal that this concern is addressed by excluding damages as a remedy is hollow; damages are the primary remedy in negligence and there is no principled basis on which such an exclusion can be made).[210]

---

203 CA Judgment, [100] to [102], in particular [102].

204 *Sharma*, above n 12, [336], [338].

205 CA Judgment, [7-8], [82] and [113].

206 Recognition of such a duty would lead to liability of a magnitude far greater than that recently observed to be better introduced by legislation: *Attorney-General v Strathboss*, above n 75, [260].

207 Appellant Submissions, [127].

208 CA Judgment, [27].

209 See, eg, Cardozo CJ's seminal statement in *Ultramares*, above n 75, 444. That was recently recognised by the Full Federal Court of Australia in the climate change context in *Sharma*, above n 12. Allsop CJ correctly found that there was no reason why the pleaded duty, said to be owed to all children in Australia under 18 years of age and born at the time of commencement of the proceeding, should not also be owed to the unborn: [341]. See also Beach J's comments: [742] – [747].

210 See Todd, above n 63, [59.25.1]. See also Part VIII below.

119.4 The Court did not err in its view that the pleaded duty would cut across the CCRA. For the reasons given above,[211] this claim is inconsistent with the policy goals and scheme of the CCRA.[212]

119.5 The Court did not find the judiciary ill-equipped to deal with negligence claims in the round. It held that courts are not well-placed to fashion and deliver the parallel regulatory regime for controlling emissions that is sought.[213]

120 Mr Smith's negligence claim could succeed only if the elements of the tort are stretched beyond recognition. As Professor Kysar said, the central relational underpinnings of the tort (e.g., *Palsgraf*'s rejection of "*negligence in the air*") would have to be abandoned.[214] The claim is not incremental development but squarely engages the concerns expressed by the Court of Appeal in *South Pacific Manufacturing* in declining to impose a novel duty.[215]

Causation

121 Mr Smith seeks to dismiss the role of but-for causation as a fundamental organising principle in tort law.[216] It is of course accepted that, in other legal contexts, causation may have different meanings.[217] As the United Kingdom Supreme Court said:[218]

> *Whether an event which is one of very many that combine to cause loss should be regarded as a cause of the loss is not a question to which any general answer can be given. It must always depend on the context in which the question is asked.* ***Where the context is a claim under an insurance policy, judgements of fault or responsibility are not relevant.*** (Emphasis added)

122 But the role of tort law *is* the attribution of responsibility for harm, based on the relationship between plaintiff and tortfeasor.[219] In tort law, the long-standing attribution mechanism is but-for causation.[220]

---

211 See paragraph [51], above.

212 CA Judgment, [33].

213 CA Judgment, [23]–[28], [33]–[35], [116]. Controlling emissions is also the target of Mr Smith's separate claim against the Attorney-General: see above n 192.

214 Kysar, above n 8, 44. The Court of Appeal properly rejected any suggestion that the applicant's pleading demonstrated "*a close connection between the parties*" because "*[t]here is no physical or temporal proximity*": CA Judgment, [103].

215 *South Pacific*, above n 72, 299 per Cooke P; 310 per Richardson J.

216 Appellant Submissions, [133] – [135].

217 *Financial Conduct Authority v Arch Insurance* [2021] UKSC 1, [182] – [185].

218 *Ibid*, [190].

219 See above n 61.

220 *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340, [24]; Todd, above n 63, [20.2.02].

Departures from but-for causation in tort law are rare and, when adopted, rarely sustainable.[221]

123 Mr Smith says that matters of causation are best addressed on evidence at trial.[222] This is incorrect where Mr Smith tacitly concedes that the claim cannot get past the threshold 'but for' causation requirement. In order for the claim to proceed to trial, this Court must determine that one of the exceptions to 'but for' causation identified by Mr Smith forms part of New Zealand law, and would apply if he establishes his pleaded facts.

124 The appellant relies on three proposed "*exceptions*". But each of these exceptions involves attribution to a defendant of causal responsibility for an existing harm. And none are in the context of injunctions against future conduct to prevent future harm.

125 First, the *Fairchild* line of cases,[223] which has proved controversial.[224] Mr Smith's claim is not, in any event, analogous to the claims considered in *Fairchild*. The justification for *Fairchild* is that each defendant had, in breach of duty, exposed the plaintiff to asbestos dust but scientific uncertainty meant that it was impossible to prove the source of the fibre or fibres which caused his mesothelioma. In this case, Mr Smith is not asserting that any one of the respondents is a 'but for' cause of the climate change damage pleaded. He is instead asking the Court to treat each of the respondent's contributions as satisfying the causation requirement.

126 Second, *Clements v Clements* and *Resurfice Corp v Hanke*.[225] These cases are firmly grounded in but-for causation, requiring that one or more of the multiple tortfeasors' negligence is a necessary, or 'but

---

221 Mr Smith's citation of the Supreme Court of Oklahoma's decision in *Northup v Eakes* 178 P 266 at 268 (Okla 1919) does not assist. It has not been adopted as a basis to depart from 'but-for' causation in New Zealand in cases of environmental harm. Nor do the international cases in the submission for Lawyers for Climate Action New Zealand: in *Massachusetts v Environmental Protection Agency* 549 US 497 (2007), causation was conceded by the EPA; in *Urgenda* the focus was the government duty rather than causation by a tortfeasor; in *Milieudefensie* there was no discussion of causation of harm, rather the establishment of Shell's emissions reductions, and in *Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7 the causation discussion was in respect of the link between GHG emissions from burnt coal and climate change, rather than any link to specific damage: [516], [525].

222 Appellant Submissions, [139].

223 *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32; *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10, [2011] 2 AC 229, [167] per Lord Brown, [174] per Baroness Hale, [189] per Lord Mance; *International Energy Group v Zurich Insurance plc* [2015] UKSC 33, [2016] AC 509, [209]-[210].

224 Lord Hoffmann "*Fairchild* and After" in Andrew Burrows, David Johnston and Reinhard Zimmermann (eds) *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press, Oxford, 2013), 63, 64 and 68.

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

for', cause of the harm.[226] That approach does not assist in this claim, where no actor can be considered a 'but for' or necessary or sufficient cause of the effects of climate change Mr Smith says is causing the pleaded harm. Further, the Supreme Court of Canada was only willing to entertain the idea of a "*material contribution to risk*" threshold in a situation where there was clear breach of a duty of care – a precondition that is absent here.[227]

127 Third, *Sindell*.[228] This case concerned the liability of drug manufacturers for cancers caused in the daughters of mothers who, while pregnant, had taken the drug diethylstilbestrol (*DES*). The California Supreme Court held that each defendant would be liable for a percentage of the judgment equal to the defendant's share of the national market in DES at the time the plaintiff's mother took DES, unless it could not have made the product which caused the plaintiff's injury. Market share liability is a poor fit for the current claim. The harms from climate change do not result from one unidentifiable emitter of GHGs, but from the aggregate emissions of millions of sources over decades which then act on natural processes, resulting collectively in changed atmospheric conditions.[229] Further, courts have rejected market share liability where it would be difficult to identify the boundaries of the market,[230] or where products cause different degrees of harm.[231]

128 Mr Smith says that *Fairchild* and *Sindell* were not cases where the individual tortfeasors were all before the Court as defendants. In *Fairchild*, they could have readily been – which distinguishes *Fairchild* from Mr Smith's claim where "*there is… no identifiable group of defendants that can be brought before the Court to stop the pleaded harm*."[232] And, as the Court of Appeal explained, even under *Sindell*, which was the "*most liberal of the approaches*", a

---

226 *Clements*, *ibid,* [15] – [16], [33], [43] and [46].

227 There is judicial restraint in exercising a "*material contribution to risk*" approach even where there is a clear breach. In *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 and *McGhee v National Coal Board* [1973] 1 WLR 1, the Courts applied a "*material contribution to risk*" approach. As Glazebrook J observed in *Ambros*, above n 220, [31], an inference of material contribution to injury can be drawn where a breach of duty increases an existing risk factor, but not where it simply adds a *new* discrete risk factor. The appellant's claim falls squarely into the latter category.

228 *Sindell v Abbott Laboratories* 26 Cal 3d 588 (Cal 1980), 145.

229 Matthew Gerhart "Climate Change and the Endangered Species Act: The Difficulty of Proving Causation" (2009) 36 Ecology LQ 167, 192-193.

230 *Goldman v Johns-Manville Sales Corp*, 514 N E 2d 691, 700 (Ohio 1987).

231 See *re Related Asbestos Cases*, 543 F Supp 1152, 1158 (ND Cal 1982), distinguishing *Sindell* on the grounds that DES was a "*fungible commodity*" whereas asbestos fibres are of several varieties, each used in varying quantities by defendants in their products, and each differing in its harmful effects.

232 CA Judgment, [92].

substantial share of the manufacturers who produced the product must be named as defendants in the action.[233]

VII. NOVEL TORT SHOULD NOT BE INVENTED

129 Mr Smith pleads a novel tort. Mr Smith asserts that the novel tort "*is drawn by analogy to the existing torts pleaded*".[234] If, however, the existing torts suffice, the novel tort is not needed; and if the existing torts do not suffice, then the novel tort can hardly represent an incremental development of the common law.

130 The Court of Appeal succinctly explained why the novel cause of action must be struck out:

130.1 the pleading makes no attempt to refer to existing legal obligations nor to incrementally identify a new obligation by analogy to an existing principle (at [120]);[235]

130.2 the bare assertion of the existence of a new tort without any attempt to delineate its scope cannot of itself be sufficient to withstand strike out. The strike out jurisdiction demands an element of rigour in the interests of justice (at [124]);[236]

130.3 the fundamental reasons for not extending tort law to a claim of the kind pleaded by Mr Smith apply equally to the proposed new tort.[237]

131 In this Court, Mr Smith explains for the first time that the proposed liability is strict and arises from proof of "*material contribution to dangerous anthropogenic interference with the climate system and the adverse effects of climate change*." However, any basis of liability resembling those in public nuisance (emanation interfering with an established public right) and negligence remains absent.

132 In other cases where novel torts were recognised, the Courts have developed the law by analogy and limited extension from established causes of action.[238] So, for example, the rule in *Rylands v Fletcher* represented the incremental development in the law of nuisance. As this Court has observed, the House of Lords

---

233 CA Judgment, [111].

234 Appellant Submissions, [144].

235 CA Judgment, [120].

236 CA Judgment, [124].

237 CA Judgment, [126].

238 See generally *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 (HCA), 481 per Brennan J, affirmed in *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 618.

considered its judgment was "*no more than a restatement of settled principles*", with Lord Cairns describing the principles as "*extremely simple*".[239] The better view today is that the rule in *Rylands v Fletcher* is part of the law of nuisance.[240]

133 The tort of privacy was developed by analogy and consistent with established causes of action in breach of confidence.[241] Similarly, the tort of intrusion into seclusion recognised in *Jones v Tsige*[242] and *C v Holland* was a "*logical extension or adjunct*" to the tort of invasion of privacy.[243] Justice Whata in *Holland* and the Court of Appeal in *Jones v Tsige* (as Mr Smith acknowledges)[244] considered that the new tort was consistent with long-standing rights and values of privacy underlying traditional causes of action. It was not sufficient for recognition of a new tort that the relevant conduct is "shocking".

134 Despite Mr Smith's claim that evidence must be heard before a Court can decide whether the novel cause of action is arguable, the cause of action is plainly deficient *as pleaded* and must be struck out. On an application to strike out a novel cause of action, the Court must ask the preliminary question of whether a sufficient legal basis for an arguable cause of action has been articulated.[245] To fail to do so would effectively remove the requirement for a plaintiff to state their claim. Mr Smith's invitation to the Court to refrain from assessing the legal basis of the third cause of action simply highlights his inability to articulate any coherent basis for a new, strict liability duty. This cause of action must be struck out.

VIII. RELIEF IS CONTRIVED, WHICH POINTS TO DEEPER PROBLEMS

135 A notable feature of Mr Smith's submissions is the extent to which he seeks to assuage the obvious practical concerns with the rights he asks the courts to create by inviting the Court to compensate by fashioning bespoke remedial limitations. So, it is suggested that tort liability would not sound in damages[246] (a proposition unique to

---

239 *Papakura* (CA), above n 94, [72], citing Newark, above n 133, 487.

240 *Cambridge Water Co Ltd*, above n 92, 304; *Papakura* (CA), ibid, [73]. See also *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1, [9], [35], [52] and [92].

241 See discussion of *Hosking v Runting* at paragraph [45] above.

242 *Jones v Tsige* 2012 ONCA 32, 108 OR (3d) 241.

243 *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672, [86].

244 Appellant Submissions, [153].

245 *Clarke v Bruce Lance & Co* [1988] 1 WLR 881 (CA), 885. See for example *Burns v National Bank of New Zealand Ltd* [2004] 3 NZLR 289 (CA), [89] – [91].

246 Appellant Submissions, [128], [146](b).

counsel's knowledge in tort law where damages is the primary common law remedy);[247] and that if an injunctive regime to be managed by the High Court until 2050 is unworkable, then the appellant seeks injunctive relief requiring the respondents to cease their emitting activities immediately; and if that is too draconian and might adversely affect third parties who are not before the courts, then injunctive relief can be suspended for some period of time.[248]

136 This series of implicit concessions that the relief claimed is unworkable is realistic[249] and consistent with the conclusion of many other courts.[250] The fact that, on examination, the claim boils down to essentially symbolic relief indicates that the rights sought to be created are inconsistent with the law of private obligations. Of course some cases are suitable for declarations. But the creation of common law rights that effectively result only in a form of declaration is a different matter entirely. The truism that there is no right without a remedy is meaningful in reverse. Taken at face value, it seems that this claim is brought not to obtain meaningful relief from harm from the respondents but to create a constitutional dialogue in which Mr Smith can press more firmly his views, with the benefit of judicial criticism of the CCRA's legislative regime.

IX. CONCLUSION

137 For the above reasons, the first to fifth respondents respectfully submit that the appeal should be dismissed.

D R Kalderimis / N K Swan / T Dewes
Counsel for the first respondent

247 See above n 210.

248 Mr Smith seeks declarations and injunctions which he concedes require at least court supervision (to achieve linear reductions of emissions reductions by 2025, 2030, 2040 and 2050) and potentially suspension to allow the respondents to modify their activities or to lobby Parliament to pass legislation in reaction to the Court's judgment: Appellant Submissions, [164].

249 As identified in the CA Judgment at [24], [26], [35].

250 See e.g. *Environmental Defence Society* (re: application to impose air discharge consent), above n 93, [86]; *Misdzi Yikh*, above n 54, [65] and [73].

S J P Ladd / T M Shiels
Counsel for the second respondent

B Williams / J P Papps
Counsel for the third respondent

D T Broadmore
Counsel for the fourth respondent

T D Smith / A M Lampitt
Counsel for the fifth respondent

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