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 HOLIDINGS LIMITED**
	Third Respondent
AND	**NEW ZEALAND STEEL LIMITED**
	Fourth Respondent
AND	**Z ENERGY LIMITED**
	Fifth Respondent
AND	**THE NEW ZEALAND REFINING COMPANY LIMITED**
	Sixth Respondent
AND	**BV MINING LIMITED**
	Seventh Respondent

SUBMISSIONS BY LAWYERS FOR CLIMATE ACTION NZ INCORPORATED AS INTERVENOR

22 June 2022

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MAY IT PLEASE THE COURT

1. Lawyers for Climate Action NZ Incorporated (**LCANZI**) is a non-profit group of over 350 lawyers, as well as a number of non-lawyer associate members, which advocates for legislation and policies to ensure Aotearoa New Zealand achieves net zero greenhouse gas (**GHG**) emissions as soon as possible and no later than 2050 and that it does so in a manner that is consistent with the rule of law, Te Tiriti o Waitangi, international legal obligations and the New Zealand Bill of Rights Act 1990 (**NZBORA**).

2. LCANZI has no private or pecuniary interest in these proceedings. It sought and was granted leave to intervene on the basis the issues raised by this appeal are such that the Court is likely to be assisted by submissions from LCANZI.[1]

3. LCANZI's position is that the decision under appeal (**Decision**) would, if upheld, prematurely block potential tort law responses to climate change. LCANZI says, in summary:

    a. The common law and the courts have critical roles to play in ensuring humanity and the rule of law survive the climate crisis.

    b. Tort law provides a suitable mechanism by which to recognise and enforce the rights of groups and individuals to be protected from harm caused by GHG emissions and the obligations on major GHG emitters to cease, reduce or mitigate their emissions and/or to compensate those who suffer harm caused by GHG emissions.

    c. The Court of Appeal's view that climate change requires a comprehensive regulatory response overlooks the limitations of the current statutory framework and the difficulties faced by governments around the world in regulating on this issue.

    d. Further, the existence (or desirability) of a statutory regime does not preclude a role for the common law. Common law and

[1] Minute of Williams J dated 10 May 2022.

statute law can and do develop side by side, each informing the other.[2]

e. Mr Smith's claims are arguable and should go to trial. In the alternative, if any part of his claims is struck out, it should be in the narrowest possible terms so that the potential for future claims is not foreclosed.

The need for the law to respond to climate change

4. Climate change is the greatest challenge facing humanity. It is already causing and will continue to cause immense harm.[3] Left unchecked, it poses an existential threat to humanity.[4] There is a direct relationship between GHG emissions and temperature increase.[5] Each additional tonne of GHG emissions and fraction of a degree of warming increases the harm.[6] GHG emissions must cease to stop further warming. These facts have been known for decades.[7] Yet GHG emissions continue to rise, both in Aotearoa New Zealand and globally.[8]

5. While most of us create some GHG emissions in our daily lives, a relatively small number of entities are responsible for a large proportion of GHG emissions.[9] Responsibility for (and power to prevent) the climate crisis is therefore not evenly distributed. A larger

[2] LCANZI endorses the appellant's submissions at [56]-[67] on the relationship between common law and statute.
[3] See generally Intergovernmental Panel on Climate Change (**IPCC**) Sixth Assessment Report (**AR6**) Working Group II (**WGII**) Summary for Policy Makers (**SPM**) at [SPM.B.1]-[SPM.B.1.7].
[4] See generally IPCC AR6 WGII, including the Final Draft Technical Summary which states at p TS-6 "the maintenance and recovery of natural and human systems will require the achievement of mitigation targets". The United Nations Secretary General Antonio Guterres has also described climate change as an existential threat: see <https://news.un.org/en/story/2018/05/1009782>.
[5] IPCC AR6 Working Group I (**WGI**) SPM at [A.1].
[6] IPCC AR6 WGI SPM at [D.1.1] and Figure SPM.10.
[7] The United Nations Framework Convention on Climate Change (**UNFCCC**) was adopted in 1992.
[8] As detailed further below at [14]-[28].
[9] The appellant pleads that the respondents are responsible for around one third of New Zealand's emissions. Globally, the *CDP Carbon Majors Report 2017* found that over half of all global industrial emissions since 1988 can be traced back to 25 corporate and state entities while over 70% can be traced to 100 entities: at 8.

share of the harm has and will continue to fall on the most vulnerable and least responsible.[10]

6. Unless climate change is effectively addressed, the ability of humans to live with minimum standards of dignity, or to survive at all, will be at serious risk.[11] The right to a climate system capable of sustaining human life is hence implicit in the rights protected by international human rights instruments and incorporated into domestic law by NZBORA. None of the protected rights can be fully realised without a sustainable environment.

7. The link between the environment and human rights has been recognized at an international level since the 1960s.[12] In the *Gabcikovo-Nagymaros Project* decision of the International Court of Justice, Vice-President Weeramantry called the right to protection of the environment "a vital part of contemporary human rights doctrine, for it is sine qua non for numerous human rights such as the right to health and the right to life itself".[13] In December 2013, the UN's Independent Expert on Human Rights and the Environment concluded that international human rights obligations require states to adopt and implement legal frameworks to protect against environmental harm that may infringe on enjoyment of human rights.[14]

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[10] IPCC AR6 WGII SPM at [SPM.B.2.4]-[SPM.B.2.5]; IPCC Special Report on Global Warming of 1.5C, 2018 at 234-235 **[[303.1110]]**; Ministry for the Environment *National Climate Change Risk Assessment for New Zealand: Main Report* at 64.

[11] See *Netherlands v Stichting Urgenda* ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands, 20 December 2019) at [4.2]-[4.8]; *Juliana v United States* 947 F.3d 1159 (2020) at 1171; *Minister for the Environment v Sharma* [2022] FCAFC 35 at [2] per Allsop CJ.

[12] For example, in 1968 the General Assembly passed a resolution noting its concern about accelerating impairment to the human environment and "the consequent effects on the condition of man [sic]" and "his enjoyment of basic human rights, in developing as well as developed countries". See *Problems of the Human Environment* GA Res 2398, XXIII (1968), preamble. The General Assembly resolved to hold a Conference on the Human Environment to develop a framework for focussing the attention of Governments on environmental issues and ways of resolving them through international co-operation.

[13] *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* (separate opinion) at 91-92.

[14] John Knox *Report of the UN Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (Mapping Report)* (30 December 2013) A/HR/25/53 at [46].

8. Continuing to emit GHGs in large quantities that contribute to climate change therefore threatens the rights of others, particularly those most susceptible to harm from the impacts of climate change.

9. As a general principle, where there is a wrong, the law should provide a remedy. This is especially so where the wrong infringes on fundamental human rights. Further, if the law fails to provide any mechanism for plaintiffs seeking redress or to curb the harm being caused by GHG emissions then the relevance and the legitimacy of the law will be at risk.[15]

Limitations of the current response to climate change

10. The Court of Appeal saw responding to climate change as primarily a matter for Parliament rather than the courts:[16]

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

11. LCANZI respectfully submits that this reasoning is cursory and fails to engage with the relative roles and abilities of Parliament and the courts. Nor does it allow for the possibility that the common law and Parliament both have roles to play.

12. Responding effectively to climate change at the international level is extremely difficult due to the collective action problem: the extent to which harm is avoided depends on what states do in total, not on the actions of any one state. In addition, rapid decarbonisation will impose costs in the short term while most of the benefits will accrue in the long term, beyond the decision-making horizons of most actors.[17] Further,

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[15] As members of this court have observed extra-judicially. See Winkelmann CJ, "Renovating the House of the Law" (29 Aug 2019) and Winkelmann CJ, Glazebrook and France JJ "Climate Change and the Law" (May 2019) at [136].

[16] Decision at [16].

[17] For this reason, climate change has been described as "the tragedy of the horizon", see Mark Carney "Breaking the tragedy of the horizon – climate change and financial stability", speech at

states that presently benefit from fossil fuel or agriculture sectors that produce large GHG emissions have a strong interest in preserving the status quo.[18]

13. We sketch out below some of the issues that the courts should grapple with through cases going to trial and evidence being presented before reaching any view that the climate change response should be left to international co-operation and Parliament.

14. First, international co-operation to date is limited in its scope and has not succeeded in reducing global GHG emissions. The United Nations Framework Convention on Climate Change (**UNFCCC**) was adopted in 1992 with the objective to stabilize GHG concentrations in the atmosphere at a level that will prevent dangerous human interference with the climate system in a time frame which allows ecosystems to adapt naturally and enables sustainable development.[19] The UNFCCC was followed by the 1997 Kyoto Protocol,[20] and then by the 2015 Paris Agreement.[21]

15. The Paris Agreement sets a common objective of holding the increase in global average temperature to well below 2˚C and pursuing efforts to limit it to 1.5˚C.[22] However, it does not prescribe what individual states must contribute towards meeting that objective. Instead, it requires each party to submit a "nationally determined contribution"

Lloyd's of London, 29 September 2015, available at <www.bankofengland.co.uk/speech/2015/breaking-the-tragedy-of-the-horizon-climate-change-and-financial-stability>.

[18] The problem of climate change can be usefully contrasted to the problem of ozone-depleting chlorofluorocarbons (CFCs). The latter problem was ultimately solved by international coordination and national regulation: the 1987 Montreal Protocol required its 197 states party to phase out the production of CFCs and related substances. The problem of CFCs was capable of being solved in this way because it differed in two key respects from the problem of climate change: (a) there were no or limited short term costs, because good substitutes for CFCs were readily available; and (b) the harm caused by the CFCs (depletion of the ozone layer) was immediate, whereas the worst harms from climate change are yet to come.

[19] UNFCCC Article 2. The text of the UNFCCC is in Schedule 1 of the Act.

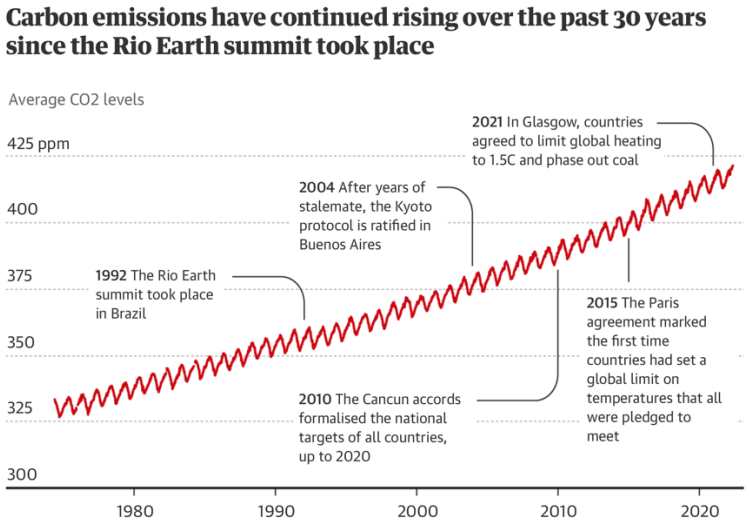
[20] Under which developed countries agreed to adopt specific GHG reduction targets for the period from 2013-2020. New Zealand's target under Kyoto was to reduce its emissions to 5% below 1990 levels by 2020. The text of the Kyoto Protocol is in Schedule 2 of the Act.

[21] The text of the Paris Agreement is in Schedule 2A of the Act.

[22] Article 2.

(**NDC**) that it intends to achieve.[23] NDCs must be submitted every five years.[24] Each NDC will "reflect [the party's] highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in light of national circumstances".[25]

16. The international framework therefore largely consists of agreed objectives and statements of principle, leaving states free to determine their individual contributions. This has so far resulted in failure to achieve the agreed objectives. The following chart maps CO2 concentration in the atmosphere against milestone international agreements on climate change:[26]



17. Secondly, and without overstatement, the position the world is now in due to this collective failure to arrest GHG emissions is dire. The harm which will be caused by average global temperatures rising by 1.5˚C or more is well documented by the Intergovernmental Panel on Climate Change (**IPCC**).[27] In 2018 the IPCC reported that, to have a 50-66% chance of limiting warming to 1.5˚C by 2100 with no or limited

[23] Article 4(2).
[24] Article 4(9).
[25] Article 4(3).
[26] Fiona Harvey "Thirty years of climate summits: where have they got us?" *The Guardian* (11 June 2022) <https://www.theguardian.com/environment/2022/jun/11/cop-climate-change-conference-30-years-highlights-lowlights>.
[27] IPCC Special Report on Global Warming of 1.5C, 2018 **[CoA 303.0923]**.

overshoot, global emissions should be reduced by around 50% from 2010 levels by 2030 and must reach net zero by 2050.[28]

18. The IPCC has since estimated that the remaining CO2 budget from 2020 before the 1.5˚C threshold is reached is 400 billion tonnes.[29] If the world continues to emit CO2 as the same rate it did in 2019 this budget would be exhausted by the end of 2030.[30]

19. Thirdly, Aotearoa New Zealand has failed to reduce its net GHG emissions from 1990 levels, despite being a signatory to the relevant international agreements and having passed its first domestic legislation in 2002 in the form of the Climate Change Response Act 2002 (the **Act**).[31]

20. As reported in New Zealand's 1990-2020 Greenhouse Gas Inventory (**GHGI**), our annual net GHG emissions (measured in millions of tonnes of carbon dioxide equivalents (**CO2-e**)) have risen from 44 Mt CO2-e in 1990 to 55 Mt CO2-e in 2020, an increase of 26%.[32]

21. Indeed, the GHGI shows that Aotearoa New Zealand's total decadal net GHG emissions have increased for each of the three previous decades:[33]

    a. 467 Mt CO2-e for 1991-2000;

    b. 536 Mt CO2-e for 2001-2010; and

    c. 541 Mt CO2-e for 2011-2020.

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[28] Specifically, the IPCC found that net CO2 must be reduced by 40-58% by 2030 and 94-107% by 2050 and agricultural methane must be reduced by 11-30% by 2030 and 24-47% by 2050: IPCC Special Report on Global Warming of 1.5C, 2018 Summary for Policymakers, Figure SPM.3b.
[29] IPCC Sixth Assessment Report (**AR6**) Working Group I Summary for Policy Makers at Table SPM.2.
[30] According to data from the Global Carbon Project, the world emitted 36.4b tonnes of CO2 in 2019. [400b/36.4b= 11]. Friedlingstein et al "Global Carbon Budget 2020" (2020) 12 Earth Syst Sci Data 3269–3340.
[31] The Act had the original purpose of enabling New Zealand to meet its international reporting obligations under the UNFCCC and the Kyoto Protocol by establishing a national inventory agency to record and report GHG emissions (s3(1)(a)). Its purpose has since been expanded to include the ETS (s3(1)(b)) and, most recently, contributing to the goals of the Paris Agreement (s3(1)(aa)).
[32] New Zealand's Greenhouse Gas Inventory 1990-2020 page xxvii. This contains the information required to fulfil our reporting obligations under the UNFCCC and Kyoto Protocol and is available at https://environment.govt.nz/publications/new-zealands-greenhouse-gas-inventory-1990-2020/.
[33] These figures are calculated by adding together the relevant annual figures contained in the supporting information for the 1990-2020 GHGI, also available at the address above.

22. Fourthly, it is by no means clear if and when Aotearoa New Zealand's net GHG emissions will peak. Following the amendments to the Act by the Climate Change Response (Zero Carbon) Amendment Act 2019, the Act requires the Government to adopt a series of five-year budgets for GHG emissions from 2022 onwards.[34] The total budget adopted by the Government in May 2022 for the 2022-2030 period, based on advice from the Climate Change Commission, is 595 Mt CO2-e.[35]

23. LCANZI has sought judicial review of the Commission's advice on the budgets including on the grounds that it does not meet the purpose of the Act of "contributing to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5˚C above pre-industrial levels" (s 3(1)(aa)). The application was heard before Mallon J on 28 February-3 March 2021 and is awaiting judgment. LCANZI presented evidence that the demonstration path which the Commission used in recommending the budgets implied net CO2 emissions and net emissions overall would both be higher in 2030 than they were in 2010 when expressed in the UNFCCC accounting methodology required for GHGI reporting. The Commission contests the validity of this comparison.

24. Furthermore, this is just a budget. It is far from clear that it will be achieved. While the targets set by the Act and the budgets adopted under it are binding, no remedy or relief is available for failure to meet them, except that the Court may make a declaration to that effect and any such declaration must be brought to the attention of Parliament.[36]

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[34] Act, s 5X.

[35] This figure is the sum of the budget figures for 2022-25 and 2026-30 as published on the Ministry for the Environment's website: https://environment.govt.nz/what-government-is-doing/areas-of-work/climate-change/emissions-budgets-and-the-emissions-reduction-plan/. It is not directly comparable with the previous decadal figures above as it is a 9-year figure, uses "modified activity-based accounting" (**MAB**) rather than the UNFCCC accounting methodology required for GHGI reporting and uses global warming potential figures to convert all gases into CO2 equivalents from the IPCC's Fifth Annual Assessment Report.

[36] Act, ss 5X, 5ZM. The Act sets targets in s 5Q that "net accounting emissions" of GHGs, other than biogenic methane, are to be zero by 2050 while emissions of biogenic methane are to be 10% less than 2017 emissions by 2030 and 24% to 47% less by 2050.

25. Aotearoa New Zealand's main policy tool for reducing emissions is the emissions trading scheme (**ETS**), introduced in 2008.[37] Businesses in certain industries are required to surrender one "unit" for each tonne of CO2e they emit.[38] Participants who remove CO2 from the atmosphere through forestry earn one unit for each tonne of CO2 they remove.[39] Participants can buy and sell units from each other, or from the Government through auction.

26. The ETS has proven ineffective. The reasons for this include:

    a. Approximately 57% of New Zealand's GHG emissions are not covered by the ETS (this mainly comprised of emissions from agriculture).[40] That is, most of our GHG emissions are not affected by the ETS at all.

    b. There is no effective cap on the remaining 43% (about 30Mt per annum) because there is an existing available stockpile of units of around 130Mt.[41] That is, the number of units available for surrender is several times higher than the expected level of annual emissions. In addition, more units are made available by the Government each year through auction, free allocation to certain emitters, and release of the "cost containment reserve".[42]

27. Based on experience to date, LCANZI submits it is unsafe to assume that Parliament is better able to respond to climate change than the courts.

28. In the absence of effective government action to date, courts internationally are increasingly being asked to play an important role. This is reflected in a wide range of climate litigation including judicial review of government decision-making or inaction, human rights

[37] The ETS was introduced by the Climate Change Response (Emissions Trading) Amendment Act 2008 and is contained in Part 4 of the Act.
[38] Act, s 63.
[39] Act, s 64
[40] See Ministry for the Environment's Consultation Document: Reforming the New Zealand Emissions Trading Scheme: Proposed Settings at p34, available at: <https://environment.govt.nz/assets/Publications/Files/reforming-the-ets-proposed-settings-consultation.pdf>.
[41] Ibid page 45.
[42] Ibid.

claims, shareholder actions, and damages claims against emitters. There is a potentially important role for tort law within this developing field of climate litigation.

Tort law as a suitable legal mechanism

29. Tort law provides a means of redress for civil wrongs. It seeks to do justice between the parties but also serves broader social ends. Thus, tort law has evolved to reflect changing social needs and values.[43]

30. Emitting GHGs in large quantities infringes on the individual rights of others, including but not limited to the right to a sustainable environment. In that respect it is a harm for which there is a need for justice as between the parties.

31. At the same time, there is a broader social dimension. The problem of global warming can be seen as a complex externality problem.[44] The "externality" is the current and future harms from the atmospheric accumulation of GHGs from human activity. These harms are an "externality" because the costs and risks from climate change are borne by the world at large rather than by emitters such as the defendants in this proceeding.

32. From an economic perspective, one of the functions of tort law is to promote efficiency by internalising the costs of harms from accidents and pollutants.[45] By holding a factory owner responsible for the damage the factory causes to the environment they will be incentivised to take appropriate steps to reduce that damage. Absent liability, the factory owner will likely continue to damage the environment because the costs of their decisions fall on someone else.

33. Seen in this light, there is an argument that climate change is a paradigmatic case for tort law as the ideal mechanism to make emitters

[43] See discussion in the appellant's submissions at [38]-[48].
[44] See Thomas Helbling "Externalities: Prices Do Not Capture All Costs" International Monetary Fund <https://www.imf.org/external/pubs/ft/fandd/basics/38-externalities.htm>.
[45] The pioneering work on this topic is Guido Calabresi *The Costs of Accidents: A Legal and Economic Analysis* (New Haven, Yale University Press, 1970).

bear the true costs of their GHG emissions and thereby drive socially desirable (indeed, necessary) steps to reduce GHG emissions.

34. In this respect, climate change has much in common with the pollution nuisance cases detailed in the submissions for the appellant. LCANZI agrees with and supports the appellant's submission that Mr Smith's claim falls within the orthodox principles of public nuisance. It also agrees that there is an arguable case for negligence.

35. Of course, applying tort law to GHG emissions gives rise to a number of complexities. However, these difficulties (some of which are addressed below) are surmountable and must be seen against the size of the threat to humanity posed by climate change.

Causation

36. LCANZI supports the appellant's submissions as to why it is not necessary on current legal principles for Mr Smith to establish "but-for" causation to succeed on the pleaded causes of action.[46] However, if current legal principles did require Mr Smith to establish "but-for" causation, then LCANZI submits that this Court, in its capacity as New Zealand's apex court, should recognise an alternative approach to causation whereby multiple contributors who factually contribute to a harm bear causal responsibility even if the harm would have occurred without that contributor's particular contribution.

37. This approach is consistent with a growing body of international case law. While these have not all been tort cases, they are nevertheless relevant to show the courts' willingness to impose legal obligations on actors (whether states, regulators or commercial entities) in respect of their proportionate contributions to climate change.

38. For example, in *Massachusetts v Environmental Protection Agency*[47] the state of Massachusetts sought review of the Environmental Protection

[46] At [132] to [139].
[47] *Massachusetts v Environmental Protection Agency* 549 US 497 (2007).

Agency (**EPA**)'s refusal to regulate emissions of GHGs from vehicles under the Clean Air Act (which required the EPA to prescribe standards for any air pollution from vehicles reasonably anticipated to endanger public health or welfare). To have standing, the state of Massachusetts had to show that it was injured by the EPA's failure. The United States Supreme Court upheld the claim. On causation, it said:

> EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming. At a minimum, therefore, EPA's refusal to regulate such emissions "contributes" to Massachusetts' injuries.[48]

39. It also rejected the EPA's argument that any reduction in emissions achieved by regulation would be offset by predicted increases in other countries, saying: "A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere."[49]

40. Similarly, in *Netherlands v Stichting Urgenda*[50] the Supreme Court of the Netherlands held the Government was in breach of duty, including the duty to protect the right to life under the European Convention on Human Rights, by not pursuing deeper GHG emissions cuts.[51] The Court rejected arguments that doing so would not be effective because emissions would continue to occur elsewhere and because the Netherlands' share of global emissions was small:

> the defence that a state does not have to take responsibility because other countries do not comply with their partial responsibility, cannot be accepted. Nor can the assertion that a country's own share in global greenhouse gas emissions is very small and that reducing emissions from one's own territory makes little difference on a global scale, be accepted as a defence. Indeed, acceptance of these defences would mean that

[48] At 523.
[49] At 526.
[50] *Netherlands v Stichting Urgenda* ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands, 20 December 2019).
[51] For a discussion of the reasoning on duties of care owed by states that lay behind the Urgenda claim see Cox RHJ 'The Liability of European States for Climate Change' (2014) 30(78) Utrecht Journal of International and European Law 125.

> a country could easily evade its partial responsibility by pointing out other countries or its own small share. If, on the other hand, this defence is ruled out, each country can be effectively called to account for its share of emissions and the chance of all countries actually making their contribution will be greatest, in accordance with the principles laid down in the preamble to the UNFCCC...[52]

41. While this case was about government obligations, the Hague District Court subsequently applied the same principles to a company in *Milieudefensie v Royal Dutch Shell plc*.[53] The Court upheld the plaintiffs' claim that, on the basis of the Paris Agreement's goals and the scientific evidence regarding the dangers of climate change, Shell had a duty of care to take action to reduce its GHG emissions. It ordered Shell to reduce its emissions by 45% by 2030, relative to 2019. The Court expressly acknowledged that Shell could not, by reducing its emissions, solve the global problem of climate change on its own, but said that "this does not absolve [Shell] of its individual partial responsibility to do its part regarding the emissions of the Shell group, which it can control and influence".[54]

42. The same focus on partial responsibility can be seen the Australian case of *Gloucester Resources Ltd v Minister for Planning*[55] which rejected an appeal against refusal of consent for a coal mine, including on the basis that the mine would result in GHG emissions which would contribute to climate change. In terms of materiality of the impact, the Court noted that:

> Many courts have recognised this point that climate change is caused by cumulative emissions from a myriad of individual sources, each proportionally small relative to the global total of GHG emissions, and will be solved by abatement of the GHG emissions from these myriad of individual sources.[56]

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[52] At [5.7.7].
[53] *Vereniging Milieudefensie v Royal Dutch Shell Plc* ECLI:NL:RBDHA:2021:5339 (26 May 2021).
[54] At [4.4.49].
[55] *Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7.
[56] At [516].

43. The Court held there was a causal link between the mine and the impacts of climate change because its cumulative GHG emissions would contribute to the total GHG concentration in the atmosphere, which in turn would affect the climate system and its impacts on the oceanic and terrestrial environments, and on people.[57]

44. The concept of a partial contribution to climate change harm has also been accepted as an arguable basis for a damages claim in the German case of *Lliuya v RWE AG*.[58] The plaintiff, a Peruvian farmer, filed proceedings in Germany alleging that RWE, Germany's largest electricity producer, having knowingly contributed to climate change by its emissions of GHGs, had some responsibility for the melting of mountain glaciers near his home town of Huaraz. He sought damages to cover a portion of the costs that he and the Huaraz authorities expect to incur to protect property from the flood risk.

45. The district court dismissed the claims on the basis that there was no "linear chain of causation" between RWE's emission of GHGs and the particular impact of climate change at issue in the case, and that it could not provide any effective redress: even if it ordered RWE to stop emitting GHGs, the glacier would not stop melting.

46. However, on appeal it was held that the case should move to the evidentiary phase, where the plaintiff would have the opportunity to prove "the active contribution of power plant operations to the acute flood risk".[59] The appeal court held the fact that RWE was not the only contributor to the creation of the flood risk (the 'interference') did not necessarily mean that eliminating the interference would be impossible. Rather, on established principles of German law, where there are multiple contributors, each contributor must eliminate its own contribution, and joint and several liability only comes into play

[57] At [525].
[58] *Lliuya v RWE AG* (District Court Essen, 15 December 2016); *Lliuya v RWE AG* (Higher Regional Court Hamm, 1 February 2018).
[59] At [4].

where the contributions cannot be separated and are of equal importance.[60]

47. On the other hand, the decision of the Full Federal Court of Australia in *Minister for the Environment v Sharma*,[61] which held that a Minister did not owe a duty of care to Australian children to exercise her powers to approve the expansion of a coalmine in such a way as to avoid the harmful effects of climate change, indicated a potentially more restrictive approach to causation. The case was not concerned with causation directly but rather with whether the appellants could establish a duty of care. Causation was relevant to this inquiry because the test of reasonable foreseeability has a causal element, i.e. it must be reasonably foreseeable that the negligent act/omission will cause or materially contribute to the pleaded harm. Two of the three judges concluded that the primary Judge's positive conclusion as to reasonable foreseeability was sustainable, noting that for the purposes of the duty inquiry, "causation does not have to be proved, but some causal relationship between the act and the harm looking forward must be real and not fanciful".[62]

48. Despite this, all three judges expressed doubt that the appellants would ultimately be able to prove causation on current legal principles.[63] But in doing so, Beach J recognised the traditional "but-for" approach to causation as problematic, stating that "[i]t seems to me that the common law is going to have to evolve to deal with scenarios such as the present, including adopting such considered suggestions[64] to deal with factual causation".[65]

49. Likewise, even if this Court considers that "but for" causation is a requirement of the current law, it should expressly recognise that it is no longer required in cases such as Mr Smith's. Those who materially

[60] Ibid.
[61] *Minister for the Environment v Sharma* [2022] FCAFC 35.
[62] At [329] per Allsop CJ; see [440]-[441] per Beach J.
[63] At [304]-[326] (Allsop CJ); at [430]-[441] (Beach J); at [873]-[886] (Wheelahan J).
[64] Broadly, those addressed at [132]-[139] of the appellant's submissions.
[65] See [438]-[440].

contribute to environmental harm should be responsible even if the harm would still have been suffered but for their individual contributions.

Scope of liability

50. One of the Court of Appeal's reasons for striking out Mr Smith's negligence claim was that "recognition of a duty would create a limitless class of potential plaintiffs" and subject defendants to "indeterminate liability".[66] LCANZI does not agree and supports the appellant's submission that the size of the class to which the duty might be owed, or the large number of claims that might arise, does not make the defendant's potential liability indeterminate.

51. On its face, the Court of Appeal's reasoning is supported by *Sharma*. However, *Sharma* was a representative proceeding on behalf of all Australian children under the age of 18 in respect of an *anticipated* breach of the pleaded duty and prospective harm. The Court found that there was no principled way to "confine the duty to the claimant class, as opposed to all living people at the relevant time, including those presently unborn, who will be exposed to the same risks as the claimant class, albeit for different periods of time".[67] Further, the Court held "the relationship that founds the duty is one between the government and the governed and lacks the relevant nearness and proximity necessary for the imposition of a duty of care".[68] Beach J suggested in his judgment that concepts such as proximity and indeterminacy in their present form "may have reached their shelf life" but concluded that engineering new approaches "is for the High Court not us".[69]

[66] Decision at [116].
[67] At [746] per Beach J; see at [341] per Allsop CJ and [842] per Wheelahan J.
[68] At [346] per Allsop J; see [696]-[701] per Beach J; Wheelahan J concluded that the initial threshold of reasonable foreseeability had not been met: at [886].
[69] At [754].

52. By contrast, in this case, Mr Smith has a strong argument that the necessary proximity will be established at trial. As an indigenous leader who inhabits a coastal area, he forms part of an identifiable group that is subject to a particular or distinctive risk. Furthermore, he says that the adverse effects of climate change have already harmed his whenua and other sites of significance to him, his whānau and his descendants. The extent to which a novel duty of care might extend to a group broader than this is a matter that can, and should, be worked out in future cases. Permitting Mr Smith to establish at trial that he is owed a duty of care does not require this Court to find that all New Zealanders are owed the same duty.

53. To the extent the Court remains troubled by the spectre of indeterminacy, there are ways for the courts to address this that do not require this claim to be struck out. As the appellant suggests, removing the possibility of damages as a remedy in the climate change context, or limiting claims for damages to claims for property damage and not economic loss, would both be possible options.

Injustice/arbitrariness in choice of defendants

54. The Court of Appeal's concern that bringing proceedings against "subsets of emitters" is likely to result in "arbitrary outcomes"[70] and open the floodgates to litigation on an "unprecedented scale"[71] is misplaced. A court is asked to determine the claim before it. There is always an element of arbitrariness about which claims are before the courts. The fact that there are other tortfeasors in the world against whom claims are not brought does not make it unjust for court to impose judgment on those tortfeasors against whom proceedings are brought.

55. In the case of public nuisance, the threshold of materiality provides a safeguard against floodgates being opened to claims by everyone

[70] Decision at [27].
[71] Decision at [116].

against everyone. In the case of negligence, LCANZI agrees with the appellant's argument that it is open to a court to impose a materiality threshold for the emissions of potential defendants. In any event, a flood of private litigation is very unlikely. Once the principles have been established, parties are likely to modify their behaviour to avoid claims and/or settle.

Remedy

56. The Court of Appeal stated that "there is no remedy available to the Court in private civil proceedings which can meaningfully address the harm complained of".[72] This is the same concern invoked by the district court in *Lliuya v RWE* but rejected on appeal. As demonstrated by *Lliuya* and the other decisions discussed above, the remedy granted by a court need not be capable of fixing climate change to be effective.

57. Furthermore, fixing the problem is not the sole function of the law of torts: "[t]he vindication of the claimant's rights, a public acknowledgment that the claimant has suffered a wrong, may be just as important a social value for the law of tort to uphold".[73]

58. In any case, concern about the suitability of the remedy is not a reason to strike out the claims, given that the appellant is able to amend his pleadings, and is certainly not a reason to rule out tort claims generally.

The relative strength of the common law

59. Society faces an immediate practical need to find a way to avoid environmental collapse. LCANZI submits that tort law can provide an important contribution based on existing principles. To the extent that development of existing principles is required, then it is time for that to happen. Tort law must "adapt or perish":[74]

[72] Decision at [25].
[73] *Clerk & Lindsell on* Torts (23rd ed, Sweet & Maxwell, London, 2021) at [1-12].
[74] Douglas A Kysar "What Climate Change Can Do About Tort Law" (2011) 41 Env L 1 at 6-7.

> When even the most dystopian climate change scenario—such as the complete erasure of territorial homeland for distinct and long-lived human civilizations, or the rendering of vast swaths of currently inhabited land unsuitable for human existence due to the threat of hyperthermia—fails to register as a responsibility of any actor anywhere, our principles of causal and moral attribution need to be rethought.

60. Indeed, the great strength of the common law is its flexibility and adaptability to changing circumstances. To the extent that current torts are not suited to new scenarios, there is potential for new torts to be developed over time as the impacts of climate change grow and the science of climate harm attribution develops.[75] New torts could take a variety of forms, including a tort to the environment[76] or tort claims on behalf of maunga, awa or other natural features which have been granted personhood.[77] LCANZI also supports the appellant's submission that the law of tort in Aotearoa New Zealand is informed by tikanga Māori, which may over time infuse it with new principles.

61. The Court of Appeal's conclusion that there is no role for tort law would prematurely foreclose these potential developments. Even if such comments were strictly obiter, they will have a broad chilling effect in relation to any potential future action.

Conclusion

62. Mr Smith's claims should not be struck out. It is reasonably arguable that his claim meets the existing requirements for the torts of nuisance and negligence but, if not, those requirements should be revisited. To extent that his negligence claim would require a novel duty to be

[75] See Winkelmann CJ, Glazebrook and France JJ "Climate Change and the Law" (May 2019) at [109]: "Developments in climate science and research, particularly attribution science, will bolster private law claims. Courts may be more willing to hold corporations responsible if emissions can be scientifically linked to actions."
[76] M Hook, C Warnock, B Allan & M Pirini (2021) 33 "Tort to the Environment: A Stretch Too Far or a Simple Step Forward?" Journal of Environmental Law 195-210.
[77] M Pirini & R Morar (2021) 5 "Climate change and the claiming of tino rangatiratanga" New Zealand Women's Law Journal 86-148.

recognised, the Court should exercise its standard caution in striking out a new category of claim before trial.[78]

63. If this Court nevertheless considers Mr Smith's claims should not proceed, its judgment should be confined as far as possible to the circumstances of this case and leave room for the development of tort law in future cases.

64. To follow the Court of Appeal's approach, in which there is no role for tort law no matter how bad climate change gets and no matter how inadequate the statutory response, would be an abdication of the role and responsibility of the courts. To quote District Court Judge Staton in her dissent from the decision of the United States Court of Appeals Ninth Circuit denying standing to the plaintiffs in *Juliana v United States*:[79]

> Where is the hope in today's decision? Plaintiffs' claims are based on science, specifically, an impending point of no return. If plaintiffs' fears, backed by the government's own studies, prove true, history will not judge us kindly. When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?

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

[78] See *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [32]. For the Court's approach to recognition of a new duty of care see *Body Corporate No 207624 v North Shore City Council (Spencer on Byron)* [2012] NZSC 83.
[79] *Juliana v United States* 947 F.3d 1159 (2020) at 1191.