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IN THE SUPREME COURT OF NEW ZEALAND SC 149/2021

I TE KŌTI MANA NUI O AOTEAROA [2022] NZSC Trans 19

BETWEEN **MICHAEL JOHN SMITH**

Appellant

AND **FONTERRA CO-OPERATIVE GROUP LIMITED**

First Respondent

GENESIS ENERGY LIMITED

Second Respondent

DAIRY HOLDINGS LIMITED

Third Respondent

NEW ZEALAND STEEL LIMITED

Fourth Respondent

Z ENERGY LIMITED

Fifth Respondent

CHANNEL INFRASTRUCTURE NEW ZEALAND LIMITED

Sixth Respondent

BT MINING LIMITED
Seventh Respondent

Hearing:	15 – 17 August 2022
Court:	Winkelmann CJ Glazebrook J Ellen France J Williams J Kós J
Counsel:	D M Salmon QC, D A C Bullock, N R Coates and N T Sussman for the Appellant D R Kalderimis, N K Swan and T Dewes for the First Respondent S J P Ladd and T M J Shiels for the Second Respondent B G Williams and J P Papps for the Third Respondent D T Broadmore and C T Ottow for the Fourth Respondent T D Smith and A M Lampitt for the Fifth Respondent A J Horne and J S Hofer for the Sixth Respondent R J Gordon and A S Kirk for the Seventh Respondent J S Cooper QC and J Every-Palmer QC for the Intervener Lawyers for Climate Action New Zealand Incorporated M K Mahuika and H K Irwin-Easthope for the Intervener Te Hunga Rōia Māori o Aotearoa A S Butler, R A Kirkness and H Z Yang for the Intervener Human Rights Commission

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CIVIL APPEAL

WINKELMANN CJ:

Mōrena tātou. Tuatahi, ki te kaikarakia, tēnā koe. Tuarua, e ngā rōia, ko wai koutou?

MR SALMON QC:

Tēnā koutou e ngā Kaiwhakawā. Ko Mr Salmon ahau. Ko aku hoa ko Mr Bullock, Mr Coates and Ms Sussman. E whakakanohi ana mātou i a Mike Smith.

WINKELMANN CJ:

Tēnā korua.

MR KALDERIMIS:

E ngā Kaiwhakawā tēnā koutou. Ko Kalderimis, tōku ingoa. Kei kōnei māua ko Ms Swan and Ms Dewes, mō te kaiwhakahē tuatahi Fonterra.

WINKELMANN CJ:

Tēnā korua.

MR LADD:

May it please the Court. Ladd for the second respondent and I appear with Mr Shiels.

WINKELMANN CJ:

Tēnā korua.

MR WILLIAMS:

May it please the Court. Counsel's name is Williams and I appear with Mr Papps for the third respondent.

WINKELMANN CJ:

Tēnā korua.

MR BROADMORE:

Tēnā e te Kōti. Ko Broadmore, ko Ms Ottow māua ingoa. Ko māua ngā māngai mō te kaiurupare New Zealand Steel.

WINKELMANN CJ:

Tēnā korua.

MR SMITH:

E ngā Kaiwhakawā, tēnā koutou. Ko Smith tōku ingoa. Ko tēnei māua ko Ms Lampitt mō Z Energy.

WINKELMANN CJ:

Tēnā korua.

MR HORNE:

May it please the Court. Horne with Mr Hofer for the sixth respondent.

WINKELMANN CJ:

Tēnā korua.

MR GORDON:

May it please the Court. Counsel's name is Gordon. I appear for the seventh respondent, BT Mining, with my colleague Ms Kirk.

WINKELMANN CJ:

Tēnā korua.

MS COOPER QC:

Tēnā, e te kōti, ko Cooper tōku ingoa. E tū ana māua ko Every-Palmer, mō Lawyers for Climate Action NZ Incorporated.

WINKELMANN CJ:

Tēnā korua.

MR MAHUIKA:

Tēnā koutou e Te Kōti. Tuatahi ka mihi atu au ki te kaikarakia ki te tuahine nei, nāna i tau mai te mauri kei runga ki a tātou e hui tahi nei i tēnei rā, me ngā mihi anō hoki ki a tātou katoa i haramai kei mua i tō koutou aroaro te whakahaere tēnei kaupapa. Ma'am ko Mahuika taku ingoa. Kei kōnei māua ko taku hoa,

ko Ms Irwin-Easthope. Ko māua ngā māngai kōrero mō Te Hunga Rōia Māori o Aotearoa. Tēnā koutou.

WINKELMANN CJ:

Tēnā korua.

MR BUTLER:

Tēnā koe e ngā Kaiwhakawā. Ko Andrew Butler, tōku ingoa, me Robert Kirkness, me Hannah Yang tênei. Ko mātou ngā rōia mō Te Kāhuia Tika Tangata. So Butler, Kirkness and Yang for the Intervener Human Rights Commission.

WINKELMANN CJ:

Tēnā korua. Right, Mr Salmon.

MR SALMON QC:

Thank you, your Honour.

WINKELMANN CJ:

We've seen your time estimate.

MR SALMON QC:

Yes, I can say that I think that's conservative. We haven't quite agreed on where the baton will be passed.

WINKELMANN CJ:

Well, you may not have, but we have agreed, that you must pass it by 11.30 am on Tuesday.

MR SALMON QC:

Yes, I think we might be done by then.

WINKELMANN CJ:

That would be good because we were going to say that it be regarded as a deadline, not a target.

MR SALMON QC:

As a hard stop. In that case if we continue on, it will be in the adjournment without you, your Honour.

WINKELMANN CJ:

You might find the going a bit easier then.

MR SALMON QC:

Well, in any event welcome to Auckland.

WINKELMANN CJ:

Thank you.

MR SALMON QC:

Mr Smith has brought two cases before the Court about climate change. This is one of them. The other is a claim that has been stuck out by Justice Grice in the High Court in which he sought orders compelling the Crown and instruments of Government to take action in relation to climate change. A central tenet of both cases, one that's not actually factually controversial but we don't get into here because his pleading to this effect is taken to be true, is that not enough has been done and not enough will be done despite the legislative instruments my friends refer to and the international agreements to protect him and his people from calamitous consequences of climate change.

His, so far at least, his attempts to compel the Government to take steps having failed, this case really presents the most acute opportunity to ask and answer the question, whether the law responds to a threat, an existential threat to fundamental rights, property rights, rights to the culture and human rights. Rights that are protected under the Bill of Rights Act 1990 of course and under international law but particularly for today's purposes, rights that are conventionally and consistently protected by the laws of torts.

Mr Smith's particular background is probably familiar to the Court, having reviewed the papers, but is set out in his affidavit filed in response to the

strike-out applications by the defendants at 201.00048, and I won't go through it in detail, but he sets out his background in engaging in environmental protection matters since the ‘70s as well as struggles regarding the rights of his people since that time. Some of that is well-known and some of it is not. Some of it involves official roles such as his role as climate spokesperson for the Iwi Chairs Forum and others involve his, I would say tireless work with Hinekaa Mako who delivered the karakia, seeking to advance the interests of the people that are threatened by climate change and climate change has become their predominant life focus over the last decade or so. He speaks in his affidavit to cultural and other interests that are legally significant in his home region, including in the block at Mahinepua C, an area where at paragraph 9 of his affidavit he describes specific spiritual, cultural and nutritional areas of significance, and I note that last point because one of his concerns is the impact of climate change being on the poorest and on cultural minorities first. Again, not a controversial proposition. It’s something that’s recorded in the IPCC reports which New Zealand has ratified and is recorded in numerous governmental instruments.

So coming from what I think is the poorest electorate in New Zealand and from one with a substantial proportion of Māori, many of whom faces pressures from poverty, as well as environmental pressures, the ability to, for example, obtain kaimoana isn't a luxury or an incidental pleasure of being beside the water, but it is part of life itself. So he brings this proceeding, mindful of the risks posed to his people by the intrusions of climate change from the viability of the oceans, ocean acidification and the loss of species. The viability of living near the coast and speaks later in his affidavit about the exposure of many of his people to low-lying floodways, Northland being caught between both on the one hand severe summer drought and loss of crops and agriculture, and on the other hand flooding inland, and yet before the seawaters rise a profound risk to sea life in general, and as your Honours will know, one of the alarming predictions, near certainties now, in the IPCC reports is a collapse of ocean life because 99% of the world’s coral reefs are predicted to go, even if we hold to present best case scenarios, and that has flow-on effects for the abundance of life in

the emissions that profoundly affect Northland which receives waters from the Pacific straight down the coast past the Poor Knights Islands.

So these are not only, and I don't mean only in the sense that it doesn't matter, these are not only cultural concerns, an they're not just concerns about an Omaha bach being flooded, these are concerns about risks to life itself, and as I'll come to they're concerns that dont' relate to just localised risk, it's related to the profound systemic risk threatened by climate change, one that's taken to be true on Mr Smith's pleading, but one that is now a matter of universal agreement between civilised countries on earth. The risk is truly existential.

Now Mr Smith's core claim advances concern both claims about risks to the right to life for him and his descendants and his people, a right protected under the Bill of Rights, as well as risk to his culture, again protected under the Bill of Rights, and risks to his property. It's trite, as we say in our submissions, that a right without a remedy is really no right at all. He has no remedy following the decision of Justice Grice in the High Court against the Crown and certainly not one that resounds in action, and this case raises the question whether he will be allowed to have a trial in which the question of remedies will be explored with full facts as to their implications and effects. In that context the Court of Appeal has made a decision at strike-out stage that the proposed relief, which includes various alternatives of injunctive relief, including fairly standard nuisance-based suspended injunctive relief, wouldn't be efficient, effective or just, and in that language the Court of Appeal has quoted from the Climate Change response, its purposes, which is to achieve an efficient, effective and just mitigation of climate change effects and cut to emissions.

The Court of Appeal did not have a factual basis for concluding that, and as I will come to there is a tenable and, of course, pleading that's taken to be true, factual basis for concluding that it is the only path to achieve any effective, any efficient, or any just response to climate change. More than that, embedded in the Court of Appeal's decision is an assumption which I will come to as a common strand in tort, or running through 200 years of tort development, which is that there is an upside, a community, social and economic upside to activity,

and the doer, as a number of the writers in our epically large bundle of authorities say, the doer is assumed to be producing some societal good by building in the old days the proper smelting plant, the sewerage, the railways which, of course, crushed a lot of people, but there was an upside, the invent of the motorcar and so on. As torts developed it's recognised that there is good in progress, to speak colloquially.

That is an assumption that Mr Smith challenges here. The defendants will say, do say that in asking them to stop causing harm other people will be harmed, and that there is a delicate polycentric balance to be struck. Mr Smith says that's not right. Mr Smith says the Court of Appeal lacked any evidence about the counterfactual where they don't stop, and Mr Smith says if they don't it's not that people have a mix of benefits and losses, it's that they lose everything, and of course he has the issue to face, that there are other emitters and that New Zealand is a small country and so on, and we will come to that. But the short point for now is the Court of Appeal has wrongly concluded that it can decide the balance at this stage and decide that there's injustice in stopping the cause of major New Zealand emissions now. That requires evidence, and the evidence will be difficult for the defendants to assemble, to rebut Mr Smith's position, because the language of the international agreements and instruments, and the assessment reports are clear that there is no debate about the need to cut. Almost no price in cutting emissions is too high to pay because we are not looking at a balance sheet problem, but an existential problem.

In that context this claim asks the question, how might tort respond, and of course our first answer is, it will respond and should respond following a trial where a trial judge has evidence on this economic and risk factors that enable the Court to consider the counterfactual of advocating engagement of tort laws. But also it will benefit from a trial where the Court understands the unique constitution and legal context of Aotearoa New Zealand in 2022.

I'll spend a bit of time later this morning on the history of tort development, and this is a fascinating case to consider when reading tort history because firstly, tort has shown a continue willingness to adapt, to engage with new harms

caused by new technologies, that much is trite, but when one looks at the history of development of tort law, and the history of academic analysis, and this is a key theme I will seek to, again, elaborate on, one can see that a number of the doctrinal barriers that the defendants set up to engagement of the law of negligence here, are doctrinal barriers that reflected a particular policy perspective that was unique or particular to the 19th and 20th centuries, and is stale and not fit for purpose now. So I will spend a bit of time unusually on that arc of history in the law of torts, and that will be by way of submitting that what is proposed by Mr Smith in his negligence claim is not revolutionary or jarring or, I forget the strong language used in my learned friend's opening paragraph, but where bending and welding tort together. It's not that at all. It's evolutionary in a step that seems surprising now in a way that *Donoghue v Stevenson* [1932] AC 562 (HL) seem surprising to the reactionary, and I don't mean "reactionary" in a pejorative way, but the conservative responses of the minority there. But it is, in fact, less epic and striking a change than the step in the view of what is a relation and what is relational reflected in *Donoghue v Stevenson*. We say it's an evolutionary step but also we say importantly notions that are housed in a view of personal relationships that involve collisions of individuals, literally collisions, train crashes, car crashes, horse and carriages in England, are not necessarily fit for purpose in understanding a modern ecological problem, and why is that? That is because in the 19th century a negligence case, or in the 20th century, typically involved what one commentator referred to as something as a morality case. Someone bumped something. Someone's wheel came off or a train was being built that would inevitably kill people. Should liability be stripped or based on reasonable care. There's a balance to be struck. We're trying to build trains.

Ecological and an interconnected world and science show us that cause is not so simple. That to understand cause and effect we, lawyers, and judges need to have scientists help us see what is now known to be obvious, and so what we may assume to be remote, or what we may assume to be not relational, is assumed to be that way because we don't yet understand. We don't understand the facts and the science, something a trial would teach us.

1030

So whereas to a newcomer to the problem of negligence and climate change, who believes in the indication that my learned friend has advanced in the lower courts, that tort is relational and these aren't relations, it's easy to say, well, bumping someone involves a or gives rise to a relational tort and easy to explain why *Donoghue v Stevenson* that shocked people by extending the concept of relational to an end purchaser who the manufacturer could never meet. It's easy to say, but plainly, the atmosphere, and anyone in it, is too many people and too far to be relational. But that highlights the problem of doing this at the strike-out stage because to a scientist, and to the scientists who will give evidence if Mr Smith is allowed a trial, that's as proximate and relational as can be. Emitting something into the air that I breath affects me in a way that is to a scientist, as obvious as the train coming off the tracks or the buggy dragging a wheel and killing a passenger.

But that's a trial perspective that we don't yet have, and when thinking about this following the recorded session for the academics that we undertook last week with Justice Glazebrook, I reflected on my friend's and Mr Kalderimis' indication of Daniel Kahneman's *Thinking Fast and Slow* where he said: "Well, of course the knee-jerk reaction is that tort should do something about climate change, but that's thinking fast and we have to think slow." That surprised me because the knee-jerk reaction in my experience of running this case, and reading and looking at it, the knee-jerk reaction is the luddite's one of it's too remote, tort can't respond, it's too hard, too many plaintiffs, defendants. The reasons emerge very quickly in conversation and we probably know this from our experience of discussing it and from papers we've read or written, but when, and this is a submission, when one thinks slow and hard about it and when one sees that the calibration of tort defences and tort measures of causation and loss are creatures of a classical liberal world view and creatures of a type of menace and problem to society that was visible more local and more direct, one can see that they may not be fit for purpose. And so thinking slow and thinking carefully about negligence takes us not to the conclusion it shouldn't respond, but in our submission to the conclusion that it may well

respond and that a trial will help us inform how, whether and how and what relief might be appropriate. So that's negligence.

Nuisance is in a different category. Much as the defendant's think to characterise this case as novel and subverting tort law, in the nuisance context it's not at all. Mr Bullock will speak about nuisance in some detail and his part of this set of submissions is really my cause for doubt as to how long it will take because – and I can see that sounded like it was a dig at Mr Bullock, but it wasn't him I'm worried about, Sir. I'm joining you under the bus, Mr Bullock. The bus of timing will drive over all of us, I'm sure, but as we confront it, what Mr Bullock is seeking to do is explain a way, perceived or asserted barriers in law of nuisance that just don't exist and didn't exist. He will summarise a history of nuisances reacting to harm caused by people to other people's right. He will explain that it was never seen as a policy step to say, you must stop, and instead that the Courts would routinely stop even conduct clearly for the public good if it harmed rights, and when the defendants here, in their version back then, the polluters would say: "But people need this," or: "But the pipes carry things for the people." The courts would say: "Well, lobby Parliament." To expressly endorse it you are harming a right and there will be a remedy.

So he will talk too about the remedies of suspended injunctions to give time for that, if need be, injunctive relief tailored to stop it. But in every sense a close thinking slowly study of the law of nuisance shows the law used to protect these rights and one question is why has it stopped? We say it hasn't stopped, that the Court of Appeal erred in saying that in some way this was an affront to the policy underlying the Climate Change Response Act 2020. We have a bit to say about that because the policies underlying the Climate Change Response Act are to try and stop fossil fuel mining, conveying and burning as soon as possible. There is really no clash in saying stop it now. It is true that it sets up a framework for trying to do that within the political limitations of the Act but it is a far too long bow to draw for my learned friends to say that that Act expresses a policy that is at odds with stopping burning fossil fuels.

More particularly though, as Mr Bullock will come to, that's not an answer in the nuisance context. The requirement in an Act to terminate an otherwise available plan for nuisance is either that it expressly legislates away nuisance or that it provides a better, stronger remedy for the person whose rights have suffered. So why doesn't nuisance respond in this case? Why has Mr Smith not got a trial? Well, Mr Smith submits because there was a bit too much thinking too fast. There's that knee-jerk reaction that this problem is too big and it's being dealt with by Government. It is a very big problem. But if we, again, look in the arc of history the problems imposed by the St Helens plant in the nineteenth century or by the incredible exposure to industrialisation or by the sewerage schemes were as big a problem as people could possibly imagine then. They raised all of the balances of public and private good and public and private interests of, I'm paraphrasing what my friends aren't saying, but it is a theme that underlies all of this, you can't stop progress. Progress we now know is not progress in the industry context of climate change initiatives. It is full, complete harm. But the Courts would respond whether or not there was legislation already in existence, whether or not there was regulation underway and whether or not and often noting regulation by the legislative would be better, because as Mr Bullock says in his part of the submissions: "Nuisance, and indeed negligence here, isn't about making policy or regulating." Mr Smith doesn't seek regulation by the Courts. He seeks to protect his rights so then tort is always done.

Finally, the third cause of action, this got one line in my learned friend's submissions in the High Court because it was perhaps not taken seriously, but it is advanced seriously. It is a strict liability tort. The reasons for that are one, why not? Why do we not have strict liability for such harm? We have in the past. Secondly, knowledge is a given now. It is known harm that the defendants are causing. So a knowledge or reasonable care component is otiose.

The third cause of action is embraced by some of the interveners as the most logical place to have regard to principles of tikanga when looking to synthesise and understand what the modern response of tort should be to this problem in

2022. Respectfully, I'm not sure that's the only place that tikanga is of relevance in assisting us understand how tort would respond because it raises important lessons about standing and about the dangers of old fashioned or stringent or American views of standing, industry-protecting views of standing. Tikanga speaks profoundly to those issues and accords with this Court and other courts' increasingly more encompassing view of standing. But it also speaks to other questions such as my learned friend's reliance on the relational underpinnings of tort law, something that persuaded the Court of Appeal very much. Something that doesn't relate to nuisance or the third cause of action, but does to negligence, this notion that relational underpinnings are essential before tort responds.

Tikanga, as my learned friend Ms Coates will talk about, shows that rather than this atomistic approach to individual human or corporate players in the world bumping into each other, colliding with each other physically, or more recently commercially, and causing physical loss, and more recently economic loss. Tikanga identifies that it's not inevitable that there wouldn't be concerns in custom and, therefore, common law about ecological harm and environmental harm and further, as Ms Coates will speak to, and I accept that this is a strike-out and we need evidence about tikanga to fully understand it and engage with it, and I am not an expert by any means, but it shows lessons of how a culture that is more understanding of the environment that it lives in, something that industrialisation has taken away from us, knows the lesson of ecology that scientists tell us which is, we are all proximate when we pollute, unless it's extremely local pollution, a horse defecating near a house or something like that, from an old case. True ecological pollution makes everybody proximate and it is an artifice to seek to draw fine-tuned relational boundaries when, in fact, one is harming all.

1040

But secondly, and perhaps more importantly, tikanga shows a recognition that sometimes the remedies should not be focused on the end sufferer, one person who has suffered loss, but on the resource itself. So when Ms Coates talks about rāhui that are put in place because a resource, an ecology is suffering,

that is a response that shows a remedial focus, not on punishment at the one end, not on a morality judgment necessarily, as a number of the 19th century cases might have, and the juries in England in those days did, and not on the loss of a particular person, nor on the relational focus on remedy that Mr Kalderimis is so keen upon, based upon the American scholars who structure their thinking around those ideas, but on what sort of remedy will protect the resource, and resource not in the sense of something to be dug up and burned, but resource in the sense of a thing that we need to live. Ms Coates will talk about a rāhui imposed by Te Whānau-ā-Apanui which was specific to major fishes. That might inform us if we're were to have a trial and have evidence about it, about ways in which our narrow and orthodox thinking about remedies is not mission fit. Not fit for purpose in 2022 in Aotearoa, because it shows that dividing lines can be drawn between the major causes of emitters, perhaps, and the individuals and their cars, just in the way that Te Whānau-ā-Apanui drew a distinction between the major commercial fishers and the mums and dads and kids going out to get some kai.

So tikanga is a special topic both because we submit on behalf of Mr Smith evidence is needed of it and we shouldn't be making assumptions about how it interplays with the delicate policy and other balances being undertaken by the Court. But also because it signals reasons why 19th century and 20th century classical liberal tort theory is not fit for purpose. It doesn't explain and deal with and respond to scientific understandings of climate or harm or I might add as some of the academics say, and I've included these in the bundle, to a scientific understanding of causation. The but for test is not, in fact, solid. It's not just that but they speak to which rights should be protected and, importantly, how, and the how becomes a theme because a lot of what my learned friends say is problematic about this duty, is drawn from rules that the common law has developed to deal with loss and damage. It's not that the conduct should be stopped or not so much as how much should be paid, to what extent should loss be recoverable, should it be economic or not, has it been caused and, if so, on what standard was it put. These are calibrations, as I'll come to, designed to control extent of liability and, as the academics say, to protect defendants, to protect the doer because it's doing some good. But if

the real issues and the real risks are not compensated, if they're not part of a balance of economic pain from the too remote victim, but yet economic benefit by job creation, but just full pain, a fully privatised profit and a fully socialised harm, but more particularly if what is lost is not capable of compensation, then those tools are not mission fit, and more particularly they can be seen to be at odds with, to jar with the very underpinnings of New Zealand common law and our customary approach to protecting resources, and to taking a collective not atomistic view of interactions between people, and between people and their environment.

So with that background we've handed up a summary of our submissions which has me opening on the place of tort, and covering the pleaded basis of the claim, the cautious approach to strike-out, the nature, function and development of tort law, and the Courts, Parliament and policy. I intend to spend more time on the first and third of those than the others, but I shouldn't be an undue amount of time before Ms Coates is on her feet. Mr Bullock will then speak about nuisance and deal with the defendants' attempts to characterise it as somehow unavailable, and then I will try to capture, against the backdrop of Ms Coates' submissions on tikanga, some concluding comments on negligence, the novel tort and relief. I think by then I will be able to be reasonably brief but I will be getting back to my feet following my offsiders speaking. I know that once wasn't the way but it now is.

So the pleading. You will have read it and you will not want to contemplate the idea of me going through it in painful detail, but I will go through a few points and use them as springboards to go to a few of the documents that show what the issues here are. Again, we don't have the time to look carefully and slowly, as Parliament would have it, at all of the issues, but a very quick look shows Mr Smith is pleading points that are not, in fact, controversial in planet Earth 2022, and which show the stakes are as high as he says there are. So taking the –

KÓS J:

Are we looking at the draft amended statement of claim?

MR SALMON QC:

The draft amended one Sir.

KÓS J:

Thank you.

MR SALMON QC:

So the one attached to the submissions. I'll work quickly through most of it but there are a few points I'll pause upon. The plaintiff's interests are dealt with at the bottom of the first page, paragraph 10 onwards, and then we deal with the defendants and their emitting activities. Now the general context of these, as we have pointed to and as the Lawyers for Climate Action pointed to, and indeed as the UN Secretary-General keeps imploring the planet to notice, emissions keep going up. They go up in New Zealand every time there's an aspirational statement made about action, the graph keeps going up, and each time one of these companies has said, we are going to cut or change or migrate, we don't see a profound drop in emissions. I accept that those are matters for trial but some key points that emerge from this are Fonterra is causing emissions in a, just dealing with them briefly, in a range of ways. It burns a lot of coal. It has publicly stated it will divest, it hasn't done, and as the Court will know one of the points Mr Smith makes, and he's not alone in this, is that the greenwashing of emissions is endemic, and assertions of change are promissory and unenforceable. But Fonterra, therefore, has a mix of those emissions and of its methane emissions and other agricultural emissions that it enables or causes, which are outside the ETS, the latter.

Genesis is dealt with on the next page, and again just material emissions caused by burning coal, something that the international census, including as ratified by New Zealand, says has to stop.

Dairy Holdings, over on the next page, page 4, emissions from agriculture. Again excluded from the ETS and subject to extensive agricultural lobbying, which is pleaded later on as a cause of lack of regulation and likely continued lack of regulation.

NZ Steel, 800,000 tonnes of coal a year, or the capacity for it. Z Energy, a major purveyor of automated fuels.

Channel, and I'll just spend a bit of time on Channel and BT Mining. Channel and BT Mining will give submissions specific to their own position. Channel says it should not be in this claim because it no longer refines and therefore it doesn't cause emissions, and it doesn't own the fuel it imports, it's just the pipeline so to speak. To that it said the cause of Mr Smith's concern was never really the refining emissions, the amount burned to refine oil, of course those are bad. But the biggest problem was that NZ Refining then, now Channel, imports so much oil. He identified it in his pleading because it is a bottleneck, or a conduit for major emitting oils. It remains so. It says it doesn't own the fuel it's importing, it's changed its business model, it is literally a pipeline. As Mr Bullock will outline in specific cases in the UK, even the providers of sewerage pipes who were just the conduits, the sewage from towns, in the public good and to rivers, were not immune from suit because their pipes enabled the nuisance. Mr Smith says, same problem, and beyond that not much more needs to be said on them at the strike-out stage.

BT Mining makes a similar point in a different way. The Court will know that because of the interpretation taken by this Court in *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32, section 104E of the Resource Management Act 1991 prevented there being any consideration of the climate change payload of digging up coal here and exporting it. That's what BT Mining does. It says, well not all of it goes to China, some goes to countries that have climate change response plans. On China it says China said it might do something. Mr Smith pleads they don't, and they won't. So he says that is an unregulated by New Zealand emission caused by BT Mining. It is doing something that the assessment report says must stop. That the Secretary-General of the United Nations says must stop, that our Climate Change Minister says must stop, but that political intransigence prevents the passage of laws to stop.

1050

ELLEN FRANCE J:

Mr Salmon, the pleading is the majority sent to China.

MR SALMON QC:

Correct.

ELLEN FRANCE J:

There's no pleading about sending to other countries?

MR SALMON QC:

No, there's not but my learned friend for BT Mining have filed some materials in submissions saying actually some also goes to I think Korea and Japan that have some systems in place. The short answer for Mr Smith is none of those countries are cutting emissions. None have banned the burning of coal. So sending it there burns coal. But I note those because those two defendants, and they took these positions in some form in the Court of Appeal as well, say they're mistakenly included, they're not.

Just a brief moment in reply, please. The defendants say generally how unfair to handpick these ones. They are 30% of New Zealand's emissions but there are others. If they're joined there are problems of apportionment and all of these in terrorem arguments, it's slightly unfair to call them that, but arguments as to problems arise.

WINKELMANN CJ:

So can I just clarify, you're saying that the burning of their coal offshore is still something that can be taken into account in all of the causes of action?

MR SALMON QC:

Yes.

WINKELMANN CJ:

Because it's?

MR SALMON QC:

Because it only happens because it's dug up.

WINKELMANN CJ:

And what of the extra territorial aspects of the nuisance and…

MR SALMON QC:

The short answer that that your Honour is, that at trial Mr Smith will lead evidence showing that extra territoriality doesn't apply to $C0_2$ emissions. That they are everywhere the moment they're burned and so if New Zealand allows, if the Courts allow or legislature allow, or both, a party to dig up coal and send it elsewhere, it is harming us just as much as if it were burnt here and the extra territoriality problems of the burning do not collapse the essential causative link of, digging it up means it gets burnt. So no coal, bar a few that's used to squash and make diamonds, is dug up for anything but burning.

WILLIAMS J:

What was the basis on which Royal Dutch Shell's external provision of fuels external to the Netherlands was said to be controllable?

MR SALMON QC:

Simply that Shell had, you're talking in the *Millieudefensie v Royal Dutch Shell* case?

WILLIAMS J:

Yes.

MR SALMON QC:

Simply that Shell was causing harm and had to stop.

WILLIAMS J:

So the issue didn't arise as to whether it was possible to do it?

MR SALMON QC:

Well it wasn't successfully raised, at least I would have to check with Mr Bullock whether that was argued, I forget now, but certainly it's not a barrier. Shell was told it had to limit, and in that case in my defence the Dutch courts not only found no issue dealing with those territoriality problems, but they also dealt with the argument which states and companies put up again and again, which is it doesn't make a difference others are doing it, and I'm only X per cent, and the Dutch court said that is just no answer for this type of problem. It's actually an answer that's, on public policy grounds, one would think abhorrent, which is everybody's harming, so I'll do it too, it's a keep off the grass problem. Douglas Kysar in one of his papers that several of us refer to, the guy who says tort either redacts or perishes, talks about it being the sucker's bargain. The fear that we will be the person who stops emitting first, and maybe has a brief moment on the balance sheet that suffers, and he says there's honour in taking that sucker's bargain because the alternative is you kill us, and quotes Alexander Solzhenistsyn saying that the lie come into the earth but not through me, those are his words. They're profound words because as the Dutch court has said, what sort of answer is it. Whether it's a Rwandan massacre or in climate change, just say everyone was doing it.

I just want to say a bit about why these defendants were chosen because the suggestion is it's both unfair –

KÓS J:

Before you do, happily, for reasons of apprehended bias, I don't see my name in the list of defendants, Mr Salmon. Now you'll be pleased to know I have an electric car, but I also have a rather smoky Land Rover Defender, and my question I suppose is where your list stops?

MR SALMON QC:

Yes, and in part we say that it can be dealt with on a question of materiality and de minimis and Mr Bullock will speak about how nuisance dealt with that, one is on the road, one breaks down, not a cause of action for nuisance. One digs up the road, it is. It's one of those questions that sounds hard, we say, in the abstract. It's raised as a problem and it was put to me in a fairly rugged couple

of days in the Court of Appeal that this was an impossible line to draw. A character building couple of days in the Court of Appeal. But it's not. It's a problem that seems hard because we're imagining every case and not this one and the usual answer to flood gates problems, and the one that this Court has given in various leaky building cases, is those in terrorem or difficult arguments, or those difficulty hurdle problems that might occur in another case aren't here today and they can be worked out. We would say a de minimis answer quickly deals with that but there are other possible ways of –

WINKELMANN CJ:

Is there a way of distinguishing on the basis that, I mean, everyone emits because it's part of the human condition? We have to be warm in our homes, et cetera. But what about the notion that people whose business is dependent upon something which is significant or, and I also ask you at the same time whilst I'm asking the question, there's also evidence, isn't there, about the mass, the gross emitters.

MR SALMON QC:

Yes. A number of those and one way I sought to put it for the Court of Appeal was industrial emitters or enablers of emissions, and that might be another way. Of course, a component perspective, which is partly pleaded for Mr Smith is, it's true we each emit but most of that is because we are locked in a cycle of fossil fuel dependency which is forced upon us because industry has lobbied for it and the American lobbying of course is notorious. There's been fraud cases brought in relation to oil companies deceiving the market about climate change. Here we say there's active lobbying and the agricultural lobbyers, New Zealand's strongest lobby by far, not just because of its size but of course because it's consolidated into one force. It doesn't have the same problem lobbying under the Commerce Act 1986 as a more diverse market group would be. So that is our strongest lobby group and that is where we're failing worst in emissions. But a part of Mr Smith's claim is that these defendants are part of lobbying activities which cause us to continue to be emitters. So it's true that, of course, we heat our homes and some of us might burn gas, but gas is being promoted, and indeed advertised, as a good way to warm our homes and

regulation has been delayed. Mr Smith says it's been delayed in part because of those defendants. So it's important I think for us to just step slightly back from the assumption that we're all part of the problem.

WILLIAMS J:

All of that argument is true but you still run in with the problem that you're saying the Court gets to define damage and where the line is between, you know, in a physical collision sort of case place it would be a lot easier, a scratch on the door isn't, a head-on is, and that's kind of obvious as you can see it, and you're asking the Court to define damage by reference to numbers that need to have some connection to actuality.

MR SALMON QC:

Yes.

WILLIAMS J:

Otherwise you're, you know, they're just numbers on a whiteboard, they mean nothing.

MR SALMON QC:

Yes, I don't shy from that, Sir, but I'd say not just numbers but activity or means of emitting or causing emissions. By that I mean, and I was coming to explain why Mr Smith chose these defendants. He chose them not because he attempted to have every possible defendant before the Court, he plainly didn't. He'd need about 15, as you will have seen, to get three-quarters of our emissions. But because these are bottlenecks or conduits, the key areas of emission, so he has named the crowd who bring in most of our oil that gets burnt, because that is a place of duty to be housed. People who bring oil into New Zealand. He's targeted someone who digs up fossil fuels, because that's another key link in the chain. Break that and no one's burning coal, for example. He's taken the people who actually retail and sell petrol and advertise and encourage us to use more of it. Again, break that and they problem of downstream burns of petrol would fall away, and so on. So what he sought to do is, in the hope that he will have a hearing where the Court can grapple with

if there's to be a duty or possibly a duty, is it really such a big problem to identify to whom it might attach when the question of to whom it might attach, despite what my learned friends say about never going near policy, has always been a policy decision, always. And Professor Gardner says this again and again. What is relational? How far does the relation go? It's a policy decision. All of these are policy decisions.

WILLIAMS J:
How will I get my number?
1100

MR SALMON QC:
Your number?

WILLIAMS J:
Where's my line?

MR SALMON QC:
Your line might be commercial purveyors of fossil fuels.

WILLIAMS J:
But on what basis would I draw my line there?

MR SALMON QC:
De minimis perhaps, Sir.

WILLIAMS J:
Well, that's a word but what's the basis?

MR SALMON QC:
Well, it's a word but without for a moment suggesting that it's not an important discussion to have. It's one that was had in the nuisance cases.

WILLIAMS J:
I mean, basically that is, it's not big enough.

MR SALMON QC:

Yes.

WILLIAMS J:

Well, it's not helping me here.

MR SALMON QC:

It's not big enough or it might be that you are not causing or enabling others to emit. You're the cause of multiple emissions perhaps would be another way of drawing a bright line between the defendants and Joe Blogs.

KÓS J:

Well, that's a question of who the cause really is. I mean, you're attacking these defendants but in a way they're a proxy for us. Let me finish. Your attack is on a failure to act politically in a sense. You make that point several times. But that's an attack on the consumer. It's the consumer that's failing to achieve political action on this. It's the consumer who demands the products to put in the back of their tank and to keep their houses warm.

MR SALMON QC:

I'm engaged with that, Sir. It's a core concern. Firstly, this case is not an attack on a lack of regulation. This case mounts the factual proposition, with pretty good evidence, that the Government will not act. That's the key point. So it's not an attempt to push for policy reform. It says as a pleaded fact the Crown and the legislature will not act so this is going to happen. Secondly, he says, lobbying causes it to continue and subsist. Now, the Court might not agree with that, but it is a factual allegation. But thirdly, as the Court will know and has observed, or may know and have observed, the industry response to attempts to curtail emissions began with denial of the science. Then it began with minimising it and its moved and moved and moved, and now where it is, is with aspirational statements, my learned friends make them responsibly, we are committed to being a part of transition et cetera, et cetera. Unenforceable future statements. But also, and this is written about extensively, a campaign of persuading people that the problem is at the

individual level. That it's my choice as a consumer to drive a car and, therefore, attacking the oil companies is unfair to me. Now, that is contested as a matter of evidence and a key answer to the question from you, Sir, and from Justice Williams, is we need evidence because we assume these things. The reason I drive a car, Mr Smith says, is because I'm trapped in a socio-economic context dominated by the world that the emitters, or the causes of emitters has established and are seeking to perpetuate, and I don't lose by losing petrol. I keep buying it because it's there and because it means that the roads are too full of cars to do anything else. But if, in the hypothetical, this city did what civilised cities in Europe are doing and stopped motor cars in the middle, my life doesn't get worse and I don't insist on keeping driving, I am inheriting a system where that's the inevitable thing to do. So it's true that one can say each individual is an emitter because we are the end consumers of all corporate products, it's people. But it's not true to say that that is of a level of willingness, significance or when one has regard to how losses or liabilities are allocated, policy such that one should attach liability there.

But really I think the question is, not are we saying there should be liability attached to individuals because we're not. The question is, does that observation that one might say there's a continuum of emission or caused emissions that goes all the way down to the atomistic level as individuals, is that a reason to do nothing? And I think, respectfully, that's the rhetorical question that underlies all of this. Mr Smith's claim says that nobody's got climate change, nobody is doing enough, and he's not alone. He says the efficient and effective way to intervene for the Courts is to stop it at key source points and then it all falls away, and he's sought to present some of those to the Court. Some are duplicative, for example Z sells some fuel that's brought in by Channel, but between them that's our motor cars. That's why it's impossible to catch a bus in Auckland, and if it went away it would be possible and easy tomorrow. Or to ride a bike safely, the things people can't get their children to. Now these are details for trial, but they highlight the danger of saying we will do nothing because there's a trial question about who is a proper defendant and where the delineation is, that seems hard from a distance. The answer is evidence and evidence that enables the Court to do what it does

at the second stage of the tort enquiry, which is to say, for example, who is best placed to control this? That tells us a lot about who should be a defendant because, of course, the individual has very limited agency over their lives, especially the poor, they are trapped. To get to their job right now they have to drive, they'd love to stop.

So in terms of vulnerability and ability to control, classic second stage considerations, well, one can easily see you don't shine the spotlight on the individual. But also in terms of economic efficiency, the evidence Mr Smith will lead at trial, and it's overwhelming, is that these are the real cause that can be stopped and must be stopped and the rest will be easy.

So those transitions that we're failing to make cannot be made while the industry spin of the individual needs to change, the greenwashing that says, buy reusable plastic bags, all of this stuff, it is well written about that it's a distraction technique to stop structural change to save the planet. So none of that is to shy away from the fact that that is a discussion to have but it's a discussion that had in the strike-out stage leaves me at the risk of then saying well, that's evidence from the Bar, and it is, but that's the point that this Court needs to understand systemically how climate change is caused before saying its impossible to draw a line. Otherwise, as Justice Williams says to me, they're just numbers from the Bar. So we would say this exchange is a striking example of questions that are properly dealt with at trial, first because they require evidence and they warrant proper understandings of cause and effect and of efficiency and so on. But secondly, in the negligence context, they're stage 2 policy factors.

WINKELMANN CJ:

Can I just ask you what the evidence would be? What would be the categories of evidence you would see that would assist with this?

MR SALMON QC:

With which part? With identification of the defendants? There would be an expert evidence –

WINKELMANN CJ:

Yes, well the way you framed it because it's not, you don't say it's just that you're identifying the defendants, you also say that the whole issue of proximity and causation has to be analysed within this broader picture you paint where consumers are being manipulated, I think, into making the wrong individual choices. So it's not –

MR SALMON QC:

Perhaps manipulated I wouldn't say alone, although there is manipulation, but also they are inheriting a default where its inevitable.

WINKELMANN CJ:

It's systemic.

MR SALMON QC:

It's systemic and it won't change. So one piece of evidence will be, this will not change, given there won't be legislation Mr Smith says, this will not change short of upstream orders that stop the fuel flowing and/or cause it to internalise the presently externalised harm it causes.

KÓS J:

But that's the consumer's choice. It's also their economic choice to purchase and it's their political choice not to vote for political parties that might make a change to that.

WINKELMANN CJ:

Yes, so I think we've already gone through that. So can we just have the list of evidence so –

MR SALMON QC:

I will answer you, Your Honour the Chief Justice, by just very briefly, those will be arguments for never having a rāhui as well, in answer to Justice Kós. We would never have a rāhui because these are people who are doing it and that is a perspective on relief and a perspective on harm that is not mission fit

for this environmental problem. So to answer the Chief Justice, the evidence would be a series of partly expert evidence and partly evidence about what's said in the international instruments showing, firstly, the science that the effects direct et cetera et cetera. Secondly, what must stop and it's not controversial that we must stop digging the coal out of the ground, and there's almost no end user who chooses to buy coal. It's industry and process, heat, steam and electricity.

WINKELMANN CJ:

Would the evidence cover the significance of the climate change impacts these particular defendants are involved in?

1110

MR SALMON QC:

Yes, it would. I wonder if I can better answer the question by jumping slightly further on in the statement of claim because we've usefully addressed this, but perhaps if I come to the harm over on page 7 and then I will just give an example of some of the sort of evidence about impact because my learned friends will say, well this is a drop in a bucket, this harm, and as the Court of Appeal says, Mr Smith suffers harm either way. I'll come to that too because it's slightly more complicated than that. But paragraph 58 of the amended claim pleads, and this is essentially just taken from a careful reading of the assessment reports: "Increases in temperature" et cetera "loss of biodiversity and biomass, loss of land and productive land… risks to food and water security" et cetera, "ocean acidification" and so on, and then inserted in the third to last particular: "The reaching of 'tipping points' which may cause the catastrophic breakdown of crucial environmental systems. An unacceptable and escalating risk of social and economic collapse and mass loss of human life and as further described in the reports of the IPCC."

Now one of the pieces of evidence is evidence that would likely be given by Professor Will Steffen, and I mention him because he's already given evidence in one New Zealand case and was unrebutted, that's in the unsuccessful

judicial review of the Auckland Council and Auckland Transport on the regional transport plan.

WILLIAMS J:

How do you spell Steffen?

MR SALMON QC:

S-T-E-F-F-E-N. But also because, and really this is a convenience point, in the Australian case of *Sharma* there is a really quite impressive judicial summary of what he says, that is similar to the evidence he gave in the Auckland High Court, and I'll just go to, my assistant might bring it up, to the *Sharma v Minister for the Environment* [20211] FCA 560 case. Now as we've each pointed out this decision was overturned on appeal in Australia but this involved a finding, the *Sharma* decision in the first instance that the Minister owed a duty of care in relation to the proven extension of a coal mine, a discrete amount of emissions. The Court has probably read the decision, or at least a number of you. What I'll just go to is a summary of the type of evidence that Professor Steffen gave, and it's just one example, but it's the first layer of evidence to answer the Chief Justice's question as to type of evidence. At paragraph 29, I'll have to assume the screen has that, of the trial judgment, so my assistant has pulled that up. Do you see that on your screens?

WINKELMANN CJ:

Yes.

MR SALMON QC:

You do. From 29 he deals with the risk of harm, and I won't go through it in detail, but over the next page, top of page 9, he deals with two parallel strands that Professor Steffen says represent the way the Earth might go. Now I note this was unrebutted and unchallenged, and it's been unrebutted and unchallenged again in the New Zealand courts, and it represents an attempt to explain to the Court in layperson's language what the reports say. He says, Professor Steffen, there are two ways in which the Earth might go. One is a linear increase in temperature in which one has a bit more sympathy for the

idea that any given hundred megatons of carbon dioxide might not be that great, we might get there anyway, a year later it might speed up a bit but that's all. But then he deals with, and this is the bolded words, with "Hothouse Earth" and he says that the Earth is already on a path, at paragraph 31, where we won't under two degree. Now that's calamitous. It's calamitous in a way we don't properly imagine, and I'll come to what it means for us. But beyond that there's a risk with hothouse Earth that we have an exponentially increasing risk of the Earth being propelled into an irreversible four degrees trajectory. Now thinking fast, as my friend would have it, four degrees isn't that much. We have those changes, I'll come to what it means and why the scientists are universally terrified and despairing. I'll come to what it means. He summarises in some detail that the IPCC do as well.

The judgment then goes on, and it's worth reading in full when the Court has time, just to get a sense of the type of evidence and the reasons why our assumptions about causation are importantly informed by a trial. He deals with the impact of temperatures and then over at 42 talks about a continuing rate which would see the temperature reads about five degrees at 2103. Again I'll come to what that is. But then over the page on 11, refers to the "tipping cascade" and here he talks about feedback loops and sinks that mean at a certain point, soon, we reach a point where tundra defrosts, and/or the Amazon burns, and/or ice melts, decreasing the ability of the Earth's systems, the ocean and soil, to sink carbon, and this isn't controversial, this is orthodox science that would pass the *Daubert* test that now applies in New Zealand, and it would be unrebuttable by any evidence it doesn't, and that too is a point made by the academics in some of those papers in our bundle. This is solid science. It's also ratified and accepted by New Zealand, but at some point we tip over and irreversibly go to hell in a handcart.

Now it's quite hard to see his map at the bottom of the page, which is showing on the screen to you now, or at least it is on my version with my eyes. He goes on over the next page to graph how emissions have changed. At paragraph 47 you'll see fossil fuel just exponentially taking off after the war, and the atmosphere and land and ocean sinks being the breakdown of where it all goes.

So the atmosphere is where it's dangerous. The land sink and the ocean sink have absorbed a lot of it. But that changes and so the climate change that we already have now and what is, as the scientists say, baked in. The sea level changes to come and the temperature changes to come and the climatic changes to come, if we stop right now, reflect that atmospheric part. But we are heading towards what he says is a feedback loop that collapses those carbon sinks, and that's at 48 and 49.

Then over the top of page 13 talks about forest dieback and there is just one small example of a small factual piece as to why New Zealand's response to climate change is so alarming. Our approach to revolving climate change involves buying foreign credits, based on forests, and planting forest of fast burning eucalypts and Pinus radiata in dry parts of New Zealand that don't support dairy. That's the plan. And they are going to burn down. Lots of them. So our attempt to have net zero, which isn't even a real target, and my learned friend Ms Cooper and Mr Every-Palmer can speak to this with more authority having done the judicial review, the scheme is hopelessly based on the delusion that forests are viable when we are heading, as Professor Steffen says, to a world where they're going to go.

So he then talks, over the balance of that page, about the feedback loops causing interconnected responses that cause what he calls, at 51, a rippling effect on others, with the result that "humans will lose the capacity to control the trajectory of climate change", and he draws a picture, quoting the judgment, but I won't take you through all of it, but jumping over to page 18, he draws a picture of the Earth as a little marble rolling down a valley in which, you can see it there, in which we were and could have been on the left-hand side, rolling down that valley of time where it's cool and we can live, and he draws the Earth having swerved off into an ever deepening valley of warming, this is just an attempt to get us to understand it, and where the Earth is now is down the middle of that, and what he's depicting is that to get us back to a world that's terrible, but liveable, not good, we can't get there anymore, the harm has already started, to get back to a world where we might maintain civilisation requires pushing that marble uphill, today, but that every day goes past, it gets harder. So every day

that these defendants externalise and socialise the costs of their harm, is a day of more harm correcting it. It's not a damages problem, but a conventional tort case where one injury is felt. But you'll see the topographical map of that valley on the right drops at some point, and it drops soon.

So he would be explaining to the Court, for example, what that means and how imminent those changes are, and just for a sense of what he says even a two degrees world is like, at the bottom of that page he summarises things that would start to happen with a two degrees world. Now he says it's essentially inevitable now. We talk about one point five degrees but we are truly aspirational there. But you'll see over the next page at the top, the next bullet point is: "99% of coral reefs will be dead from severe bleaching." That's food in the Indian Ocean for the coastal people gone, just like that. It's going to happen, already. But that's small there, that's just one example out of those bullet points.

If we scroll down to a three degrees world, over on the top of page 20, and they're focused on Australia here, but the judge found this to be a basis on which to say there was a causation basis to conclude that there was a duty that engaged.

Many of Australians' ecological systems would be unrecognisable. Water resources leading to increasingly contested supplies. Many Australian cities, third bullet point, would be extremely challenging to live in, high fire danger and so on, and then he deals with the four degrees world and that's from the bottom of that page over onto page 21. We see the Amazon savannah tropical drylands too hot and dry to live. Global or economic collapse. Major coastal cities on all continents become uninhabitable. Now that's not hyperbole. It's just the science. *Daubert*-qualified science as to what is being caused if courts and governments are going to fail to act and governments have and will, and one just has to pause and think about the type of systemic collapse that is contemplated here. We've heard nothing but alarmed news from economists about the financial pain caused by shipping bottlenecks as COVID

has slightly slowed ports. He's talking about no ports, and that's again just one example.

Another failure of the monsoon, the third to last bullet point before he gets into Australia. Most of the people, or more than half the people in the world live within a small circle one can draw around China and Indonesia and a bit of India. The monsoon is what causes the rains to make their crops grow. He says the glaciers alone, second to last bullet point, provide the freshwater resources for over one billion people at risk. 1.8 billion people live in areas that depend on the floodwaters from the Himalayas. 1.8 billion. These are changes that upend the world and, so on he goes to explain why we do not live in the world that one imagines when thinking fast where as the Court of Appeal said, and it records him as making a concession about the but for test and what would be caused. It is true that Mr Smith suffers harm and has suffered harm and will suffer more harm whether or not these defendants are stopped, but they make it worse, and thus this harm is properly seen and that of its people not as a discrete, finite piece of harm in our collision-based 19th century world, he broke his arm falling off the cart. This is a strange mix of cause and effect and harm that requires a court to have evidence and think slowly about. It's a strange mix of the 10,000 straws that break the camel's back and a death by a thousand cuts in the sense that each of these is putting a straw on a camel's back and might be the one who makes it collapse or at least is one of them that is added to the collapse and in that sense the first instances court in Australia said well Professor Steffen persuaded me that that is a link that the law should respond to.

But it doesn't end there the complexity of this problem because it's not that the camel collapses and dies. We're talking about how bad will the harm be with every extra straw making it worse. So it's both a significance of the straw and each straw put on the camel's back problem and the scientists help us see how vital it is now. It is knowingly much more dangerous to put a straw on a camel's back now than ever. It's legs are shaking. But also that the harm being caused is not a one-off event that was going to happen. If Fonterra doesn't put its straw

on the camel's back someone else will because the camel's collapse could be quite bad, very bad or terribly bad along a very long continuum.

Those are things that are just not properly dealt with at the strike-out stage. It's not proper that the Court have me seeking to convey evidence I can't lead to help the Court see that this problem involves real harm that each emitter is causing and it is not appropriate that the defendants get to stand up in front of a busy appellate court and say either this would apply to all consumers, it's unworkable, without time to tease that out and consider it the way tort duty should be looked at. Or this would happen anyway. The but for test isn't satisfied. Those aren't accepted as matters of fact.

Just before moving on can I go to another point that just –

WINKELMANN CJ:

So that's your list of evidence, where you were taking us through –

MR SALMON QC:

Sorry, my apologies.

WINKELMANN CJ:

So this is what I've got noted. Is evidence under the headings this won't change short of upstream waters that stop fuel flowing. Because I mean obviously the evidence that would be led is critical, you know, in a strike-out.

MR SALMON QC:

Yes.

WINKELMANN CJ:

Expert evidence as to international regulatory schemes. Expert evidence as to effects. Expert evidence as to what must stop for the middle path, Professor Steffen's middle path to be accessible to us.

MR SALMON QC:

Yes, and then expert evidence modelling the particular impact on risks of following the tipping point path of stopping these emitters, and then ditto seeking to granularize, so to speak, the extent of harm caused by each extra emission, and that's dealing with a foreseeability issue that is problematic, not in the legal sense, but in the sense that we are talking about degrees of terror or awfulness. The US Secretary-General's called it collective suicide, but it's not quite. Many, start to die, many rights are lost. It gets worse and worse the more. So there will be evidence on that.

WINKELMANN CJ:

Expert evidence on what, sorry, Mr Salmon?

MR SALMON QC:

On the extent to which each additional tonne of $C0_2$ adds to the level of pain. The point being the suffering from the tipping point path is accumulative, and so an attempt to identify that.

WINKELMANN CJ:

And would there also be expert evidence on the role that each, on the impact of each defendant's conduct?

MR SALMON QC:

Yes. Related to that though, Mr Smith doesn't envisage that the case stops by just enjoining or declaring the wrongdoing of these particular defendants and there's evidence on this too. He's picked one service station company but inevitably he would apply to attach them all into others if they didn't fall in line with it, if he succeeded at trial. For obvious reasons of attempting not to burden the Courts, he's not done that all at once. He's seeking to have these, not as representative defendants, but as defendants that enable the Court to have the factual footing to decide how and where, if at all, to order relief.

ELLEN FRANCE J:

Sorry, what are you saying would happen subsequently then?

MR SALMON QC:

Subsequently if the Court, for example, issued a declaration with injunctive relief restraining the importation of fuel oil, or the digging of coal, other importers of fuel oil, and other diggers of coal, would either react to meet the spirit of this judgment, this Court's judgment, or would face proceedings which would compel them to do so. In other words, the evidence would seek, in addition to showing the impact of stopping these emitters, would have evidence on the impact of the consequent halts in emissions. Just in case it's of assistance, given the Chief Justice I can see is taking notes on some of these, paragraph 62 of the statement of claim identifies some of these points as pleaded points and pleads why this will have effect. They're material (b) requiring them to stop "will have flow on effects of requiring other emitters to stop (whether voluntarily or by orders in other proceedings); and (c) climate inaction across the globe is interlinked. Liability and relief in this case will have effects on the cohort of emitters, and that's a pleading that reflects real world experience to those of us who have worked in the climate change space, which I've hung around litigation for nearly 20 years now.

There has never been a case that has so many foreign emails from foreign lawyers to me as the *Thomson* judicial review because it was watched and reacted to in jurisdictions around the globe and just as *Vereniging v Millieudefensie v Royal Dutch Shell Plc* ECLI:NL:RBDHA: 2021: 5339 has prompted action around the globe, we have a role as a country to recognise roles and make declarations if need be or injunctive orders about these. That has effects on how other countries respond, and we're about to go to the break, but if I can just bring that back to Douglas Kysar's observation about the sucker's bargain.

There's some metaphor, I don't know what it is, for the problem of no one acting because that doesn't do enough if I don't, an argument that the Dutch Courts rejected. Whether it's no one wants to be the first nudist on the beach, or the sucker's bargain, or whatever it is, someone has to go first and it's not a mistake of policy or law to recognise that it could be us. Mr Smith says it's a positive principled decision that reflects existing and orthodox rights to be the first to

acknowledge we're measuring harm wrong and we're considering the ecological impacts of harm wrongly, and we're defining tort supervision of conduct by a modern Lothian classical liberal notion of individual entitlement to sue instead of by looking at, it is the law of wrongs and once one looks at what the harm is, which is a loss of ecology, the question of what orders should be made are not governed by those that attach to damages calculation problems but are ones about effectiveness of relief. That does take me to 11.30, if that's a convenient time.

WINKELMANN CJ:

We'll take the adjournment now, thanks.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.49 AM

MR SALMON QC:

Your Honour, I thought I would use the break to try to assemble a quick answer, efficient answer to your question about areas of evidence and it's very much high level. The first is on the state of the science. The IPCC's reports are the most extraordinary in the sense of the number of people and experts' reports ever written but they are inevitably therefore late and the science position gets better and better from the perspective of someone wanting to prove the harm day by day, so there would be updating evidence on the scientific picture that would take the IPCC reports and supplement them.

1150

There would also be evidence that would respond to the defendants' suggestion that there is a scheme that's going to work and that's going to do something and that's not true as things stand. The climate lawyers will speak to that as well. But if it were true that tomorrow is the day we start making progress, a submission that effectively was made before the Court of Appeal, we will know that if we have a trial by the time we get to trial and nobody who studies these matters would I think expect it to be the case. In that respect there will be

evidence on psychology and human behaviour that will feed into any policy decisions about where relief might be effective and not because one suggestion is about effectiveness of relief and about the suggestion about individuals acting. As well –

WILLIAMS J:
What – the psychology of human behaviour as consumers?

MR SALMON QC:
As participants in a harm-avoiding world or where harm is suffered, the point being there Sir in the same way that we never say it's a defence for tobacco companies that people smoke or that people chose to be near a smoker and have second-hand smoke in their house. Humans are imperfect and imperfect at understanding science and risk. A lot has been written in terms of admissible academic material that's been written about people's inability to understand the climate change problem and what needs to happen in a way that informs their voting or their behaviour. That is not a reason to come back to Justice Kós' questions, that's not a reason to decline relief. It's rather a reason to recognise nobody's got this, to paraphrase one of my friends before the break. Parliament doesn't have it and there will be evidence on the political facet there. The short-term reason that has typified parliamentary responses is well-studied and there will be evidence on that, but there would also be evidence showing that the politicians psychologically but also humans don't understand this risk.

To give just an example, there are queues of SUVs dropping children off at schools around Auckland every day because parents are concerned about the safety risk for those children on the roads. The safety risks are empirically de minimis compared to the risks of climate change which they fuel with their cars. We cannot expect humans to respond to this problem where they know it's hopeless and where they don't understand the problem, it's not visceral. So whereas for example, and psychologists show this, finding out that something is carcinogenic or that there's asbestos on the land in some way in a limbic brain or somewhere, I'm not the expert, resonates with a human and they can change their behaviour. We are seeing it not happen in climate

change. The evidence would by why that will continue. In other words, why in our constitutional apparatus we can't expect people to vote on it. We can't expect politicians to do it. The one place where empirical decisions are made on evidence, hard decisions sometimes, but where the actual evidence controls the outcome in a calm and empirical way is here and reflecting on something written previously on these topics, the Courts are good at it too. They're good at understanding scientists and they're also good at understanding time and damage and discounting future economic loss but also comparing economic loss to more fundamental losses like loss of rights.

So evidence about the difficulties of anyone doing it and the likelihood that no one else would do anything, that will feed the Court's consideration of not just where one might draw a line if a duty is engaged, outside nuisance of course because there's no line to be drawn there, it's just engaged we would say, but where one might draw a line, utility of relief and those second stage policy factors.

The next topic for evidence and I'm trying to think, I think the last time I did a novel duty case was *Strathboss* in the Court of Appeal where one of the first questions I think your Honour Justice Kós asked was was there any economic evidence that would be helpful, and I'm not suggesting that's necessarily the case here but there will be economic evidence advanced and it will show some things that are trite. One of them will be that the Court of Appeal was just plain wrong, that there's downside in acting, empirically wrong. Another will be that the Stern report which –

GLAZEBROOK J:

Sorry, I didn't quite catch that evidence.

MR SALMON QC:

Empirically wrong in saying that there is a counterfactual, that in the counterfactual there wouldn't be pain that will be suffered under acting. Mr Smith's case is everyone, everyone will be better off if we act, even those enjoying the corporate profits right now. They may not know it but they, if they

understood the problem would abandon the profits now and stop. But human psychology. But on economics the Stern report in 2006 recognised, and I forget the exact numbers, but this is a stitch in time saved nine problem. A dollar spent now, stopping emissions, saves us tens or hundreds of thousands of dollars not at some future dates that we can discount away into oblivion, but soon. So, to the extent the Court on a policy level wish to have economic evidence, which it can't at the strike-out stage, Mr Smith says that evidence will provide strong and useful footing for the Court to observe or make important conclusions about economic efficiency of allocation and injustice in the event that it's not done.

Related to the second point, there will be evidence showing that the harm that is being socialised is irrecoverable. There is a charming cartoon that popped up in *Punch* or somewhere recently. Four children sitting around a campfire in a cave and one of them says: "Well, the world's been destroyed, but for a beautiful moment there, there was some tremendous corporate profits." And it's true. That's the analysis we're making. The traditional tort analysis would say well, a dollar now, we've got to weigh it up because it brings a benefit and there might be loss later, but it might be too remote. We're not talking fungible forms of pain. The loss that is suffered later is irremediable, non-financial loss of rights. Also financial, of course. But Mr Smith, I think it's fair to say on his and Ms Mako's behalf, they're not actually concerned about balance sheets including their own. They're concerned about the loss of profound human rights, and of nature itself, and that karakia that we heard at the beginning, which some might have understood the broad import of, and I broadly do, talks about the importance of holding up nature and protecting it because without it we die. These are immeasurable losses that the economists will recognise don't have no value, but have been improperly valued by tort to date.

The next point in which there would be evidence is tikanga. Now Ms Coates will speak more to that. She is, and I think you will be familiar with how the tikanga component in evidence can be dealt with, and was dealt with in the *Ellis* case. Ms Coates tells me the value of that process leading towards that hearing

was invaluable and I can't replicate it by reading. But evidence on tikanga generally and on remedies to help inform and correct an unduly narrow and financial loss focused view of the world of remedies. As well as particular evidence about Mr Smith's position, because he is an elder of his tribes, he does have obligations of kaitiakitanga. He does have cultural interests that are at risk and he does have a protected under the Bill of Rights, a hollow protection it turns out, given the strike-out in his proceedings, hollow in terms of responding to climate change, but he has a protected right to protect his culture, and so he should, and there will be evidence as to why that's particularly at risk and that evidence again is not controversial. The UN papers, the assessment reports, records specifically not just that indigenous people are at risk, most, but that the poor are too. Well, his people are both. But also they specifically identify Māori as particularly vulnerable, and beyond that, as I've said, it's Northland Māori who get it worst. So, for those reasons there will be evidence about the tikanga component and the cultural and we say legal interests that Mr Smith has, and is not only entitled to protect but has an obligation to protect as a facet of kaitiakitanga.

WILLIAMS J:

Is there going to be anything as relevant in terms of the actual impacts so far on Tai Tokerau or Mahinepua, where ever it might be –

MR SALMON QC:

I'm just having trouble hearing those words through your mask, Sir.

WILLIAMS J:

Yes, it's frustrating. The actual impacts so far on the environment over which Mr Smith says he's kaitiaki, and the evidence of iwi hapū related to that area as to how that is affecting their lives and how it's affecting the practice of their tikanga.

MR SALMON QC:

Yes, there will be, Sir. It will be partly expert and partly direct evidence.

WILLIAMS J:

Partly what, sorry?

MR SALMON QC:

Partly direct evidence, sorry Sir, I'll move this closer. When Mr Smith asked me about a mihi I had to explain it wasn't a chance for him to show the videos of people flooded out of marae and traditional lands, but that's a real Northland problem. I see from his postings he regularly captures evidence of those harms and losses of ability to grow or live from those. The seafood implications are huge and I know that from other environmental work I do. The changing landscape in Northland affects the entire food resource –

1200

WILLIAMS J:

I'm sure all, I'm certain all of that's true. I'm –

MR SALMON QC:

You're asking if there will be evidence –

WILLIAMS J:

– just interested in ensuring that the discussion about tikanga is not abstract –

MR SALMON QC:

No.

WILLIAMS J:

– and that the detail provided is detailed and tangible evidence, whatever it might be, about the state of the place and the effect on kaitiakitanga from the perspective of the relevant communities.

MR SALMON QC:

Yes, and it will be Sir. I skimmed over it perhaps but –

WILLIAMS J:

Just assuming you get to go ahead of course.

MR SALMON QC:

I'm not assuming that Sir of course but just because I skimmed over it a little, his affidavit gives something of a signal to you Sir of what might be covered. We've tried to respect the rules on, have respected the rules on strike-out. Mahinepua C, the land in which he has a customary interest has various facets that engage those principles including just for example, it's in his affidavit, sacred and ancient burial grounds, but is also a last resort place he says for displaced and homeless people from his people. So it has a legacy of traditional, customary and other interests as well as having particular value right now. In my submission that might be relevant too in the way modern tikanga responds in Aotearoa 2022. It's a place that is still left to assemble. So yes there will be evidence on that as part of that tikanga and factual harm piece.

Another point of course is that there would be discovery and we have pleaded lobbying efforts and so on to slow things down. We may see things there but the defendants may also have documents that bear on that. Before jumping ahead a bit I wanted to go with –

WINKELMANN CJ:

Well is that in addition, is that list you've just given us in addition to the list you gave us before?

MR SALMON QC:

Yes, it's my attempt to round it out your Honour. It partly overlaps but it's an attempt to round it out. Now obviously we're early in the pleadings phase and this is the biggest scientific ever in human history because it's the biggest problem ever, but it's not me dodging the question to say trial or show more science and more detailed science and give shape to things that at the moment I can only bring your attention to in a very general way.

WINKELMANN CJ:

Yes, well why I ask you of course is one of your arguments is that this all needs to develop in the context of the evidence, so evidence you say you're going to bring is pretty critical to your argument on strike-out.

MR SALMON QC:
Yes it is.

WINKELMANN CJ:
Mmm.

MR SALMON QC:
And of course in different ways. For tikanga it's a particular evidential problem flowing from the fact that that is law proven as fact as I understand it and you will have seen that we initially didn't plead it but the Court of Appeal suggested despite it being law it's probably properly pleaded, a pleadings procedural issue that is interesting to grapple with at some point. That's been pleaded now but needs to be proven and we accept, and Ms Coates will speak more about this, the ability to articulate that in the abstract is of little assistance to this Court when part of what matters is how tikanga engages, kaupapa and tikanga engage with this particular problem in context. Now I've put that very poorly and I apologise for that but the point being for the tikanga it plays its part of enabling the Court to make a legal decision even assuming everything else we plead is correct.

So in that if one just thinks in terms of negligence and novel duty in the negligence context approach is at that second stage this is the most evidence-rich second stage inquiry that I can think of in any case in terms of the policy components and so on. We say for reasons you've seen it's not just foreseeable, it's foreseen and it's proximate because we back our evidence, our witnesses to prove that this is proximate in a sense that the law can and should recognise that failing to see proximity in relation is failing to understand ecology and we say evidence engages there, but at the second stage policy the economic components, the efficiency components, they are all informed by evidence, and I'll come to indeterminacy which we say respectfully has been misframed as just being a word that applies to large, but I'll come to that after my learned friends have spoken.

Mindful of time and of the hard deadline, might I bring up one other document that is no substitute for doing the unthinkable and reading the AR6 assessment reports, there's been three so far with the synthesis report to come, but Ms Sussman has brought up on a page from the first report from last year, so this is already understating what I think scientists would say is the picture we face. But on the first page she has now predictions of the various temperatures applying, just in a broad global pattern, and I just want to briefly look at these.

UNIDENTIFIED MALE SPEAKER:

Sorry, what page is this?

MR SALMON QC:

She's brought it up at 401.0053, my apologies, I forgot that it's not broadcast to everybody. So it's assessment report number 1, 401.0053, at 401.0072. Now these are fairly regularly republished but in a context where one reads the assessment reports and the language is responsibly scientific and arid, sometimes a picture helps, and I'm looking here firstly at the temperature change and how temperature unevenly changes around the world. You'll see, for example on the bottom right, the simulated change at four degrees sees remarkably more warm for the top of the world than elsewhere. It's significant in all sorts of places of well more than four in all sorts of places. So one thing is to understand how that impacts in different geographic ways. Now that's just temperature, and humans can survive in a lot of the planet if all else remains equal and just the temperature changes. In other words all the food stays the same and humidity stays the same.

WINKELMANN CJ:

I just make the observation you can't really see what's going on in New Zealand on these programmes. You're just –

MR SALMON QC:

No you can't, and I tried to find a New Zealand specific one. I think because we're coastal it's extremely hard to be precise. I won't take you to it because I just don't have time to do it all, but Northland, for example, they think gets

somewhat drier and much more storms, but because it's a coastal country where the influence of the sea affects moisture so much, it doesn't make my general point, but my general point will become clear. If we go to the next row, and I'll as Ms Sussman just to bring that up, you'll see the precipitation changes. Now we know that it needs to rain to live, and we can see that some places get drier at 1.5 degrees, we're not going to have 1.5 degrees it seems now. We might have only two degrees if we stop now, but you'll see a drying around the Mediterranean that would be profound, and then at four degrees extensive drying in some odd places, and there you see why the Amazon is gone in really both scenarios of two and four degrees. Just to take one example of a massive carbon sink and why the professor is scared. But here's the most frightening one. If we go down just one more, can reflect on the world as we know it as an interconnected full place, teeming with people with last minute supply chains and where a small land war in one country causes a grain crisis in Africa, and look at what happens to soil moistures. You will see by two degrees the tropical forest of Central and South America are gone and much of America has the droughts that they're now starting to write about coming now, fully embedded. Spain, Turkey, Italy, Ukraine have trouble growing things, and the places that are getting rain in part are places that do not want it for a reason I'll come to.

But then one looks at four degrees, or even two degrees, and asks this question. What happens in China when they can't grow food? And they can't grow food, as this happens, and remembering that the predictions that Professor Steffen makes include that the icecaps that feed the river waters into the Yangtze and into Pakistan and into India are gone. There is both not enough soil moisture and not enough river to irrigate. Now there's a circle drawn on a map called the Valeriepieris circle, which is a circle encompassing 4,000 kilometres of radius of ocean and land above China that has half the planet's population in it. It's just a thing people draw a lot to remind us of how many people live there. That's too dry now except for India and Bangladesh, and again thinking fast one would say, well they'll grow things, but if one reads the reports one sees that humidity in the hot places becomes deadly, and the reason for that is humans can live in a perfectly dry world at 50 degrees, but as humidity approaches 100% sweat doesn't cool the person anymore, and we

measure it with what's called a wet bulb thermometer, all in the reports, but just an example. The wet bulb temperature at which my fit 22 year old son can survive is under 35 degrees. At 35 degrees he's dead in approximately six hours if he sits still, because the human body needs to cool by sweat. Those are predicted to happen around India in the wet areas, Bangladesh, the Ganges Basin and all sorts of places that are hot but not yet too humid with the result that anywhere where you don't have air con that survives the surge in power demand, it doesn't matter what you do.

1210

Shade doesn't help, running doesn't help, a fan doesn't help because water can't evaporate to cool you because the moisture is already saturating the air. Everybody there dies, healthy or not. Those are the perils of a planet that's not that much warmer and more humid. So we see a converging set of disasters, one of dryness and no growing, and the other of unlivability far sooner than we think. Again, not science fiction, nothing surprising. But in explanation as to why, if one deals with these scientists, and it's a two-edged sword doing so, they are terrified and despairing at the lack of action.

The final piece before I move on, but just a sense of where this sits and how it's perceived, is to note the way the UN Secretary-General introduced the second AR6 report, this is his speech of 4 April 2022: "The jury has reached a verdict and it is damning. The report of the IPCC is a litany of broken climate promises. It is a file of shame cataloguing the empty pledges that put us firmly on track towards an unliveable world." He has since called it collective suicide but we can see, he's not saying baches are going to go, or there will be a few refugees. They see civilisation as properly at risk now, not from a Trump event, but from a loss of the very things that enable seven billion people to live in the world.

He says: "We're on a fast track to climate disaster jumping on after terrifying storms, water shortages, the extinction of a million species of plants and animals, this is not fiction or exaggeration, it is what science tells us will result from our current energy policies. We are on a pathway to global warming of more than double the 1.5 degree limit agreed in Paris. Some government and

business leaders are saying one thing but doing another, simply put they are lying and the results will be catastrophic. This is a climate emergency. Scientists warn us we are perilously close to tipping points that could lead to cascading and irreversible climate impacts. But high-emitting governments and corporations are not just turning a blind eye, they are adding fuels to the flames. They are choking our planet based on vested interests and historic investments in fossil fuels, when cheaper, renewable solutions provide green jobs, energy security and greater price stability."

Now, that's of course a speech but it's a speech of the UN Secretary-General reflecting the UN conclusions as to where the problems lie, and that's rather a device for coming back to Justice Kós' question about whether we should be acknowledging the problem is at the consumer level too, and whether that should bear on a duty. That's not how the scientists see it in terms of what response might work or where culpability lies, moral culpability and as for reasons that become clear when one looks at the evidence. But also they are not ones that actually I would submit resonate in law in the sense that if, for example, it turned out that the cars we drive emitted a carcinogen that would kill everybody in 10 years, there would be no hesitation I think for any Court in saying it should be enjoyed. We just have to stop, find a different way to travel like we always have and we have to.

There is something different about climate change not in the effect it has but in the conception of the harm in the links. So if I enjoined the fuel companies from supplying those carcinogenic cars, we would say well, that's a right that's fundamental, the human right to live, it's being protected and it would seem natural. We shy away from doing it for climate change because we are initially seduced by the assertion by the defendants that this is polycentric policy rich areas in which something is being done. But that's not true. It is a polycentric problem but as Mr Bullock's review of nuisance will show, all of the nuisance ones were as well. They absolutely were the biggest environmental problems on a scale that was bigger than the Courts have dealt with before, and again and again the Court didn't conflate or confuse a polycentric problem with what its response should be, and saying you can't cause harm, and harm a right, is

not a polycentric position to take just because the problem's polycentric. What it is, is a policy decision by the Courts to back away from the Courts vital role, in my submission, and this is now just a submission from me on this point, our balance of power assumes a functioning Parliament. Inevitably it does. Parliamentary supremacy assumes a functioning parliament, one that competently makes laws and one whereas some judges have noted if it went way off base the Courts might even supervise legislation, the slavery-type laws. A competent Parliament in the context of climate change is one that acts to save lives and Mr Smith says it's not one., and that is such an upsetting of the presumptions that underlie court deference to parliamentary policy. It's such an upsetting of the apple cart because this is an extraordinary time that it warrants care before deciding we'll leave it to Parliament. Because as my friend Mr Every-Palmer put it to me this morning, no one else has got this –

WINKELMANN CJ:

Well I think just to chase your submission, your submission is I think that it's part of the Court's constitutional role to deliberate and give reasons and that at this time this matter should at least be allowed to go to trial so the Courts can do that, deliberate on the arguments and give their reasons because deliberative reason giving is critical.

MR SALMON QC:

Yes, and that it is part of the Court's role and always has been to deliberate on breaches of rights and to protect those rights with remedies that reflect the nature of the menace and the nature of the rights being lost. With that I might turn to the brief detour through tort law in general the history. I'll just note you will have seen that the pleading, as well as having those provisions, those paragraphs which plead the ineffectiveness of the international instruments and of Parliament, go on to plead the inadequacies of the Climate Change Response Act and why the emissions trading scheme won't work. My learned friends for Climate Lawyers have got a lot of detail in that in submissions which I adopt. I don't seek to go over it given time but Mr Smith says they are right. It's utterly ineffective and won't work.

Then over on page 10 he has five paragraphs to deal with why he says government action will not be enough and those are worth I think reading in full. They include the propositions about short election cycles and political imperatives meaning action is always kicked down the road or, and I don't say their lives as the Secretary-General of the UN did but they often involve an aspirational target which if time allowed I would go through for this Court, every time the graph presented by the government shows emissions going down tomorrow and every time one moves on a few years and looks back in time they kept going up and they keep going up. So we plead how and why that would continue to happen.

I don't think you need to hear me on the strike-out concerns or the threshold and I think it's soaking up valuable time to spend time on it although we've listed is as a point I will cover. I would just refer the Court to what we say about the true purpose and efficacy of the Climate Change Response Act. If one looks at the purpose of the Climate Change Response Act not to qualify and bar all tort claims and it's definitely not that. It doesn't meet any of the conventional thresholds for negating a nuisance or even a tort claim but rather one of trying to express New Zealand's first steps, not even their first steps, a framework for taking first steps for doing what New Zealand has agreed is necessary to save life and limb. Then what is sought by Mr Smith is just consistent with the Climate Change Response Act to find more out of context and out of context for the Climate Change Response Act's interrelationship with those international obligations and conclusions is unsafe at the strike-out stage.

A second key point and I've mentioned this but I'll just note in the strike-out context, the Court of Appeal made a finding of fact. It was not perhaps dressed up as so but at 33 of the Court of Appeal's judgment it was said that what Mr Smith proposed was not efficient, effective or just, those being words from the Climate Change Response Act. That's not accepted as a matter of fact. Mr Smith says that doing nothing is inefficient, the economists will back him on that, ineffective, the materials just looked at prove that, and unjust. So it's not accepted that there is an evidential basis for finding that there's anything inefficient or ineffective or unjust about the relief he seeks. He says it will

preserve and save rights and that the counterfactual is unthinkable. The Court of Appeal was wrong to hold to the contrary at the strike-out stage –

ELLEN FRANCE J:

Sorry. Just going back to the interrelationship with the statute. Could I just check the, in terms of the relief that's sought for the injunction am I right that I we go beyond what the Act would require of –

MR SALMON QC:

Yes. Yes it would.

ELLEN FRANCE J:

But you say that's not the sort of conflict that tort law is concerned about?

MR SALMON QC:

That's right.

1220

ELLEN FRANCE J:

Why is that?

MR SALMON QC:

We say it, well, if one considers any of the other areas where tort is ventured where there's already a statutory scheme, whether it's the Building Act 2004 where this Court held live the possibility of a manufacturer duty, for example, where the Building Act said what manufacturers needed to do to comply with the Act, yet you'll recall the facts of that case, the company had, in fact, achieved an approved solution and yet it was said there was duty beyond complying with the Act. The Court has identified rights, proximity and harm in the usual way and decided whether the duty is displaced by the Act rather than whether the duty says do something more. Another example would be recent entres in privacy and intrusion upon seclusion where, and we note in our submissions quite how many Acts touch on privacy, that didn't stop the formation of a new privacy tort or indeed the intrusion upon seclusion tort.

In Canada, as Mr Bullock's noted in our submissions, the Canadian Court said that the use of the computer in their case was so shocking it justified a new tort. That was using someone's computer, one person, and that was that level of harm, shocked a Court into acting in a context where privacy legislation already existed.

So it's not been the case, I think ever that the fact that there is an Act that attempts to govern some aspects negates a duty. Now, I'm parking nuisance for a moment because nuisance requires way more than this Act does on any view of the world, it requires expressly getting rid of it. But for negligence, we see all sorts of environmental claims or neighbourly claims available despite the fact someone has a resource consent and that's the classic nuisance one, isn't it, that someone has a consent to do certain things and the Court say, that means you've complied with planning laws, it doesn't mean that you get to breach someone else's rights not to be a nuisance.

So that Act, your Honour, sets a framework, not more, and a baseline of what the Government is prepared to do rather than, and this is the critical distinction we can say, either legislating against the duty or giving a remedy that protects the rights. And if, of course, there were a remedy, if there was a statutory cause of action it could protect the rights, that might be different. But as things stand, this Act is a gesture towards an international instrument that is acknowledged fundamental rights were at risk and we say extraordinary language would be needed to say that the Courts were expected to stop in a primary common law role of safeguarding those rights.

WILLIAMS J:
What's the impact of section 17 of the RMA?

MR SALMON QC:
Of the RMA or the?

WILLIAMS J:
The RMA.

MR SALMON QC:

I will have to pull that up. Mr Bullock's going to do that faster than I can, Sir. I would say, Sir, just looking at it that it's limited, it's not a negative impact on the claim, it's a duty to mitigate harm but within the context of the confines of the RMA. In other words, it doesn't give Mr Smith an ability to enjoin someone who is, for example, importing oil or –

WILLIAMS J:

Why not?

MR SALMON QC:

Well, in relation to coal mining, because the Act through an –

WILLIAMS J:

That's only for consents though, that doesn't relate to section 17.

MR SALMON QC:

Your Honour's asking whether section 17 gives an independent –

WILLIAMS J:

Look, I don't know. But the coal mining case was about section 104E which is consents not this. This is actually the statutory version of nuisance in the RMA context.

MR SALMON QC:

In part but it's not a codification of it, Sir –

WILLIAMS J:

No, no, I'm not suggesting it is. I'm just asking you whether you've thought about this, it's relationship to what you're trying to do as a matter of tort law, what the relationship between those two things are and whether you have alternative pathways you haven't thought about?

MR SALMON QC:

I'll think about it more over lunch, Sir, but the first thing I would say is, no I haven't thought about that particular section and I will.

WILLIAM YOUNG J:
Yes.

MR SALMON QC:
But it looks as if subsection (2) means that while there's that duty its unenforceable as a matter of rights which -

WILLIAMS J:
Yes, that's what it does but then there are all these declaration provisions in the section 320s, 310s, take a look at it over the lunch break and perhaps you can help me.

MR SALMON QC:
I'll have a look at it, Sir. I will, thank you, Sir. Turning then to tort and moving fairly briefly with what is inevitably an oversimplification or an arc of history, the one which that if the Court has the time to read some of the academic materials is, in my submission, some of the most interesting reading one can do. It's trite that court has changed and reacted profoundly to changes in technology and civilisation and it's moved from the forms of action which I don't profess to understand at all, which govern various trespasses and nuisances, which sort of incorporated negligence and were largely often strict duties, with decisions made by juries that involved no direct causal requirement, no but for test, and the like, to the development of some particular rules that reflected mischiefs, as they were, including the biggest mischiefs that were known.

One, of course, was with industrialisation of transport, people started being killed by horses and carts and trains, and I'll come to the way the US responded, which was a policy calibration of thought that favoured defendants and harmed plaintiffs, something that Professor Gifford, I think it is, in our bundle at 112 described as just a direct subsidy to railways, a move to make it harder to sue them and to protect them from strict liability, really just out of sympathy for the

fact that they were getting rid of savagery and advancing what Douglas Kysar describes as the Court's view of manifest destiny, very stale concepts. But in England a reaction to harm from injury on a person to person collision basis, and at the same time as pollution arose, and humanity for the first time dealt with pollution that harmed ecology on a scale that was as big as could be envisaged then, the Courts responded, and Mr Bullock will cover this in detail, but the Courts responded just straightforwardly by protecting rights. The Courts responded in the face of all of the arguments that the respondents advanced today, that there's already legislation, not a reason not to protect a right. That there might be legislation, not a reason. That there were diffuse and many polluters all causing problems, again not a problem. Short of de minimis you can enjoy one or many because they were harming rights, and so many people suffering, not a problem, too many plaintiffs, all dealt with, and of course the scale was smaller but it was the biggest scale they'd come across, it was their version of this ecology problem on a smaller scale.

And that extended to the most remarkable one, I think, which is a great nuisance case to hold up as a form to what the defendants say, two of them in fact, where councils have put in sewerage pipes, once sewage was moved to be conducted by pipe, which was around 1840 on my reading. Councils installed sewerage pipes that conveyed people's effluence to rivers. The rivers were already polluted through the rail industry. That wasn't a barrier to say this nuisance should stop. Maybe they can pursue it, maybe not. Again, an analogue to hear, but importantly the council said, but everybody uses this. We're all part of this problem. The pipes are carrying everybody's by-product just as my learned friend for Channel says, we're just a pipe now, we're not a refinery, we just carry everybody's product. The problems are consumer, and the Courts had not a bar of it, and the Courts in the face of, there's a social good in sewerage which is in analogue to the argument that there's some social good, we dispute it, but there's some social good in the world, the Court said, ask Parliament. If you want to get them to expressly permit a nuisance they'll have to legislate because our job is to recognise a right and protect it.

Against that background, pausing for a moment, what is said by the defendants is that the Courts not should invent a new tort in relation to a nuisance, but they should abandon one. A tort designed to protect people's ability to live in their resources, whether passing on a road or a river, or drinking the water or breathing the air is somehow said to be not applicable because why? Because policy. That's really the answer to my learned friends. There are some very Delphic attempts to characterise nuisance as having other requirements or the dive into special damages. I might add if Mr Smith doesn't have some form of special damage then no one does. I find it remarkable that it could be submitted otherwise, but the suggestion there needs to be an independent illegal act, these are not parts of the law of nuisance and that's why my timing concern exists. If the Court needs to hear more from Mr Bullock on that it can because he's nearly finished his PhD on the topic and will be able to answer each question.

But the short point from my perspective is this. If one of those courts dealing with the St Helen's toxic fumes landing around houses, or with the coal cases, had said, we're not going to enforce a nuisance, we're not going to give a nuisance injunction for the coal dust and coal because every house burns coal as well, which was true. It would have been an outlier, and the Courts wouldn't have.

1230

But equally if the Courts or people in that time had been told it's not just the coal dust. We're also destroying the planet with CO_2. Can you make an order based on that. The useful question to ask is what would the Court have done and it wouldn't have blinked. Of course harm. It wouldn't need to understand but the harm is no different except in the need for a bit of scientific assistance than the coal dust. So rather than being at odds with any rule of nuisance, because it's not, and rather than being at odds with the spirt of nuisance, which it's not, this case was just an orthodox nuisance case that was deprived of its trial.

But moving on through history a little, we know that *Rylands v Fletcher* (1868) LR 3 HL 330 (HL) introduced strict liability which I was persuaded at least at

law school to see as something of a blip that was a mistake and has gone away and been collapsed back into nuisance and I don't think that's right on my reading. Strict liability was a thing, widespread thing, and as a widespread available at least policy response to who should suffer if a train crashes and there's no lack of duty of care. We can imagine a parallel world where the conclusion of courts were taken that there should be strict liability, why should the people suffer? They weren't running a business and making a profit, where that had become our dominant paradigm for personal injury and indeed I think in the US as I read it in the 1820s it was still strict liability. It was only by 1870 that reasonable care had really become a thing, and –

KÓS J:

Yes, I mean that arose because the policy choice was not to hold the landowner liable for having dangerous things, storing dangerous things on their property, but on the other hand that if that escaped then they would be strictly liable for it. That was the policy choice.

MR SALMON QC:

Yes. That was in *Rylands v Fletcher*. Quite what the policy choice was to abandon strict liability for general personal injury in the States, at best I could read it I was reasonably persuaded reading, and we've given them all to you whether or want them or not, but reading those historical articles, extraordinary writing. That change was to protect industry and limit industry's liability because they were opening up the frontier and taming the savage wilderness, which is a policy response to move suffering from the doer to the general public.

WILLIAMS J:

I suspect it's because they had more room –

MR SALMON QC:

That's another thing I was going to say.

WILLIAMS J:

– a lot more room.

MR SALMON QC:

They had – and this is the America tort tradition and again I'm collapsing this because of time, but the American tort tradition of course like their constitution is really influenced by Lockean ideas of the environment and of civil liberty. So it is the classical liberal tort environment bar none and Locke, of course, viewed the American wilderness as a great place to be tamed. You tame it, you own it and you were entitled to have your life and your property protected with no regard and as you say Sir, more room, but no regard for what was being destroyed. It was of its time of course blind to ecological peril which we're not now. But that particular focus, the classical liberal focus on the individual and the atomistic approach to tort infuses all of those American cases and explains the change away from a vision that might have been taken of protecting the environment, explains the American calibration of nuisance to have hurdles we don't have and explains, and this is, I'm paraphrasing now, some of the academics including Douglas Kysar and that remarkable article that the Climate Lawyers quote, the one that says tort will adapt or perish. He talks about that classical liberal core of tort law involving the introduction of a series of rules in American tort, some of which are remarkable you, as an employer you cease to be able to sue if a fellow employee caused the problem. For a long time you couldn't give evidence in your own case –

KÓS J :

Well that wasn't an American invention. The common point rule is English.

MR SALMON QC:

Sorry. But they kept it. They kept it running and hard. They also for example had contribution as being an absolute bar to recovery and he would say, and I think he makes a fair point, they implemented tests for loss for relational limits and for causation. That protected corporate defendants or doer defendants. He calls them doers and hence I'm using that word, and what he says and he says it expressly, this was a perspective of its time, a Lockean or classical liberal laissez-faire view of its time that there was inherent good in economic activity. A pre-late stage capitalism view of growth but also one that didn't see any value in ecology because Locke himself, John Locke had viewed the

wildnerness as limitless. So someone could tame it and own it and do what they wanted and unless you bumped into them in that sense of a collision then no big deal and Kysar observes. He is not confident that tort law will respond in the States and you'll read that. My learned friend will point it out or at least he did when I referred to Kysar in Court of Appeal. Of course nuisance has more difficulties there because their Courts have held it doesn't apply for reasons about statute that we don't have in our legal system but also more difficult standing rules, but I think actually Kysar was just more focused on negligence in his article because that's where he keeps coming back to with requirements that don't apply to nuisance. But when one reads his article he's not saying that tort law has to be the way it is. He is pessimistic about judges' ability to do what we all struggle to do and that is step back from the rules we apply far enough that we see them as a feature of their own little historical scientific or cultural moment and question them again. So in that –

WILLIAMS J:
Well he suggests you've constructed your case wrongly. He says you should have sued for damages.

MR SALMON QC:
Kysar?

WILLIAMS J:
Yes.

MR SALMON QC:
Well I'm not sure he does. He says that –

WILLIAMS J:
He says injunctions are just too problematic and you don't get to do the balancing thing that damages claims give you the chance to do and they're more likely to succeed in the US than straight injunctions.

MR SALMON QC:

And I think he's certainly right that damages are more likely to succeed in the US than injunctions because their bias is towards economic pain being compensatable. He refers to that in the case of the Native Americans in Alaska –

WILLIAMS J:
Kivalina.

MR SALMON QC:
Yes. And points – it's the sort of fungible bits of life that apply to everybody that they'll protect at most and usually that's money –

WILLIAMS J:
Although they lost there.

MR SALMON QC:
Yes. They did because their particular cultural attachments got no weight to the, resource got no weight in the American courts –

WILLIAMS J:
Well there's no special damage I think it said didn't they? Something like that.

MR SALMON QC:
Correct. And so I would say Kysar is wrong to say that would be the case here.

WILLIAMS J:
Yes. Right.

MR SALMON QC:
But also he's again reflecting a world in which American approaches to injunctions and damages are taken and he's expressing in my reading of it, I think properly read, and remembering also it's 2011 when he wrote that. He's expressing a pessimism about the legal mind. He is really saying thinking fast and slow, to pick up on my friend's quote of it, the number of ways one could have a kneejerk reaction to the application of tort negligence to climate

change are enough that it's just hard to see American judges doing it in their classical liberal tradition –

WILLIAMS J:

I did wonder if you were calling evidence about human behaviour and inability to conceptualise the problem that you're suing on that given that most judges, perhaps not all, are humans, you may be arguing against yourself with that evidence.

MR SALMON QC:

But I'm talking about the Untermensch Sir, not judges but I'm also talking about people who don't as a job sit and listen and then decide and we do have a culture where judges hear and decide and where for better or worse we ask you to sit through terribly dense technical evidence. The kiwifruit judgment Sir that I appeared in front of Justice Kós on, there was a two week appeal on that because the appellants wanted to spend a week on scientific facts. But a judge sat through those and made a decision competently that was so at odds with what a kneejerk reaction would say because she heard the science and so there is room to believe that anyone who reads the science and understands it will react differently than someone who doesn't because we can do the full experiment ourself and look at a map and wonder what the world will look like when everyone in China wants to move, possibly here. So –

WINKELMANN CJ:

So I'm constrained by this liberal construct. Getting you back on track because you're focusing us on you saying that we – that judges need to have the ability to step back far enough to see that the existing rules were – sat within their particular historical perspective very much shaped by the Lockean view of converting property to one's own purposes through labour and that profits through economic activity were inherently good and you say that's threaded throughout the development of the law of tort –

MR SALMON QC:

Yes, and particularly I was going to say through American tort study and of course we didn't have theories of tort published at all until about 1850. We didn't have books on it until when we started about 1900. American tort thinking pervades our tort thinking and one thing I was going to say your Honour is that's not right. My learned friend relies on the relational theory of tort law as if it's a shibboleth but it rather isn't. It's what I think is properly seen as a tool for limiting the extent of damages, financial damages. That's what it really was. And that's one answer to it. The other is it doesn't mean what my learned friend says it means. It says simply someone has to have suffered or to be going to suffer and the extent to which someone is in a relation in the tortious sense has moved and changed all the tone.

1240

Donoghue v Stevenson moved the goalposts profoundly compared to what a defendant would have said they should be beforehand by taking a wider view of relation. Why? Because the world had changed from one where you meet the actual person who is going to drink the beer you make in your bar in Somerset, and you made it on site, to one of distributed manufacturing. It made sense. The same relational extends to where it doesn't before. The point I'm making, your Honour, is to look at old cases about what relational meant and think that it helps us decide what relational means in the climate context is to err when a scientist would quickly explain to us with a whiteboard that my emissions directly affect someone I've never met in the same way that the snail in the ginger beer bottle directly affected the plaintiff in *Donoghue v Stevenson*, who they'd never met.

WILLIAMS J:

Is it really though any different to the three billion people that have a contract with Facebook?

MR SALMON QC:

In terms of where the harm is done?

WILLIAMS J:

In terms of reach. In terms of reach.

MR SALMON QC:

I see, and that they would all be in a relational –

WILLIAMS J:

Well, they clearly are, aren't they? They've all signed up.

MR SALMON QC:

They are, and I would say –

WILLIAMS J:

Just about half the earth's population.

MR SALMON QC:

Yes, and they would be in the tort sense –

WILLIAMS J:

So is this a big deal?

MR SALMON QC:

The relational point?

WILLIAMS J:

Yes.

MR SALMON QC:

It was focused on a lot by my friends in the Court of Appeal, they may focus on it less, I don't think it's an answer, and it's certainly one that doesn't sit comfortably with the scientific facts, but my friends may push it more. Perhaps I'll leave relational to reply on, but the Chief Justice was seeking to capture my sprawling submission on some of these points, and I'll just paraphrase what the academics have referred to say, which is that the assumption that there are beneficial externalities from all economic conduct is another legacy of a stale error in tort, and that that drove the but for causation

rule, Kysar at least says that. But some of the other rules, including the strict liability moving to a duty of reasonable care, all of which, as I think I said earlier, Gifford, in the bundle, refers to as a, possibly even conscious, I forget if he says, but a subsidy to railways, an encouragement to do what they were going to do. That's the way the law develops, of course. It reflects mores and expectations and assumptions of good and bad at the time. We can see that in all areas of law whether its charities or contract or tort. But my point is rather to say, that period of time in which but for causation controlled problems, even ones that don't fit it, or that period of time where we moved from strict liability to nuisance, and I'm thinking of my third cause of action here, are not the way it's always been and not the way it inevitably is. They reflect policy decisions by judges, whether or not they acknowledge their policy decisions. The very doctrinal weaponry that the defendants employ to say there should be no duty of care and negligence here, are modern. Modern at least within the last couple of hundred years and some less, and they're of their time. So Mr Smith says, before assuming their right, we need to hold up to a bright light the assumptions that underlie allocation of liability in American tort law against what we now understand about ecology and against our legal culture in Aotearoa New Zealand 2022, and one thing that is abundantly clear, at least to me, is that when one looks at principles of tikanga Māori and compares them to the driving forces, the kaupapa of US tort law, they don't fit. Nor do ideas that absent reasonable care you'll never be liable when sometimes tikanga shows a reaction to protect a resource for the resource's sake, or identity in a resource sufficient to enable it to have some form of quasi standing, and my friend will speak to that. But on any view, these limits that limited liability are not natural bedfellows with modern law in New Zealand.

The other point I wanted to make when one looks through that terribly compacted view of history in which negligence changed, nuisance stayed the same, but conspiracy became tort in 1925, privacy, intrusion upon seclusion and privacy perhaps remarkably for the *Cliff Richard* case it became an intrusion upon seclusion to mention an investigation in the public interest of a crime. Again, something that statutes covered and covered once someone was called to court with name suppression, but the Courts saw a right. When courts

do all of those things and react, they do not do it bound by the shackles of doctrine line relational or but for, they start, and they always have, from much more baseline considerations like is there a right that needs protecting, and that is just one other point I would make about trying to view this problem through an American tort law lens. Mr Smith hasn't sought damages because it's not really his concern, he doesn't want some money. He wants to protect uncompensatable rights, but a lot of the problems that my learned friends put forward are problems of application of damages rules to tort problems.

So the question of what is foreseeable by way of damage, the concern about indeterminacy at all is a damages problem really ultimately, because it's about the extent of liability. It's not about whether what one did is right or wrong or should be stopped, it's who can sue and for what damage. The but for test, contribution problems that my learned friends put for again and again each of them has resonance if one were debating damages. But Mr Smith isn't seeking that, it's seeking the remedy that will do any use, which is that they stop, and in that sense, drawing a parallel again to a rāhui, Mr Smith's focus is not on trying to work out how much and for who there should be compensation. This is not the problem of the DES cases or the lead paint cases in the States where market share liability rules, and so on, needed to be adapted because people wanted the money. If that was the focus we should talk about those, and we will after lunch a little bit, but if that were the focus of Mr Smith's claim we would need to talk about them, but his focus –

GLAZEBROOK J:

Can we isolate Mr Smith's claim from other people's claims just because he is not seeking damages.

MR SALMON QC:

Well that's rather a question about the way in which this Court chooses to give, or allow the development of this area of tort or not. It would be entirely open to this Court to say that it is, for example, sorry not this Court. If the High Court were allowed a trial it would be open to the High Court to conclude that while injunctive relief might be appropriate, perhaps a suspended injunction, which is

consummate with the way the nuisance cases ran and seems to work if the answer is Parliament wants this it can say so, but the Court might say that and say this is not a finding that damages are or should be available, there are many reasons of policy, principle et cetera, why that's a case for a different day. So my concern is rather to identify that the menace that my friends point to most is a damages one, that is not this case, and as this Court said in floodgates context, in the leaky building context, these things are never as hard or bad as they seem. Indeed more recently in the *Southern Response* case where the submission was made, including by me for an intervener, that opt-out class actions had all sorts of problems. The Court had a confidence they could be worked through by the lower courts, and indeed in that case there was a legislation reform programme which might have dealt with it, and the Court again said that's not a reason, politely in my submission, not a reason not to do justice in the meantime.

ELLEN FRANCE J:

Sorry Mr Salmon, if you were saying the principles relating to causation, for example, should be changed, they'd be changed for all purposes, won't they?

MR SALMON QC:

I understand your Honour's question. I think they may not. One way of putting it would be to recover loss one needs to show, the Court might say, one needs to show that loss has been caused in a conventional tort sense. One could imagine the Court saying, for loss that's the case, but where the purpose of the injunction is to protect uncompensatable, an irreversible externalist harm by injunction, the need for that protection to limit loss doesn't arise. In other words to ask the question, what is that conventional causative and proximate, proximate causation, what's it for? It's to stop unlimited damages liability in fact. Because indeterminacy might be solved in exactly this problem because someone had a very close proximate relationship. But if the relief they're seeking is still the same as Mr Smith's, it really matters not which particular plaintiff brings the case, and how proximate or not they are. If they can persuade the Court many, many people are going to be killed by this cost, this

externalised known harm, then the remedy of injunction raises none of those concerns. So amongst that very clumsy one, but it's my way of saying the reasons one engages with causation problems on a loss front short of standing, is a damages problem rather than an injunction problem.

1250

WINKELMANN CJ:

So to take Justice France's point and amend it and apply it straight here, if the Court were to impose these duties, or issue these injunctions, in this context what would stop – why would it not follow then that every non de minimis emitter wouldn't then face an application for an injunction to stop them from trading which would cease all economic activity in New Zealand of any significance and could cause immeasurable harm, that's that clever apocalyptic scenario you have to answer.

MR SALMON QC:

Yes.

KÓS J:

Well, it's even more apocalyptic, it's apocalyptic for us because the injunction you seek puts us in a position of supervising the compliance.

MR SALMON QC:

One of them does. One of them does, one doesn't, Sir. The suspended injunction, which I personally favour, doesn't put you in that position. I accept it's –

WINKELMANN CJ:

Perhaps if you just answer my question first.

MR SALMON QC:

Sorry, your Honour. I will. It is an apocalyptic vision, or at least a sub-apocalypse that your Honour's described, and which is where we run the risk of the economy halting. Again, it's not accepted that would be the

consequence by Mr Smith, but one easy answer would be if the Court had that concern at trial, it can suspend an injunction, and if suspended injunctions are in play then nothing stops while people hasten to work out what to do about it. So, for example, your Honour –

WILLIAMS J:

As in nothing stops until people figure out how to stop. You've still got to stop.

MR SALMON QC:

People know how to stop now, that's Mr Smith's case. They truly know how to stop, but they're not doing it. So the answer to Auckland's transport emissions is known and it's a matter of just general writhing throughout the world, and throughout most of Europe, is being done. New Zealand's not doing it. So, that's just one example of where the answer to the problem is known. The answer to the problem of the smelter in Invercargill is to sell, for example, and enable electricity to run cars, so we shouldn't assume there is no ability to do it now because Mr Smith's factual contention is we can do it now and, to answer the Chief Justice's point, his contention is we can do it now without apocalypse. But if the Court were persuaded that there was this sub-apocalypse risk, then the Court can provide a window for dealing with that and that window, as Mr Bullock will note, in the 19th century was the way in which the legislature was given time to say what its intention was, and that would maintain a constitutional balance –

KÓS J:

Except the scale is totally different from closing off one sewer, with closing off all economic activity.

MR SALMON QC:

Well, that's not quite right, Sir, because the proposition that's being put to me is, if this injunction is given, others will flow. The same was the case in the sewerage case. When the Court said, you can't put a sewerage pipe into the river, that effected every incipient sewer plant in England. So the analogy is the same except that this problem is bigger. The effect of the Court judgment

then is the same as it is now, which is that it speaks to the market as a whole and to people as a whole. So, I accept climate change is a bigger problem than sewerage but it's really easy to underestimate how big those environmental problems were in the 19th century in those dark satanic mills. They were suffering an environmental problem that seemed to them like hell, and doing so in a context where they were changing their lives by participating in it. So they really did present us with a crucible in which they had the same issues we did on the biggest scale they could imagine with the biggest number of possible plaintiffs and defendants and all of those issues. So, I take your Honour's point in that sense, but I don't think it's right to say that a Court order in that context didn't have the implications for wider behaviour this Court thinks.

KÓS J:

And even your suspended injunction is still going to leave, suspended until when? Doesn't that throw the Courts right back into the question of further control?

MR SALMON QC:

No. Respectfully, I think that's not right, Sir. It's just a slightly delayed triggering of an absolute injunction to stop the emitting, or stop – let's say the order for Channel was stop bringing in oil, which it will say is terrible and people will suffer, and I will say there's no evidence of that at all. That's a trial point. If they want to say that, we dispute it. But if the Court said, we will suspend the injunction for two years, all that is being done is delaying the triggering of an order they must stop, like the sewerage pipe. In those two years, if they're right that Parliament wants this to happen, and we're wrong that Parliament's just frozen and unable to do a thing because the middle swinging voters will never stick with the party that does anything either way, but if they're right, Parliament will pass an Act saying it will be the High Court Decision Overpowering Act 2025 and the suspension will allow for that. So those suspensions maintained the constitutional balance in the 19th century and they can now but they also would deal with a risk that the Chief Justice has identified that there might be flow-on effects of stopping.

WINKELMANN CJ:

Can I just say on that, isn't part of your answer it must be to do with some more thinking about your de minimis threshold? Aren't you really thinking about this as targeting the worst emitters?

MR SALMON QC:

Yes, the worst emitters but also certain nodes. So again I'm wanting for obvious reasons to keep open the ways in which relief might be framed and argued for and run at trial, partly because of the need for evidence. But to give you a two part answer your Honour, some of these are there because they're big. Some are there because they're big and they're the no. So if you are the coalminer then being stopped stops all coal. Problem solved and there's not the same de minimis concerns. There are no small coalminers, and oil importers are the same category. We've got very few in those categories but the short point is short of agricultural emissions which are a separate factual problem all of the major emissions from industry and transport and generation are supplied through a limited number of nodes and my friends are wrong to say that we need necessarily to imagine a spreading to many, many parties. It's true that there are 15-odd emitters that give us 75% of our emissions but you cut out a bunch of those just by stopping Channel. Or if an order was made no coalmining then Fonterra's coal stops. You don't need an order against Fonterra. So there are those nuances to work through –

WILLIAMS J:

Well it stops from Stockton.

WILLIAMS J:

Correct. But again as per the exchange with Justice Kós about the sewerage pipes the likely incident of a judgment would be if coalmining is to be stopped by this defendant it's to be stopped by all, and that's what every expert and all of the world's nations that have signed up to the UNFCC all agree has to happen. They've agreed you can't keep digging coal. So that one's one of those more easy on the scale. I'm not suggesting here this is easy but more

easy on the scale compared to the, some of the thornier examples if one tackles the problem further down the process.

The other point to note is the Chief Justice asked the question about the apocalyptic possibilities of an order of, an injunctive order that might stop certain things. The exact extent to which that is a risk will depend on facts and the duration of that risk, the time needed for a suspension will depend as well. My learned friends elegantly and skilfully as advocates have taken our attempt to provide templates for how relief might look as if they're final and we're seeking to regulate as opposed to us putting forward prayers for relief which include such other relief as the Court thinks just which we expect as one always would to be recalibrated as evidence matures and emerges. So by trial it might be clear that there is no adjustment time needed for the New Zealand economy if we stop the mining of coal. Fonterra claims it's got plans. They might have them by then. There is no harm to New Zealand beyond a little bit of tax in stopping coalmines for experts – for exports. So that might be very readily resolved and the Court might think if there's injunctive relief considered a suspension there doesn't matter, or it doesn't need to be long. For something else we might not have electrified our bus fleet. Petrol might need longer but these are matters of evidence and the short submission from Mr Smith is it's wrong to assume it's strike-out but we won't have evidence to persuade a court these are workable and don't have apocalyptic blowback.

WILLIAMS J:

I guess if you're going to do history you have to think about the fact that energetic common law judges in the 19th century in the UK were operating in a world in which the Parliament was part-time and the public sector was probably about a tenth the size of New Zealand's public sector let alone the British public sector and that is likely to have generated a bit of energy because they might have been the best people to resolve the issue in capacity terms. You can't really argue for that now.

MR SALMON QC:

Well, I'll have a go before the break –

WINKELMANN CJ:

I think you just have earlier haven't you? You did just over – earlier because your point is that the nature of the political cycle means that it's not well-suited to –

MR SALMON QC:

Yes.

WILLIAMS J:

Well I just wonder whether I get an answer to my question.

MR SALMON QC:

You do. I'm trying to answer them all. The, well one answer to you Sir would be that's right, that politicians were a different breed and different time applied but the –

WILLIAMS J:

And so was state capacity.

MR SALMON QC:

– but the regulatory and reform programmes for some of these areas of pollution was priority number 1 as I understand or high priority. Some people might say the government's climate change strategy is but I would say that might be where the UN Secretary-General's right about words over actions but certainly in the 19th century that was an area there was reform and the Courts acknowledge that. That would be better, reform would be better and will cure more of this, but that's why we've said in our written submissions we're not submitting the Court should regulate or unduly supervise one idea for a supervisory role but it does put forward as possible areas of relief the suspended injunctions the cleanest by far. But that's not regulation in the same way it wasn't regulation in the 19th century.

Then the other limb to the answer as the Chief Justice noted is that our submission is that we have a parliament that is not and will not act on this issue

and is therefore worse than the 19th century English equivalent in which they were at least trying to legislate and deal with nuisance, and in that sense there is truly a constitutional vacuum in the protection of Mr Smith's rights and we're at lunch but I'll try and find a way of being finished so Ms Coates can stand up –

WINKELMANN CJ:

Or you could just stop talking.

MR SALMON QC:

I was meaning to say I will try and find a way of not having to stand up after lunch but yes I do plan to stop talking.

WINKELMANN CJ:

So Mr Salmon, when you look at your timeline are we – have you finished? Are we onto Ms Coates?

MR SALMON QC:

I'll have to find it your Honour.

WINKELMANN CJ:

It's the Courts, Parliament and policy was your last point.

MR SALMON QC:

That's what I was meaning by finding a way to finish your Honour. I had planned to say more but I think given timing I'm better to park it, so what I'd suggest I do is let Ms Coates stand up, absent anything occurring to me after lunch, and hopefully we'll get most of the way through her and Mr Bullock before the clock starts ticking too loud tomorrow morning.

WINKELMANN CJ:

Well, I mean you better, yes. Don't forget you're finishing at morning tea tomorrow.

MR SALMON QC:

Oh, I did pick that up your Honour.

WINKELMANN CJ:

Thanks very much.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.18 PM

MS COATES:

Tēnā koutou e ngā Kaiwhakawā. I wanted to start my oral submissions today with a whakataukī, or an anchoring thought that I thought was appropriate to this particular cases, and it goes, ko au the whenua, te whenua ko au, I am the land, and the land is me. That well known whakataukī encapsulates, as whakataukī do, really succinctly and beautifully the way that Māori relate to the land. We are one and the same. That whakataukī also reflects the underlying motivation for Mr Smith in bringing this case, which Mr Salmon has already talked to. He's here because, as recognised by the Court of Appeal in paragraph 2 of their decision, scientists have predicted that if greenhouse gas emissions keep increasing, the planet will eventually reach a point of no return. He's here because he belongs to a vulnerable Māori community, up in Northland, where his whenua, his whānau, his iwi, his hapū, will bear the brunt of the harm caused by climate change. Human-induced climate change. That harm, which has already been spoken of, is complex and extensive, but some of those examples are irrevocable damage to the whenua. That whenua is a source of life, wellbeing, identity, culture and is of historical significance. Mr Salmon also talked about the harm to coastal urupā, here the bones of his ancestors, his tūpuna, are buried, and that being swallowed up by the sea, at least in part.

1420

He also already referred to the loss and impairment of kaimoana, which many members of that community depend on to survive. Mr Smith has tikanga-based obligations to protect his whenua for his whānau and future generations, and the respondents are materially emitting pollutants that we say unreasonably contribute to the harm that they face. That needs to significantly slow down or

stop. So my submissions focus on the relevance of tikanga, and we address tikanga in our submissions at paragraphs 49 to 55, as well as paragraphs 158 to 163.

Now I've been placed in the batting order here, after the relatively extensive introduction of Mr Salmon, but speaks to a lot of the pertinent points that need to be made, so it's not well-used, and the substantive exploration of the three different torts, because tikanga provides a pivotal framing element for those three torts. There's four main points that I want to speak to and make today. The first is that tikanga is relevant to the development of the common law, including torts. The second is that of any area of law, tikanga speaks to the protection of our environment, and the regulation of human behaviour in relation to that environment. My third point that I want to speak to is that given tikanga is relevant, that caution should be taken in relation to strike-out. That is the nature of tikanga is such that in most cases, and certainly this one, expert evidence will be required on tikanga. The last point that I wanted to talk to, is to add some additional thoughts about substantively how tikanga can contribute to how we think about the law of wrongs in Aotearoa New Zealand.

So that's the direction I've set for the travel of my waka, unless you blow me off course significantly.

WILLIAMS J:

Or sink you.

MS COATES:

Yes. Hopefully not that one Sir. So the first point. Tikanga is relevant to the development of the common law of Aotearoa. That general relevance appears to be agreed by all of the parties. So Te Hunga Rōia Māori and the respondents both accept that as a starting proposition, and I'd be happy to step that out for you if the Court requires, referring to authorities that you already would have heard of and be well known.

WINKELMANN CJ:

I don't think you need to take us through that.

MS COATES:

Great, perfect, I was hoping we'd reached that point in the maturity of our laws Ma'am. So second, I was going to talk about tikanga and the environment. Although the respondents appear to accept tikanga is relevant to the development of the common law generally they do not see this as an appropriate place to explore that particular issue. We say that to the contrary of any area of law tikanga is relevant to the protection of the environment and there regulation of human conduct in relation to that environment.

The environment frames Māori thinking. It frames our way of life. It frames the way we understand our existence in the world. It's no coincidence that a number of the cases that come before courts that involve Māori speak to Māori environmental issues or concerns. The *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 18 (HC) case, which is in our list of precedents, is just but one of the early cases that does that. It's also no coincidence that Māori thinking is now leading the world in relation to the legal regulations of the environment. If we think of what we've done in the legal personality space, for example, with the Uruweras and the Whanganui River. That's Māori thinking leading the way that we think about the environment, how we interact with it, how it's regulated and how it exists in the world.

The significance of the environment to Māori is reflected in the way that we personify the natural world. So the sky is not just air, the earth is not just soil, but it's Ranginui and Papatūānuku, our primordial parents and their offspring that we have a direct whakapapa relationship and connection to. That whakapapa connection is important. It's the lens through which Māori see the natural world. It's the lens through which we conceptualise our relationship to the natural world, and it's the source and the basis of our responsibilities and obligations to that natural world. It's not a difficult concept to understand if you think about your own relationships with your parents or say your children, right? Your whakapapa, genealogical connection to them provides a basis of responsibilities. If they're harmed you feel that harm even though you're not

personally harmed. It's the same way that Māori think about the environment. There's that connection to that in a very real genealogical sense. You can literally trace your descent line back to those atua.

This is all reflected in what's become a now well-known concept or ethic of kaitiakitanga or guardianship but that is of course only one principle in an interconnected web of principles that speak to what is tika or what is right.

So the main point of emphasis that I really wanted to make there was that tikanga speaks directly to the environment and the regulation of human conduct in relation to that environment, and in the context of people putting out pollutants into the air that is causing known harms and resulting harms from that tikanga is a rich source of law that can be drawn upon in this context.

Which leads me to my third point which is that caution should be taken in relation to strike-out. So if it's accepted that tikanga is relevant to the development of the law of torts we say that that pushes against any strike-out application. Tikanga is a unique combination of law and fact. Given that, courts have commented on what's required to prove tikanga and I did want to take you to a reference that I am not sure why it's not coming up. Oh, there you go. Kia ora. So I did want to take you to a particular case reference.

So the *Ngāti Whātua Orākei Trust v Attorney-General (No 4)* [2022] NZHC 843 case. So for the record that's volume 5, tab 57 at page 161 of that particular case. And in it Justice Palmer refers to, and quite succinctly I think summarises, a number of the cases that have talked to this issue of proving tikanga. He refers to Richard, Professor Richard Boast's commentary in *Māori Land Law* that draws an analogy with foreign law and he goes on to cite the Privy Council case of *Angu v Attah* that states: "As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have, by frequent proof, become so notorious that the Courts will take judicial notice of them." And he goes on to cite that, well goes on to reference the *Ngāti Hurungaterangi v Ngati Wahiao*

case that says the same sort of thing but says it in relation to tikanga concepts as well.

So that's the basic starting proposition of what's required to prove tikanga. What we then submit is that at this point it's important to have an understanding of the nature of tikanga and how it works. So tikanga is not only comprised of customs or particular practices, so this is the visible manifestation of customs that you might see if you for example go to a marae and are subject to a pōwhiri. You see those customs practised and expressed. But sitting behind those particular customs are a set of fundamental informing principles.

We refer to a number of those principles in our amended pleadings and I did want to take you to those amended pleadings so you can see the fundamental propositions of tikanga that we've stepped out. So those are at the back of our submissions, and in particular paragraph 82. So there we've stepped out a series of seven different propositions and have effectively pleaded the broad framework of tikanga principles that we say apply to this particular case, and in it we refer to the concepts of whakapapa and whanaungatanga and that genealogical connection that humans have to the whenua. We say those give rise to or tikanga says that those give rise to kaitiakitanga obligations where harm or damage occurs including in relation to the environment.

1430

That gives rise to (Māori 14:30:09). That impacts mana and requires utu or a restoration of balance and we refer to one regulatory mechanism that helps to restore that balance that Māori employ and that's the relatively now well-known concept of the rāhui.

I would say that all of those fundamental principles are rela – have reached the stage of being relatively notorious. That is those in and of themselves do not need to be proven. But – and they do provide a sound tikanga framework for thinking about wrongs in our relationship to the environment. But tikanga is of course different to the common law. So the common law for example has a

principles, say an equitable maxim such as you must do no wrong or you come to equity with clean hands. So there's a principle that says that.

Sitting behind that are generally textbooks and hundreds or perhaps thousands of different cases that tell you how that particular principle has played itself out in a myriad of different ways.

Tikanga is different in that although there's an increasing – or the nature of tikanga is such that there's a principle that exists there or an interlocking web of principles that exist there. Sitting behind that are people. So people and the community and their general collective corpus of knowledge. In te ao Māori you also refer to precedents but they exist in the stories of our people. They don't exist in textbooks that we can easily refer to.

It, therefore, is or we say that it's increasingly important given that nature of tikanga that it's ground up, that it's found in the community, that you have these high overarching principles but how those applied is fundamentally the preserve of experts why it's particularly important for evidence to be heard on those particular matters. That's why in the *Ellis* case that Mr Salmon referred to it was particularly important that there was a two day wananga where experts sat in a room and figured it out. They reasoned from principle, they reasoned from precedent and you've got a nice tidy summary of that in evidence that could be drawn upon.

We say that as we move into the progression and development of our laws of Aotearoa where we're increasingly drawing on tikanga that that process is increasingly important as well. That we have and allow tikanga that ability to be heard fully and for tikanga experts to responsibly grapple with these issues at that level of detail, and that they have that space and scope to not only apply tikanga principles but to employ a tikanga method of reasoning. So it's part of what we say is important to preserve the integrity of tikanga going forward as we move into what we say is a next phase of looking at the relationship between tikanga and the common law of Aotearoa.

So in terms of what we say that means for strike-out proceedings, we say that caution should be exercised in striking out a claim that invokes the application of tikanga to new and novel scenarios such as this one. If tikanga principles can reasonably be said to apply to inform the development of an area of law in a way that supports a tenable claim, strike-out should not be exercised.

In our particular case we say that we've done what we think is enough. We've provided the framework of relevant tikanga principles that speak to an alternative way of looking at harm and that speak to an alternative way of looking at the human relationship with the environment and resulting harms.

We've been criticised by the respondents for not articulating a tikanga principle that speaks directly to for example the concept of relational proximity. But that's because tikanga and tort law have fundamentally or do have different whakapapa. They have developed independently and tikanga is not packaged up nicely or neatly to be able to refer to that particular issue. That is we've got a concept of for example whanaungatanga which refers to this deep interrelational way that humans interact with each other in the world that doesn't speak nicely and neatly to that idea of relational proximity. To get to that point you need to go through a tikanga principles and practices and extractive reasoning process that we say is necessary to be able to get the full perspective that you need to grapple with what tikanga means in this particular context.

So what we're asking for is for tikanga to have that opportunity to be aired, to be explored, to be tested and to be deeply grappled with in that substantive hearing phase and its potential informing relevance not cut off at the knees and advanced or silenced, and our submission is that any judge dealing with these issues would – needs the benefit really of having that level of depth in respect of tikanga.

ELLEN FRANCE J:

Ms Coates, you put it in terms of caution being exercised in striking out a claim invoking tikanga to new and novel scenarios. So do you limit the proposition to new and novel scenarios?

MS COATES:

I wouldn't limit it to new and novel scenarios but it's particularly important in new and novel scenarios. What we know about the application of tikanga in this particular context is that Māori, although we have a deep knowledge and understanding of the environment and how we relate to that environment, we haven't looked at this particular issue and said this is how tikanga applies, and I'll refer you later to the one article that we could find where someone has tried to grapple at least at a broad level with the idea of how Māori cosmology more generally deals with and looks at the issue of climate change. But no, I wouldn't limit necessarily to new and novel but I think it's particularly important in relation to new and novel scenarios.

ELLEN FRANCE J:

So if it extends beyond those what does that mean in terms of the approach to strike-out more generally?

MS COATES:

What we think is that you need to at least show. So at this pleadings phase we need to show that tikanga tenably speaks to this area of law, and that's it. Given that we've done that you then need to – it then requires that level of depth that full expert evidence would bring. So we're not saying you can necessarily just pull a tikanga card and get a free pass to the next level. But we are saying that in this particular case that we're grappling with tikanga clearly has something to say about these issues. We just need to give it the opportunity to do that.

GLAZEBROOK J:

Do you go so far as to say that the tikanga framework may after hearing evidence actually replace the current framework as being more suitable in this particular area of law? I'm not talking environmental law generally of course. Just in relation to climate change.

MS COATES:

What we say is that tikanga, one we think it can inform in a number of ways the existing torts. So it can inform, help inform the way we look at public nuisance, it can help inform the way we look at negligence but the third tort in particular we think that is a vessel or a way of thinking about it that tikanga is particularly appropriate to fill. That is tikanga could appropriately help address and provide a perspective on the polycentric problem of climate change that we're particularly dealing with. So it can help fill some of the substance in relation to the third tort if we haven't done enough to show how it changes and modifies the other existing two.

KÓS J:

I know the Crown is not a party to this but do we learn anything in this context from provisions of the Treaty in relation to protected interests in land?

MS COATES:

We haven't argued or pleaded anything about the principles of Te Tiriti o Waitangi largely because we thought it did sort of throw the spanner in the works with having to grapple with Te Tiriti responsibilities in the context of private businesses and there's enough here for you –

WILLIAMS J:

We've got enough spanners do you think?

MS COATES J

– there's enough here for you to deal with. But in terms of, I mean the general relevance, Te Tiriti in and of itself helps protect, you know, tikanga principles and concepts. It speaks directly to the importance of whenua because Māori retain the right specifically to that in Article 2, so I don't think it's irrelevant but it's not something that we focused on for that reason of giving you another issue to play with.

1440

WILLIAMS J:

I guess though it is at least adjacent to the human rights discussion that Mr Butler's team spoke to us about, at least in writing, isn't it?

MS COATES:

Yes, Sir, I would say yes. Of course, whenever human rights are invoked I'd – Te Tiriti is a form and source of rights as well. So Te Tiriti is perhaps relevant in terms of speaking more generally to the rights that Mr Smith and his whānau, hapū and iwi have in relation to that land and that ability to exercise rangatiratanga over that land.

WILLIAMS J:

I was thinking more in the section 3 BORA context of the development of the common law in a manner that's not just human rights consistent but Treaty consistent.

MS COATES:

And that proposition, I understand, was mentioned specifically in the Court of Appeal in the *Takamore* case.

WILLIAMS J:

Yes. I'm interested in, not so much in the abstract question of how tikanga feeds the common law generally, more about tikanga in place. You've said tikanga is a ground up organic thing. It seems to me a lot of what I've seen about the way tikanga is used, stories are used a hell of a lot like cases, and whakataukī are used a hell of a lot like Latin maxims, and I guess that's likely to be the case in a process of law making and law defining, but we're talking about Ngāpuhi tikanga here and the effect, if there is such an effect, of the impugned activity on Ngāpuhi life.

MS COATES:

Yes, Sir, and I'll make two comment in relation to that. I think there's two different things that we need to grapple with in relation to these proceedings. So one is just generally how tikanga informs the development of tort law, and

so that's at that more, I would say, abstracted level, although we need to have a coherent tikanga approach to that.

WILLIAMS J:

Of course.

MS COATES:

But then, of course, there's the drop-down level of the actual harms that climate change cause and, in particular, in relation to – and the way that that's looked at at that localised level – that is, there is – well, one of the things that we plan to lead in the substantive hearing phase is evidence around how Mr Smith's kaitiakitanga obligations have been specifically harmed by this, and so it's thinking about, I think, tikanga as applying at a number of different levels in relation to this case.

WILLIAMS J:

Yes. Well, if what you pleaded is so, and coastlines disappear, and if ko au te whenua, te whenua ko au, for example, and the land is story, place names provide connection and story, and therefore law, don't you have an argument that what's happening is an involuntary destruction of tikanga, because the landscape, which is the repository of it, is being damaged?

MS COATES:

Yes, Sir, and we're certainly not arguing just a generic abstracted breach of tikanga. We are arguing that Mr Smith and his whenua and his whānau are harmed as a result of the actions of, ultimately, something that the polluters are contributing to.

WILLIAMS J:

Right, so it does seem to me that what's important is the practical detailed day-to-day impact on life and tikanga for the particular people. Explained tangibly, it seems to me to be an important component in the case you're establishing. Is it?

MS COATES:

Yes, Sir, I would agree with that, because again – I mean this case is relevant at a number of different levels clearly. So we're talking about the specific harm to Mr Smith and his whānau and that will require a level of detailed tikanga, the application of tikanga to the particular scenario at hand as well as thinking more broadly how might tikanga apply to these specific torts. So we're grappling with what I think will be the regional specifics and the generic, "generic", I do not like that word, but the generic way that these –

WILLIAMS J:

Global.

MS COATES:

Global way that these tikanga principles might help inform the particular tort, and what I suspect is we, to do that we will need regional evidence, not only specific to Mr Smith in relation to the particular harm we're saying he's claimed, but also regional evidence around the different ways that, different iwi and hapū might grappled with this issue as well.

WILLIAMS J:

Well if you look at, here's the source of my question, if you look at, for example, the impact on the Inuit or the Inuvialuit, I can't remember which, in the village of Kivalina, where they've got to move to somewhere else, I guess you need to ask yourself, what's the impact on the life of tikanga in that context. How does that affect the ongoing preservation and growth and nurturing of your tikanga if you can't live there anymore. Do you see the point?

MS COATES:

Yes Sir.

WILLIAMS J:

It's not quite clear to me that that's pleaded quite in that way.

MS COATES:

The particular harm suffered by Mr Smith and his whānau?

WILLIAMS J:

Yes it's more the harm to both the life of the community and its law.

MS COATES:

Mmm, Sir, I mean we'd be happy to make any amendments to the pleadings –

WILLIAMS J:

I'm not suggesting you do, I'm teasing out the question with you.

MS COATES:

But, yes, I mean that's fundamentally part of the claim. We're saying that he was wrong in this particular way and so part of that is talking about the specific cultural tikanga-based harms that have occurred to him and his broader collective, which is a natural extension of the tikanga. So I think we do grapple with, or we will need to grapple with tikanga at both of those levels in relation to this particular case.

So in relation to my section that I wanted to talk about is I wanted to expand a little bit more on how tikanga principles support an arguable claim for the duties asserted by Mr Smith, and in doing that I wanted to give a, I guess, a feel for the type of tikanga-based reasoning that you would undertake in doing what Justice Williams has referred to, referring to case examples, like here is what this specific case tells us about the way that tikanga looks at the world. So here is what we think we can say about tikanga.

So one, tikanga provides an alternative lens through which to look at wrongs and harms and yes, there are examples in tikanga where you can draw a straight line between A and B. That is you have a clear perpetrator who has done something wrong to that person, and tikanga wraps collectives in and around those, and it complicates that situation so that there's collectives involved in harm in that specific type of scenario. But we say pollution and harm involving the environment and the natural world are a different category of roles

to te ao Māori. That is tikanga in relation to the environment and pollution directed, or harms directed at that environment do not tend to focus or have this focus on individualised relational proximity between two people. Or, does it require that you show a particular special harm over and above other people. It's concerned with the pollutant nature of the harm and the activity that's being undertaken and how to stop and how to reach a balance in te ao Māori.

So I did want to, again, talk to two simple examples that help extract those points a little bit more. So the first example I wanted to look at was the *Huakina Development Trust* case. So I'm not referring to that all in terms of the actual law that it propounds, I'm just referring to it because it's an example in the case law that you can look at later if you want to, that talks to pollutants and environmental damage. So in that particular case it involved a consent for treated effluent to be put into the Kopuera Stream and the Waikato River. That case involved the Huakina Development Trust which was led by Dame Ngāneko Minhinnick. They objected to the discharge of that treated effluent and said that it was polluting their awa. That discharge was said to have impacted the river itself, and the mauri of that river. Both of those things, both the river itself and the mauri of that river were said to be two separate and distinct taonga that should be protected.

1450

The awa was also considered in this example to be a valuable tribal resource that provides both physical and spiritual sustenance and I did just want to draw you to one particular paragraph in the case which I think highlights quite beautifully the way that Māori or the Waikato River Māori relate to that particular river, and it's highlighted up there and for the record it's page 200 and line 30 of the decision. And in it it's quoting a Waitangi Tribunal report that says: "It is difficult to overstate the importance of the Waikato River to the Tainui tribes. It is a symbol of the tribes' existence. The river is deeply embedded in tribal and individual consciousness. Like Manukau it has its taniwha or guardians but unlike Manukau there is a taniwha at each bend. The river has its own spirit. It is addressed in prayer and oratory as having a life force of its own. The spirits of ancestors are said to mingle and move with its currents."

Now from this basic factual scenario I think we can make a number of inferences about tikanga. One is that harm to the environment is a harm in and of itself. So that's evident in this particular case because there's harm to the, the emphasis was on the harm to the river and the harm to the mauri of that particular river. It's a very ecocentric as opposed to anthropocentric way of looking at harm in relation to the environment. And in the context of climate change we think it means for example that the emission of greenhouse gas emissions alone creates a harm to our atmosphere and Ranginui. Not to mention the complex resulting harms to the ocean, to fish stocks, to whenua, et cetera.

In this case we also see that a collective harm, a collective tribal harm has been suffered, so the effluent discharge was considered to be a harm to the whole iwi. That reflects the idea that I've already talked about about Māori having that whakapapa relationship to the whenua. So the focus in this particular case clearly not just around harm being conceptualised in terms of individualistic relational proximity. But instead the relational proximity just was between the polluter and the river and that enough was sufficiently enough to draw a relational proximate mind to the whole tribe. So it starts to push against I think some of those classically enshrined relational proximity points that we see in the development of the torts today.

I think this case also speaks to that question of standing. So in this case it was brought by Huakina Development Trust led by Dame Ngāneko Minhinnick. It wasn't necessary to show she suffered harm or the trust suffered harm. Special damage wasn't required for her to be able to take action in relation to this particular claim. She simply had the mana to take it, and we say that Mr Smith similarly has the mana to take this type of claim which talks not only to his individual harms but clearly is about harm more broadly and has broader impacts. And Mr Salmon in his affidavit showed you where we've talked about his long history in relation to these types of issues and also his not insignificant role as one of the co-leaders or the lead chairperson of the National Climate Change Iwi Leaders Group.

The other example before ending is I wanted to talk briefly about the use of rāhui and aukati restrictions in response to environmental issues. So rāhui are a relatively well-known Māori tool for regulating human behaviour. One of the contexts in which they are commonly used of course is in relation to the environment where a particular area or an action is considered tapu or prohibited to allow for regeneration of that resource to occur.

Now there's an example that we refer to briefly in our submissions where certain hapū of Te Whānau-ā-Apanui placed a restriction or a rāhui on commercial fisheries in their rohe whilst allowing to permit a customary – whilst continuing to permit a customary and commercial take. We think that there's some analogies in that situation that can be made with climate change. Overfishing is a polycentric problem that is contributed to by many to different degrees. So you have commercial fishers, you have recreational fishers, you have customary fishers, you have a local domestic context as all as an international context. The Te Whānau-ā-Apanui example shows, we think shows that one, taking, or these three points that I want to make about it. The first is that taking action is not contingent on relational proximity, so it's a similar point to the *Huakina Development Trust* case. So the focus on tikanga is not, in this particular example, is not drawing a line between the commercial fisher and the person who wants to catch food for their whānau, and they can no longer do that because of the overfishing issue.

WINKELMANN CJ:

Nor does it depend on drawing a line between the commercial fisher person and the harm that's occurred in the past. So it's not, they don't have to be identified as the harm-doer.

MS COATES:

No, it's about taking a pragmatic – it's about responding pragmatically to what's in front of them within the jurisdiction that they have. So what this example also shows though is that tikanga has the capacity to draw pragmatic lines. So yes, it is more common to have a rāhui that is a ban over everything. It prohibits

everyone from doing that particular activity. But in the absence of Te Whānau-ā-Apanui they are a poor coastal low socioeconomic community and they rely on their back yard to eat. So they drew this pragmatic line between those who needed to continue to fish for their survival, and those that were taking a disproportionate amount of the resource. That wasn't related to the fact that they were gaining commercial profit from them, that was just incidental. It was related to the nature and the extent of what they were taking in that particular rohe. Now we're not saying that the line, and as Mr Salmon pointed out, that the line to be drawn in the climate change context is necessarily easy, we do not need to solve that here. What we do know is that tikanga doesn't just throw up its hands though and say, everyone's contributing to it, the problem is too hard, let's all keep exploiting the resource. It at least makes an attempt to draw that pragmatic line between different users of the resource.

Finally it brings me to my final point related to the Te Whānau-ā-Apanui example, that tikanga demands a localised response, even if the problem is big and complex. So a local hapū rāhui is not going to solve the problem of overfishing in Aotearoa or the world. It may not even solve necessarily the problem that they're having in relation to a resource being exploited. Fish move, they can just swim next door and be caught by the commercial fisher over there, but what it shows is that tikanga demands a response because that is what is tika. That is what they can do within what they can control. So there's an analogy here, I think, to what New Zealand does, extracted out to our country in relation to the climate change issue. It demands a local response to, well, tikanga would say – or at that particular – from that particular example that tikanga would demand a local response to the identified harm, that we are contributing to, even if we don't solve the whole problem all at once.

So just finally I did want to draw your attention to the Andrea Tunks article because as I said it's the one place, or the only source that we could find that was written that had someone trying to grapple with how te ao Māori responds to a – or how tikanga responds to a climate change issue. This is the type, and it's worth reading if you've got an opportunity, this is the type of evidence that

would be drawn upon in the particular substantive hearing, and I did just want to draw your attention to one paragraph at page 81 of the article, and it's highlighted up there where she says: "In Māori terms, the absence of an intention to cause harm is irrelevant. The harm in itself is enough evidence of our continuing violation of the Mana and Tapu of our non-human whanaunga (relations). As Kaitiaki we have absolute liability for our effect upon the environment. The development by our tipuna of strict environmental regulation was to maintain Utu and to safeguard the Mauri of the natural world. This includes respect for the domains of the different Atua and the prevention of acts that are detrimental to the Mauri of co-existing states of living."

She goes on to talk about how "human induced pollution of the atmosphere… constitutes an adverse tilting of balance" that results in a depletion of mauri, that it engenders a negative reaction from the entities responsible for climatic conditions, that solutions lie in restoring balance to the natural world and meeting our obligations to the other parts of the earth's whakapapa and she also specifically refers to the solution of non-interference and that a tikanga framework can restore this balance. So although this article is of course not at all talking to the very specific issue that we have at hand it is someone that has grappled with the application of tikanga to the specific issue of climate change and it starts to paint a picture of tikanga speaking directly to hara, to wrongs, the harm that these emissions cause to the environment and that this harm needs to stop and that a tikanga framework could help us restore an appropriate balance.

So I just wanted to offer a couple of very few concluding whakaaro before I pass it on to my learned friend –

KÓS J :

Just before you do.

MS COATES:

Yes Sir.

KÓS J:

If one thinks, as I happen to, that the real battleground in this case is public nuisance then the biggest obstacle your side faces is the special damage rule and your tikanga argument is quite a strong attack on that rule as appropriate in 21st century Aotearoa New Zealand. That's the heart of your argument I think in that – for that audience.

MS COATES:

Yes Sir. For that particular tort that would be the heart of how we say tikanga is relevant to that particular tort of public nuisance or it helps you particularly to address that issue in relation to Mr Smith and the damage he says has been caused. We think more broadly that tikanga also aligns generally with the idea of there being public nuisance and it being dealt with in that particular way that is when the environment is there it does cause a broad harm to people and it's about who has the right to take that on behalf of the community and we say Mr Smith certainly should be able to do so.

I was talking to Mr Smith over lunch and he offered a beautiful whakatauki by a tipuna of Ngāti Hine up north called (Māori 15:02:16), that says: "Titiro atu ki te taumata o te moana," which translates as look to the edge of the horizon. And in talking to me about that particular whakatauki he put emphasis on not only looking at the balance books or the way that companies might look to the three year cycle of profit or planning but that te ao Māori looks and has that intergenerational way of looking at that issue and that's something that we encourage you to bring to this particular proceedings.

We think that indigenous knowledge is vital in navigating the world's climate response and in the New Zealand context tikanga should be drawn upon not only in relation to what they're doing in the legislative space but of course how we develop our common law in relation to responding to this issues. What we're asking for is to let the tikanga voice be explored in a substantive and meaningful way. We do not need to solve how tikanga is perfectly woven into tort law today but is it relevant? Yes. Will it tenably assist a claim that holds the mirror up to those in Aotearoa that are contributing the most to the known harm of

greenhouse gas emissions? Yes. And should this case be permitted to continue? Yes. So unless your Honours have any further questions, those are my submissions.

WINKELMANN CJ:

Thank you Ms Coates.

MS COATES:

Kia ora.

MR BULLOCK:

May it please the Court. Mr Smith has pleaded an orthodox public nuisance claim which is grounded in centuries of relevant authority. By and large the Court of Appeal agreed with this proposition albeit in our submission making a number of missteps on the issue of standing and causation.

In response to Mr Smith's appeal to this Court the respondents invite the Court to manipulate and depart from centuries of principle in an effort to avoid Mr Smith's claim being tested at trial. Mr Smith does not ask the Court to invent new law on the public nuisance cause of action. He simply seeks to have existing law, existing principle applied to new facts in the ordinary way that the common law does, and he submits that that is something best done at trial.

The Court will have quite a detailed road map from me and I was going to do an opening sign post but I feel the bus of timing rearing up behind me, so I –

WINKELMANN CJ:

What's the timing you've set for yourself, Mr Bullock?

MR BULLOCK:

I don't want to go there, your Honour. I'm going to do my best to give Mr Salmon a chance to come back.

WILLIAMS J:

Just your best, Mr Bullock.

WINKELMANN CJ:

Does Mr Salmon need all of tomorrow?

MR BULLOCK:

No, I think he won't need all tomorrow. We'll spill over if we need to.

WINKELMANN CJ:

Before morning tea I meant.

MR BULLOCK:

Before morning tea, yes. It's ingrained principle. So I was going to talk a bit about the history of public nuisance but I don't think I really need to. It has its origins in the criminal law and it developed into a tort. There's nothing particularly unusual about that when we look at other common law torts. I should note, without wanting to cite myself too much, I did provide the Court on Friday a paper which has been accepted into the *Journal of Tort Law*, a paper of my own, which talks about the history of the private action and public nuisance in quite some detail, and I really just refer that as a source of research and reference if that's helpful, but I think some of the history will come out as we work through the different elements.

The other thing I wanted to make clear at the outset is that "public nuisance" and "private nuisance" are different torts with different origins and they protect different things. The reason I say that is that there are various efforts in the respondents' submissions to conflate the two or to conflate principles between them and that's not something we see in the case law and it's not actually something we see in the commentary either. I'll refer to a few examples of that as we work through, but I want to be clear about that at the outset.

Public rights protect rights that are common to the public. Private nuisance protects private interests in the enjoyment of land. They protect different things

and they operate in different ways because inherent in the protection of common rights is this issue of collective action problems. Many public nuisances involve the use of common resources and that's why we see when we come to causation the Courts using different causation rules to what we see in more familiar private contexts.

So on the issue of interference with public rights which is the main thing a plaintiff needs to prove in a public nuisance claim, the Court of Appeal accepted that Mr Smith had tenably pleaded this and in my submission it was right to do so. There are two types of public rights, as the Court of Appeal recognised, and this is drawn from numerous sources but helpfully the England and Wales Law Commission's paper on the subject sets this out quite nicely. We've got, first, acts that endanger the life, health, property, morals, comfort or convenience of the public, and, secondly, this is an alternative form of public right, we have what the Court of Appeal called interferences with public rights as such, and we might call those recognised public rights, and the classic examples of those would be the right to pass and repass on a public highway, the right to pass over navigable waters, the right to fish in public waters. There's a bunch of specific rights that the law's developed over the centuries. But there's these two separate classes.

That first class of acts that endangers the life, health, property, et cetera, is the sort of public right that was recognised in *Attorney-General v PYA Quarries Ltd* [1957] 2 WLR 770 (CA) case which the House of Lords in *R v Rimmington* [2005] UKHL 63, [2006] 1 AC 459 recognised as the leading modern authority on the subject. That was a case about a quarry that was blasting and causing vibration and dust and, importantly, in a way that affected a cross-section or a class of Her Majesty's citizens. So this is where we see the distinction between public and private nuisance developing. It's got this, I think Lord Denning in the *PYA Quarries* case talks about this, indiscriminate effect, broad effect.

The question of what amounts to a sufficient class of the subjects to be affected to transform something into a public nuisance is ultimately a question of fact and degree, a question of trial. But what we do know from *PYA Quarries*, and

it's in the Law Commission Report too, *PYA Quarries* was a case that I think affected about 30 households and that was held to be a sufficient class of Her Majesty's citizens for these comfort and convenience rights to engage. The Law Commission Report refers to another case, which name escapes me, where only three houses were affected and that was said to be too few. So somewhere between three and 30. Well, Mr Smith says this case involves literally billions of people, so we submit we're into the class but it's ultimately a question for trial.

1510

The other thing I want to stress is that this framing of public rights is involving endangerment to life, health, property, et cetera is precisely how Mr Smith has pleaded the interferences with public rights at paragraph 84 of the amended claim. He's used this language in this form. It's entirely orthodox. And he might or might not be right but he's presented his claim on an orthodox, tenable legal foundation.

And I was going to work through the *PYA Quarries* case but I actually want to look at an earlier case which is the *Southport Corporation v Esso Petroleum Co Ltd* [1954] 2 All ER 561 (CA) decision which is at volume 6 of the appellant's bundle, tab 83. And the reason I want to look at this, is you'll go away and read *PYA Quarries* because it's according to *Rimmington* the leading modern authority, but *Southport* really sows the seeds for that decision. So *PYA Quarries* in 1957, *Southport* in 1954 and this was a case about an oil tanker which became grounded on some rocks and released oil to lighten itself and the oil spilled out into the bay and washed onto the plaintiff's shoreline. Now only Lord Denning looked at the question through the issue – through the lens of public nuisance but we see a lot of what he says come up again in *PYA Quarries*.

So on page 571 of the decision we see Lord Justice Denning's discussion of a public nuisance and it begins by saying it covers a multitude of sins great and small, and then he says: "Suffice it to say that the discharge of a noxious substance in such a way as to be likely to affect the comfort and safety of

Her Majesty's subjects generally is a public nuisance." Well in many respects that is Mr Smith's case.

He then looks at two cases, one about a quarry in Torquay and another about a lighted firework being thrown into a crowded market and he says, well yes, these were cases about explosives. This is a case about oil. But that doesn't really matter. It doesn't go to the legal principle. It just goes to the underlying facts. And around line C his Honour says: "Applying the old cases to modern instances it is, in my opinion, a public nuisance to discharge oil into the sea in such circumstances that it is likely to be carried on to the shores and beaches of our land to the prejudice and discomfort of Her Majesty's subjects." Again this is Mr Smith's case. We look at to the old cases. We find the principles. We apply them to the modern facts as they are presented and will be heard at trial.

He goes on at D to refer to the standing rule, which his Honour Justice Kós has raised, noting that: "If any person should suffer greater damage or inconvenience from the oil than the generality of the public, he can have an action to recover damages on that account provided, of course, that he can discover the offender who discharged the oil."

Interestingly and when we look at these cases in the interests of time I'm just going to flag some points that will go in later in my structure but arise as we go. At line E we see a reference to a statute passed in 1922 which criminalised the discharge of oil into navigable waters and his Lordship goes on to say that does not mean that the public nuisance has not also arisen by the common law. So we see this – when we come to talk about independent illegality and statute we have Lord Denning here saying, well look there is a statute that criminalises this very behaviour, but that doesn't mean it can't also be a public nuisance at common law, and then he goes on to say, well once the nuisance has been established it's for the defendant to show an excuse and the most common excuse is statutory authorisation and we'll come to talk about that a bit more as well.

So I just wanted to start there because I think that's a useful and different introduction and of course when the Court goes to consider *PYA Quarries* we'll see both his Lordship and Lord Justice Romer expressing very similar sentiments when they come to talk about the comfort and convenience.

The other case I wanted to briefly touch on at the outset is the *Attorney-General* v *Abraham and Williams* [1949] NZLR 461 (HC & CA) decision, the New Zealand decision, which is in the respondents' bundle, volume 1, tab 2. And this was a decision about a stockyards in Johnsonville in Wellington and it was the main stockyards that linked the abattoirs in the city with the rural farming lands where the presumably sheep were largely being raised. And if we just turn to that case. I'll just go to the headnote to start with in the interests of time because it does refer to dicta that's in the decision. So at 461 of the decision, the front page, we see the first holding that the unsanitary condition of the saleyards, offensive odours from unremoved manure and stagnant urine and the attracting of flies and mosquitoes constituted a nuisance likely so generally to affect or to be a danger to the health of all residents in the vicinity as to amount to a public nuisance and that it was a sensible interference with their common right as the King's subjects to the enjoyment of life and property and the ordinary comfort of human existence. And I like that framing because again when we think about what this case is, this is a case about the ordinary comfort of human existence.

Over the page we see some discussion in the second holding of the appropriate remedy and the appropriate remedy was an injunction. But not only that, the appropriate remedy was a suspended injunction, and I'll come more to talk about relief but there's a suggestion from the respondents that Mr Smith is seeking some contrived remedy here. Well he's not. The suspended injunction was an orthodox remedy and we see here in 1949 the Court of Appeal of New Zealand upholding a suspended injunction in a public nuisance case. Why? Because it recognised this abattoir was important. Yes it was a nuisance but there would be a problem if it were just shut down. The Court suspends its injunction to give the defendant time to find somewhere else to put its abattoir, in this case where it would not be a public nuisance. We'll come to look at the

river cases where the Court say, well you can also use that time to go to Parliament and if Parliament thinks what you're doing is sufficiently worthy, of course it will pass a statute letting you continue –

WINKELMANN CJ:

So Mr Bullock, can you just tell us what exactly you're taking us through at the moment? I mean I know you're taking us through cases but what's the point of the cases you're taking us to? Although they're very interesting.

MR BULLOCK:

I'm starting on the public rights proposition. So that's why we were looking before at –

WINKELMANN CJ:

So it doesn't have to be a legal interest? Is that the point of what you're saying or?

MR BULLOCK:

The point of what I'm saying is that something that affects the enjoyment of the comfort and convenience of life and property and the ordinary comfort of human existence is sufficient to be an interference with the public right according to the case law, and I'm sorry for doing it in a slightly disjointed way. I'm just keen to avoid us turning things back up –

WINKELMANN CJ:

But it's meeting the respondents' point that it has to be a legal interest or a legal right, legal right.

MR BULLOCK:

Correct. Well the legal right this the right to live with comfort and convenience. That is the legal right. That is what the cases say.

WINKELMANN CJ:

Although it's not one we formulate.

MR BULLOCK:

No it's not. But there's nothing crazy about this. If we just look in Halsbury's or Todd it's recognised. So Mr Smith isn't pushing the boat out here –

KÓS J:

It might actually be more put in a negative sense. It's the right to live without interference in that way.

MR BULLOCK:

Correct. The other thing I want –

WILLIAMS J:

Does – do the respondents refer to this because these are all done by relator action?

MR BULLOCK:

We'll come to that Sir, but this one was. This was brought essentially on behalf of the local council. It's sick of having this smelly stockyards in its vicinity. But we'll come to what the standing rule means shortly. I don't know why the respondents have referred to this. I think to be honest I omitted to include it in my material. It was before the Court of Appeal.

The other thing I just want to flag and there was a suggestion when this case was raised in the Court of Appeal that there was an independent illegality here because there was a finding by some of the judges that the stockyards had been operating in breach of the Health Act. But I want to, if we just scroll down that 462 we see the holding of, holdings of Kennedy and, Justice Kennedy and Finlay and they say, well yes, this is also a nuisance under section 26 of the Health Act, and then we see Justice Gresson under that, and the holding here correctly records his Honour's decision. "The evidence established (in addition to a material interference with the comfort and convenience of life of the persons residing or coming within the sphere of influence of the saleyards, which amounted to a public nuisance) a statutory nuisance within the meaning of s 26 of the Public Health Act 1920."

So we've got this distinction between a statutory nuisance and the public nuisance. In this case some of the judges found it to be a statutory nuisance. All of the judges found it to be a public nuisance at common law. So on that first question of public rights in my submission we have a tenable pleading. We've also pleaded a potential new public right as such which is this suggestion of a public right to be able to exist in a safe and habitable climate which we say is primary to the exercise of all other rights. If one cannot exist in a safe and habitable climate one cannot exercise the other freedoms and rights we seek to enjoy and that must be a preeminent right of the public. But this Court doesn't need to resolve this question. This is a question of whether Mr Smith has pleaded a tenable interference, and he's pleaded in this comfort and convenience and so on language, which the cases recognise.

1520

Turning now, and this is to the next box in my road map, the question of independent legality and in my submission this really is a red herring. The submission which my learned friends continue to press arises from some dicta in the *Rimmington* case where the House of Lords adopts the definition of a criminal law scholar called Archbold in his textbook which defines a public nuisance in the language of "an act not warranted by law", and my learned friends creatively submit that well this means it needs to be shown to be unlawful, independently of the fact it is a nuisance.

This was expressly looked at by the England and Wales Law Commission. They said that that's not what it means, you don't need an independent legality. Halsbury says you don't need it. John Murphy's leading English text on nuisance says you don't need it. There's nothing in Todd or the other texts we've cited that say you do need it, and I won't do it, I won't put you through this, but I could go to a dozen cases where the conduct which was found to be a public nuisance was not only found not to be independently unlawful, but the conduct was found to be positively lawful, apart from being a nuisance. The *R v Cross* (1826) 2 Car & P 484, 172 ER 219 case, which is noted there, was a case about smoke and things going onto a highway from a

slaughterhouse, smells I think largely, and the Judge in that decision says, you can have a licence from every magistrate in the land to have a slaughterhouse in this location, but from the moment it becomes a public nuisance, it becomes liable to be restrained. So in my submission independent legality, it's a red herring. The question of rights, the rights basis of public nuisance are those public rights we've just been talking about.

So I'll come to the standing rule, which his Honour Justice Kós has indicated it interests him a lot, and in my submission, there's actually a very short answer to the standing rule question in this case, and I find it slightly difficult just how, and I think to be fair it's been the very effective advocacy of my learned friends, how tied up in knows the Courts below have got on this point, and I'll come to talk about what the standing rule means, but I'll just start with the point of doctrine which I think answers the question, which is physical damage to property has always been sufficient particular damage to found standing for a claim in public nuisance, it always has been. That's what Todd says, that's what all the texts say, and we've got the references there, we don't need to turn them up, unless the Court is interested.

WILLIAMS J:

What did Lord Denning mean when he said the oil damage on the shoreline has to be greater than the damage suffered by the general public?

MR BULLOCK:

Well, we'll come to that. He may not have seen that as a property damage case, he may have seen that as an interference with the comfort and convenience of the public to use that beach for example. It's not clear to me his Honour viewed that as a property damage claim, because of course the property wasn't damaged. There was an oil slick that got cleaned up.

WILLIAMS J:

Well…

MR BULLOCK:

Well, it's not clear to me that that's the way the Court was thinking, but I'll come to your Honour's point. But at the very least if you read Todd, if you read the texts, property damage is sufficient and in fact in the case in which the private action for public nuisance was first recognised the example was given of someone who digs a ditch in the road, which is a public nuisance, it's an interference with the right to pass and re-pass on the highway, and this is the anonymous decision from 1535, so if a rider comes upon the ditch and falls into it and injures themselves, then of course they have an action on the case in public nuisance. Now that would be the same whether they were personally injured or whether their carriage came into the ditch and the wheels came off. That is particular to the person who owns the property, or the person whose bodily integrity has been interfered with. So I'll just start with that point of doctrine, but to answer the question of why there is a standing rule, we need to think about these, the nature of these broad public rights, which are rights held in common by all citizens, and I say "held in common" because there's been a suggestion in the submissions that these are rights that derive from the State, and in my submission that's not right. The proper understanding of these rights is that they are rights held by each citizen in common with every other citizen, and we can see that with the, and it is, in *Rimmington* they call it the classic case of the public nuisance, which is the interference with the right to pass and repass over the highway. That right exists to allow me, as a citizen, to travel and it allows every other citizen to use the road to travel so that we can participate in life. We aren't beholden to our neighbours to let us pass over their land, rather there is a system of public routes we can take to do what we need to do.

My right to pass and repass on the highway isn't a right that is of the State which I can enforce, rather it is a right that is my own, and I use this example because the right to pass and repass over the highway shows the potential problem. It's the problem you see in the 1535 case and it's the problem you see in the case that really solidified the private action which is the 1592 decision of *Williams's Case* (1592) 5 Co Rep 72a, 77 ER 163 at 73a which is in the bundle.

The concern of the Courts was that finding a public nuisance, finding the interference with the public right, could lead to a multiplicity of trivial actions for the same thing. So where a road is blocked it injures every citizen because every citizen loses the ability to travel down that road. Doesn't matter whether they know where that road is, doesn't matter whether they had any intention. As a matter of fact, everyone is prevented from using it. Everyone is injured. The concern of the Courts in the 16th century was, well, that might lead to a lot of people coming to court and saying: "Give me some nominal damages, please, because my rights have been interfered with," and the Court was concerned that that shouldn't happen, rather it only wanted people who had been actually injured by the nuisance to be able to claim. So some of the cases and some of the text books talk about this as being "special damage" which you'll see some of the authors describe as perhaps being unhelpful language and the decision of *Walsh v Ervin* [1952] VLR 361 (VSC), a very good decision from Australia from the 1950s, which says "special damage" isn't the right characterisation, it's "particular damage", and that's actually what *Williams's Case* says. It says "particular damage".

WINKELMANN CJ:

Sorry, what was the name of that case?

MR BULLOCK:

Walsh v Ervin is the Australian case. It's at volume 8, tab 92, according to my notes. But when we think about it as "particular damage" we're talking about damage particular to the plaintiff.

KÓS J:

What's the difference?

MR BULLOCK:

Well, there's no difference, Sir, but I think the idea is that because "special damage" means something broader in other parts of the law it's unhelpful to use the same words to describe different things. All the Court is concerned is is the plaintiff coming to court because they have actually been harmed or are

they coming to court because, like everyone else, their rights have been interfered with?

So again, not to labour the example, but imagine there is a road in the rural back-blocks of Cleveland in South Auckland. It's a road very few people ever drive by, it maybe connects to one farm, and a defendant comes and obstructs that road in some way. Every New Zealander, every Aucklander, every New Zealander, has a right to drive down that road. The obstruction stops everyone using it, but that doesn't mean everyone gets to claim. What it means is that someone who can show a particular injury can claim, a private claim. So perhaps the farmer whose farm is connected by the road and is impeded from accessing his farm or moving his stock might suffer a sufficient particular injury or someone who does happen to drive down the road and hit the obstruction might suffer a particular injury.

So this is this distinction we see in the cases between a theoretical injury to the rights of everyone and an actual injury, and in this case Mr Smith says: "Well, I have suffered an actual injury, I've pleaded an actual injury, because I've said my property is going to be damaged, the property in which I have an interest." So we're not in this concern of the tort having an over-broad reach in Mr Smith's case. He's saying: "I'm here as someone who has been injured," and…

GLAZEBROOK J:

Couldn't everybody say that, at least in relation to health, and would it be odd to say, well, if you've got a particular property claim then you can claim but not actually if you die?

MR BULLOCK:

If you actually die then you probably have been particularly injured. If you're simply saying we all have a risk to our health, that might not be enough, but if there's something particular to you it might be. In the property case, as this Court will well know, the common law has always recognised, especially landed property, as being peculiar. It's not substitutable. It's my land is mine and I have my own interest in it which can't be readily compensated by damages for

example. That's why we've got specific performance as the default remedy in relation to land –

1530

WINKELMANN CJ:

So is your point that this notion of special damage is really just a situation – a means of limiting the class of particular – of claimants who can bring a claim where they haven't actually suffered damage?

MR BULLOCK:

Yes. Actual damage.

WINKELMANN CJ:

Or is it simply… mmm. Okay.

MR BULLOCK:

So this becomes more profound in cases where the injury is said to be delay or inconvenience. So where it's physical damage that's, the reason why I say that's always been sufficient is because –

WINKELMANN CJ:

Okay. So you are damaged in a sense when you've been delayed or inconvenienced but it's not – if everybody's been delayed or inconvenienced that's not elevated enough to make you a potential claimant –

MR BULLOCK:

Yes.

WINKELMANN CJ:

Whereas if your land has been damaged or your business has been damaged –

MR BULLOCK:

So I'll give a really good example. There's a case called *Rose v Miles* (1815) 4 M & S 101, 105 ER 773, it's an old case, it's in the bundle, we don't need to dig it out, where there was a navigable canal which is blocked by the defendant

and the plaintiff is trying to ship some goods down the canal and comes upon the obstruction and to get the goods to where they need to go the plaintiff has to unload the goods onto land and transport them over land at considerable expense. So no property damage, just delay and inconvenience, and in *Rose v Miles* the Court says, well, that is particular damage to the plaintiff because the plaintiff's injury, and this is the Court's language, did not rest merely in contemplation. So it wasn't just the fact they thought, you know, they could, anyone could have navigated down this canal but that wasn't that case. The plaintiff had –

KÓS J:

Well that's your plea if you're a farmer.

MR BULLOCK:

Yes. Exactly. So there's a lot that could be said about the standing rule that's very interesting and could be the subject of many articles and PhDs theses but here we have, at least part of this claim is about property damage and that's enough. I want to address a couple of points in my learned friend's submissions because –

KÓS J:

Well I suppose your point is the fact that it's millions of property owners affected doesn't affect the basic proposition.

MR BULLOCK:

Correct. Lots of people can suffer special damage, and there's a good case on this and I will just go through it briefly, because it's, as you can tell I quite like old cases. It's in my volume 1, tab 5, it's a very old case from 1703 called *Ashby v White* (1703) 2 Ls Raym 938, 32 ER 126 and you can see I've gone to some lengths to find this.

WINKELMANN CJ:

I know that case.

MR BULLOCK:

I had to –

WINKELMANN CJ:

Well you know that people have written doctorates about whether this is an accurate report.

MR BULLOCK:

Well I'll tell you what the report we've got says. So about half way down it says: "And it is no objection to say that it will occasion multiplicity of actions, for if men will multiply injuries, actions must be multiplied too; for every man that is injured ought to have his recompense. Suppose the defendant had beat 40 or 50 men the damage done to each one is peculiar to himself, and he shall have his action. So if many persons receive a private injury by a public nuisance, every one shall have his action, as is agreed in *Williams's Case*." And perhaps the suggestion that I'm right is that that is what *William's Case* says, and we've got that in the bundle.

So we see the fact a defendant injures many people doesn't give the defendant a defence. If they actually injure many people they will face many suits. That's what *Ashby v White* says, and this is the trap the lower courts fell into is they thought well because there's lots of people who are going to be hurt Mr Smith's damage isn't special to him, but it is because it's his land. It's his cultural sites. It's his fishing grounds. It's the ones he uses and we'll come to fishing now because this is the point in which I think I'd like to clarify a few points.

So my learned friends in their submissions at 113, 115. So 113 I just want to clarify a misstatement of my argument. So they say Mr Smith submits it's sufficient for him to suffer actual injury rather than a theoretical injury. Well that's not my submission. My submission is everyone suffers a theoretical injury. He must show he also suffers an actual one.

They then say that Mr Smith acknowledges authority to the contrary but relies on obiter statements in a single case from Canada. Now somewhat ironically at paragraph 115 when my learned friends are saying that I am wrong that property damage will always suffice. They also cite a single case from Canada, and one from Australia. The case from Canada they cite is a case called *Hickey v Electric Reduction Co of Canada Ltd* (1970) 21 DLR (3d) 368, and this was a case about a pollution of Placentia Bay in Canada from a pulp factory, caused all the fish to die and the fishermen said, we've lost our livelihoods, can we have some damages please, and the Court in that case said, well, the fish have died for everyone. You're not in any particular, you haven't suffered any particular harm because every Canadian has lost the right to go and fish in this water, the fish are just gone, you're not in a particular position to say you've been injured, and that gets applied in *Ball v Consolidated Rutile Ltd* [1991] 1 Qd R 524, which is an Australian case which had similar facts where some debris from a sand mining operation washed into Moreton Bay and made it difficult to fish for prawns.

Now *Hickey* was heavily criticised. You've got in the bundle a case called *Gagnier v Canadian Forest Products* (1990) 51 BCLR (2d) 218 (SC), which I think is referred to in my notes, from the British Columbia courts, which says, we're not bound by this *Hickey* decision. We're not going to apply it. We think it's overly exclusive and wrong. That was another case about fishing, by the way. Basically the same facts. Polluted fishery and in that case they said, well no, the fisherman do have special damage –

WINKELMANN CJ:
What's the name of that case?

WILLIAMS J:
Gagnier.

WINKELMANN CJ:
How do you spell it? I'm just trying to assist your assistant.

MR BULLOCK:

It's G-A-G-N-I-E-R. It's in the respondent's bundle, volume 1, tab 18. So that was a similar case, and it reaches a different conclusion, and the reason, and in my submission the correct reason is that the Court said, well, the fishermen aren't in the same position as the rest of the public because they have bound up their livelihoods and their investments and been able to fish in this fishery. So that they're affected in a different way. To use the *Rose v Miles* example, they are the person who's taking their goods down the canal and gets hit by, obstructed by the obstruction. Their injury is not in contemplation, it's real, whereas every other Canadian who lives in Toronto and is never going to go to British Columbia and fish, is not affected in the same way. So we've got –

WILLIAMS J:

Well that takes us to that village in Alaska, doesn't it?

MR BULLOCK:

Well I'll come to that too Sir because your comment about, reminded me to bring it up, and I'll make sure I cover that before we finish today.

WILLIAMS J:

There the Court says precisely what you said, and said therefore you've suffered no damage.

MR BULLOCK:

Two things I'll say to that Sir. First, is the Court there was looking at article 3 standing under the US Constitution, slightly different test. The second point is the US courts have taken a bit of a different turn on the standing rule. They have taken a must be different in kind and degree from the rest of the public.

WILLIAMS J:

So you say that they're an outlier?

MR BULLOCK:

Yes, and *Hickey* went down that route, but the Canadian courts have now walked it back.

WILLIAMS J:

And so did *Ball*.

MR BULLOCK:

Ball is interesting, I'll come to *Ball* very briefly.

KÓS J:

Yes, these are all first instance decisions, aren't they?

MR BULLOCK:

Well this is what I'm coming to Sir. The one Canadian case I rely on, *George v Newfoundland and Labrador* (2016) 399 DLR (4th) 440, is a decision of the Court of Appeal of Newfoundland and Labrador. *Hickey* was a decision at first instance. *George* expressly overrules it and it says *Hickey* – and actually we'll turn up *George* because there's a couple of good illustration principles. This is my volume 3, tab 34, and we're going to paragraphs 101, which is near the end. It's more in the middle. So actually it's paragraph 115 where *Gagnier* is overruled. Sorry, not *Gagnier*, where *Hickey* is overruled. The Court says: "I agree with *Gagnier* that a difference in the degree of damage should be a sufficient basis for recognising the right of an individual to sue in public nuisance. I would not follow *Hickey* and I would adopt 'the more modern view' discussed by Linden." The rest of the Court agrees with this position. Now what does this –

WILLIAMS J:

You can't really say it was overruled though because they're from different jurisdictions.

MR BULLOCK:

No, same jurisdiction. *Hickey* is Newfoundland and Labrador as well.

WILLIAMS J:
Oh is it? My apologies.

MR BULLOCK:
Yes. So –

KÓS J:
So what does Linden say?

MR BULLOCK:
So if you go just slightly up to 113, Linden submits, Linden is an author, "Linden submits that 'special damage' means 'particular damage; a special loss suffered by an individual which is not shared by the rest of the community.' Linden suggests that while at one time the Courts" and this is the case in America, "required a difference in kind and degree, 'the more modern view is that recovery is permitted in either case, as long as the damage to the plaintiff is 'more than mere infringement of a theoretical right which the plaintiff shares with everyone else.'" And this is where we come back to my road in Cleveland. It affects everyone theoretically, it affects only some people actually, and it's only those people who are actually harmed who have their claim.
1540

So I'll just talk briefly about *Ball v Consolidated Rutile* because that was mentioned by his Honour, Justice Williams. So this is the one where we've got sand mining and a bunch of basically plant matter, roots and things, get washed into the bay and they start snagging nets. I'm not sure we need to go to it but I'll just tell you the issues. So the Court in that case said: "Well, applying *Hickey*, we're not really sure this is a public nuisance at all," and, of course, that might not be true if the case came before the Queensland Courts today but that was the case at the time, pre-dates *Gagnier*, pre-dates *George*. It's from 1987, I think. The Court then asks, well, are these prawn fishers in Moreton Bay people who have suffered special damage, and in light of *Hickey* they say, well, to the extent they're finding it hard to catch prawns they're not. They are in the same

position as every other Australian who would find it hard to catch prawns as a result of this landslide.

But interestingly the Court says – and I think I've made a note of this so I'll just check where I've put it – the Court says that – I haven't noted it – of course, to the extent people's nets are getting caught up in the debris and their nets are being damaged, I think it was pleaded there had been $40,000-worth of damage to fishing gear, they would definitely have standing for that.

So they say interference with their ability to fish, no standing, following *Hickey* which has now been overruled, but they say to the extent fishing gear has been damaged, that is sufficient, and this comes back to my point: property damage has always sufficed. It's always particular to the plaintiff.

WILLIAMS J:
Is it rather that it's just non-speculative?

MR BULLOCK:
Well, that's another way to put it, Sir, yes.

WILLIAMS J:
Who knows where the prawns went?

MR BULLOCK:
Well, perhaps, albeit the Canadian Courts would now take a different view on that issue as well, Sir, but…

WILLIAMS J:
Do they know where the prawns went?

MR BULLOCK:
Can't answer that one, Sir. So, re-orientate myself.

WINKELMANN CJ:

So does that deal with your main points?

MR BULLOCK:

Yes, it does. I'll just drop one last point in there, it's a related one, which –

WINKELMANN CJ:

You have a little bit of time.

MR BULLOCK:

Yes – which is that there's reference in some of the cases to the need for the particular damage to be direct or immediate, and there's a suggestion from my learned friends that this is intended to apply to the property damage case too. It's not, and I'll just invite the Court to look at, for example, the discussion in Sappideen and Vines or in Murphy where the issue of directness and immediacy is something that arises in the case of an interference with convenience or where there's delay, and this is just designed to get at basically an indeterminacy problem. So if in the case of *Rose v Miles* where the person is delayed in conveying their good, of course their damages have to be immediate and consequential on the obstruction. But where there's property damage the cases don't show that same requirement. Why? Because, as your Honour said, it's tangible, it's not speculative. It actually exists.

The last point I wanted to talk about on standing is whether we need the standing rule at all. In my submission there's an easy answer for this Court which is that Mr Smith has pleaded a tenable basis for standing because he's pleaded damaged property. If for some reason this Court takes a different view, in my submission questions must be asked about whether the standing rule is now appropriate at all. As I discussed earlier, the origins of the rule were to prevent multiple trivial cases being brought. Well, in my respectful submission, that's not a risk in a case like this. It's not really a risk at all. Litigation is expensive. Mr Smith is fortunate to have some pro bono lawyers to help him bring this case but most people are not going to bring cases to seek trivial or nominal damages, but also, as my learned friend, Ms Coates, submitted, it's

very hard for this Court to say that Mr Smith is not a proper person to bring this claim. He's got a proper interest in the resources at issue. He's a person of standing in his community and he's appropriately placed to represent his community's interests.

Now there was some discussion earlier about relator actions in cases brought by the Attorney-General and in my submission that doesn't help us or it doesn't raise any questions about why Mr Smith can bring this case. It's always been the case that the Attorney-General could bring a claim in the public interest. It's always been the case that someone could go to the Attorney-General and seek the Attorney-General's fiat to bring a claim and we see that quite often where the claims are being brought by local authorities who have gone to the Attorney-General and said, we've got this problem. We want your help to fix it. Of course the local authority doesn't have standing because it hasn't suffered particular damage but it enlists the help of the Attorney to have standing –

KÓS J:

But the Attorney only lends his or her name to it not his or her wallet.

MR BULLOCK:

Correct Sir.

WILLIAMS J:

The impression I got from the respondents was they said that was compulsory.

MR BULLOCK:

No. No, not at all. I mean there's numerous examples –

WILLIAMS J:

No the respondents didn't say it or?

MR BULLOCK:

Sorry. What was compulsory Sir?

WILLIAMS J:

That it had to be brought by the Attorney in a relator action.

MR BULLOCK:

I'm not sure if they say that's compulsory. If they are then it's wrong because there's numerous examples of that not happening –

WILLIAMS J:

Okay. Well perhaps I've mischaracterised what they said.

MR BULLOCK:

But in my submission that's – it's not compulsory and it never has been. There's numerous examples in the bundle and dare I say I've provided you with 11 volumes where private parties have brought private actions in their own name.

KÓS J:

Just give, perhaps you give us a couple of those cases at some point.

MR BULLOCK:

Certainly Sir. I'll think of the best ones overnight.

KÓS J:

Thank you.

MR BULLOCK:

But *Rose* and *Miles* would be an example just off the top of my head. I've already talked about that one.

So that was all I was going to say for now on standing. Like I say I think it's actually an easy question for this Court.

I wanted to talk now in the last 10 minutes or so we've got about defendants and one of the questions that came up this morning was how do we know who

a proper defendant is. Is this a case where everyone is going to be on the hook including Justice Kós and his Landrover but not his electric car. There's a couple of answers to this and again without wanting to cite myself too much I've given you an article, we've talked about this in some detail, but I'll just try and encapsulate the way in which the Court can think about this at least in the public nuisance context. So there's a case that's in the bundle. It's called *Harper v Hayden* [1933] Ch 298. It's a case about the obstruction of a road, it was a footpath in that case, some hoardings, scaffolding and the question the Court was asked was, is this a public nuisance? Is this an unlawful interference with someone's right to pass and repass over this footpath? And the Court talks in that case about public nuisance being, involving an element of give and take.

So on the highway reasonable user, to use the language of the cases, will always be permitted and this really comes from a simple moral principle which in my submission as we see in the cases and is relevant here which is we must accept from others what we expect others to accept from us. So on the highway we expect that others will be using the road. They may use it to stop briefly to unload some goods and that may get in my way, but that's a reasonable use of the road. While I'm driving my car I occupy some of the road to the exclusion of someone else as a matter of just physical impossibility, but that's a reasonable use. I'm allowed to drive on the road. I may come upon all of other cars and become stuck in a traffic jam and fixed stationary on the road but I'm making reasonable user of the road so I'm not committing a public nuisance.

But if I park my car in the middle of the road or if I dig up the middle of the road to plant a flowerbed I'm not making reasonable user and I am committing a public nuisance. So this comes back to this idea. We must expect from others what we expect them to accept of us. So through that lens one can look at climate change and say well we all know that we need to use a bit of the atmosphere to dispose of some greenhouses gases from time to time. I'm here spewing out lots of carbon dioxide and methane. It's got to go somewhere. It's going into the atmosphere. Not very much, and that's the point. We all have to drive our car. We all have to heat our homes. Of course we do, and I have to accept from others what I expect others to accept from me.

1550

But we're not all burning hundreds of thousands of tons of coal a year to dry milk powder to make enormous profits, and I agree with the discussion this morning that where the line is drawn is difficult and it's not a question this Court can answer in the abstract. The way the – the common law is adept at drawing lines. It's done it for a really long time and the way the common law method draws lines is by having different cases brought over time and having different facts and fixing points that over time accumulate into a principle. This is the first case. We've picked people who are emitting a lot. We've picked people who are not just burning a log in their log burner at home or driving a car. We've picked people who are running their businesses in a way that involves either burning or selling or producing large amounts of fossil fuels for private profit.

WILLIAMS J:

Well, that rather simplifies it. Of course, that's true, but that feeds a lot of babies in China with milk powder, with baby formula, for example. So there is a good at the end of it.

MR BULLOCK:

There's good at the end of it, Sir, and that might be a question for relief but, in my submission, in a nuisance context it distinguishes the conduct, and I'll –

WILLIAMS J:

But so is the profit, isn't it? Isn't that irrelevant?

MR BULLOCK:

Well, potentially. So I'll –

WILLIAMS J:

You can't have it both ways.

MR BULLOCK:

Well, maybe I can. I'll give you one more example, Sir, perhaps. I'll see how we go for time but I'll give you this other example and –

WINKELMANN CJ:

Yes, you've only got six minutes until – nine minutes until break.

MR BULLOCK:

Nine minutes, yes. I'm sorry for not having put these authorities in because we'd already got to 11 volumes and I wasn't sure we would go but that's what happens in this Court. In the article that I've got in the bundle from *Modern Law Review*, I've got a discussion of what I call the defendant problem, and I talk in there about the way the common law used to treat cases involving the abstraction of water from flowing watercourses. As the Court will know, at common law every riparian owner is entitled to receive the natural flow of a watercourse and someone who diminishes the natural flow might or might not have committed a nuisance. Where these cases drew the line was between what the Courts called ordinary or domestic activities and extraordinary activities. So the cases say that abstracting water for a domestic purpose, like cooking, cleaning, giving to one's dog, washing –

WILLIAMS J:

Stock.

MR BULLOCK:

Well, we'll come to stock.

WILLIAMS J:

Stock was included.

MR BULLOCK:

Stock was included but I don't think they were envisaging large-scale agriculture, but yes, your own stock, watering your own garden. Those cases said, well, even if those domestic uses exhaust all of the water so there's none

left in the river, that's not a nuisance. But where the use is for extraordinary purpose, and your Honour's obviously read it, I think some of the examples are manufacturing, I think large-scale irrigation might have been mentioned, but manufacturing is the main one because that was the cotton mills and the dye works and everything else that was exercising the Courts at that time, the Court said, well, those people do have – if you're going to use the water for an extraordinary purpose, not a domestic purpose, then you have to ensure the people downstream get the natural flow. So you have to put the water back in or you have to do whatever you do to not diminish the natural flow. So here we have the Court distinguishing again, much like the road example on reasonable user. The reasonable user of the water was taking it for domestic purposes. But an unreasonable user was taking it for other purposes. The road, reasonable –

WILLIAMS J:

I haven't actually read it but that was crystallised in the Water and Soil Conservation Act 1967 and then in the Resource Management Act 1991, you don't need a consent to draw drinking water or feed your stock.

MR BULLOCK:

Right, and that provision has a long history in the common law.

WILLIAMS J:

Exactly, it's that history you talked about.

MR BULLOCK:

And so again I can't give you a really good answer right now before we've had a trial and some facts about where this line is drawn, but what I can say is the common law has drawn lines before. It's drawn lines around use of resources. We have a case about the use of a resource: the atmosphere. The atmosphere has two uses. One, it's a place to dispose of carbon dioxide and greenhouse gases from things we do and, two, it's also the thing we need to be safe and habitable for us to live and do other stuff.

WILLIAMS J:

Be nice if you gave us a couple of lighthouses, even if you didn't give us the path.

MR BULLOCK:

I think it's gone over my head, Sir. It's too late in the day.

WINKELMANN CJ:

Well, you have given us a lighthouse, haven't you? You've said effectively extraordinary users or industrialised or commercialised users.

MR BULLOCK:

Yes, and the short point is Mr Smith's got –

WINKELMANN CJ:

What you haven't given us is the bottom threshold and you're saying let the common law develop.

MR BULLOCK:

Correct. We've given you some very, very serious examples. There's going to be an interesting case as to whether someone who flies to San Francisco three times a week for work is on one side of the line or the other. That case might be brought one day. But Fonterra burning hundreds of thousands of tons of coal, that we say is clearly over the line wherever that might end up being. At the very least we say there's enough there that we should have a trial and work out how bad these defendants' contributions are and whether they are making a reasonable use of the atmosphere, accepting that we all do contribute something but that these defendants contribute much more for different purposes. –

KÓS J:

And as you say given the implications of stopping their activity including on the employment of large numbers of New Zealanders they would have a powerful argument to make in relation to remedy.

MR BULLOCK:

Yes and I will come to remedy probably tomorrow. But the short answer is yes they will and we'll talk about how the Courts dealt with that.

I think your Honours, watching the time I think we've got four more minutes so I'll try and make the most of that. I'll come to causation tomorrow because I think I can deal with this, so I'll skip ahead to statute which is I think quite a short point. No one in this case has actually made the argument that there's a statutory authorisation for this nuisance and of course that is not the proper basis to strike-out the case anyway because it's something on which the defendant would bear an onus. But I do – but it did sort of motivate a lot of the reasoning in the Court of Appeal and I just want to touch on a couple of principles.

The first is that the cases are clear and you've got some references there in my handout that statutory authorisation is a very, very narrow defence. There are cases that say what you would need for statutory authorisation for. The *Allen v Gulf Oil Ltd* [1981] AC 1001 (HL) at 1012 case, I think it was an oil refinery, they said well you would need a statute that either says your nuisance is authorised or it would need to be so necessarily implied that Parliament had said you must build this oil refinery in this particular place and it – you could not do it without causing a nuisance. It was a high threshold.

We've got some references there to dicta recording that the common law does not need to march in step with statute. *Barr v Biffa Waste Services* Ltd [2012] EWCA Civ 312, [2012] 3 All ER 380 was a private nuisance case as was *Lawrence v Fen Tigers Ltd* but that's where that principle was expressed. *Biffa Waste* is a relatively recent decision of the English and Wales Court of Appeal. *Lawrence v Fen Tigers*, a decision of the House of Lords and Supreme Court, and we've looked at *Southport v Esso Petroleum* earlier where the fact there was a common law, sorry, statutory crime didn't permit the common law developing.

The last point I wanted to touch on today was that the effect of the Court of Appeal's decision was to effectively find that the climate change response that had displaced tort law because it said well there's statute here, therefore, the Courts can't go there in a tort case, and I've referred there to the *Gendron v Supply & Services Union of the Public Services Alliance of Canada, Local* 50057 [1990] 1 SCR 1298 case from Canada which – and that same statutory displacement logic is what we see in the American cases, like *American Electric Power Co Inc v Connecticut* (2011) 564 US 410 (SC) where they found that the federal common law of nuisance had been displaced by statute.

The common law approach to this is that the Courts are jealous guardians of tort law and absent a very clear imperative from Parliament either expressly abolishing tort law or in the case of *Gendron* creating an alternative and better remedial regime which could be used by a plaintiff, and in that case the Court said Parliament's done that and, therefore, there's no role for tort. Absent that the Courts aren't going to find that the fact there's statute displaces tort law or public nuisance. Instead they will look to statute or be part of the context but the statute and the common law can do their own thing.

So in my submission the fact we have a Climate Change Response Act and Mr Salmon's made submissions about what that means and why we say it doesn't cut against tort liability, from a public nuisance perspective there's nothing in the Climate Change Response Act that says that the emissions of the respondents have been authorised or that the tort of public nuisance has been displaced as regards climate change and to the extent that flavour comes through the Court of Appeal's decision. In my submission it's wrong. I think I've hit time your Honour, so we'll leave my last two points until tomorrow.

WINKELMANN CJ:

And your last two points are?

MR BULLOCK:

Causation and relief, and then we'll see how we go.

WINKELMANN CJ:

All right, then we're half way through. But Mr Salmon's going to speed up tomorrow. Right. We'll retire for the evening then.

COURT ADJOURNS: 4.00 PM

COURT RESUMES ON TUESDAY 16 AUGUST 2022 AT 10.02 AM

WINKELMANN CJ:
Mōrena, Mr Bullock.

MR BULLOCK:
Mōrena. Yesterday we went on something of a whirlwind tour through the history of the private action for public nuisance and today the tour is going to move on to the issues of causation and relief. Mr Salmon and I have discussed the hard finish and we've got that under control, so flag that at the outset.

Before I get onto causation, his Honour, Justice Williams, yesterday set me homework relating to cases that had been brought by private parties rather than relator actions and I said I'd bring up a few names.

KÓS J:
I think that was actually me, Mr Bullock.

MR BULLOCK:
Was it, Sir?

KÓS J:
But we'll both benefit.

MR BULLOCK:
Sure.

WILLIAMS J:
You said two. The two big ones.

MR BULLOCK:
I said two. The short answer is there are very many and there are very many in the bundle. We talked about *Rose v Miles* yesterday. We've got *Amalgamated Theatres Ltd v Charles S Luney Ltd* [1962] NZLR 226 (SC) which is a New Zealand decision; *Blair v Deakin* (1887) 57 LT 522, (1887) 4 Times

LR 757, (1887) WN 148 which we'll come and look at; *Crowder v Tinkler* (1815) 19 Ves Jun 618 which is a case about a powder mill; *Harper v Haden* which I mentioned briefly about some hoardings on a footpath; *Jan de Nul (UK) Ltd v Axa Royal Belge* [2000] 2 Lloyd's Rep 700 (QB) and *Tate & Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509 (HL), two different cases about dredging in navigable waters; *Metropolitan Asylum District v Hill* (1881) 6 App Cas 193; *Ryan v Victoria* (City) [1999] 1 SCR 201 which is about flangeways on a tramway in Canada; *Walsh v Ervin* about a farmer whose – the road adjoining his property had been obstructed by his neighbour; *Woodyear v Schaefer* (1881) 57 Md 1 which we'll come to look at now; *Benjamin v Storr* (1874) LR 9 CP 400 which is one of the great public nuisance cases, it's in the respondent's bundle; and additionally two other of the great public nuisance cases, both from the 17th century, *Iveson v Moore* and *Maynell v Saltmarsh* which were both decisions where the plaintiff's goods had been damaged as the result of a delay from an obstruction in the road. So there are legion cases involving public nuisances that were not relator actions.

WILLIAMS J:

I may have misarticulated, misdescribed, what Mr Kalderimis was arguing and if I did I apologise, Mr Kalderimis. It was just an impression I had. I may have sent you on a homework wild goose chase.

MR BULLOCK:

That's all right Sir. It was welcome. So moving on to causation. Mr Smith's submission in the Court below, and it was largely accepted albeit with one crucial point we'll come to, was that public nuisance has developed its own causation rules connected to the sorts of problem public nuisance has historically dealt with which are often these problems to do with what I call collective action problems, so problems to do with public spaces or public resources where often the injury was being caused by very many people in a small amount much like the case before the Court now. And just to give some historical context we're going to come to look at some cases largely about waterways and there was a discussion yesterday, and again apologies if I misattribute it, I think it was his Honour Justice Williams mentioned to

Mr Salmon the question of whether these were cases of energetic judges and part-time legislature, and in my submission that's actually not the case and this wasn't a situation where we had a legislature which was inactive. In fact these problems especially of water pollution but also air pollution were the gravest problems social and environmental facing England during the industrial revolution, and my learned friends have suggested these were localised problems and of course they're localised compared to climate change. Everything is. But for their time these problems involved complexity in the form of multiple contributors to the nuisance, multiple victims. The nature of rivers and the industrialisation of the interior of the English isles with large industrial cities and manufacturers needing to discharge their wastes the easiest place to do so being into the nearest river, which carried its effects through numerous other boroughs and parishes as it flowed to the sea.

So we have this latticed effect that we have in climate change, albeit a different scale of course, but it's not a dissimilar issue, and in this context it's important to observe that there were numerous Royal Commissions into river pollution, Royal Commissions into air pollution, parliamentary Commissions of Inquiry and I've put in some historical material, it's modern writing but about legal history, from Ben Pontin, Leslie Rosenthal and there's a famous article by McLaren which is in there as well, and they talk about the nature of these pollution problems, the nature of the regulation, efforts to regulate them at a central level or to investigate them and the challenges that were faced. So this wasn't a case where the Courts were dealing with highly localised problems in the absence of interest from central government. On the contrary, these were profound and grave problems of national concern and they were identified as problems of national concern.

WILLIAMS J:

Was there legislation?

MR BULLOCK:

Yes. Various forms doing various different things and we'll look at a little bit of it when we look at some of the cases. But there was both – the legislating came

in different directions. Some was designed to try and address the problem of pollution in waterways. Other legislation helped to create the problem because it required cities to build sewers and to drain them into rivers. So –

WILLIAMS J:

Better that than back gardens and streets.

MR BULLOCK:

Yes. Well, again we might think that but we'll come to see what the Courts say about that shortly.

WILLIAMS J:

Ah. What I'm – the – where I'm driving my question to is were the political responses then analogues to the political responses now?

MR BULLOCK:

I think they were to the extent they were imperfect and that they pushed in both directions both attempting to solve the problem while also trying to resolve other problems like the –

WILLIAMS J:

I guess the question is were they reparative, sorry, planning rather than reparative? Did they leave reparative to the Courts?

MR BULLOCK:

No. Both I think broadly –

WILLIAMS J:

Okay.

MR BULLOCK:

– but I think the best sources for those are the writings I've put in front of the Court.

The basic causation rule was that the proof of a contribution to an aggregate nuisance sufficed even if the defendant's own share was tiny or not a nuisance in and of itself. So the Courts weren't applying but for causation, they were applying an aggregate contribution rule, and this strife again. I talked yesterday about the simple moral principle that we must accept from others what we expect them to accept from us. The simple moral principle here was that multiple wrongs don't make a right, and the Courts were not content to have defendants point to other people and say: "Well, they are doing it too and therefore I should be allowed to continue."

1010

Now the Court of Appeal accepted this principle existed and that it might well apply in New Zealand, but it purported to distinguish these cases at paragraph 92 of its judgment on the basis, and I quote: "All of the cases which have invoked this aggregation principle have involved a finite number of known contributors to the harm, all of whom were before the Court," and they went on to say that it was wrong – and that Mr Smith was looking to extend the principles. Well, Mr Smith is not looking to extend the principles. He's looking to apply them, and in my respectful submission the Court of Appeal was wrong to find that in all of these cases, and it didn't refer to any of them, there were a finite number of known contributors, all of whom were before the Court.

I'll take you to some cases now which show that it's simply not true. Often there were very, very many contributors and only one of them was before the Court. That was one of the issues in these cases, and I really implore the Court when it looks at these cases to read the full reports because the reports, especially of the argument of counsel, show these issues being raised time and time again by defendants, and that's part of the important context of the decisions.

The Court of Appeal also said that in none of these cases did the Court grant the claimant or the Attorney-General an injunction, knowing it would do nothing to stop or even abate the nuisance. Again, in my respectful submission, that's wrong and we'll come to look at the *Attorney-General v Colney Hatch Lunatic Asylum* (1868) LR 4 Ch App 156 case. I'll put that last because it expands into

the next issue we're going to talk about. But that was a case where the Court granted an injunction despite clear evidence that it wasn't going to fix the problem.

So I want to first turn to the *Woodyear v Schaefer* case which is at volume 8 of our bundle, tab 96. This is a decision of the Court of Appeals of Maryland, it's an American decision, but it's from 1881, at a time where the Court will know the common law of England and the common law of the United States were relative aligned and we'll see the Court largely refers to English authorities in its decision.

So this was a case about Gwynn's Run, a stream outside Baltimore. The appellant, the plaintiff, was the owner of a flour mill and sought to restrain a slaughterhouse which was dumping blood and offal into the waterway. The defence run by the slaughterhouse was, well, there's a very large number of other people dumping things into the stream so why should I be the one to be restrained?

WILLIAMS J:
Sorry, can you – it's, you say, your volume 6?

MR BULLOCK:
Volume 8, tab 96. So go to page, and the reports are a bit all over the place in terms of numbering but if we just go to page 5 of 9 in the top right-hand corner on the right-hand side, we see that the defendant is a butcher, having a slaughterhouse on Gwynn's Run, about a mile above the plaintiff's mill, and that the defendant has emptied and continues to empty or allow to flow into the run blood and slaughtered animals which causes offensive smells, stenches, and then over the page into page 6, half way down the left-hand side, we see the defence run that on Gwynn's Falls and the run there are a large number of other slaughter-houses and other establishments, which use "these streams as sewer-ways, and that the blood from all these slaughter-houses, and the refuse from breweries, soap and other factories, have flowed into these streams, and that there are cattle scales adjoining the run. So they say multiple other people

are causing this problem, and then at the end of that paragraph they say, well, if you were to shut us down it would be ruinous to a vast amount of property owned by butchers and other people along this stream. The Court goes on to say a vast amount of testimony was taken, establishing that there were all these other contributors, and then if we go to the right-hand side of page 6, the top paragraph: "…judging from all the evidence, we are left to the blood which is proved to have flowed regularly from the slaughter house of the appellee, though in comparatively moderate quantities," and the principal contribution by the appellee is in common with a large of number of others to the injury of the plaintiff.

Over onto page 7, at the very bottom of the left-hand side, which says HN4, the Court says: "It is no answer to a complaint of nuisance that a great many others are committing similar acts of nuisance upon the stream. Each and every one is liable to a separate action, and to be restrained," and the Court there refers to the *Crossley and Sons Ltd v Lightowler* (1867) L R 2 Ch App 478 case which is in your bundle. It's an English decision.

It continues on the right-hand column: "The extent to which the appellee has contributed to the nuisance, may be slight and scarcely appreciable. Standing alone, it might well be that it would only, very slightly, if at all, prove to be a source of annoyance and so it might be as to each of the other numerous persons contributing to the nuisance. Each standing alone might amount to little or nothing. But it is when all are united together and contribute to a common result that they become important factors in producing the mischief complained of. It may be only from," and so on. Then there's an example in the next paragraph. "One drop of poison in a person's cup may have no injurious effect but when a dozen or 20 or 50 each put a drop fatal results may follow. It would not do to say that neither was to be held responsible." This is the simple moral principle I referred to earlier.

In that stated facts as in the one presented today in this case each element of the contributive injury is part of one common whole and to stop the mischief of the whole each part in detail must be arrested and removed, and goes on to

refer to *St Helen's Smelting Co v Tipping* [1861-73] All ER Rep Ext 1389. It refers to an injunction being the only effectual remedy, especially in this case where the injury is caused by so many that it would be difficult to apportion damage or to say how far one may have contributed to the result, so that damages would likely be nominal and repeated actions without substantial benefit might be the result. So here we have this concern that was raised with Mr Salmon about damages. Here the Court's saying we can't deal with these problems for damages. The only effectual remedy is to stop the wrong or to stop the contribution to the wrong. Over the page we see reference to the English cases, this is on page 8 –

WILLIAMS J:
What if it was the Mississippi?

MR BULLOCK:
Well this case would say that if there is an effect that has been felt by the plaintiff and you're contributing to that effect you have to stop. There could be very many people polluting the Mississippi.

WILLIAMS J:
Do you think the judge would be as clear and precise in his articulation of the principle in such a case as he is in respect of a stream in a slaughterhouse?

MR BULLOCK:
I think so Sir. If the effects being felt were as significant as the effects being felt in this case and Mr Salmon is talking about the effects of climate change that may well be the case.

WILLIAMS J:
Sure, but you're not talking about dozens of contributors or even hundreds. On the Mississippi you're talking about millions of industrial contributors.

MR BULLOCK:

Potentially. But the Court hasn't seen that as a problem and we'll come to look at some of the other cases where there were a large number of people –

KÓS J:

I mean that's, that might affect the nature of the remedy. Granted Mr Salmon was big yesterday on the idea that there's no right without a remedy but the reverse could also be true that if remedy is inconceivable then there may be no right.

MR BULLOCK:

And I'll come to address that directly with another case Sir which talks about exactly that point. Returning to this they're talking about *R v Cross* and *R v Neil* (1826) 2 Car & P 485, 172 ER 219 which are English cases which are in the bundle. And then at HN8 the Court says: "It has been proved that a number of other offensive trades are carried on near this place … but the presence of other nuisances will not justify any one of them; for the more nuisances there were, the more fixed they would be; however, one is not to be less subject to prosecution, because others are culpable." That's referring to *R v Neil*, quoted from. So the doctrine is well settled that where the nuisance operates to destroy the health, or impair the comfort or enjoyment of property, an action at law furnishes no adequate remedy, protection by injunction must be given.

Then over on the right-hand side it refers to *Thorpe v Brumfitt* (1873) L R 8 Ch App 650 which is an English case which we'll talk about in another context.

Then at what's marked as paragraph 13, page 13, on the right-hand side, it's been urged on the Court that it will prove ruinous to businesses to grant an injunction and the Court says, well, yes, that might be possible, might be a possible result, but the issue here is the comfort, health and development of the whole neighbourhood affected by the pollution of the stream and "certainly there must be a remedy, and a prompt and thorough one for such an evil, in and adjacent, to a large and rapidly growing city; we know of no other remedy equal to the emergency, but that of the protective and preventive interference by injunction."

The next case I wanted to talk to is *Blair v Deakin* which is an English decision, and the reason for going to this one is it has a useful summary of a lot of other cases and saves us some time. So this is a case where the plaintiff bleach works brought a claim against the defendant dye works for polluting a stream. I think it was called Eagley Brook, and at page 525 of the decision, this is a decision of Justice Kay, he observes that – and it's written in a somewhat rhetorical style. He raises the issue of multiple contributors to a nuisance and he says: "They might all laugh at the plaintiff and say: 'You cannot sue any one of us because you cannot prove that what each one of us does would be enough to cause you damage.'" Then he says himself: "All I can observe is that that in my opinion it would be a most unjust law if it were the law at all." And he goes on further down the page to say: "If someone along a river finds that it's no longer in such a condition that it's impossible to use for domestic purposes or for manufacturing purposes then it becomes a filthy sewer like this stream. And further he finds that it was produced by the combined acts of a number of riparian proprietors above him, is he without remedy? He has no remedy because each of them can say" – sorry, "has he no remedy because each of them can say" 'It was not my doing. I only contributed part and the part I did contribute was not enough to do you damage.'"

He gives another illustration of two manufacturers. Each puts a chemical into the water which of itself does no damage but when combined proves to be poisonous and he says: "I have no hesitation in finding these people liable. It's my opinion that a man so injured has distinctly a right to take the several persons who injured him in detail and say: 'I am suffering from the combined acts of all of you. If I can prove that each one of you contributes to the result which is damaging me I have a right to sue and a right to ask the Court to prevent each of you from sending this his contribution to that which an aggregate does me to damage.'"

KÓS J:

Where does that leave the de minimis principle?

MR BULLOCK:

Well Sir, my submission on this, and I talk a bit about this in my article, is I think you have to be looking at this point at only at people who are not reasonable users. So you have to come – you have to get through the defendant door, then be looking at the causation question. So if – we can perhaps assume here he's only talking about what would be unreasonable users of the water course.

WILLIAMS J:

What do you mean by that? You mean users for profit?

MR BULLOCK:

What we talked about yesterday Sir. Perhaps manufacturing uses industrial uses. This line that we've talked about the Court needing to draw but best drawn with evidence possibly over several cases.

On the right-hand side of page 526 the Court refers to the decision of Lord Justice James in a case called *Thorpe v Brumfitt* which is in the bundle and the illustration given by the Lord Justice that: "Suppose one person leaves a wheelbarrow standing on a way. That may cause no appreciable inconvenience. But if a 100 do so that may cause a serious inconvenience which a person entitled to use the way has a right to prevent and it is no defence to any one person among the hundred to say that what he does causes itself no damage to the complainant." So the, it's the contribution to the aggregate effect that's important, and he goes on to say: "It seems to me that he was dealing in that case with a right of way," which is true, but he says: "which is precisely the same state of things which I have imagined to exist here, namely that a number of persons contribute what I call in each case an infinitesimal share to what becomes in the aggregate a grievous nuisance." He says that: "No one of those persons can allege that when he is sued that his share is by itself inconsiderable. That seems to me consistent with the law and common sense." And that's Mr Smith's case here.

Now just as an aside because we'll come to relief, if we turn over the page to 527 we see just near the very end of the case where counsels' names are listed

he records that he suspends the injunction for six months in order to enable the proper remedy to be applied. So this is one of the many cases we see of suspended injunctions being used to restrain public nuisances.

In the same volume, going to tab 22, so this is volume 2, tab 22, we've got a Canadian case, *Canada (Attorney-General) v Ewen* [1895] BCJ No 11 and this was a case about the pollution of the Fraser River –

WINKELMANN CJ:

So I think, I mean we've got the general thrust of these. What we're particularly interested in hearing about is where we've got large numbers of contributors. I think you've got *Crossley v Lightowler* –

MR BULLOCK:

Yes.

WINKELMANN CJ:

– as an example of where there's no evil such, so many you could say that one individual hasn't contributed any evil at all. But I mean I'm just saying, all I'm saying is if we're just going over the same principles you don't need to take us over the same principles.

MR BULLOCK:

Sure. Okay. What I'll do is now move onto – there's three cases now that I would like to look at and these touch on both relief and also this question of multiple contribution and they're the cases –

WILLIAMS J:

Can you just tell, before you do, can you just tell me is the Fraser River case a repetition of these ideas?

MR BULLOCK:

Yes Sir.

WILLIAMS J:

All right. Thank you.

MR BULLOCK:

So I'd like to look at three cases. They're all in my volume 1. *Attorney-General v Colney Hatch*, *Attorney-General v Council of the Borough of Birmingham* (1858) 4 K & J 536, 70 ER 220 and *Attorney-General v Leeds* (1870) LR 5 Ch App 583. I'll start with the *Colney Hatch* case which is at tab 6. So this was a case that was a relator action and we can see this, first we see the holding in the headnote: "The plaintiff has proved his right to an injunction against a nuisance or other injury. It is no part of the duty of the Court to inquire in what way the defendant can best remove it." the plaintiff is entitled to an injunction at once unless the removal of the injury is physically impossible and it is the duty of the defendant to find his own way out of the difficulty whatever inconveniences or expense it may put him to." So that's the holding in the headnote.

If we turn over to page 147 we see the description of the factual background that this was a relator action brought at the relation of the local board of health Edmonton which is a borough in North London against the committee of visitors for the county lunatic asylum at Colney Hatch which is another town upstream. So here we already see something of a transjurisdictional issue where we've got one town – we've got two towns, one taking issue with what's going on in the other affecting the place downstream and of course this has to be a relator action because it's been brought by the local board who can't have suffered any special damage itself, and the proposition was that there was a nuisance injurious to public health.

Over on the right-hand side on page 148 we see a description of the background and talk about the number of inmates at the asylum, the numbers of gallons of sewerage released and then down that middle paragraph the defendant substantially admitted the pollution of the stream but they attributed it principally to the great number of new houses which had been built both above

and below the grounds of the asylum and all of which were drained into the brook. So we have again the same argument being run.

If we turn over the page to 149. Just to note the point about the procedural history of this case. At first instance the judge had decided using a power that exists in the High Court Rules today to appoint a court-appointed expert go out and see what was going to go, what was going on. The Chancery Appeals Court didn't think much of that but by the time it came to be heard it had received the evidence and we see the evidence on page 150. So the Court-appointed expert is this Captain Galton who is an engineer and his report was this. "It is clear from this that the brook is considerably polluted with sewerage before it receives the asylum sewerage. The pollution is considerably increased by the asylum sewerage and still further by the sewerage which is received from private houses immediately after it passes outside the asylum boundary." And this is the important part. "It is quite certain that if the whole of the asylum sewerage were removed from Pymmes Brook the brook would still remain seriously polluted with sewerage." So this is a case contrary to the Court of Appeal's finding where the evidence before the Court was if you stop this sewerage it's still going to remain considerably polluted. But as we see that wasn't something which prevented a remedy being given.

So we see the decision of Lord Hatherley beginning on 153 and he opens by saying that: "This case shows the difficulty that people who need to get rid of their wastes face." But he says: "The proper approach is not to come to court and defend an action. It is to go to the legislature and get permission to do it," and you see this theme throughout his judgment.

So over on 154 he deals with the point made by his Honour Justice Kós where he says: "No doubt there are cases where the Court will take care not to pronounce an idle and ineffectual order," and he gives the example that a court will not give a mandatory injunction that cannot be complied with like a mandatory order that trees remain standing after they've been cut down and he gives that example to say he's talking about true impossibility, not inconvenience.

And he goes on at the bottom of that paragraph, half way through to say: “But this has no application here as it seems to me a case like the present where there is no impossibility in the persons who are committing the wrong ceasing to commit that wrong though it may subject them and I agree it would subject them in this case to very considerable inconvenience. They have inflicted this wrong on their neighbours for a considerable length of time and having done so they have a great difficulty in it once ceasing to inflict it. That is a difficulty which is more properly met by the Court as it is done in a variety of instances allowing the defendants sufficient time to set themselves right. But it affords no reason whatever for allowing them to continue to commit a wrong which would amount to a permanent injury of the rights of their neighbours.”

KÓS J:

I mean presumably the remedy is only ineffectual if the other contributors ignore the Court’s ruling and the question then arises why would they do so given that if they were then sued, the plaintiff picked them off one by one the same outcome would presumably be inevitable.

1030

MR BULLOCK:

Yes and I forget if it’s this case or the *Leeds* case Sir but in one of the judgments, there’s a discussion of the fact that for example a plaintiff might choose to go and buy up the property rights of people upstream of them and put them out of business because they want the water clean and the Court says well a plaintiff who takes that self-help remedy can't then make right the nuisance of whoever is a holdout. It’s either wrong or it’s not. It can't depend on others.

WILLIAMS J:

So what happened to the asylum?

BULLOCK J:

Well, I haven't done a legal history of this case but my understanding of most of these cases and Ben Pontin's book extract which you have in the bundle talks about the fact that, and we'll come to look at the *Birmingham* case which is a famous example of this. There was a huge investment in sewerage treatment following these cases. That was the answer. There was an investment in technology largely.

WILLIAMS J:
Did the asylum close?

MR BULLOCK:
I don't know.

WILLIAMS J:
It's possible.

MR BULLOCK:
It's possible. I don't believe it did. I think it actually lasted for quite a long time but it's possible.

WILLIAMS J:
I guess the logic of your argument is a hospital with a coal-burning boiler to keep its patients warm and in some cases alive could be enjoined.

MR BULLOCK:
Yes, and if we turn to page 155 –

WILLIAMS J:
You've already thought of this.

MR BULLOCK:
Closed in 1993. So – Mr Salmon tells me it closed in 1993 so it must have continued.

WILLIAMS J:

According to Aunty Google anyway.

MR BULLOCK:

I thought I'd look that up at some point.

WINKELMANN CJ:

Mr Bullock's going to run out of time at this rate, so...

MR BULLOCK:

Sorry. I'm doing okay.

The Court at 155 refers to the *Attorney-General* and *Birmingham* case which we'll look at briefly for one particular interesting point and he says: "The answer to the proposition," so the, so in *Birmingham* we'll see that the issue was that the town of Birmingham had said, well you just stop your sewers and the city said well that's going to cause a calamity and the Court in *Birmingham* said well that's not the Court's problem. That's the legislature's problem. The answer is if you want to run your hospital with your coal-burning boiler you can get a statute passed that says you can cause that nuisance. It's not for the Courts to work out how the defendant can comply with an injunction. It's for the defendants to work that out and the defendants can either invest, they can move, they can shut down or they can go to Parliament and get a statute which authorises them to take the rights of the people who they were harming, and it's Parliament that is properly placed to do that calculus, not the Courts.

WINKELMANN CJ:

What were they doing in the *Birmingham* case?

MR BULLOCK:

So the *Birmingham* case was, this is the case Mr Salmon referred to where there's the pipe coming out of the city. Lots of people are contributing to the sewerage, it's a case of many thousands of people, 250,00 people contributing to the sewerage but one pipe going into the river. And this Charles Adderley a person downstream owned a big estate, brings this action and it's a relator

action and it's not entirely clear to me why it was but Adderley was very politically connected, he was a senior Conservative MP, so he probably had the Attorney-General's ear and wanted to put issues of standing beyond doubt.

But there's an interesting passage at 224, so this is at tab 7, it's the next tab over in the bundle, and this is from the argument and this is why I say it's interesting to read the argument in these cases. So at the top of 224 we see Mr Wilcock, counsel for the city saying: "Here the evil that must ensue if the Court should interfere with the – is it would be incalculable. If the drains are stopped the entire sewerage of the town would overflow. Birmingham would be converted into one fast cesspool and it would cause a deluge of filth which would plague not just the 250,000 in habitants of Birmingham but will spread across the entire valley and become a national calamity." 0

So we hear the same thing we've been told in this case. If you grant relief this will cause a national calamity. And the Vice-Chancellor interjects and he says: "We cannot talk of that in this Court. Here the safety of the public is that which the legislature has said is for the safety of the public and no more," and what he's saying there is our point which is Parliament can pass statutes dealing with these things. It hasn't passed a statute permitting this, and it doesn't bode well for the city because he doesn't ask for a reply and goes on to give judgment at the bottom of the page and talks about being urged about the importance of keeping these sewers open, and he says, this is at the bottom of 225 going onto 226, he says: "Well if after all the experiments that the city can do and after all its efforts and expense it cannot do anything but release this untreated sewerage into the river, then it can go to Parliament, and he says: "And if the case be of such magnitude as it is represented to be, Parliament no doubt will take measures accordingly and the plaintiff will protect himself as best he can. So what we see here again is the Court saying it's not for the Court to make a policy decision, it's for Parliament. What the Court should do is remedy the wrong, it should grant relief, and if Parliament thinks that calculus should be different it can intervene.

WILLIAMS J:

So that shifts us, the focus to the interface between distributive reparative, sorry, distributive planning forward-looking statutes and a reparative common law, doesn't it?

MR BULLOCK:

Yes. And this is the irony in the Court of Appeal's decision is that it made a policy decision by saying Mr Smith has no claim, because it said Mr Smith can seek no relief for what he suffered.

WILLIAMS J:

But it does mean we have to look carefully to see whether Parliament has actually spoken.

MR BULLOCK:

Of course.

WINKELMANN CJ:

It connects to Ms Coates point yesterday, doesn't it, that it's addressing what's tika, you're addressing the wrong…

MR BULLOCK:

Yes, that's the –

WINKELMANN CJ:

As opposed to being overly concerned about the wider policy considerations, the right thing to do is to address the wrong?

MR BULLOCK:

Correct. Two final reflections on this case – and we're nearly done, your Honour – there was a suggestion in the Court of Appeal that this isn't a public nuisance case at all, that's wrong. At 227, at the very bottom of the page, we can see the public aspect raised. Adderley was very proud of the 20,000-odd people who lived on his estate and he was particularly concerned that they should be protected, so there was an explicit public aspect to this

case, and we also see on 228 near the bottom, again a suspended injunction is granted, the classic relief in a public nuisance claim.

Now finally – we don't need to go through it all in detail – we've got the *Leeds* case, which is at tab 9 of the same bundle…

WINKELMANN CJ:
Can I just ask what's the point of the suspension in this particular case, I mean, why did they grant a suspended injunction, what are they envisaging occurring in that period of time?

MR BULLOCK:
Well, what they envisage was that the city would invest in either finding a way to treat its sewerage or finding another way to dispose of it, but usually putting on fields was the common way to do it. And you'll see in the legal histories we've given you, the *Birmingham* case went on for years and years and years, I think it was into the 1910s before it was finally resolved, with various pieces of litigations. So this idea that the relief Mr Smith is seeking here is contrived or unusual is, in my submission, a historical. Finally the –

GLAZEBROOK J:
But when you say it was years before it was resolved, was that because they were coming back with different remedies or arguments about further restrictions, or there were other people suing?

MR BULLOCK:
It was more the city was trying things and it would get better and then it would get worse again and…

GLAZEBROOK J:
Oh, okay.

MR BULLOCK:
It was that sort of issue.

The *Leeds* case, very similar. It's got a very interesting statutory overlay, which I'll just briefly touch on because it was raised. There was a piece of legislation which said – it's the Towns Improvement Clauses Act 1847 – "You the city must make a sewer and you may drain it into a public river but you can't cause a nuisance," that's the effect of the statute. Now the city of Leeds went off in 1848 and got its own local Act passed, and in what the first instance Judge called "catching Parliament napping", it got a specific legislative provision allowing it to drain its sewers, I think requiring it to drain its sewers, into the River Aire, which was the river at issue, so the low plate didn't deal with historic cause of nuisance issue. And so the town comes to court and says: "Well, here's this local Act, it says we can do this," even though the empowering primary Act said the opposite, and that doesn't find much favour with the Court. But I just want to note page 586 of the decision, about halfway down: "It was admitted by the Defendants that the Aire below Lees was foul and polluted but they alleged, in opposition to the information, first, that the Aire was a polluted stream from the drainage of a large district, including several manufacturing towns, before it reached Leeds and that the nuisance was only partially due to the drainage operations of the corporation, and of this evidence was produced." So we see the same argument being run, there's many, many other people contributing to the nuisance and –

ELLEN FRANCE J:

Would you agree, Mr Bullock, that in that case and in ones like *Colney Hatch*, you can identify the defendant as being, I don't know if "major" is the right word, but…

WINKELMANN CJ:

"Significant"?

ELLEN FRANCE J:

Yes, "greatly aggravating", that's the sort of language that they use. So it's not quite the same as the present case.

MR BULLOCK:

Well, it is and it isn't. I mean, the nature of the problem is slightly different, but the Court was concerned with the major contributors, that's true, and we say we've got the major contributors here, at least in this jurisdiction.

ELLEN FRANCE J:

Well, it is dependent then on you having the major contributors.

1040

MR BULLOCK:

Sure, and this comes back to this question of line drawing.

KÓS J:

One of them anyway.

MR BULLOCK:

One of them, yes, and this is the great thing about the common law. It can draw lines with facts. That's what it's always done.

I just want to note one passage in this decision. It's on page 595, decision of Lord Hatherley who as the Court may know was Vice-Chancellor Page Wood who gave the *Birmingham* decision, so he's thinking: "I've seen this before and I know exactly what I'm going to say," and he says, this is half way down, he sees this – "I think the argument deduced from the foul state of the water before it gets to *Leeds* is not deserving of any weight, for two reasons—first," as your Honour has said, "it is hardly disputed, the evil did become seriously aggravated when the new sewer was opened," and of course Mr Smith's case is the defendants here are seriously aggravating the evil. He has pleaded that. Then he says: "… and, secondly, the nuisance might terminate, … It seems to me, therefore, upon the whole case, that the conclusion the Vice-Chancellor has come to is correct. The defendants must either abate the evil—whatever difficulties may be imposed in their way—or they must go to the Legislature; and, no doubt, the Legislature will be ready to afford a remedy if the evil is such as is deserving of it."

So we see exactly the issue here. The Court doesn't do policy. The Court deals with rights and wrongs and remedies. Parliament deals with policy. Parliament can step in. We have a sovereign Parliament and it can deal with that.

The last point, before I hand over to Mr Salmon, is just a –

WILLIAMS J:
I was struggling to keep up with you.

MR BULLOCK:
Sorry, Sir, it's a whirlwind.

WILLIAMS J:
No, that's all right, not your problem. It's the drop-dead time. Can you tell me, the empowering Act was set aside as irrelevant for what particular reason?

MR BULLOCK:
I think the Court considered that the – well, no, it wasn't the – the Towns Improvement Clauses Act had this "you must not cause a nuisance" provision in it and that was seen as basically trumping the local Act which didn't include that.

I just want to note two rats-and-mice points about my learned friends' submissions before I finish. The first is that there's some discussion, this is around paragraph 95 of this Court's decision in *Wu v Body Corporate* 366611 [2014] NZSC 137, [2015] 1 NZLR 215 which is, of course, a private nuisance decision, and my learned friends invite this Court to draw on private nuisance principles in the public nuisance context. In my submission that's, A, historical and it's not borne out by the authorities and texts, and I just want to note the sentence that is footnoted to 172 could be read as suggesting that the England and Wales Law Commission endorse what the respondents are saying. In my submission it doesn't and it should be read on its face. All the England and

Wales Law Commission is saying private nuisance deals with land issues, public nuisance deals with public spaces.

Finally, paragraph 99 of my learned friends' submissions –

WINKELMANN CJ:

Sorry, what paragraph was that of their submissions?

GLAZEBROOK J:

Yes, if you could give me that too.

MR BULLOCK:

Sorry, 95.

GLAZEBROOK J:

And the note is the note to that paragraph, was it?

MR BULLOCK:

Yes, 172, and now paragraph 99, it's suggested that the major texts do not support Mr Smith's proposed rule about aggregate contributions in a causation context, and it goes on to footnote at 175 several texts, but looking through those this morning all of the passages footnoted are about defences of consent and contributory negligence and in my submission don't stand for the proposition that those texts contradict Mr Smith's case at all.

So with that whirlwind which I apologise for, your Honours, I'll hand over to Mr Salmon unless there's further questions.

WINKELMANN CJ:

No, just…

ELLEN FRANCE J:

Just, I'll make it fast, going back to standing, cases like *Hickey* – like *Gagnier* and – would say that *Hickey* was too narrow but would still see a requirement for a significant difference in degree in the damage. Do you accept that?

MR BULLOCK:

I accept it but I think care is needed and you need to look at the way the Courts explain it and the best explanation was in the *George* case, which overruled *Hickey*, where they talk about the distinction between the theoretical injury and the actual injury. That's what the Court means by a difference in degree. We all suffered a theoretical injury but I suffer more because I'm the one who runs into the obstruction or I'm the one who's delayed by the obstruction. So that's the difference in in degree. The issue isn't the fact that there are many people who are in my position. It's that I'm different, the bulk of the public –

ELLEN FRANCE J:

No, but it is still requiring some difference in kind.

MR BULLOCK:

Not in kind. In degree.

ELLEN FRANCE J:

Well, in the sense that they differ in degree.

MR BULLOCK:

Yes, and like I say my submission is the differences between the injury the entire public suffers when a public right is infringed and someone who has – is – and the easiest way to think about it I think is to say someone who is actually hurt, someone who is actually injured is a proper plaintiff. Someone who just comes to court saying, well, if I wanted to I could have navigated down this canal or I could have driven down this road but I never actually intended to, I never actually knew it existed. That person is in a different position to someone who says: "I was trying to get my goods down this canal and I couldn't." That person's actually injured.

WINKELMANN CJ:

So have you placed that in this context and everybody's actually injured?

MR BULLOCK:

Well maybe a very many people at least. Probably everybody but that's okay. There can be many people who are actually injured, but –

WINKELMANN CJ:

So you're – because that was what I was going to ask you. It doesn't depend upon a difference, your plaintiff being different. Your analysis depends upon actual injury as opposed to a distinctive form of harm for the plaintiff.

MR BULLOCK:

Correct. So imagine the ditch in the road. Many carriages come across the ditch and are damaged. They're all damaged in the same way but they are all damaged. They all suffer particular injury. It could be the same but they all suffer it and that's what the Court's looking for. Is there an injury pleaded, an actual injury.

GLAZEBROOK J:

And as I understand it your back up argument in any event is that actual specific property damage has been suffered already by Mr Smith?

MR BULLOCK:

And that that suffices and always has, yes.

GLAZEBROOK J:

Well a back up's not quite the word but –

MR BULLOCK:

So perhaps the principle actually but yes.

GLAZEBROOK J:

But that damage might be different to damage suffered by you or me which might be more theoretical in this particular context because we don't have coastal land in Northland.

MR BULLOCK:

Sure. Potentially. Right.

GLAZEBROOK J:

Well we might but –

MR BULLOCK:

I don't.

GLAZEBROOK J:

– I don't.

WINKELMANN CJ:

Thank you Mr Bullock.

MR BULLOCK:

Thank you.

MR SALMON QC:

Unfortunately at the risk of bathos or pathos I have to bring us back from fascinating detail in the case law to a reasonably confined and brief review of the remaining issues for us. The hard limit's workable but I'll be inevitably high level rather than going to cases in the way that made Mr Bullock's submissions so interesting.

If I can pick up on an aspect of what's just been said because it's just timely to do it. It is right that Mr Smith of course has the harm to his Northland land but there are other facets of harm that he suffers and his people suffer that are unique and special in any sense such that in my submission it would be irregular and worrying if standing was the issue that stopped this case and that includes

of course interests in land, fisheries and tāonga protected under Article 2 of the Treaty and given this Court itself is an instrument of government, that is a factor too that one would anticipate in trial would be weighed up in considering the extent to which he has special harm or standing as well as in considering the extent to which the Court should respond to protect and save those customary and protected interests. I don't have time to say more on that but I think the Court will understand that submission in and of itself.

Secondly I just wanted to pick up on the Mississippi example because it's a good example of the creeping problem that is inherent in a more complicated world. The rivers in England had 10, 20, maybe 50 serious polluters. The Mississippi might have thousands, I don't know. There cannot have been a point in the common law at which rights were chosen to be unprotected as the number of polluters increased. That would be abhorrent on public policy grounds. It must always have been the case that the right to protect for nuisance subsisted and that as the number of polluters grew it might be administratively harder, although Justice Kós' point is right, an injunction against one would cause compliance by others and that's the way those environmental protection tort agencies operate in the States, is to ping an injunction and then have others comply. But the sheer number of polluters is not a feature that undermines the response of tort law, it's a facet of modern life, and against that –

1050

KÓS J:

Unless it reaches a form of public consent, the activity, because we're all complicit in it.

MR SALMON QC:

Well, possibly, although there's not a doctrine that says that short of true volenti, that there is public consent barrier to any of this, the sewerage engagement by everybody, everyone sat down and gave bodily consent, they engaged with the pipes, so to speak, and participated in them. This is not the case of course with Mr Smith, he disavows this entire industry. So he doesn't consent and neither

do I. So it's true that there is a general inertia amidst the public but in my submission it's not properly equated to some concept of expanded inferred volenti but rather equated more with for example the sufferers of the opioid epidemic who are being protected by tort responses across the States against manufacturers, and they participated, they consented, they actually bought and took a pill. But that's not the end to a tort inquiry, so that might be the better example or comparison compared to a classic volenti case from the 19th century.

But the next point again, mindful of time, is that we live in a complicated world, we're taught responses have had to become more complicated. Time prevents me from going over the market share contribution approaches and others adopted by the States in dealing with complex damages problems, you will have read those in our submissions and know the tools are there to modernise our approach to causation and to damages assessment. They reflect though an extremely complicated world in which people inter-relate in new and difficult ways. That has not stopped tort entering into and governing rights and harms in those complicated areas, it's just required it to be modern. So whereas once each tort case was a morality play: "David bumped me, someone said something bad about me in the public square. One witness one day, done," a two-page judgment which we all mourn the loss of, at times. In this case that will be impossible. But the morality play that we once had has gone.

We now have cases where DNA evidence is required for weeks or economic evidence, where Mr Every-Palmer needs four economists from the United States who explain to us why the Commerce Act shouldn't apply, all of those things. We are in a world of complicated, detailed scientific interactions where the physical bump is no longer the only way people connect, they connect via pharmaceutical supply chains or they connect via market statements or they connect via the internet and by intrusion upon seclusion through a line that runs all the way to Delaware and back before invading someone's privacy. The point being it's a sleight of hand for the defendants to say "this is too big and complex" and it's a trick, it's a trick designed to stop us having a trial where this Court will hear from witnesses that say "this is easy".

So with that I'll move quickly into the negligence cause of action, and I think it's fair to say that a number of observers would see nuisance as responding in terms to the alleged harm here, indeed it's hard to think of a reason that it wouldn't apply or a reason a 19th century judge says it wouldn't apply, and most or possibly all of the doctrinal barriers that the defendants put up do not in fact on examination apply to nuisance. So Mr Bullock's very careful review which has been compressed – but you'll understand now why I was concerned to allow time for it – it's a remarkable period in law, but it stands and it responds.

The doctrinal weaponry that's put up as argument against the application of tort represents the tools of the reactionary – and I don't mean that in a pejorative sense, I mean it in the literal traditional meaning of the word "reactionary" – don't change. But it's not actually an argument that tort shouldn't change, it's an argument that we shouldn't look back very far in the history of tort and look to fundamental principles but instead look to certain doctrinal tools that were developed principally by academics in the 20th century but then applied by judges as means of, unwittingly or not, limiting damages liability. So I just want to run through some of those and articulate why we say a trial leaves tort and negligence live, and these are negligent-specific points on the whole.

Foreseeability and proximity, the first stage test as we now know it, in the way that we in this country have approached novel duties, and I just note that's not inevitable and it may be after a trial we recalibrate that, but for a moment imagining that that remains our test because it binds me.

Is this foreseeable? Well, it's foreseen in fact. Since 1992 in the UNFCCC the country has agreed that this is a problem. There's an article circulated from 1910 predicting this but we know the industry agrees with it because they barely deny what's said. Instead they say: "We agree it's a problem. We are committed to playing our part," which of course means: "We will keep emitting until we're forced to stop by somebody." But is it foreseeable? Well, it's foreseen in fact and that's an answer.

Is it proximate? The two options before the Court are to conclude at the strike-out stage that there is no proximity or to entertain the possibility that the proximity Mr Smith pleads and that scientists have effectively unanimously agreed upon might be accepted by the Court.

So just painting the picture of a trial. Scientists will say this is, in any modern, scientifically coherent, concept of proximate, this is proximate. The emissions we make here are going to cause displacement of people in Bangladesh and they're going to cause Mr Smith to suffer harm in Northland and each of those is proximate and there's no more surprise in that than there is the notion that, as is now accepted, it's just a facet of the modern complicated supply chains that an unknown consumer is proximate to a manufacturer wherever they are, across the world, through 20 different contracts. All of the policy finangle involved in *Donoghue v Stevenson* has been forgotten by the reactionary who tries to hold onto the rules that have developed since. But that was a simple reaction of its moment and of its time acknowledging that we live in a more complicated world and your neighbour is no longer next door.

So proximate, we say, is a trial issue and one that Mr Smith backs himself to prove because there is no Daubert qualified evidence to rebut what the scientists say that I am aware of and the defendants don't assert some. They don't assert that there's a scientific basis for showing no proximity. They assert it by reference to the request that this Court dumb down the analysis, imagine there won't be science and go off quick-thinking, knee-jerk reactions to this harm. That's a point I wish to raise, just an observation, about some of the questions that have come from the Bench which are natural strike-out stage questions but in a modern world require evidence. Justice Williams made the observation that the sewerage pipes were at least better than the back yard or the streets. In fact, a number of scientists identify the modern sewerage network as a colossal blunder on a planning and environmental level with better ones that we don't imagine because we see the alternative as the street but that in fact would be better environmentally, socially and economically. Now I don't seek to bang on about that but it's an example of something where the answer might be in evidence that I can't imagine or

don't know, and so we need to, respectfully, remind ourselves at all stages that this is a strike-out and that we are not the scientists who will prove the facts and that we live in a world where facts are often almost all scientific or expert.

The other key doctrinal arguments put up by the defendants. Polycentricity. Well, that's never been an answer and indeed Lon Fuller who the Court of Appeal relies upon, and this reference is in our submissions, notes that it's never been an answer to non-engagement. The examples abound where complex polycentric problems do not prevent tort dealing with harm because a remedy to protect harm is not a polycentric policy decision, it's a reflection of our laws and our rights, and whether it's the building cases or whether it's injury cases abroad or whether it's the opioid crisis with huge public policy and health positions being taken and regulatory backdrops, the law of tort engages and identifies rights.

In any event, if there is said to be polycentricity, we shouldn't be assuming it and we shouldn't be assuming it based on inferred purposes of the CCRA as the Court of Appeal did, with respect, that are not in fact made out in it. There is no polycentric circle in the Venn diagram in which it says these people should be continuing to produce fossil fuels. There is no policy written anywhere, not in New Zealand, not in the international agreements and not in the legislation, that says they should keep going. The legislation represents a framework for making them stop with all of the lags that Mr Smith has pleaded but a polycentric analysis or a policy analysis or a statutory analysis that assumes there's a purpose of consent or endorsement of the activities of these defendants is false and will be argued against at trial.

1100

The next is indeterminacy and I would differ from the Court of Appeal's analysis in *Strathboss* of indeterminacy there and I identify that because the same point arises here where defendants put up the size of the class as equating with indeterminacy. Indeterminacy has never been about the size of the class and nor should it be, for reasons I'll come to in a moment. Indeterminacy is about difficulties defining it and you've heard Mr Bullock on the fact that tort has

managed to delineate and draw lines based on facts. It's managed to apply and enforce the reasonable use criteria in the nuisance context and it manages to delineate who can get damages. But as Mr Bullock said, that's what the common law does. It draws lines based on the facts. If there is an indeterminacy concern here it will govern where the Court draws a line. It does not explode a cause of action and lead to inevitable mass breaches of rights. The purpose of indeterminacy is to limit liability, not to enable tortious conduct.

So firstly this is not indeterminate. It's just huge. And secondly it's not an answer to the claim. It might be an answer to a damages claim by certain people. And we can analogise this in terms of plaintiff indeterminacy. If instead the defendants were assembling a bomb or if they were what some people thought the Large Hadron Collider was going to be, something that blew up the world, and they came to court – we came to court and persuaded the Court they were about to destroy everybody in one explosion there would be no indeterminacy argument raised. The problem here is that the complexity obscures the certainty of class. Mr Smith says based on those reports and the maps drawn that, what the scientists say, that there is a near inevitability of horrific warfare and global societal collapse because we will lose food and water security and that all happens well before a lot of the sea level rises and so on. We've learned recently just how interconnected the planet is, how badly the Syrian refugee crisis threatened the stability of Europe, for example, and all of that sort.

So who will that affect? That will affect a certain class of the planet. It's not indeterminate. It's just really big. And how perverse would that be on a policy level if the fact that the harm was the biggest ever harm with the biggest ever problem known and for profit somehow meant the Courts wouldn't respond? That in my submission would be perverse.

Then in terms of policy and statute generally I've mentioned the Act. It is not at odds with a duty. It says they have to stop. Its problem is the political hand brake partly lobbying-inflated on action. The international agreements say the same. Human rights structures and instruments say the same. Principles from

Te Tiriti say the same. Governmental policy statements say the same. All human knowledge and science says the same. It is not open for the defendants to say that what Mr Smith wants is a breach of any policy. The best they can say is what the Court of Appeal did that this is not the efficient, just or fair way of doing it and that is a trial issue. That is a trial issue par excellence and I'll just take a few examples of that if I might that have come up in discussion and unpick them. Firstly there is no harm. There are no Chinese children not getting milk powder if for example coal stops being mined. There's no evidence of that at all. And it's not true. That applies both to BT Mining which is just selling coal abroad. There is no terrible economic or unjust harm if they are stopped. Their profits cease but there is not some flow-on effect of harm. If they are going to say that that has in a factual sense some relevant balance in policy that's a trial issue.

But Fonterra too with its tremendous numbers of coal boilers. I recall when acting for Jeanette Fitzsimons in the *West Coast Ent* case she was campaigning just to persuade Fonterra to accelerate its change from coal. They know they have to do it. They're going to do it. They might even have to do it very suddenly. She was pushing for cogeneration for those boilers. Milk powder still, and they haven't done it. And why? Cost. So the Court needs to be very careful before thinking that eggs are going to be broken in making this omelette at all. It might just be profit margins, unsurprisingly given directors' duties, driving all of this. Why hasn't Fonterra migrated from coal boilers? As we've pleaded it keeps saying it will. It can. Why hasn't it? Trial issue. If there's real harm this Court should not be assuming it, and I made that point yesterday though. It's so important because this case, this important case tipped over in the Court of Appeal because three judges, with respect, not experts in the area, and not presented with any evidence, assumed there would be harm from the orders sought. Those are two examples of where there is no harm.

If I move then briefly to remedy and then I'll come to the third cause of action, and I'm just mindful of time and that you may have some questions for me, and

I want to allow some time for that because this is my last chance to speak for a day, on remedy a lot of what's –

WILLIAMS J:
Definitely not speaking for a day, I think that was clear.

MR SALMON QC:
Yes, there's a comma I meant to have somewhere in there. This is the last chance I have to speak *today*.

WILLIAMS J:
Well done.

MR SALMON QC:
Thank you Sir. Baby steps for me. Remedy. It is natural for us to ask, and a number of the questions the Bench have asked, about problems with damages and a damages analysis because we can see the problems with quantification or with foreseeability or with remoteness of damage. In my submission it's a tenable and trial proper issue to explore the possibility that none of that should be a controlling factor int his case where damages are not sought. That it may be that the Courts would conclude that those doctrinal barriers to damages, those what I called Lockean, laissez-faire or classical liberal barriers from the 19th century and the UK, might continue to subsist for damages claims. But that they do not help the Court decide how tort should deal with conduct which simply must be stopped or everybody will die.

Now the reasons Mr Smith doesn't seek damages are obvious and known to the Court, but I just want to explore why I say it's a wrong poison pill to bury damages concerns in an analysis of this case, and hard cases and other cases made bad law and so the slippery slopes and in terrorem arguments in this case no damages are being sought so why would the Court forestall the consideration of relief which seeks none because damages might be remote, or hard to quantify, or suffered by an enormous class. In my respectful submission the purpose of those measures of considering damages and limiting

when they were available, are tools designed to delineate financial allocation of risk, and injunctions are different, and that's shown by the most fundamental of tort principles that are illustrated by Mr Bullock's presentation of nuisance. It's not really about damages most of the time, it's about stopping or not, and thus, in my respectful submission, to control this case with the back end of damages principles, and deny it being heard at all, is to make these rights without remedied, and Justice Kós made the observation that without remedies there is no right. It goes both ways.

These are the most profound and important rights on any view, at stake here, and they're taken to be proven as truly at risk, and they are. If it is to be said that we will not protect the right to life because of someone, instead of wanting to save their life, sought damages, and that would be hard to quantify, then tort is failing, and tort is failing in the face of the biggest harm to life and property ever. So would it be hard to draw the lines required for allocation of loss and allocation of damages? Yes it might be difficult, it might require quite a lot of fact, but as Mr Bullock said, the Court draws lines with fact. Are there ways we can imagine it would do it such that a trial should be granted? Yes, we could see it being done on the basis of bottlenecks of supply, or of industrial supplies or burners, or purveyors of fossil fuels, or major industrial profit-driven emitters, or any number of other approaches, none of which prevented the law of nuisance properly protecting rights, and in my submission shouldn't prevent the tort of negligence from properly protecting rights too. Why would it only be the tort of small things, and in that context the –

KÓS J:

Do you not feel that we need to provide some sort of guidance to the trial court that you seek to sustain, otherwise they're going to wander eyeless into Gaza. 1110

MR SALMON QC:

With respect Sir, no. I can understand the concern to provide clarity, and it's a proper concern, but equally the drawing of lines, if Mr Bullock is right and he is, which is something to be done against facts, is to be done against facts, then

the trial Court should have reasonable latitude to draw a line once understanding where the problems are. If for example there are countervailing policy concerns with certain levels or certain descriptions or certain parts of the supply chain we should be, we plaintiffs too should be open to the possibility the Court will swerve or move to navigate around those. So I understand the concern to provide it but the question for now is just tenability of course and in my respectful submission we all on this most important issue ever do credit to the law by giving the trial judge the opportunity to hear the evidence so that she can make a decision about where the line should be drawn in a full factual and policy context.

Also just on relief. These defendants have known they have to stop for a long time. There is not evidence that it's going to be hard and we shouldn't assume that it is. They know that they might be stopped at any time the Green Party holds more power in a balance of power or at any time there is a for example Chinese market reaction to coal-fired milk supply. At any time could happen. Or at any time that there is a ban on coal or a ban on coal imports or a ban on coal exports from supplying countries or a consumer uprising or reaction or a shareholder revolt. The things stopping those things are just the conceptual lag as people fail to understand why scientists are so frightened. So these defendants can be taken at least until trial as being ready to change. They've got their alternative sewerage system ready to go and it is a false threat for them to say that Mr Smith seeks to upend the economy. He does not. If there is evidence that some part of this would upend the economy then a trial judge will have the latitude to suspend an injunction to allow plans to be made or legislation to be lobbied. But for today's purposes the proper approach on a tenability strike-out test is to ask whether Mr Smith might be able to prove that those are not proper concerns and thus he's got to be taken for the strike-out purposes as being able to show that there is no countervailing societal collapse and the Court of Appeal was with respect in error to conclude that there were.

KÓS J:

Your challenge is presumably to say that unless the respondents can show that a remedy is inconceivable, going back to my point about remedy and rights –

MR SALMON QC:

Remedy and… Exactly Sir. Exactly. That resonates. So if a remedy is truly unworkable and that's a trial judge question it's so factually rich. If someone says, we can't do that without a profit margin hit, well is that unworkable? Not where death's at stake. Of course. If they say, this is unworkable because we can no longer produce product for a year, well that would bear on perhaps suspension time but again those are workability details for trial not for today and certainly not ones where the Courts flinch at the first hurdle on a tort here. Just a few other points –

WINKLEMANN CJ:

Could I just ask. I mean say the Court concluded that there weren't any doctrinal obstacles to one of the three causes of action, what are the strike-out approach? Does the Court normally if there's not a significant evidential burden allow the other two to run alongside?

MR SALMON QC:

Yes. I was going to come to that in relation to the third especially. In my submission there's no reason to strike-out two and leave one alive as the learned judge in the High Court did because everyone's facing a trial on the same facts and it's proper that all three torts are considered alongside, not because they're all equally strong. It's obvious I think to everybody in the room that nuisance just responds on its face. It would be an extraordinary policy swerve to decide nuisance disappeared when the harm's really big. Be very strange. If that's right and I say if I'm not expecting it then negligence doesn't disappear as having utility because it attaches in slightly different contexts and like respondents slightly different ways. There is no utility in the strike-out discretion to the defendants or the plaintiffs in narrowing the trial judge's available suite of remedies and analytical tools, and I say that particularly because in my submission this is a moment that's truly historic. It's historic because we stand on the edge of history, not at the beginning of it, but at the end. That is literally what the scientists are saying. This is the end of civilisation, and at that moment in time wouldn't it be remarkable if we decided

negligence couldn't respond to this harm, when we do more than just step back from a Harvard article which talks about foreseeability and proximation.

If we just go back for a moment to, for example Lord Atkin's speech in *Donoghue v Stevenson*, which I'll pull up just two quotes that might resonate as the type of way a judge would look at this truly novel problem at a trial. Lord Atkin said at one point: "I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilised society and the ordinary claims it makes upon its members so as to deny a legal remedy when there is so obviously a social wrong." If you'd inserted after that a whole bunch of finicky defendant-favouring, economic-based hurdles, it would have read like an aberration in that profound judgment.

Secondly – and this is the last quote from any case I'm going to give today – Lord Atkin said this, and it's worth thinking about this, given he was talking about a snail in a ginger beer bottle that might harm one person. He said: "I do not think that a more important problem has occupied your Lordships in your judicial capacity." We should reflect on that. The law changed with the most important problem that had occupied them being a snail in a ginger beer bottle in t his new form of societal interaction. He went on to say: "Important both because of its bearing on public health and because of the practical test which it applies to the system under which it arises."

Two parts to that. The impact on public health. It has always been tort's place to respond to injury and safety issues first and foremost. That snail in the ginger beer bottle seems almost comically harmless, and we do perceive some bathos in turning from climate change and its problems to that snail in the ginger beer bottle. But that was important enough to turn tort on a dime and offend every reactionary jurist who said "not proximate, not relational", et cetera. But, secondly, he posed it as a practical test that applies to the system under which it arises. Now it was a practical test and the test was the same one that Douglas Kysar puts forward in his paper: does tort adapt or perish? Mr Kysar, Professor Kysar, has no optimism about American jurists because those "doctrinal weapons", his words, are so embedded in the thinking of tort scholars.

We're not there, we don't have them and we don't have their Supreme Court. We are able in our courts to stand back and look at the sweep of tort history and say: "These doctrinal tests and thresholds," which my learned friend is about to extremely skilfully outline, "are analytical tools presented by academics first." When did Salmond write his tort book? About 1900. He didn't even think there was a unifying theory of tort there, he rejected that idea and said it's still a discrete bundle of individual claims. The unifying theories of tort law came later, and American scholars infected us and infected our writings and they infected UK writings. Their tools for delineating and limiting risk and the judges' adoption of them in some cases was a historical aberration and has acted as a handbrake on the natural development of torts which, when one looks at the cases Mr Bullock looks at, they just don't contain concerns about indeterminacy, they don't contain concerns about relational, the word "relational" just doesn't appear, academics invented that first and foremost. Those granular parts of the way tort has tried to respond to a market environment and a cultural environment in which progress was good, in which the wilderness was meant to be tamed, in which trees should be removed so a parking lot or a farm could be build, the Kysar article really does quite elegantly portray that as reflecting that same Lockean vision of the world that inspired John Locke's drafting of the Virginia constitution. It's aberrant in a world where we're running out of time and space.

That brings me to the third cause of action, and I think I've got time to finish while you're still in the room, as opposed to my threat of carrying on once you've gone. The third cause of action got one line in my friend's submissions in the High Court because it wasn't taken seriously, but it is advanced seriously, and it's advanced in part to give a trial judge a template to respond in the way we should respond and the way Lord Atkin would have responded and, indeed, all those 19th century judges would have responded if someone had said: "This pollution is going to kill everybody," and they would have started from first principles, first principles including that rights without a remedy are no rights at all and if there's one policy feature of the modern landscape it's that the rights that Mr Smith asserts are definitely not intended to be without remedy.

1120

They're the most profound ones we have. If they won't be protected and tort continues to protect – tort continues to run two-week defamation trials over slight slurs in an email, if tort becomes the tort of little things and little problems it has perished, really it's perished, and we perish, as Douglas Kysar says. So how should the Courts engage with the third cause of action? We say at trial, at trial where, instead of flinching from evidence and context, the Court has proper evidence on the policy concerns and the policy blow-back of not acting, where the Court of Appeal's unfactual conclusion that this is not fair, efficient or just, efficient, economic or just, is tested and Mr Smith is shown to be wrong, evidence about the legislative effectiveness or lack of, and you'll hear more from the Climate Lawyers on that, it is not right to assume that anyone's got this if the Courts don't.

Mr Smith says, and he's entitled to go to trial on this basis, this is it; he has no hope and no expectation that there will be proper regulation in time at the governmental level of emissions. There will be evidence on that and there will be evidence from the defendants on how ready they are to change. So instead of the Court being asked just to assume that Smith is trying to stop progress, we will hear, we will get discovery, on how ready Fonterra is to switch its boilers over, and we'll have people, as I have done, who've walked inside co-generation plants and seen how you change them over. We will see that, and instead of a submission that this is disruptive we will know whether it's true or not. Mr Smith says it's not true. He should have a trial on that. We should not have our highest Court just taking defendants with a profit motive at their word that this is really hard. We need numbers on that, and those numbers don't just inform whether there's relief at all but, of course, whether there's a suspension or some more calibrated form of relief.

We also need to put in its box the suggestion that this is asking the Courts to be supervisory or regulatory. That's not right and it's never been. It's true that one form of the injunction we've put forward involves some Court oversight. The Court does oversee things. The Court oversees small Anton Piller orders. Is it, Mr Smith asks, really so strange to say that the Court might bring parties back before it to supervise an existential threat?

Finally, it will have evidence on – well, not finally actually. Penultimately, it will have evidence on the extent of harm caused by these particular defendants and the extent that impacts on Mr Smith and that too will inform the duty and it will inform the Court's sense of the setting of lines and the setting of thresholds because my learned friends will say: "This is de minimis, we're this many tonnes out of a planet of this many." Mr Smith will say: "We're at the tipping point. Those are the straws being placed on the camel's back that could cause it to collapse but also I suffer more and more for every tonne," and also what's done here affects everywhere because everybody in every jurisdiction considering bringing a tort case will be watching this one.

Now finally on matters of evidence, those taonga, fisheries and land protected by the Treaty will be properly articulated and understood by the Court and so too will the areas of tikanga that you've heard my learned friend, Ms Coates, on and we'll hear others on.

WINKELMANN CJ:

So Ms Coates said that this third cause of action could be the place the tikanga conception of tort law could find its expression.

MR SALMON QC:

Yes, and that's, of course, true although I think she would agree with me that that's not to say that we shouldn't have regard to tikanga in principles, tikanga in the other two, and I would say the most obvious area where tikanga might inform us is to wrench us away from this Chicago School of Economics obsession with tort as something that deals with financial loss, people who are trying to make money, and look at it as something that prevents harm, and that's a key part of Mr Smith's case. He is not saying: "Look at me." He doesn't want to be the plaintiff here particularly. He's not saying: "Assess my harm in a granular specific way." We won't have **John Hagen (11:24:45)** giving evidence or whoever the modern version is saying: "This many dollars for Mike Smith." There's no compensation for him on that.

WINKELMANN CJ:

I don't know that there is a modern version of him. Carry on.

MR SALMON QC:

Well everything changes. But you take my point. That's not his focus. His focus is on the harm and that's a very different way to view tort from that which an American scholar or a Harvard Law Review article might describe, because it says look not just at me and my pain in financial terms, damages, damages. It says there's a massive harm happening, happening to me and others and I speak for myself and others which is an approach that from my limited understanding of tikanga resonates. But also the remedy I seek is not one that says you can make me whole for my loss of taonga with a dollar. Mr Smith doesn't seek that. It won't make him whole and, of course, it won't make anyone whole on the threat to life.

He says the proper focus of tort with environmental threats is akin to that which might be entertained in tikanga. He says what happens when a resource, when the environment is under threat. We can see parallels between tapu and the approach taken to sewerage in streams I suspect in England. Those are common concerns to protect the integrity of the water source. We can see wider rahui being placed to protect a resource. It doesn't even necessarily require the moral balance judgment that is required in an old English case, the collision. It's recognising the resource is under threat. Rules are needed. Orders are needed, translating, to protect it and that's the focus that Mr Smith takes. He seeks to wrench this case and tort law away from an inevitable focus on who suffered financial loss and ask it to look at the heart of the problem, because all the loss falls away of course with an injunction, it's better. If an injunction can be ordered it's better. He says look at the wrongdoing and look at the harm –

KÓS J:

Well that focus might more fit with negligence where those concepts have predominated but I'm not sure that this rather ethereal construct that you're advancing here does anything different to what nuisance might do but in two

particular respects I want some clarification. The first is this is not necessarily the entry port for a greater consideration of tikanga because nuisance can do that as well. The second is I don't see this innominate tort which you don't even give a name to as actually providing a greater remedial base than say nuisance does. Are you asking this tort to do anything that nuisance, on your version of it, can't do?

MR SALMON QC:

Well yes and no. Yes and no. Firstly in my submission we might reach a point where questions of standing, like those put forward in nuisance, whatever view this Court takes of them are not the proper lens for a tikanga informed approach to protection of a physical resource. In my respectful submission it should not be right that we would have that threshold. Now that might be a calibration that can take place within nuisance –

KÓS J:

I think if we thought that we would reformulate nusiance.

MR SALMON QC:

Yes. But that's an example of where tikanga might inform nuisance of course –

WILLIAMS J:

Are you talking about a new tort that's more tikanga than common law? Is that the point in saving that, putting that in your back pocket?

MR SALMON QC:

No. I'm not actually saying it's more tikanga than common law. I'm saying, I think perhaps what I'm seeking to say and I'm saying it very clumsily Sir but it's important enough, I'll try and say it better. The third cause of action gives the Court the ability to start in the way a 19th century court would or tikanga would from a first principles, harmed rights and resource-based focus on protection.

WINKELMANN CJ:

Is your simple point that this is a cause of action in which you would strip away proximity, test the proximity? I mean are you saying you should strip away the legal theorising that has gone on in the area of negligence?

MR SALMON QC:

Yes. Strip away or ask afresh what are the appropriate probanda for this unique problem. So you're right Sir, I haven't given the tort a name and neither has Mr Smith. It could be just called the climate tort or the Bullock tort. Whatever it's called its purpose is not to cause a watershed change in tort law in other context but rather to recognise that this is the harm to end all harms and it just is. That will be the evidence and it's the evidence accepted by our own sovereign. In that context the third tort serves this purpose I think to try to answer your question as directly as I can Sir. A trial judge will hear a suite of evidence and she or he will either have to navigate through the probanda of nuisance which doesn't include a bunch of the negligence ones that my friends put up. They somewhat conflate them. Or through the tort of negligence and adapt those to reflect new understandings and new approaches.

1130

Or a trial judge might say, I am better to approaoch this in the way the Courts did until the 20th century and ask, what is the right that's being infringed, or rights, we talked about those, and what is the remedy that properly responds to that, and why doesn't the law protect people from this harm, and in that sense, to answer Justice Williams' question, am I saying it should be more tikanga than common law, no Sir, I'm saying it should be first principles tikanga and first principles common law, because all the greatest cases either did sleight of hand by departing from doctrinal restraints or small fine print in the case law, or they began from first principles, and in my respectful submission this is the moment par excellence where a court should be saying not damages are hard, that should kill the cause of action, the damages tail should wag the dog. But rather on more first principles levels to say, as we often do, if damages are hard to quantify what do we common law lawyers routinely say, we say, well that's a reason to have an injunction. It's a remarkable world where the defendants are seeking to say damages are hard to quantify therefore you should have no rights.

WILLIAMS J:

I thought your point was you were saying to, picking up on Ms Coates' argument, that if the planet itself is personalised, then you head off the proximity problem by, for example, developing a cause of action on behalf of. I thought that's what you were suggesting.

MR SALMON QC:

Yes I am.

WILLIAMS J:

And if you were that's very deep tikanga and that would be very novel and brave.

MR SALMON QC:

Well thank you Sir.

WILLIAMS J:

Perhaps you might read that as saying it in the Sir Humphrey –

MR SALMON QC:

No, no, on behalf of Mr Bullock and Ms Coates, they're very flattered.

WILLIAMS J:

It was a serious question. If you're repositioning New Zealand's law of tort in that way then that is a significant shift.

MR SALMON QC:

Yes, and again at the risk of trying to have my cake and eating it –

WINKELMANN CJ:

Well that was Ms Coates argument yesterday.

MR SALMON QC:

No.

WINKELMANN CJ:

It wasn't?

MR SALMON QC:

Sorry your Honour?

WINKELMANN CJ:

It was Ms Coates' argument yesterday?

MR SALMON QC:

Yes, but at the risk of having my cake and eating it on the third cause of action, I see the third cause of action accommodating that approach a trial judge might, and we say should, take. There is, it's hard to think of a good policy reason why there wouldn't be an action available to save the planet. It's really quite hard when one stops and thinks slowly about it. But independently of that, and whether one says one draws from tikanga, the third cause of action would also enable a parallel analysis in line with the Pākehā common law tradition which says, rights being harmed, we can get away from foreseeability and proximity, whether because they're, on principle, not appropriate here, or because they're just met, we know foreseeability is met, we know knowledge is met because it's known.

WILLIAMS J:

In which case you don't need the third category at all.

WINKELMANN CJ:

Yes, exactly.

MR SALMON QC:

Well we might because –

WINKELMANN CJ:

You're a little bit incoherent on this, I have to say.

GLAZEBROOK J:

Isn't the argument really that you don't necessarily want to upend those things in other contexts.

MR SALMON QC:
Correct.

GLAZEBROOK J:
So rather than upending negligence in another context, the third tort is, if I understand you, is one that you could have specifically related to the environment.

MR SALMON QC:
That's right, and can I attempt to coherence, to respond to the Chief Justice's constructive feedback. The third cause of action gives us a chance to do what, in my submission, is right, which is be bespoke about climate change. I can just see the hundreds of pages of submissions about problems if we start fine-tuning negligence. Not to say it can't be done, it can be done, but the third cause of action gives a clean sheet to the Courts to respond in a way traditionally the common law has. That's the, I think, value of the third cause of action, and I don't deign to predict how a court properly informed about tikanga with evidence would view the infusion of that tort with tikanga because I need to hear that evidence too. But it's entirely possible it would take that step, or would take a step of saying, this is a harm that's pervasive for people generally, and the approach to rights informed by tikanga which, more than we've ever needed it, is collective rather than individualistic, will inform the way a third cause of action is shaped. So Mr Smith is not so much picking one or the other as seeking to present three vehicles through which tort law can respond. One requires no fine-tuning at all, that's nuisance, but has conventional apparatus that mean maybe it's not the only way.

One he accepts is evolutionary – it's not revolutionary, it's evolutionary – and that's negligence. The other is the open question for a trial judge which will mean if this Court allows this case to go to trial and if we come back before this Court we will have evidence from witnesses and not from the Bar. We will know

the economic answers and when my learned friends say they are responding, they're going to do things, well, they've said that every year and they haven't done it. We'll know by trial whether they've started and wouldn't it be great if they had, but the Court will have evidence, and so that cause of action might be put to one side by a trial judge when the evidence is heard but it might provide the most elegant way of responding to climate change with a tort that, to pick up on Justice Glazebrook's tort, avoids the problem that someone says you're causing flow-on effects for other areas, and my learned friends would say incoherent, doesn't fit with the framework of tort law to have a climate-specific tort. Why not? Call it an earth system tort, whatever it might be. There are existential threats facing the planet we're having trouble imagining but they're here and, in my submission, keeping the three of them alive gives the trial judge the flexibility to craft things with a level of knowledge on tikanga and on issues that we do not have.

WILLIAMS J:

I wonder if I could ask one small question? I'm reluctant to keep the Chief Justice away from her caffeine but…

MR SALMON QC:

I hadn't checked the time, Sir. It's fine.

WILLIAMS J:

Yes, actually, you're five minutes past dropping dead, Mr Salmon. You haven't mentioned section 17.

MR SALMON QC:

Yes, sorry, I did look at that. My apologies.

WILLIAMS J:

Do you want to deal with it in replies if it's more efficient?

MR SALMON QC:

I'll do it in a moment and come back to it in reply if it helps. But the short point is, I think, people have – as well as saying it's not actionable except through the mechanism of enforcement orders, the general – and as having been treated by the laws of New Zealand as not supplanting nuisance, nuisance prevails, and –

WILLIAMS J:

Yes, well, that, yes.

MR SALMON QC:

The key point I think is that the practice and commentators have taken *West Coast ENT* as determining that it can't be invoked for climate change problems.

WILLIAMS J:

Is that right?

MR SALMON QC:

Is the *West Coast ENT* decision right, Sir, or…

WILLIAMS J:

Well, *West Coast ENT* is not about nuisance-like things. It's about a consent.

MR SALMON QC:

No, but the Court concluded that the legislative purpose was, or legislative scheme, was such that climate change emissions considerations were excluded from consideration under the RMA.

WILLIAMS J:

Well, that's true in a consent.

MR SALMON QC:

Well, they went beyond consent because the first one was consent. It was the *Genesis Mighty River* case. The second one, *West Coast ENT*, was the

BT Mining equivalent. That was my client seeking to restrain the digging for export. So there was no emissions or consent issue in that sense.

WILLIAMS J:
I see.

MR SALMON QC:
It was a consent, not –

GLAZEBROOK J:
Wasn't the issue rather that it wasn't – you didn't look at it at that level because there was a national – it's supposed to be looked at at a national level?

MR SALMON QC:
Yes.

GLAZEBROOK J:
So it's a slightly different issue to say it's nothing to do with the RMA because it will be something to do with the RMA if it's dealt with under a national policy statement.

MR SALMON QC:
If it ever is, yes. But right or wrong, that's the view that's been taken as I understand it by RMA practitioners, Sir, and I do apologise for going over the hard stop but I can deal with that more in reply.

GLAZEBROOK J:
Well, it might be slightly wrong is all I'm saying because it was only a matter of looking at it in the particular context.

MR SALMON QC:
Yes, it might be, and then the second answer would be that the Act doesn't supplant nuisance or other torts.

But, Sir, I will look at it further and deal with it in reply because I truly have gone past the half-stop.

WINKELMANN CJ:

Yes, and so when we come back, the interveners. What order are we going with the interveners?

UNIDENTIFIED SPEAKER:

Your Honour, Lawyers for Climate Action is going to go first, followed by Te Hunga Rōia Māori.

WINKELMANN CJ:

Thank you.

COURT ADJOURNS: 11.39 AM

COURT RESUMES: 11.58 AM

WINKELMANN CJ:

Ms Cooper.

MS COOPER QC:

Your Honours, in striking out Mr Smith's claim the Court of Appeal found that tort law had no place as a potential response to climate change. The Court concluded that in view of the magnitude of the climate crisis it cannot be appropriately or adequately addressed by the common law through tort claims pursued through the Courts.

WINKELMANN CJ ADDRESSES MS COOPER QC – MICROPHONE

MS COOPER QC:

As I was saying, your Honours, the Court of Appeal held that climate change is an issue, quintessentially a matter that calls for a sophisticated regulatory response at a national level supported by international co-ordination. Now in our submission that conclusion was wrong, we say there is a potential law for

tort law, Mr Smith's claims are arguable, and his claims should go to trial, and there are five points we wish to emphasise in our submission.

First, the need to take meaningful action to reduce emissions is extremely urgent. Secondly, the Court of Appeal was wrong to assume that the executive and legislative branches are better placed than the Courts to address climate change, and even more wrong to assume that they had already or were about to. Third, Mr Smith's claim is consistent with common law principles, as you've heard extensively from the appellants on, and is really based on the unremarkable proposition that those causing him harm should be held responsible. Fourth, we say such liability does not cut across the Climate Change Response Act but has the potential to be an important underpinning of the regulatory response. Fifth, and perhaps most importantly, we say that the Court has an obligation to ensure that the law can meet and respond to the challenges of the climate crisis and that it does so in a way that protects human rights, provides justice to those harmed, accountability of those responsible, and preserves the rule of law, which will be endangered if the law fails to provide these things. We also agree that this response should be informed by tikanga. We also say it should be informed by Aotearoa New Zealand's international legal obligations and by the developing international jurisprudence on climate issues, and by that I don't simply mean jurisprudence in international law but the domestic jurisprudence of other jurisdictions.

Dealing first and very briefly with my first point, urgency, the extreme nature of the climate crisis in a future scenario as we face have been well covered by Mr Salmon and I won't repeat them. Suffice to say there really genuinely is very little time left to keep warming to 1.5 degrees, which is not a safe threshold, it's just the threshold that's been adopted as still being realistic at the time of the Paris Agreement and beyond which much worse scenarios would unfold. The remaining carbon budget to keep global warming to that will be exhausted by the end of this decade at the current rate of emissions, and we've detailed the calculations behind that in our submissions at paragraph 18, which is based on the IPCC's estimate of the remaining budget and the rate of emissions in

2019. The adjunctive relief sought by Mr Smith merely applies the required global reductions, it is what the scientific consensus says is required to have a better than even chance of limiting warming to 1.5 degrees, it is not an overly conservative or precautionary calculation that is to simply have a better than even chance. The opportunity for doing anything more gradual towards this goal has passed. Much of the harm from climate change is and will be irreversible, and I would recommend to your Honours to read the powerful dissent by District Judge Staton in the *Juliana v United States* 947 F.3d 1159 (2020) decision. She notes that what sets this harm apart from all others is not just its magnitude but its irreversibility, and that case is in the respondents' authorities, your Honour, at tab 29, and the reference is at page 13 of the judgment. This urgency and the irreversibility of the harm, elevates the human rights and rule of law aspects of this case, and I'll come back to those in my point four. It also means we need to use all available mechanisms to address it and we shouldn't foreclose any potential solutions and particularly not at the strike-out stage.

Now the second point I want to emphasise is the fact that we say the Court of Appeal was wrong to assume that it's appropriate to leave climate change to a regulatory response. It's very tempting to think that domestic regulation and international co-operation will avert the worst-case scenarios. But the history and the current evidence unfortunately is to the contrary. Now we've reviewed the international background and progress in our submissions from paragraphs 12 to 16. This starts with the UN Framework Convention on Climate Change in 1992 followed by the Kyoto Protocol in 1997 and the Paris Agreement in 2015. Now each of those agreements have seen the vast majority of states in the world commit to preventing dangerous anthropogenic climate change and each of them has failed. We've included a graph in our submissions which shows the dates of each of those key international agreements against the path of global CO_2 emissions rise and as you'll see there's really no discernible impact. So each time the world commits to action, emissions just keep on keeping on in exactly the same way.

Now in terms of our domestic progress that's dealt with in our submissions at paragraphs 19 to 26. Aotearoa New Zealand is a signatory to all the international agreements. It passed the Climate Change Response Act in 2002. It introduced an emissions trading scheme in 2008. But despite this New Zealand has failed to reduce its emissions from 1990 levels. In fact net emissions have increased by 26% from 1990 to 2020. That's one of the highest increases in the OECD. Under the budgets adopted by the Minister last year under the framework of the Climate Change Response Act both gross and net emissions will be higher in 2030 than they were in 2010. That's assuming we meet the budgets provided for under the Act and there is no legal relief for a failure to meet them other than the option to apply to the Court for a declaration.

Now I should say that that calculation of increase is based on the UNFCCC accounting methodology. The Climate Change Commission uses a gross/net approach rather than net/net and also adopts a modified activity-based accounting methodology rather than the UNFCCC methodology and so they will take a different view on the legitimacy of that comparison. Those issues are the subject of Lawyers for Climate Action's judicial review which we are awaiting a decision on. But nevertheless, I don't think there's any serious contention that net emissions will be higher in 2030 than our net emissions were in 2010.

So the upshot of all of that your Honours is that we say the Court should not assume particularly on a strike-out that there is a functional international regime to reduce global emissions or that the New Zealand government has taken or will take the necessary steps to reduce emissions in line with limiting temperature rises to more moderate levels. That's not to say they're not doing anything. The point is that what they are doing is proving ineffective and is simply not ambitious enough to protect the rights which Mr Smith seeks to vindicate in his claim.

Nor should the Court assume that other branches of government are better placed to respond. As Mr Salmon said, there's very good reason to think that judges are in fact best placed to make meaningful systemic chance towards

rapid decarbonisation because courts are well-placed to make rational evidence-based decisions. And we say when faced with an existential threat which is climate change it would be extremely risky to assume that someone else has it under control. And at any rate it would be inconsistent with the case pleaded by Mr Smith who explicitly pleads the inadequacies of our legislative response.

That brings me to my third point your Honours which is that Mr Smith's claim we say is unremarkable and consistent with common law principles. So Mr Smith is effectively saying that large greenhouse gas emitters should be held accountable by the common law in the same way as other actors who undertake activities that cause harm, and we say in a sense the surprising thing is not that such large emitters might be held responsible for the harm they cause but rather that they're presently regarded as not being responsible or having any liability for, as Mr Salmon has so eloquently described, what is in fact a knowing contribution to the destruction of life as we know it.

1210

The number of contributors and the disperse nature of harm are certainly challenges to be overcome but they should not result in immunity, and I won't say any more about this because the appellant's submissions have addressed them in detail except to say I do think the Court here can look to and draw from some of the international cases that have considered exactly these issues, albeit in slightly different domestic legal contexts. So, for example, in our submissions we talk about the *Lliuya v RWE AG* (District Court Essen, 15 December 2016), *Lliuya v RWE AG* (Higher Regional Court Hamm, 1 February 2018) case which the German Court has allowed to go to trial on the basis that it's arguable that a German oil company, RWE, has liability for its partial contribution to the climate change harm being suffered by the plaintiff's community in Peru. So this concept of partial contribution leading to partial liability has certainly been found to be arguable in Germany in the context of a civil claim and it's found to be arguable in many other contexts which we outline in our submissions. So, for example, the *Netherlands v Stichting Urgenda*

ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands, 20 December 2019) case and the *Shell* case which I'll come to shortly.

So what Mr Smith's case is really asking the Court, in my submission, is not to recognise a change in the principles of tort law but rather a change in our understanding of greenhouse gas emissions. They are not harmless and inconsequential despite the fact that we have treated them that way in the past. We know better now. They are dangerous and they are harmful and therefore we must respond accordingly.

The fourth point, your Honour, is that recognising your Honours, is this type of liability does not cut across our domestic arrangements as the respondents suggest. So dealing first with the Climate Change Response Act, the nature of that Act is well encapsulated by looking at section 3, the purpose section, and that states clearly the purpose of the Act is to provide a framework by which New Zealand can develop and implement clear and stable climate change policies – so it's a framework, it's not a code, it's not a detailed manifesto for how this is to be achieved, and there's a focus on the goal – policies that contribute to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5 degrees Celsius. That is what matters. That is what the government has committed to, is what the countries of the world have committed to. If the orders Mr Smith seeks are necessary to that and consistent with that then making those orders in no way cuts across the legislation.

Secondly it's important to note from the purpose the purpose of the emissions trading scheme which is also part of the Climate Change Response Act and that's addressed in subparagraph (b) of section C. So gas, greenhouses gas emission scheme that supports and encourages global efforts to reduce the emission of greenhouse gases by assisting New Zealand to meet is international obligations and assisting New Zealand to meet its 2050 target and emissions budgets. Again there's no suggestion there that it is intended to be the only tool to achieve those things. It is merely part of an overall effort to

achieve those things. It is not a code. It is not comprehensive and the CCRA in no way excludes other measures.

Some other things the Climate Change Response Act doesn't do, it doesn't address rights issues. It doesn't provide individuals with any right of remedy. It doesn't impose any individual obligations on any actors outside the requirements of the ETS. Now that does not reflect a policy choice by Parliament that there should be no such obligations. It's simply that that's as far as the Act currently goes. It doesn't provide compensation for anyone and it doesn't provide any remedies –

ELLEN FRANCE J:

Just in terms of the interrelationship Ms Cooper, looking at the terms of the injunctions, for example, what if the Court came up with something that's quite a lot lower, for example, or would lead to a lower range – sorry, higher range than the legislation envisages?

MS COOPER QC:

Well your Honour, if that's what the rights point to and what the law requires then I would say that is – that again does not cut across. The CCRA, the overarching purpose of the CCRA is to contribute to the global effort to limit global warming to 1.5 degrees –

ELLEN FRANCE J:

Yes but what I'm envisaging is something that perhaps is less consistent with that goal –

WINKELMANN CJ:

You mean overachieves it?

MS COOPER QC:

Oh.

ELLEN FRANCE J:

No.

WINKELMANN CJ:

Underachieves it?

ELLEN FRANCE J:

No, that underachieves.

KÓS J:

Underachieves it.

ELLEN FRANCE J:

I'm just trying to test out the – you say this is not a code –

MS COOPER QC:

Yes.

ELLEN FRANCE J:

– but it is the current response and I'm just trying to see whether you end up with any potentially inconsistencies between the regimes.

MS COOPER QC:

Well your Honour, no I don't think so because they can be treated separately. I find it difficult to conceive of a situation in which the Court would come to a conclusion that a less ambitious response was necessary and in fact if it required less of the respondents than the legislation did then it's difficult to see what the orders of the Court would add I suppose other than the fact of course the legislation doesn't impose individual obligations –

KÓS J:

That's the point surely?

MS COOPER QC:

Yes.

KÓS J:

Yes.

MS COOPER QC:

But – so this point is well-dealt with by the Dutch court in the *Royal Dutch Shell* case. So in that case The Netherlands also has a Climate Act the provides a framework for policy to reduce emissions over time, so by 49% by 2030 and 955 by 2050 and the Dutch Cabinet is required to draw up a plan to achieve those goals, so it's a very similar framework. The EU has its own emissions trading scheme which is a genuine cap and trade scheme unlike ours and Shell argued as part of its defence against having a duty imposed on it that the solution should be regulatory and that it was already subject to the ETS and, therefore, there shouldn't be a separate duty and the Court rejected that argument. They essentially said that to the extent that the – there was an overlap with the ETS then that was fine, there was no additional obligation on Shell, but to the extent there was not the common law duty could simply require Shell to go further. And so for example the EU ETS doesn't cover Shell's emissions in other countries outside the EU and my understanding is it doesn't cover its scope 3 emissions, so the emissions caused by people consuming the products it sells by burning petrol, and yet the duty that the Dutch court found applied to all these things. So the Dutch court was quite happy to find a duty of care which was, they felt was an unwritten duty drawn from the Dutch civil code and it's definitely worth your Honours looking at this case and in particular I'd refer you to paragraph 4.4.2 where the Court describes the elements it relies on in interpreting the unwritten duty which include the right to life, the UN Guiding Principles on Business and Human Rights, ETS regimes, the responsibilities of states and society. But it's very much a, very much driven by the science as the Court was in *Urgenda*. So they looked at what does the science say is necessary for 1.5 degrees and that was really the basis for what they found Shell's individual responsibility was which was to cut its global emissions by 45% by 2030.

KÓS J:

Can you just remind me. This is the Hague District Court. What's the status of the judgment?

MS COOPER QC:

As far as I know your Honour it's under appeal. I don't believe the appeal has been heard yet.

KÓS J:

Right.

MS COOPER QC:

I have to confess I haven't checked that very recently so it's possible but there's certainly no judgment.

So it's a very useful judgment your Honour because as well it reflects the approach of the fact that there are multiple contributors to harm doesn't mean that Shell can be absolved of its individual responsibility. It rejects the – Shell made the argument that well if you cut our emissions someone else will just make those emissions and the Court rejected that. They said each reduction emissions has a positive effect on countering dangerous climate change and of course your Honour, this also resonates with the submissions on tikanga and the idea that this is just the tika thing to and so we say, your Honour, if you look at examples like the *Shell* case, like the *Lliuya* case in Germany what we can see is potentially an emerging shared jurisprudence, so what may be seen to be perhaps a drop in the ocean in terms of the result of a judgment in New Zealand or in any other country becomes very powerful when it's combined with similar judgments in other jurisdictions around the world.

1220

Now I just want to deal quickly – I think I'm running out of time – but I did just want to respond briefly to the suggestion from the Bench that there's an issue of consumer or political sovereignty here, and we say that's wrong for a number of reasons. First of all, many emissions that we make as consumers are embedded in everyday life and they can't realistically be avoided as individuals.

Secondly, the harm from emissions is not currently included in the prices we pay and so we're not getting proper signals. Third, the collective action problem is even bigger when it comes to decisions by individuals. The benefit from me not driving my car is shared by billions and is tiny, while the inconvenience is material and felt entirely by me, and so there's a massive disincentive to individual action. But most importantly, your Honour, the people who will be most affected by climate change haven't been born yet, there is a very important intergenerational equity issue. They have not exercised any consumer or political autonomy in relation to the harms that emitters are causing them, and again I would strongly recommend to your Honour the decision of the German Constitutional Court in *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), which is in the respondents' authorities at tab 35, and I'd refer you particularly to paragraph 186 of that decision. In that case the German Constitutional Court held that the state was in breach of its obligations –

WINKELMANN CJ:

Sorry, which case is that?

MS COOPER QC:

Neubauer, your Honour.

WINKELMANN CJ:

Whose authorities is that in?

MS COOPER QC:

The respondents' authorities, tab 35.

GLAZEBROOK J:

Referred to in your written submissions?

MS COOPER QC:

I don't think *Neubauer* is, unfortunately, your Honour, which is an oversight by us.

GLAZEBROOK J:

That's all right. It's just an easy way of working out how to spell it.

MS COOPER QC:

Yes. It's, as I say, respondents' authorities, tab 35, and the paragraph I particularly wanted to draw your Honours' attention, which I'm just struggling to find myself, is 186. So essentially there the Court made the point that: "Because every amount of CO2 that is allowed to irreversibly depletes the remaining budget," if we are working against a set temperature objective, "any exercise of freedom involving CO2 emissions" today will mean more subject restrictions will be necessary in the future. And so essentially the Court found that the state had not adequately taken that into account in its budgeting of carbon emissions and it failed to ensure that a disproportionate burden wasn't being offloaded onto people in the future.

So we say, your Honours, that the Court does have a responsibility to address this case and to ensure that the tort law develops in harmony with human rights principles and our international legal commitments. We've already referred in our submissions to the rights to a sustainable environment as being implicit in all the other rights, and another point I'd like to add to our submissions, your Honour, is that very recently, on the 28th of July this year, the Unite Nations General Assembly passed a resolution declaring access to a clean, healthy and sustainable environment a universal human right. That's not in the materials but it is easily accessible on the UN website. That resolution was passed with no votes against and eight abstentions and New Zealand voted in favour.

So that builds upon the existing body of authority that we referred to in our submissions recognising that right, and of course your Honours will be familiar with the Dutch Supreme Court's decision and agenda finding that the right to life required the Netherlands to make emissions reductions, at line 1.5, and then of course the *Royal Dutch Shell* decision is an extension of that to a corporate actor, and I should note as well, your Honour, we're at the very early stages of the development of this jurisprudence, so *Urgenda* has been followed by

multiple filings of proceedings in other jurisdictions. Most of those haven't yet been determined. Likewise, the *Royal Dutch Shell* case is very recent.

So I think what we can expect to see over the coming years is a burgeoning of further cases tackling these issues and, as I say, the evolution potentially of a very rich international jurisprudence and it would certainly be a tragedy if this Court were to foreclose New Zealand law developing in line with our international development.

Then finally just perhaps a point on the rule of law. The respondents in their submissions make an appeal to the rule of law and specifically the need for predictability and stability as a reason for the Court to refuse to recognise Mr Smith's claims. We say that is completely misplaced. First, the defendants' calls for predictability and stability are in reality seeking to allow the status quo to continue which is simply not a viable option. Secondly, Mr Smith's claims are truly novel only in the sense they apply existing principles to a new scenario, and, thirdly, we say the evolution of common law is integral to adapt to new situations, new social wrongs, to use Lord Atkins' term. That is integral and necessary to the rule of law. It is not a threat to it. The much greater threat to the rule of law would be to fail to uphold and protect fundamental human rights at this moment of crisis and it would be an extremely bleak view of the common law and of the role of the Courts if it were to turn its back on the greatest problem that humanity faces.

Unless your Honours have any questions, I think I've more than used my time.

WINKELMANN CJ:

Thank you, Ms Cooper.

MR MAHUIKA ADDRESSES THE COURT – MICROPHONES (12:27:27)

MR MAHUIKA:

Heoi anō, e te Kaiwhakawā Matua, e ngā Kaiwhakawā o tēnei Kōti Mana Nui, tēnā koutou. Koinei ngā whakaputa kōrero mō Te Hunga Rōia Māori o

Aotearoa. So as your Honours please, these are the submissions for Te Hunga Rōia Māori.

At the outset there are just two preliminary points that I would make. The first is I know that it's the practice that time should be allotted for my junior to also submit. We only have 20 minutes, so we've made the decision that I will do that. We will find out in about 20 minutes whether we are going to live to regret that. But that's just an exigency of the time that we have allotted to us.

Secondly, and I've been thinking about this during the course of the hearing and it occurred to us also when we were writing the submissions, and that is that it's the challenge of dealing with the topic of tikanga as it applies to this issue in a brief way, both in terms of the written submission but also in 20 minutes when it comes to present on that.

One of the reasons that we sought to intervene, and we didn't say this explicitly in our application or accompanying memorandum, but it is that tikanga is, in our submission, in a New Zealand context when you are dealing with issues that speak to or involve matters of culture and custom, customary uses of places, customary connection of places, tikanga is more than an adjunct or an add-on or just a matter to be considered in the broader mix.

1230

Tikanga itself, as this Court will be aware, involves a complex series of principles that experts in matters of tikanga balance amongst the way that this Court balances the different principles that underscore the different common law causes of action such as nuisance or negligence. It's therefore not a matter that is possible to deal with in a cursory way or that we would advocate is dealt with in a cursory way or as an adjunct to the broader proceeding and increasingly, in our submission, it informs the values of our society and so is relevant from that point of view as well. Nevertheless, we are where we are in terms of that.

So ultimately Te Hunga Rōia Māori's intervention relates to the relevance and application of tikanga in relation to the claims made by Mr Smith. If we start by

accepting the orthodox position or what we say is the orthodox position, that tikanga is either part of or informs the common law of Aotearoa as it develops, the questions that arise for Te Hunga Rōia Māori are two. The first is is tikanga relevant to the particular subject matter and issues that are before the Court and, following on from that, if it is relevant how is it relevant and how might it be applied to the circumstances that the Court is dealing with?

So with this in mind, we will in these submissions cover four broad topics. We will make some initial points that we think inform the context to the matters that are before the Court. We will then deal with whether tikanga is relevant. We say the answer to that is yes. And we will deal with that relatively orthodox position quickly, and actually in fairness I am not sure that there is any serious contention between the parties as to its relevance. Following that, we will then deal with how it might apply, which is a more complicated matter, and ultimately, in our submission and as we say in our written submissions, if the Court is minded to the view that tikanga is relevant, then that leads to the point of there being some form of factual inquiry in order to ascertain a whole range of things. So, starting with Mr Smith's particular position, what is the nature of the connection to the places that are being damaged, what is the impact of that connection, through to the impact on not just him but his family, his hapū, his iwi, and those sorts of things. Then dealing also with what other relevant aspects of tikanga Māori that are activated, are triggered, in relation to the matters before the Court and therefore how might they be applied and what impact, if any, would they have on the three torts that have been pleaded: nuisance, negligence and the new tort which was discussed earlier this morning. And at the end we will deal briefly with the question of standing.

I would also emphasise that in saying what we're saying we are mindful of our role in this proceeding as an Intervener. So the submissions we make are not strictly advocating for any particular position, they are intended to assist the Court but they necessarily involve us placing a perspective before this Court for this Court's consideration.

So dealing first then with the context. As pleaded, it is clear that Mr Smith, his whānau, hapū and iwi, have suffered and will continue suffering harm as a consequence of climate change. So this includes harm to cultural sites and the exercise by Mr Smith, his whānau, hapū and iwi of their cultural practices and connections to those important sites. Put simply, their ability to exercise kaitiakitanga is engaged here and the exercise of that is negatively affected. As traversed yesterday, the nature of the harm is intergenerational. His Honour Justice Williams noted the harm is both to the life of the community and its **law/lore**, so in other words the tikanga of the community and their intergenerational responsibilities.

There is also no doubt that certain activities associated with the respondents contribute to carbon dioxide emissions and by extension to climate change. Having said that, it is also acknowledged that the respondents do not accept that they are necessarily emitters themselves or they say those emissions are only a small contributor to a global issue. Mr Smith says that they are nevertheless contributing to the harm that he is suffering and it is also acknowledged that the respondents are significant businesses within Aotearoa and there is a potential for impact should the Court intervene.

Against all of that context this is a strike-out application and this is not a place where those contested matters of fact will necessarily be dealt with or able to be dealt with.

So dealing then with the relevance of tikanga. As we or as I noted in opening it is common ground that tikanga is relevant to the subject matter of this case. So in the submissions and in the Māori way you look to sayings to give expression to the things that you're talking about and I think his Honour Justice Williams referred to them as the equivalent of a maxim, and in our submissions we make reference to the saying “Whatungarongaro te tangata *toitū* te whenua,” which literally means that people disappear but the land remains. It talks to the transient or ephemeral nature of human existence relative to the land, in a literal sense, but it also speaks to intergenerational responsibility, and what I mean by that is that it recognises that a person is only

here for a fleeting moment in time but the land and its resources remain forever. So the idea is that in that moment that you're here you have the privilege of utilising the land and its resources but accompanying that privilege is a responsibility to care for those things for the generation that follows you.

Tikanga is not black and white of course and, sorry, I've skipped over something. So the – so if you think about what that is saying, what that talks to in terms of the Māori attitude, the tikanga values that apply when you're thinking about an issue such as climate change that is clearly relevant. It's clearly relevant because it talks to the responsibility of the current generation for those generations that follow. Now although that's a particular Māori value it's an important tenet of Māori society. It does also have I'd suggest a broader application and reflects broader community values, and the fact that we debate these things reflects how perhaps the community that we're in is actually quite aligned with that particular set of Māori values and approach to caring for the environment and thinking about the impacts of the things that we do now on our children and our grandchildren and the generations that will come after us, who will inherit the benefits of the good things that we do but also will inherit our mistakes and the impacts of those mistakes.

So how, therefore, might tikanga apply, which as I said is a more complicated matter. So the principles of tikanga identified by Mr Smith I don't think are in contention. So I don't think Ms Coates referred to these specifically in her submissions but in the written submissions they talk about, for Mr Smith they talk about whanaungatanga, kaitiakitanga mana, tapu, hara, ea, all concepts principles that are of tikanga Māori that are potentially triggered by the matter that's before the Court.

1240

Now just because those principles are relevant it doesn't mean that they apply in a black and white way, or there is one solution to how they might be applied. Māori society and Māori values also think about balance. There are also principles are utu and muru which are about reciprocal responses to actions that occur. That aim to be proportionate, and that talk to the sorts of issues that

arise when considering a tort such as negligence, when considering nuisance, when potentially considering a new tort which deals with protecting the environment, and imposing obligations on us in relation to environmental responsibility.

And ultimately the question is what is tika? So what is the right thing to do, what is the right balance to strike when considering the application of these principles, given these competing views in relation to this particular matter. So what impact might tikanga Māori have in considering the application and development of either the established torts of nuisance and negligence, or whether or not the Court is minded to create a new tort. So there was some discussion about whether or not these principles apply more to the new tort, as opposed to the established torts. I would argue that it applies to both.

WILLIAMS J:

The respondents argue that tikanga is collective and relational and that that's more a reflection of collective community response via legislation than the one-on-one punch-up one gets in tort cases. What do you say to that?

MR MAHUIKA:

I mean the one-on-one punch-ups were also not uncommon in tikanga terms, but I think that simplifies it. I think that dumbs down tikanga and its potential application. So tikanga talks to, as I said, a series of values. So those values were community values, and as part of the application of those values it also talks to preventing harm against the community, and in some cases giving the community itself the ability to enforce a wrong or a hara that was done. A muru would be a good example. A muru doesn't require the intervention of a court. It doesn't require a community response. It focuses on the fact that a harm has been committed and then it imposes a sanction on the party that commits that harm.

WILLIAMS J:

I think the point was that in fact responsibility too is a community responsibility that muru is effected on the wrongdoers community, not just the wrongdoer.

That's a fundamental difference between English conceptions of the law of obligations and Māori conceptions of them, hence it's for the community to respond. What do you say to that?

MR MAHUIKA:

Yes, I understand the point Sir. I'm grappling with it because it's not a conceptualisation of tikanga which, two things. First of all it doesn't consider tikanga and how it might apply in the current context, which is why I say actually it's taking a very limited view of tikanga, the ability of tikanga to evolve and respond based on the values that underpin it. So I would argue that it's the values that underpin the tikanga that are ultimately what should guide you, as opposed to saying, yes, of course, Māori community values in that communal society operated on the basis that a wrong that was committed against one member of the community by another person was, in effect, a wrong committed by one community of people against the other community of people. But the principles that underpinned the response to that, were principles that were aimed to bring balance between those two parties.

WILLIAMS J:

You keep speaking in the past tense.

MR MAHUIKA:

I'm really thinking about the way that Māori society was talking about these things. What I'm saying is that these things apply now. You're saying that in a historical context this is what happened from a tikanga point of view, which is correct.

WILLIAMS J:

No, I think this is just the argument that is being made.

MR MAHUIKA:

Yes. So what I'm trying to do, Sir, is explain that the fact that it was one community that was enforcing a muru or some other punishment or sanction against another community reflected first of all the way the community

operated. But there are a number principles that underpin that and the principles that underpin it are principles of, first of all, was there hara committed, so is there a wrong in respect of which a sanction is appropriate, and what is a proportionate response to that in order to bring balance, in order to create a state of air as between the parties, and it will be dependent on a number of factors: who was wronged, what was the nature of the harm that was committed, what was the impact of that harm on the community? Which is when you get to questions such as whanaungatanga, such as those kaitiakitanga principles.

So my argument, Sir, is that that's in my submission a superficial consideration of how tikanga apply, and I'll speak in the past tense because I think that is looking at its historical application and is not allowing it to be adapted or allowing those principles to be applied to a current situation.

WINKELMANN CJ:

Is your point, one of your many points I think, that the analysis over-weights one aspect of tikanga, which is the socialising or the communal spreading of the cost of the harm?

MR MAHUIKA:

Well, I think, Ma'am, that the point I'm making is that of course, if you think of the way that tikanga was applied historically, it was one community enforcing against another community because that's the way that the society was organised and that's the way that rights were held and that's the way that interactions occurred. But there are a number of principles that underpin that and those principles are as important as the context within which they were being applied historically. So when I say it's dumbing it down, I think we're looking at the historical context and the nature of the community and assuming that it can't adapt to the current series of challenges that we have before it, and my submission is that there are principles that tikanga applied that are capable of application to a situation such as a public nuisance, because there is a, for example if you think about the, a classical statement of public nuisance, it talks about harms that are so wide and indiscriminate that there is a public

responsibility for the enforcement of those harms against the person who commits the harm. Actually that has a lot of tikanga parallels when you think about it in those terms.

WINKELMANN CJ:

So you're saying that tikanga can respond just as well, it responds very well in a case-by-case type situation, which is the common law approach?

MR MAHUIKA:

Yes.

WINKELMANN CJ:

And you don't need, and you can't say it's inconsistent with tikanga to respond on a case-by-case basis because that's putting all the loss onto one party, which is not socialising it but rather individualising it?

MR MAHUIKA:

Yes. I'm – yes.

WINKELMANN CJ:

Which I think is what's said against you.

MR MAHUIKA:

Yes, I think that – well, I wouldn't say it's set against me, I'm –

WINKELMANN CJ:

Well, set against, sorry, set against the –

MR MAHUIKA:

Set against the applicant…

WINKELMANN CJ:

Quite right, quite right.

MR MAHUIKA:

I'm providing a perspective on it.

WINKELMANN CJ:

Mmm.

MR MAHUIKA:

I mean, there is an argument that the fact there are, I'm taking a different view and there are perhaps more than one perspective is that it's a matter that requires some teasing out.

WINKELMANN CJ:

And evidence…

GLAZEBROOK J:

I was just going to say wouldn't you also say that the community approach might actually be the right one here in any event? Of course we don't know until we've had the evidence on tikanga, but one can understand a view of the community or, alternatively, a view of the environment itself, as being a player in its own right might well be the result of this further evidence on tikanga, that's as I understand it.

MR MAHUIKA:

Yes. Well, and if you look at the history of public nuisance it was, as I understand it, it was a community action, there was community responsibility taken for the enforcement of the public nuisance rather than that responsibility being placed on an individual. So if you think about where public nuisance comes from, actually it comes from a place which is not that dissimilar to the way that Māori society operated and continues to operate.

1250

KÓS J:

Can I tease out another question. Your whakatauki at the beginning of paragraph 26, the Whatungarongaro te tangata proposition, the idea of intergenerational harm. In – historically presumably the protection of land has

been something that a genera - one can pass on as a matter of autonomy. You care for the land. You pass it on. It's not impaired.

MR MAHUIKA:

Yes.

KÓS J:

There are very limited exceptions to that. For instance land being taken by the Public Works Act in which you can't pass it on but there's particular legislative provision for that. Here what we have is an external effect attributable to a large number of sources which deny the autonomy of the landowner to transfer land unimpaired for one generation to another. Is that part of your argument here?

MR MAHUIKA:

No, my reason for referring to that particular saying is that it talks to the values. So it talks to the notion that if you think about the Māori view of the world is that a person exists on a continuum. So you are the living representatives of those who have gone before and you are the custodian for those who will come after. So the idea *toitū* te whenua whatungarongaro te tangata is it talks to that concept, it talks to the idea that you have as I said the privilege of utilising resources during your lifetime but also responsibility to care for those for generations that follow. If you look at Māori history you would have to admit that Māori society wasn't perfect in doing that but it had that value and it had that set of aspirations that it sought to apply and seeks to apply, and so the reason I say that tikanga Māori is relevant or we say that tikanga Māori is relevant is that actually it talks to that underlying set of values.

KÓS J:

But largely as a matter of autonomy the landowner or holder, iwi, the hapū could pass that on, that land on. It was their choice as to whether the land was impaired or not. The difference here is you have an external force which compromises that capacity, that autonomous capacity.

MR MAHUIKA:

Yes, although Sir, I'm not sure that looking at it in that way captures the reason that I refer to. The fact that you are autonomous or not autonomous doesn't speak to the responsibility that you have and the values that get applied in that sort of circumstance. So that the fact that, let me think of an example. The fact that there's a debate as to whether or not the bed of the way of the Waiapu River is owned by the Ngāti Porou tribe or not doesn't speak to the need to protect it, to look after it, and to that underlying set of values. It doesn't remove responsibility from someone who might do something that negatively affects that place or my right to enforce that responsibility if I am able to do so. So –

WILLIAMS J:

But what's suggested here is the loss of the ability to do that through law changes that mean although you carry the cultural burden of kaitiakitanga the local authority has the legal ability to exercise that or not, for example, I think that's the point that was being made.

MR MAHUIKA:

Yes. Although what we're about here is we're talking about whether or not the common law ought to respond to that sort of situation. So that rather begs the question, the debate we're having here is should the law respond to that sort of situation, she the law provide Mr Smith or some other party who believes they're affected by climate change with the ability to go to the Courts and to ask them to protect his rights, his ability to exercise his cultural practices, the places that are important to him, and that's the issue that's before the Court, and when we talk about these things what we're saying is actually tikanga values, if they inform the common law, if we accept that tikanga is relevant to either the development of the common law and its application, then those values are matters for a court looking at a common law issue to apply.

WILLIAMS J:

Yes. Well, whatungarongaro te tangata is an appropriate humble whakatauākī in the sense that it really says "I am nothing".

MR MAHUIKA:

Yes.

WILLIAMS J:

"I'm gone in the blink of an eye".

MR MAHUIKA:

"I will disappear," yes.

WILLIAMS J:

But the land, literally gone in the blink of eye but the land prevails, and "this is isn't about me, it's about the seven generations after me" right?

MR MAHUIKA:

Yes, that's correct, Sir. And, as I said, the question of enforcement of that is, the ultimate question that – well, not the ultimate question but one of the questions before that Court, but for this Court. So, you know, if we accept, as I say, that tikanga's relevant, if we accept that it should have a bearing on the way that the common law develops, then when the Court is considering the application of both these existing torts, nuisance and negligence, and a possible new tort, which are common law responses to various situations, then all we're saying is that tikanga, A, does speak to these things, and in fact what we're saying is if the Court accepts what say that it is relevant, then it triggers the type of enquiry and the type of debate that we've been having. But ultimately it's a matter that can't be done in 20 minutes.

WINKELMANN CJ:

So, you're on point 2, aren't you, of your points?

MR MAHUIKA:

Yes.

WINKELMANN CJ:

And your third one is the need for a factual inquiry, which you may have already covered, I don't know.

MR MAHUIKA:

Yes, Ma'am. Well, I think I've covered that actually in quite a lot of detail as a result of those exchanges, and it really is that tikanga's a lot deeper and it's not something that we're able to judge in the way that we currently are in this discussion. It's ultimate a matter which, in our submission, if your Honours are persuaded by what we say and that it is relevant, the it is something that needs to be taken into account in the development of these common law torts, then it is a matter that will require further evidence and further and better consideration than I've been able to give to it today in front of your Honours.

WINKELMANN CJ:

And then you had standing.

MR MAHUIKA:

Ma'am, on the point of standing, so I understand the application of the special damage rule, and I just have a couple of points to make in relation to that, and the first is that the harm as pleaded by Mr Smith is significant from a cultural point of view, and in my submission that must in and of itself be sufficient. Not everybody will suffer that same cultural harm. So some of us will be inconvenienced because the sea will come up, it might erode a little bit of our coastal property or something like that, but not everybody is going to have places of cultural significance inundated or destroyed, not everybody is going to have their traditional fishing grounds disappear or unable to be fished, and in my respectful submission, look, this may in and of itself be sufficient to, first of all to satisfy the special damage test, if indeed that's the approach wishes to take in relation to the matter of standing.

There is also a more general proposition to make on the point of standing and, as we've submitted, her Honour the former Chief Justice in the *Proprietors of Wakatū v Attorney-General* [2017] 1 NZLR 423 case acknowledged on the specific facts of that case, so that was the case where Mr Stafford, who was a pakeke kaumātua of the peoples that are associated with the *Wakatū* lands, had made an application in relation to various alleged Crown breaches of its fiduciary obligations.

1300

Her Honour the Chief Justice in that case at paragraph 490 that in that particular case the relaxation of the rules relating to standing might be appropriate. An additional factor is that when you talk about these cultural rights and cultural considerations you are talking about rights which in terms of our particular legal system are recognised and protected by the Treaty of Waitangi. Now that's not the source of the right itself. It's an acknowledgement by the State that these things are important and they ought to be guaranteed and protected. So it would be somewhat perverse if the very rights that the Treaty was designed to protect are not able to be pursued or protected in this context for want of standing. And of course these are all things where picking up on the international instruments that would also be protected and recognised through the likes of (**inaudible 13:01:07**).

WILLIAMS J:

You might say that suing in the name of a traditional leader is the tikanga equivalent of the relator action.

MR MAHUIKA:

Yes, I think that's true Sir, and it is a common way that Māori communities acted. *Wi Parata v Bishop of Wellington* was about Wi Parata. But –

WILLIAMS J:

It wasn't about Wi Parata.

MR MAHUIKA:

Well no, it was, sorry, was an application that was made by Wi Parata who was the leader of that community. So he was bringing that action on behalf of his community, and it is the way that Māori society operated before there was a corporate identity that a lot of tribes have these days. Actions were taken through the agency of the leader now and I, I know Mr Smith. I found a test for his relationship with his whānau and hapū. It's not a matter that's contested on the pleadings as far as I can see it. If it's contested that becomes a trial matter but as it stands he says that he is the representative of that community and if

there's to be a test of that then that's not, this is not the forum in which to test it. But it is a normal way of –

WILLIAMS:

If that were not the case we'd probably have heard about it by now.

MR MAHUIKA:

I'm not sure. I don't follow his Instagram feeds or anything. That seems to be the way these things are communicated these days. The point is though Sir that it is a common way that you do things, that you work through the agency of your leader or your spokesperson or your representative and he pleads that he has these positions that he has the support. Strike-out is not the time at which you ought to interrogate that particular question.

WINKELMANN CJ:

All right. I think – is that it for you Mr Mahuika?

MR MAHUIKA:

It is.

WINKELMANN CJ:

It's the luncheon adjournment.

MR MAHUIKA:

Well if you say it is Ma'am it certainly is.

WINKEMANN CJ:

Well I sense we've come to the end of your submissions naturally.

MR MAHUIKA:

Yes I have. Thank you. So those are my submissions.

WINKELMANN CJ:

Yes, and you managed it quite well on your own I think.

MR MAHUIKA:
Well it didn't always feel it that but thank you Ma'am.

COURT ADJOURNS: 1.04 PM

COURT RESUMES: 2.15 PM

WINKELMANN CJ:
Mr Kalderimis?

MR KALDERIMIS:
Thank you your Honour. Tēnā koutou. This case is not about the need to respond to climate change. Everyone in this room including all of the respondents accept the importance and urgency of doing so. This case isn't even about whether tort law can in any form respond. This case is about whether Mr Smith's highly abstracted claim, pitched we would submit at the highest possible level of abstraction asserting legal rights against seven disparate respondents but it could have asserted those rights against an untold number of other respondents, is viable and the answer if one does think slowly enough is that it is not.

This appeal traverses a vast territory. At its heart is the question of the extent to which individualised litigation can coherently and legitimately be used to prevent alleged harm to Mr Smith caused by a global problem to which we all contribute and from which none of us are immune. We all acknowledge the unprecedented threat caused by climate change but this appeal is existential for a quite different reason.

This case requires the Court to think long and hard about what is a tort, a civil wrong. What does it mean for a court to declare that one person owes a duty to another which in turn entitles that second person to civil recourse to this Court or other New Zealand courts to seek relief against that first person? Doing so it is respectfully submitted reveals that this claim raises truly foundational issues about the character of tort law and about the limits of legal abstraction. Giving

the wrong answer in this case will resonate throughout future tort cases in this motu.

The appellant urges this Court and did so with considerable charm and skill to be bold and act creatively. New rights can be repurposed, expanded, invented. Old ones can be set aside. You can wield the genius of the common law through your person and reshape it to achieve things never done before and you've been presented here with an array of arguments to choose from as scaffolding but the true act of courage here is to be bold through wisdom and insight and humility in face of a very difficult problem.
1420

The genius of the common law does not reside in any one person and I'm not talking here about the declaratory theory of law but of the legacy that you as judges inherit and pass on to future generations and of course that legacy carries with it scope for development and creativity, but that must be expressed by following the method of the common law, a theme all of the judges are intimately familiar with and which the Chief Justice in the Lord Cooke lecture recently described as "the warp and weft" of the common law. We could also call it the wairua or the spirit of the common law, and we must be faithful to that spirit even as we develop the common law to take on new colours, especially with the acknowledged influence of tikanga Māori, the first law of Aotearoa.

The point I'm making and will return to is that the legitimacy of the common law rests on nothing other than the coherence and integrity of this Court's reasoning, and it's a particular type of reasoning concerned with determining individual cases even if with an eye to the bigger picture. Through its method the common law traces and give legal expression to the moral character of our social interactions and thus – and this is maybe the biggest difference between me and my learned friend – we say the relationship between plaintiff and tortfeasor is at the heart of the common law mechanism. We are not saying, as my learned friend put it, that the problem is too hard, we are not, as my learned friend put it, "pulling a trick", we are saying the problem is the wrong shape. The appellant's submissions in a thoroughgoing way confuse tort law,

the law of wrongs, with the law of harm only. Now harm is an ingredient of most torts but it's not sufficient, what you need also is a wrong. And of course the common law can and should evolve, just at society does, but there's good reason why it does so incrementally and by analogy to existing rights and duties which are, as the Court of Appeal put it, the building blocks of the mechanism of the common law method. And so, and maybe this is the only submission I'm really making throughout what I will be saying, when the Courts say person A owes a duty to person B such that person B can require person A to act in a certain way, that is a genuine and authentic act of judicial recognition, giving legal expression to something real about the relationship between these parties. If this Court were to incline to the submission of my learned friend that the relational theme of our case is just a shibboleth, tort law in New Zealand will be changed substantially and in a way that would be to the detriment of New Zealanders and the common law generally.

Now perhaps another aspect of that these is that this process of common law reasoning is of course different from regulation made by the Executive or by Parliament because here new laws and regulations can be made simply because they're perceived to be a good thing. Their legitimacy rests not on fidelity to a process of an illogical reasoning but on the democratic process itself. There is no need for regulatory law to reflect community expectations in the sense of being social morality or expectations or customs writ large, the community's participation comes at the ballot box. Now these points are made no better than in the article that my learned friend refers to by Lon Miller *[sic]*, and I'll go to that now, that's the polycentricity article.

WINKELMANN CJ:

Is that Lon Fuller?

MR KALDERIMIS:

Yes. And if we can just put that up and go to page 363 of the article, you can see before Professor Fuller gets to his discussion about polycentricity he really has a much more profound discussion about what ways we have to order ourselves in society, and if you look at the table in the middle of that page what

the professor says is that there are really three ways. You can negotiate something by contract, and put that to one side for the moment. The other two are you can have elections and you can vote on things or you can have adjudication in which you present proofs and reasoned arguments, and what Professor Fuller goes on then to say at page 366 at the bottom paragraph is that adjudication, what we're involved in today, is "a device which gives formal and institutional expression to the influence of reasoned argument in human affairs" and "as such it assumes a burden of rationality not borne by any other form of social ordering. A decision which is the product of reasoned argument must be prepared itself to meet the test of reason," and we don't demand this of any form of contract or of voting. "This higher responsibility toward rationality is at once the strength," and this is in italics, "*and the weakness* of adjudication as a form of social ordering."

Then if we skip a paragraph and go to the paragraph about half way down, there's an insightful comparison of adjudication to elections. All of the things complained about by my learned friend in the submissions, written and oral, and in the pleaded claim are set out in that paragraph. That rationality doesn't apply to elections. "We may assume that the preferences of voters are ultimately emotional, inarticulate, and not subject to rational defense," but the way that type of decision-making works is that you decide not on the basis of reason but because you have the legitimacy through the system in which your elections are embedded.

So if we come to the polycentricity part of this article, which is at 393 under the heading "The Limits of Adjudication", what Professor Fuller is saying based on, at 394, Michael Polanyi's book, is that polycentric problems are especially difficult for rational determination by judges, not because judges aren't clever, not because judges can't wield scaffolding and put an answer together but because you're often comparing incommensurable things. You're dealing with a problem that doesn't have a simple syllogistic nature to it and, as this article which I won't go through in detail comes on to say, if you look at 395, it talks about this sort of issue as being like a spider web. You pull on one strand and it will distribute tensions after a complicated pattern throughout the web as a

whole. The difficulty with dealing with these types of problems as a Court is that of course you can and Professor Fuller recognises this. You can rightsify anything. All you have to do is call something a right and call its cognate a duty and then you've turned it into the language of rights and obligations and it becomes, facially, a subject mete for judicial determination. But the challenge for this Court is whether there is authenticity in that process for this claim. Are you really identifying rights and duties as would be understood by people in the world, as being rights and duties that they apply to others that fall on them, that express through legal language the morality and social ordering that they understand, or are you doing something different, and we all know what that different thing might by. That different thing might be that you're identifying what Mr Smith's real complaint is. He does not like what the Executive and Parliament are doing or how fast they are doing it. He would like the Courts to take over and to do the job better, and Mr Smith knows that the tools of this Court and of the common law are rights and duties and so these are sought to be refashioned to achieve what in Mr Smith's mind is a preferred policy outcome.

1430

GLAZEBROOK J:

Doesn't he say it's a very simple policy outcome, it's just a 1.5 and what's hard about that? What's your answer to that?

MR KALDERIMIS:

Well, that's, firstly, precisely the policy target that is enshrined in our legislation. So we will come to deal in a way that it hasn't been dealt with at all in this case so far with what the legislation says.

GLAZEBROOK J:

No, I'm just asking, you say it's really, really complicated. He says it's not at all, as I understand it.

MR KALDERIMIS:

Yes.

GLAZEBROOK J:

It is the agreed target that doesn't even get rid of the irremedial harm but just means that it's not quite as bad as it will be left unchecked. So he says it's very simple. It's not polycentric at all, it's very simple.

MR KALDERIMIS:

Yes, I understand that point. My answer, your Honour, is that the objective might be simple but as the IPCC recognises, and we will go to the reports where it does recognise it, and as the Climate Change Commission recognises and we will go to them too, the pathways that a society can legitimately take to get to that are many and varied and there are trade-offs in those pathways. There are trade-offs of efficiency, there are trade-offs of equity, there are trade-offs of who gets to do what and on whom the burden is placed, and the reason why it's so important to get that mix right, the reason it feels, when you think about it slowly enough, so political, is that if you get the balance wrong you won't achieve the three Es in climate change transition which are that it has to be enduring, it has to be effective and it has to be equitable.

Of course, if it was simple enough that all you had to do is issue a decree that there will be no more emissions or no more emissions by this person or that person then all the countries in the world could easily just issue that decree.

WILLIAMS J:

That's what happened in *Shell*.

MR KALDERIMIS:

We'll come to the *Shell* decision. So that decision is, as was mentioned, under appeal, and I will take your Honour to paragraph 4.4 of that decision and the reasoning in that decision, and I will ask the Court whether it's the type of reasoning this Court would see fit to employ.

WINKELMANN CJ:

So I could see your arguments as having a lot of force if we were sitting in final judgment of this case but we're not sitting in final judgment on this case.

All we're being asked to do is to allow the case to proceed to hearing with evidence and full argument in accordance with the adjudication model that Lon Fuller sets out. So we were not –

MR KALDERIMIS:

That's right, your Honour. It is a strike-out case and we accept and acknowledge the strike-out standard, but what we say is missing from this case in all its formulations is a sense of a duty that is owed by one person to another person who has a right against that person. We say that is missing. What the real shape of this case is is the Court simply issuing a decree or a sanction, the Court being invited just to say abstractly what it is it would like to have stopped. So we say there are two problems with this case. One is the sheer abstraction of it, taking out –

GLAZEBROOK J:

Sorry, but perhaps you could just repeat. Two problems?

MR KALDERIMIS:

Two problems. One is the sheer abstraction of the case, taking out the players, as it were, the subject of tort law being the plaintiff –

GLAZEBROOK J:

I just have difficulty with what you're talking about in abstraction of the case, I mean you've said that about four or five times, but Mr Smith would say, well, no, it's not very abstract, especially if you're looking at my land, Northland, and my responsibility to my people.

MR KALDERIMIS:

The harm is not abstract your Honour. The harm is tangible. No one is denying that climate change will cause harm to many people. What is abstract is the alleged moral and legal right and duty that fits together between plaintiff and tortfeasor, and it's very important that I get that right and I don't fail to properly explain that, so I will come on to do that in detail.

GLAZEBROOK J:

That's why I was asking you the question because I was having trouble with what you were talking about in terms of abstract. It's a word – it's always difficult to throw words like that around without actually knowing exactly what part you say is abstract.

MR KALDERIMIS:

Yes, maybe it was a slightly abstract use of the abstract.

GLAZEBROOK J:

No, no, it's fine as an overview, and it's fine to use, it's just I want to understand exactly what you mean.

MR KALDERIMIS:

Thank you your Honour. I have a road map that I will come to shortly that will help set this out.

GLAZEBROOK J:

Okay.

MR KALDERIMIS:

But I've got a few more opening remarks to make.

WINKELMANN CJ:

So you had two problems there: abstraction, sheer abstraction –

MR KALDERIMIS:

Yes, and the second is its naked instrumentalism. That this case is deliberately and openly saying that you should invent or adjust or expand or refashion rights and duties to achieve a certain outcome, and so it is not trying to ask the Court to look, as it ordinarily does, to see whether those rights and duties really fit the shape of social and moral relations between people.

GLAZEBROOK J:

Well it does say for nuisance that it's doing nothing other than applying the cases, and I know that you're going to move onto that, but it's not very fair in terms of that nuisance to say they're asking us to reshape is it? I mean you just say it's not fit for purpose in terms of… and that those cases don't apply.

MR KALDERIMIS:

Well we accept, and I've obviously listened to the questions from the Bench over the last day and a half, that the public nuisance cause of action is where, as his Honour Justice Kós put it, the battleground is likely to be.

KÓS J:

Well, that's my view.

MR KALDERIMIS:

And the reason for that is the public nuisance is the most abstract and diffuse tort that is on the book. So we have some important submissions to make about that, which I will come onto make, but can I give a –

GLAZEBROOK J:

No, no, that's fine.

MR KALDERIMIS:

What I might do is just give a sense of direction as to what I wish to say about public nuisance so at least sort of pre-road map you have an idea of where it is we want to go. Perhaps the best way to think about it is that my learned friend Mr Bullock spoke of his academic writings, and they are prodigious and impressive. One of them, the most recent one, is to be published in the *Tort Law Journal*, is a response to an article by Professor Merrill asking is public nuisance a tort, and I might just bring that up so your Honours have that. Now what Professor Merrill is doing in that article, which is worth reading cover to cover, whether you think public nuisance is a tort or not, we're not here to argue it's not a tort, but we are here to reveal something important about the type of tort public nuisance is. What Professor Merrill does is he talks about the way in which public nuisance was exhumed in the United States to

Prosser's secondary statement, and having appeared at all in the first *Restatement*, and that it was inserted into the secondary statement and the professor's view is that it actually doesn't have the characteristics of being a tort. What is more important, though, than that question –

KÓS J:

I think every cricket fan would have difficulty with that proposition. Since *Miller v Jackson*.

MR KALDERIMIS:

I'm not here to argue that it's not a tort at all, but I want to say something about its character. So if we can turn to page 4 of that article, and you see just at the top –

WILLIAMS J:

Just before you do, is this in the bundle is it?

MR KALDERIMIS:

Yes, this is in the bundle. So it's the most recent document added to the bundle in the respondents' supplementary authorities.

WILLIAMS J:

Right.

MR KALDERIMIS:

It is tab 118. So from pages 4 to 6 what Professor Merrill does is he talks about the way in which unconstrained and without doctrinal discipline public nuisance can easily become what he calls a super tort, a monster tort. A tort so wide and so contentless that it can swallow the rest of tort law in a single gulp.

WILLIAMS J:

It can be planetary in its breadth. I think that's what they're arguing for.

MR KALDERIMIS:

It does sound familiar your Honour. But not just it's width in terms of what it can reach, but in terms of how little one has to prove to reach it because as Professor Merrill explains through those pages, once you establish a very broad based doctrine of public nuisance, then it's a very wide list of things that you could catch. My learned friends talked about the opioid crisis in the United States. That becomes a public nuisance. Lead paint in houses, public nuisance. Tobacco, public nuisance. Sugar, fast food, alcohol, building materials, all sorts of cases that you might have thought about as negligence cases, or maybe as private nuisance cases, can with the intellectual dexterity of a judge climbing the scaffolding, be transformed into public nuisance without any of the relational connections that were previously required. Why would you need negligence law for *Donoghue v Stevenson* if it's the case that manufacturing something defectively causing harm, interfering with the comfort and convenience of consumers is, in fact, a public nuisance. Now of course if there's only one snail it's a negligence problem, but if it's a more systemic issue in anyway, then it can become a public nuisance problem.

Now what Professor Merrill says about this at page 19 is that there are five aspects of public nuisance that are worth reflecting on. He says these are atypical of tort law, that is why it looks, if you think fast, like the most attractive tort for this case. The first one is that is protects public rights, not private rights, but at least, we would say, you have to have a right, and not just –

GLAZEBROOK J:
Can you just tell me what page that is because it's not coming up on…

MR KALDERIMIS:
Sorry, that's 19 of the document itself.

GLAZEBROOK J:
Page 19, thank you.

MR KALDERIMIS:

Just under those three asterixis. Secondly, and this is a very important historical artefact, public nuisance liability was historically said to lie only for activity indictables of crime. If you read the *Rimmington* case, which is maybe the leading authority in the common law, although as my learned friend said Lord Bingham in that case said the *PYA* case was the leading authority, but *Rimmington* itself says that the ingredients of the crime of public nuisance are coextensive with the ingredients of the tort.

WINKELMANN CJ:

Well isn't it that the public nuisance was the crime as opposed to the crime was a public nuisance?

MR KALDERIMIS:

Well they were the same thing. The crime of a public nuisance was able, through an extension of tort law, to be injuncted. The public nuisance tort was really the injunction remedy superimposed on the crime and the history of public nuisance is that obviously the Attorney-General, especially in days of a fairly limited police force, it wasn't always feasible just to lock everyone up who was committing the crimes, sometimes you needed the Court to actually get in and injunct, and the Attorney-General took that on, but in some cases, and from 1536 when the so-called anonymous case was decided, and Justice Fitzgerald in his dissenting judgment had that metaphor about the trench and the horse and the person who gets injured. Well, from the point that that became the law, it became possible for an ordinary citizen to effectively injunct the commission of a crime of public nuisance if they had suffered special damage.

WINKELMANN CJ:

So the crime, the content of the crime, was the public nuisance?

MR KALDERIMIS:

Yes, and in –

WINKELMANN CJ:

Yes, and it's not that unusual at that time for the members of the public to have to prosecute crimes themselves, is it, quite a common thing?

MR KALDERIMIS:

That's true but always with that special damage limitation, and there's a case in the bundle that we may return to later, but I'll tell the Court about it now, called *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL), 477. Now that case is important not because it's a public nuisance case but you might remember it was the case where there was an attempt which the Post Office was very happy to co-operate with of not processing mail to be sent to South Africa and Mr Gouriet did not like this. He thought he had a right to have his mail processed going to and from South Africa irrespective of that stance and he thought that was something that ought to be injuncted, the law of processing the mail or at least the crime of not processing the mail by someone taking action, but the Attorney-General wouldn't take the action so he wanted to take the action, and that case has in it important statements about the constitutional propriety of someone who is not the Attorney-General effectively arrogating to themselves the right to take on the vindication of the public interest. That case is at respondent's authority 20 and we may return to it.

But if we stay with Professor Merrill's list, public nuisance is predominantly enforced by public officials, not private claimants. That's the *Gouriet* point. Number 4, public nuisance is traditionally focused on the existence of a condition, not the defendant's conduct. So it's a bit more contentless, and public nuisance typically does –

GLAZEBROOK J:

Can you explain what you mean by that, a condition rather than action –

MR KALDERIMIS:

A condition, a state of affairs.

GLAZEBROOK J:

– because discharging sewage is an action.

MR KALDERIMIS:

Yes, or the existence of some sort of noxious substance in a public road or someone blocking a public road.

GLAZEBROOK J:

But that's through an action of somebody.

MR KALDERIMIS:

Yes, but what really matters is you get rid of the state of affairs and it's not fault based is maybe what is being driven at by that point. You're not trying to say the defendant necessarily was wrong or certainly they don't have to be proved to be negligent. You just need to order the thing that is interfering with the public right to stop.

Now what were we saying generally about public nuisance is that you have to have not only this quality of public nuisance in mind when you think about it which is that it's eminently abstractable and it can swallow up other parts of tort law very easily to become a monster tort. But the appellant's version of public nuisance in this case is of the most diluted kind because it would not have any requirement for independent unlawfulness or for the conduct of the nuisance itself to be a crime of public nuisance or otherwise. It would not have any separate right, which is really the cognate, as an ingredient of it. You don't need to find a public right. This Court doesn't need to find that there is a right enforceable in the New Zealand common law to a safe and habitable climate. All the Court needs to do is say that people will be impeded in their comfort and convenience by something. You're also being asked to dilute the special damage rule down such that it's not, as the Chief Justice's question to my learned friend hinted at earlier, as it is expressed in all of the cases, a relative standard. You have to suffer more damage than other people. Instead it becomes an absolute standard. If you suffer any damage to your property, well,

that's sufficient even if the nature of this condition, this phenomenon, this global phenomenon in the world, is that that will be everyone, and then finally –
1450

KÓS J:

It seems a very convenient argument to make in a case of what's a ubiquitous harm.

MR KALDERIMIS:

Well, Sir, it may sound like that, but that is in fact not, we say, the gravamen of what this discussion's about. We say that there are other ways tort claims could be formulated that would be narrower and more specific. We are not here to say tort can't respond, we're here to say don't leap at the first case that comes along that is the widest possible form, because once you do that you will eviscerate parts of tort law and it will not be easy to put the genie back in the bottle. The other aspect of public nuisance that makes it difficult and is more diluted in this case is –

WINKELMANN CJ:

I think Justice Glazebrook has a question for you.

MR KALDERIMIS:

I'm sorry.

GLAZEBROOK J:

You say there are other ways the claims can be formulated and this is formulated too widely. The Court of Appeal say this is just out of bounds altogether. Are you not wanting to argue that?

MR KALDERIMIS:

No, we're not, your Honour.

GLAZEBROOK J:

Right.

MR KALDERIMIS:

The other way in which this case –

KÓS J:

So how should you be served, Mr Kalderimis?

MR KALDERIMIS:

Well, that's not of course for me to answer, Sir, but I will observe that in the United States where cases are being tried and different formulations are being advanced, ingredients in many of those cases focus on the specific conduct of the defendants in misleading and not fully disclosing what they are doing in the context of people with whom they have a relationship and who have a dependence and a reliance on what they're being told and what is happening. So we have a sort of assumption of responsibility-type relationship, which we say feels more typically tort law like –

WILLIAMS J:

Climate change cases, or are you speaking about other?

MR KALDERIMIS:

Yes, I'm talking about climate change cases.

GLAZEBROOK J:

Are these disclosure to shareholders or greenwashing cases, is that what you're speaking about?

MR KALDERIMIS:

Yes, or even to city authorities who are working with those sorts of entities.

GLAZEBROOK J:

Yes.

MR KALDERIMIS:

And if we think about that other abstraction I was coming to…

WINKELMANN CJ:

So that's – but those are not targeting the climate change, the wrong there is not the contribution to climate change, it's a failure to be straight-up about the contribution to climate change.

MR KALDERIMIS:

Well, it is the contribution to the climate change, in the context of the way in which that relationship has progressed, so it is –

WINKELMANN CJ:

Well, as you've just articulated, it's actually a failure to be straight-up about the contribution to climate change, or are there other places where the wrong is the contribution to climate change?

MR KALDERIMIS:

Well, one example would be the *City & County of Honolulu and BWS v Sunoco*, LP, et al. Civ. No. 1CCV-20-0000380 (First Circuit Court, State of Hawai‘i) case that is in our road map, which I'll come to. That is a case where the Courts of Hawai'i, federal court, and it's just a first-instance decision, and I'm not recommending it but I'm just noting it as a case that did not strike-out claims against emitters, but one of the ingredients of the way that claim was formulated was closely targeted on the conduct of the relevant emitters and not just the sheer fact that they were emitting.

WINKELMANN CJ:

So we having to find some?

WILLIAMS J:

So these are local emitters?

MR KALDERIMIS:

They were in that case, local emitters.

WINKELMANN CJ:

So why would you have to find some – does the extra X-factor, is that somehow wrongful? Because you're saying it has to be something more than just the emission, it has to be something else?

MR KALDERIMIS:

Yes, yes, we say that that X-factor is the relationship between the parties, it's the difference between a wrong, which really is another phrase for a harm, "I've suffered harm", to "you have wronged me", which imports, we say, in the common law always some type of relationship between the parties. That is of the gist of what we are saying.

WILLIAMS J:

So the anonymous case and the equally anonymous horse would only have been winnable if the digger of the ditch had invited the rider to come visit him?

MR KALDERIMIS:

No, that's not right, Sir, because as – if we reflect on *Donoghue v Stevenson* perhaps, and I'll come to this in more detail, but if we reflect on that case, the manufacturer of the ginger beer didn't know the consumer. They weren't in a direct contractual relationship, that was the whole point. But nor did Lord Atkin or Lord Macmillan, whose other judgment is worth reading, say all that matters is that you did the act and they were harmed, or perhaps there's some veneer of foreseeability, what they really dig into in those cases is that you can import out of the fact that you're manufacturing ginger beer for an end use consumer, and they're going to drink it. A relation, as Justice Cardozo said in *Palsgraf v Long Island Railroad Co.* 248 NY 339, 162 NE 99 (1928), which we say is really the intellectual inspiration for *Donoghue v Stevenson*, risk imports relation in a context. There's no –

WILLIAMS J:

Yes, they had to sell the bottle to somebody.

MR KALDERIMIS:

They had to sell the bottle to somebody.

WILLIAMS J:

And they had to do it via the retailer.

MR KALDERIMIS:

That's right, and the somebody was going to drink it and it wasn't going to be the retailer.

WILLIAMS J:

Does that mean Chinese babies can sue Fonterra.

MR KALDERIMIS:

I'm not going to get into Chinese babies and –

WILLIAMS J:

Well I mean that's the logic of your argument isn't it?

MR KALDERIMIS:

In terms of product liability, if there's defective product in what Fonterra is making, then in theory that would be what Chinese lawyers would be arguing.

WILLIAMS J:

But just by drinking the formula that's contributing to global warming, something that I'll inherit when I become a grownup, then –

MR KALDERIMIS:

We say that's an entirely different type of reasoning, and you can always hear it as the question comes out.

WINKELMANN CJ:

Can I just ask you why isn't your argument just one of scale, because if they can foresee that their conduct is harming people your – if they proceed and their conduct is harming people, people are brought into relationship through them with, by the knowledge of harm, why isn't it just a factor of scale then?

MR KALDERIMIS:

Because fundamentally, your Honour, we don't see this as simply an indeterminacy problem, or a problem of scale. We see it more profoundly as a problem of tort in the air. Of tort not sufficiently grounded in relations between people that the Court can find so that it really makes sense to say this person owes a duty to that person.

WILLIAMS J:

What Mr Salmon says in response to that is that the world's moved on since *Palsgraf* and *Donoghue* and the other person who wasn't *Donoghue* but was the actual plaintiff I think, anyway.

GLAZEBROOK J:

And even if there was a snail but…

WILLIAMS J:

Yes, that's right. There's the small point that there was never a snail in the bottle anyway. Things have moved on and in fact science tells us we can identify relationships on a vast scale now, and that's the problem.

WINKELMANN CJ:

Our neighbourhood is on a vast scale effectively is what the argument – who is my neighbour and the answer is –

MR KALDERIMIS:

Yes, that is the argument. So let me give you my answer to that. Two steps. The first is, we should note on the way that all the cases that have been relied on by my learned friends, from *Donoghue v Stevenson* and negligence law, to all of the different cases that we looked at in public nuisance, from *Abrahams* to *Woodyear* to *Colney Hatch*, to *Southport*, *PYA Quarries*, they all talk about neighbourhood or locality or vicinity. It's in every one of them. So why do we say that the answer isn't just think bigger, understand that we all live in one global village, and so we're all everyone else's neighbours. We say at that point you really have gotten to the point where you have to ask yourself are you breaking tort law with this sort of decision because you have taken out the

concept of relations between people. Once you dilute them what you are doing is no different from just announcing a sanction. You are just saying, you should not do that. Not you should not do that in relation to any one person, it could be Mr Smith bringing this claim, as my learned friend Mr Bullock said, probably everyone is actually injured, or as my learned friend Mr Salmon said, ecological pollution makes everyone proximate.

1550

At that point we say you're confusing a scientific concept that might show that molecules in the atmosphere are connected in some way and can be traced in some way over many, many years of history to connect different peoples at different times in the same way that our DNA can be traced back generation after generation to different people and different places, you're confusing that factual concept with the very legal concept of proximity, and we say proximity in its express form in negligence, but also in its implicit form in public nuisance through its other tools, is a moral concept at heart. It's a concept where the Court is recognising a real relationship between plaintiff and tortfeasor, and that is at core what we object to about this claim and that is at core my answer to the Chief Justice's question of how can you strike-out this claim.

KÓS J:

The underlying proposition which you're making is that there is a grand theory of tort law, so you are intermixing various strands of tort law in your argument. Proximity transfers from negligence to public nuisance in a way that I don't recognise, Mr Kalderimis, it's simply not how tort developed. It is a patchwork of different propositions with different degrees of relationship, some close, some based on connection, some based on mere physical propinquity. But, to take one example, deception has never been a feature of public nuisance in the way you were rather trying to make it before, I think.

MR KALDERIMIS:

I'm not suggesting that deception is a feature of public nuisance and nor am I arguing for a grand theory of tort law, and perhaps –

WINKELMANN CJ:

Well, you do seem to be, because you are saying that.

MR KALDERIMIS:

Well, perhaps the best way to get to that is to come to my road map and work through this point with the proposition in front of your Honours. So I've handed this up. I don't know if you have it in front of you? Yes, so we have copies here if you don't have it.

WINKELMANN CJ:

We have it.

MR KALDERIMIS:

Thank you. So what this document does, your Honours, is set out at the top where we're going, which is those first three propositions, but then work through 11 more specific propositions on the way to get there. So what we're really talking about here are propositions 2 and 3, half way down that page, but I'll just make a reference to proposition 1 on the way.

GLAZEBROOK J:

It would be useful, which this doesn't seem to do, to split out the public nuisance aspect of the argument.

MR KALDERIMIS:

It does in proposition 7, your Honour.

WINKELMANN CJ:

So all the first six propositions respond to both negligence and nuisance?

MR KALDERIMIS:

Yes. It's true that they are more high-level than simply working through the elements of the torts at that point. So bearing in mind – and I will return to Justice Kós' question about grand theories – but just working through proposition 1 quickly…

GLAZEBROOK J:

And this is which one, which one is your one you were…

MR KALDERIMIS:

Yes, yes, everything I'm talking about is from the words "in support of these conclusions" and under them, so the second one.

WINKELMANN CJ:

It starts: "Climate change is a "*super wicked*" problem"?

MR KALDERIMIS:

Correct.

GLAZEBROOK J:

Sorry, it's just…

MR KALDERIMIS:

So what we are doing there, your Honours, is, noting that Professor Kysar is really the intellectual inspiration for the claim that the Court is looking at here, has written two articles that are both worth reading.

WINKELMANN CJ:

I think that proposition is a huge part of the plaintiff.

MR KALDERIMIS:

Well, we've heard a lot about Professor Kysar over the last couple of years. The first article is the one where Professor Kysar describes – and these are all hyperlinked on the version that you have electronically – describes climate change as the paradigmatic anti-tort. So this is a professor who is trying to come up with the arguments why this should work but is seeing clearly the difficulties along the way, and I know that various members of this Court have read this article. Perhaps the relevant pages are 3 and 4 at the top, and the heading begins at page 8, "Climate Change as the Anti-Tort", and what the professor says at page 9 towards the bottom and top of the next page is if you are going to find that tort law wraps itself around this problem then at each stage

of the traditional tort analysis "the climate change plaintiff finds herself bumping up against doctrines" in which threats like climate change don't register.

Now, of course, that's the challenge that Professor Kysar is trying to solve but if we take a clear-eyed view of the problem one has to recognise that that's the starting point.

In Professor Kysar's second article, which is more directly pertinent to Justice Kós' question, what the professor is talking about is about how you might think through the mechanisms and what he says at page 55 of that article under "Tort Law as Private Law" and at the top of 56 is that the corrective justice theorists about tort law, who are not just talking about negligence although I agree it's the most elegantly descriptive tort of this type, note: "… tort law's particular focus on the particular relationship of wrongdoing that exists between a plaintiff and defendant."

WILLIAMS J:

Which part are you at?

MR KALDERIMIS:

This is top of page 56. What Professor Kysar is saying which is so interesting from the point of view of a climate change advocate is that he is answering the critics of law for not being instrumental enough and he's saying, actually, what Judges should do is not be instrumental. In the next paragraph he says: "Much of tort law that appears mysterious from the instrumentalist viewpoint becomes quite understandable when this basic insight of corrective justice is kept in mind." What he says is this is what Judges do and this is actually what Judges should do. So he doesn't say corrective justice is relevant only to some parts of tort law but the rest of it we can just avoid it. He says: "This moral fabric of tort law is what I am trying to work through," and that's our criticism of this claim, that it doesn't work through the mechanisms of tort law to get where it wants to go. So all of 56 we say is relevant as well as 58.

GLAZEBROOK J:

It would be useful if whoever is running this just leaves the – what we were looking at, up there rather than getting rid of it so quickly.

WINKELMANN CJ:

The document has been removed, yes.

UNIDENTIFIED FEMALE SPEAKER: 15:08:58

I'm afraid that the technology has just fallen over

GLAZEBROOK J:

Is that a technology issue? Okay.

KÓS J:

Yes, it faded.

GLAZEBROOK J:

We understand.

MR KALDERIMIS:

It's always the way. So what that is about, and I really see that my role here, your Honours, isn't so much to persuade you to see everything from one perspective but to at least do what I –

GLAZEBROOK J:

It almost might be, given it's a strike-out, I think, just indicating because – well, you do have to show us that this is the only perspective we can look at.

MR KALDERIMIS:

No, I –

GLAZEBROOK J:

I mean not necessarily this particular one, but you do have to show that it's untenable.

MR KALDERIMIS:

I understand and that is what I aim to show but I suppose what I aim to show first, it's a more modest target perhaps to begin with, your Honour, is at least with clear eyes understanding what the challenge is and what the tools are and what the strengths of those tools are but what the limitations of them are as well.

1510

WILLIAMS J:

It does seem to me that the tension here is writ large. You say that this is a regulatory issue, it's really a public policy issue, best dealt with there. What tort does, you say, and that's probably true at some level or other, is make things personal and this proceeding makes climate change personal in a way that public policy has failed to do.

MR KALDERIMIS:

Well, that's the question, we say, your Honour. We say that this –

WILLIAMS J:

But it is, isn't it, it is personal?

MR KALDERIMIS:

We say that this proceeding tries to make climate change personal. Climate change is of course personal to everyone…

WILLIAMS J:

That's the point.

MR KALDERIMIS:

Everyone's condition of their life and their harms and traumas and vulnerabilities and what goes right and what goes wrong in people's lives is of course personal to them.

WILLIAMS J:

Well, you see, the point then is this could very well be the circuit-breaker that public policy has been struggling with for 30 or 40 years, because this makes it personal.

MR KALDERIMIS:

Well, one could see it that way. Another way of seeing it is that this could be the case in which the moral fabric that connects wrongdoer to plaintiff gets effectively severed, so that a tort exists in the ether, in the abstract. It doesn't matter who the plaintiff is, it doesn't even really matter who the defendant is, the Court is just saying: "This is what should happen." If we maybe think about the taxonomy of tort cases you can have. The classic case is one plaintiff, one defendant. And then you might have multiple plaintiffs and a defendant or a plaintiff and multiple defendants, or you might have multiple plaintiffs and multiple defendants. This case is off any of those scales, not just because of its largeness but because, as I say, due to its abstractions. It's all potential people as plaintiffs against any number of defendants, not just by number but by character.

WINKELMANN CJ:

Well, hypothesise a situation in which everyone's contributing a bit but there are some mega mega contributors, say there are a hundred mega mega contributors in the world who are contributing 75 per cent of the climate change problem. Does that become "super wicked" and beyond tort law?

MR KALDERIMIS:

Well, we say the starting point for tort law is you have to have a plaintiff who is in some form of neighbourhood or vicinity or relational proximity, whatever the language, of the relevant elements of the tort described. And so if I respond to Justice Kós' point on elements and tort law essentialist theory, I say it's not at all foreign to public nuisance that the neighbourhood concept is in there. It's in all of the cases, every single public nuisance the common law has ever decided, have been cases pretty much involving a locality. No case has sought to extend public nuisance across the whole world and say: "Well, anyone who is

contributing to the state of the atmosphere is committing a public nuisance unto me in a way that I have a special right to take action."

WINKELMANN CJ:

So, hypothesise that the neighbourhood is New Zealand and some of these 100 super-polluters, if we call them that, live in New Zealand and New Zealanders say: "You're not only doing this to the world, you're doing this to my neighbourhood, Northland, New Zealand," Northland in the top of the North Island, not in Wellington. Why isn't that sufficient for your neighbourhood principle?

MR KALDERIMIS:

Well because firstly we know that the mechanism is a global one, so we –

WINKELMANN CJ:

So that excludes the – because it might be that that pollution of the streams carrying on past that neighbourhood would, you know, if in your little neighbourhood model that pollution carries all the way down to the sea and across an entire nation, the fact it does that can't preclude the people closer to home from being victims, can it?

MR KALDERIMIS:

Well, if the mechanism of the problem is that the greenhouse gases don't go over to your neighbour's property, they don't – they're not like a cloud of pollution that carries over into it, they go up into the air and they're mixed with all of the other greenhouse gases in the atmosphere, then what we are complaining about when someone says: "I'm suffering harm from climate change," which is a fair complaint about harm, is not really a complaint about a wrong that someone has done unto them. It's a complaint about a systemic problem that has not been dealt with in that person's view quickly enough. It's a collective action problem.

WINKELMANN CJ:

But it is, however, just a scientific process, a far more complex one than, say, asbestos particles floating through the air and causing mesothelioma, but it's still just a scientific process, so is your objection the number of victims or the mechanism of harm? I'm just trying to understand what you say is the fatal flaw in this picture because if you know that you are one of the 100 polluters of the world who are causing most of this problem and you know that your neighbours in Northland are being most severely affected by it in your own neighbourhood, is the problem the fact that other people overseas are being affected or is the problem that it's a complex scientific process or what is the problem?

MR KALDERIMIS:

It's neither. It's the lack of relationship. So if I think about *Palsgraf* as the most obvious example of how this worked. So let's go to *Palsgraf* so I can try and illustrate this point which is in proposition 2. So we know this case well. This case was about the damage that was suffered by Mrs Palsgraf who's standing at one end of the platform and the person who has caused this damage is the railway guard at the other end of the platform who bumps into someone who's carrying a package that contains explosives and when the explosives go off they cause a weight or a clock at the other end of the platform to fall on Mrs Palsgraf. So causally, just as you are describing, your Honour, the collision between the guard and the person carrying the package caused, in an unarguable way, the damage to Mrs Palsgraf, and what Justice Cardozo, here the Chief Justice, says in paragraphs 1, 2 and 3 is that: "The conduct of the defendant's guard, if a wrong in relation to the holder of the package, was not a wrong in relation to the plaintiff, standing far away. Relatively to her it wasn't negligence at all." Nothing in the situation gave notice that the package had the potency here. Proof of negligence in the air will not do. And if we go further down that page towards the bottom: "The ideas of negligence and duty are strictly correlative," a word that we say is very important in this context. "The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another," and we say that's exactly what we have in this case. "A different conclusion," says the Chief Justice –

GLAZEBROOK J:

So who's the "other"?

MR KALDERIMIS:

Well, the breach of duty to the other is the person who gets pushed holding the package.

GLAZEBROOK J:

In this case, I mean. No, sorry, I didn't say in this case. I just said you said this is what we – were you talking about this *Palsgraf*, not climate change?

MR KALDERIMIS:

No, no, I'm saying in a case like this we have Mr Smith being the vicarious beneficiary of a breach of duty really to no one in particular. That's not a question that this case is focused on, who the duty is owed to. That is not a question it asks. This question simply says, well, there should be a duty and there should be the Court issuing a remedy.

GLAZEBROOK J:

I'm just not sure how this case is helping you if you don't have a duty to somebody else.

WINKELMANN CJ:

No, I'm not understanding either. I must say I'm having difficulty although I do think this is an interesting case because I think it must be the birthplace of all those ridiculous problem situations law students have sat, had to face ever since that time.

WILLIAMS J:

Yes, it's a great case. The problem you've got in this case is that the clock is going to inevitably fall on this lady's head and everyone else's head. The only question is –

GLAZEBROOK J:

And everyone knows it.

WILLIAMS J:

That's right. The only question is who's responsible for pushing the guard, sorry, the person carrying the box of dynamite and who was most responsible and is it appropriate to isolate out those whose physical impact on the carrier was markedly greater than everyone else's.

1520

MR KALDERIMIS:

Well that is equivalent, your Honour, to saying everyone owes a duty to everyone, isn't it.

WILLIAMS J:

Well the first point is that *Palsgraf* doesn't help you because we all know the clock's going to fall. The only question is, who caused it and you can ask yourself whether that means everyone, as the Court of Appeal said, is both plaintiff and defendant, or you can think of it in different ways. But this is not negligence or duties or tort in the air. It's definitely not that because we know that the result is inevitable.

WINKELMANN CJ:

Can I just say, can I take you back to my problem situation was a small number of super polluters, say a degree factor, there is a small number of super polluters in the world, and those super polluters know what, know the mechanism by which they are contributing to this climate problem, and they know that it's going to have particularly harsh impacts on some parts of their own neighbourhood, the same neighbourhood is New Zealand. What's the problem with that from your relational model?

MR KALDERIMIS:

The problem with that is, as Justice Palsgraf *[sic]* says, you'll get in a maze of contradictions if you are simply saying that all that matters is someone who

produces harm, and some causal mechanism that connects the production to the harm.

WINKELMANN CJ:

Right, so I've added in other facts that aren't that though, haven't I, which is that they know of a harm they do. That just know it does, they do a harm to quite a lot of people.

MR KALDERIMIS:

What you've added in is what I call reasonable foreseeability.

WINKELMANN CJ:

Yes.

MR KALDERIMIS:

And that is exactly what *Palsgraf* stands for, that reasonable foreseeability, even that is not enough, and that's also what *Donoghue v Stevenson* fundamentally stands for. So the way *Donoghue v Stevenson* was reasoned builds upon Justice Cardozo's decision in *MacPherson v Buick Motor Co* 217 NY 382, 111 NE 1050 (1916), which is also in that bullet point and both Lord Buckmaster and Lord Macmillan refers to *MacPherson* in detail with the latter talking about the importance of not having negligence in the air. So I know we're talking about negligence, but just to make this point, if we go to *Donoghue v Stevenson*, I'll show you the two passages that seem most pertinent here, because really my proposition here your Honour is that the *Palsgraf* insight is baked into New Zealand's common law through *Donoghue v Stevenson* and it would be a major change to depart from it. So if we start with Lord Macmillan and move our way to Lord Atkin. If we go to page –

WINKELMANN CJ:

Whose authority is *Donoghue v Stevenson* in?

MR KALDERIMIS:

That's our authorities, respondent supplementary 97. If we go to page 4058 of the bundle, and you look at that second paragraph you can see the *MacPherson* case is being discussed. That was really, Justice Cardozo working out his *Palsgraf* thoughts through *MacPherson* which had very similar facts essentially to *Donoghue v Stevenson* itself and what Lord Macmillan goes on to say at the next page towards the bottom is: "The law takes no cognizance of carelessness in the abstract." A very Palsgrafian statement. "It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in the law of negligence."

But then if we go down to the bottom of that paragraph, what Justice Cardozo is saying is reflected in that last sentence. "Where there is room for diversity of view, it is in determining what circumstances will establish such a relationship between the parties as to give rise, on the one side, to a duty to take care, and on the other side to a right to have care taken."

Now that's exactly what Chief Justice Cardozo is saying on page 1456, no need to go to it, when he says: "Negligence is not a tort unless it results in the commission of a wrong," not just harm, but a wrong, "and the commission of a wrong imports the violation of a right." That's really the difference between Chief Justice Cardozo and the dissenting Justice Andrews.

If we come to Lord Atkin and what he says, that is at page 4019, and the famous passage begins at 420 in that bottom paragraph, so 4020, on the previous page where Lord Atkins says: "It is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty." If we go to 4021, it's the same idea as Chief Justice Cardozo. Half way down: "At present content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care… The liability for negligence, whether you style it such or treat it as… a species of 'culpa'" or wrong, "is no doubt based upon a general public sentiment of moral wrongdoing for which the offender

must pay." But that's not enough. You don't just need a moral wrong. You need to then understand who is the neighbour.

So if we go onto the next page you can see that is where the concept of proximity comes from and it's refashioned from *Le Lievre v Gould* and *Heaven v Pender* to be what we say is really the moral spirit of tort law. So if you look at the road map again at paragraph 3 –

WINKELMANN CJ:
So are you saying proximity can only arise from physical proximity or –

MR KALDERIMIS:
No, that is exactly what is denied by Lord Atkin in that passage that's already correct.

WINKELMANN CJ:
Or from economic transactions proximity, or from known reliance –

WILLIAMS J:
Yes, it's physical proximity or market proximity then.

WINKELMANN CJ:
Or known reliance.

MR KALDERIMIS:
Well it's, I say –

WILLIAMS J:
But we've moved on from that, haven't we?

MR KALDERIMIS:
I say it's proximity may not be a concept that you can define precisely, but we say that its importance can't be understated. So if we go to the *Michael* –

WILLIAMS J:

Does it get us any further than within your contemplation?

MR KALDERIMIS:

Well we say it does because –

WILLIAMS J:

What's your, how do you divide those?

MR KALDERIMIS:

Well, in terms of proximity of negligence, if use the *Michael* case as my example, if you just click on that link and go to 5163, and see Lord Kerr, and if we skip over to 5201 and go to paragraph 144 in that Lord Kerr's judgment at 5202. You can see Lord Kerr struggling at paragraph 144 with this concept of proximity. So it is a proximity of relationship. It's not just closeness, it's not just economic relatedness, it's more profound than that. It is what the law regards as a sufficient degree of relationship such that the one person really can be said in law to owe a duty to the other, and he says at 145: "This test is criticised on the basis that it is circular," but it's in that test that the proportionality of tort law is to found.

WINKELMANN CJ:

So what is said against you is that the harm, the certainty of the harm is the thing that creates the relationship of proximity. That whether you know that what you are doing is having this harm in law that creates – that the law should move so it is said to create proximity and that that's a necessary response.

1530

MR KALDERIMIS:

Yes, and I say that is not enough, your Honour. If we go to 146, his Honour quotes Justice Deane in a *Sutherland Shire* case. In *Sutherland Shire* and *Jaensch v Coffey* Justice Deane wrote some very memorable judgments on what proximity meant, on what Lord Atkins meant in *Donoghue v Stevenson* and really unpacking those concepts, and what Lord Kerr says here is there's an inevitably pragmatic dimension involved in proximity which doesn't destroy

its importance or utility but it is pragmatic, and we say there's nothing pragmatic about the Court declaring everyone's proximate to everyone or even declaring that everyone is a plaintiff and a big emitter anywhere in the world is proximate to them or even saying just big emitters in a country are proximate simply because there is a system in which we are all consumers and there are others who manufacture the things that we consume.

WILLIAMS J:

I guess it depends on what you mean by "pragmatic".

MR KALDERIMIS:

It does, your Honour. It is a judgment. If we go to 147 what I'm submitting –

WILLIAMS J:

Mr Salmon says, well, look at the alternative.

MR KALDERIMIS:

What I'm suggesting is rather than –

WILLIAMS J:

He pleads the ultimate pragmatism.

MR KALDERIMIS:

Yes, well, I'd call that a form of in terrorem argument in itself. It's a way of –

KÓS J:

You're each guilty of that, with respect, and I think that you are really creating a kind of immunity by highly distributed responsibility. Now I also confess I'm finding this argument extraordinarily strange. Before you denied having a grand theory of tort and yet a few moments ago you talked about the motive spirit of tort. We are spending all time on negligence when I think the battleground, and the battleground certainly in the arguments so far, has been on nuisance. Yet public nuisance rates one of your – how many points – one of your 11 points. Now are we going to talk about public nuisance at some point?

MR KALDERIMIS:

We are. Let me tell you the order and –

GLAZEBROOK J:

Paragraph 7.

WINKELMANN CJ:

I am still, however, interested just to hear the end of this.

KÓS J:

Well, I agree, but I cannot help but think the argument is the wrong way round.

WINKELMANN CJ:

Just to hear the end of it.

MR KALDERIMIS:

Let me tell you the split, Sir. So I'm hopeful of getting through these propositions and my learned friend, Ms Swan, will talk about the statutory scheme. My learned friend, Mr Smith, behind me, will discuss in great detail public nuisance and the elements of it, and we do appreciate the importance of it, and then my learned friend, Mr Ladd, will talk about the remedial aspects of tort law. Now I have been talking for one hour and one-quarter in a case that has traversed a wide terrain of material. The reason I've gone to this first, Sir, is that, with respect, it is submitted that looking simply at the ingredients of public nuisance is to miss the wood for the trees in that this is a case that asks good questions about what a Court is doing when it recognises or expands a tort and there's no doubt that there is expansion involved in what is asked for here, and so my respectful submission is that there is value in this theoretical underpinning.

KÓS J:

Well, that sounds like a grand theory.

MR KALDERIMIS:

One can have a theoretical underpinning without a grand theory and perhaps my way of making good that point, Sir, is under point 2 under the second bullet point we refer to Peter Cane. Now Professor Cane, I've given you three articles from him. Professor Cane is someone who's not a theorist, he's not a corrective rights theorist or a civil recourse theorist. He is just a pragmatist who sought to explain descriptively what it was that tort law seemed to do.

WINKELMANN CJ:

And he's been criticised for having fundamentally failed to do so.

MR KALDERIMIS:

Well, he's been criticised for…

WINKELMANN CJ:

They've written books about it. But anyway…

MR KALDERIMIS:

That's the third, that's the – in fairness, I've put that. That's the third Cane article. It's not written by him.

WINKELMANN CJ:

So just to sum up where we've got to now though, Mr Kalderimis. When we say your point 2 are you saying that the fundamental relation requirements that this falls foul of, is the relation, is the proximity requirement and, giving rise to a duty of care, and here what is argued is not sufficient to give rise to that duty of care. Is that what lies behind your two?

MR KALDERIMIS:

What lies behind my two is, that is the language I would use to describe it with respect to negligence. I say that that point holds true, although you'd express it through different elements in public nuisance as well. I would say it fails that relational test of real wrongs between different people, a duty between one and another, in respect of public nuisance –

GLAZEBROOK J:

Does this rather come down to the argument that the more people you hurt, the less likely you are to be held to account. So just to take the Chief Justice's example. If you had somebody who was responsible for 75% alone of the emissions around the world, and hurt everybody around the world, they are immune from liability because there's no relation.

MR KALDERIMIS:

No, that is not what the argument comes down to.

GLAZEBROOK J:

Well, what exactly is it that creates that relationship then?

MR KALDERIMIS:

An example of the, you're liable no matter how many people you hurt, because you still have a relationship with them, would be what Justice Williams posed previously. A manufacturer makes a defective product. It goes to very many different people around the world, maybe lots of babies in Asia. That is a tort problem. There's no doubt there's a tort problem. It doesn't matter how many babies it goes to because you have a relationship with those end use consumers. You are manufacturing something that you know is going to be bought by them. You can't deny, not just that you could foresee it, but that that's inherent in what you have undertaken to do, and what you're expecting them to undertake to do. We say that's different, fundamentally, from the problem of climate change, which is not really a problem about fault and blame and responsibility in that sense. It is a problem about the need for fast action and movement and a collective response in that sense. So we are all a part of the problem, we all have to be a part of the solution, and we're all responsible in a way. But the way people are responsible is not the atomised language of legal responsibility. You are responsible for that bit of someone's loss. Not really. The way we're responsible is we're all in it together, and there needs to be a system of collective action for what my learned friends have described as a systemic problem, and there is. There is a system of collection action, and

that's exactly what the legislative scheme is designed to implement. So we say that the question –

GLAZEBROOK J:

That's a slightly different point because that's saying in a policy sense because – so I would see that as policy rather than related to the point you're making about relation, the useful – well you may say they're linked, but I would see them as separate, in fact.

MR KALDERIMIS:

Yes, that's why they're in a separate proposition.

GLAZEBROOK J:

Yes, exactly.

MR KALDERIMIS:

I see them as connected but not identical. So in answer to Justice Kós' point, with respect we do not see this as shirking legal responsibility. We see this as correctly situating what we mean by "responsibility". Maybe I can illustrate it this way. When we were listening to the submissions on tikanga Māori, one of the mechanisms that we heard about, and it's an important mechanism, is that of the rāhui. Now a rāhui, which I understand to be a ban or a prohibition, is an important tool. It's an important part of any iwi and hapū's tikanga over time, and it's an important and well-known and, as I think my learned friend Ms Coates put it, a notorious term in New Zealand today. Now principles of tikanga inform rāhui and when one should be put on, and who can put it on and for how long it will last, and to whom it applies. But we say that the concept involved there, if you use Fuller's language, is not the concept of adjudication. It's a concept of collective decision-making. It's not trying to blame anyone for what they did, or single out this person and say, you're responsible for that share of my harm. It's trying to say, this should not be happening. We should stop it.

GLAZEBROOK J:

Well didn't they analogise it to an injunction?

MR KALDERIMIS:

Well you could analogise it to an injunction but it's not, really I would say, an injunction in the common law sense, because an injunction in the common law sense can only come once you've adjudicated that someone has wronged someone else, hence our focus on relational connection, whereas a rāhui can come when no one has wronged anyone, it's just something that has to stop.

WINKELMANN CJ:

Well, we don't know quite when a rāhui can come, do we, because we haven't got the evidence –

WILLIAMS J:

Well it can come following adjudication.

WINKELMANN CJ:

I would have said so, yes.

WILLIAMS J:

You're not fishing there anymore because you breached the rules.

MR KALDERIMIS:

It could do.

WILLIAMS J:

It's a form of rāhui.

MR KALDERIMIS:

But in terms of what is needed now, what we say is it's not a you can't and you can't. It's a system for how New Zealand as a country, and the world generally, is going to get to where we need to go. So we say that the form of responsibility the Court should be thinking about is more like Fuller's form of decision-making by a polity collectively, and in a foregoing sense, and you can have injunctions in a sense in that context, but they're more like decrees. They are not the

results of fault-finding, and we say there's an artificiality to say that an injunction here is the result of fault-finding, because we don't have the element of fault between one and another.

GLAZEBROOK J:

Well we haven't had a trial or evidence yet, which is the point that I think your friend is making, isn't it. That you do need evidence and a trial in order to see whether whatever the elements happen to be, are met.

MR KALDERIMIS:

Well if I put it this way. In the *Michael* case, the reason I went to it is that there are two references to Justice Richardson in that case. One is at 147, quoting the judge from *South Pacific*, and the other is at 158, quoting the judge again he said the same thing in the *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA) case, and in each case what Lord Kerr is taking from Justice Richardson is that proximity, which we say is an express element of negligence, that you can see in different ways and different torts is a balancing of moral harm of the plaintiff – sorry, a moral claim by the plaintiff to compensation, and the defendant's moral claim to be protected from the undue burden of legal responsibility. We say that's not an abstract balancing. It's not a court simply distributionally deciding who it wants to bear loss out of anyone who could be a plaintiff, and who should bear loss out of anyone who could be a defendant. What that is, is recognising is the Court balancing claims between two people where one has caused harm to another in a context whether the Court will recognise it.

So if I come back to the Chief Justice's question. The Chief Justice is really asking, well why can't we just do that with climate change? Why don't we just say that the proper doctrinal analysis of climate change is as a whole lot of tortfeasors, in a sufficiently close and meaningful relationship with all the people in the world, causing harm to them, and then if we do it like that, we could just regulate that through tort law, and of course the only tort that you could conceivably try and stretch that far, would be public nuisance, as Justice Kós

said. So my only headline comment on that, because we don't have to work through the elements of public nuisance there, is what is set out in proposition 7.

WINKELMANN CJ:

So just before we leave proposition 2 again. Is another way of formulating your arguments, then, that the plaintiff is arguing for the imposition of a novel duty of care and there are compelling reasons not to allow it to be imposed are so compelling that it meets the strike-out test?

MR KALDERIMIS:

Yes, that is what we say about the novel duty of care, because it would be such a departure from the way tort law is and has been understood to recognise a strict liability duty without that aspect of relationship, and if we think about the most obvious analogue, which is *Rylands v Fletcher*, in that case you had very close relationship between the parties. The plaintiff and the defendant's land were virtually contiguous. It was known not just as a reasonable foreseeability issue but as a people living cheek and jowl together issue that undermining the mines could happen through flooding and that would impact the mill, and that's exactly what happened.

WILLIAMS J:

I don't think reasonable foreseeability was conceded in *Rylands v Fletcher* at all.

MR KALDERIMIS:

No, but it became an element of public nuisance in The Wagon Mound, reasonable foreseeability.

WILLIAMS J:

Yes, but in this case they had no idea what the potential was that mines would flood and end up in, is it MacPherson's or whoever it was, in their works?

MR KALDERIMIS:

Yes, Fletcher's mill, yes.

WILLIAMS J:

Fletcher's mill? None whatsoever.

MR KALDERIMIS:

Perhaps that's right that it wasn't in that case but the physical closeness and the foreseeability at the general level that if you have something dangerous on your land and you do something that would allow it to escape you will cause problems to the people who are immediately near to you was an element of what the case was about.

WILLIAMS J:

I didn't think the mill was next door.

MR KALDERIMIS:

It wasn't exactly next door. It was diagonally across.

WILLIAMS J:

Yes, because the water travelled through the mine shaft.

MR KALDERIMIS:

Through the underground mines, that's right.

WILLIAMS J:

Yes, didn't travel across the land.

MR KALDERIMIS:

That's right, but still there were two lands in between. There were some lands owned by Lord Whitehead and Hutton I think in between Lord Wilton's land up at the top, the north-east, and the Fletcher mill that was just further south under those lands. So all I'm trying to say there is that it would be a very stark change to recognise a new duty of this character, and as we heard it expressed this new duty was really described, at least by my learned friend Ms Coates, as being a sort of duty to the environment generally, not really a duty to Mr Smith

as such. It's really a duty that owes more in character to moves to give legal personality to landmarks or places than it does to duties between people.

GLAZEBROOK J:

My understanding she was just explaining the tikanga view of the environment and talking particularly about the novel duty rather than negligence, but I might be wrong.

MR KALDERIMIS:

My understanding of it was that there was no attempt to establish any form of proximity. It was viewed as not necessary for that tort.

WILLIAMS J:

Proximity between?

MR KALDERIMIS:

Plaintiff and tortfeasor which is always what I am focused on.

WILLIAMS J:

In that particular context or more generally?

MR KALDERIMIS:

That at least the tikanga element which I thought was most stressed by the appellant's case for the third cause of action was a proximity free discussion.

WILLIAMS J:

Well, I think the point was –

GLAZEBROOK J:

It certainly was because that was – because it was a proximity to the environment and that was why it's a novel tort.

WILLIAMS J:

Proximities are given since we're all, except perhaps those on the international space station, proximate to it.

KÓS J:

Why is an underlying economic relationship so important here to your theory of tort responsibility? The child in – the infant in China who drinks the formula who's five or six or seven or eight or 15 links down the economic chain between the supplier in New Zealand and the consuming infant in China has no moral connection apart from the harm that's been done.

MR KALDERIMIS:

I say that there is a moral connection. It is not only the harm. The harm doesn't tell a story of moral connections. The harm is just a fact. The moral connection comes from a sense as to who is responsible for that harm, it's not just that it was caused, it was that –

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WILLIAMS J:

It was the point.

MR KALDERIMIS:

It was the point, that's it, it was the very point.

WILLIAMS J:

You, I think that the point's well-made but the analogy kind of falls down when you think that the driver of the truck taking the formula to the port engaged in a collision killing someone will be just as responsible, even though that's an along-the-chain step that isn't the point, it's simply an ancillary activity required to get to the point, and that's really what's being argued here except on a global scale.

MR KALDERIMIS:

But if you're the driver of the truck you are not assuming in Palsgrafian terms a legal responsibility to everyone in the world, it's the people who are sufficiently close to you, and all the great negligence cases are built on if you hit someone and –

WILLIAMS J:

Yes, but the truck is owned by the same company, you see, it's the same thing as the stakes that pump out the GHG gases.

WINKELMANN CJ:

Well, can I try for a closer analogy, I think, which is these factories, these factories, the super polluters that are pumping out a super noxious gas which is known to travel around the world and poison everybody, and they know this but continue to pump out the super noxious gas because it enables them to manufacture incredibly profitable cellphones, say. Wouldn't the fact, wouldn't their knowledge of the certainty of harm of their activity create that moral connection that you're talking about, just because it's large numbers of people they are knowingly harming, would that not be sufficient?

MR KALDERIMIS:

The large numbers don't come into it, your Honour, I have already mentioned. Does the fact that you know when you are pumping out the greenhouse gas emissions that it will cause contribution to global warming –

WINKELMANN CJ:

Well, I was taking it to a super noxious gas because it's easier to get our heads around. It's taking up a –

MR KALDERIMIS:

Yes.

GLAZEBROOK J:

Like, a really, a poisonous one that kills people, yes.

WINKELMANN CJ:

Yes, we're taking out the scientific complexity.

MR KALDERIMIS:

Yes, okay. So if it's a super noxious gas that just travels along, then that is something that you could imagine falling within negligence and private nuisance and probably also public nuisance, yes. If we think about the *Sharma* case for a moment, that was the case where you got taken to the High Court but not of course the Chief Justice also.

GLAZEBROOK J:

And is the difference because it's poisonous as against cause climate change?

MR KALDERIMIS:

Yes. The difference is that you are pumping –

GLAZEBROOK J:

So it's a degree, so it's slow death and no slow death is –

MR KALDERIMIS:

No, no, not the poisonous…

KÓS J:

Oh, no, harm is just a fact, Justice Glazebrook, harm is just a fact.

MR KALDERIMIS:

It's the nature of it being a gas that is being pumped out and your gas is landing on someone or on someone's property, we say that is a very different mechanism to everyone's emissions going up into the sky, and we say that that is not just a causally different thing, it's a reflationary different thing. If everyone's activities all co-mingle in the sky that is not like just one plaintiff or many plaintiffs and one defendant where a cloud of gas passes and goes over everyone and it's your gas that has landed on them and you can't deny that that was a risk of your activity. We say this is a fundamentally different character and its diffuseness sounds in how the Court should think about legal responsibility.

WILLIAMS J:

So if everyone was producing the gas but some, a very small number, are producing 80 per cent of it or 90 per cent of it and that's what is creating the cumulative problem, is there proximity or not?

MR KALDERIMIS:

We say still there would be difficulties, but that is vastly different than the case here where –

WILLIAMS J:

So just proximity or not?

MR KALDERIMIS:

That would be a trial issue at that point. At 80 per cent where it's one person who is causing all of the harm in the world that is a –

WILLIAMS J:

Well, no, not one person but – well, one –

GLAZEBROOK J:

Well, it's as the asbestos cases, I suppose, where you can't say which particles you actually – so it would be the same thing here with about three or four people who pump this gas out.

MR KALDERIMIS:

You would find yourself in a *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32 type situation there, with all of the problems that attended that case. Now if your Honours have scanned down you'll see that my proposition 10 is about *Fairchild*, and perhaps if I just note –

GLAZEBROOK J:

Actually, we should probably let you go through your propositions in order unless you want to skip them.

MR KALDERIMIS:

Yes, well, what I'll do is I'll mention *Sharma* and I'll mention *Fairchild* and then I'll let you know how I'm planning on dealing with timing.

So in terms of *Minister for the Environment v Sharma* [2022] FCAFC 35, just to take you to it so that you have it, the relevant discussion begins at page 270 of the case. At 206 it's respectfully submitted that what the Chief Justice there was doing was very much the discussion that we've been having, that the search for a principled approach to the imposition of a duty of care hasn't had some grand formula behind it. There's no grand theory, but yet, at line 24: "The notion of neighbourhood … is built on the human and societal relationship between the parties." Just like Lord Kerr. Just like Justice Richardson. There's something real that the law is describing there. It's not imposing it. When we come to 213 at page 272: "Understanding the core concern of the law of negligence, and the nature of relationships falling within the concept of neighbourhood, is of critical importance in this case," and then climate change is talked about from about line 22: what we're looking at here is imposing a duty of care (on uncontested evidence) of the potential global catastrophe for the world and all of humanity, and what it's said is important here is keeping in mind, at line 35, all of these important elements that we've been talking about, including the constitutional system, the broader legal system, and what is called context and coherence, and it's said that that is "what was necessarily thrown up at the point of breach by the posited legal duty [and that] was a defect in the method employed by the primary judge." So put less kindly, the primary judge got spooked by the evidence that your Honours were shown earlier and didn't meet the test of a reasoned and articulated legal duty, just decided that the harm was enough and the harm important for duty.

The analysis that the Chief Justice goes through is then picked up at paragraph 46 on page 279, and all of those different issues, and I'll let your Honours read it at 246 through to 260, including discussion of the Court of Appeal decision in this case, are dealt with. We say that's really no different than what we see in other New Zealand cases that have thought about new torts. So *R v Hines* [1997] 3 NZLR 529 (CA) was Justice Richardson giving

some real guidance to the idea of bringing in a new duty and it's worth looking at the factors that the Judge looked at there, if I just bring that up. So that's at page 538 of the case. "There are three considerations," line 20, "in determining whether it is appropriate for the Courts to fashion a new rule …" Got the "subject-matter and its closeness to the Court's function". Got the idea that you're applying community values, underlying community values and not personal values because different democracies may do things in different ways, and on 539, second paragraph: "The responsibility for keeping the common law consonant with contemporary values does not mean that the Courts have a general power to mould society and its institutions according to judicial perceptions of what is conducive to the attainment of those values," and the third are those familiar points about working out how the policy is to be made about different issues where evidence is going to be needed, and all of these points at 539 to 540 will be familiar even though they're important.

So I said I'd come back to where I am and where I'm going, given it's 4 o'clock, your Honours. So I will come back tomorrow and talk for roughly 30 to 45 minutes. I'll then hand over to Ms Swan to talk about the statutory scheme and then the balance of our submissions will be on public nuisance, delivered by Mr Smith, with Mr Ladd talking about relief and the way in which the difficulty of giving relief here says something profound about the right, and then there will be very short submissions for both Channel Infrastructure and B T Mining.

WINKELMANN CJ:

Thank you very much, Mr Kalderimis and thanks for being so patient with our questions. Now take the adjournment.

COURT ADJOURNS: 4.01 PM

COURT RESUMES ON WEDNESDAY 17 AUGUST 2022 AT 10.02 AM

MR KALDERIMIS:

Good morning your Honours.

WINKELMANN CJ:

Mōrena.

MR KALDERIMIS:

Following the robust discussion yesterday afternoon my aim this morning is modest, which is to get through the last page of the road map in time to give my learned friends a chance to do the deep dives into the statutory scheme, into public nuisance, the importance of which we acknowledge for this appeal, and into remedial issues and what they might tell us. So where we stopped yesterday was at the bottom of the first page, item 4, looking at the *Sharma* case. If I could recapitulate on what the submissions we are making there are. They are these. We say the *Sharma* case puts into stark relief the essential question we say this Court should ask itself. Would the trial the appellant is seeking really be judging a dispute between litigants or deciding actually what should happen as to climate policy. We say it's a fair question because the appellant's submissions and stance in this case is clear. That they consider Parliament is not making the right policy and that the Courts are needed, in effect, to drive the car, because no one else is driving. So would it be a trial or would it be a commission of enquiry. Would it be adjudicative or would it be governmental in nature. That was the reason, your Honours, for the list of academic authorities under item 2. I want to make it very clear, we are not here propounding universal theory of tort law. We are not here to say that there is one right theory of tort law, and all the others are wrong. That selection, in that second bullet point of item 2, was carefully crafted and curated to be right across the spectrum of different theorists taking different views and different stances. But what they have in common is something that we say is ineluctably true, which is that whatever you think about what tort law should do, or not do, it works through a correlative mechanism. That's what Gardner says, even while disagreeing with Weinrib, and when we put the last, or the second to last

item of Professor Gold with his very recent book on the right to redress, he disagrees with everyone else and says there are pluralist outcomes and different influences in tort law and you can't have a unified theory. But yet he agrees too that the mechanism is correlative. So while this Court may legitimately have an eye to distributive outcomes, in things it wants to achieve, because tort law is always forward-looking, of course, you have to do it through resolving a legitimate dispute between litigants, and once you lost your footing in that dispute, the Court has lost the legitimacy and proper place of its role. That's why we say that discussion we were having yesterday about poisoning the air, or polluting the stream, comes right to the heart of what the right pattern or theory is here. What the right analogy is. Because if you think about it we say this is not a case of even a lot of Birmingham sewer odours polluting the stream of Mr Adderley. Mr Adderley is polluting his own stream as well. Everyone, how they live, how they breathe, all the things in this Courtroom, all the clothes we wear, all the computers we use, all the technology that gets us through the world, it's all based on an economy and a way of living that must transform. That's why my learned friend described in this Court the problem as a systemic one, something we adopt. That is why my learned friend in the High Court in the struck out case against the Crown, at paragraph 52 of her Honour Justice Grice's judgment, my learned friend described it as a unique collective action problem. That's what we say it is.

WILLIAMS J:

Problem did you say?

MR KALDERIMIS:

Problem, and we say there's something very significant about the true construction of the challenge we're all facing being a unique collective action problem, and that is that it is not conducive to being atomised into individual rights and duties between one person and another. We are in this together. Yes, change must happen. Yes, change must happen quickly. Yes, sacrifices must be made. But they have to happen knowing that it's entirely systemic.

KÓS J:

Where does this bit Mr Kalderimis? Is this a disqualifying submission, that the plaintiffs are polluters too so therefore they cannot sue? Is it a remoteness argument? Which is it, or both?

MR KALDERIMIS:

I would say it is a lack of meatness argument for tort law generally.

KÓS J:

A lack of?

MR KALDERIMIS:

A lack of meatness argument. This case is not a true trot law problem because it is not a dispute between a plaintiff who has a dispute with a particular respondent. The plaintiff could be anyone. The respondent could be anyone. This is actually a case not about rights and wrongs looking backwards. It's a case about the need for systemic transformation looking forwards. So we say it's more profound than remoteness and we do not accept the characterisation yesterday that the defendants are trying to immunise themselves from liability by pointing to others. We say it's more profound than that, and maybe if I got to the Climate Change Commission's report at –

WINKELMANN CJ:

This is a submission you make where you actively decline to engage with current forms of action and you say this is really essentially a system of law submission, aren't you, so mega submission.

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MR KALDERIMIS:

Yes, that's right your Honour. So if I could just go briefly to the Climate Change Commission's report, which is RA76 at page 3013. I commend your Honours to paragraph 97 to 101 where the Commission says that a key challenge in preparing its advice is to find the right balance as to how to move, as to what to move, and of course we have to move but we have to do it in a way that doesn't "threaten wellbeing and further disenfranchise those already disadvantaged".

In paragraph 99, or perhaps 98, if we move too slowly we will create problems but, 99, if we move too fast we will create problems and there might be unanticipated ones. We might find that moving too fast creates a push-back, the sort of push-back that we can see in some countries with COVID-19 that means that you don't transition as quickly as you should and that we need to balance all of these factors up, under 100 and 101.

So what we are trying to say here is not that there's not responsibility, there is responsibility. The respondents need to change. But it's a type of responsibility that is too systemic to fit within the framework of rights and duties to this plaintiff, it is bigger than that. And I'm not simply saying this as a submission that I have created, this is where the US authorities that have looked at this have landed.

So if we turn over to the second page of the road map, those three cases, which I know your Honours are familiar with: *American Electric Power*, which was Justice Ginsburg's decision, which at page – this is quoted in our submissions – says that the sorts of systemic choices are too purely distributive for the Courts to engage in because they're not – and that was a public nuisance case – they're not being mediated through a correlative mechanism of real rights and duties, the Court is being asked –

WILLIAMS J:

Would they say that now that her reasoning hung quite a bit on the jurisdiction of the EPA on greenhouse gases, which seems to have been lost?

MR KALDERIMIS:

Well, that is true, the most recent US Supreme Court has cut back where the *Massachusetts v Environmental Protection Agency* 549 US 497 (2007) case got to.

WILLIAMS J:

Well, I guess the question is would it have been the same decision if the EPA didn't have that power?

MR KALDERIMIS:

I believe it would have been, because of the way t was put by Justice Ginsburg. So if we look at page 9, if you just click that first hyperlink, what the Court is saying on the left-hand side of page 9 in the second and third paragraphs is that: "Federal judges lack the scientific, economic and technological resources an agency needs to bring in coping with issues of this order," because judges can't commission the scientific studies or do anything else that is needed properly to regulate this problem. So of course it is better that you have a statutory scheme that is dealing with it, this is a point that Chief Justice Allsop made in *Sharma* as well, and that is under our item 5 in the road map, that the difficulty is not merely one that exists if you don't have a statute, it's just made worse if you don't have a statute.

The *City of New York v BP plc* 325 F Supp 3d 466 (SD NY 2018) is to similar effect, but the one I want to go to in the interests of time is *City of Oakland v BP* PLC 325 F. Supp. 3d 1017 (ND Cal 2018).

WINKELMANN CJ:

So you're saying it does not depend upon the availability of a legislative framework or existence of it, you're saying it's effectively, it's beyond justiciable?

MR KALDERIMIS:

Well, is beyond justiciable in a claim of this abstracted nature, and I must emphasise this for fear of our argument being caricatured and seen as a straw man. We are not saying no tort claim could ever succeed, we are saying this claim –

GLAZEBROOK J:

Right, can you tell me which tort claim will succeed?

MR KALDERIMIS:

Well, I can't tell you –

GLAZEBROOK J:

Because I'm just still having trouble with the abstract nature, what I understand you say the abstract nature is, that there are too many possible plaintiffs and too many possible defendants. You say no, that's not what you're saying. Now I need to understand what it is you are actually saying.

MR KALDERIMIS:

Let me explain that by reference to *Oakland* and *Honolulu*. If we start with *Oakland.* So this case was also a public nuisance case. If we look at 0574 we can see under the heading "Analysis", the issue isn't over science. Two paragraphs down, after talking about the sole claim for relief being "public nuisance": "The scope of the plaintiffs' theory is breathtaking. It would," like this case, "reach the sale of fossil fuels anywhere in the world…"

Next paragraph down, these are the elements of public nuisance.

Next paragraph: "No plaintiff has ever succeeded in bringing a nuisance claim based on global warming," and then if we go to the following page at 575, three paragraphs down, with respect to balancing social utility against gravity it's true that carbon dioxide has caused global warming, but against that negative we have to weigh the fact that our entire industrial revolution and development of the modern world has literally been fuelled by oil and coal, and without these virtually all of our monumental progress would have been impossible. All of us have benefited. Having reaped that benefit, is it really fair now for us to say only some are responsible when the truth is it's entirely systemic, we're all involved in this, and is it really fair to say that in light of how we have gotten to this point that the sale of fossil fuels was unreasonable?

WINKELMANN CJ:

Well, that sounds like a very value-laden proposition as opposed to an analysis in terms of causes of action.

MR KALDERIMIS:

Well, if we come to 578, the conclusion there is what we submit. "In sum, this order this order accepts the science behind global warming. So do both sides. The dangers … are very real. But those dangers are worldwide. Their causes are worldwide. The benefits of fossil fuels are worldwide. The problem deserves a solution on a more vast scale than can be [provided] in a public nuisance case. While it remains true that our federal courts have authority to fashion common law remedies for claims based on global warming," and I agree with that, "courts must also respect and defer to the other co-equal branches of government when the problem at hand clearly deserves a solution best addressed by those branches." So –

WINKELMANN CJ:

That's in a nutshell the difference between yours and the appellant's case then, isn't it?

MR KALDERIMIS:

Yes.

WINKELMANN CJ:

Because they say this may be a worldwide problem but we know that it will be addressed and can only be addressed locally with local solutions and the common law is well suited to local solutions and it can proceed to consume the elephant toe-by-toe, and you're saying no, this is a hopeless way of going about it because in fact you can only conceptualise and address the problems in this mega way and otherwise you risk placing too much stress on the system.

MR KALDERIMIS:

Not quite. The difference is that we say that the local solution to the problem is governmental, not adjudicative. It is by definition something that requires the value-laden choices that we all know have to be made. How quickly, who does what, when do they do what, is it the plaintiff, Mr Smith –

GLAZEBROOK J:

I'm coming back to what I said to you yesterday. I totally understand that part of the argument and I understand that's the part of the argument that Ms Swan is addressing. What I don't understand is how it relates to an abstract nature of the claim.

MR KALDERIMIS:

Let me come on to *Honolulu*. I said I would deal with it in relation to that case.

GLAZEBROOK J:

It's just I need to be able to write down and I still haven't been able to write – I can't just say: "The claim is abstract," because I have no idea what that means, or what you say it means, I'm sorry.

MR KALDERIMIS:

So if we come onto *Honolulu*, which is a claim that as I noted has recently not been struck out in Hawaii in a first instance decision and look at page 450, so that's… So the case is *City & County of Honolulu*.

GLAZEBROOK J:

We're having difficulty finding it so…

MR KALDERIMIS:

So if we search under "City".

MS SUSSMAN:

It's RA11.

MR KALDERIMIS:

If we go to page 449, you can see that the defendants there said this claim is just like *City of New York*. It should be struck out for that reason. The plaintiffs responded that their claims included "failures to disclose and deceptive promotion", that the defendants in particular had a duty to disclose to them…

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…included failures to disclose and deceptive promotion, that the defendants in particular had a duty to disclose to them dangers of fossil fuel emissions and they breached those duties, and the Court on the next page at D says the plaintiffs' framing of their claims is more accurate than the defendants' framing and that they were just simply like *City of New York* and moreover, the plaintiffs didn't ask here – at the bottom of the page – for the Court to "limit, cap or enjoin the production and sale of fossil fuels", the defendants' liability arises from "alleged tortious conduct" and not simply from allegedly unlawful conduct in just carrying out their business. So –

WILLIAMS J:

The failure to disclose?

MR KALDERIMIS:

Yes, the failure to disclose.

WILLIAMS J:

So if they put a warning on their cigarette packets they're off the hook?

MR KALDERIMIS:

Well, that's how that case got through the strike-out mechanism, your Honour.

WILLIAMS J:

Well, we know that doesn't work with tobacco.

MR KALDERIMIS:

Sorry, I missed that.

WILLIAMS J:

We know that doesn't work with tobacco. Why would it work with petroleum?

MR KALDERIMIS:

I'm not talking about the outcome to a case, I'm talking about the need to frame a case so it really is a dispute between a particular plaintiff and a particular

defendant, so that the Court is truly adjudicating a dispute between two people. So for her Honour Justice Glazebrook – and I recognise the importance of the question and why it's being asked – our answer on what we mean by "abstraction" is that the Court can utilise the tools in its toolbox, including –

GLAZEBROOK J:

I'm sorry that really just does not help me at all, sorry.

MR KALDERIMIS:

I hadn't finished my sentence.

GLAZEBROOK J:

Well, okay, can use tools.

MR KALDERIMIS:

Can I finish my sentence, please?

GLAZEBROOK J:

Mhm.

WINKELMANN CJ:

Go ahead, Mr Kalderimis.

MR KALDERIMIS:

The Court can utilise the tools in its toolbox, including public nuisance, provided that what it is really doing there is it is adjudicating a dispute between a plaintiff and a defendant where they are sufficiently close and related under the elements of the respective tort, whether it's public nuisance and those elements or whether it's negligence and those elements, such that the Court is confident it is adjudicating a dispute and it is not seeking systemically to regulate a problem, that is the question.

WINKELMANN CJ:

So how the Court normally does that, because it's using the common law method, it looks at the existing forms of action, and I think we probably need to

look at the existing forms of action and come away from the abstract and away from the mega view of the law and come down to the existing forms of action.

MR KALDERIMIS:

Yes, well, that is what Mr Smith will do. So I will move on then to item 5.

GLAZEBROOK J:

Can I just check again? I mean, really this is just framing it in exactly the same way as you're saying it needs a systemic choice, is that what the – so it's in fact the same as its alleged sort of choice because it's a systemic problem?

MR KALDERIMIS:

Yes, that –

GLAZEBROOK J:

And so when you say "abstract" you're meaning that it's dealing with a systemic problem?

MR KALDERIMIS:

Yes, I'm meaning that, but I'm also meaning the reason it is dealing with a systemic problem you can see from the fact that it could be any plaintiff against any defendant, it could be anyone against anyone.

GLAZEBROOK J:

Well, it's very easy to say that, and obviously the big polluters or the big emitters are quite keen on framing it as being everybody's fault and not theirs. But isn't it difficult to say that if you are – and I'm not necessarily talking about just the plaintiffs in front of here – but if you had an emitter – and you do have these very big emitters and of course they're incredibly powerful in terms of lobbying in the States – to say: "No, it's not our fault", like the tobacco companies: "It's not our fault, it's the people who smoke. It's not our fault, it's the people who use our products," and it's a very convenient way of framing something, isn't it, when you say: "No, it's not our fault, however big we are in terms of being emitters."

MR KALDERIMIS:

I hear that argument and my response to it is that it is not shirking responsibility to say that what is needed is a systemic society-wide transition: "There is no benefit here in stopping this emitter but then to have someone else come and emit," and the law of –

GLAZEBROOK J:

That argument I totally understand, and I've said that, it's just I had difficulty with the abstract. But really they're the same argument, is that…

MR KALDERIMIS:

They're closely interconnected.

GLAZEBROOK J:

Okay, that's fine. I understand now.

MR KALDERIMIS:

The logic –

WILLIAMS J:

I get the sense that what you're really saying is this problem is not a dispute at all.

MR KALDERIMIS:

Yes.

WILLIAMS J:

It's an inquisition.

MR KALDERIMIS:

That's right.

WILLIAMS J:

And there are no markers against which to adjudicate the problem.

MR KALDERIMIS:

That is the submission and I am grateful to your Honour for the clarity and succinctness of that description.

WINKELMANN CJ:

But the problem with it is that it's all a matter of framing.

MR KALDERIMIS:

Well, that is – and maybe that's my submission. So if we look at 4 and 5, I'm distinctly not saying this is just simply not justiciable as a ipso facto matter. What I am endeavouring to say is something more subtle, again that subtlety may have been lost in translation, which is that the more flimsy the scaffolding that the Court is able to climb and the greater the degree of policy content, this is the way Justice Richardson put it in *Hines*, the more careful the Court needs to be, and as I come to 5 I just want to take you, as I said I would, to the *Milieudefensie* case which is under appeal and take you to the relevant reasoning which is at item 4.4 of the case, so paragraph 4.4.

WILLIAMS J:

Are you at point 5 now?

MR KALDERIMIS:

I'm just finishing off point 4. You can see *Milieudefensie* is a compare note.

WILLIAMS J:

Yes.

MR KALDERIMIS:

I just would be grateful for the Court to read all of part 4.4 of this case. It's summarised in 4.4.2 under the 14 points that apparently make up the liability of the Shell group in that case under the Dutch section 162 Civil Code which is an unwritten duty of care. What I submit to this Court is that a close reading of those different elements is that they are disparate, they are incommensurate, they do not reflect anything like common law reasoning. That is the making of

policy. That's exactly what is happening in that case because you have references to the UN guiding principles mixed in by different factual elements, mixed in by different views about the efficacy of "cap and trade" systems. It's the whole system. It's the big kahuna. Everything is in that paragraph. That is where the Court risks being drawn using the very blunt ledge of public nuisance, and I suppose the big point about public nuisance, Mr Smith will make with more skill than I am doing the more specific surgical points about public nuisance, but the big point is that once the Court has decided that a claim of this level of generality is cognisable, it is left owning the problem without any of the tools to then make the sorts of distinctions and choices that have been kicked down the road by my learned friend. Every question about what the choice is has been said to be a trial matter and we really run the risk that that is an awful lot of responsibility for the Courts to bite off with no real tools then to deal with it.

KÓS J:

Just before you move on, yesterday you used the arresting proposition that harm was just a thing, and I've been puzzling about that overnight as a proposition. You do not say here that your clients bear no responsibility for this state of affairs, nor –

MR KALDERIMIS:

In a general sense, no, they are in it.

KÓS J:

No, because you say there has to be change and your clients must change with it.

MR KALDERIMIS:

Yes, quite.

KÓS J:

You just say tort law doesn't have a function in achieving that outcome. So your clients have to bear some responsibility in some form for what's occurred. We could also I think draw a straight line between what is happening to

Mr Smith's land and the emissions that are occurring. There is harm and it is a thing and the question is whether it is the point or not, to use your other arresting phrase from yesterday. Your argument I think is that in these circumstances your clients are relieved of responsibility in at least a tortious sense.

1030

MR KALDERIMIS:

My argument is that in these circumstances it is not a case where tort law can identify a tortious wrong, a dispute between two people over rights and duties as between them. There's a case where judges can see that there is a need for the harm to be remediated but that is a political question as to how that happens.

KÓS J:

However I'm not unsympathetic to your argument in relation to negligence, I've said all the way through in this case that I see it as a public nuisance case, if anything at all. But it is quite conceivable, for instance, that one could have an intentional tort which harmed all of New Zealanders, sabotage of the transmission system. In that context I imagine Slater & Gordon will come leaping across the Tasman and start a class action and all New Zealanders might join in that. So in that situation the saboteur would be liable to five million people potentially.

MR KALDERIMIS:

Yes, so that comes back to my distinction part at the outset of this morning between a pollution case where there is a cloud of poison coming from one person and a "way we are all living is unsustainable" case where everything, everyone does, is based on an economy and a way of living that has to change, and so it is not a case of one person is causing this harm and that's what needs to stop: "You're poisoning the stream, no one else is poisoning the stream," it's a case of fundamental global and societal transformation, and in response to the Chief Justice, I say not that this can only be fixed at a global level, it can be addressed, it must be addressed at a local level, but I say it's a political question that is, in my phrase, "too abstract", but is just beyond the tools of tort law,

because it's not a case of backward-looking assignment of responsibility for a wrong, it is a case of pure rāhui – what needs to change, what needs to stop? – it's a case of choices, institutional choices.

The Merrill article at the end, if you read it through, says the difficulty of expanding the monster tort of public nuisance too wide is that you make institutional choice decisions, you take difficult policy questions and you give them to the Courts to resolve, but it doesn't have the tools to do it. But that's the question that I asked the Court to ask itself. Of course you have the intellectual scaffolding through public nuisance to take control of most anything, it's such a diffuse and diluted tort, the question is whether you should.

WINKELMANN CJ:

In some ways you're presenting tort in a more challenging revolutionary way than the plaintiffs are, because the plaintiffs are just asking us to apply torts with modern knowledge of science, et cetera, and you're saying actually there's a risk that if you do apply it to such a systemic problem you will have unintended consequences.

MR KALDERIMIS:

You could see it that way, you could see it, and I urge the Court to see it through the other end of the telescope, which is that public nuisance was developed in a world of communities, local communities, that's where all the public nuisance cases are. All the public nuisance cases about stopping pollution of a river are not saying you can't have a sewerage factory anywhere in the world, they are saying you just can't put it right here in this way. This case is of a totally different dimension. Logically it doesn't matter where the emissions come from. It could be, if you take the *Lliuya v RWE* case which is cited at the top of page 5, that's a case by a Peruvian farmer against RWE. The same logic of the plaintiff's claim extends to that. There's no reason why the next plaintiff couldn't sue Royal Dutch Shell in the Netherlands, or I think Royal Dutch Shell is now based in English, or a case vice versa where a foreign plaintiff couldn't sue a New Zealand defendant in these courts.

WILLIAMS J:

You know, when these cases developed in the 19th century it took three months or six months to get here. Now you can do it in a few hours. I mean, the "here" has shrunk, that's the essential problem you face.

MR KALDERIMIS:

Yes, that's –

WINKELMANN CJ:

So your proposition is effectively these were developed to address the problems in a local world, we now live in a global world and the Courts can't legitimately amend or allow the torts to develop to address or even to apply the torts to address a global world's problem.

MR KALDERIMIS:

We say that it would be an expansion of public nuisance to extend it in this way because it's never been extended to anything remotely this systemic, and the Court should – perhaps a way of thinking about it is if you consider the submissions on what parts of the economy would fall under the alleged suspended injunction were the plaintiff to be successful at trial. We would have a real prospect of a de facto nationalisation of most of the productive economy of New Zealand because there's virtually no business that on what we've heard today that is involved in making things or producing things or industry at all that wouldn't have the shadow of a suspended injunction hanging over it and then it would be able to operate only at the grace and favour of the Courts and that is not what any public nuisance case has been about. They're not about putting a cap on the total gross output of an entire nation. They are about dealing with a specific problem and that's why even though it's harder to see, and this reflects my robust conversation with Justice Kós yesterday, the proximity elements of public nuisance are expressed in different words. We're not getting away from those words or those elements. I'm just trying to outline that you can see them there if you look at "public nuisance" through its proper historical context and with principle. It's not a charter for the Courts to take vast swathes of national policy from government and decide them itself.

I'd like to turn to paragraph 5 and go to just one case. So this is that point. This is closer to Justice Glazebrook's point that her Honour was saying she wanted me to come to. I want to take you to one case in this list and that is the *Budden v BP Oil and Shell Oil* [1980] JPL 586 case. Now *Budden* we say is very important and worth reading in detail. It's a case from 1980, English Court of Appeal, involving a public nuisance and a negligence claim brought in respect of lead in petrol. So it was suggesting in that case, you can see at 382 a description of the case, that the defendants make petrol with lead added to it. They must have known that when you burn that in vehicles it's injurious to human health. It goes into the air and it injures people, including the plaintiffs, and therefore we have claims in negligence and nuisance.

If you go to 383, the learned Judge on appeal struck out the nuisance claims, but not the negligence claims, and so there was an appeal against the negligence claims.

Go to the next paragraph down. These three Judges said, penultimate paragraph: "So far as concerns nuisance, we have difficulty in seeing how the question could arise … But, however that may be, we agree with the view [that] 'I fail to see how on the facts pleaded the defendants can be said to have created or licensed a public nuisance.' We regard this supposed issue as unarguable." So at least as recently as 1980 public nuisance –

GLAZEBROOK J:

Can we see why?

MR KALDERIMIS:

Well, because nuisance wasn't appealed that's just dealt with in passing, so I accept it's cursory.

KÓS J:

It's fairly obiterish. It's sweeping.

MR KALDERIMIS:

Yes, and I'm not suggesting anything other, your Honour. I'm –

KÓS J:

What was the reasoning in the first instance?

MR KALDERIMIS:

The reasoning in the first instance is that it was just too big and beyond the bounds of public nuisance. It was similar to what we're prosecuting here. But the point that I really wanted to make about not so much pure lack of justiciability but about the lack of wisdom and the constitutional element of this Court deliberately leaning in –

GLAZEBROOK J:

Can I see why, why do you say we should read this case when there's no reasoning in it?

WILLIAMS J:

It's to mispoint.

MR KALDERIMIS:

Your Honour, I've dealt with the point that wasn't appealed, so there's no reasoning on that point. They didn't have to address it. I'm getting on to the point that was appealed which is reasoned, and I will answer that question through the case.

What this case helps the Court with is understanding when leaning into an existing statutory scheme creates a constitutional collision and the way that is dealt with is at 386. So you can see at the top of 386 there are regulations at that time that dealt with lead content in petrol, and the defendants said: "Well, we've complied with those regulations."

1040

Now, of course, it's just like this case. There wasn't a specific statutory authorisation to create a public nuisance but there were lead regulations and they were being complied with, and the defendants said, second paragraph, bottom sentence, they haven't exceeded those amounts, and the Court in the next paragraph says, well, that's not a statutory defence but it is very relevant to considering the extant claim here, which was only negligence, and in the third paragraph from the bottom the Court says, well, it's not for us to express a view as to whether the Secretary of State was right or wrong, and when we come to 387 we see the gravamen of the case, last three paragraphs, last perhaps four paragraphs: "… we are unable to see how a court could hold that a reasonable person," from the defendant's perspective –

WILLIAMS J:

Hold on, hold it. I see, yes: "In these circumstances"?

MR KALDERIMIS:

Yes: "In these circumstances," thank you – "… had failed in his [negligence] duty" by simply abiding by the laws that were in place. "This is not to say," next paragraph, that the Courts are bound to hold that you can't be negligent if you comply with regulations, and then there was this example which we cite in our submissions. Imagine the speed limit for motor vehicles in built-up areas is 30 miles per hour. It can't be that someone is per se negligent simply for driving at that speed limit. If you're going to find someone to be negligent it's got to be on a less, in my words, abstracted basis. It's got to be something about the particular way they are driving, because if you go to the next paragraph: "If Parliament had provided by statute" that the maximum speed was 30, it wouldn't be right for a court to hold it was per se negligent for anyone to drive at 20, yet that's what the plaintiffs in substance and effect are inviting the Courts to do. Skip a sentence: "The courts would necessarily be, in effect, laying down a permissible limit … of universal application." That's my point about regulation, not adjudication.

WINKELMANN CJ:

It's distinguishable on the facts, though, isn't it, because there's no regulation of the levels of emission of greenhouse gases, no clear limits?

WILLIAMS J:

Well, we're going to get to that.

MR KALDERIMIS:

Well, we say there is through the ETS system.

WINKELMANN CJ:

Limits per – on individual?

MR KALDERIMIS:

Yes, we say individual emitters, there are different classes of emissions that are regulated and we say that's exactly the situation.

And we come down to here: "The permissible limit ordained by the Courts, … would be different from, and inconsistent with, the permissible limit prescribed by Parliament." That would be a constitutional anomaly which would be wholly unacceptable. "The authority of Parliament must prevail. Where Parliament has decided a matter of general policy, the Courts cannot properly be asked to make decisions, by way of litigation under the adversary procedure, the effect of which would, or might, be that the Courts would lay down, and require to be enforced with the authority of the Courts a different and inconsistent policy and that's –

WILLIAMS J:

There's plenty of authority in the opposite direction at the same level and occasionally even higher. The problem is the underlying problem is this too big and yucky or not and then judges wrap reasons around those things that stick in the context but we can't get beyond the basic point is this just too big, and really the 30 miles per hour is a very bad example that they've put because it's not – it's a maximum limit. It's not actually a target in terms of what you do –

WILLIAMS J:

Well –

MR KALDERIMIS:

Well, I don't accept –

GLAZEBROOKJ:

Well no, but I mean if you said well you can't – you have to drive at 20 in a built up area but you may well say you have to be careful and drive at a lower speed if the conditions apply and that would be something that you would say and maybe in many built up areas it would be negligent to do it because kids can run out in front of you and you can't stop in time. So it's a bad example but it may be it's just a bad example in that case.

WILLIAMS J:

Well the point made is that per se negligence at 20 –

GLAZEBROOK J:

Exactly.

WILLIAMS J:

– is not the – you say that makes the point that the case is in fact specific enough –

MR KALDERIMIS:

Yes.

WILLIAMS J:

– because we don't have any children running out onto the road.

MR KALDERIMIS:

That's exactly right. So if we take your example your Honour two days ago of the Mississippi River. This is not just a case for Mississippi River. This is a case really about all the rivers and so you could see it as whether the problem is too big. I see it myself and urge the Court to see it as a problem of insufficient

narrative, insufficient connection, insufficient grip for the adjudicative backward looking system of tort to grapple with, but either way there is very little foothold for the Court to stand on as it ends up being drawn into making what we say is general policy and if I can make one more point because I will hand over shortly and just explain how this fits with the remaining points in the road map.

Really the last important point apart from the ones I will come to to conclude, but the last general point of discussion is my learned friend has said don't worry. You're seizing this territory in a sense to decide how quickly emissions have to go down from these emitters which by proxy is for all emitters, but you won't have to do anything because the injunction will be suspended and the difficulties of our claim which might have arisen if we were seeking damages don't arise.

Now the way the claim is framed means that can't be right because the primary relief sought in this claim is an injunction requiring these respondents to reduce their emissions in line with what are called global reduction targets, the global minimum reductions and it must be the case that under this claim a respondent could come to court and say, well I don't think it's appropriate for me to be under a suspended injunction any longer for I have met my fair share of the alleged global reduction targets. Must be possible for them to say that. If they come to the Court and say that by what rights will the Court decide whether these respondents, or that respondent, has actually met its fair share of the global reduction targets? What methodology will the Courts use? How will the Courts decide whether emissions are offset? Will they use a net/net or a gross/net methodology? How will the Courts deal with all of these questions that have been deal with through the statutory system?

WINKLEMANN CJ:

Just before you sit down Mr Kalderimis, two things. *Hines* is a very important case for you in terms of thinking, the analytical framework you've applied isn't it really?

MR KALDERIMIS:

Yes. That is true.

WINKELMANN CJ:

Yes, and the second thing is you've expressed yourself a lot I think as if we are the Court hearing the substantive proceeding rather than dealing with the issue of strike-out. So what do you say about the fact we're at the strike-out threshold because what the appellants say is that it may be that this is an unusual case but really it's the first time the Courts have been asked to grapple in a significant way with global change – a global climate change and with the applicability of the law of torts and it should grapple with that against the facts as opposed to various hypothetical scenarios the sort you've just run out?

MR KALDERIMIS:

I say it is truly a case for strike-out because the issue that arises is not one about facts. It is one about principle. Not the principle of whether any tort claim could work but the principle of whether tort creates rights and duties effectively for all against all with the Court then having on a fact by fact basis in each trial or commission of inquiry to work out where the lines are to be drawn and that is why this case must be struck out because it tries to eat the elephant in one bit your Honour, not toe by toe.

WILLIAMS J:

The toes are the chewiest bits though. I'd eat those last.

MR KALDERIMIS:

Maybe that's right. So just to conclude, I don't need to say anything further about the points going down the page save that in relation to 0.6 we do not accept we are dumbing down tikanga and that with respect does not do justice to the thought and the breadth of the team that has contributed to the respondents' submissions. What we are saying about tikanga is not that it's always collective but that one expression of tikanga as an overall system of law can be governmental and we say that some forms of rāhui are truly governmental. Other forms might not be but what is sought here is not really the looking back creation of atomised legal rights and responsibilities between

individual people. It is the choice as to how we move forward and so we say tikanga doesn't assist because it leaves us with that same division.

1050

GLAZEBROOK J:

Can I just check on this looking back because normally the Courts are looking back but with injunctions that are stopping people doing things it's a stopping of a continuation and I'm not saying – I'm just trying to understand whether that is actually what tort is always doing. Often it will be.

MR KALDERIMIS:

We say tort has to even when it issues an injunction it has to look backwards to decide whether a right has been breached. So an interim injunction can be granted –

GLAZEBROOK J:

Or will be breached?

MR KALDERIMIS:

Well an interim injunction can be granted where a right may be breached.

GLAZEBROOK J:

Yes.

MR KALDERIMIS:

If you're simply talking about stopping future harm you have to find an actual infringement of a right, so you could find natural infringement –

GLAZEBROOK J:

Oh, I know, I understand. So you're not really – you do accept that if there's a right you can make sure that it's not breached in the future –

MR KALDERIMIS:

In the future, yes, of course.

GLAZEBROOK J:

Yes. Okay. That's fine.

MR KALDERIMIS:

No difficulty with that your Honour. In paragraph 8 what we say is that paragraph from *Re Spectrum Plus (in liquidation)* [2005] UKHL 41, [2005] 2 AC 680 which I might just bring up on the screen is very important. That is Lord Nicholls dealing with the question of whether you can have prospective rulings but saying at paragraph 33 something very significant about how, this is 1655, the common law develops. 1655, and what he says there is that the development of the common law, of course it's usually marginal, some cases bigger like *Donoghue v Stevenson* but: "In all cases development of the common law, as a response to changed conditions, does not come like a bolt out of a clear sky." And we say there are too many differences between this claim in reality and tort law as it has existed to date for that not to be engaged.

In relation to paragraph 9 I simply ask your Honours to note that although this claim is pleaded by using the phrase "material" there is a material contribution, when you look at paragraphs 62 and 81 and my learned friend's synopsis at 175 to 177 you can see that there's a certain artifice in that pleading. It's not alleged this one extra ton of CO_2 is causing material damage that we've heard from the bar. What is actually alleged is that the harm to Mr Smith will be reduced not by these defendants stopping but by what I would call the butterfly or the snowball effect of this case creating waves such that other defendants around the world will stop which is an implicit concession that these defendants are not creating material harm. So that's the true basis on which this claim has to be assessed for the purposes of strike-out and secondly this claim alleges things about what Parliament will or won't do and about what will happen in the future. They are not present material facts for the purposes of strike-out –

WINKELMANN CJ:

Sounds like the rule of law Mr Kalderimis. I said it sounds like the rule of law.

MR KALDERIMIS:

Mmm.

WINKELMANN CJ:

Others around the world complying with court rulings.

MR KALDERIMIS:

Well, sounds not so much complying with court rulings that bind them but it's more like I'd say the rule of fashion that we would have a –

WILLIAMS J:

Other judges catching on?

MR KALDERIMIS:

Other judges catching on if indeed cases like *Milieudefensie* survive to be caught on with.

The final thing I just wanted to come down to and say a few words about and then I promise I will sit down is paragraph 10. Now I said at the end of yesterday I'd come to *Fairchild*. I come to *Fairchild* now. I want to say a few salutary words about *Fairchild*. Now your Honours have all read the case. I know that her Honour Justice Glazebrook's very closely familiar with it because of the *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340 decision that deals with *Fairchild* and the stream of cases after it, *Barker v Corus UK Ltd* [2006] UKHL 20, [2006] 2 AC 572, *Sienkiewicz v Greif.* What that case involved was, as Lord Hoffmann put it in his slightly rueful reflection, which we have hyperlinked in that last bullet point, which is a reflection in the **Festschrift** to Lord Rodger was a deliberate desire, and willingness at that time, to as Lord Hoffmann put it to take a nibble out of the but for test because it seemed just to do so. In the case of mesothelioma where you couldn't prove which asbestos fibre had truly caused the loss, what Lord Hoffmann says is we knew that in trying to exhume the *McGhee v National Coal Board* [1973] 1 WLR 1 case we were engaging in a crude equiparation between materially increasing the risk which is what the *Fairchild* doctrine was and materially contributing to something which is what the *Bonnington Castings*

Ltd v Wardlaw [1956] AC 613 case had said and they knew that that was a bit of artful reasoning that didn't provide a very secure foundation but it just seemed right at the time and what Lord Hoffman says looking back is that he should have left it to Parliament. Why? Well he says we decided *Fairchild* and we thought we'd done with it but then *Barker* and *Corus* came along and it seemed to us wholly unfair that all of these defendants even though they'd contributed but a fraction should be liable on a joint and several basis, so we created a new rule that said that they should only be liable for their proportionate contribution. But then that raised a question as to whether this was a wholly new tort which is what Lord Hoffmann thought or whether there were other ways of explaining it which is what some other judges thought or whether that didn't make any sense at all, which is what still some other judges thought and it all got reversed by Parliament anyway. And we say that the salutary lesson here is that once this Court eats the elephant using public nuisance all of these difficulties remain downstream and you can give the elephant back at that point and that the wisest course here although it does not feel like the easiest course is to recognise with wisdom and foresight and judgement, which all of the judges of our top court have, much more than I do, where the true limits of deciding disputes between parties truly lie because if it's not determined now it will have to be determined later and it will be more painful at that point, and I'm grateful your Honours for your time and attention. Unless you have any further questions for me I'll pass on to Ms Swan.

ELLEN FRANCE J:

Sorry, can I just ask one thing about *Hines*. Would you that that's more relevant to the appropriateness of the relief sought?

MR KALDERIMIS:

Well, *Hines*, let me just go to it –

ELLEN FRANCE J:

I say that because it's really saying in the context of whether to develop a rule about undercover witnesses the Court's getting involved in social policy-type issues and there's the question about the interplay with the statutory scheme –

MR KALDERIMIS:

Yes.

ELLEN FRANCE J:

– but I'm not sure that necessarily has an impact beyond the nature of the relief sought here.

MR KALDERIMIS:

I agree with that your Honour, that *Hines* is there as guidance and inspiration. It's not a rule of law for the creation or non-creation or extension or non-extension of a tort. We say the reason why this Court should not extend the torts in the way sought is that it is not in fact adjudicating on disputes but it will pull itself into that same territory that *Hines* talks about of then having to make policy in effect on the hoof and determine between all of these classes and do all of the line drawing down the track. So *Hines* your Honour I accept is there as a marker of wisdom rather than as a tort case itself.

WILLIAMS J:

There are some areas where Parliament would actually prefer the Courts to deal with the difficult problem and they be forced to respond to it. Lots of areas, some of which I'm quite familiar with.

MR KALDERIMIS:

There are, I submit this is not one of them and I ask you to listen carefully to Ms Swan's submissions as she tries to explain that.

WILLIAMS J:

Yes. All right.

WINKELMANN CJ:

It's certainly what the appellants have said though isn't it? They've said that this is the place which – where parties can put their scientific and complex evidence and have reasoned decisions which is not necessarily what political process produces. Well it certainly doesn't produce reasons –

MR KALDERIMIS:

And it's submitted that we come right the way back then to *Fuller*. We say that the reasons decisions have to take all sorts of polycentric issues about equity, about efficiency, about who bears what into account and it becomes not an adjudicative process about rights and duties. It becomes institutional choice.

WINKELMANN CJ:

Well actually probably your response could be more along the lines of *American Electric Power* wouldn't it which is in fact it's beyond our competence to do that.

MR KALDERIMIS:

That is a part of it too.

WINKELMANN CJ:

All right.

MR KALDERIMIS:

Thank you your Honours.

1100

WINKELMANN CJ:

So, Ms Swan, perhaps you can remind us exactly what you're covering?

MS SWAN:

Thank you your Honour. Tēnā koutou ngā Kaiwhakawā. Mr Kalderimis has referenced the political and regulatory context relevant to the assessment of the alleged duties in tort, and here that context reveals an extensive legislative collective action response to a globally and collectively caused threat. So for my next 30 minutes I will cover first, the international consensus on emissions mitigation policy design from the IPCC reports, which we've heard a lot about in terms of the science, but not about what the IPCC reports say in terms of policy design on litigation and second, the legislative scheme, which again we've heard a lot about from a higher level, but its critical for this decision that

the Court is well apprised of how and why the Climate Change Response Act is more than just the regulatory framework that it has been made out to be, and the relevance of the expert advice of the Climate Change Commission, which Mr Kalderimis already went very briefly too, which draws on those IPCC reports and advises on the appropriate emission reduction pathways for New Zealand in the particular economic social and cultural context, and this really goes to the importance of this Court seeing and understanding not only the framework and the regime, but the unfolding implementation of that regime which is very much alive.

Now the relevance of this material, of course, is to see, as I think Justice Williams put it the other day, whether Parliament has actually spoken in this area, and specifically that a duty in tort would be cutting directly across that regime, which is contrary to the submissions that we've heard to date, and that the very existence and implementation of this Climate Change Response Act, and everything that goes along with it, should give the Court pause for thought when assessing whether or not the tort of public nuisance should exist alongside the statute. Whether or not a duty of care, a negligence should it exist alongside the statute. So the collective response centres on the Climate Change Response Act but it encapsulates our international commitments that are pulled through in that Act, and it also encapsulates an increasing range of connected legislation policy development, and repeated through this material, and from the source of the IPCC reports, is a clear recognition that neither government nor business nor communities can respond to this threat alone, and that the transformational shifts demand these seeping changes to our society, that these are best effective through this, best affected through the expert and iterative policy development that we are starting to see rather than via the Court-led regime.

So what I want to do first, and this picks up from paragraph 13 of our submissions, is just to take you briefly to three IPCC reports, and I'll start at the AR6 Working Group 3 Mitigation of Climate Change Report which is from earlier this year, and this is in the case on appeal at 401.5551, and I'm going to start at page 56.

GLAZEBROOK J:

Sorry, can you just give the name of that again?

MS SWAN:

Yes, it's known as the *Mitigation of Climate Change Report* and it's the third working group report to the 6th assessment report, and it's at case on appeal 401.5551.

GLAZEBROOK J:

Thank you.

MS SWAN:

And at 401.5620 of the case on appeal you can see there in bold at the start of that paragraph: "The transition to a law carbon economy depends on a wide range of closely intertwined drivers and constraints, including policies and technologies where notable advances over the past decade have opened up new and large-scale opportunities for deep decarbonisation, and for alternative development pathways which could deliver multiple social and developmental goals. Drivers for- and constraints on-, low carbon societal transitions comprise," and then they go through the detail, the economic and technological factors, sociopolitical issues, institutional factors and these over the page both drive and inhibit transitions at the same time within and across different scales.

Now if I just go to the bottom of this page 5621 you can see again in bold, "Achieving the global transition to a low-carbon, climate-resilient and sustainable world requires purposeful and increasingly coordinated planning and decisions at many scales of government including local, subnational, national and global levels (high confidence)."

If we just go over the page for one final quote from this one here. "The governance required to address climate change has to navigate power, political, economic, and social dynamics at all levels of decision making."

GLAZEBROOK J:

I can't quite see that. Oh, I see. Thank you.

MS SWAN:

That's just at the first line there. So the IPCC is recognising, this is April this year, the need for this economy-wide and profound transformation to a low carbon economy. The IPCC recognises that the change must be as rapid as possible, but it is not the abrupt injunction of a particular set of emissions that is determined out of context with everything else that needs to happen. If we just go over to page 5554 you can see here in the first bullet point there half way down, "Literature highlights that climate change mitigation action designed and conducted in the context of sustainable development, equity, and poverty eradication, and rooted in the development aspirations of the societies within which they take place, will be more acceptable, durable and effective."

So there are significant adverse and distributional effects of taking the wrong actions at the wrong time without the collective and system-wide approach that the IPCC is calling for here, and those impacts and negative impacts can be for the transformation itself, and that would be the worst outcome of this case –

WILLIAMS J:

Isn't it also saying everyone's got their part to play?

MS SWAN:

Exactly. And that that part must be played in a –

WILLIAMS J:

That's including the judiciary.

MS SWAN:

In a co-ordinated fashion. So if I just take you to the –

WINKELMANN CJ:

So your emphasis in this material is on the need for co-ordination?

MS SWAN:

It's on the co-ordination, it's on the scale and economy-wide, society-wide transition that is needed and the benefits of doing it in that way, and if we can look at the –

WILLIAMS J:

I guess the problem, I mean I see the point but –

MS SWAN:

Yes.

WILLIAMS J:

– it tends to be suggesting that we wait until there's one puppet master across the whole system who can – and we all know systems don't work like that and aren't they really saying that the players in the system have to be fully aware of other players while they play their part, all of them?

MS SWAN:

I think that the best way to answer that is to look at exactly that point dealt with by the Climate Change Commission in the New Zealand context your Honour. So if I just skip through, just before I leave the IPCC reports I will come on to that. If we just go to case on appeal 301.0254. This is the fifth *Synthesis* report from 2014. You can see here and this just gives the scale of what the IPCC has been considering. This is the reference to these co-benefits and side-effects that you can have from taking one action out of context of other actions that are needed, and I'm not going to go through all of this but I would just ask you to look at this page and then over to page 0374 of the case on appeal –

WILLIAMS J:

This is the New Zealand Climate Commission?

MS SWAN:

So this is the IPCC report I said I'd just finish on before I go to the Commission. So 0374 of the case, I'll just give for your record. This is just a snapshot of a table of all of the different types of policies that the IPCC is recognising and actions that can be taken to take to mitigate emissions across all of these different sectors and the IPCC is recognising the benefits of decisions and then the potential adverse impacts if these are not properly co-ordinated. And that you can see again just for the record at 0379 of the case on appeal.

1110

So what the IPCC is recognising is that we need deep societal transformation and systemic change and we need to bring society along with us as we do that to have the best shot at making the scale of transformation that we're going to need. So if I look at the New Zealand context, how we have pulled this through into the Climate Change Response Act and the policy underlying that, you've been old repeatedly in this hearing that our legislation has not, cannot and will not do enough, and this Court has been called upon to act because the Climate Change Response Act has just been put as a gesture towards our international obligations, or a framework that is not actually going to get us to 1.5 degrees. In our submission to the contrary respectfully. The Climate Change Response Act is enabling the collective action response that is needed in the New Zealand context, and the relevance of this is that if this Court is being asked to effectively replace that scheme with its own, then it's critical to appreciate the depth and breadth of that scheme and what is happening.

So what I want to do is look very briefly at the scheme itself, and I'm doing this in the 20 minutes that remain. The Climate Change Response Act, and we'll go to it shortly at appellant's authorities tab 1. The Act itself establishes a formalised policy development process to deal with emissions reduction. It's led by science, it's connected to our international obligations, and it has a major role of employing independent scientific advice, and it's designed, and this is written into the text of the legislation itself, to achieve an orderly transparent and clearly signalled transformation of the economy, and I cannot emphasise more how important that is, that the orderly, transparent and clearly signalled transformation. The importance for our economy and our society and

the vulnerable groups in our society and the importance for the success of the transformation itself. So the Climate Change Response Act, and you will be aware of this, it sets out at the start its target that are designed and collected directly to the IPCC report, and if you want to see where that comes from, it comes from the IPCC's 2018 report, which is at LCANZI's authorities, tab 16, I won't go to now, but that's where the targets in the Act are actually drawn from, and that was recognised in the first reading of the Act, which is at the respondents authorities at 69. But the important thing it then does is that it says how we're going to get to this goal, and this is where we see the five yearly economy wide mandatory emissions budgets that are required by the Act.

Now these have to be set by the Minister on the advice of the Climate Change Commissioner, we've seen that process unfold in the last 18 months in particular, and what I wanted to focus on is section 5W of the Act, which states that the purpose of this subpart of the Act, which is related to setting the emissions budgets, is with a view to meeting the 2050 target, contributing to the Paris impact, and to allow those budgets to be met domestically, and that allows greater predictability for all t hose affected by giving advance information. So what we now have in place are the first three emissions budgets, which take us through the first three five-year periods, and they are reducing emissions, they are governing emissions across the economy in five year chunks, and those budgets have been designed to take us down to the net zero goal at the end of it.

WILLIAMS J:

Except for methane?

MR SWAN:

Methane has a separate target and it subject to a separate process, but there is a backup in the Act –

WILLIAMS J:

It kicks in later, does it?

MS SWAN:

Yes, so there is a backup in the Act that it gets pulled into the ETS by the end of 2024 if there isn't another policy developed, and that's where there is a huge amount of focus, as you know, at the moment your Honour. So the budgets themselves are set on the advice of the Climate Change Commission, and I want to look at section 5M of the Act, which demonstrates that the Commission is not just there to give advice on the science. The Commission is required to consider in section M, not only the current available scientific knowledge, and the technology, but also the likely economic effects of budgets, the social, cultural, environmental and ecological circumstances, the distribution of cost benefits and risks between generations, the Crown-Māori relationship, te ao Māori, specific effects on iwi and Māori and then responses under the Paris Agreement. So the Commission has, and we saw this in the extensive work that they did, it has an unenviable role in terms of assessing all of that material and then presenting achievable pathways that will get New Zealand to the 1.5 degree carbon net zero target. So what we then saw was the Commission actually delivering emissions budgets that, it was pathways that took us to the goals in the, and I want to go to RA76, which is the Commission's advice –

KÓS J:

As you do, Ms Swan, I'm wondering as you're doing this and describing the legislation for us, whether this really precludes a duty, a lawful duty, or whether it's simply more relevant a question of what remedy might be granted, and some of these points go towards the proposition that perhaps the Court's response might be no more than a declaration, and the actual hard work would have to be done thereafter. So how does this preclude a duty?

MS SWAN:

Your Honour, the relevance of the statutory scheme is particularly because it demonstrates how the Court is, the appellant is seeking to draw the Courts into this competing regulatory role, and that is because what is being asked is seeking to replace I would say at least five aspects of what the Act covers. So it's seeking to replace the decision-maker itself under the Act, which is the Minister on the extensive advice of the Commission.

WINKELMANN CJ:

Well, that's no statement. You mean it might have a small overlap.

WILLIAMS J:

It depends.

MS SWAN:

Well it depends how far this Court –

WILLIAMS J:

On the remedy.

MS SWAN:

Exactly, it depends on how far the Court is willing to go, that is what the appellant is asking the Court to do. It's seeking to put the Court into that space. It's seeking to –

KÓS J:

I don't see a privative clause here.

MS SWAN:

Sorry Sir?

KÓS J:

I don't see a privative clause in the legislation. How is our role excluded?

MS SWAN:

That is correct Sir. Perhaps if we just look briefly at the –

WINKELMANN CJ:

Well I did interrupt you though. You were just saying seeking to replace the Commissioner as a decision-maker.

MS SWAN:

Yes, so I'll come to the point on the privative clause. So the second aspect that it's seeking to replace is the process of decision-making, and the way it's doing that is because the relief that is sought is seeking to prohibit certain activities. It's seeking to stop these activities. When these activities have been factored in through the Commission's work, and through the work of government, and been expressly allowed to continue as part of the overall shift, including by the ETS, and one way of drawing that example out is to go to the Commission's advice, which Mr Kalderimis went to before. If we can just look at page 3013 at paragraph 101. "The transition can be economically affordable and socially acceptable. To achieve this it must be well-paced, well-planned, well-signalled and co-designed." Now that's exactly what the IPCC reports are saying. How has the Commission actually done this? If we just go down to 3059.

WILLIAMS J:

I don't think you have to convince us of the Commission's doing an incredibly complex and, you know, multi-faceted balancing exercise et cetera. You don't need to blow minutes on this, we get that.

MS SWAN:

Yes, and all I would say Sir is that the Commission is recognising the risk of moving too slowly and too quickly.

WILLIAMS J:

Isn't the elephant in the room the RMA and public nuisance. No one is suggesting the RMA displaces public nuisance. Why does this displace public nuisance?

MS SWAN:

It's because, Sir, when you look at the scale of what the Act is trying to achieve, and the scale of what the Commission and the Minister have had to do to put in place the budgets et cetera, that are now filling up in place –

1120

WILLIAMS J:

That's the same scale as the RMA. It runs the entire national environment taking into account sustainable management, economic. It's exactly the same mantra. No one suggests that takes public nuisance away.

MS SWAN:

With respect Sir, the, what is being signalled through the Climate Change Response Act and the policy underlying that affects every single part of the economy and the way we are going to get there –

WILLIAMS J:

So does the RMA. You can't do activities that aren't authorised by it.

MS SWAN:

Well perhaps it's useful to look at what we do have signalled in the Climate Change Response Act, and if we look at section 5ZM of that Act, this is where I would say we do have some guidance by ZM, for Mary, that's –

WILLIAMS J:

The privative clause or semi-privative clause.

MS SWAN:

This is the clause which puts in place the ability for the Court to make a declaration if either a target or a particular emissions budget is not met and in the respondent's submission, and there is a clear process that then has to be followed with the Minister responding to the declaration that the Court has made and in the respondent's submission this is the more appropriate constitutional conversation that the Court can have with government in terms of critiquing why or being concerned by a particular target or budget not being met.

Similarly the Act itself has the accountability, has accountability built in through the role of the Commission, so the Commissioner has a particular additional role to monitor and advise on the emissions reduction activity that is happening and it is those accounts of democratic accountability measures which are in fact

hardwired into this system that the Court needs to be cognisant of when being asked to set up an additional parallel duty –

WILLIAMS J:

What do you make of 5ZN then? N for November?

MS SWAN:

Yes, 5ZN exactly. So this allows the power, a particular body when it is exercising its duties to take into account the target, the budget, the plan, so this is empowering government, institutions of government to take these into account –

WILLIAMS J:

Why institutions of government?

MS SWAN:

Who are you additionally suggesting your Honour?

WILLIAMS J:

Well why not judges working with the common law?

MS SWAN:

That is so your Honour but the – you can't see 5ZN on its own without recognising 5ZM which comes before it and which is inviting that conversation –

WILLIAMS J.

Well you see you could argue that 5ZN is, the point is that 5ZN is very narrowly crafted to the budgets themselves but says that despite the keep of the grass where budgets are clause you can take into account the wider issues of global warming if you're exercising a public power when you're exercising that power. I wonder whether this really, this makes the point that public nuisance survives this doesn't it?

MS SWAN:

Well with respect Sir, the section 5ZN allows the body to take account the target, the budget and the plan in the exercise of its duties –

WILLIAMS J:
So obviously –

MS SWAN:
– and that is exactly what we would say this Court should be taking into account when considering whether it's appropriate for it to extend into, extend public nuisance and talked nuisance as it's been, public nuisance and negligence as it's being asked to do.

WILLIAMS J:
All right.

MS SWAN:
But what I, I'm very mindful of time Sir and what I would like to –

WILLIAMS J:
This is really important though.

MS SWAN:
I agree Sir. I would like to look at very briefly the emissions education plan because that is the critical document that has come out from government this year in terms of how this is being done. Now I want to look at a couple of examples. If we just go to RA63. This is the plan whereby government is taking the Commission's advice and explaining how it is going to meet – how it's going to take on board that advice in terms of actually deciding the budgets that were set and the way it's going to get there and because of time I'm not going to go through the detail of it but if we can just look at 2278 in the bottom right-hand corner. These are just a summary of how this plan is focused on getting the settings right across economy. That's at 2278, and then over to 2281. The box in green you can look at in slower time, are the broad settings that the emissions reduction plan is focused on across the economy, and then here at 2281 are

the sector plans where government is taking each sector and deciding what it needs to do sector by sector, and you can see in the middle there of that page is the reference. If we just zoom in to the boiler example in the energy sector in the middle of the page there. One of the policy decisions that's been taken in the emissions reduction plan is the banning of the new low and medium temperature coal boilers and phasing out existing ones by 2027. Now that is exactly what this Court is being asked to do in the claim in terms of the relief pleaded against Fonterra, and to go back to the *Budden* example, this is the kind of concern we have with the Court being asked to step into fashioning remedies that directly engage with policy decisions that government has taken in the context of this very developed legislative scheme –

GLAZEBROOK J:

So is the submission that anything we did would be contrary to this?

MS SWAN:

It would conflict with it your Honour.

GLAZEBROOK J:

So how does it conflict with it?

MS SWAN:

So this policy decision is banning certain boilers at the moment and then requiring a phase out by a certain date. Parliament could have equally decided to ban a different type of boiler by a certain date and by a different date and what the relief here is asking is the immediate cessation of Fonterra's activities in terms of the boilers it's running, the same boilers that are being talked about here or in the alternative relief it's a pleaded reduction of emissions by certain times, by certain dates but you can just see the conflict that is being requested here –

KÓS J:

Well I think that's extravagant. I mean that ends up being a trial issue as to what relief was granted.

MS SWAN:

This particular point would be a trial issue Sir but it demonstrates the types of assessments that the Court is being asked to make and it demonstrates how the Court would be pulled into all of this policy development that is happening within government and that is the choice that the Court has –

KÓS J:

Well it may do but the Court may resist that. It may simply say it's not our function to fashion relief at such a specific level. We will declare, this is the trial court, not this Court, we will declare that Fonterra's actions amount – are sufficiently grave that they are harming Mr Smith and that act is unlawful. That might be as far as it goes because it might just be too hard to do anymore.

MS SWAN:

And the submission from the respondent Sir would be that that is, that that demonstrates how carefully the Court needs to think before making such a declaration because the impact of that on these respondents and on the economy generally is going to be incredibly significant because the Court is effectively saying there is a declaration as to the unlawfulness of the conduct but without explaining how it's going to –

WILLIAMS J:

That's exactly the point. The Court is going to hear that isn't it? Because there'll be excellent evidence from your clients and their experts on precisely that point. Evidence that we don't have.

MS SWAN:

That's correct Sir, but it's the concern that you would be asked to hear that evidence and that evidence would be conflicting with the regulatory regime which is underway which is the concern from a constitutional perspective.

WILLIAMS J:

I've got to say I don't see this and I'm saying this with, you know, genuine care, because you run into exactly the same tension with RMA enforcement

proceedings or with public nuisance cases in which a consented activity is being undertaken but is having noxious effects in which compliance with the terms of a consent is going to be relevant to any remedy but won't be fatal and certainly won't be seen as a constitutional conflict.

MS SWAN:

Mmm.

WILLIAMS JJ:

Why is this any different?

MS SWAN:

Well what we are asking the Court to do is to be cognisant of the –

WINKELMANN CJ:

Can I just... Is a possible answer that this is regulating, this is regulation which is aimed at addressing the very harm that the claim is purporting to address? So it's different say to a situation –

1130

WILLIAMS J:

I get that except that's exactly what RMA does, precisely, when it says you can only make noise up to a particular level and you can only discharge air particles to a particular level and so on and so forth. Still public nuisance exists in the common law and is occasionally sued upon. Compliance with the consent conditions is one of the answers. Sometimes it's a complete answer. Sometimes it's not. No one ever says, well we've got a constitutional problem here judge –

MS SWAN:

Well respectfully Sir, the orders that are being made in that context are in relation to a particular entity. They're not being made –

WILLIAMS J:

Yes, well a particular coal boiler –

MS SWAN:

Well, yes but they're not being made in a way that could impact all of society. So there's an ability for the Court to assess what is before it and make an order that will remedy the particular situation that's being complained of –

WILLIAMS J:

So that takes you back to Mr Kalderimis' argument –

MS SWAN:

To Mr Kalderimis' submissions that that is broader –

WILLIAMS J:

But it's not a constitutional issue. That's what I'm trying to get you to see the point I'm putting to you. Doesn't seem to me to be a constitutional issue at all. It might be an adjudicative issue but it's not – this takes the oxygen away from the Courts because that would be the case with so many areas that are regulated in which the common law co-exists, if you're right.

MS SWAN:

Well yes Sir but the dicta we can see from so many courts already, and they're in the roadmap that Mr Kalderimis has taken you to, is that the Courts have not been willing in a common law context to take on the scale of the problem that this Court is being asked to –

WILLIAMS J:

Sure. We've heard lots of argument about that.

MS SWAN:

That's correct.

GLAZEBROOK J:

So it really does come down really not to abstraction and not to legislation but a combination of the two that the only way this global problem and a problem

that affects all of us and that we cause to lesser or greater degree is because I'm sorry I'm not buying into the rhetoric of it's all our problem and, therefore, the emitters are not the ones who are more culpable, but that it's just too big to deal with in the Courts and that there would be clashes with the existing scheme that's calibrated to be giving that global response if that's –

MS SWAN:

That's correct Ma'am, and it's not only the clashes but it's the potential adverse impact on the transformation itself –

GLAZEBROOK J:

Yes, of course, yes.

MS SWAN:

– that is at risk here.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.53 AM

MS SWAN:

I just have two short observations before I hand over to my learned friend Mr Smith. The first in relation to the RMA and the discussion with Justice Williams, the in short submission from the respondents there is that the RMA is dealing with activities rather than systems, and it really is –

GLAZEBROOK J:

Sorry?

MS SWAN:

Dealing with activities rather than systems, from an enforcement perspective, and it is those systems which are the focus of this case. The second short point is that Justice Glazebrook had made the point that you weren't buying into the concept that larger emitters are not more responsible, an important feature of the scheme that I didn't touch on, and will touch on very briefly, is of course the

ETS, which is the Emissions Trading Scheme, which is regulating these large emitters at a particular point in the supply chain that Parliament has identified as appropriate, and the essence of what the ETS does is it requires the entity to surrender New Zealand units based on the production that it is particularly responsible for, and so an obligation is created under statute for that emitter to surrender the equivalent number of units that are required to meet the obligation that arises under the Emissions Trading Scheme, and what is being sought here is that these respondents are required to make specific Court-imposed reductions, which cuts across that existing structure of them having to meet emissions, meet their obligations under the ETS, and that is what the Court needs to be cognisant of as it considers whether or not to step into that zone.

At the risk, just being conscious of time your Honours, I will, unless there are any further questions, stop there and pass to Mr Smith who will discuss the public nuisance aspects in detail.

WINKELMANN CJ:
Thank you Ms Swan.

MR SMITH ADDRESSES THE COURT – MICROPHONE

MR SMITH:
May it please the Court. Your Honours, lacking a PhD I'm nonetheless tasked with providing a response to my friend on public nuisance. I propose to do that in five points. I propose to say something about the orthodoxy of the appellant's pleaded claim first. Second, I will address your Honours on public rights, including whether there is, as we say, an independent unlawfulness requirement. Third, causation and related to that, neighbourhood concept. Fourth, the issue of special damages, effectively the plaintiff class.

KÓS J:
Special damage?

MR SMITH:

Special damage, sorry, yes, special, quite right your Honour, and finally the defendant class, and the appellant's claims to limit this. Relief will be addressed by Mr Ladd then subsequently.

WINKELMANN CJ:

So we don't have a road map for you, am I right?

MR SMITH:

You don't. I have speaking notes, which I could make available at lunch, but I don't have a hand up your Honour.

WINKELMANN CJ:

No, that's fine, but the speaking notes would be of assistance.

MR SMITH:

Thank you your Honour.

WILLIAMS J:

It will help me, in terms of my notes, I didn't get down those five points. I'm too slow a typer but if you, as you move through each one, just give me a heading so I can…

MR SMITH:

I will. Apologies your Honour.

WILLIAMS J:

No, that's all right.

MR SMITH:

That probably links to time. So to extent my learned friend Ms Coates' analogy, I will be paddling quite quickly, and so rather than take you to all the cases that one could, I will probably end up giving you more references and reading quotes, without them on the screen, but we'll just see how we go. I'm conscious that you do like to see things on screen and I'll try and do that where that's appropriate. But in terms of the overall time, we think we're on track.

I'll probably take this session, maybe a touch after lunch as well, and then you'll have from my learned friend Mr Ladd on relief, and then the other respondents will address the Court on their particular circumstances.

So first heading, orthodoxy. My friend's submission is that this is an orthodox public nuisance claim and our submissions were perhaps unkindly characterised as manipulating centuries of cases and principles. Obviously enough we have a different view, and we say that what the appellant is seeking is an expansion of public nuisance in a number of key respects. In a sense your Honours have already discussed this with my friend Mr Kalderimis but to try and be more precise about what I meant about that point before going to each point of the elements of the tort, you have been taken to a number of broad statements of principle in various cases. Some of those cases are first instance, some of them are obiter, some of them are of more impressive authority. But they occur in a factual context that we say is quite different from the context that your Honours are faced with in this pleaded claim. If I can make that point by reference to the *Birmingham* case, which your Honours are hopefully by now familiar with. That case, although it's a relator action, is effectively dealt with as a single plaintiff, a wealthy landowner, with established riparian rights. So an established recognised effectively property right. It involved a single defendant, a corporation that controlled and – if I remember my property law from law school correctly – probably owned the effluent that was in his control as it was putting it into the River Tame. Again very –

1200

KÓS J:

I think it was trying to abandon it.

MR SMITH:

It was trying to abandon it. I think that's right Sir. But you have to have property to abandon things, so that's my, and that's really my point. That's different from what we are faced here for the reasons that Mr Kalderimis has really explained.

Thirdly that case involved emanation of a pollutant that the Court found, and this is at 225 of the decision for your Honours' reference but in a passage that you weren't taken to, that prior to the Corporation's activities the stream was previously unpolluted, or at least it was sufficiently unpolluted that cattle could drink from it which is – and people could take water from it, which was effectively what Mr Aldersley liked his tenants to be able to do and possibly did it himself.

KÓS J:
I think that's why the, was it Colney asylum case was referred to because that was not the facts in that case.

MR SMITH:
And I'll come to that Sir, but in terms of a central authority that you've been put to to say this is very orthodox, it's just the same, my simple proposition is that if you just take one of those examples it's different in a number of respects.

And finally in terms of the statutory overlay there, there was a statute authorising the incorporation of the sewerage works but that expressly excluded nuisance and so we don't have the competing complex statutory scheme that my friend Ms Swan has taken you through. And so in a sense there you can understand the attraction of what the judge did in that case. He had a single polluter. The stream was previously unpolluted. It was now polluted and he granted an injunction to stop it. Cause and effect. Now that we say is again very different from this case for reasons that I will come to. Interestingly though on an historical note my friends have given you a number of competing interpretations of the history of that case, all which is very interesting to read particularly if you liked war and economics as sometimes I do, which has a wonderful –

WINKELMANN CJ:
We won't hold that against you.

MR SMITH:

Oh, thank you your Honour. Rosenthal addresses it from a law and economics perspective and says this is a wonderful example of **Coase-ant? (12:02:27)** bargaining because eventually what happened was the landowner got paid off but of course others have different perspectives. What's interesting though is that even in that simple case it took 39 years to resolve and eventually it was resolved by the landowner being paid off, and so Mr Ladd will address you a little bit about the implications of how to think about that from the perspective of relief.

So, of course the respondents accept that the common law responds to new factual situations but we say in doing so, and this is hopefully obvious by this point, that the Court is engaged in a more nuanced judgement than a question of simply identifying broad statements of principle and applying those in a particular case. Public nuisance to the extent that I can persuade your Honours that at least some extension of some elements is required, and I hope that I can, will require the Court to consider whether that expansion is justified and that raises the same issues of policy, of principle and consideration of the legislative scheme that the Court of Appeal was ultimately persuaded by and of which has been addressed to you by Mr Kalderimis and Ms Swan. I won't repeat those because that is old ground at this point.

One point that I do want to make before departing from orthodoxy though, well actually I'm going to be trying to not depart from orthodoxy, but get my point –

WINKELMANN CJ:

We get the drift.

WILLIAMS JJ:

That was very good Mr Smith. I think it's the best one so far.

MR SMITH:

Thank you.

WILLIAMS J:

But Mr Salmon does have a right of reply.

MR SMITH:

He does. I think I've lost your Honour. Many of the public nuisance claims involves resource allocation. So the stream cases are partially about who gets to take what water, and that was based, those riparian rights were based on custom and then a property-based riparian system. The principles developed were being developed to regulate this relatively simple type of water course situation, and in our submission this case, if it's a public nuisance case, is also a decision about how to allocate finite resources, and that links to Ms Swan's position, and we say that that is a question for Parliament rather from this Court. But again that is something that's been covered.

So addressing your Honour on public rights. As I understand the appellant's position it is that they accept that this case doesn't involve a recognised public right by which they mean a right to pass the highway or a right to fish or any of those other rights that have been recognised from time to time. The question for this Court then is whether it is sufficient to establish in public nuisance that the appellant pleads that there has been an interference with life, health, property, comfort or convenience to the public, the second category and the Court of Appeal held that it was contrary to the High Court and I would like to try and persuade your Honours that the Court of Appeal was wrong to do so, and the authority that we start with and say is most helpful for your Honours on this is a recent decision, or relatively recent –

GLAZEBROOK J:

Can I just check how that fits with the river cases.

MR SMITH:

Yes.

GLAZEBROOK J:

What public right was there in the river cases?

MR SMITH:

There is a special – well, it depends on the case your Honour a little bit. Some of the cases are about riparian rights so they're the rights of the adjoining landowner to take water. There is also in English common law, they develop a suggestion that there is a, if you like a recognised public right within the first category –

GLAZEBROOK J:

A what sorry?

MR SMITH:

A recognised public right in what the appellants call the first category of public nuisance to take clean water from streams if it's been clean in the past, and so those cases are not explained by the appellants as I understand their submission as being examples of the second category, this interference with –

GLAZEBROOK J:

I thought they were actually but no point in arguing about that I guess. We'll find out in reply.

WINKELMANN CJ:

Yes. I can see the reply's being prepared as we speak.

GLAZEBROOK J:

I thought they were relying on the right to public health but –

MR SMITH:

Well, so sorry your Honour. I'm – I want to be clear. The appellants are relying on that –

GLAZEBROOK J:

Well that's what I thought, so they're relying on that as the right but you say it's not. It was actually a property right?

MR SMITH:

We say in the elements of property right there is, I mean these are broad judgments and so they also refer to health impacts. I don't deny that but in my submission most of the cases fall in the recognised public rights category. So what I'd like to do is address your Honour about whether it is sufficient, and this is I think the key difference between us and the Court of Appeal and us and the appellants on this question, is whether if you are just claiming interference with rights the general –

GLAZEBROOK J:

So you actually disagree with Mr Kalderimis with the poisonous gas example?

MR SMITH:

You'll have to remind me in the flurry of questions yesterday as to what the question was.

GLAZEBROOK J:

Well he accepted that if a limited number of people were putting poisonous gas into the atmosphere and causing harm to health that that is in a different category in public nuisance and/or negligence could sound.

MR SMITH:

I don't need to disagree with that your Honour.

GLAZEBROOK J:

Al right. Well where's the public right? What public right is there other than being able to have air that you can breathe without being poisoned?

MR SMITH:

I understand your Honour's point. So in our submission those cases or that hypothetical case will either be unlawful involvement, unlawful conduct or it will be unlawful because it involves widespread public – widespread private nuisance and one of the points I'll address your Honour to, hopefully –

KÓS J:

Well it doesn't affect land.

MR SMITH:

Sorry?

KÓS J:

The poisoning cases don't affect land which is the usual indicia of private nuisance.

MR SMITH:

Well they – some – they affect use and enjoyment of land. I mean you can't bring a case in New Zealand simply based on health impacts. ACC bars that. So that case would be brought as a private nuisance case or a public nuisance case because of widespread public nuisance in order to reflect use and enjoyment of land in the sense that you can't use the land because it'll cause health impacts to you.

GLAZEBROOK J:

Well, but on that example it's in the atmosphere and it causes health issues if people breathe it. I don't think it has to be related to the land to say –

WILLIAMS J:

You can't sue in damages for that –

MR SMITH:

Yes.

WILLIAMS J:

Surely you can get an injunction to stop it. The Accident Compensation Act doesn't stop that.

MR SMITH:

I don't disagree with that your Honour. It's just I think we're disagreeing with the way in which you were properly pleading. If I could take –

GLAZEBROOK J:

Well it would be very odd to say it stops my use and enjoyment of the land because I'm going to die because I've breathed bad air.

1210

MR SMITH:

Well, your Honour, most of the private nuisance cases involving atmospheric discharges, including some of the ones that my friends rely on and I will take you to, are public nuisance cases because it does naturally harm use and enjoyment of land. But rather than answer in the hypothetical I'd like to just address the point of principle if I may, and I'd like to take the Court to *In Re Corby Group Litigation* [2008] EWCA Civ 463, which is at tab 26 of the appellant's bundle of authorities.

WINKELMANN CJ:

Sorry, what was that name Mr Smith?

MR SMITH:

It's *In Re Corby Group Litigation*, it's at tab 26 of the appellant's bundle. Does your Honour have that?

WINKELMANN CJ:

Thank you.

MR SMITH:

So if I could take your Honour to paragraph 27 of this case. So this is a decision after *Rimmington* and it's a decision by Lord Justice Dyson for a unanimous Court of Appeal, and the issue in that case was whether damages for personal injury were able to be claimed in public nuisance as opposed to private nuisance. The rule is you can't get damages for personal injury or private nuisance. So in answering that question Lord Justice Dyson articulated what he understood the rule to be and did so in a number of places, but first that is in 27 and I'll take you. The last two lines: "A public nuisance is simply an unlawful act or omission which endangers the life, safety, health, property or

comfort of the public." Similarly then he repeats that same proposition in paragraph 29 about half way down. "The essence of the right that is protected by the crime and tort of public nuisance is the right not to be adversely affected by an unlawful act or omission whose effect is to endanger the life, safety, health… of the public."

Then perhaps in the most clear example in paragraph 30 says: "… it is difficult to see why a person whose life, safety or health has been endangered and adversely affected by an unlawful act or omission and who suffers personal injuries as a result should not be able to recover damages. The purpose of the law which makes it a crime and a tort to do an unlawful act which endangers the life, safety or health of the public is surely to protect the public against the consequences of acts or omissions which do endanger their lives, safety or health."

WINKELMANN CJ:

So that begs the question about whether the acts are unlawful because of its effect, or whether it s a pre-existing unlawful act because –

MR SMITH:

I don't think paragraph 30 does beg the question, with respect, your Honour, because what, the way in which, unless Lord Justice Dyson is engaging in tortology, what he's saying is what makes it a crime and a tort is to do an unlawful act, and if he was just saying –

WILLIAMS J:

But the fact is, it is unlawful to endanger the life of a person, just per se. You'd hope it would be, wouldn't you?

MR SMITH:

Yes.

WILLIAMS J:

So, does it matter?

WINKELMANN CJ:

It doesn't seem tortologist to me, myself, but anyway. It seems tortologist to say it's wrongful, you're a wrongful act.

WILLIAMS J:

I think you'll find it in the Crimes Act.

MR SMITH:

Well that's the other proposition, is that since 1893 in New Zealand the crime of public nuisance has been defined by an independent unlawful act.

WILLIAMS J:

Yes, but we're not talking about that, we're talking about its content. It is a crime to endanger someone else's life without lawful excuse. For example, if you're a soldier engaging in war, et cetera et cetera.

MR SMITH:

I don't have to disagree with that your Honour. All I'm –

WILLIAMS J:

Does it really matter, that's my point.

MR SMITH:

I think it does in the sense that you need to plead an independently unlawful act, and that's not pleaded here, and I don't think it can be pleaded.

WILLIAMS J:

Well then that can be amended but –

MR SMITH:

Well, with respect, I'm not sure it is. I'm not confident that even with the ingenuity of the appellant's, that they would be able to identify what makes this conduct unlawful, that's why they haven't done it to date.

GLAZEBROOK J:

I think they say what makes it unlawful is that it endangers the life. That's effectively what the argument is. So you can't do anything that – because in the poisonous gas it might be in that example that there isn't a statute that says you're not allowed to discharge X, and that's unlawful if you do, because it might be that it was a combination of circumstances that created the particular gas that nobody had thought to say you couldn't do specifically. But by doing it, if it has the effect of endangering life, then you're not allowed to do it. I think that's the argument. I'm not saying – so the unlawful act is the very act of endangerment of public health.

MR SMITH:

I think that the way I would frame that, your Honour, is that for that to be true there would have to be pleaded, and maybe they will say well, it will be pleaded, we'll find out in reply, that there is an independent crime here, not because it's public nuisance, but because it offends some other provision of the Crimes Act, or some other provision of, I don't know, the HSNO Act. Now I doubt –

GLAZEBROOK J:

So it can only be public nuisance if it's expressly prohibited, which in fact the sewerage cases, they were expressly permitted.

MR SMITH:

No, no they weren't your Honour. In the sewerage cases there was nuisance clauses and that legislation that said you can incorporate to build sewerage –

GLAZEBROOK J:

I understand that but you're saying you have to have an independent unlawful act, it can't just be nuisance, so it becomes difficult when you've got an actual permitted activity to say you've got an independent unlawful act, unless I'm misunderstanding you?

MR SMITH:

I think I'm probably not being clear your Honour. My submission, based on Lord Justice Dyson's approach, based on the New Zealand codification

approach, which we say picks up the *Spencer* description of the tort in crime of public nuisance that is found, still the foundation in *Rimmington*, is that there are, if you like, two categories of public nuisance. The first category is where there is interference with a recognised right. The second category is whether there is no interference with a recognised right, but there is an interference with life, health, comfort and convenience, and that's what's pleaded here. It's not solely life, what is pleaded includes comforts and inconvenience, the interference with the comfort and convenience of the public is enough to file a public nuisance, and it's in respect of that second limb, which we say if that was right would just be mechanism for intervention in all facets of public concern, is limited in the way that Lord Justice Dyson describes by a requirement for independent illegality. Now this is a contestable proposition, obviously your Honour, and I have to acknowledge that it is a proposition that I'm arguing against several texts, as my friends have pointed out. But in my submission when one –

GLAZEBROOK J:

And just to be clear then you say that the river cases fall within a recognised public right, which is to be able to take water, is that the – and so they are nothing to do with this life, health and comfort, despite the rhetoric in some of them to say they are?

MR SMITH:

I say they can be explained on that basis your Honour, yes.

KÓS J:

I'm happily recalling the day in which I successfully prosecuted a local body under s 145 of the Crimes Act for not putting out road sides on road works, and I wonder what section 145 tells us here, because that says: "Every one who commits criminal nuisance who does an unlawful act or omits to discharge any legal duty, such act or omission being one which he or she knew would endanger the lives, safety, or health of the public…".

MR SMITH:

Yes.

KÓS J:

Now that doesn't sound like a very independent act. It sounds like the act.

MR SMITH:

No, as I remember your victory in that case your Honour, I think –

WINKELMANN CJ:

Obviously a famous victory.

KÓS J:

Yes, in the District Court in Napier, yes.

MR SMITH:

In a different life I might have had occasion to look at that.

WILLIAMS J:

Really?

MR SMITH:

Yes your Honour. It's well-known in the transport lawyers community.

KÓS J:

I feel I've made it.

WINKELMANN CJ:

Anyway, I think you're saying that you accept that it's pushing it uphill that you, you've got the Court of Appeal and several texts against you, but you say if we read these cases carefully then we will see that you are right?

MR SMITH:

Well that's broadly, your Honour, obviously, I might like to elaborate on that if I may.

WINKELMANN CJ:

Feel free, go ahead.

1220

GLAZEBROOK J:

Or move on to a better point.

MR SMITH:

Well, no, I –

WINKELMANN CJ:

Carry on Mr Smith.

MR SMITH:

I think I do want to make this point with respect your Honour.

GLAZEBROOK J:

I know. I wasn't…

MR SMITH:

No, I understand. The point I want to make about the texts and it's relevant I think more broadly to how the Law Commission has seen this issue. So the reason the Court of Appeal rejected our argument on this ground was because it was persuaded by the approach of the English and Welsh Law Commission to decodification, and what the English and Welsh, Law Commission of England and Wales says is that they are dealing with two categories in their view. They were dealing with, and unfortunately these are slightly different categories from the categories that the appellants have put forward, so apologies for multiplicity of categories, but anyway the categories that the Commission referred to was a first category, and this is at paragraph 2.11, I won't take your Honours to it but it's at 2.11 of the provisional report CP193 which is at the appellant's tab 100. They say the first category of, and they call this nuisance proper, consists of those cases where there is a clear analogy with private nuisance.

There is a second category which is what they call public mischief and that is I think what Lord Denning was referring to in the passage of *Southport* that you were taken to around a multitude of sins great and small. These are the cases around criminalisation of nude bathing, wasting police time and the like, and the concern of the Commission as I understand it in saying that they wanted a broader articulation of the tort was that they were concerned that public nuisance or public nuisance crime should be articulated in a way so as to ensure that there was a general right of the public to enjoy public spaces without danger, interference or annoyance, and we say that that can be done without eliminating the unlawfulness point, and to go back to your Honour's famous victory, Justice Kós, the answer to that is because although I framed unlawfulness in terms of the criminal law, which is the most obvious example, the respondents accept that it would include a breach of tort duty at common law, so – and that's the position in Canada obviously that if there's a negligent act then, which I think was the case in your, in the decision that you're referring to your Honour, if there is a negligent act in that you found a public nuisance claim if the negligent act affects the life, health, comfort and convenience of a sufficient class of Her Majesty's subjects.

So that, in our submission that also explains cases like *PYA* and *Abraham and Williams*. *Abraham and Williams* is a little bit more subtle because there's also a breach of a statute in that case under the Health Act. But it explains –

GLAZEBROOK J:

What case?

MR SMITH:

Abraham and *Williams* your Honour. That's the Johnsonville stockyards case that you were taken to yesterday. It's our volume of authorities, tab 2.

WILLIAMS J:

It's *AG* against *Abraham and Williams*?

MR SMITH:

It is. It's a realtor [*sic*].

WILLIAMS J:

A realtor's case?

MR SMITH:

It's a relator actually your Honour. That and *PYA* in our submission are clearly examples where the Court is dealing with private nuisance and saying that because it affects a sufficiently wide group of the community the Attorney-General can bring that claim on behalf of the community. In our submission if you look at Lord Denning's articulation in *PYA Quarries*, and this is at appellant's volume, A11, and I'll take your Honours to page 785 of the decision. Lord Denning in that case is suggesting that the classic statement of the difference is that a public nuisance affects Her Majesty's subject generally whereas a private nuisance only affects particular individuals and goes on to say that doesn't help much because the question is how much. He says: "I prefer to look at the reason of the thing and say that a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings and his own response to it was to put a stop to it should be taken on the responsibility of the community as a whole. So in our submission that is a case where there is an unlawful act, it's dealing with private nuisance, and effectively the private nuisance is sufficiently widespread that the Attorney-General can take action on it on behalf of the community.

The other cases that suggest that no independent unlawful action is required is the first instance decision called *Gillingham Borough Council v Medway (Dock) Co Ltd* [1992] 3 All ER 923, I won't take your Honour to it, its at A35, but actually all the texts just largely cite *Gillingham*, and the only proposition I want to say about *Gillingham* and the only proposition I want to say about *Gillingham* is that the approach of the judge in that case was to cite *PYA*, but I've explained, I think, our perspective on that, and the second thing, and this is also in a number of commentaries, is to cite public mischief cases. So for example there's a case

called *R v Crunden* (1809) 170 ER 1091, which is at the respondent's volume, tab 41, which is a relatively elderly public nuisance case dealing with bathing in the nude, and in that case it was accepted that there was no independent illegality, and so the common law was effectively creating a new crime of bathing in the nude because it offended public decency, and which seemed to be a general offence against public decency at that stage.

In our submission, based on what the Law Commission has likely said, those earlier cases of public mischief do not and should not determine the boundaries of tort liability in Aotearoa New Zealand currently. So we say those earlier cases which are examples of the English jurisprudential position were obviously the common law could and still does create new crimes, is not one that's available to your Honours. We prefer Lord Dyson's approach which we commended to you. That was, somewhat regrettably point 1.

ELLEN FRANCE J:
Just on the public right Mr Smith. The change to the pleading, so 84F, the reference to interference with a public right to a safe and habitable climate system. On a strike-out what's the approach that the Court should take, do you say, to something which is potentially, at least, pleading a new…

MR SMITH:
A new right?

ELLEN FRANCE J:
Yes.

MR SMITH:
Yes, obviously the Court has to be satisfied that that's not a tenable pleading. We, of course, accept that, and we say that's it not. It's been put in my friend's submission, but I don't think it was referred to at all orally, but it was put in their written submissions as something that could be extracted, something that is, I think I'm probably going to use the term incorrectly, grundnorm, whereby you look at a series of public rights and you say well underlying that must be a right

to a safe and habitable environment, and in our submission we address that relatively succinctly in our written submissions, but the short response to that is that kind of abstraction is, in our submission, inconsistent with the way in which public nuisance claims have been developed, and we've referred the Court to the Australian decision of *Ball*. There's also a very good article by Matt Neyers, who is a Canadian academic.

WILLIAMS J:

Can you give me that name again?

MR SMITH:

Neyers, N-E-Y-E-R-S.

GLAZEBROOK J:

I think it would be really useful actually, Ms Swan and you, if we could have the actual things you've referred to in writing.

MR SMITH:

Of course your Honour.

GLAZEBROOK J:

Because I think even with the transcript it's going to be difficult sometimes to pick those up.

MR SMITH:

I apologise.

GLAZEBROOK J:

I think you promised that you will do that.

MR SMITH:

I have.

ELLEN FRANCE J:

Which of the Neyers articles was it in?

MR SMITH:

They actually both make that point, your Honour, in terms of what rights.

ELLEN FRANCE J:

Right.

MR SMITH:

They actually take a very, Professor Neyers actually takes a very narrow view of what public rights are enforceable in a public nuisance.

GLAZEBROOK J:

I can understand the rights in public nuisance. What do you say about the recent UN declaration?

1230

MR SMITH:

Yes. I suspect that's something that we're going to come back to your Honour in writing because I think it was raised in my friend for the Human Rights Commission –

WINKELMANN CJ:

Human Rights Commission.

GLAZEBROOK J:

Well it is very recent. It's just the end, 28th of July.

MR SMITH:

I think what we will need to think about, and I don't want to sort of commit to what our answer was, but what we'll need to think about there is there is a prior question about the relationship between UN Assembly resolutions and the common law of New Zealand. Traditionally the position has been that unless, and obviously there's changes over time and there's different points of emphasis, but sort of the classical position is that unless something is customary international law does not influence the common law of

New Zealand because the traditional position was that the Executive shouldn't be able to change the common law through the entry into the Treaty. Obviously UN General Assembly resolutions are in the structure of a treaty. Whether that extends or then purports to be I don't know because I haven't studied it yet I'm afraid your Honour. A statement of customary international law I will need to make – we will need to address you on –

GLAZEBROOK J:

Well it may be the extent to which it's at least international consensus but I'm not entirely sure that a statement like that, which is probably more really saying what underlies the human rights treaties, which would not be directly enforceable in New Zealand, although we would tend to develop the common law with international law and international consensus in mind and interpret statutes as well.

MR SMITH:

Of course.

GLAZEBROOK J:

But anyway –

MR SMITH:

Interpretation of statutes is clearly different –

GLAZEBROOK J:

– as you say it's probably something you want to think about but…

MR SMITH:

I think that's right and it also I'm conscious of time. so –

GLAZEBROOK J:

Yes.

MR SMITH:

So I will move on if your Honours please. The second topic I wanted to address your Honours on was causation. Again trite that the activity must cause an interference with a public right. We place more emphasis on the concept which we draw from private nuisance cases that there, in the absence of a direct instruction of the type that the Court of Appeal considered in *BEMA* that what is required in classic nuisance is the transposition of the alleged nuisance which is from your Honour Justice Glazebrook's judgment in *Wu* at paragraphs 122 to 124 in our bundle of authorities, tab 25.

Now my friends and I think this is why this case hasn't been pleaded in public nuisance – hasn't been pleaded in private nuisance even though the claim is found in property rights as it's now articulated to satisfy the special damage requirement. So I don't think my friends are taking an issue with that being the position in private nuisance. They just say it doesn't apply to public nuisance because public nuisance is different from private nuisance, and we of course accept that there are different rights at issue. That's what in *Re Corby* decides but when it comes to the concept of what is a nuisance and what and how that nuisance must interfere then we say the Courts do draw heavily on more frequent private nuisance cases in considering public nuisance cases and we rely for that proposition on a number of authorities which I will just briefly summarise.

First is that there is an excellent article by J R Spencer. That's probably the leading article on the history of public nuisance. It's picked up in *Rimmington* and elsewhere. We've included that in our bundle of authorities at tab 94. Page 58 of that decision just – Professor Spencer describes the relationship between public rights and private rights as an extension of private rights to areas of public spaces very similar to what the English and Welsh Law Commission decided in their favour –

WINKELMANN CJ:

And you would say yes, Lord Denning, similar to Lord Denning?

MR SMITH:

And similarly to Lord Denning. We say interestingly a number of the cases that my friends rely on are actually private nuisance cases, so the *Lambton v Mellish* [1894] 3 Ch 163 case which is a decision of Justice Chitty that your Honours were taken to or at least it was referred to. That's in the appellant's 47. This is the fascinating case of the competing merry go rounds that made a lot of noise and it's a private nuisance case. It interfered with the use and enjoyment of an adjacent homeowner's land. It was maddening is the language of the case. Similarly when one looks at the authorities, and we've cited *Fleming* at the appellant's volume 133, and at paragraph 21.240 the discussion of causation is discussed in terms of public nuisance and private nuisance together. So in terms of then the suggestion that – so we say the fact that you don't have an emanation is a problem, that's the first proposition, and really I think what the proposition that was put to Mr Kalderimis by the Chief Justice is well maybe we don't need an emanation of – modern science tells us that there's a connection and obviously we can't argue about the science because at this –

WINKELMANN CJ:
Maybe we don't need a, what did you say?

MR SMITH:
Sorry?

WINKELMANN CJ:
Emanation.

MR SMITH:
You don't need an emanation. You just need a scientific connection I think is, I think as I understood it maybe. You're frowning your Honour so maybe it wasn't the proposition that was put to Mr Kalderimis –

WINKELMANN CJ:
No –

WILLIAMS J:

What do you mean by emanation?

WINKELMANN CJ:

– I'm just struggling to understand what you mean by emanation.

MR SMITH:

Oh, I'm meaning emanation in the sense that Justice Glazebrook defined it as a transposition –

WILLIAMS J:

What did Justice Glazebrook mean by emanation?

WINKELMANN CJ:

Yes. This is what we're all struggling with.

MR SMITH:

She defined it as a transposition of the alleged nuisance. So in other words –

WILLIAMS J:

So an effect?

MR SMITH:

No.

WINKELMANN CJ:

What does it mean?

MR SMITH:

It means that you have either a particle or a wave or if it's like both, moving from the defendant's activities –

WILLIAMS J:

Are you sure you don't have a PhD Mr Smith?

MR SMITH:

Only a graduate degree in chemistry your Honour I'm afraid. As you know that's a lie. I don't. I don't have a graduate degree. I just have a Bachelor's. I would want to give your Honours any greater sense of my respectability than I actually have. So what is being talked about in those cases is the proposition that there is a particle or typically a particle of pollution that moves –

WINKELMANN CJ:

Or a soundwave.

MR SMITH:

Or a soundwave that moves from the defendant's activities, typically a defendant's land but not always, to the, effect the, for the plaintiff. That's what all the cases involve. It's what all the pub – it's what all the river cases involve is taking a particle of effluent from the sewer outlet or whatever particle is being put into all, tracing it down the waterway and it interfering with the plaintiff's rights.

WINKELMANN CJ:

So is this – are we onto your third point here or what point are we onto here, because you're now simply moving on causation.

WILLIAMS J:

This is causation.

MR SMITH:

Oh, sorry your Honour.

WILLIAMS J:

He has moved on to causation.

KÓS J:

Your numbering system went astray. You're on point 3.

WILLIAMS J:

I think you're on point 2.

MR SMITH:

I'm on causation your Honour which is my point 2.

GLAZEBROOK J:

You said 2 earlier with…

MR SMITH:

Did I? I'm sorry, I thought that was my second point, but…

WINKELMANN CJ:

Okay. All right.

GLAZEBROOK J:

You said second topic causation. Are we still on that?

MR SMITH:

Yes we are.

WINKELMANN CJ:

Okay. Thank you.

GLAZEBROOK J:

Well that's what I wrote down so I'm assuming that's what you said.

WINKELMANN CJ:

So you need to – you're saying you need direct causation either through a particle or a soundwave. You can't have a more, in public nuisance you can't have a more attenuated causation. Is that your fundamental proposition?

MR SMITH:

That's the first proposition your Honour, yes and the reason why… I suppose there's two propositions I make from that. One is that in our submission that is a limiting principle that is doing some work because in mister – as Mr Kalderimis puts it that focuses attention on a locality or a relationship. The second proposition is that if your Honour says *Wu* only applies to private nuisance, the

rules in public nuisance are different, we say that that's policy choice that your Honours are making and that engages the matters that have been traversed and I won't cover that. So –

GLAZEBROOK J:

Just so I'm – in your submissions you say there we should stick with a but for contribution. So is that the submission, is the submission a but for or is it more related to direct relationship?

MR SMITH:

It's direct I think your Honour. It's following the classic lines that you need an emanation. I don't think it's strictly ever explained as a but for proposition

WILLIAMS J:

Well you can have but for that wouldn't meet the emanation test obviously.

MR SMITH:

Yes.

WILLIAMS J:

So you say but for is not the argument?

1240

MR SMITH:

But for wouldn't be an emanation test.

WILLIAMS J:

The domino effect, where it's not your particle, it's someone else's particle, but you set the particles running.

GLAZEBROOK J:

Or you've got to make a material contribution to the particles, but we can't analyse which one.

MR SMITH:

So the, I think I want to be very clear about this. There's two points. My first point is the emanation point, which is the direct point. That's the particle transference. The second point, which I'm about to come to, is my friend's submission which says that there is a rule that says a contribution, no matter how innocuous, is sufficient to establish liability and public nuisance.

GLAZEBROOK J:

I don't think they say how innocuous. I think it has to make a contribution to whatever happens.

MR SMITH:

It has to, yes –

GLAZEBROOK J:

However minimal I suppose is the –

MR SMITH:

That's what I mean by innocuous your Honour, so I'm using that in the language of, I think, *Blair v Deakin*.

GLAZEBROOK J:

Yes, sorry.

WINKELMANN CJ:

Although they also say it's not innocuous in the case of these defendants.

MR SMITH:

Well they, yes, they plead that an injunction against these defendants will result in a material reduction, but as we will come to see, I hope, in paragraph 62, the mechanism of that is not any traditional understanding of materiality that comes from the river cases. It is saying that the injunction of these respondents will lead to actions by other respondents, or lead to other courts and other legislatures and other jurisdictions affecting, and that's what's going to lead to

material change. At least that's how I understand paragraph 62 in the current plan.

KÓS J:

Can I just understand your emanation point of the law? If there are three factories with chimneys all spouting air pollution, and that causes physical damage to some adjacent property, but we can't tell which chimney did what, there's simply three contributors.

MR SMITH:

Yes.

KÓS J:

Do you say that doesn't meet your emanation test?

MR SMITH:

If they can't show that there is an actual transference, no, and interestingly that's not as –

KÓS J:

That seems an astonishing rule to me. If we start with, you know, one chimney and then go to two chimneys and then go to three, in this case 3,000.

MR SMITH:

So if your Honours read what I suggest is another quite helpful historical article which is the McLaren article, which is at tab 119 of the bundle of authorities. Page 198 of that article there is a citation –

WILLIAMS J:

Can you give me the name again, sorry, I didn't quite catch it?

MR SMITH:

McLaren.

WINKELMANN CJ:

As in motor cars?

MR SMITH:

Yes.

ELLEN FRANCE J:

What page Mr Smith?

MR SMITH:

Page 198. So at that page there's some helpful evidence which has been collected from the select committee on noxious vapours from 1862 where they have a range of solicitors coming to complain to Parliament for reform in this area because they don't think that common law is being particularly effective to deal with noxious vapours, and the point that they're making is exactly that point I'm making to your Honour. So while it's my understanding of the law, it's also the understanding of a range of solicitors in 1862.

If I could just, I'm very conscious of time your Honours, so if I could just address briefly the proposition that any contribution, or perhaps in fairness to my friends, they might say any material contribution, although that bit is unclear, is sufficient in public nuisance. Just as one housekeeping matter. My friend rightly pointed out that there was an error in our footnote 175 where we refer to some texts on this point. The reference to *Winfield & Jolowicz* should be to 15-061.

WINKELMANN CJ:

Sorry, can you just give me the footnote number again?

MR SMITH:

It's footnote 175.

WINKELMANN CJ:

And the reference to *Jolowicz* should be?

MR SMITH:

The paragraph reference should be 15-061. It's currently written as 15-068. I apologise for that your Honours.

ELLEN FRANCE J:

So that was, I thought it was 172?

MR SMITH:

Have I got that wrong as well your Honour. I've got in my notes 175, but I will check that before I hand up my notes to you. The cases that your Honours have been put to, your Honours were taken to a number of different passages. I think in light of time I can't do that justice, but I would like to put to your Honours two propositions. One I think which your Honours already will have, and another one which may be less obvious, at least on the passages that your Honours have been taken to, to date. So the first is that all these river cases are modest rivers, discrete numbers of upstream polluters, and with pollutant emissions that could be traced toa particular outcome, and this links to the emissions points.

Your Honours were taken to *Blair v Deakin*, which is at A15 and you were taken to various passages, but you weren't taken to a passage at 525 where the Court says near the top of that paragraph: "… the amount of effluent was formerly not anything like so great as it had been since the defendants… occupying the works." Have I got that right? Yes. The second is, and perhaps more doctrinally interesting, is that there's a discussion of the *St Helens* case in 526 and 527.

WILLIAMS J:

Is this your second proposition?

MR SMITH:

Yes, second proposition, sorry, I'm not doing a very good job of giving your Honours a sense of direction but I'll try and improve.

WILLIAMS J:

That's all right.

MR SMITH:

The proposition that I think my friend was drawing for this passage is the classic one drop of poison is enough, and all I want to invite your Honours to do in those passages from *St Helens* at 526 to 527 where it quoted, is to note that that discussion is in the context of where the emissions are traceable, and it's the traceable language that we say is picked up by the concept of an emanation.

Your Honours asked my friends, after you were taken to *Blair v Deakin*, well these are all modest rivers. Can you give us an example where we have a sufficiently large river, that not all the polluters could be identified, and in my respectful submission you weren't given an answer to that. None of the three cases that you were taken too, *Birmingham*, *Colney Hatch*, and *Leeds* are cases where polluters could not be identified. They were all discrete waterways. And indeed in each of those cases the defendant that was before the Court was found to have, at least, greatly aggravated the evil.

So if I can just give your Honours the page references where you can find that. In *Birmingham*, which is tab A7, at page 225, the judge records that the river before the defendant's operations flowed unpolluted. In *Colney Hatch* –

WILLIAMS J:

Can we have the page again please sorry?

MR SMITH:

Page 225 your Honour. *Colney Hatch*, tab A6, the passage I want to take your Honours to is, or give your Honours the reference to is page 155. In that case the finding was "that a vast quantity of sewage is poured into a brook which in former times appears to have been pure". The asylum sewage greatly aggravates the evil.

Then in *Leeds*, which is tab A9, again there is a finding, which in fairness to my friend you were taken this, at page 595, that the sewage in those cases seriously aggravated the evil.

So in our submission those are not cases which on their facts support a proposition that they are being cited for.

WINKELMANN CJ:
Well, even the bits you took us too done seem to make out your proposition though, because you're only saying that these discharges aggravated the evil.

MR SMITH:
I think the "seriously" is doing some work with respect your Honour.

WINKELMANN CJ:
Okay, so your focus is not upon whether or not all the **(inaudible 12:49:51)** before the Court, but the materiality of contribution?

MR SMITH:
Yes. So we say that the Court of Appeal was – there's probably two propositions –
1250

WINKELMANN CJ:
Because that's a different proposition to the one you started off with which was that we had asked where, for cases in which all the polluters could not be identified because the Court of Appeal had said that all the polluters could be identified and were before the Court I think and Mr Bullock said no, well that's not so.

MR SMITH:
Yes, and I have to accept that in these cases not all the polluters were before the Court but with one amendment that passage in the Court of Appeal holds which is that they could be before the Court, because they could be identified

and they could be stopped one by one by the Court and that we say is a function both of the emanation doctrine and of the fact that these are discrete waterways, and so the proposition that still holds in my respectful submission from the Court's judgment is that those are different from the present case where we are dealing with global effects through the mechanism of climate change and that raises the policy arguments that, of course, the Court held were compelling.

WINKELMANN CJ:

So how do you say that, as you look at the structure of public nuisance how does that sound in the structure that rule that seems to be imposed as a rule but where does it fit into the course of action notion that all the polluters could be before the Court?

MR SMITH:

In our submission it is a function of the causal requirement for there to be a direct and serious contribution to the harm.

KÓS J:

So in my three chimneys example we can count the chimneys and assume the effect that each is a major contributor, assuming the science will support that –

MR SMITH:

Yes.

KÓS J:

– but there's a bit of a problem if there's a whole valley full of chimneys.

MR SMITH:

Well if there's a whole valley full of chimneys and you can show through science that particles are emanating to the defendant's property or public spaces and that each of those seriously contributes then I would accept but that's not this case.

WILLIAMS J:

Well I don't think that proposition really carries because your argument is that you've got to find particle from factory A turning up on the place where the nuisance is claimed and a particle from factory B and C and D and so forth.

MR SMITH:

Yes.

WILLIAMS J:

So a valley full of factories would on your analysis not be able to found an assumption that if they're all doing it then they all must have affected them.

MR SMITH:

It depends on the science that we're hypothesising which is –

WILLIAMS J:

Well that's exactly right isn't it?

MR SMITH:

– which is the difficulty. I would say that if you can scientifically trace then I have to accept that, but what the historic position in the McLaren article illustrates that at that time they couldn't scientifically illustrate it so there was no claim which is –

WILLIAMS J:

Well it seems to have changed by *Birmingham*.

MR SMITH:

No –

WILLIAMS J:

Or sorry, *St Helen's*, the one drop of poison 20 years later. Perhaps they were listening to the lawyer.

MR SMITH:

No, because *St Helen's* doesn't rely on the single drop of poison –

WILLIAMS J:

Whichever the single drop of poison case was.

MR SMITH:

Well they refer to the single drop of poison but the answer in that case is that the stream was previously unpolluted, so there's a cause and effect that they can point to in *Blair v Deakin* –

WILLIAMS J:

Well that's so on the facts but –

MR SMITH:

Yes.

WILLIAMS J:

– you could say that proposition was obiter but it's certainly a proposition.

MR SMITH:

I'm not – this is one of the points that your Honours will have to grapple with is that throughout the history of public nuisance in a variety of contexts you have a series of wide statements that are often broader than are necessary to decide the case in front of the Court, and I'm not denying that my friends have skilfully weaved together a collection of those propositions. My submission to your Honour is that it's not as simple as weaving those propositions together. You have to look at the facts of the case in which those propositions were made and ask yourself is that an expansion of the way in which that proposition was being articulated and applied in that case and if the answer is yes then your Honours have to engage in the policy question of whether that expansion is appropriate. That's as far as I think I'm putting the proposition.

KÓS J:

The particular cases, and the sewage cases, don't quite fit here, do they. This is rather more like the cases involving shadow.

MR SMITH:

Involving, sorry?

KÓS J:

Shadow. Where you don't actually have – well I suppose shadow involves some sort of electromagnetic connection, but what –

MR SMITH:

Shadow is typically an absence of light Sir so…

KÓS J:

Well all right, the absence of electromagnetic radiation, so it's the absence of wave, and yet nonetheless that confound an action, at least in private nuisance.

MR SMITH:

That's not what Lord Hoffmann held, but yes.

KÓS J:

But my point is that what we have here is emanations have an atmospheric connection. It's not that they attach to your land, or attach to your washing. It's that they go up into the atmosphere and cause this depressing effect in terms of climate. So they're more like the shadow cases which involve a very indirect visible connection to the land or they're just affected.

MR SMITH:

Well I have to go back, and I probably will at lunch, because I'm going to have to go over lunch, and I'm sorry your Honours, to think about the shadow cases.

KÓS J:

All right, think about them.

MR SMITH:

But in my submission I appreciate that there's an element that this might look like dancing on the heads of pins, you know, does emanation really make a difference to modern science, and in our submission it does because what it changes if fundamentally the mechanism and the diffuseness of the mechanism by which harm is caused by the entire blow, and it's that that engages the policy questions.

WINKELMANN CJ:

So it's Mr Kalderimis' point about these are the natural features of nuisance which require proximity.

MR SMITH:

It is your Honour, but I've tried to situate that –

WINKELMANN CJ:

So to sum up on your second point, which is causation, as I understand it, first there's the emanation point, and secondly, there is a dimensional aspect, which is direct and serious contribution to the harm, so it's the materiality threshold.

MR SMITH:

Not materiality in a de minimis sense, though, your Honour.

WINKELMANN CJ:

No, in a direct and serious contribution to the harm. That's how you would define the material threshold.

MR SMITH:

That's our submissions on causation your Honour. The third topic is special damages. So I only have two more to go, but would your Honours want to take the adjournment now or do you want me to just be fast?

WINKELMANN CJ:

We have three minutes.

MR SMITH:

Three minutes. Special damages. There's no doubt that that's a longstanding rule. We say that it reflects constitutional propriety and in particular that it reflects a rule that is designed to present multiplicity of plaintiffs, but that's, I dont want to be understood as saying that the purpose there is simply to let people who have caused a lot of harm off the hook. The purpose of, in our submission, of restricting multiplicity of plaintiffs, is linked to the idea that these are public rights that are generally enforceable by the Attorney-General, and the constitutional significance of that, in our submission, is that inevitably in the course of litigation the plaintiff's perspective on how the public right is formulated and acquires redress will be significant. So Mr Smith has already in this proceeding articulated two views of what he wants the respondents to do. It's possible that there will be a multiplicity of other different perspectives in the community.

So the mechanism of special damage in our submission is a useful one because it requires the Attorney-General to say to a particular individual, unless they suffered special damage, which we will come to, that you are the person that I think is appropriate to represent the community on this issue, and have your perspective on what the correct balance to be struck in any relief is to be heard, and we say that's a significant constitutional role and it shouldn't be underweighted.

In terms of a special damage, we –

GLAZEBROOK J:

Why is the Attorney-General involved in your – because does that mean the Attorney-General doesn't take it over, or doesn't stop it or…

MR SMITH:

Well the Attorney-General has to give consent to a relator action.

GLAZEBROOK J:

Well to a relator action, yes, but you don't have, it doesn't have – are you saying it has to be a relator action?

MR SMITH:

Only if there's no special damage. So I'm explaining why the special damage rule is important and what I think the purpose of that is.

GLAZEBROOK J:

Although somebody – in terms of defining the public right, whether they've got special damage or not, they're going to define it in a different way and then the Court decides what that public right is or isn't, don't they?

MR SMITH:

Well I mean obviously the Court will ultimately decide but the evidence and the submissions of it can be heard, will inevitably be influenced by the plaintiff, and we say that that's a significant matter.

WINKELMANN CJ:

Right, so that's finished that item?

MR SMITH:

We'll take a break?

WINKELMANN CJ:

Yes.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.20 PM

MR SMITH:

Thank you your Honour. I have one piece of homework and two substantial topics to cover, and I'll try and do that in 15 minutes and then hand over to Mr Ladd. Homework is to report back on shadows. We think that the answer maybe in *Hunter v Canary Wharf* [1997] appeal cases 655 at Lord Goff's discussion at page 685.

In terms of the final two points, or two topics I wanted to cover, the first is special damage. I've addressed your Honours what we say purpose of that rule is. In terms of the test, as we understand the appellant's position it is the actual damage is sufficient. We say that is wrong and that there must be a relative assessment of damage, and the cases that we rely on for that proposition are a range of authorities starting with Lord Justice Denning's judgment in *Southport* that your Honour Justice France discussed with my learned friend. We rely on the *Gagnier* decision, which does refer to a significant difference in degree, that's the respondent's bundle of authorities 18 at page 230. We rely on the Murray *[sic]* text, which is at A20, appellant's bundle of authorities 120 at paragraph 7.18 where Professor Murray *[sic]* talks about an appreciably greater extent, and interestingly at paragraph –

WILLIAMS J:
Did you say 7.18?

MR SMITH:
7.18 sorry your Honour, yes, and then at 7.21, there is an interesting discussion of *Rose v Miles* by the professor. *Rose v Miles* was one of the cases you were taken to, of course, and the professor explains that in his view, if others "had also suffered pecuniary loss" that case would have been differently decided because the "claimant's loss would no longer be categorically different to the losses of those other members of the public."

Now the final authority for this proposition is actually a decision in this jurisdiction, which is the decision of our Court of Appeal in 1869 in a case called *Mayor v Kaiapoi v Beswick* (1869) 1 NZCA 192. I might just take your Honours to that very briefly. This was a case about building a bridge over a river, the Mayor of Kaiapoi had built a bridge over a river which had stopped amongst other things the plaintiff's ability to get to their wharf, and that was held not to be sufficient to establish a public nuisance, and there's various quotes from the different judges that considered that. At page 208, the second Chief Justice of New Zealand, Chief Justice Arney, refers to a right of action cannot depend on the quantum of damage, cannot depend on the fact the plaintiff happens to be

a trader, that would confer rights of action upon a great number of persons thus promoting that multiplicity suits which the rule of law herein is intended to prevent.

Then at page 210 we have Justice Richmond, and he says that by a particular damage is meant a damage different in kind from that which the nuisance causes the public at large. Then I'll go slightly slower on the last one, at page 213 we have the judgment of Justice Johnston at the bottom of the page and he says that damage must be different in kind as well as degree. Now partially it's an elderly case in New Zealand for once and that's why I've take it to you but in our view that is still good law in terms of the requirement for a relativistic assessment consistent with the modern authorities such as *Murray* and *Gagnier*.

WILLIAMS J:

Would it have made a difference if the bridge had been built by a private party?

MR SMITH:

No Sir, because the –

WILLIAMS J:

There's no mention of the sort of public good of the bridge in the judgment?

MR SMITH:

Well, the traditional point on that in respect of –

WILLIAMS J:

In the case I mean.

MR SMITH:

I don't recall your Honour. I think it's generally treated much as *City of Birmingham* obviously that the public nature of the wrongdoer isn't treated as a particularly relevant consideration.

WILLIAMS J:

Well it wasn't in *Birmingham* but I wonder what it would have meant here you see because it's not that different to the ditch and the horse is it?

MR SMITH:

Well the ditch –

GLAZEBROOK J:

That's what I was a bit puzzled by.

MR SMITH:

The ditch and the horse example is explained by the fact that if you have a ditch and that causes an obstruction to people's use of the highway but someone falls into it and suffers personal injury the personal injury is different in kind and also in degree from the general obstruction. If multiple people fall in the ditch then I think my friend's proposition is that they all have a claim in damages, that's where we depart.

WILLIAMS J:

So if Ward had hit his head on the arch of the bridge he'd have an action but not otherwise?

MR SMITH:

Sorry Sir, I didn't quite catch that.

WILLIAMS J:

If Mr Ward had hit his head on the arch of the bridge he'd have an action –

MR SMITH:

Potentially.

WILLIAMS J:

– saying: "Oh, that wasn't there yesterday."

MR SMITH:

Potentially, yes, and so applied to the facts of this case we say that property damage isn't always sufficient because the same relativistic assessment must be required. We of course accept that property damage often will be because typically in those cases the property damage is different in kind from the general interference with use of a highway which is often where these cases occur.

Now for the purposes of strike-out of course the respondents accept as they must Mr Smith's pleaded interests including interests in and at tikanga and the harm threatened to it and again for the purposes of strike-out it is accepted that he is a proper person to represent the interests of his hapū and iwi following *Wakatū*. The proposition that we put to you which is the one that found favour with the Court of Appeal, albeit on a contingent basis because they thought there was another way of dealing with the case, is that those undoubted interests and including interests in land are not sufficiently different in degree from the interests that all other iwi and hapū and many other landowners and others would suffer in New Zealand as a result of climate change to justify Mr Smith acting without the consent of the Attorney-General to bring a claim for an injunction –

WILLIAMS J:

What's the evidential base for that? How did they know that?

MR SMITH:

I think the Court was taken possibly by my learned friend Mr Salmon to the catastrophic harms of climate change just as your Honours were –

WILLIAMS J:

Yes but I mean if for example a particular bay was the landing place of the Mataatua canoe, one of the original migration canoes, that's specific damage isn't it?

MR SMITH:

It depends on whether the Court is satisfied that that is sufficiently different in extent and degree –

WILLIAMS J:

I think you, you know, that's like, I don't know, the cultural equivalent of Tower Bridge or something like that, a culturally iconic spot if that were the case. You can't just assume that all the Māoris are going to get hurt the same way.

MR SMITH:

I hope I wasn't making that submission your Honour.

WILLIAMS J:

No but the Court of Appeal did come to that conclusion it appears without evidence.

1430

MR SMITH:

I think in fairness to the Court of Appeal they were faced with a claim very much as made in this Court that the distinction is property damage and I think my friend Mr Bullock in all candour said everyone who suffers property damage in New Zealand can claim with special damage –

WILLIAMS J:

Yes but the property damage might be, I don't have any evidence either, might be inundation of the landing site and the Pohutukawa tree that's 800 years old where the canoe was tied up.

MR SMITH:

I understand Sir.

WILLIAMS J:

It's destruction of a culturally iconic site.

MR SMITH:

And I suppose I'm doing two things. One is to explain that that context was not put as directly as your Honour has to the Court of Appeal by my friends –

WILLIAMS J:
Right.

MR SMITH:
– and the second I think I have to –

WILLIAMS J:
But I'm suggesting it's you and –

MR SMITH:
I know you're suggesting it so –

WILLIAMS J:
Come at me.

MR SMITH:
– I, having defended the Court of Appeal's honour I –

WILLIAMS J:
Fair enough.

MR SMITH:
– I have to address your specific question, and I think it is, I mean obviously that is a profound example that your Honour is putting to me and all I can say in response is that that hasn't been pleaded.

WINKELMANN CJ:
Well isn't – is this another way of you coming at the point that Mr Kalderimis made earlier today and yesterday which is that these – the change is so generalised and profound that it becomes meaningless to talk about different people suffering particular –

MR SMITH:

It's a more elegant way of putting the point than I have your Honour.

WINKELMANN CJ:

– particular damage?

MR SMITH:

Yes, I think that's a fair encapsulation of the point. So final topic is defendant class and I just propose to do two things on this –

WILLIAMS J:

What's the final topic again sorry?

MR SMITH:

Sorry. The defendant class.

WILLIAMS J:

Oh, yes.

MR SMITH:

So I think my friends accept that it would be inappropriate for every emission to be an actionable wrong and so the question is what is the limiting principle and the proposition that is being put to your Honours is that this Court doesn't need to determine that or even determine what principles might be applied to identify that limiting principle. That can just be worked out through a series of cases in accordance with what they characterise as the common law method, and in our submission because for a range of these points the proposition we are putting to your Honour is that this is a systemic problem, we say that that is not something that the appellants can lightly jump over, that the Court must be satisfied that there is a principle basis for line drawing that would determine – that would avoid the proposition of –

GLAZEBROOK J:

And can we do that without evidence? I think that's the… So what, I mean what you have to show us I think is that there can be no lines drawn at all whether on evidence or otherwise.

MR SMITH:

I think we would have to rebut the propositions that have been put forward by my friend as to where the line can be drawn and –

GLAZEBROOK J:

Or whether it can, well, but whether a line can be drawn at all or whether it's just no there is no possibility of an action in a case of this nature.

MR SMITH:

And my friend Mr Ladd when, I sit down which will be shortly, I promise, will address your Honour onto materiality because I think that it is an important proposition. Our –

GLAZEBROOK J:

Because we do have to keep remembering this is a strike-out.

MR SMITH:

Of course your Honour. Our proposition that Mr Ladd will articulate more, with more vigour and clarity than I will do now is that when you look at the pleading the pleading requires effectively a carbon budget to be set with an attribution to these emitters to achieve what is defined as minimum global reductions, and in our submission the concept of minimal global reductions in that articulation doesn't allow line drawing because everyone has to contribute to achieving those minimum global reductions. If you exclude the de minimis people from that, you don't achieve minimum global reductions. It's **a logical/illogical 14:34:48** incoherence that is present in the pleadings in our submission.

GLAZEBROOK J:

But does tort law ever try and do something global which might be the other side of your argument I suppose?

MR SMITH:

I mean that is somewhat is the entire argument your Honour. It also tends not to do something that won't be, have any meaningful effect or avoid the harm, and that's probably a submission that is best expanded on by Mr Ladd. I just wanted to, two very quick things. One is to suggest to your Honours that in relation to the suggestion that one of the lines that might be formed is reasonable versus unreasonable use. I invite your Honours to look at pages 17 and 18 of Mr Bullock's *Modern Law Review* article where he discusses that concept, where he discusses such fine distinctions as the difference between long-haul flights for work versus an occasional holiday as being a potential line. In my submission that just illustrates the concern that the respondents have that no sensible line drawing exercise is, in fact, possible.

Then the second and final thing that I wanted to say about defendant class, and this applies only for my client, Z Energy, as well as for BT Mining and Channel, is that those respondents are sued in a different capacity. The appellants have been very candid about that. They understood not in their capacity as emitters but in their capacity as nodes or choke points of the supply chain, and we say, and we've set that out in our written submissions, and I won't go to it in detail, but there is a particular problem with using public nuisance as the mechanism for attacking node or choke points, and that is that there is an established line of authority that says liability for nuisance, public and private nuisance, is on the doer, the actual emitter, and that liability for suppliers and manufacturers who do not exercise control past the point of sale, is not available, and we have cited to your Honour a range of international cases which have made that point. In my submission a helpful authority, because it collates much of the discussion in this area, is the *Hoffman v Monsanto Canada Inc* 20025 SKQB 225, [2005] 7 WWR 665 decision from Canada.

WINKELMANN CJ:

The central submission is you can't be a party, liable as a party to a nuisance.

MR SMITH:

Yes, yes, and we say that is, if your Honours read paragraphs 118 to 122 of the *Hoffman* decision, which is in our bundle of authorities at tab 26, you will find authority for that proposition. I'm very conscious of time so unless your Honours have any further questions, those are my submissions.

WINKELMANN CJ:

Thank you. Mr Ladd.

MR LADD:

Thank you your Honours. I am looking at the appeal through the lens of relief, which is really to pick up a dialogue which his Honour Justice Kós has prompted form time to time over the last couple of days. As a starting point Mr Smith's submissions say at paragraph 168 the relief sought might be uncommon and that relief is either the mandatory injunction requiring annual reductions in net emissions to be supervised by the Court until 2050, or the prohibitory injunction requiring each defendant to submit its emitting activities completely but which may be suspended.

It was clear from my learned friend Mr Salmon's submissions on Monday that the goal of the claim is structural change. If your Honours look at the transcript from Monday morning you will see reference to "breaking". Breaking nodes or sources for the supply of petrol, gas and coal, and as Mr Salmon said, hence these defendants. The difficulty with that is it implicates every aspect of our society that relies on those sources of energy for light, for heating, for transport, for food, for industry, which is precisely why the necessary societal transformation away from those energy sources is hard. Why it is the subject of legislative and political responses, and why it cannot be achieved immediately.

Now your Honours I accept that a strength of the common law is that it adapts. It adapts to meet changing societal expectations, but an injunction in this case can't touch the structural changes that would be needed if injunctive relief is granted.

1440

The Courts don't have the ability in a proceeding like this to address the corresponding changes that society would need to make in response. So, for example, electrification of many forms of land transport. A replacement for air travel. Alternative sources of peak generation to provide energy security, and very respectfully I submit that many people in society would be surprised that an injunction had been made by the High Court against these respondents that had the effect of disrupting their lives in the way that relief in this case would.

So with that introduction I have just two points I want to develop. First, suspending a prohibitory injunction isn't a solution to the extreme consequences of the relief sought. The result of the suspended injunction will either be that Parliament overturns the High Court, and Mr Smith does not achieve his goal, or the businesses cease with wide-ranging societal consequences, or the Court will be engaged in managing the injunctions for many years. Secondly, the relief sought is futile, futile in the sense meant by Dr Spry. That is even if granted it cannot prevent a pleaded harm to Mr Smith and of course I have to persuade the Court that that is evident on the pleadings and information properly before the Court now. Your Honours can see those consequences now so this matter doesn't need to proceed to trial.

If I can briefly deal first with why the relief is uncommon. If I could ask your Honours when you are considering the appeal to review the draft amended statement of claim between paragraphs 14 and 50, you will see the pleaded activities which Mr Smith asks the Court to injunct. Fonterra burns coal at eight dairy factories to produce dairy products. Genesis owns and operates the Huntly Power Station, which is fuelled by coal and gas. If I can just pause there. I'll ask Ms Lampitt to put up an MBIE report called *Energy in New Zealand* and I want to do this because I don't want the Court left with the impression that, to paraphrase David Lange, this is a lean forward, you can smell the coal dust on my breath moment. There's good reason why Genesis burns Huntly at coal. So this is the introduction to this report. I don't need to read to your Honours. Then at page 858 under the heading "Transformation" if we can just come down

to that. There's this passage: Coal use in the North Island is heavily influenced by Genesis Huntly Power Plant. This power plant is the only coal-fired power plant in New Zealand and is important for New Zealand security of electricity supply requirements in dry years to meet winter energy and peak demand requirements." There's a, says immediately below that there was heavy rain in the first quarter of 2017 so that there was zero coal use, and then the position changed with a dry winter in the middle of the 2017 year. That's Genesis.

Dairy Holdings has 59 dairy farms with 50,000 cows producing 17 million kilograms of dairy solids, releasing methane and nitrogen dioxide.

New Zealand Steel operates the Glenbrook Steel Mill.

Z Energy supplies retail and commercial customers, including the aviation and maritime industries, with a range of petroleum fuels.

Challenge Infrastructure is the primary, the only importer of the majority of the fuel products in New Zealand, which are, it's pled, burned to power combustion engines for land, maritime and air transportation, or to generate electricity.

BT Mining, as your Honour has already noted, produces coal at the Stockton Mine, which is majority exported to China.

An important part of what is at stake in this claim, is a broad reach of basic and fundamental social and economic activity. Food, electricity, energy for transportation, energy for industry, and the consequences that follow from those activities. Employment, income, tax revenue, social activity that has everyday energy needs. Our schools, our hospitals, cultural and sports clubs, and it's not just the social and economic activity of these respondents. Mr Salmon said clearly that other emitters will either follow voluntarily or face their own proceedings. That's Air New Zealand, that's other airlines that fly to New Zealand. That's the Crown in respect of its own emitting activities, a claim that Mr Smith advanced in the parallel proceeding against the

Attorney-General. It's other farms. It's private hospitals. It might be councils in respect of their emitting activities.

In my submission the relief sought has become a suspended injunction because the appellant is trying to navigate two difficulties. First the mandatory injunction requires court supervision of each defendant each on their own factual circumstances for 28 years and to do that the Courts will have to develop what is really a regulatory regime. They'll need an emissions counting method, annual net emissions budgets, an emission offset standard to determine what is an acceptable offset. Will have to decide how budgets and offsets would be applied. Would banking and borrowing between years be possible. Decide how compliance would be recorded and how compliance would be investigated and enforced –

KÓS J:

Well that's if that form of equitable relief were granted but if instead the relief were declaratory you don't have those same issues and I would have thought that at the end of the day the selection remedy might be a question for the trial court –

MR LADD:

Yes.

KÓS J:

Unless you can tell us that the declaratory option is impossible. In the same way you're saying the injunction is.

MR LADD:

Respectfully your Honour what I have to say and what I do say is if this Court were to conclude that injunctive relief was not possible it would be unusual and an unusual use of the Court's resources to send this matter to a trial for declaratory relief, as opposed for example to engaging in the same constitutional dialogue with Parliament and the Executive in the judicial review proceedings in this area that will inevitably come to the Court in time.

KÓS J:

But I wonder if that's right. I mean if the underlying conclusion of a court, and I don't say this Court because it's not for us to say, were that a degree of emission was unlawful then it is an important step to so declare it and then even if no further relief followed that point something will happen, because what happens in that situation is that the emitters concerned are acting unlawfully and there will have to be a response. Now it may be the response doesn't come from the Courts. It may be the response comes from the government or from Parliament I should say. It may also be the response comes from consumers but it won't be simply a breath in the wind.

MR LADD:

Yes. I'm not sure I can give a different answer from the answer I've given Sir, except to observe, your Honour put to Mr Salmon I think that it might be, and these are my words not your Honour's, unusual to find a right where there wasn't meaningful relief, and that's the only additional comment I can make Sir.

WILLIAMS J:

Well that's what section 5ZM says.

MR LADD:

Yes.

WILLIAMS J:

Declaration in just those circumstances by reference to the standards in the Act.

MR LADD:

5ZM for Mary or?

WILLIAMS J:

M for Mike, yes.

MR LADD:

M for Mike. Yes your Honour, I was reflecting on section 5ZN which your Honour also raised and which provides for those exercising public power to refer to and take account of the 2050 target, budgets and plans. It's quite specific the targets, the budgets and the plans and what Mr Smith is trying to achieve here is something different from that.

1450

WILLIAMS J:

Well that's true but first of all Parliament does seem to contemplate declarations alone for the sorts of problems that have been talked about, albeit by reference to the standards in the Act, and secondly, Parliament also seems to contemplate that when public power is being exercised, reference to the standards in the Act is a requirement anyway, as long as the Court or the decider sees fit. Is there a clash?

MR LADD:

Yes. I can't disagree with that proposition Sir.

WILLIAMS J:

No. Well I just wonder what the problem is then?

MR LADD:

The problem with declaratory –

WILLIAMS J:

Because all of those things you talk about the Court having to do are partially done in this legislation, in respect of which any judge dealing with an application would, if he or she thought fit, it would be unlikely that they wouldn't, was going to have regard to anyway.

MR LADD:

Yes. I think the point I'm advancing is that if a judge had a consideration of those things, would decide that injunction relief can't be provided.

WILLIAMS J:
Possibly.

MR LADD:
Yes. The point I'm pressing is not just possibly, because I have to, but this Court can be satisfied a judge wouldn't grant injunctive relief.

Your Honours, recognising the first difficulty of the consequences of injunctive relief. The appellant says at paragraph 167 of his written submissions, which will just come up on the screen, the Court does not need to, and this is responding to a finding of the Court of Appeal, quote "address the social, economic and distributional implications of different regulatory design choices to grant the relief Mr Smith seeks, nor does it need to design a regulatory regime." This is where we differ there from the appellant. "It can simply make the respondent stop (albeit Mr Smith recognises that such an inunction might be suspended for a period)."

But then in an earlier paragraph, 113, the appellant also recognises the extreme consequences of making the respondents stop. It says, again this is on the screen: "To that end it might well be appropriate for any injunctive relief to be suspended to allow the respondents time to seek legislative authorisation, or to modify their activities so that they do not cause a nuisance." That's said to be a matter for a trial judge but it's also said to give this Court confidence that the claim can be determined without creating absurd or oppressive outcomes. That's the concern lurking below that submission of the appellant.

That brings me to my first point. That the proposed solution, suspending a prohibitory injunction, is illusory. So we've been told that three things can happen. Seeking parliamentary intervention, changing their businesses, or ceasing business. For Mr Smith he does not achieve his goal. By definition a suspended injunction must mean the respondents can continue their activities, therefore to some degree their submissions, notwithstanding, as Mr Salmon said, that every tonne of carbon dioxide is a straw that may break the camel's back, and if Parliament overturns the Court, Mr Smith has gained nothing.

For the respondents, if they can change their businesses, they will want to find a way to have the injunction discharged, and must be entitled to seek to do so. That will involve each of them engaging in progressive reductions in net emissions over time, presumably in terms of the pleaded mandatory injunctive relief. We've pushed back to that. But if they can't change their businesses, they close, and that matters in this case because despite Mr Salmon's insistence that these are trial issues, it's obviously now that there are no realistically viable alternatives for the respondents' activities. There isn't an alternative power source to gas and coal for the Huntly Power Station. Dairy Holdings can't stop the enteric fermentation of its 50,000 cows, other than by slaughtering them. There is no replacement fuel that Z Energy or Channel can supply that will power our cars, trucks, buses, trains, planes or ships.

KÓS J:

These are absolutes and instant imperatives. If, taking a long view, what happens is relative change, then Mr Smith may take the long view and he may also be gradualist as opposed to an absolutist. Why should he not have that relief. Why would he regard that as a loss?

MR LADD:

He might not, and I heard Mr Salmon to say prompting change is one of the things that Mr Smith wants to achieve. But Mr Salmon also said that where he thinks Mr Smith comes to is that the suspended injunction requiring the respondents to cease their activities is the way forward, and the point I make is within the sorts of timeframes that Mr Salmon was contemplating, you heard reference to two years your Honour, that change can't be made.

KÓS J:

It seems to me we're well ahead of the capacity of this Court to reach firm conclusions in the absence of evidence. I mean Mr Smith might be pleased with a half per cent change in the first year, and 2% in the second. It's probably better than he's got at the moment.

MR LADD:

Yes. Perhaps, Sir, the way to pick this point up is firstly to note the implications for the Court of this discussion with your Honour, which is that it will be asked to manage complex –

KÓS J:

Well I understand that point.

MR LADD:

– emissions reduction processes for each one of these seven businesses, and others like them, and because the claim is directed to New Zealand's major businesses and emitters, the Courts find themselves managing important parts of the New Zealand economy over an unknown period of time.

WINKELMANN CJ:

So I had this headed up the relief is futile, but that's not really your submission. Your submission is that the relief is too impactful and – is that right?

MR LADD:

It's both your Honour, and I am coming in minutes to the relief is futile.

WINKELMANN CJ:

It's too impactful, it takes us outside our proper role.

MR LADD:

Yes.

WINKELMANN CJ:

And now it's futile.

MR LADD:

Yes. Futile, perhaps I come to this immediately, just with this very brief stop. We've heard discussion of the *Birmingham* case, and my learned friends refer to an article by Rosenthal, which will come up on screen. That is held up as an indicator, *Birmingham* is held up as an indication of what is possible for

the Courts, but in my submission it's actually a cautionary tale. Firstly, it didn't immediately, or even quickly, fix the sewage problems faced by the plaintiff in *Birmingham*. It took 35 years from commencement of proceedings in 1858 to settlement in 1893 to resolve the claim because of a fundamental difficulty. The nature of the sanitation problem, like the nature of climate change, didn't have an immediate fix.

Secondly, just to draw your Honours' attention to the two paragraphs under the heading "8. Conclusions" and the observation there that looking at the history of that claim, and the claims and the negotiations and the legislation around it: "It is evident that, far from supporting the view that cost-benefit balance-of-convenience arguments were irrelevant to the Court's decisions, for the disputes involving sewage pollution of the Tame, in the event, such considerations were paramount."

That brings me to the question your Honour the Chief Justice asked about futility. As I said, I'm referring here to futility in a sense that Dr Spry refers to it. If impossibility of compliance or futility is certain, that second paragraph in front of you, and the grant of specific relief is pointless. An injunction should prima facie be refused. The respondents say that it is evident on the pleadings that the relief sought cannot prevent a pleaded harm to Mr Smith.

Mr Smith takes a step towards acknowledging that in his written submissions at paragraph 166. That will come up in a moment, but what is said is, in the middle of that paragraph: "While it is obviously true that an injunction in this case will not, by itself, stop all the adverse effects of climate change, Mr Smith intends to lead evidence showing that it will contribute to a material reduction in those adverse effects…"

1500

So to unpick that assertion we need to consider three things. 1) the causes of climate change which I don't expect to be in dispute, 2) the respondent's contributions to the pleaded harm to Mr Smith and 3) the pleaded pathway to reduction in adverse effects. Just looking at timing, I think I can move quickly

past the causes of climate change. Just noting that it is of course caused by emissions which are global, contributed to by billions and have accumulated in the atmosphere over decades. There's both a global and a temporal and a scale dimension to them and that's recognised in the pleadings, the draft pleadings at paragraphs 53 to 55. The references to from human activities and it's recognised at paragraph 60 where it is pleaded that what is required based on the IPCC science is minimum global reductions. If I can give your Honours two references, pinpoint references to the AR5 *Synthesis* report from the IPCC –

WINKELMANN CJ:

I'm a bit lost where you're at with your submissions Mr Ladd, I'm sorry. I'm sorry to be a bit dim here.

MR LADD:

Not at all your Honour.

WINKELMANN CJ:

You're moving at speed I know.

MR LADD:

I am because I'm conscious that I'll be moved on at speed. Futility.

WINKELMANN CJ:

Yes.

GLAZEBROOK J:

You say it won't fix climate change whatever happens with these –

MR LADD:

Yes your Honour.

GLAZEBROOK J:

Is that, sorry, just to be –

MR LADD:

Just to be direct, yes.

GLAZEBROOK J:

– to be direct, yes.

MR LADD:

But it won't fix the pleaded harm to Mr Smith –

GLAZEBROOK J:

No. I understand –

MR LADD:

– because that's the compass of what we're arguing about.

GLAZEBROOK J:

Well it won't fix climate change and, therefore, it won't fix the pleaded harm.

MR LADD:

Yes. And picking up that discussion, the Ministry for the Environment has published a report *How New Zealand Compares to Other Countries*. My learned friend Ms Cooper referred to it. It's at RA66 and it's also referred to in the respondent's submissions at footnote 182. At 2757, that's a case on appeal reference, the Ministry states: "New Zealand's gross emissions contributed approximately 0.17% of the world's gross emissions."

Now the appellant carefully presents the boundaries of the claim in terms not of global emissions but of New Zealand emissions and there is that pleading that the respondents together are 33% of New Zealand's total emissions. That, of course, is sleight of hand. The appellant accepts that climate change is caused by global emissions. Minimum global reductions are required. In seeking to address indeterminacy problems in the written submissions at paragraph 15 which will come up in a moment, the appellant submits that 100 individual entities primarily fossil fuel producers are responsible for the majority of global

emissions and acknowledges that none of the respondents are among those top 100 global entities. And even framing the position in terms of New Zealand's emissions the respondents are collectively 33% of 0.17%. of total global emissions. And when that scale is recognised the defendant's contribution to the pleaded harm to Mr Smith is firstly de minimis and secondly in my submission it's clear that stopping these emissions will not stop that pleaded harm, and that's emphasised by the highly attenuated logic, we're now moving back to the draft statement of claim at paragraph 62. The highly attenuated logic used at that paragraph to explain how injunctive relief will materially reduce the adverse effects.

Firstly the appellant doesn't plead that the defendants materially contribute to global emissions. 62(a) is that they are material contributors to New Zealand's total emissions. Secondly, there is on pleading of any direct reduction in adverse effects from requiring the defendants to cease or reduce emissions, or actually any reduction at all. Instead at (b) and (c), we'll just bring them up a little, what is asserted is flow-on effects requiring other emitters to stop, and very substantial emissions reductions being made in other countries through inspiration, precedent and adoption of similar judicial responses or political steps becoming unavoidable or more normalised. These aren't pleadings of fact, your Honour, they're speculation. The prospect that a decision in this case is going to cause a cascade of swift, positive judicial and political change around the world is unreal. In fact the appellant's own case turns on a concern that these processes haven't responded so far, and won't respond in the future. That is one hand, Mr Smith is saying that the New Zealand courts must act because the legislature and the Executive will not act, despite the inspiration and the precedent of cases like *Urgenda* and *Shell*. On the other hand he says that liability and relief in this case will drive judicial and political steps around the globe in a way that they haven't in New Zealand. Respectfully, that causation argument is drawing an impossibly long bow in reinforcing that the relief sought will not achieve its purpose.

Now two more things from me before I hand over to Mr Horne. The first is to come back to the discussion with your Honour Justice Kós and I think

Justice Williams about declaration. Respectfully we don't require a trial. We don't require a trial that would really look like a Royal Commission of Inquiry just for a declaration. This Court could address the point in its judgment in this case, or as I said, in any one of judicial review cases that will come before this Court.

GLAZEBROOK J:

How would we do it in this case? What would we say? This is a really, really big problem and these people should do something about it, but we're not going to let the case go to trial?

MR LADD:

The structure, your Honour, would need to be –

WINKELMANN CJ:

It's not a serious submission that you're making, is it? That's not a facetious question. Is that a serious submission that you – are you inviting us to make such a declaration or are you just saying we would be – is your submission rather that following a trial we'd be in no better position to make a submission – a declaration.

MR LADD:

I'm obviously not inviting the Court to make that declaration. All of my submissions are predicated on the basis that the High Court gets to relief. But I'm saying a court could, and the Court doesn't need a trial in order to make that kind of declaration.

KÓS J:

I don't follow that. If the conclusion of the trial court were, Mr Ladd, that the emissions by certain emitters in this country were unlawful, that is a effectively a statement to Parliament, as well as the emitters, to do something about it.

MR LADD:

Yes.

KÓS J:

It might be that we accept entirely your submission, that it would be too hard for this Court to exercise a supervisory role – not this Court, the High Court.

MR LADD:

Yes.

KÓS J:

But we can't declare illegality now, and a declaration of illegality alone is not futile, or purposeless.

MR LADD:

I don’t think I can take that any further Sir.

KÓS J:

Fair enough.

WINKELMANN CJ:

No, it was a flourish.

MR LADD:

I think it was a flop. Thank you Sir.

KÓS J:

Constructive feedback Mr Ladd, you and I know each other well.

GLAZEBROOK J:

We all have these moments.

1510

MR LADD:

That’s all right. I've been sitting through almost three days. I put my technical gown on this morning.

WINKELMANN CJ:

All right. So Mr Ladd, where are we at with your submissions?

WILLIAMS J:

You had two points.

MR LADD:

I had two points. I've addressed both of those points. The question I was going to ask the Court because I have been necessarily moving at speed, whether it is useful for me to provide my speaking notes with the references to –

GLAZEBROOK J:

I'm sure it would be –

WINKELMANN CJ:

It would be.

GLAZEBROOK J:

– because it's just easier to pick up the references from –

WILLIAMS J:

Including the draft declaration.

WINKELMANN CJ:

And that would be true also – if we can stop with the stand-up comedy routine – that would be true also of Ms Swan and Mr Smith's outlines.

MR LADD:

Yes. Well, I'll bail out from my part of the stand-up comedy routine and cede the floor and the open mic to Mr Horne. Thank you, your Honour.

KÓS J:

And I do apologise, Mr Ladd.

MR LADD:

Not at all, Sir.

MR HORNE:

Tēnā koutou. Good afternoon, your Honours.

WINKELMANN CJ:

Mr Horne. Now what are you addressing us on, Mr Horne?

MR HORNE:

Your Honours, I don't have a road map for you because my road is mercifully short. You'll see that my written outline is only five pages in length, so I don't need to give you any more than that and even that it appears you won't have time to go through in any detail. So I am addressing only the specific circumstances of Channel Infrastructure and what that means not only for a case against Channel Infrastructure but also the case against the other respondents.

When this proceeding was commenced, Channel Infrastructure was named Refining New Zealand and it was so named because it operated an oil refinery up at Marsden Point, and in a rare piece of good news for greenhouse gases and climate change it, as you know, has shut down that refinery. It no longer produces fuels in New Zealand, and as a result of that it no longer produces greenhouse gases of any significance. It estimates that its reduction in the production of greenhouse gases was in the order of 98% and it's my submission that anything that remained would be truly de minimis as my learned friend, Mr Salmon, said when this case opened.

So Channel estimates that this alone will contribute approximately one-third of the reductions proposed in New Zealand's first five-year emissions reduction plan, and that's based on the New Zealand Government's emissions budget under the Climate Change Response Act.

So Channel is now an infrastructure company. It operates a pipeline, a terminal and some storage tanks. The pipeline is a good thing. It is the most efficient and low-carbon way of transporting fuel from Marsden Point to Auckland. It generates, by Channel's estimation, only around 10% of the greenhouse

gases in operation than it would cost to transport all that fuel using trucks. It's also ideally placed in the future to transport biofuels or other sustainable fuels if and when producers make them or consumers want them.

So, importantly, Channel does not produce any substances that contribute to climate change, nor does it own them, nor does it make any emissions itself. The appellants describe it as an importer but it's really an importer only in the sense that it facilitates other people's imports. It's simply a provider of infrastructure to other people.

So we might ask the question: "Why is Channel still here?" The appellant might have been expected to celebrate Channel's decision to cease refining fuels and reduce its emissions by 98%, and in a moment of wild optimism I half-wondered whether we might receive notice of abandonment of the appeal against Channel but instead the appellant proposes to amend his claim, in part in response to Channel's closure of its oil refinery.

Now I won't go through the amendments in detail – we don't have time – but I do invite your Honours to read my written outline and you'll see there that most of even the amended pleading is incorrect in almost every material respect. It asserts that Channel operates the refinery. Well, it doesn't any more. It asserts that Channel produces and supplies fuels. It doesn't do those things either, and whilst it's referred to as an importer I've just said that its importing role is really limited to assisting others.

Because Channel is not a producer, supplier or an emitter, the claims against it in tort can only be made on the basis that it provides services to others, the fuel company, who supply products to further persons, consumers, who in turn burn them and create greenhouse gases. My submission is this: that is a very, very long bow for the appellant to draw to bring a claim in tort, whether in negligence or nuisance.

I adopt the first to fifth respondents' submissions in this respect, and I won't repeat them or the authorities referred to there, that public and private nuisance

claims do not extend to suppliers of products that are used to create a nuisance and Channel's position is even further removed from that of suppliers of products because it doesn't own or supply the products; it merely transports them for other people who own and supply them.

Now I have been unable to locate any authority, and I'm confident that's because there is none, that would support the proposition that a claim in public nuisance might lie against a person who does no more than transport, for its owner, a substance that is later alleged to cause a nuisance when in the hands of yet another party, and I adopt Mr Smith's submissions earlier when he said that you can't be a party to a nuisance.

Now my learned friend, Mr Salmon, made a very confident submission on Monday that those 19th century sewage cases, which your Honours have been taken to in some detail, involved providers of sewage plants that were held liable because their pipelines enabled a problem. That's not correct, your Honours. In all of those cases the defendants were held liable because they were the emitters. It was incidental they happened to have some pipes. They were using those pipes to discharge their effluent straight into the waterways that were the subject of those cases, and that is not what Channel does.

If the appellant's claim may lie against Channel because it provides the use of a pipeline and other infrastructure, then I ask the question: "Where does liability end?" A suit might lie against almost anyone with even the most peripheral involvement in the process. What of those who provide the ships, those who provide the steel to make the ships, those who provide the road tankers?

If a claim in tort might lie against Channel, it's difficult to see where there will be an end of it and it's my submission that to recognise a duty in these circumstances would give rise to disproportionate and indeterminate liability. This exemplifies the argument that has been made earlier by other counsel for the respondents, that the law of torts must proceed incrementally and carefully.

This would be a quantum leap beyond any recognised case in negligence or nuisance.

Your Honours, I do also go into some detail in my written outline with respect to the relief sought and again, like the claims of breach of duty, it's wrong, it's not appropriate. It seeks a declaration, for instance, that Channel will cease its emitting activities (it doesn't have any), that it will seek an end to the production and supply of fuel products (it doesn't produce them, it doesn't supply them), and so on and so forth. But we don't have time to go through those in detail, so I'll leave you to read those at your leisure.

We are very short of time. I hope that's of assistance. Unless there's anything, those are all my submissions.

WINKELMANN CJ:

No, it's very helpful, thank you, Mr Horne, and it's appreciated that you're so to the point.

MR HORNE:

Thank you, your Honour.

MR GORDON:

Tēnā koutou, your Honours, and good afternoon. I too, like the people before, speak with the clock ticking loud, but I also do appear for a respondent who is no less liable on the claim that is being sought to be pursued by the appellant and for whom the consequences are no less serious if there is indeed held to be a cause of action against it and fundamentally I appear for a respondent who is in a very different position to the others.

So if nothing else is taken out of what will be a very short oral submission from me, it is to request that we don't lose sight of the fact that there are seven very different respondents against whom this action is sought to be brought. I know that media comment has focused on calling them the "polluting seven" or some

such. Well, that's simply wrong and it's incorrect to view them as some sort of indistinguishable group.

We, of course, are a coal miner and we are being sued because of steel-making activity. I was somewhat surprised, or a little surprised, to hear my learned friend, Mr Salmon, on Monday talk about "if they don't like the activity being challenged they can lobby Parliament to authorise that activity" and in a nuisance context my friend, Mr Bullock, said: "They can go to Parliament and get permission to do it." But with the greatest respect, that's not how the situation lies, at least in respect of coal miners.

1520

Coal mining is an activity that has long been authorised by Parliament. I mention the most recent Crown Minerals Act 1991 in the road map there at paragraph 4 but long before that the Mining Act 1971, 65, 26, I think. The Land Act of 1892 was the first statutory approval for coal mining.

The other point there is that we are talking about steel-making, so to pick on your Honour, Justice Kós, point about the Land Rover, it's not just the fuel going into the Land Rover, it's the steel with which one builds the Land Rover and if we're all going to be driving round in electric cars we'll need steel to make those.

So the points I have to make will be very swift and come from the basis that BT Mining has been joined for a very specific purpose which is to draw in exports of coal. It's obvious and there's no need to – domestic use of coal is captured by other defendants and it's been expressly pleaded that this is all about capturing exports. It does add a considerable layer of complexity to a case that would be an awful lot more straightforward if my client had not been drawn into it.

But the points that I make are essentially threefold. First, that you've heard before, which is that my client is not an emitter. It's not being sued for having carried out any material activity of its own. It's because of the emissions of overseas steel makers which are not my client's emissions.

The second point is how, unlike any other respondent, the activity is one that is occurring in overseas jurisdictions and that really draws into the heart of it the question of relational proximity in a nuisance context or causation, and I'll put the point simply: if third-hand involvement in an overseas supply chain is sufficient to create a liability in tort then we really are getting further and further down the supply chain to something approaching a tort for the environment. I wouldn't say a tort, a Bullock tort, but perhaps a tort for injury to Gaia or the like. The point there is that to pitch this as a case brought to attack bottlenecks is, in my respectful submission, one to approach it in a back-to-front way. It's to say, well, we look for the bottleneck which could be anyone – it could be an exporter of iron ore it could be a shipper who transports the coal, it could be the railer who rails it to port – the point there being that there must be a point for strike-out purposes where you get too far down the chain to assert a tortious liability and that is fundamentally BT Mining's position.

The final point to note was in relation – you've been taken to the CCRA a lot. One point I would say is that the question of exports of coal has been very specifically addressed and one can see how and why. It's a reciprocal thing. One accounts for the emissions in the jurisdiction in which they occur. So imported coal to New Zealand gets counted here and exported coal from New Zealand gets counted there. So the relief would unavoidably be a double counting. So it's not a general provision under the CCRA: it's very specific.

The only other point I had to note – with one eye on the clock, your Honours – is perhaps not quite housekeeping but you were taken to section 104E of the Resource Management Act and *West Coast ENT*. Of course, that was repealed by the 2020 RMA Amendment Act but with the caveat that the date of that repeal which was originally December 2021 was put to November 2022, but that was more a point of housekeeping.

I've fairly rattled through that but I do want to do justice to my learned friend in reply, so they're the submissions that I had to make for BT Mining, your Honours.

WINKELMANN CJ:

So you're confident you've covered all the points you wanted to though? I mean, personally, I think you've made them very clearly and quite succinctly. I just don't want you to feel –

MR GORDON:

My points are succinct ones, Ma'am, and that's why I've made them in that way. No need to go diving into old cases any more. As your Honour pleases.

WINKELMANN CJ:

No, no need for flourishes. Thanks. All right. Mr Broadmore?

MR BROADMORE:

Nothing from me, Ma'am.

UNIDENTIFIED MALE SPEAKER: (15:24:14)

And no submissions from me.

WINKELMANN CJ:

Sorry? No more submissions for the respondents?

MR KALDERIMIS:

Could I just take one minute to make one last point which is on the question of the declaration that my learned friend, Mr Ladd, addressed? What I have to say on that is simply this: that if what this case comes down to is that the Court could see a way through to allow a case to go to trial, that's simply in order for declaratory relief to be granted at the end of it, that that would be a disproportionate and unfortunate situation because if we imagine what that trial would involve, how many years it would take, how unformed the allegations are at the moment and would remain, the evidence it would traverse, it would be a Commission of Inquiry into all of the things the government is doing, all in order to send a message effectively to Parliament.

My answer to the question asked of Mr Ladd is the answer that I apprehended he was really trying to make which is if it gets to that point the Court has other means available to express its general sentiment and disapproval to Parliament. There will be other cases, including in tort, there are other cases that are not in tort, and there is the mechanism of the language that the Court uses in this judgment. It comes down to that. We urge the Court to exercise judicial economy and judgment in how we proceed because this case, if this action can't be struck out, means that no other actions of this type by any number of plaintiffs could be struck out and they will all have to be addressed one-by-one through their own Royal Commission trials.

So thank you to your Honours for listening to that last point. Unless you have any other questions, they are the submissions for the respondents.

WINKELMANN CJ:

Thank you, Mr Kalderimis.

MR SALMON QC:

It's not, of course, correct to characterise this claim as some sort of improper inquiry that goes beyond the Court's constitutional and institutional competence. The claim that's brought pleads certain conduct which is largely not disputed, certain harm which is disputed and raises trial questions that will take some time at trial, not too much and we can case manage it, and it raises a number of factual claims, some not pleaded but led from the Bar today by the defendants, that somehow any of the relief sought is impossible. Now if the defendants want to run those points, they, of course, will occupy trial time and putting them up today, of course, rather highlights the problems at the strike-out stage of the defendants seeking to claim they cannot make changes that they plainly are already preparing to make. So I don't, with respect, accept that the comparison seized upon by my learned friends of this proceeding to a Commission of Inquiry is right. The burden of proof will apply. Pleadings rules apply. Particulars could be sought. Particulars and pleadings will define the scope of discovery, the scope of questions and the scope of evidence. The normal rules of evidence will apply, including the *Daubert* rules, which will

mean that unlike in much of the democratic world climate change will be discussed based on actual science. This is a trial that's properly within the domain of the Court and, most materially, the suggestion that it's disproportionate to occupy some weeks, possibly two months, of High Court time on this problem, the suggestion that that is disproportionate, one just needs to look at the daily lists over the last few weeks of the High Court to see that's just not right.

That's a general response to what has just been said. Can I deal with two very brief housekeeping matters? As a courtesy to the Court, firstly, on a closing karakia, Mr Smith has spoken with some representatives of the defendant group and there's been a suggestion that a member of the defendant group would give a closing karakia, with the Court's leave. We are in your hands on that, but that's agreed to be appropriate as between Mr Smith and representatives of the defendants.

WINKELMANN CJ:
Yes, that's fine.

MR SALMON QC:
I'm not sure who's giving that so I'll just leave that to happen. Secondly, I know leave is required for this but I'm aware that while my friends have been really constructive about timing you will want me to finish by four as well. I think I'll be quick –

WINKELMANN CJ:
Well, we could allow you a small amount of slippage. A small amount.

MR SALMON QC:
Well, I'm going to suggest a constructive way of cutting some time which is that Mr Bullock, if we interpose him now to deal with just "nuisance", he thinks he can spend five minutes giving all our reply points. I will take longer, being less familiar with the materials.

WINKELMANN CJ:

Okay, and if you could try and make clear when you're moving from point to point, Mr Salmon.

MR SALMON QC:

I will.

WINKELMANN CJ:

Mr Bullock doesn't have such an issue with that but you do.

MR SALMON QC:

I'm sure I'm joined by some of my friends in saying it's great to have livestreaming in place with so much helpful career feedback. But I agree, he's good at that, your Honour.

So I'll hand over to Mr Bullock and if the Court's happy with that I think he will be efficient. If there are questions obviously he'll be better placed to answer them too.

WINKELMANN CJ:

Thank you.

1530

MR BULLOCK:

Thank you, your Honours. I've six points which I'll work through briefly. The first is that it was suggested that *Birmingham* was a case about a single wealthy landowner relying on riparian rights. I invite the Court to consider the commentary in the judgment at pages 227 to 228 where the Court refers to the case also being brought on the basis of an interference with the general body of persons living along the river, and there's evidence there of health issues engendered by the nuisance. Also Professor Pontin's history, there's articles at 127 and 128 of our bundle. At page 32 of the 127 tab he notes that Adderley brought the case as a representative of the 27,000 tenants on his estate. Also in Pontin's material in respect of what Mr Ladd submitted relating to

technological change, Professor Pontin has done a very detailed history of the effect these suspended injunctions had on driving change in sewerage cases.

Second point. These cases about rivers were not just about riparian rights. The *Canada v Ewen* case which – these are all in my outline – the *Canada v Ewen* case at page 3 is a case about health effects. The *R v Bradford Navigation Co* (1865) 6 B & S 631, 122 ER 1328 case is a case about smells. The *Birmingham* case, as I just noted, was also about health –

WINKELMANN CJ:
Can you just slow down a tiny bit there?

MR BULLOCK:
Sure.

WINKELMANN CJ:
So can we just start at the beginning of your statement?

MR BULLOCK:
So *Canada v Ewen* at page 3, they refer to typhoid outbreaks caused by the pollution along the Fraser River.

GLAZEBROOK J:
Would it be useful to have these just written down?

WINKELMANN CJ:
Yes. At the end it would be quite good if you could reduce your points in reply to a little short…

MR BULLOCK:
Something more readable, yes.

ELLEN FRANCE J:

Sorry, Mr Bullock, what was your introductory point, your point 2? You had an introductory sentence.

MR BULLOCK:

Point 2. My learned friend, Mr Smith, suggested that the river cases were just about riparian rights.

ELLEN FRANCE J:

Right, sorry, thanks.

MR BULLOCK:

I'm saying they were about wider public issues, public health, and also inconvenience, smells, and that was the *R v Bradford* case.

WINKELMANN CJ:

So *Canada v Ewen* was about typhoid outbreaks?

MR BULLOCK:

Outbreaks, yes, caused by the offal and things being thrown into the river. It was about salmon canneries along the Fraser River. *Bradford* was a case about a canal that had been maintained with polluted water. *Birmingham* I've mentioned as to health. *Colney Hatch* was also a case at 147 where health effects are listed as the basis.

This comes to a related point which was that Mr Smith said that the sewerage cases were about the right as such. You'll remember the distinction between rights as such and maybe the *PYA Quarries* interference with health, convenience, et cetera, of a large class.

WINKELMANN CJ:

A free-standing right.

MR BULLOCK:

Yes. So Mr Smith said, well, this – the sewerage cases were based on a free-standing right to take clean water. But very shortly after that he also endorsed Professor Neyers' article which is at volume 10, tab 122, and Professor Neyers' view is that there are only two recognised public rights as such: the right to pass and repass and the right to fish in tidal waters. He doesn't refer to a right to take clean water from rivers, and that suggests that our reading of these cases as being about this *PYA Quarries* interference with public health, et cetera, is the proper reading.

As to independent illegality – this is my fourth point, sorry, I should have flagged that – independent illegality, there was an effort by my learned friend to read *PYA Quarries* as involving a private nuisance to support this independent interference with rights argument that is being advanced. I just want to note paragraph 2.18 of the Law Commission's report at tab 100 of volume 9 where in its discussion where it rejects this requirement for independent illegality it gives *PYA Quarries* as the example of a case where there was no independent illegality, and this is what motivated my initial submission yesterday that there's been an attempt to recast or recharacterise some of these cases into things that they aren't.

Actually, I'll skip one point. I think we can go to the last one which was simply that his Honour, Justice Williams, raised an example of a significant cultural site, the landing place of a waka, for example, as potentially founding a distinct interference with a Māori person or a Māori community in New Zealand and I believe my learned friend, Mr Smith, suggested that that was not this case. I would invite the Court to review the pleadings because in addition to pleading specific harm to Mr Smith's land, or land in which he has an interest, he also identifies that there are various sites of high cultural and historical significance to him and his whānau around that land which are also impacted, including fishing sites, waka landing sites, burial grounds, and so on, and I think this is detailed to some extent in his affidavit.

That was all I was intending to say, your Honours.

WINKELMANN CJ:

Thank you, Mr Bullock.

MR SALMON QC:

First sign-post is tikanga. I don't feel equipped to respond or deal in reply in any real way on this point except to make one observation and if the Court has particular questions I will hand the mic to Ms Coates. But my one observation is this: given the fact we don't yet have trial evidence on tikanga and acknowledging that what I'm saying is based on what we have heard so far within this hearing, it would seem surprising to say the least if principles of tikanga dictated that the Courts should shy away from engaging with otherwise justiciable issues in favour of Parliament resolving matters. That doesn't really sit with my understanding of New Zealand's history or of tikanga, a context in which customary took a range of approaches that didn't always involve a national collective democratic approach. So just that observation. If the Court wants to hear more on that I'd defer to others on that.

The next headline is just very briefly on nuisance. One discrete point I would make arising out of what I think it was Mr Ladd said which is if one or two of the defendants are, by nature of the type of activities they undertake, outside the scope of nuisance, then in my submission that would reinforce the reasons for not dissecting the causes of action and leaving some alive and some not. This is a point Justice Kós and the Chief Justice raised with me yesterday, my coherence on that point, once one acknowledges the possibility that nuisance might not capture all defendants, yet keeps alive the prospect that efficient and just Court responses might nevertheless have them in frame, and I'll take, for example, the Channel position where it says it's just an infrastructure provider, well, maybe in the sense it doesn't take ownership, but it is running the pipes the whole way, that may or may not meet a nuisance test but we would respectfully say as a node for delivery of most of what's burned in cars it would otherwise come within the third cause of action, whatever it is to be called. So that's a cautionary note about the Court closing off both jurisprudential and remedial options for the trial Court. There is no down-side

and no inefficiency in having three causes of action live as opposed to two or one.

The next broad topic is the statutory scheme and the submissions made about that and when I say "statutory scheme" I'll include in there what was said by my learned friend, Ms Swan, in her submissions about the emissions report and the IPCC reports.

On the IPCC reports first, one can cherry-pick statements which read in isolation might suggest that we are unable to identify any emissions that must stop yesterday, but that is to misread these thousands and thousands of pages of dense materials. They acknowledge that some changes will take longer because, for example, there isn't another way to run the Flying Doctors service in a country without aeroplanes that burn fossil fuel. They are not a basis for saying New Zealand should keep digging up coal nor that it should keep burning it at all and that again is an example of a problem of running this case at strike-out, putting forward selected factual assertions by the defendants as if they represent a coherent picture of the policy backdrop for the Court or of the international agreement. The international consensus, and the UN Secretary-General's language confirmed this, is didactically clear about what should be being done by these defendants.

Secondly, in terms of the emissions report which my learned friend, and she wasn't doing this on purpose, but she referred to it as "Parliament's response" because it's a report that's connected to a parliamentary process, that is not, of course, a piece of legislation, it's not binding and it's being fiercely attacked by climatologists and by the interveners, Climate Lawyers of New Zealand. So for trial purposes it can be taken to be disputed as to its accuracy or appropriateness.

Turning then to the legislation that we have, it's worth reminding ourselves that New Zealand ratified the UNFCCC in 1992, so 30 years of increasing emissions, that these companies have known that since 1992, that the Climate Change Response Act was in 2002 and there was urgency then.

1540

West Coast ENT was I think 2010 but the prior litigation about 104E was 2004 or '06. So this Court and others were already hearing of this emergency. In that time, (1) the defendants have been on notice and (2) Mr Smith's claim that Parliament cannot effectively act and will not act has been proven year after year as the graphs show increasing emissions.

So putting aside the points acknowledged by my learned friends about the lack of a privity clause and the lack of really a coherent reason at all for saying why it would subvert or collapse otherwise available common law rights under nuisance or wherever, those pieces of legislation are said by Mr Smith to be unfit for meeting the need to safeguard human life, property and culture and unfit to meet the acknowledged needs in the international instruments that New Zealand has ratified. So they cannot be taken at strike-out as representing (1) a clear message there should not be remedial relief ordered by this Court nor (2) that there will ever be any action by anyone else. In other words, I quoted one of my learned friends before this hearing started yesterday, no one else has got this, and that's the case with many democracies as democracies struggle and struggle with fake news and false science. The Courts are in a unique and important space as part of our constitutional structures and balance of powers to do something in that vacuum.

Another point is my learned friends have sought to characterise an attempt to enjoin them as going against a statutory or IPCC concern that action on climate change might harm the vulnerable or minorities. That is not a fact that this Court can assume to be true and it's contested by Mr Smith. He is suing a number of corporates who do not, as part of even their duties the directors owe to the companies, focus on the interests or concerns of minorities on the whole. He does, and his pleaded and factual position – and he says he will prove this at trial, at least if there's a chance – is that the minorities and the poor will suffer terribly if these emitters continue. It is not a basis on which this Court can act in a strike-out context to assume otherwise.

Another point, the notion that we are all in this together, which is presented as both a factual and a policy argument by my learned friends, it's somewhat ironic, I would note, to have advanced as a reason for not acting the English phrase "we're all in this together". The lobby group for agriculture which is seeking to avoid action by agriculture, He Waka Eke Noa, which means "we're all in this boat together", is focused on keeping agriculture out of our proper climate response. "We're all in this together," and this is my only point on this point, is recognised and has been for years, including by Dr Michael Mann of Penn State University, recently discussed in Yale's climate law page, identifies that as polluter distraction method 101. To say "we're all in this together" is the way that they operate now to take attention away from what they've done and he traces it back to advertisements telling people not to drop their bottles on the ground which was Coke's way of avoiding blowback for introducing so many bottles. It is standard modus operandi and it is not in fact a coherent policy argument for denying relief.

Just very briefly on section 17 of the RMA in that statutory context, the one additional thing I would say to what's been discussed with me and with others on that point is to note that it contains indeed a statutory recognition that there might be contexts in which injunctive relief, leaving aside damages, is the appropriate remedy, and I would say that's some support for the notion that Mr Smith's claim isn't odd for avoiding all damages problems by focusing on an injunction. It's consistent with, in that case, a statutory recognition that when one is talking about the environment one is talking about something that has an inherent value that damages will not cure.

The next point is just a general observation about how much of what we've heard from my learned friends respectfully underscores the problem of seeking to strike-out a case on the issues of this nature without evidence. Whether it's my learned friends' repeated invocation of the relational theory of tort law, the risk that, as the planet burns, the hapless plaintiff team will burn up a pure theory of tort law and part of it is the relational theory of tort law and it said this isn't relational. It should be thrown out, but that's actually a factual assertion made in a void today because what is relational has been shown in the cases

again and again to be factually nuanced and context-specific partly by way of market understanding and partly by way of scientific understanding. So it's really just a tautological assertion to say relational theory of tort law means this should go without a trial.

Next point on what evidence we need. My learned friend Ms Swan said we would stall industries and they would stop. There is no evidence of that and that's not accepted by Mr Smith. You would see for example in the pleadings noting Fonterra's express statement it would cease burning coal which it then didn't do. But also you would have heard my learned friend Mr Ladd talk about Genesis and bringing up the reference to dry years and needing a fossil fuel-powered boiler to deal with dry year downtime when there's not enough grid capacity otherwise.

Now doing it as I must by email I've spoken with an adviser to Mr Smith who is an expert in energy supply and New Zealand's energy market and I don't put this forward as evidence from the bar but rather by way of highlighting the problem of taking my learned friend's evidence from the bar.

He says that Genesis needs to do this all the time and keep burning. What I'm told is it's true that in a particularly dry year because there've been no other steps taken sometimes a boiler needs to be on at dry moments, but also, and this is just a counterfactual –

WINKELMANN CJ:

Well I don't think we need to bother with that. I mean I think we've got it –

MR SALMON QC:

Well –

WINKELMANN CJ:

Obviously it's factual material from Mr Ladd and it's –

MR SALMON QC:

It's factual material but also what's missed is it's burning all the time for price maintenance reasons. That's the only point –

WINKELMANN CJ:

Well that is really uber-factual material Mr Salmon.

MR SALMON QC:

And that's my point your Honour. That's my point. So that's another example –

KÓS J:

Some of us are pretty familiar with it Mr Salmon, you don't need to –

MR SALMON QC:

I don't plan to spend any more time on it Sir but I heard it said that the implication is Mr Smith will crash the grid and that's not true but it's again another example of –

WINKELMANN CJ:

Oh, you only need to say that there isn't – that it's a factual issue that just shows you how important the facts are. You don't really need to go into it.

MR SALMON QC:

And I won't go further on those facts. I'll make one parallel observation which is it's a great example of where a judge at the trial talking about remedy might say: "I will suspend or I will make the injunction with a caveat for summer for two years." There might be answers that work around each of the problems my friends put up. So it's really just a cautionary note about those factual assertions about problems. They're not accepted and they may not indeed be right at all. They will, however, be a matter that if the matter proceeds to trial will be easily tested because discovery will show if there are plans and competent directors will have made plans because it would be remiss not to otherwise.

The next point is relating to some of the queries about human rights and this is a point that I think is worth just spending a moment on because my friends for the Human Rights Commission of course have put some things in writing but not perhaps highlighted them but in light of some of the points raised including by Justice Williams and Justice Glazebrook in the course of today and I think yesterday, just a couple of points and making sure that the Court's aware of documents that it may be assisted by going to.

The first is to note that, and this relates to exchanges between Justice Williams and Ms Swan regarding the responsibilities of public actors and the legislature, Executive and possibly the Courts, that that is dealt with in paragraphs 6 and 7 in footnote 35 of the Human Rights Commission's submissions, but if the primary document is sought the Commission's bundle of authorities, tab 35 at paragraphs 4 and 8 deal with the international law position which is that the Courts are engaged by those obligations too. So that's the first point just to commend those paragraphs to the Court as making clear that the Court is an actor in that context.

WINKELMANN CJ:

Whose authorities are these? Oh, it's the Human Rights.

MR SALMON QC:

Human Rights Commission. So tab 35 is the UNHCR's general comment from May 2004.

The next point relates to a related issue which is general comment number 24 of the Committee on Economic, Social and Cultural Rights which deals with diffuse harms and multiple actors. Now this is at tab 32 of the Commission's bundle and the whole of that document I think is relevant because it bears on the obligations of States in relation to business activities and "States" to be read as including the Courts, and the obligations of business entities in turn in respect of human rights. If paragraphs 39 through 44 of that tab 32 in particular are perhaps noted as ones to have regard to because they address several issues identified by this Court as of interest during the course of this hearing –

WINKELMANN CJ:

Which paragraph, sorry?

MR SALMON QC:

39 to 44, the importance of effective remedies where business activities cause harm to victims, ensuring that State parties remove barriers to business entities' accountability but in particular noting that, and this is a quote, "business entitles routinely escape liability" because of barriers to effective remedies. Among those barriers is "the unavailability of collective redress mechanisms where violations are widespread and diffuse". That's in paragraph 42, that particular quote.

So an international instrument ratified by New Zealand that recognises that remedies face barriers through diffusion arguments and the like and that they need to be addressed to give proper effect to human rights, and we see that illustrated here because really part of the diffusion argument is, look, this is so bad that it's going to kill everybody, speaking hyperbolically, therefore the Courts shouldn't engage, and the UN Committee has rightly concluded that that is not appealing logic on the human rights front. It's to admit defeat.

The final point on human rights materials and UN materials, the international law position, relates to an exchange that my learned friend, Mr Kalderimis, had where he distinguished this case from some others where there had been an arguable assumption of responsibility and indeed in *Royal Dutch Shell* there had been a commitment to the UNGP by Shell. You'll recall that's been discussed I think with my friend and possibly with one other. Now this prompted us to have a look this afternoon and just take the first defendant and see what facts might emerge on that front, and two things emerged. One is Fonterra has publicly committed to the Paris goals and to effecting them, and that might be seen in a trial context as something that would be a relevant fact when having regard to the existence of a duty for the reasons my learned friend acknowledged, but more particularly Fonterra has committed to the UNGP, and I will just go to that, if I can, and actually go to it. That's tab 37 of the Commission's bundle of authorities, and looking here at, first, principle 11 which

is on page 13 or 14. We might be able to bring that up. Principle 11 is: "Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."

Then turning over to 13: "The responsibility to respect human rights requires that business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services …"

Then jumping over several pages to page 17 and principle 17, just this one and one more: "In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. [This] should include assessing actual and potential … impacts, integrating and acting upon the findings," et cetera, and at (a), (b) and (c) making clear when they identify that they "cause or contribute to", so no hiding in being one of many – the question is whether it's directly linked, not whether it's done by others – acknowledging at (b) that these "will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations," not meaning one doesn't try if one's part of many but rather the bigger the business the more effort it should be making, and Fonterra's committed to this.

And then at 24, which is over a few more pages, just lastly on this document: "Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable."

So that is something. I'm not sure, we haven't had time to do the full audit on all of the defendants, but taking Fonterra, it's committed to that in the way *Royal Dutch Shell* has. It is marketing itself with a public expectation that it is meeting those obligations and that would on the face of things on my own friend's

argument be a factor that points in the direction of tort response. So when it's acknowledged as it was for the defendants that they're not saying tort will never respond but that possibly something more is needed, this is another example of how the evidential matrix informs the duty inquiry in a way that a strike-out hearing cannot.

And then I turn to relief as my next topic. It's right of course that there's value in an injunction – in a declaration, sorry, and there is inherent vindication in a declaration. The fact that my learned friends are saying that such a declaration would be jarring for their businesses reflects one of the features of them. They resound in having the Courts determine an issue, and we know this from research, the fact of a decision is often more important and provides greater vindication than damages. So a declaration has value in and of its own right. But an injunction, my learned friend Mr Ladd said that was somehow useless for Mr Smith because it might be suspended. That's not accepted. It's not accepted that there's no utility in that. He's not putting forward suspension as anything other than a mechanism that a trial judge might find useful if it can be shown that there is this sort of negative blowback from a non-suspended injunction and it's going to be said I guess possibly at trial that Fonterra might take time to migrate from coal to something else in its boilers, I doubt long because it's been advertising as if it was going to do so and because it must have been making plans, but if there's a time perhaps an injunction would be suspended for that.

If a trial judge was looking at an injunction in relation to BT Mining by contrast there is no harm to any child somewhere or any worker in New Zealand beyond the fact that it's a business that would stop and be replaced by a, Mr Smith would submit, say demonstrably higher contributing green energy alternative in New Zealand or different enterprise, but there's no reason for example why there would be suspension there. He's not presenting his relief here as a final formula. He is rightly anticipating that if he has a trial and if he succeeds there would be a close consideration by a judge of what relief was appropriate.

Next point on relief. One of his suggestions involves a level of supervision and it said for some reason the Courts should never engage in supervision and I just want to very briefly reflect on that. the High Court engages in supervisory roles all the time. It did – supervisory steps were undertaken in the *New Zealand Māori Council v Attorney-General* [2008] 1 NZLR 318 case, in liquidations for receivers, construction companies being ordered to perform specific performance or indeed anyone. Banal moments of incompetence or concern about the management of private trusts. The courts do supervise injunctions, Anton Piller orders, all sorts of things. The suggestion this is too hard is one that assumes the worst about the injunctive relief made. It's actually a submission that should be being made at trial about the framing of injunction rather than being the tail wagging the dog and saying because one form of injunction might be harder than a trial judge would want to do we should throw the baby out with the bath water.

The final point on Mr Ladd's submissions about relief and the like is this. It was suggested that when we have submitted that Mr Smith says the harm to him is material we really mean material if we are right that other countries and other industries will follow suit. That's not the case. We have particularised those as positive flow on effects in terms of further reductions but it is alleged by Mr Smith by reference to the Professor Steffen evidence and the IPCC materials that show we are close to tipping points and by reference to the death of a thousand cuts that is already underway but will accelerate and worsen –

WINKELMANN CJ:

So I don't know if you've that quite right. What's said against you is that Mr Smith doesn't say that these injunctions will –

MR SALMON QC:

Yes.

WINKELMANN CJ:

– that the relief, the reduced emissions that will flow from these injunctions will make a difference.

MR SALMON QC:

And that's not accepted. So Mr Smith says that will make a difference in and of itself but the difference will be increased in the utility of the injunctions, will inevitably be increased by certain of the particulars he's pleaded. So he's just pleaded some particulars to amplify the submission that this will be material and show other ways in which it may be more material.

Beyond that and keeping to the spirit of a reply I don't have further submissions to make and it's exactly on 4 o'clock and that feels like the right time to let the Court retire, unless you have any questions for me.

1600

WINKELMANN CJ:

Yes. Well I'll just – before we invite whoever is going to give the karakia, but just before you do I was just going to say thank counsel for the extremely helpful submissions that we received and thank you for your patience with the questions from the bench and the quips from the bench, particularly coming from my extreme right and extreme left, and –

WILLIAMS J:

And the extreme centre it appears.

WINKELMANN CJ:

– and we'll take some time to consider –

GLAZEBROOK J:

No right of reply.

WINKELMANN CJ:

– our decision. Thank you.

MR SALMON QC:

Can I perhaps just briefly note in that respect, because it's been raised by several of the interveners as well as my client. It's fully understood how

important the issues in this case are and that they will need time for a reserved decision. The observation filtered through to me that in the event the Court is able to give a results decision followed by reasons, given the time it will take to get a trial together and given the global urgency of these issues, that the suggestion was I just raise the possibility of a results only judgment. Thank you your Honour.

WINKELMANN CJ:

Thank you.

Karakia Whakamutunga

COURT ADJOURNS: 4.03 PM