IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-001730
[2020] NZHC 419

BETWEEN	MICHAEL JOHN SMITH Plaintiff
AND	FONTERRA CO-OPERATIVE GROUP LIMITED First Defendant
	GENESIS ENERGY LIMITED Second Defendant
	DAIRY HOLDINGS LIMITED Third Defendant

/Contd…

Hearing:	3-4 February 2020
Appearances:	D Salmon and D Bullock for Plaintiff D Kalderimis and N Swan for First Defendant S J P Ladd and B A Keown for Second Defendant J M Appleyard and A Hill for Third Defendant D T Broadmore and A N Birkinshaw for Fourth Defendant T Smith and A Lampitt for Fifth Defendant A J Horne and O K Brown for Sixth Defendant R J Gordon and A M B Leggat for Seventh Defendant
Judgment:	6 March 2020

RESERVED JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
On 6 March 2020 at 11.30 am
Pursuant to r 11.5 of the High Court Rules
Registrar/Deputy Registrar

Date:……

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NEW ZEALAND STEEL LIMITED
Fourth Defendant

Z ENERGY LIMITED
Fifth Defendant

THE NEW ZEALAND REFINING COMPANY LIMITED
Sixth Defendant

BT MINING LIMITED
Seventh Defendant

Introduction

[1] The plaintiff, Michael Smith, has filed a statement of claim against Fonterra Co-operative Group Limited (Fonterra), Genesis Energy Limited (Genesis), Dairy Holdings Limited (DHL), New Zealand Steel Limited (NZS), Z Energy Limited (Z Energy), The New Zealand Refining Company Limited (NZ Refining) and BT Mining Limited (BT Mining).

[2] Each of the defendants is either involved in an industry which releases greenhouse gases into the atmosphere, or supplies products which release greenhouse gases when they are burned. The statement of claim raises three causes of action, all in tort – public nuisance, negligence, and breach of an inchoate duty. Declarations are sought that each of the defendants has unlawfully caused or contributed to the public nuisance alleged or breached duties said to be owed to Mr Smith. Injunctions are also sought requiring each defendant to produce, or cause, zero net emissions from its activities by 2030.

[3] The statement of claim raises novel issues. Insofar as I am aware, they have not been raised in New Zealand before.

[4] The defendants have each made application seeking to strike out the proceedings. Broadly, each defendant argues that Mr Smith's statement of claim raises issues which cannot properly be resolved through the Courts via the law of tort, and that it discloses no reasonably arguable causes of action. Mr Smith opposes the strike out applications.

The pleadings

(a) The statement of claim

[5] Mr Smith asserts that he is of Ngāpuhi and Ngāti Kahu descent and that he is the climate change spokesman for the Iwi Chairs' Forum. He claims customary interests in lands and other resources situated in or around Mahinepua in Northland. In particular, he claims an interest according to custom and tikanga in land known as the Mahinepua C block, and he says he is a representative of the interests of his whānau in that land. He says that there are various sites of customary, cultural, historical,

nutritional and spiritual significance to him on that land, and that many other such sites are situated in close proximity to the coast, waterways or low-lying land, or are in the sea.

[6] It is alleged that:

(a) Fonterra owns and operates dairy factories in New Zealand that burn coal to generate energy. Fonterra will continue to burn coal in its factories for the foreseeable future. The combustion of coal releases greenhouse gases.

(b) Genesis operates the Huntly power station. It is fuelled by the combustion of coal and natural gases. The combustion of coal and natural gases at the power station releases greenhouse gases.

(c) DHL operates a large number of dairy farms in the South Island. Livestock on its farms release greenhouse gases as a result of enteric fermentation. Nitrogen dioxide is also released from nitrogen-based fertiliser use.

(d) NZS operates the Glenbrook steel mill which is primarily fuelled by the combustion of coal. The combustion of coal releases greenhouse gases.

(e) Z Energy supplies retail and commercial customers with petroleum related fuel products. The fuel products supplied are burned by its customers resulting in the release of greenhouse gases. Z Energy knows that the fuel products it supplies are burned.

(f) NZ Refining operates the Marsden Point oil refinery and the pipeline from the refinery to Auckland. It produces the majority of the fuel products consumed in this country. The fuel products supplied are burned by others to power combustion engines. The process of refining crude oil and the burning of the fuel products causes the release of greenhouse gases. NZ Refining is aware of this.

(g) BT Mining owns and operates the Stockton mine north of Westport. The mine produces bituminous, coking and thermal coal. The majority of the coal is exported, much of it to China, where it is burned in the production of steel. The burning of the coal releases greenhouse gases and BT Mining is aware of this.

It is alleged that each defendant can achieve net zero emissions by 2030 and that those who supply products that are burned can account for the emissions of the end users of the products supplied by 2030.

[7] It is then alleged that:

(a) the release of greenhouse gases into the atmosphere from human activities increases the natural greenhouse effect, and causes, amongst other things, the warming of the planet;

(b) climate change from the release of greenhouse gases into the atmosphere from human activities will result in the additional warming of the earth's surface and atmosphere, and will adversely affect natural ecosystems and humankind;

(c) the release of greenhouse gases is dangerous anthropogenic interference with the climate system;

(d) the current scientific consensus as to the nature, effects and mitigation requirements of climate change is set out in recent reports of the Intergovernmental Panel on Climate Change (the IPCC), in particular in a report released in October 2014, and in a special report released in 2018;

(e) it is necessary to further limit warming caused by climate change to 1.5 degrees Celsius to avoid dangerous anthropogenic interference with the climate system and to minimise long-term and irreversible adverse effects from climate change;

(f) limiting the warming caused by climate change to 1.5 degrees Celsius requires a global net reduction in human-caused emissions of carbon dioxide by 45 per cent from 2010 levels by 2030, reaching net zero by around 2050, and substantial and fast reductions of other greenhouse gases.

[8] It is then alleged that the release of greenhouse gases by the defendants is human activity that has contributed, and will continue to contribute, to dangerous anthropogenic interference with the climate system and to the adverse effects of climate change. Particulars are given – namely, that the release of greenhouse gases by the defendants results in increased temperatures, a loss of biodiversity and biomass, a loss of land (including as a result of sea level rise), risks to food and water security, increasing extreme weather events, ocean acidification, geopolitical instability and population displacement, adverse health consequences, economic losses and an unacceptable risk of social and economic collapse and mass loss of human life. It is also asserted that poor and minority communities will be disproportionately burdened by the adverse effects of climate change.

[9] It is next claimed that it is necessary for the defendants to achieve greater emission reductions and at a faster rate than the minimum total global reductions recommended by the IPCC, because:

(a) New Zealand is a developed country;

(b) the defendants are among the major emitters in New Zealand;

(c) the defendants have had the financial benefit of their greenhouse gas emissions over time; and

(d) the dangers associated with climate change are so significant that a precautionary approach is required.

[10] Against this background, the first cause of action raised is **public nuisance**. Mr Smith asserts that he will suffer harm from the effects of dangerous anthropogenic interference with the climate system. In particular, he says that climate change will

result in increasing sea levels, irrevocably damaging his family's land at Mahinepua C. He says that there will be a physical loss of land, a loss of productive land, a loss of economic value, and the loss of sites of cultural and spiritual significance. He claims that climate change will irrevocably damage customary resources; he will lose traditional or customary fisheries and landing sites; burial caves and cemeteries will be lost as a result of erosion and inundation. He also asserts that climate change will result in ocean warming and acidification which will impact specific coastal and fresh water fisheries that he customarily uses and that climate change will result in the irrevocable and irreplaceable loss of land, resources and species that are economically, culturally and spiritually significant to him as tangata whenua. He asserts that there will be increasing adverse health impacts to which he and Māori communities are particularly vulnerable.

[11] He next asserts that by releasing greenhouse gases into the atmosphere, or by producing products which result in the release of greenhouse gases, the defendants have interfered or contributed to inference with, and will in the future interfere or contribute to interference with, the rights of the public. Particulars given assert that there is and will be interference with public health, safety, comfort, convenience and peace. It is claimed that the defendants' interference with these public rights is substantial or unreasonable and that the defendants knew, or ought to have known since at least the release of the IPCC's fourth assessment report in 2007, that their activities were contributing to dangerous anthropogenic interference in the climate system. He claims that the defendants knew, or ought reasonably to have known, that it was necessary for them to immediately and significantly reduce their greenhouse gas emissions as from 2007, and that despite that knowledge, the defendants have continued to emit greenhouse gases into the atmosphere or to produce and supply products which result in the emission of greenhouse gases.

[12] He seeks a declaration that the defendants have unlawfully caused or contributed to a public nuisance through their emitting activities or their production of products that result in the emission of greenhouse gases and he seeks an injunction requiring each of the defendants to produce or cause zero net emissions from their activities by 2030, by linear reductions in net emissions each year until that time. He seeks that such injunctions should be supervised by the Court. In the alternative, he

seeks that the defendants should cease their public nuisance creating or contributing activities immediately.

[13] As an additional or alternative cause of action, Mr Smith alleges **negligence**. He claims that the defendants owe him, and persons like him, a duty to take reasonable care not to operate their businesses in a way that will cause him loss by contributing to dangerous anthropogenic interference in the climate system. He asserts that the defendants have breached this duty by doing acts that have contributed to and will continue to contribute to dangerous anthropogenic interference in the climate system, and that the defendants knew, or ought reasonably to have known, from 2007, that their activities would contribute to such interference. He again claims that since 2007, the defendants knew, or ought reasonably to have known, that it was necessary for them to immediately and significantly reduce their greenhouse gas emissions, but that despite that knowledge, they have continued to emit greenhouse gases into the atmosphere or to produce materials from which greenhouse gases are emitted. He claims that the defendants' breach of duty has or will cause him loss.

[14] Mr Smith seeks a declaration that the defendants have, individually and/or collectively, unlawfully breached the duty owed to him, and have caused or will cause him loss through their emitting activities, or by the production of products which result in the emission of greenhouse gases when consumed. Again, he seeks an injunction that each of the defendants produce or contribute to zero net emissions by 2030 by linear reductions in their net emissions.

[15] As a third cause of action, Mr Smith submits that the defendants owe him **a duty, cognisable at law**, to cease contributing to damage to the climate system, dangerous anthropogenic interference with the climate system and adverse effects of climate change through their emission of greenhouse gases. A similar declaration and injunction are sought.

[16] In the prayer for relief to each cause of action, Mr Smith seeks such other relief as the Court determines appropriate to enable the mitigation of or adaption to damage to climate systems said to be contributed to by the defendants. Mr Smith does not

however seek damages. Nor does he seek costs, because he claims to be bringing the proceeding in the public interest and because he has *pro bono* legal representation.

(b) Statements of defence

[17] Each of the defendants (other than BT Mining) has filed a statement of defence. They are broadly similar although tailored to each defendant's particular industry and the allegations made against each.

[18] Some of Mr Smith's claims are denied because the defendants say they have insufficient knowledge of the matters raised; others they say they are not required to plead to. Each admits the greenhouse gas emitting activities, or supply of products, attributed to it in the statement of claim. Each says that it is acting lawfully and in accordance with all relevant statutory and regulatory requirements. Some assert that they have already achieved a reduction in their greenhouse gas emissions, and that they are committed to further action in this regard. One (DHL) says that there is no scientific or technological solution available to it that would allow it to achieve net zero emissions by 2030, other than by ceasing livestock production. Each broadly admits that climate change from the aggregate release of global greenhouse gases into the atmosphere from human activities results in additional warming of the earth's surface and atmosphere, but each, in different words, says that the extent of the adverse effects on natural ecosystems and humankind depends on the success of global efforts to reduce greenhouse gas emissions, on the increased removal of greenhouse gases from the atmosphere and on global adaptation efforts. All admit that the IPCC reports record current scientific consensus as to the nature, effects and mitigation requirements of climate change on a global scale. Most say that while their activities produce greenhouse gases, they do so only in very small amount, and that their emissions would ordinarily be regarded as *de minimis*. Each denies sufficiently contributing to dangerous anthropogenic interference with the climate system as to cause the harm claimed by Mr Smith. Some refer to the Climate Change Act 2002, to the New Zealand emissions trading scheme and to the Climate Change Response (Zero Carbon) Amendment Act 2019 and say that these measures best deal with New Zealand's response to climate change. They variously assert that the matters raised by Mr Smith are non-justiciable and beyond the purview of the Courts.

[19] Mr Smith has not as yet filed a reply to the statements of defence.

(c) Strike out applications

[20] Again, there is substantial overlap between each of the various interlocutory applications to strike out Mr Smith's statement of claim. Each defendant says that the statement of claim discloses no reasonably arguable cause of action against it. Some assert that the statement of claim relates to complex policy matters that have already been dealt with by Parliament, and/or which are currently before Parliament. Some suggest that Mr Smith is inviting the Court to determine non-justiciable and polycentric questions of public policy that are only appropriate for determination by Parliament.

(d) Notice of opposition

[21] Mr Smith asserts that the causes of action pleaded by him are reasonably arguable, that the Climate Change Response Act and the Climate Act Response (Zero Carbon) Amendment Act do not abrogate the law of tort, and that even if defendants surrender units under New Zealand's emissions trading scheme and/or operate under permits issued under the Resource Management Act 1991 and otherwise comply with relevant regulatory regimes, this does not prevent them being liable to him in tort. He asserts that he will suffer "special harm" as a result of the defendants' actions, but says that in any event, this is a matter for trial. In the alternative, he says that the special harm standing rule in public nuisance is outdated and unconstitutional and that it should not be enforced. Relevant to his cause of action in negligence, he argues that there is a sufficiently arguable relationship of proximity between him and the defendants. He says that the defendants' various assertions as to causation, breach, remoteness, indeterminate liability and disproportionality, are either incorrect or overstated, and in any event, are matters for trial.

Applications to strike out proceedings

[22] Relevantly, r 15.1 of the High Court Rules 2016 provides as follows:

> **15.1 Dismissing or staying all or part of proceeding**
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> (1) The court may strike out all or part of a pleading if it—

(a) discloses no reasonably arguable cause of action, …

(2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.

(3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.

(4) This rule does not affect the court's inherent jurisdiction.

[23] The established criteria for striking out were summarised by the Court of Appeal in *Attorney General v Prince*.[1] They are as follows:

(a) pleaded facts, whether or not admitted, are assumed to be true. This does not however extend to pleaded allegations which are entirely speculative and without foundation;

(b) the cause(s) of action must be clearly untenable. The Court must be certain that it (they) cannot succeed;

(c) the jurisdiction is to be exercised sparingly and only in clear cases;

(d) the jurisdiction is not excluded by the need to decide difficult questions of law, requiring extensive argument; and

(e) the Courts should be slow to strike out a claim in any developing area of the law, particularly where a duty of care is alleged in a new situation.

[24] The threshold for a strike out is high, and the Court should consider not only the basis on which the claim is pleaded but also any other basis on which the claim might be pleaded.[2]

[25] The Court is entitled to receive affidavit evidence on strike out applications, and will do so in proper cases. It will not however attempt to resolve genuinely

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1 *Attorney General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267; *Couch v Attorney General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33]; *North Shore City Council v Attorney General* [2012] NZSC 49, [2012] 3 NZLR 341 at [25] and [146].

2 *Couch v Attorney General*, above n 1 at [123].

disputed issues of fact, and it will generally limit evidence to that which is undisputed. Normally it will not consider evidence inconsistent with the pleadings, because, as noted, a strike out application is dealt with on the footing that the pleaded facts can be proved.[3]

[26] Here, affidavits have been filed.

Analysis

(a) Climate change – the IPCC reports

[27] There is no doubt that climate change, and the appropriate response to it, is a defining issue, affecting all peoples and all countries. As the Chief Justice has said, it is "the most pressing issue of this age".[4]

[28] The IPCC has reported that:[5]

(a) the earth's surface is warming;

(b) this warming has been caused by human influence on the climate system, predominantly by the release of greenhouse gases into the atmosphere;

(c) emissions of carbon dioxide from the combustion of fossil fuels and industrial processes have contributed about 78 per cent of total greenhouse gas emissions from 1970 to 2010;

(d) the effects of these emissions are already being observed;

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3 *Attorney General v McVeagh* [1985] 1 NZLR 558 (CA) at 566; *Pharmacy Care Systems Ltd v Attorney General* (2001) 15 PRNZ 465 (CA) at 472.

4 Helen Winkelmann, Chief Justice of New Zealand, *"Renovating the House of the Law"*, (keynote speech to Te Hūnga Rōia Māori o Aotearoa (Māori Law Society), Wellington, 29 August 2019) at 4.

5 The Intergovernmental Panel on Climate Change, *Climate Change 2014:AR5 Synthesis Report* (October 2014), see especially *Summary for Policy Makers* at [1.2] – [2.4].

(e) unless substantial and rapid reductions in anthropogenic emissions occur, temperature rise will exceed 2 degrees Celsius and likely be substantially more;

(f) it is very likely that heatwaves will occur more often and last longer, that extreme precipitation events will become more intense and frequent and that the oceans will continue to warm, acidify and rise;

(g) these risks will not be evenly distributed and are likely to be greater for disadvantaged peoples;

(h) the effects of greenhouse gas emissions lag behind the release of emissions into the atmosphere. Emissions which have already occurred are locked in, and will inevitably have effects in the future; and

(i) there are multiple mitigation pathways that are likely to limit warming to below 2 degrees Celsius relative to pre-industrial levels. These pathways require substantial emission reductions and near zero emissions of carbon dioxide and other long-lived greenhouse gases by the end of the century.

[29] The IPCC has more recently produced an updated Special Report on the impacts of 1.5 degrees Celsius of warming.[6] Inter alia, it concludes that ambitious mitigation measures are indispensable if limiting warming to 1.5 degrees Celsius is to be achieved and that limiting warming to 1.5 degrees Celsius requires achieving global net zero carbon dioxide emissions by around 2050, with concurrent deep reductions of emissions of non-carbon dioxide greenhouse gases, particularly methane. It reports that limiting warming to 1.5 degrees Celsius requires a marked shift in investment patterns, and a substantial reduction in the use of fossil fuels to create energy.

[30] Mr Smith pleads these reports and they are admitted by the defendants (other than BT Mining which, as noted, is yet to file a statement of defence).

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6 Intergovernmental Panel on Climate Change, *Global Warming of 1.5°C*, (IPCC, SR15, October 2018).

[31] Mr Smith has also filed an affidavit which refers to a report by the Climate Accountability Institute, which identifies 100 individual emitters – primarily fossil fuel producers – who are said to be responsible for most of the world's greenhouse gas emissions. None of the defendants is identified in that report.

(b) New Zealand's response

[32] Over the last two decades New Zealand has entered into a number of international commitments to reduce greenhouse gas emissions.[7] Notably, this country is a state party to the UN Framework Convention on Climate Change,[8] the Kyoto Protocol[9] and the Paris Agreement.[10] These various accords put in place regimes for participating states and defined their international climate change commitments and obligations. The regimes were the product of extensive debate, negotiation and compromise. They left it open to each participating state to determine how to best implement its commitments and they did not impose obligations directly on businesses or individuals in respect of their individual emissions.

[33] Under the Kyoto Protocol, New Zealand committed to emission reductions over the period 2008-2012. This country's obligation was to maintain its annual average emissions over this period by at least five per cent below its 1990 emissions.[11] The Paris Agreement aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, by holding the increase in the global average temperature to well below 2 degrees Celsius above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 degrees Celsius above pre-industrial levels.[12]

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7 And see, *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32 at [98]-[101]; *Thomson v Minister for Climate Change Issues* [2017] NZHC 733, [2018] 2 NZLR 160at [19]-[71].

8 United Nations Framework Convention on Climate Change, 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994). For text, see also Climate Change Response Act 2002, Sch 1.

9 Kyoto Protocol to the United Nations Framework Convention on Climate Change, 2303 UNTS 148 (opened for signature 16 March 1998, entered into force 16 February 2005). For text, see also Climate Change Response Act 2002, Sch 2.

10 Conference of the Parties, *Adoption of the Paris Agreement*, FCCC/CP/2015/L9/Rev1 Draft decision CP21(2015). For text, see also Climate Change Response Act 2002, Sch 2A.

11 Kyoto Protocol, above n 9, art 3(1).

12 Paris Agreement, above n 10, art1(a).

[34] To these ends, the New Zealand Parliament has developed a climate change policy for this country and has put in place measures which seek to regulate New Zealand's greenhouse gas emissions. Notably, it has enacted the following:[13]

(a) The Climate Change Response Act 2002. This Act provides the legal framework for New Zealand to meet its international emission reduction obligations. I summarise aspects of this framework below.

(b) The Climate Change Response (Emissions Trading) Amendment Act 2008 which amended the Climate Change Response Act and put in place the emissions trading scheme as New Zealand's primary mechanism for reducing this country's emissions of greenhouse gases. Again, I summarise this scheme below.

(c) The Climate Change Response (Moderated Emissions Trading) Amendment Act 2009, which delayed the commencement of the emissions trading scheme and introduced transitional measures.

(d) The Climate Change Response (Emissions Trading and Other Matters) Amendment Act 2012, which extended the transitional measures.

(e) The Climate Change Response (Removal of Transitional Measures) Amendment Act 2016, which removed the transitional measures.

(f) The Climate Change Response (Zero Carbon) Amendment Act 2019,[14] which amended the Climate Change Reform Act, introduced a domestic greenhouse gas emissions reduction target of net zero emissions by 2050 (excluding biogenic methane) and put in place a framework for New Zealand to contribute to the effort by state parties to the Paris Agreement to limit global average temperature increase to 1.5 degrees Celsius above pre-industrial levels.

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13 There are other industry specific provisions – e.g. dealing with the electricity industry.
14 Passed with cross party support in Parliament.

[35] Each of these enactments and their underlying policies, has been the product of iterative reform and refinement, and has proceeded only after extensive consultation, political compromise and consensus building. Collectively, they represent the balance that Parliament has struck, and continues to strike, between environmental, technical, social and economic considerations, and the anticipated effects, costs and benefits of various alternative options considered in the process.

[36] Parliament is currently considering the Climate Change Reform (Emissions Trading Reform) Amendment Bill. In its current form it proposes to further amend the Climate Change Response Act to better implement New Zealand's climate change commitments under the Paris Agreement. Inter alia it proposes to bring agricultural livestock emissions into the emissions trading scheme and price those emissions at farm level, and fertiliser emissions at processor level, by 2025.

(c) The Climate Change Response Act

[37] New Zealand's overarching legislation is the Climate Change Response Act 2002. It provides the framework within which this country has developed and implemented its climate change policies. It seeks to allow New Zealand to prepare for and adapt to the effects of climate change, to enable New Zealand to meet its international obligations, and to provide for the implementation and operation of a greenhouse gas emissions trading scheme that supports and encourages global efforts to reduce the emission of greenhouse gases.[15] As amended in 2019, it seeks to contribute to the global effort under the Paris Agreement to limit the global average temperature rise to 1.5 degrees Celsius above pre-industrial levels.

[38] Relevantly, given Mr Smith's statement of claim, the Act recognises the Crown's responsibilities under the Treaty of Waitangi, and requires the responsible Minister to include in emission reduction plans required by the Act, a strategy to recognise and mitigate the impacts of reducing emissions on iwi and Māori, and to ensure that they are adequately consulted on the plans. The Minister must also take into account the economic, social, health, environmental, ecological and cultural effects of climate change on iwi and Māori in preparing national adaptation plans.[16]

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15 Climate Change Response Act 2002, s 3.
16 Section 3A(ad) and (ae).

[39] The Act puts in place a target for emission reductions which requires:

(a) the net accounting of emissions of greenhouse gases in a calendar year, other than biogenic methane, to be zero by the calendar year beginning on 1 January 2050, and for each subsequent calendar year; and

(b) emissions of biogenic methane in a calendar year to be 10 per cent less than 2017 emissions by the calendar year beginning on 1 January 2030, and to be 24 to 47 per cent less than 2017 emissions by the calendar year beginning on 1 January 2050, and for each subsequent calendar year.[17]

[40] The Act (as amended in 2019) provides for the establishment of an independent Climate Change Commission. The Commission is required to provide independent expert advice to the Government on mitigating climate change (including through reducing emissions of greenhouse gases) and to monitor and review the Government's progress towards its emission reduction goals. One of the Commission's functions is to review the 2050 target and if necessary recommend changes to that target. It is also required to monitor and report on progress towards meeting emission budgets and the 2050 target.[18] The Commission has a wide brief in performing its functions. It must consider current available scientific knowledge, existing technology and anticipated developments, the likely economic effects, social, cultural, environmental and ecological circumstances, the distribution of benefits, costs and risks between generations, the Crown – Māori relationship, specific effects on iwi and Māori and responses to climate change taken or planned by parties to the Paris Agreement or to the United Nations Framework Convention on Climate Change.

[41] The Minister is required to set an emissions budget for each emissions budget period.[19] Each budget must state the total emissions that will be permitted in each budget period,[20] and the budgets must be met, as far as possible, through domestic

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17 Section 5Q.
18 Sections 5B and 5J.
19 Section 5X – there must be emission budgets for the periods 2022-2025, 2026-2030, 2031-2035, 2036-2040, 2041-2045 and 2046-2050. As from 31 December 2021, there must be three consecutive budgets, one current and two prospective, in place.
20 Section 5Y.

emission reductions and domestic removals.[21] Inter alia the Minister (and the Commission when advising the Minister) must have particular regard to how each emissions budget and the 2050 target might realistically be met, and have regard to matters such as the likely impacts of actions taken to achieve the emissions budgets and the 2050 target, the distribution of those impacts, the economic circumstances and the likely impact of the Minister's decisions on taxation, public spending and public borrowing.[22]

[42] The Minister must also prepare and make publicly available emissions reduction plans setting out the policies and strategies for meeting the emissions budgets.[23] The plans must include sector specific policies, a multi-sector strategy, a strategy to mitigate the impacts that reducing emissions will have on inter alia iwi and Māori, and any other policies or strategies that the Minister considers necessary.[24]

[43] Section 5ZM is significant. It provides as follows:

> **5ZM Effect of failure to meet 2050 target and emissions budgets**
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> (1) No remedy or relief is available for failure to meet the 2050 target or an emissions budget, and the 2050 target and emissions budgets are not enforceable in a court of law, except as set out in this section.
>
> (2) If the 2050 target or an emissions budget is not met, a court may make a declaration to that effect, together with an award of costs.
>
> (3) If a declaration is made and becomes final after all appeals or rights of appeal expire or are disposed of, the Minister must, as soon as practicable, present to the House of Representatives a document that—
>
> (a) brings the declaration to the attention of the House of Representatives; and
>
> (b) contains advice on the Government's response to the declaration.

[44] The Act as amended in 2008, puts in place an emissions trading scheme and requires that persons and entities engaged in various listed activities participate in the

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21 Section 5Z.
22 Section 5ZC.
23 Section 5ZG.
24 Section 5ZG(3).

scheme. This is discussed below. Relevant to Mr Smith's statement of claim, most of the key sectors of the New Zealand economy are subject to the emissions trading scheme, including liquid fossil fuels, stationary energy (including the importation and mining of coal), industrial processes (including the production or iron and steel and the importation and manufacture of hydrofluorocarbons or perfluorocarbons) and agriculture (although agricultural emissions do not at present trigger surrender obligations under the emissions trading scheme).[25]

[45] The Act contains comprehensive monitoring and enforcement provisions.

(a) It provides for an Inventory Agency, and authorises the employment of inspectors by that agency. Inspectors are given comprehensive powers to enter property, if necessary with a warrant, for the purposes of collecting information to estimate emissions or removals of greenhouse gases.[26]

(b) An Environmental Protection Authority is also created, which inter alia has the function of ensuring that participants comply with the relevant parts of the Act, and if necessary, taking any action that may be appropriate to enforce those provisions.[27] The authority can appoint enforcement officers, who have powers to acquire information. The authority or its chief executive can require persons to appear before the authority, or can apply in writing to a District Court Judge to hold an enquiry.[28] Enforcement officers have powers of entry for investigation and they can apply for warrants.[29] There are extensive provisions creating offences, and prescribing penalties for the offences created.[30] Unusually, if a body corporate is convicted of an offence, every director and every person concerned with the management of the body corporate is also guilty of that offence if it is proved that the act or omission that constituted the offence took place with the authority or

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25 Climate Change Response Act 2002, Sch 3.
26 Sections 36-40.
27 Section 87.
28 Sections 93-96.
29 Sections 100-101.
30 Section 129-134.

consent of the director or person, and the director or person knew that the offence was to be, or was being committed, and failed to take all reasonable steps to prevent or stop it.[31]

(d) The emissions trading scheme

[46] The emissions trading scheme has been and continues to be the key tool adopted by Parliament to regulate and manage greenhouse gas emissions.[32]

[47] Emissions trading is a market-based scheme, which is designed to reduce greenhouse gas emissions. The introduction of the scheme in 2008 followed on from New Zealand's decision to become became a party to the Kyoto Protocol. The Protocol established a global emissions "cap and trade" scheme.[33] It set emission reduction targets or quotas for each state party. Each state party held a number of emission units equal to its quota. If the state party's emissions exceeded its quota, the state had to purchase enough additional emission units to cover the excess from other parties to the Protocol, whose emissions were below their quota.

[48] The emissions trading scheme put in place by the New Zealand Parliament in 2008 sought to devolve the Government's Kyoto Protocol responsibility to domestic emitters by requiring them to procure units to cover their emissions.

[49] New Zealand's emissions trading scheme is found in part 4 of the Climate Change Response Act. Under the Act participants involved in scheduled activities[34] are required to register with the Environmental Protection Agency and then open a holding account.[35] The holding account is used to surrender or repay units, and to receive units which the participant is entitled to.[36] Participants in the scheme must have emission units equal to the volume of emissions they produce. Some participants receive emission units for carbon removal activities, and some are allocated emission units. Other participants do not receive any emission units. Units are tradeable and

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31 Section 140.
32 Climate Change Response (Zero Carbon) Amendment Bill (136-3), (explanatory note) at 6; Climate Change Response (Emissions Trading Reform) Amendment Bill (186-1), (explanatory note) at 1.
33 Kyoto Protocol, above n 9, arts 3-7.
34 See above at [44].
35 Climate Change Reform Act 2002, s 56.
36 Section 61.

participants who do not hold any units, or enough units to permit their emissions, must purchase units to cover their emissions from those who hold more units than they need. Participants are required to surrender one unit for each ton of carbon dioxide equivalent greenhouse gas emissions emitted, calculated as set out in the Act.[37] Participants must monitor their emissions, and they are required to record and report them annually.[38]

[50] Units are valuable and sellers, by selling their surplus units, are rewarded; they have an incentive to further reduce their emissions, or increase their removal activities, to obtain more units to sell.[39] Buyers have an incentive to reduce emissions to limit the number of units they must buy. The expectation is that the price signal the scheme sends will lead to emission reductions that may not otherwise occur.[40]

[51] Parliament established the scheme only after an extensive process of policy formulation and consultation. Consideration was given to a broad range of options for achieving reductions in greenhouse gas emissions.[41] An evaluation was undertaken of each option's costs and benefits, including its impact on the New Zealand economy and its compatibility with New Zealand's international law obligations. The emissions trading scheme emerged as the consensus solution.

[52] As noted at [36], the emissions trading scheme is currently the subject of proposed reform. The Bill – the Climate Change Reform (Emissions Trading Reform) Amendment Bill – is at the Select Committee stage. The Bill is currently open for public submissions. The Select Committee is due to report in May 2020.

(e) The tort claims

[53] Against this background, I turn to consider the causes of action pleaded, and whether the law of tort has any application given the suite of measures put in place by Parliament.

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37 Section 63.
38 Sections 62 and 65.
39 I was advised from the bar that as at 20 December 2019, a unit was worth NZ $24.76.
40 And see, Alastair Cameron, *"Climate Change and Emissions Trading"*, *DSL Environmental Handbook* (online ed, Thomson Reuters) at [CC3.01]..
41 Climate Change Response (Zero Carbon) Amendment Bill (136-3), (explanatory note) at 3 – 6.

[54] I start by referring to a report produced by the United Nations Environment Programme in 2017 – *The Status of Climate Change Litigation: A Global Review*.[42] It was there noted that, as laws codifying national and international responses to climate change have grown in number, specificity and importance, and as these laws have recognised new rights and created new duties, litigation seeking to challenge their validity or their application has followed. It was noted that, with notable exceptions, Governments have almost always been the defendants in these climate change cases.[43]

[55] I also note extra judicial observations made by Winkelmann CJ and by Glazebrook and France JJ in a joint paper – *Climate Change and the Law* – prepared for the Asia Pacific Judicial Colloquium held in Singapore in May 2019.[44] The authors recorded their view that recourse to the Courts in the area of climate change will increase. They noted that claims relying on private law doctrines have faced difficulty, as parties have struggled to show a sufficient interest in the subject matter of the claim, or to show the relevant causal link between the action complained of and harm or loss they have suffered. They noted that the problem of climate change does not easily conform to existing forms of action. After referring to private law claims in the US, they noted that the difficulties of tort law "are starkly apparent".[45] They cited one commentator who suggests that climate change is the "paradigmatic anti-tort" due to its "diffuse and disparate" origin, its "lagged and latticed" effect; "a collective action problem so pervasive and so complicated as to render at once both all of us and none of us responsible".[46] Their Honours ventured the view that it may be that private law will develop to meet some of the challenges confronting climate change litigation – adjusting traditional concepts of standing where the wrong affects the whole of society and where the impacts of climate change are intergenerational and will impact young generations more significantly. They also observed that, in terms of causation, existing

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42 United Nations Environment Programme, *The Status of Climate Change Litigation: A Global Review* – May 2017.

43 At 4; see for example, *State of the Netherlands v Urgenda Foundation* Hague Court of Appeal, 200.178.245/01, 9 October 2018 , where the Dutch Government's greenhouse gas emission targets were held to breach its duties under the European Convention on Human Rights.

44 Helen Winkelmann, Chief Justice of New Zealand, Susan Glazebrook and Ellen France, Judges of the Supreme Court of New Zealand, *"Climate Change and the Law"*, (Asia Pacific Judicial Colloquium, Singapore, 28-30 May 2019) at [131]-[136].

45 At [109].

46 Ibid, citing Douglas A Kysar, *"What Climate Change Can Do About Tort Law"*, (2011) 41 Environmental Law 1 at 4.

frameworks may constrain the successful litigation of the novel and complex claims presented by climate change litigation, but that looking at issues from different angles may mean that such hurdles become less significant. They observed that climate change science and the increased ability to model possible effects will also be salient. They commented that the Courts are constrained by several things, and that the common law generally proceeds incrementally, while climate change issues require a rapid response. They observed that climate change litigation will likely present various issues which the Courts have typically regarded as non-justiciable, and it that may be that demand for climate justice will be a demand the Courts will struggle to satisfy.

(f) Public nuisance

[56] A public nuisance has been defined as "any nuisance [that] is public which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects".[47]

[57] The tort of public nuisance developed at common law. It originated as a criminal offence. In addition to redress by way of criminal prosecution, the Court of Chancery was prepared to issue an injunction at the suit of the Attorney General to restrain the commission of the nuisance complained of.[48] The tort emerged when the common law courts recognised the right of a private citizen to bring a civil action for damages, or for an injunction, if he or she suffered "special damage" over and above that suffered by other members of the public affected by the nuisance.[49]

[58] A person commits a public nuisance who:

(a) does an act not warranted by law, or

(b) omits to discharge a legal duty,

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47 *Attorney General v PYA Quarries Ltd* [1957] 2 QB 169 (CA) at 184 per Romer LJ.
48 Stephen Todd (ed), *Todd on Torts*, (8th ed, Thomson Reuters, Wellington, 2019) at [10.3.01].
49 *R v Rimmington* [2005] UKHL 63, [2006] 1 AC 459 at [5]-[7].

if the effect of the act or omission is to endanger the life, health, property, morals or comfort of the public or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects.[50]

[59] The Attorney General has standing to sue for an injunction to restrain a public nuisance. The Attorney General can act personally or by way of a relator action in which he or she acts on relation of a private individual or local authority. An individual citizen can bring an action only if he or she suffers some special or particular damage over and above that suffered by the public generally.[51] It has been suggested by one commentator that the weight of authority supports a liberal view, and that the requirement of special damage is satisfied where a plaintiff suffers harm that is appreciably more serious and substantial in degree than that suffered by the public generally, even if it is of the same kind.[52]

[60] Here, Mr Smith has not sought the assistance of the Attorney General. Rather, he seeks to sue in his own name.[53] It is argued that Mr Smith can do so because he has or is likely to suffer special or particular damage. His counsel pointed to Mr Smith's interest according to custom and tikanga in the Mahinepua C block, and to his claim that his whānau's land, and sites of significance to him and his family, will be damaged as a result of climate change.

[61] The Courts have held that special damage is damage that is "particular, direct and substantial". It must not be "a mere consequential injury".[54] The Court of Appeal in this country has put the special damage requirement as follows (in the context of the obstruction of a public way):[55]

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50 At [10] and [45].

51 At [7] and [44]; In New Zealand, *Mayor of Kaiapoi v Beswick* (1869) 1 NZCA 192; *Murray v Wellington City Council* [2013] NZCA 533, [2014] NZAR 123 at [32].

52 *Todd on Torts*, above n 48, at [10.3.03].

53 Mr Smith has brought separate proceedings against the Attorney General – *Smith v Attorney General*, HC Wellington, CIV-2019-488-384. He there claims that the Crown owes a duty to Māori, cognisable under the laws of New Zealand, to actively exercise its authority over New Zealand in a manner that protects Māori from the adverse effects of climate change. He seeks a declaration that the Crown owes that duty, that it has breached it, and that the Crown will continue to be in breach unless it acts to limit warming to 1.5 degrees Celsius above pre-industrial levels, and at a minimum reduce New Zealand's net zero emissions to half of their 2010 levels by 2030, and to net zero by 2050.

54 *Benjamin v Storr* (1874) LR 9 CP 400 at 407 per Brett J; *R v Rimmington*, above n 49 at [7] and [44].

55 *Mayor of Kaiapoi v Beswick*, above n 51 at 207, per Arney CJ.

> … the damage [must be] particular, direct and following upon the individual immediately from the obstruction.

The Court also noted that:[56]

> It is not easy to deduce … a canon of interpretation by which to define a right of action for a public nuisance; but it must at all events be remembered that the right forms an exception to the general rule, and the plaintiff must in every case prove such an injury as brings him reasonably within the exception. The right of action cannot depend upon the quantum of damage …

[62] In my judgment, the damage claimed by Mr Smith is neither particular nor direct; it is not appreciably more serious or substantial in degree than that suffered by the public generally and there is no difference in kind between the damage that Mr Smith pleads and the damage that very many others, including iwi, hapu and other land owners, and members of the public who live in or use the coastal/marine area may suffer. By way of example, land owners in South Dunedin are thought to be at risk if there is sea level rise. Modelling has been done in Auckland, and no doubt elsewhere in New Zealand, which identifies low-lying land that is at risk. The impacts of climate change are all-pervasive and they are not confined to individuals or to specific pieces of land or areas or resources. In my judgment, the damage that Mr Smith points to is neither particular nor direct to him. Rather, it is a manifestation of the effects of climate change not only on him but also on very many others.

[63] Further, the pleaded harm is consequential and not the direct result of the defendants' activities. It follows not from the activity attributed to and admitted by each defendant, but rather, from a number of consequential and indirect steps pleaded by Mr Smith. For example, Z Energy and BT Mining (and in part NZ Refining) are not sued in respect of their direct emissions. Rather, the allegation is that they supply either fuel or coal, that the use of these products by third parties (in BT Mining's case outside New Zealand) releases greenhouses gases, that these greenhouse gases (in conjunction with greenhouse gases released by others worldwide) contribute to the warming of the planet, that this warming, if it exceeds 1.5ºC, will result in sea level rise, ocean warming, acidification and increased health and societal impacts, and that these effects in turn will result in the loss of land, customary resources, sites of cultural, historic, nutritional and spiritual significance, and in other impacts to which Mr Smith

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[56] At 208.

is particularly vulnerable. A similar but slightly shorter chain of consequential and indirect steps is pleaded against those defendants who emit directly. That the damage claimed is indirect and consequential is demonstrated by the fact that even if Mr Smith were to obtain the relief sought, it would not prevent the damage he claims he will suffer.

[64] It was argued for Mr Smith that the special damage rule is archaic, unnecessary and out of step with the liberal approach to standing adopted in other contexts by the Courts, for example, in public interest proceedings. It was said that there is no justification for the rule and that it is unfair, unprincipled and unnecessary. I note that there are reasons for the rule. It reflects the rationale for the tort – namely that a public nuisance claim should generally be brought in the public interest to protect the public right infringed. It also avoids indeterminate liability of tortfeasors to a multiplicity of claims. These matters aside, it was properly acknowledged for Mr Smith that the Court of Appeal authorities I have cited above mean that it is not possible for me to reach the conclusion that the special damage rule should go.[57] I am bound by those authorities, and I take this issue no further.

[65] It was also argued that, if I find that Mr Smith lacks standing, rather than striking out the claim, I should grant him leave to approach the Attorney General to seek permission to bring the proceedings on a relator basis. I can see no basis for this suggestion. Mr Smith does not need leave to approach the Attorney General. He can prepare fresh proceedings in the Attorney General's name and submit those new proceedings to the Attorney General for his consideration. That course is independent of the present proceedings.

[66] Moreover, in my view, there are other difficulties with Mr Smith's public nuisance claim.

[67] First, to establish public nuisance, a public right must be interfered with. What is required is "… suffering of common injury by members of the public by interference

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[57] See, above at [59] and n [51].

with the rights enjoyed by them as such".[58] The interference with the rights of the public pleaded by Mr Smith is interference with public health, safety, comfort, convenience and peace. Assuming that this pleading can be made out, the difficulty from Mr Smith's perspective is that the defendants' interference with those rights does not have any direct connection with the pleaded damage to Mr Smith's interests in the Mahinepua C block, or in the customary resources or sites of cultural, historical, nutritional and spiritual significance to him. In my judgment, there is no sufficient relational or causal link between any of the defendants' activities and the claimed damage. To put it another way, the pleaded connection is not sufficiently direct to give rise to a liability in public nuisance. Mr Smith does not and cannot plead that, but for the defendants' activities, he would not suffer the claimed damage.

[68] A second additional difficulty is that the right protected by the tort is the right not to be adversely affected by an unlawful act or omission, the effect of which is to endanger the life, safety, health, property or comfort of the public.[59] A person can only be guilty of a public nuisance who does an act not warranted by law, or who omits to discharge a legal duty.[60]

[69] Here, Mr Smith does not plead that the activities of any of the defendants alleged to interfere with public health, safety, comfort, convenience or peace are unlawful. He cannot do so. On the undisputed affidavit evidence before me, all of the defendants are acting in accordance with all relevant statutory and regulatory requirements.

[70] It was argued for Mr Smith that it is the interference with the alleged public right that constitutes the unlawful conduct, and that there is no requirement for additional unlawfulness.

[71] I have difficult with this submission. If it is correct, the tort would be "pulling itself up by its own bootstraps." That is a curious proposition. Moreover, the cases cited by counsel for Mr Smith do not, in my view, support the argument.

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58 *R v Rimmington*, above n 49, at [6] – comments made in the context of the crime of public nuisance, but as noted in [7], conduct which founded a criminal prosecution for causing a common nuisance could also found a civil action in tort.

59 *In Re Corby Litigation* [2008] EWCA Civ 463, [2009] 2 WLR 609 (CA) at [29].

60 See above at [58].

(a) *Attorney General v PYA Quarries Ltd* was referred to.[61] These proceedings were relator proceedings brought by the Attorney General. A quarry operator was held to have created a public nuisance as a result of stones flying out of the quarry onto neighbouring properties during blasting, and as a result of dust settling on neighbouring properties and vibrations arising from the quarry operations affecting neighbours. While it is correct that the judgment does not expressly mention the lawfulness or otherwise of the defendant's activities, the nuisances complained of would seem to have been a trespass. There was an underlying unlawful act.

(b) In another case relied on, *Attorney General v Abraham & Williams Ltd*,[62] an injunction was granted at the suit of the Attorney General restraining the use of land as a sale yard. There was again underlying illegality. The sale yard did not comply with the then relevant Health Act.

(c) Other cases cited dealt with interference of the right of passage on the highway.[63] Such rights are held by the public in common – all have a right to access land designated as a highway at common law. In my view, these cases are sui generis, and they do not establish that a public nuisance can arise absent an unlawful act or omission.

[72] There are also significant problems with the relief sought which I set out below at [104]-[105].

[73] For the various reasons I have set out, I consider that the cause of action in public nuisance is clearly untenable and could not succeed even if the proceedings were to go to trial. I strike it out.

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61 *Attorney General v PYA Quarries Ltd*, above n 47.

62 *Attorney General v Abraham & Williams Ltd* [1949] NZLR 461 (HC) and (CA).

63 *Amalgamated Theatres Ltd v Charles S Luney Ltd* [1962] NZLR 226 (SC); *Lower Hutt City Council v Attorney General, ex parte Moulder* [1977] 1 NZLR 184 (CA).

(g) Negligence

[74] The threshold condition for liability in any negligence action is that the defendant must owe a legal duty to the plaintiff to take care.[64] It has been noted as follows:

> The mere fact that a man is injured by another's act gives in itself no cause of action: if the act is deliberate the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right: if the act involves lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists.[65]

If there is a duty of care owed, the defendant must have acted in such a way as to breach that duty, the damage suffered by the plaintiff must have been caused by the defendant's breach of duty, and the damage must have been a sufficiently proximate consequence of the breach.

[75] Here, it was common ground that the duty alleged by Mr Smith – a duty on each of the defendants to take reasonable care not to operate its business in a way that will cause him loss by contributing to dangerous anthropogenic interference with the climate system – is novel.

[76] Whether it is appropriate to find a duty of care in novel circumstances depends on:

(a) whether the claimed loss was a reasonably foreseeable consequence of the alleged wrongdoer's acts or omissions;

(b) the degree of proximity or relationship between the alleged wrongdoer and the person said to have suffered loss; and

(c) whether there are factors external to the relationship which would make it not fair, just and reasonable to impose the claimed duty. Policy considerations can support or negative finding a duty.[66]

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64 *Todd on Torts*, above n 48 at 5.1.

65 *Grant v Australian Knitting Mills Ltd* [1936] AC 85 (PC) at 103 per Lord Wright.

66 *North Shore City Council v Attorney General*, above n 1 at [158]-[160]; *Carter Holt Harvey v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78 at [14];

[77] As I noted above at [23(e)], the Supreme Court has warned about the need for caution in striking out negligence claims where a novel duty of care is alleged or where the law is confused or developing. However, the Courts have not shied away from striking out claims seeking to raise novel duties of care that are clearly untenable.[67]

[78] I briefly summarise Mr Smith's case on negligence as it was put to me. Mr Smith says the connection between the emission of greenhouse gases and the impacts of climate change is established by widely available science, and that the science is well known. He pleads that the defendants knew of the science, and that significant reductions in their respective emissions would be required. It is said that in emitting and continuing to emit greenhouse gases, it was and is reasonably foreseeable that the defendants would and are continuing to contribute to the impacts of climate change, and that those living in, or connected with, coastal or low-lying areas will be distinctly affected by those impacts.

[79] I first consider the issue of reasonable foreseeability.

[80] Foreseeability in a novel case is a screening mechanism which excludes claims which must obviously fail because no reasonable person in the shoes of the defendant would have foreseen the loss or damage. Damage is foreseeable only where there is a real risk of damage, that is one which would occur to the mind of a reasonable person in the position of the defendant and one which he would not brush aside as far-fetched.[68] The law can regard damage as such an unlikely result of the defendant's act or omission that it would not be fair to impose liability even if the act or omission was actually a cause or even the sole cause of the loss.[69]

[81] In my judgment, the damage claimed by Mr Smith cannot be said to be a reasonably foreseeable consequence of the defendants' acts or omissions.

[82] It is not pleaded that it is reasonably foreseeable that the emissions of the individual defendants, or the defendants collectively, have caused or will cause the

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67 See, for example, *Attorney General v Prince & Gardner*, above n 1, at 267-277; *North Shore City Council v Attorney General*, above n 1.

68 *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* [1967 1 AC 617 (PC) at 643.

69 *North Shore City Council v Attorney General*, above n 1 at [159].

damage claimed to the Mahinepua C block, or to resources or customary and traditional sites of significance to Mr Smith. Rather, in his pleadings, Mr Smith seeks to extrapolate the overview findings in the IPCC reports, and apply them in a blanket way to the Mahinepua C block, the customary resources and the sites he says are of significance to him. There are difficulties with this approach. Mr Smith says that the defendants knew, or ought to have known from 2007, that their activities were contributing to dangerous anthropogenic interference in the climate system, and that it was necessary for them to immediately and significantly reduce their greenhouse gas emissions. As noted at [80], damage is only foreseeable where there is a real risk of damage, and I do not consider that the defendants should have apprehended that there was any real risk of the damage claimed in this case. Assuming the damage claimed by Mr Smith can be proved, the defendants cannot protect Mr Smith from that damage. Even if they stop emitting greenhouse gases, either immediately or by 2030, and/or stop supplying products from which greenhouse gases are emitted, the science (on which Mr Smith relies) suggests that it is likely that the damage will nevertheless eventuate. The defendants' collective emissions are miniscule in the context of the global greenhouse gas emissions which are causing climate change and it is the global greenhouse gas emissions which are pleaded as being likely to cause damage to Mr Smith. In these circumstances, in my view, reasonable persons in the shoes of the defendants could not have foreseen the damage claimed by Mr Smith.[70] It is such an unlikely or distant result of the defendants' emissions that it would not be fair to impose liability on them.

[83] This leads into the issue of causation. Causation in tort law is usually split into two separate enquiries – causation in fact and causation in law. Causation in fact arises where the tortious conduct has an historical connection with the injury. This is usually assessed on the basis of the "but for" test, although that test has been relaxed in some limited circumstances. The but for test poses the question whether the plaintiff would have suffered the damage without the alleged negligence. If it is more likely than not

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[70] The situation is akin to that in *Hamilton v Papakura District Council* [2002] UKPC 10, [2002] 3 NZLR 308 – pesticides in water sold to tomato grower. Supplier not liable in negligence. The fact that certain herbicides might kill or damage certain plants at certain concentrations did not make such a risk foreseeable.

that, absent the negligence, the plaintiff would have avoided the damage, then there will be causation in fact.[71]

[84] Here, the but for test is not, and cannot be, relied on by Mr Smith, for the reasons I have set out. Can Mr Smith avoid the but for test?

[85] The most significant exception to the test is found in what is known as the *Fairchild* line of cases on the United Kingdom.[72] *Fairchild* concerned appeals by workers who had contracted mesothelioma following exposure to asbestos at work. Each worker had been employed by multiple employers and there was no way of proving which employer was responsible for the disease each had contracted. The House of Lords held that, in the circumstances of the case, proof of contribution to risk sufficed to prove material contribution to the disease.

[86] It was argued for Mr Smith that climate change is analogous to the situation in *Fairchild* and that the rationale in that case applies.

[87] The Court of Appeal in this country considered *Fairchild* in *Accident Compensation Corporation v Ambros*.[73] The facts of that case fell outside the *Fairchild* principle (which cannot arise in New Zealand under this country's no fault accident compensation regime). Glazebrook J nevertheless noted that *Fairchild* and other decisions modifying the traditional test of causation were of uncertain scope and that they lack an overarching principle.[74] It is also noteworthy that there have been reservations about the *Fairchild* rationale overseas.[75]

[88] In my judgment, Mr Smith's claims are not analogous to the claims considered in *Fairchild*.

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71 *Accident Compensation Corporation v Ambros* [2008] 1 NZLR (CA) at [24].

72 *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 (HL).

73 *Accident Compensation Corporation v Ambros*, above n 71.

74 At [35]; And see *Calver v Accident Compensation Corporation* [2019] 3 NZLR 261 (HC) at [85]-[100]; *Tindall v Far North District Council*, HC Auckland CIV-2003-488-135, 20 October 2006 per Winkelmann J at [81]-[88].

75 See, e.g. *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10; [2011] 2 AC 229 at [186] per Lord Brown – "the law tampers with the but for test of causation at its peril"; at [167] per Lady Hale SCJ; at [189] per Lord Mance; *International Energy Group v Zurich Insurance PLC* [2015] UKSC 33, [2016] AC 509 at [209]-[210]; And see Lord Hoffman *"Fairchild and After"* in Andrew Burrows, David Johnston and Reinhard Zimmermann (eds) *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press Oxford, 2013) at 63-70.

(a) In *Fairchild*, one of the defendants was liable for the disease suffered; scientific uncertainty meant that each defendant might have been the "but for" cause of the loss; as a result of scientific uncertainty, it was simply impossible to prove which one. Mr Smith is not asserting any scientific uncertainty. He is asserting the opposite. Further, he is not asserting that any one of the defendants in this case is the "but for" cause of the climate change damage pleaded. He is rather asking the Court to treat each defendant's contribution as being the causation in fact of the damage claimed, even though he cannot responsibly assert that any one of the defendants, or even all of them, has materially contributed to climate change.

(b) In the UK, *Fairchild* was followed by *Barker v Corus UK Ltd*.[76] It was there held that a defendant's liability for material contribution to a *Fairchild* type risk should be proportionate, and not joint and several. This was seen as a necessary *quid pro quo* for relaxation of the "but for" causation threshold, and to smooth "the roughness of the justice" which the rule of joint and several liability – normally applicable in tort – would otherwise create.[77] There are obvious difficulties in applying a material contribution threshold to Mr Smith's claim. It is impossible to determine each defendant's contribution to global greenhouse gas emissions, or the extent of climate change effects that each defendant's contribution to date to global greenhouse gas emissions has caused. To put it another way, the proportion of the damage pleaded that is caused by climate change effects contributed to by each defendant, or even the extent to which anthropogenic interference with the climate system has caused, or will cause, the damage pleaded is impossible to measure. This reinforces my view that the damage claimed by Mr Smith is not a reasonably foreseeable consequence of any of the defendants' acts.

[89] This leads into issues of proximity.

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[76] *Barker v Corus UK Ltd* [2006] UKHL 20, [2006] 2 AC 572.

[77] At [43] per Lord Hoffmann; at [61]-[62] per Lord Scott; at [109] per Lord Walker; at [121]-[128] per Baroness Hale.

[90] Mr Smith submits that there is a tenable basis on which it can be said that there is a sufficiently proximate relationship between him and the defendants. He says that he forms part of an identifiable group – coastal Māori residing north of Auckland – subject to a particular or distinctive risk greater than that faced by the general public. He says that the defendants knew of the risk their activities posed to him and the group of which he forms part and that this is a strong indicator of proximity.

[91] The proximity enquiry requires the Court to consider "the closeness of the connection between the parties". It is a "means of identifying whether the defendant was someone most appropriately placed to take care in avoidance of damage to the plaintiff";[78] it is connected with balancing "the plaintiff's moral claim for avoidable harm and the defendant's moral claim to be protected from an undue burden of legal responsibility".[79] Whether recognising a sufficiently proximate relationship will expose the defendants and others in the position of the defendant to an indeterminate liability can be a relevant factor.[80]

[92] In the present case, in my judgment, it cannot be contended that there is a proximate relationship between Mr Smith and any of the defendants. Obviously, there is no physical proximity. Nor is there any relationship between the parties from which proximity can be established and, as I have already sought to explain, there is no proximity in terms of the defendants' actions and the damage claimed by Mr Smith. Further, the defendants are not the persons most appropriately placed to take care in the avoidance of damage to Mr Smith. The most appropriately placed entity in this country to address the complex and collective problems presented by climate change is the Government. Only it can require the necessary collective action by emitters in this country, and action by the defendants alone, whether by Court order or otherwise, will not avoid the damage claimed.

[93] There are further difficulties for Mr Smith in asserting proximity – namely, disproportion and indeterminate liability.

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78 *North Shore City Council v Attorney General*, above n 1, at [158]; *Couch v Attorney General*, above n 1, at [48]-[50].
79 *North Shore City Council v Attorney General*, above n 1, at [158].
80 At [159].

[94] Mr Smith's claim seeks to require the defendants to achieve zero net emissions of greenhouse gases by 2030. The climate science relied on by Mr Smith in his pleadings, and the Government's response to the obligations it has assumed by becoming a state party to the various accords noted above, requires that New Zealand achieve net zero emissions of greenhouse gases by 2050. Mr Smith invites the Courts to second-guess that target and impose a date of 2030, but only on the defendants. Further, Mr Smith seeks to require BT Mining to cease producing coal which is burned overseas. Again, this invites the Court to second-guess the approach taken in the Climate Change Response Act. It provides that participants in the emissions trading scheme who mine coal, are not required to surrender units in respect of any carbon dioxide emissions from coal that is exported.[81] This is consistent with New Zealand's international obligations. The various international accords envisage that emissions will be accounted for in the country where they occur. Mr Smith, in his pleadings is, in effect, seeking to carve out the defendants and impose on them greater obligations than are imposed on other emitters under the relevant statutory provisions. If the alleged duty exists, the defendants could be subject to a disproportionate liability.

[95] There is further disproportion between the damage claimed by Mr Smith, and the acts of the defendants. It is the global emission of greenhouse gases that are likely to cause the damage which Mr Smith pleads. Mr Smith accepts that the defendants' contribution to those global emissions is minute. In my view, to recognise the duty alleged by Mr Smith would be to expose the defendants to an undue burden of legal responsibility, way beyond their contribution to damaging global greenhouse gas emissions.

[96] Exposing the defendants to the duty of care alleged would also create indeterminate liability for the defendants. The defendants could potentially become liable at the suit of anybody able to claim damage from climate change. Mr Smith seeks to impose a date of 2030 on the defendants. He does not seek damages. Other prospective claimants might take a different view or views. The defendants could be subject to competing claims and, potentially, orders.

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[81] Climate Change Response Act 2002, s 207.

[97] I turn next to consider the final stage of the inquiry – whether policy considerations support or negative finding the duty alleged. Factors external to the relationship between the parties can make it unfair, unjust or unreasonable to impose liability on the defendants, and the law permits the Court to consider the wider effects of a decision imposing liability on society and the law generally.[82]

[98] In my judgment, there are a number of factors (many of which run together) which militate against the imposition of the duty of care claimed in this case.

(a) As noted, Mr Smith has not sought damages, but others could. Tortious liability is generally joint and several, and any defendant against whom a claim is made could potentially be liable for the whole of a plaintiff's loss, notwithstanding the individual defendants' minimal contribution to the global emissions that, combined, have caused climate change. Leaving individual defendants to seek contributions from others does not address this consequence. A New Zealand defendant's ability to recover contribution from an overseas emitter would be likely to be very constrained.

(b) Recognising the duty claimed would give rise to issues of indeterminate liability on anyone. The statement of claim alleges that the claimed duty is owed to Mr Smith and "to others like him". At its narrowest, the claimed duty would be owed to persons who have interests in coastal land, sites of cultural and spiritual significance, fisheries resources, or that suffer adverse health or societal effects arising from climate change. The class of potential plaintiffs on Mr Smith's pleading is very large. Moreover, it is unlikely that the class could be limited to the owners of coastal property. The claimed duty would be owed to anybody who can claim damage as a result of the widespread effects of climate change. In a very real sense, everyone is a polluter, and therefore a tortfeasor, and everyone is a victim and therefore a potential claimant. If a duty of the kind alleged were recognised, every New Zealander would be liable to suit from every other New Zealander.

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82 *North Shore City Council v Attorney General*, above n 1 at [160].

Moreover, liability would not be confined to claims for physical damage. There could be claims for economic loss given that climate change is predicted to have economic implications as well as physical impacts. None of us could take steps sufficient to avoid liability.

(c) For the same reasons, the class of potential defendants is equally open-ended. Potential defendants could in principle include overseas defendants, who could be served without leave, if it were to be alleged that their activities have contributed to climate change effects in New Zealand.[83]

(d) If the claimed duty were to be recognised, emitters could be caught between their legislative obligations, and decisions made by the Courts. As already noted, the relief sought by Mr Smith differs from the established science and from the targets set by Parliament in the Climate Change Response Act (as amended). Further, and again as already noted, emitters could be required to answer to an indeterminate pool of potential plaintiffs, who could assert that there should be different obligations imposed for emission reductions.

(e) The duty alleged is inconsistent with Parliament's regulation of emissions. While compliance with a regulatory standard does not of itself mean that a defendant has not been negligent, in the present context, Parliament has put in place a comprehensive mechanism designed to deal with climate change. Climate change presents a complex and collective global problem. Very many countries, including New Zealand, have committed themselves to trying to deal with the problem. This country has assumed international obligations and the legislature has dealt with the matter in a way which it considers meets those obligations.

(f) Related to the above, there is a comprehensive legislative framework already in place designed to deal with the climate change. Recognising

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83 High Court Rules 2016, r 6.27(a)(ii).

a liability in negligence would potentially compromise Parliament's response, and would require the Courts to engage in complex polycentric issues, which are more appropriately left to Parliament. It is an area where the authority of Parliament should be respected.[84] This is not to say that climate change is a "no go" area. Rather, the better course is for aggrieved victims of climate change to seek to hold the Government responsible.[85] The provisions of s 5ZM of the Climate Change Response Act, set out at [43] above, are directly in point.

(g) The Courts are poorly equipped to deal with the issues which Mr Smith seeks to raise. This country's response to climate change involves policy formation, value judgments, risk analysis, trade-offs and distributional outcomes. These matters are well outside the normal realms of civil litigation.[86]

(h) If the Courts were to reach different conclusions than Parliament, there could be inconsistent and different net zero emission targets and different ways of dealing with the problems thrown up by climate change. That would be highly undesirable and would put significant emitters in a quandary.

(i) The social utility of the defendants' activities also falls for consideration. Each operates a business with substantial economic and social utility. Each is a major employer, and each plays a role in and is a contributor to the New Zealand economy.

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84 In New Zealand, see *Thomson v Minister for Climate Change Issues*, above n 7, at [134]; *Royal Forest and Bird Protection Society of New Zealand v Buller Coal Limited* [2012] NZRMA 552, upheld on appeal, *West Coast ENT Inc v Buller Coal Ltd,* above n 7, at [169]; *Genesis Power Ltd v Greenpeace New Zealand Inc* [2007] NZCA 569, [2008] 1 NZLR 803 (CA) at [17] per William Young P; *Environmental Defence Society Inc v Auckland Regional Council* (2002) 9 ELRNZ 1 (EnvC) at [35] and [83]-[88]; In the UK, see *Budden v BP Oil Ltd* (1980) 124 Sol J 136 at 6-7; In the US, see *City of Oakland v BP PLC* 325 F Supp 3d 1017 (ND Cal 2018) at 1028 per Judge Alsup; *City of New York v BP PLC* 325 F Supp 3d 466 (SD NY 2018) at 475 per Judge Keenan (I was advised that both of these cases have been appealed).

85 *Thomson v Minister for Climate Change Issues*, above n 7, at [101]-[134].

86 And see, in the US – *American Electric Power Co Inc v Connecticut* 564 US 410 (2011) at 428 per Justice Ginsberg; *Native Village of Kivalina v Exxon Mobil Corp* 696 f 3d 849 (9th Circuit 2012) at 858 per Judge Thomas.

[99] In my view, the duty of care alleged by Mr Smith if accepted, would have wide effects on society and on the law generally. All of the various matters I have noted count against the duty claimed.

[100] In my judgment, were the action allowed to proceed, Mr Smith would be unable to establish a duty of care in the terms alleged. For all of these various reasons, I consider that the cause of action alleging negligence is clearly untenable.

(h) Inchoate Duty

[101] It was common ground that the law, on appropriate occasion, evolves, and that the common law is an important source of law. It is capable of creating new principles and causes of action, and from time to time does so – for example, a new tort of intrusion into seclusion has relatively recently been recognised in New Zealand.[87] The common law however proceeds through the methodological consideration of the law that has been applied in the past and the use of analogy. The common law method brings stability, but it can also allow for the injection of new ideas and for the creation of new responses as required.[88]

[102] Mr Smith's has made no attempt in pleading his third cause of action to refer to recognised legal obligations, nor to incrementally identify a new obligation by analogy to an existing principles. This, I suspect, is because such attempt cannot readily be made. The claimed duty of care is not obviously analogous to any existing duty of care and I doubt that its recognition could be described as a gradual or step by step expansion of negligence liability. The public policy reasons I have identified in [98] above in considering whether a duty of care in negligence can extend in the novel way claimed by Mr Smith, seem to me to create significant hurdles for him in trying to persuade the Court that a new legal duty should be recognised.

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87 *C v Holland* [2012] NZHC 2155, [2013] 3 NZLR 672; and see Winkelmann CJ – *Renovating the House of the Law*, above n 4, at 4-5.

88 At 8; And see, *Myers v Director of Public Prosecutions* [1965] AC 1001 (HL) at 1021 per Lord Reid – "The common law must be developed to meet changing economic conditions and habits of thought, and I would not be deterred by expressions of opinion in this house in old cases. But there are limits to what we can or should do. If we are to extend the law it must be by development and application of fundamental principles"; *Merrifield v The Attorney General of Canada* 2019 ONCA 205 at [20]-[23].

[103] Nevertheless, I am reluctant to conclude that the recognition of a new tortious duty which makes corporates responsible to the public for their emissions, is untenable. As noted by Winkelmann CJ and Glazebrook and France JJ, above at [55], it may be that a novel claim such as that filed by Mr Smith could result in the further evolution of the law of tort. It may, for example, be that the special damage rule in public nuisance could be modified; it may be that climate change science will lead to an increased ability to model the possible effects of emissions. These are issues which can only properly be explored at trial. I am not prepared to strike out the third cause of action and foreclose on the possibility of the law of tort recognising a new duty which might assist Mr Smith.

[104] Accordingly, I decline to strike out the third cause of action.

(i) The relief sought

[105] I comment briefly on the relief sought by Mr Smith. Effectively, he is seeking declaratory and injunctive relief to put in place his own bespoke emissions reduction scheme.

[106] If Mr Smith were to succeed in his claim, it would be possible for a declaration to be made. It would however, in my view, be all but impossible to injunct the activities of any particular defendant as sought.

[107] The injunctions sought by Mr Smith would require the Court to go beyond enforcing the terms of the Climate Change Response Act, and require the Court to apply an emissions accounting methodology to determine gross emissions from each defendant. The Court would have to consider the extent to which each defendant should be responsible for supply chain emissions for which it is not directly responsible. It would have to guard against double counting between defendants (and entities overseas in the case of BT Mining) and potential future defendants in similar proceedings. The Court would have to select a methodology to apply to carbon dioxide equivalents, so that greenhouse gases could be meaningfully compared when taking into account the different effects of different emissions on global warming. It would have to determine whether an emissions trading type scheme would be required by any Court order (noting that Mr Smith seeks "net" zero emissions) and, if so,

whether, how and to what extent units could be acceptable offsets against each defendant's gross emissions. The Court would have to put in place a system to verify each defendant's acquisition and/or surrender or cancellation of units. The Court would have to consider what if any trajectory of net emission reductions each defendant would be required to achieve between 2020 and 2030 (the target date suggested by Mr Smith). The Court would have to determine whether there should be uniform linear progression towards net zero, or whether and how the progression towards net zero should take into account each defendant's circumstances that might suggest that a particular trajectory would be inappropriate or patently inequitable for one or more of the defendants.

[108] These, and probably other, tasks would make it extraordinarily difficult to craft any form of injunction. Any orders would require continued judicial supervision – certainly up to 2030 and perhaps beyond. The Court's supervisory role would become akin to that of a regulator, requiring specialist, and not judicial, expertise.

Result

[109] For all of the above reasons, I strike out the first and second causes of action. I decline to strike out the third cause of action.

Costs

[110] It is my preliminary view that costs should lie where they fall. Both Mr Smith and the defendants have had a measure of success.

[111] The defendants may take the view that they have been more successful than Mr Smith and that they should be entitled to their reasonable costs and disbursements.

[112] Only DHL and BT Mining sought costs in their interlocutory applications, and I do not know whether either of them, or any of the other defendants, wishes to advance a claim for costs and disbursements against Mr Smith. In the event that they or any of them do, I make the following directions:

(a) any claim for costs and disbursements is to be advanced by way of memorandum, to be filed within 10 working days of the date of release of this judgment;

(b) any memorandum in response is to be filed within a further 10 working days;

(c) memoranda are not to exceed 10 pages.

I will then deal with the issue costs and disbursements on the papers, unless I require the assistance of counsel.

Assistance of counsel

[113] I thank all counsel involved in this matter for their helpful, thorough, and thought-provoking arguments. I was very much assisted by both the written and oral submissions.

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Wylie J