Pushing Boundaries: Novel Torts and Climate Change in Light of Smith v Fonterra

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Introduction

"Developing a comprehensive, fair and effective solution to the problem of human-induced climate change is one of the most formidable challenges currently facing the international community."[1] Since 2007, the danger of greenhouse gas (GHG) emissions leading to climate change and its impacts on our planet have been established by the Intergovernmental Panel on Climate Change.[2] Despite this global recognition and corresponding push for action, the actual adaption to and mitigation of climate change through GHG reductions has been limited. In Aotearoa New Zealand, a range of means to respond to climate change have been considered, including by Winkelmann CJ and Glazebrook and France JJ, in their paper "Climate Change and the Law".[3] One such measure is a applying tort law to climate change.

In *Smith v Fonterra* the High Court considered the possibility of a novel tort for climate change.[4] Although *Smith* did not include much argument for or give much consideration to the justifications for nor the nature of this tort, Wylie J's refusal to strike out the claim for the novel duty has opened the door for us to consider it. Therefore, this dissertation will consider the scope for such a novel climate change tort in New Zealand. Based on the analysis in *Smith*, the purpose of this novel climate change tort would be to initiate emission reductions and wider climate action, in response to this significant public issue, rather than vindicate individual rights. This reflects the nature of Smith's claim as one brought in the public interest and based on a duty "to cease contributing to damage to the climate system, dangerous anthropogenic interference, with the climate system and adverse effects of climate change through their emissions of GHGs".[5]

Therefore, this dissertation will consider the potential for a novel climate change tort in New Zealand. Chapter one will look at the Government's current policy response to climate change to demonstrate the necessity of a novel tort. Chapter two will consider the

[1] Jonathon Boston "The nature of the Problem and the Implications for New Zealand" in Alistair Cameron (ed) *Climate Change Law and Policy in New Zealand* (LexisNexis, Wellington, 2011) 88.
[2] Intergovernmental Panel on Climate Change (IPCC) *AR4 Climate Change 2007: Synthesis Report* (IPCC, Geneva, 2007) www.ipcc.ch/assessment-report/ar4/.
[3] Helen Winkelmann, Susan Glazebrook and Ellen France "Climate Change and the Law" (paper presented to the Asia Pacific Judicial Colloquium, Singapore, 2019).
[4] *Smith v Fonterra Co-Operative Group Ltd* [2020] NZHC 419.
[5] *Smith,* above n 4, at [15].

justification for the tort, applying the approach in *Hosking v Runting* to demonstrate that there is a gap in our law and a wider demand for a climate change tort. Chapter three will outline some of the advantages and disadvantages of applying tort to climate change claims. Chapter four will discuss some of the issues encountered in *Smith* in applying negligence and public nuisance to climate change. Chapter five will then extrapolate from the issues in *Smith* to set out some potential features of a novel climate change tort. This dissertation will conclude that there is sufficient necessity and justification for a novel climate change tort in New Zealand and that such a tort would be beneficial. Overall, this analysis is not intended to invent a new tort, but to extrapolate from the arguments against public nuisance and negligence claims in *Smith* and establish some potential characteristics for a novel climate change tort.

I Climate Change Law and Policy in New Zealand

A What is Climate Change?

Climate change is a long-term warming of the planet, above pre-industrial levels, as a result of anthropogenic greenhouse gas (GHG) emissions, from a variety of sources.[6] It has been recognised as a significant global problem since 1998, with the International Panel on Climate Change warning that if we do not keep global warming below 1.5 degrees above pre-industrial levels, there will be significant consequences.[7] The effects of climate change include extreme weather patterns, ocean acidification, biodiversity loss, sea level rise, and are felt globally, crossing international jurisdictional boundaries.[8] The causes of climate change are broad and complex, the risks and effects are wide-reaching and significant and requires coordinated domestic and global action to address.[9] Climate change is therefore considered to be a 'wicked problem' and poses a significant problem for policy makers.[10]

B New Zealand's Policy Response to Climate Change

New Zealand's climate change response began with the Climate Change Response Act 2002, which was enacted to enable the New Zealand Government to meet its obligations under the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol.[11] The UNFCCC involved a broad commitment to mitigating the impact of climate change through GHG emissions reductions and the Kyoto Protocol set the first specific obligations, requiring New Zealand to reduce its emissions to 1990 levels in the period between 2008-2012.[12]

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[6] Intergovernmental Panel on Climate Change (IPCC) *Global Warming of 1.5: Special Report: Summary for Policy Makers* (IPCC, Geneva, 2018) www.ipcc.ch/sr15/chapter/spm/ at 4.
[7] IPCC, (2018) above n 2, at 4.
[8] IPCC, (2018) above n 2, at 5.
[9] Samuel P Leonard "Commitment Issues: A Critical Analysis of New Zealand's Emissions Trading Scheme" (2015) 19 New Zealand Journal of Environmental Law 1143 at 114 and Douglas A. Kysar "What Climate Change can do about Tort Law" (2011) 41 Environmental Law Reporter 1 at 4.
[10] A "wicked problem" is one that "defies resolution because of the enormous interdependencies, uncertainty, circularities and conflict stakeholders implicated by any effort to develop a solution". Lazarus refers to climate change as a super wicked problem in Richard Lazarus "Super Wicked Problems and Climate Change, Restraining the Present to Liberate the Future" (2009) 94 Cornell Law Review 1153 at 1159.
[11] United Nations Framework Convention on Climate Change (opened for signature 9 May 1992, entered into force 21 March 1994) and Kyoto Protocol (opened for signature 11 December 1997, entered into force 16 February 2005).
[12] Catherine Leining, Suzi Kerr and Bronwyn Bruce-Brand "The New Zealand Emissions Trading Scheme: Critical Review and Future Outlook for Three Design Innovations" (2020) 20(2) Climate Policy 264 at 247.

To meet these targets, New Zealand introduced the Emissions Trading Scheme (ETS) in 2008.[13] The ETS remains our major response to reducing GHG emissions and requires emitters to surrender one emission unit for every tonne of carbon dioxide (or GHG equivalent) emitted.[14] In doing so, it requires emitters to reduce their emissions or purchase emissions credits, creating a financial incentive for businesses to reduce emissions.[15] The original regime was intended to include all economic sectors by 2013 and the six major GHGs.[16] Sectors were intended to be brought under the scheme with two years of voluntary reductions and then mandatory reduction targets.[17]

Whilst initially considered 'trail-blazing' for its comprehensive plan to include all sectors, subsequent amendments have reduced the potential effectiveness of the regime, with Palmer stating "the weaknesses of the [ETS] are notorious".[18] First, whilst agriculture was intended to be included by 2013, due to a series of amendments by the National Government this has been delayed and at the time of writing, agriculture is still not covered by the regime.[19] Although the exclusion of agriculture from emissions trading schemes is not uncommon internationally, it poses a significant challenge to New Zealand's emissions reduction goals as agriculture accounts for almost half of New Zealand's emissions.[20] Although the current Labour-led Government has committed to including agriculture by 2025, the targets for biogenic methane emissions (from

[13] Climate Change Response (Emissions Trading) Amendment Act 2008.
[14] Ministry for the Environment "About the New Zealand Emissions Trading Scheme" www.mfe.govt.nz/climate-change/new-zealand-emissions-trading-scheme/about-nz-ets.
[15] "Ministry for the Environment "About the New Zealand Emissions Trading Scheme" above n 14.
[16] Leining, Kerr and Bruce-Brand, above n 12, at 248.
[17] Leining, Kerr and Bruce-Brand, above n 12, at 248.
[18] Toni E Moyes "Greenhouse Gas Emissions Trading in New Zealand: Trailblazing Comprehensive Cap and Trade" (2008) 35(4) Ecology Law Quarterly 911 at 913 and Geoffrey Palmer "New Zealand's Defective Law on Climate Change" 13 (2015) New Zealand Journal of Public and International Law 115 at 131. Palmer cites New Zealand's position as 43rd on the Climate Change Performance Index as a consideration. Whilst Palmer acknowledges the potentially inaccuracies of this as a measure, it is interesting to note that New Zealand now ranks 37th overall, but 54th for our GHG emissions. See German Watch, NewClimate Institute and Climate Action Network "The Climate Change Performance Index: Results 2020" climate-change-performance-index.org.
[19] Leining, Kerr and Bruce-Brand above n 12 at 248 and Ministry for the Environment "Action on Agricultural Emissions" www.mfe.govt.nz/consultation/action-agricultural-emissions.
[20] Ministry for the Environment "Action on Agricultural Emissions" above n 19 and Suzi Kerr and Andrew Sweet "Domestic Emission Trading Scheme; New Zealand's Experience to Date" (2008) 5(4) Farm Policy Research 19 at 19.

agriculture) remain lower than for all other GHGs, and thus, there is still a significant gap in our GHG emissions response.[21]

The second issue with the ETS was that until 2015, the it was linked to the Kyoto Emissions Trading Scheme (the Scheme). This was considered beneficial because it enabled domestic parties to trade unlimited units with the Kyoto scheme, resulting in a more flexible and cost-effective regime, with efficient emission prices.[22] As a result, the ETS does not have a domestic cap on emissions; it relies on the Kyoto cap on emissions.[23] This has poses several challenges for the effectiveness of the ETS. First, the Kyoto linkage did not create the efficient emissions prices intended. First, the availability of cheap internationals credits meant that it was cheaper for domestic parties to buy those credits than reduce their emissions.[24] For example, New Zealand was able to meet our original Kyoto target with a surplus of credits, despite a rise in domestic emissions.[25] There have also been challenges with the price management of units. This is because the ETS prevents excessively high unit prices, through the introduction of a price ceiling in 2012, but not excessively low prices.[26] The system also utilised fixed-price options, which have become increasingly popular as unit prices have risen and an industrial allocation, which allocates units to emissions-intensive and trade exposed businesses, is phased out.[27] As such, the ETS has been criticised for providing "little incentive for domestic mitigation" through consistently low unit prices and an on-going lack of certainty that has discouraged low-emission investment.[28] Thus, overall the ETS has been viewed as ineffective in achieving the GHGs reduction targets and mitigating climate change.

In 2016, New Zealand ratified the Paris Agreement, committing to further reduce emissions to the equivalent of 11 percent below 1990 levels, between 2021-2030.[29] In 2019, the Climate Change Response (Zero Carbon) Amendment Act was enacted, in order

[21]Leining, Kerr and Bruce-Brand, above n 12, at 248.
[22] Moyes, above n 18, at 933-934.
[23] Moyes, above n 18, at 933.
[24] Leining, Kerr and Bruce-Brand, above n 12, at 252.
[25] Leining, Kerr and Bruce-Brand, above n 12, at 252.
[26] Leining, Kerr and Bruce-Brand, above n 12, at 254.
[27] Leining, Kerr and Bruce-Brand, above n 12, at 254.
[28] Leining, Kerr and Bruce-Brand, above n 12, at 246 and 255.
[29] Ministry for the Environment, "About the Paris Agreement" www.mfe.govt.nz/climate-change/why-climate-change-matters/global-response/paris-agreement.

to meet New Zealand's obligations under the Paris Agreement, by requiring a reduction of GHG emissions, with the exception of biogenic methane (which is subject to a separate, longer-term target) to net zero by 2050, introduced five-yearly emissions budgets and established a Climate Change Commission.[30] In 2020 the Emissions Trading Reform Amendment Act was enacted to; introduce an emissions cap, improve price controls, phase out industrial allocation and enable the introduction of agriculture by 2025.[31] With these amendments, the Ministry for the Environment states that New Zealand is on track to meet its international obligations.[32] That said, the effectiveness of these reforms remains to be seen. The effectiveness will likely depend on whether these reforms are retained by future governments and whether they result in true emissions reductions, rather than merely paper reductions, as experienced in meeting the Kyoto obligations.

In terms of adaption to climate change, Aotearoa's environment and natural resources are predominantly managed under the Resource Management Act 1991 (RMA), alongside other specific Acts, such as the Biosecurity Act 1993 and the Environment Act 1986.[33] Palmer argues that the RMA is one of our main mechanism for climate adaption, although it is not an environmental protection statute.[34] It is founded on the principle of sustainable development.[35] This is an anthropocentric concept focused on balancing the three pillars; environmental concerns, socio-cultural values and economic development. This same ethos is also present in legislation in other areas such as forestry, fisheries and energy.[36]

Palmer has criticised the RMA as insufficient for climate adaption, despite a series of amendments intended to improve it.[37] For example, only recently has the RMA been

[30]Leining, Kerr and Bruce-Brand, above n 12, at 248.
[31] Climate Change Response (Emissions Trading Scheme Reform) Amendment Act 2020 and Ministry for the Environment "Overview of the New Zealand Emissions Trading Scheme Reforms" www.mfe.govt.nz/overview-reforming-new-zealand-emissions-trading-scheme.
[32] Ministry for the Environment. "New Zealand and the United Nations Framework Convention on Climate Change" www.mfe.govt.nz/climate-change/why-climate-change-matters/global-response/new-zealand-and-united-nations-framework.
[33] Ministry for the Environment "Environmental Legislation and Governance" www.mfe.govt.nz/publications/environmental-reporting/environment-new-zealand-2007-chapter-2-our-environment-and-0.
[34] Palmer, above n 18, at 126-127.
[35] Klaus Bosselmann "Sustainability and the Law" in Peter Salmon and David Grinlinton (eds) *Environmental Law* (Thomson Reuters, New Zealand, 2018) 83 at 83.
[36] Bosselmann, above n 35, at 132-137.
[37]Palmer, above n 18, at 127.

amended to allow GHG discharges to be considered in consenting decisions.[38] Previously, the majority of the Supreme Court in *Genesis Power Ltd v Greenpeace New Zealand Inc* affirming the Court of Appeal's decision found that Resource Management (Energy and Climate Change) Amendment Act 2004 was to be interpreted as prohibiting discharges of GHGs from being considered in consenting decision, except for renewable energy developments.[39] This decision was criticised for departing from the approach in case such as *Environmental Defence Society v Taranaki Regional Council*, where the Court held the comparatively small nature of New Zealand's emissions was irrelevant, "further entrench[ing] the policy shift away from dealing with GHG emissions under the RMA".[40] *Genesis Power* was subsequently affirmed in *West Coast ENT Inc v Buller Coal Ltd*, which held that GHG regulation was a national issue, best dealt with under the ETS and National Environmental Standards.[41] Daya-Winterbottom suggests that this decision represents a deference to the political preference of the time, rather than necessarily robust legal analysis.[42]

Overall, Daya-Winterbottom argues that judicial interpretation of the RMA has tended to veer strongly away from consideration of and adaption to GHG emissions, reflecting political deference and nationalised policy aims.[43] Whilst the continuity of a national response is beneficial, Palmer suggests that central government has failed to provide sufficient guidance.[44] Therefore, whilst well-intention the response of the RMA to GHG emissions and the challenges of climate adaption are insufficient. This insufficiency is likely reflected in the recent drive for RMA reform, with the *New Directions for Resource Management in New Zealand Report* recommending that the RMA be repealed and

[38] Resource Management Amendment Act 2020.
[39] *Genesis Power Ltd v Greenpeace New Zealand Inc* [2007] NZCA 569; [2008] 1 NZLR 803; [2008] NZRMA 125 and see RMA ss 7(i), 104E and 104F in particular.
[40] *Environmental Defence Society v Taranaki Regional Council* ENC Auckland A184/02, 6 September 2002 and Trevor Daya-Winterbottom "Judicial Perspectives on Renewable Energy and Climate Change Governance" in Jordi Jaria I Manzano, Nathalie Chalifour and Louis J. Kotzé (eds) *Energy, Governance and Sustainability* (Edward Elgar, Cheltenham, 2016) 173 at 179-180.
[41] *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32 and Daya-Winterbottom, above n 40, at 186.
[42] Daya-Winterbottom, above n 40, at 187.
[43] Daya-Winterbottom, above n 40, at 193.
[44] Palmer, above n 18, at 128.

replaced with two acts, one for the environment and one for longer-term planning and resource management.[45]

Therefore, New Zealand's policy response to climate change and environmental management is lacking. Although New Zealand has various systems in place to manage its resources and regulate GHG emissions, and these have been continuously amended to improve our response, it remains to be seen whether the current legislative and regulatory framework will be effective in generating the substantial emissions reduction required and to allow New Zealand to adequately mitigate and adapt to climate change.

C A Solution: The Prospect of a Novel Climate Change Tort

While Aotearoa's current policy response to climate change is lacking concurrently we are seeing increasing demand for action, nationally and internationally. The question therefore arises, what do we do about this? Many different legal avenues have been considered for initiating climate action. In their recent paper, Winkelmann CJ and Glazebrook and France JJ summarised climate change and the law in New Zealand and considered potential avenues for improvement, including international law, customary international law, human rights law, and different forms of public and private law.[46] They noted that litigation is increasingly being used as a source of climate action and regulation and in particular, tort.[47] Tort has often been used internationally as a source of climate action, particularly in the United States.[48] Although New Zealand has had a few climate change cases, for example *Thompson v Minister for Climate Change Issues*, until recently there had been no such tortious attempts.[49]

In 2019, Mike Smith (Ngāpuhi and Ngāti Kahu) brought claims against Fonterra, Genesis, Dairy Holdings Ltd, NZ Steel Ltd, Z Energy, the New Zealand Refining Company and BT Mining. He claimed that they had harmed him in negligence, public nuisance and a

[45] Ministry for the Environment. "Resource Management System: A Comprehensive Review" www.mfe.govt.nz/rmreview.
[46] Winkelmann, Glazebrook and France, above n 3.
[47] Winkelmann, Glazebrook and France, above n 3, at [80] and [101].
[48] Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert "If at First You Don't Succeed: Suing Corporations for Climate Change" (2018) 38(4) Oxford Journal of Legal Studies 841 at 842 and Winkelmann, Glazebrook and France, above n 3, at [101]. Examples of cases include *Native Village of Kivalina v ExxonMobil* 696 F 3d 849 (9th Cir 2012).
[49] *Thompson v Minister for Climate Change Issues* [2017] NZHC 733.

"breach of inchoate duty" through their GHG emissions.[50] Smith claimed that there was a novel duty owed to him by the defendants "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 [GHGs]".[51] In response to a strike out application, Wylie J declined the claims in public nuisance and negligence but allowed the claim for the 'inchoate' tort to proceed. Although the novel tort was not analogous to any existing duty of care, nor an incremental development of negligence, Wylie J did not strike out the claim stating, "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".[52]

Therefore, *Smith* has established the potential for a novel climate change tort to be introduced in New Zealand. However, Smith did not put forward any arguments for why or how this tort could be established in Aotearoa New Zealand. Therefore, the next section will examine how a novel climate change tort could be introduced in New Zealand.

[50] *Smith,* above n 4, at [1]-[2].
[51] *Smith,* above n 4, at [15].
[52] *Smith,* above n 4, at [102]-[103].

II Foundations for a Novel Tort

A How are Novel Torts Developed?

Tort law is a common law jurisdiction, and therefore, it changes incrementally over time, developing new causes of action in response to disputes. For example, New Zealand has recently developed a right of action for invasion of privacy.[53] The development of a new tort is not a set process. Sometimes, existing torts may be developed incrementally to create new causes of actions, or, as proposed in *Smith*, something almost entirely new. When establishing a novel tort, factors the Court may consider include;

> fairness and justice, value of the precedent and the effect of their decisions on the certainty and coherence in the law, with the practicability of defending and limiting a proposed head of liability, with commercial convenience, with promoting self-reliance and individual autonomy, and with the deterrent and economic implications of their decisions for the future.[54]

In relation to the development of the common law, *Ports of Auckland Ltd v Auckland City Council* stated:

> the time should be long past where statute law and common law were seen as occupying different planes. Decision makers, including planning authorities and the Court on judicial review must consider what construction of the legislation and what development of the common law would avoid anomaly and provide a sensible result.[55]

Thus, although New Zealand is a highly legislated community and has a fairly comprehensive body of environmental legislation, this does not mean that there is no scope for common law developments. For example, as discussed in chapter one, there remain issues with the timeline for including agriculture in the ETS, the effectiveness of the ETS for reducing actual emissions and the RMA for regulating our behaviour in relation to the environment (though the latter should be mitigated by recent

[53] Stephen Todd (ed) *Law of Torts in New Zealand* (online loose-leaf ed, Thomson Reuters) at 59.1.2.03.
[54] Todd, above n 53, at 59.1.2.03.
[55] *Ports of Auckland Ltd v Auckland City Council* [1999] 1 NZLR 601 (HC) at 609 cited in David Grinlinton "The Context of Environmental Law" in Peter Salmon and David Grinlinton (eds) *Environmental Law* (Thomson Reuters, New Zealand, 2018) 146 at 146.

amendments). Therefore, *Ports of Auckland* indicates that the judiciary is still able to develop the common law, to respond to climate change, where there is a perceived gap and alignment with the wider law.

This is similar to the approach taken in *Hosking v Runting* when considering the development of a new privacy tort.[56] In *Hosking*, Gault J considered the existing thrust of the law in New Zealand and comparable jurisdictions to determine whether there was a gap for a novel tort to fill, and whether it would fit with the wider law.[57] Gault J looked to the New Zealand Bill of Rights Act 1990 (NZBORA), international law obligations, other legislation suggesting the need to protect privacy, previous case law and the development of the Broadcasting Standards Authority as part of the wider shift towards privacy protection.[58] Gault J concluded that New Zealand's wider domestic law and international obligations guaranteed a right to privacy and as NZBORA did not make specific provision for it, it was the role of the Courts to develop the common law in line with New Zealand's wider commitments.[59]

Therefore, in looking to develop a novel climate change tort, we should first consider whether the thrust of the law is heading in that direction and whether there is a gap, which the courts should fill through the common law.

B Is There a Gap?

As discussed above, New Zealand's main response to GHG emissions has been the ETS. Although the design of the scheme is comparatively comprehensive, there have been some gaps in its application, which have significantly limited the real emissions reduction impact while major emissions groups, including agriculture remain outside the ETS. Although steps have been taken to remedy this, there is no guarantee that this will achieve the intended, nor required emissions reductions. In the context of *Smith* for

[56] William Fussey "Determining Reasonable Expectation of Privacy in the Intrusion into Seclusion Tort" (2016) 22 Canterbury Law Review and *Hosking v Runting* [2004] NZCA 34, [2003] 3 NZLR 385.
[57] *Hosking v Runting,* above n 56, at [91].
[58] *Hosking v Runting,* above n 56, at [77]-[86].
[59] James Goudkamp and John Murphy "Divergent Evolution in the Law of Torts: Jurisdictional Isolation, Jurisprudential Divergence and Explanatory Theories" in Andrew Robertson and Michael Tilbury (eds) *The Common Law of Obligations: Divergence and Unity* (Hart Publishing, Oxford, 2016) at 295

example, Fonterra's biogenic methane emissions remain outside the regime.[60] Relatedly, the RMA has veered strongly away from dealing with GHG emissions despite their major impact on the environment. Whilst there are on-going proposals for reform, and recent changes to the RMA, it is not yet clear that these will result in significant improvement to our adaptive response.[61]

C General Direction of the Law

Furthermore, if we look at the legislative context for a climate change tort, we can see an overall 'greening' of the law both internationally and domestically.[62] In the early 20th century changes reflect concerns about nature conservation, while in the 1960s it was broader environmentalist concerns in the 1960s and most recently concerns about pollution and climate change.[63] This resulted in a proliferation of international and domestic law, which sought to respond to environmental, including climate change, concerns. In particular, we have seen developments in international and human rights law, the development of emissions trading schemes, increasing climate change litigation, and developments in New Zealand's commercial and indigenous sectors. Collectively, these changes demonstrate a shift towards recognising the issue of and responding to the impacts of climate change.

1 International Law

International environmental law has undergone significant development since 1972.[64] Between the 1972 United Nations Stockholm Conference on the Human Environment (UNCHE) and the United Nations Conference on Environment and Development (UNCED) in 1992, a range of bilateral and multilateral environmental agreements, including the Convention on International Trade in Endangered Species of Wild Fauna and Flora and the London Ocean Dumping Convention were established, alongside a proliferation of international environmental bodies.[65]This was a significant period for development of

[60]Leining, Kerr and Bruce-Brand, above n 12, at 248.
[61] Palmer, above n 18, at 128.
[62] Daniel Bodansky *The Art and Craft of International Environmental Law* (Harvard University Press, Cambridge, 2010) at 31.
[63] Bodansky, above n 62, at 28-31.
[64] JL Dunoff "From Green to Global: Towards the Transformation of International Environmental Law" (1995) 19(2) Harvard Environmental Law Review 241 at 243.
[65]Dunoff, above n 64, at 243.

international environmental law due to the emerging issues of biodiversity loss, depletion of the ozone layer and global warning.[66] The UNCED culminated in the Rio Declaration (a statement of 27 environmental principles) and Agenda 21 (a plan of action to implement the Declaration's principles, an Agreement on Tropical Timber, the signing of the Convention on Biological Diversity and most significantly, the United Nations Framework Convention on Climate Change (UNFCCC).[67] In the UNFCCC, states agreed to a goal of stabilising the atmospheric concentration of GHGs at "a level that would prevent dangerous anthropogenic interference with the climate system" and developed country signatories agreed to limiting their net anthropogenic GHG emissions.[68] The UNFCC laid the groundwork for the first round of emissions reductions targets. [69] This was followed up with the Kyoto Protocol and Paris Agreements, which as discussed above, have been ratified by New Zealand, alongside many other countries. The Kyoto Protocol included different obligations for developed and developing country parties, recognising the different vulnerabilities and abilities to respond to climate change.[70] Collectively, these developments demonstrate a significant shift towards GHG reductions and climate change mitigation.

Concurrently, there have been significant developments in environmental human rights law, with international recognition that environmental degradation is adversely affecting human rights and that environmental protection is a component of human rights.[71] Although neither the Universal Declaration on Human Rights (UDHR), nor the International Covenant on Civil and Political Rights (ICCPR) explicitly provides for a right to a quality environment, the UNCHE Stockholm Declaration did recognise a right to a quality environment.[72] More recently, an International Panel has recognised the need to

[66] Dunoff, above n 64, at 31.
[67] Dunoff, above n 64, at 24 and United Nations Conference on Environment and Development "Rio Declaration on Environment and Development" (1992) www.cbd.int/doc/ref/rio-declaration.shtml#:~:text=All%20States%20and%20all%20people,the%20people%20of%20the%20world.
[68] United Nations Framework Convention on Climate Change above n 11 Articles 2 and 4.2.
[69] Dunoff, above n 64, at 24.
[70] Kyoto Protocol, above n 11 Articles 2, 3 and 12,
[71] Dinah Shelton "Human Rights, Environmental Rights and the Right to Environment" (1991) 28(1) Stanford Journal of International Law 103 at 105.
[72] Susan Glazebrook "Human Rights and the Environment" (2009) 40 Victoria University of Wellington Law Review 293 at 294.

affirm the right to a "secure, healthy and ecologically sound environment".[73] As a result, many overseas jurisdictions have begun to recognise domestic rights to the environment, with over 75 percent of states recognising environmental rights or responsibilities.[74]

Finally, there is a developing body of climate change litigation.[75] There have been several waves of environmental and now climate litigation. First, there were claims against private actors for localised environmental degradation and pollution, such as *Renken v Harvey Aluminum Inc*.[76] These are often tortious claims, including nuisance and negligence. Then there have been public or constitutional claims against governments for their climate change response, such as *Urgenda Foundation v The Netherlands* and *Juliana v United States*.[77] Finally, there has been a wave of private litigation against corporates for the impact of their GHG emissions, such as *Native Village of Kivalina v ExxonMobil* and *Saul Luciano Lliuya v RWE*.[78] Similar to *Smith,* the claimants sued major emitters for the effect of their GHG emissions on climate change leading to harm.[79] Thus, there is increasing worldwide demand for judicial action in response to climate change.

2 New Zealand law

Domestically, there is a similar greening of the law. New Zealand has committed to the international environmental agreements on climate change ratifying UNFCCC, Kyoto Protocol and Paris Agreement and development the ETS to meet the obligations they

[73] Glazebrook above n 72 at 299 citing Office of the High Commissioner for Human Rights *Meeting of Experts on Human Rights and the Environment* (2002) www.unhchr.ch para 3.
[74] David R Boyd *The Status of Constitutional Protection for the Environment in Other Nations* Paper Four (David Suzuki Foundation, Vancouver, 2011) davidsuzuki.org/wp-content/uploads/2013/11/status-constitutional-protection-environment-other-nations-SUMMARY.pdf.
[75] Joana Setzer and Rebecca Byrnes *Global trends in Climate Change Litigation* (Grantham Research Institute on Climate Change Policy, London, 2019). www.lse.ac.uk/granthaminstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf who note at 2 that there have been climate change cases in 31 jurisdictions, as of 2019.
[76] *Renken v Harvey Aluminum Inc* 226 F Supp 169 (D Or 1963). Here a factory was emitting toxic fumes where were harming the adjacent orchards cited in Douglas A Kysar "The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism" (2018) 9 European Journal of Risk Regulation 4 at 63.
[77] *Urgenda Foundation v The Netherlands* [2015] HAZA C/09/00456689 (June 24, 2015); aff'd (Oct. 9, 2018) (District Court of the Hague, and The Hague Court of Appeal (on appeal)) and *Juliana v. United States*, 339 F. Supp. 3d 1062 (D. Or. 2018). Here individual groups have sued their governments for the insufficiency of their climate change response.
[78] Setzer and Byrnes above n 75 at 8, *Native Village of Kivalina v ExxonMobil* above n 48 and *Saul Luciano Lliuya v RWE* 20171130 Case No-2-O-28515.
[79] Setzer and Byrnes above n 75 at 8. In *Native Village of Kivalina v ExxonMobil* above n 48 the residents of Kivalina sued Exxon in nuisance for their emissions leading to sea level rise and thus, forcing the inhabitants to move inland. Similarly in *Saul Luciano Lliuya v RWE* above n 78 RWE was held liable for the damages from flooding and landslides, as a result of their proportionate amount of emissions.

impose. Alongside this, there have been on-going change to the RMA, which aim to improve environmental outcomes.

In terms of litigation, New Zealand has had 17 climate change cases as of May 2019.[80] Notable cases include *Thompson v Minister for Climate Change Issues*, where Thompson sought judicial review of the Minister's decisions in setting our domestic GHG emissions reductions targets, on the basis that they were insufficient compared to our international obligations.[81] The High Court held that climate change policy was potentially reviewable, in light of the significance of the issue and that the Court had a role to play in "ensur[ing] that appropriate action is taken while leaving the policy choices about the content of that action to the appropriate statutory body".[82] However, progressing the claim was deemed unnecessary due to a change of Government and climate change policy. Significantly for *Smith,* the High Court held that cases such as *Urgenda* "illustrat[e] that it may be appropriate for domestic courts to play a role in Government decision-making about climate change policy".[83] Thus, previous climate litigation indicates that the Court may have a role to play in shaping New Zealand's climate change response, due to the significance of climate change as an issue.

In New Zealand, reflecting the international shift towards recognising environmental human rights, a right to a quality environmental has repeatedly been proposed. In 2013, the Constitutional Advisory Panel recommended the inclusion of a right to the environment in NZBORA.[84] Currently, the right to life is interpreted to include a right to the environment, but this is limited to the existence of the environment, rather than the quality.[85] Palmer and Butler reiterated the Panel's call, proposing the introduction of a "right to an environment that is not harmful to health or wellbeing".[86] Further, the

[80] Setzer and Byrnes, above n 75, at 3.
[81] *Thompson,* above n 49.
[82] *Thompson*, above n 49, at [133].
[83] *Thompson,* above n 49, at [133].
[84] Constitutional Advisory Panel *New Zealand's Constitution: Report on a Conversation* (Ministry of Justice, Wellington, 2013) www.justice.govt.nz/assets/Documents/Publications/Constitutional-Advisory-Panel-Full-Report-2013.pdf at 48 and 50.
[85] New Zealand Bill of Rights Act 1990, s 8.
[86] Geoffrey Palmer and Andrew Butler. *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016) at 164.

Lawyers for Climate Action have proposed a right to a sustainable environment.[87] Thus, there is consistent demand for environmental rights, in response to climate change, which supports the need for climate action.

Increasingly, commercial sectors are also focussed on climate change. Recently, the Aotearoa Circle published their Sustainable Finance Forum Interim Report (the Report) and Legal Opinion (the Opinion) discussing the necessity of shifting to sustainable economy and the risks climate change poses to companies.[88] The Opinion highlighted the increasingly apparent risk climate change poses to companies physically and in the transition to a low-carbon economy.[89] Examples of risks included the Ministry for the Environment's proposal to introduce mandatory climate-related financial disclosure for publicly listed companies, large insurers and banks.[90] There is also increasing pressure from investors with a rise in green investment.[91] For example, there has been a rise in sustainable initiatives including the UN's Principles for Responsible Investment, Sustainable Insurance and Responsible Banking aimed at shifting away from carbon-intensive investments.[92] This puts increasing pressure on directors to carry out their duties in a climate conscious way.[93] As such, the Business Roundtable recommends that corporates shift from shareholder primacy to considering their boarder social purpose and the Financial Market Authority recommends that companies make decisions, which comply with "current accepted social, environmental and ethical norms".[94] Finally, the Opinion notes the potential for climate change litigation against corporates, siting a number of international cases, alongside *Smith* itself.[95] Collectively, this represents a commercial recognition of climate change and the need for companies to respond to

[87] Lawyers for Climate Action "NZBORA and the Right to a Sustainable Environment" (2019) www.lawyersforclimateaction.nz/nzbora.
[88] Aotearoa Circle *Sustainable Finance Forum Interim Report (*Aotearoa Circle, 2019) www.theaotearoacircle.nz/sustainablefinance at 5.
[89] Aotearoa Circle *Sustainable Finance Forum Legal Opinion (*Aotearoa Circle, 2019) www.theaotearoacircle.nz/sustainablefinance at [28].
[90] Ministry for the Environment, "Climate-related Financial Disclosures: Our Proposal, Your Views". www.mfe.govt.nz/consultations/climate-related-financial-disclosures
[91] Aotearoa Circle *Sustainable Finance Forum Legal Opinion,* above n 89, at [28].
[92] Aotearoa Circle *Sustainable Finance Forum Interim Report,* above n 88, at 34.
[93] Aotearoa Circle *Sustainable Finance Forum Legal Opinion,* above n 89, at [55].
[94] Financial Market Authority *Corporate Governance in New Zealand: Principles and Guidelines* (Financial Market Authority, 2018) at 25 and Business Roundtable "Statement on the Purpose of a Corporation" (2019) opportunity.businessroundtable.org/ourcommitment/ cited in Aotearoa Circle *Sustainable Finance Forum Interim Report,* above n 88, at 34.
[95] Aotearoa Circle. *Sustainable Finance Forum Legal Opinion,* above n 89, at [44]-[52].

climate change as a physical and financial risk factor.[96] The recognition of the risk of climate litigation is particularly important because this goes to the heart of the novel tort, which emphasises the need for corporates to act.

The New Zealand government's climate change response is closely tied to its obligations to Māori under Te Tiriti o Waitangi. [97] Climate change is more harmful to Māori because they are tangata whenua (people of the land) and kaitiaki (guardians) of the land.[98] Te Ao Māori is founded on whanaungatanga (relatedness), mauri (health) and utu (balance).[99] Changes to the climate upsets the balance between these concepts, undermining the Māori role as kaitiaki of the whenua.[100] This harm has long been recognised by the Waitangi Tribunal and is an important factor in environmental decision-making.[101] Parliament has attempted to give effect to the Crown's obligations, through consultative decision-making under the RMA, co-management structures for natural resources and the granting of legal personhood over areas of cultural significance, including Te Urewera and the Whanganui River.[102] Although these measures have been critiqued as insufficient to recognise true kaitiakitanga, which was guaranteed to Māori under Te Tiriti, they do demonstrate a shift towards recognising Māori as kaitiaki of the land and resources, and towards protecting them.[103] Further, the legal personhood regimes show a recognition of the need to protect the inherent value of our natural resources.[104] Collectively, New Zealand's response to and treatment of Māori and their land demonstrates a shift towards greater protection and recognition of the environment.

Thus, nationally and internationally, we have seen a shift in the way the environment and climate change are viewed and responded to by the legislature and judiciary. It is clear

[96] Aotearoa Circle. *Sustainable Finance Forum Legal Opinion,* above n 89, at [26].
[97] Grinlinton, above n 55, at 47.
[98] Andrea Tunks "Tanagata Whenua Ethics and Climate Change" (1997) 1 New Zealand Journal of Environmental Law 83 at 83.
[99] Tunks, above n 98, at 82.
[100] Tunks, above n 98, at 84.
[101] For example, in the Kaituna River Claim, the Tribunal found the River Pipeline Scheme to be contrary to the Treaty due to the pollution it would cause to the water and fisheries. Waitangi Tribunal "Report of the Waitangi Tribunal on the Kaituna River Claim" (Wai 4, 1989).
[102] Samuel Weavers "Recognising Rangatiratanga through Co-Management: The Waikato River Settlement" (2013) 4 New Zealand Law Review 689 at 706.
[103] Weavers, above n 102, at 699.
[104]Andrew Geddis and Jacinta Ruru "Places as Persons: Creating a New Framework for Māori-Crown Relations" in Jason Varuhas (ed) *The Frontiers of Public Law* (Hart Publishing, Oxford 2019) at 40.

that there is a strong drive for climate change action, with the development of a range of international environmental law commitments, shifts in the commercial sectors and national and international climate change litigation, alongside the Crown's Treaty obligations to Māori. Further, there appears to be a role for the Courts to play in this action, with *Thompson* in particular, indicating that there is developing acceptance from the New Zealand judiciary that it may be appropriate for the Courts to step in.[105] This demand, coupled with the pitfalls of the current regime in dealing with GHG emissions suggests that, as in *Hosking*, there may be sufficient justification for a judicial response to the challenge of GHG emissions leading to climate change. The next question is, given this justification, why should we use tort – what benefits might using tort bring to our climate change response?

[105] *Thompson,* above n 49, at [133].

III Benefits and Possibilities of Tort and Climate Change

Thus, it has been established that there is an opportunity to develop a tort which would respond to harm from GHG emissions leading to climate change, and adopting the approach in *Hosking* there may be sufficient justification for such a tort. Tort has often been cited as a potential avenue for climate change litigation.[106] Equally many scholars have found it to be a "clumsy and imperfect measure" for the task.[107] In order to understand why a climate change tort may or may not be effective, this chapter will first consider what tort law is, the traditional purpose of tort and the purpose of a climate change tort. It will then discuss some of the potential challenges and benefits of applying tort to climate change.

A What is Tort Law?

As outlined above, tort is a common law jurisdiction concerned with the "correlative rights and obligations" "between the doers and sufferers of harm".[108] Tort law is about what happens when one individual causes loss to another individual and determining who should bear the burden of the loss.[109] Although, the typical tortious scenario is A wrongfully harms B and is responsible for that harm, there is a range of tortious claims, with the common thread of a relationship of rights, obligations and harms.[110] However, there is a lot of overlap between tort and criminal and regulatory regimes. Therefore, at times theorists have struggled to identify why tort has a continuing role in our law as many of its functions have been superseded by other areas of law.[111] Kysar argues that there is something unique and special about the role of tort, given its on-going existence and the individual remedy it provides.[112]

B Purpose of Tort

Tort has been conceptualised in a number of ways, including economic, compensatory and regulatory theories. However, Murphy argues that there is no cohesive theory of tort

[106] Kysar, above n 76, at 51.
[107] Kysar, above n 76, at 48.
[108] Peter Cane "Distributive Justice and Tort Law" (2001) 4 New Zealand Law Review 401 at 403.
[109] Todd, above n 53, at 59.1.1.01 and 59.1.4.
[110] Kysar, above n 76, at 52 and 56 and Todd, above n 53, at 59.1.4.
[111] Kysar, above n 76, at 56.
[112] At 56.

but that it evolves in response to societal need.[113] The conceptualisation of tort is significant because it influences the scope for it to develop. Whether the courts will be willing to accept a novel climate change tort will likely depend on how well it fits within the current concepts of tort and how beneficial such a tort would be.

Tort's origins are as a private law mechanism for redressing wrongs.[114] Traditionally, it has been viewed through a utilitarian, and more recently, economic lens as a mechanism for spreading the loss.[115] It is argued that making tortfeasors liable for their actions generates more utility than requiring victims to bear the full burden of the loss.[116] Therefore, this theory is one of economic efficiency and wealth maximisation.[117] Tort is argued to achieve this by first deterring substandard behaviour by imposing liability and discouraging perpetrators from repeating the relevant behaviour and others from engaging in it.[118] Second, it is argued that tort creates market deterrence, increasing the cost of risky activities and encouraging individuals to do them more safely or not at all.[119] Thus, it is argued that tort redistributes the loss and reduce the costs of accidents, generating maximum benefit.[120] As such, others argue tort is a method of risk regulation, distributing risk across groups and maximising wealth in the process.[121]

Economic theories of tort have been meet with criticism, in terms of how effective tort is in achieving these outcomes.[122] Kysar argues that although tort has positive regulatory effects, it is not merely a regulatory mechanism, because the regulatory theory fails to explain the focus on the specific relationship of harm between the two parties.[123] Therefore, Weinrib and separately Coleman, propose an alternative non-functionalist

[113] John Murphy "Contemporary Tort Theory and Tort Law's Evolution" (2019) 32(2) Canadian Journal of Law and Jurisprudence 413 at 413
[114] Kysar, above n 76, at 49.
[115] Richard A Posner "The Concept of Corrective Justice in Recent Theories of Tort" (1981) 10(1) The Journal of Legal Studies 187 at 187.
[116] Posner, above n 115, at 187.
[117] Goudkamp and Murphy, above n 59, at 279.
[118] AM Linden *Canadian Tort Law* (5th ed. Butterworths, Toronto, 1993) cited in Bill Atkin and Geoff McLay *Torts in New Zealand: Cases and Materials* (5th ed. Oxford University Press, Melbourne, 2012) at 5 and 9.
[119] Linden, above n 118, at 5 and 9.
[120] Posner, above n 115, at 187.
[121] Kysar, above n 76, at 49.
[122] Linden, above n 118, at 4.
[123] Kysar, above n 76, at 49.

corrective justice theory instead.[124] Coleman argues that tort law is best explained by corrective justice because "at its core tort law seeks to repair wrongful losses".[125] Coleman further argues that this corrective aspect is more about the victim's loss, than it is about the injurer's wrong.[126] As such this is a compensatory theory.[127] However, there is a debate about whether tort is solely compensatory.[128] Theorists within non-functionalism question whether tort is more about corrective or distributive justice. Distributive justice is generally conceived as distributing benefits, burdens, roles and resources across a group. Cane argues that although tort is about corrective justice it has distributive elements, because there are lots of different benefits and burdens.[129] Cane argues that it is not merely about shifting one burden caused by A, from B to A, but that there are wider elements of loss reallocation.[130] If this is the case, however, tort may not be very effective, given few people typically get full compensation for their loss.[131]

Collectively these theories suggest that although there have been attempts to conceptualise the foundations of tort, there is no common understanding of the role of tort.[132] Therefore, Murphy argues that there is no comprehensive theory of tort and that rather than getting steadily more cohesive, or developing in line with a particular theory, tort is developing unconstrained, in response to each dispute.[133]

Murphy highlights that torts have tended to respond to social crises and argues that novel solutions and torts have developed with the needs of the crisis, rather than in line with any particular theory.[134] As such, tort is driven by a moral underpinning, which changes over time.[135] This is significant because it broadens the scope for tort to develop, rather than being bound by conceptions of what tort can and cannot do. This can be seen in the

[124] Goudkamp and Murphy, above n 59, at 279.
[125] Hanoch Sheinman "Tort Law and Corrective Justice" (2003) 22(1) Law and and Philosophy 21 at 26
[126] Posner, above n 115, at 197.
[127] Linden, above n 118, at 3.
[128] Linden, above n 118, at 3.
[129] Cane, above n 108, at 404.
[130] Cane, above n 108, at 404.
[131] Linden, above n 118, at 4.
[132] Murphy, above n 113 at 413.
[133] Murphy, above n 113, at 416.
[134] Murphy, above n 113, at 425.
[135] Jack Hodder QC *Climate Change Litigation: Who's Afraid of Creative Judges"* (paper presented at the Climate Change and Adaption Session of the Local Government New Zealand Rural and Provincial Sector Meeting, Wellington 2019 at [3.4].

development of private nuisance, through *Rylands v Fletcher*, where Murphy argues the imposition of liability was a shift away from the increasingly fault-based direction tort had been taking, towards strict liability, due to the nature of and potential for harm.[136] Other examples are the causes of action developed in response to harm from Thalidomide and industrial workplace deaths, which both gave parties with no direct relationship to the tortfeasor (children born with disabilities and family members of those who died) the ability to claim for the harm to them, from a breach of duty to someone else (the mother and the dead person respectively).[137] In New Zealand, we have seen the development of the leaky building cases, which defied several conceptions of tort at the time, but were allowed to develop because they were deemed to be in the public interest.[138] Thus, it is arguable that tort is not strictly bound to develop in line with corrective justice, or any other doctrine, but is free to develop in response to societal need.

C Purpose of a Climate Change Tort

As Smith proposes it, the climate change tort would be a tool to initiate climate action. Smith brought the claim in the "public interest" and thus, sought declarations and injunctions to increase the rate at which the emitters respond to climate change, rather than damages.[139] This suggests a novel climate change tort would be more about deterrence than compensation. Further, Smith highlighted that those most vulnerable to climate change are those who have contributed least to GHG emissions.[140] This reflects the idea of climate justice, which recognises the inequality of the effects of climate change, alongside the urgency of climate action and encourages responses that recognise the most vulnerable populations to climate change are also those least responsible for it.[141] Therefore, the climate change tort proposed in *Smith* would not necessarily be about individual remedies but initiating wider change to mitigate harm from climate change

[136] Murphy, above n 113, at 426.
[137] Murphy, above n 113, at 427.
[138] *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 (*Spencer on Byron*) at [168]–[169].
[139] *Smith,* above n 4, at [2].
[140] *Smith v Fonterra Co-Operative Group Ltd* [2020] NZHC 419 Respondent's Submissions to the Court in Response to the Strike Out Application at [13].
[141] Melanie Burkett "Climate Justice and the Elusive Climate Tort" (2011-2012) 121 Yale Law Journal Forum 115 at 115.

Thus, it is likely a strategic claim, intended to "influence public and private climate accountability".[142] There have been similar lines of argument in relation to tobacco and asbestos. Significantly, these claims have resulted in changes in corporate behaviour and the development of regulatory frameworks to respond to the significant social issues.[143] As discussed in chapter two, there have been several strategic climate change cases overseas.[144] These include private law claims against major emitters who have contributed significantly to climate change and equally have the ability to greatly contribute to the shift away from GHG emissions.[145] Examples include *Connecticut v American Electric Power Company Inc* where several groups sued power companies for their emissions, seeking an injunction to abate them.[146] These claims are seen as an appropriate and effective source of climate action.[147] Although *Connecticut* and similar claims have failed, scholars argue that civil litigation against these companies is more effective than even government regulation or public litigation in achieving climate action because it puts pressure on private actors, who tend to do the majority of emitting and are best-placed to reduce them.[148] Therefore, the proposed climate change tort would likely be a strategic claim, intended to initiate climate action.

D Challenges and Benefits of Applying Tort to Climate Change

Tort is ultimately a private action, which has traditionally resulted in compensation to individuals for the harm to them.[149] Therefore it does not necessarily seem a natural fit for bringing claims, which although featuring private rights, are ultimately seeking to generate a public response. As such, the response to using tort for climate change has often been a negative one.[150] This section will discuss some of the common issues in applying tort to climate change and some of the potential benefits.

1 Challenges of tort

[142] Setzer and Byrnes, above n 75, at 2.
[143] Ganguly, Setzer and Heyvaart, above n 48, at 857.
[144] Ganguly, Setzer and Heyvaart, above n 48, at 843.
[145] Ganguly, Setzer and Heyvaart, above n 48, at 845.
[146] *American Electric Power Company v. Connecticut*, 564 U.S. 410 (2011) cited in James W Shelson "The Misuse of Public Nuisance Law to Address Climate Change" (2011) 78(2) Defense Counsel Journal 195 at 206.
[147] Ganguly, Setzer and Heyvaart, above n 48, at 845.
[148] Ganguly, Setzer and Heyvaart, above n 48, at 845.
[149] Kysar, above n 76, at 57.
[150] Kysar, above n 76, at 51.

There are several challenges to tort as a source of climate action, including how well a climate change tort would fit with the wider purpose of tort, the nature of climate change and the challenges this poses for tort and tort's effectiveness as a remedy to climate change.

(a) Fit with tort law

First it is argued that tort is a private law remedy, focussed on remedying specific wrongs and therefore, it is an imperfect tool to respond to social issues or reallocate resources.[151] Climate change claims are argued to be concerned with public rights, and thus, not something that should be dealt with by tort. Doing so may generate concerns that this is 'publicafying' tort.[152] If the purpose of a climate change tort is to initiate climate action, rather than merely protecting individual private rights, it raises questions about whether tort is the correct avenue for this and whether the claim is rightly a tortious one.

The correctness of locating strategic climate change claims in tort will depend on the purpose of tort. As discussed, there have been a range of conceptions of tort, including compensatory, regulatory and economic understandings. However Murphy argues that there is no cohesive theory of tort, but that it has developed to response to societal need.[153] If this is accepted, then there is no inherent requirement for tort to be strictly private; it is able to respond to public demands as required. This can be seen in public nuisance, which is deemed to be a tort despite it's more public focus.[154] Support for this understanding can be found in the New Zealand leaky building cases, where the courts developed negligence to respond to defective building materials. In doing so, the court departed from the Privy Council and consistently extended the reach of the claim such as from owners to subsequent owners and from physical damage to pure economic loss, in response to financial and health needs, and community expectations.[155] This suggests that where there is sufficient need, the theory of tort is not as important as the ability of

[151] Kysar, above n 76, at 51.
[152] Kysar, above n 76, at 57-59.
[153] Murphy, above n 113, at 425.
[154] Thomas W Merrill "Is Public Nuisance a Tort" (2011) 4(2) Journal of Tort Law 5 at 11. This article raises interesting questions about whether public nuisance is in fact a tort. Although this is beyond the scope of this dissertation, it would be an interesting area for future research.
[155] Rosemary Tobin "Local Authority Liability in Tort to Owners of Defective Buildings: The New Zealand Position" (2013) 42 Common Law World Review 151 at 169 and Todd, above n 53, at 59.6.4.02.

the courts to respond as required. Further, as will be argued subsequently, climate change may actually fit quite well with tort and there are several potential benefits to tortious climate change claims.

In terms of 'publicafying' tort, this may not be inherently problematic and many scholars there is no distinction or only an immaterial distinction between public and private law.[156] For the purpose of a climate change tort, there is already crossover between the public and private attributes of tort. Although it is argued that tort is concerned only with individual claims and private rights, torts like public nuisance are concerned with public rights and collective claims. In terms of remedies, it has traditionally been held that declarations are public law remedies and a injunctions and damages belong to private law.[157] However, declarations and injunctions in particular have become a significant part of tort and damages are now available for breaches of NZBORA, a distinctly public law issue.[158] Further, although judicial review is about public decision-makers, *Hopper v North Shore Aero Club* held that Courts may intervene in decisions by private bodies, where they are performing a "quasi-public function" or where there are natural justice concerns.[159] Thus the line between public and private is not always clear.

(b) Nature of climate change

The second issue for a climate change tort is that the harm caused by climate change is not the typical tortious harm. Kysar states "the conceptual heart of Anglo-American tort law remains very much fixed on the paradigmatic tort of A wrongfully injuring B", in which the parties, causes and harm typically are or are thought to be clearly identifiable.[160] However, climate change is not like this; there are many contributors and the impacts are diffuse and dispersed.[161] The nature of climate change poses two challenges for tort; tort's suitability in assessing these claims and the effectiveness of the remedy.

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[156] Merrill above n 154 at 8. This is a significant debate, which is beyond the scope of this dissertation. However, see Carol Harlow "Public 'and 'Private 'Law: Definition Without Distinction" (1980) 43 The Modern Law Review 241 on the validity and utility of such a distinction.
[157] Peter Cane "Damages in Public Law" (1999) 9(3) Otago Law Review 489 at 489.
[158] *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 886 at 678 cited in Cane (1999), above n 157, at 492
[159] *Hopper v North Shore Aero Club* [2007] NZAR 354 at [12].
[160] Kysar, above n 76, at 52.
[161] Kysar, above n 9, at 4.

It is argued that tort is not well-suited to respond to climate change claims because of the various causes and effects of climate change and the cumulative nature of the way the harm occurs.[162] Torts are generally focussed within a particular geographic or jurisdictional area but the causes and effects of climate change often cross jurisdictional boundaries.[163] As will be discussed further in chapter four and five, this creates issues around the key tortious concepts of causation or proximity because the cause and effects of GHGs are often difficult to attribute and there is a lack of physical proximity.[164] Therefore, it may be difficult to determine who should be liable and what for. The wide reaching nature of climate change also leads to concerns about indeterminate liability, as seen in *Smith*.[165] Particularly, there are concerns that defendants may be forced to bear an undue burden of liability. For example, tortious liability is joint and several but cross-jurisdictional defendants may result in one defendant bearing all the liability if they are unable to bring in an overseas co-defendant.[166] Thus, the diffuse and cross-jurisdictional nature of climate change may make determining causation and liability difficult.

(c) Inconsistent or ineffective judgements

Further, there are concerns that the challenges of applying tort to climate change may lead to incomplete or inconsistent judgements and ineffective outcomes. Kysar suggests current torts are not well-suited to give relief for wide-reading social harms, nor to make policy choices around climate change.[167] Thus, applying tort to climate change may go beyond the judiciary's role or result in undesirable outcomes. As such, the United States Supreme Court has been reluctant to impose tortious liability, in particular, because it may result in "piecemeal relief" and fail to respond to the underlying regulatory failure.[168] Therefore, developments in tort to mitigate these challenges may be required before the court is willing to apply it to climate change. Further, tortious liability is retrospective and ad-hoc. Therefore, it may be ineffective in achieving environmental outcomes.[169] This

[162] Kysar, above n 76, at 53 and Kysar, above n 9, at 4.
[163] Kysar, above n 76, at 51.
[164] Ganguly, Setzer and Heyvaart, above n 48, at 849.
[165] *Smith,* above n 4, at [98].
[166] Law Commission *Liability of Multiple Defendants* (NZLC, R132, 2014). This was a concern raised in *Smith,* above n 4, at [98].
[167] Kysar, above n 76, at 52.
[168] Shelson, above n 146, at 219.
[169] Elizabeth Fisher, Bettina Lange and Eloise Scotford *Environmental Law: Text, Cases and Materials* (2nd Ed. Oxford University Press, Oxford, 2019) at 87.

is a valid concern; climate change requires collective and comprehensive action and thus, legislative action is favoured.[170] However, the purpose of the novel climate change tort would be climate action and as discussed, tort has the capacity to initiate this, even where claims themselves are unsuccessful.[171] Therefore, for a novel tort the quality of the relief is not as important as the ability to bring the claim at all.

2 Benefits of tort

Despite the often negative response to tortious climate change claims, there are potential benefits to such claims, including risk spreading, the development of a parallel regulatory track, benefit to Māori and the wider benefits of litigation.

(a) Traditional benefits

Tort has long been held as a way to reallocate risks and spread the burden of harms, as outlined above.[172] Although there is no cohesive theory of tort, many scholars have found that torts tend to do certain things, including reducing the costs of accidents and corrective justice.[173] This reflects the compensatory and deterrence theories discussed above. Grossman argues that two of the main issues in climate change are the harm from human action and reallocation of costs.[174] Therefore, if the climate change tort is concerned with shifting the burden of climate change, particularly from vulnerable members, to those who are appropriately placed to reduce the emission of GHGs, tort may be actually be well-suited to achieving this.[175] Grossman further suggests that tort may force companies to internalise the negative externalities of their GHG emissions.[176] This would be beneficial from a climate change perspective because it would discourage bad climate behaviours and encourage good ones; in line with deterrence theory. Although tort is not always successful in doing these things, where it is successful, there would be benefit from climate change litigation.[177] Therefore, not only does a climate change tort

[170] Fisher, Lange and Scotford, above n 169, at 87.
[171] Ganguly, Setzer and Heyvaart, above n 48, at 858.
[172] Kysar, above n 76, at 50.
[173] David A Grossman "Warming up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation" 2003 28(1) Columbia Journal of Environmental Law 1 at 4.
[174] Grossman, above n 173, at 4.
[175] Eduardo M Peñalver "Acts of God or Toxic Torts? Applying Tort Principles to the Problem of Climate Change" (1998) 38(3) Cornell Law Faculty Publications 565 at 565.
[176] Grossman, above n 173, at 4.
[177] Linden, above n 118, at 5 and 9.

potentially align well with the concerns of climate change, but tortious liability may actually be a very good route for climate change action.

(b) Parallel regulatory track

Similar to the tobacco and asbestos strategic litigation, strategic climate change litigation has the potential to instigate significant wider legislative and regulatory change. The tobacco and asbestos litigation lead to a range of legislative changes, including regulatory frameworks, and compensation funds for those harmed, and changes in corporate behaviour.[178] Notably, even when these claims did not succeed, often due to the challenges of connecting the action with the particular harm, the litigation was "instrumental" in addressing the wider issue and providing redress to the victims.[179] Further, as Kysar argues, the courts are obligated to hear a claim, if it is brought before them, unlike the legislature or the executive.[180] Therefore, allowing private claims may result in a quicker response, because the Courts will be required to consider the issue and may motivate Parliament to act sooner.[181] Therefore, a climate change tort would provide a sort of parallel track for instigating climate action, which may result in a more rapid response.[182]

(c) Benefit to Māori

Although *Smith* did not recognise this, as discussed in chapter two, Māori will be more affected by climate change than other New Zealanders.[183] Therefore, in New Zealand, there could be an additional benefit to the climate change tort; providing Māori with an alternative pathway to exercise katiakiatanga over the whenua. Under the second article of Te Tiriti o Waitangi, the New Zealand Government has an obligation to actively protect Māori kaitiakitanga and grant Māori rangatiratanga (chieftainship) over their traditional resources, as Tangata Whenua.[184] In relation to the environment, this has been done to

[178] Ganguly, Setzer and Heyvaart, above n 48, at 858.
[179] Ganguly, Setzer and Heyvaart, above n 48, at 858.
[180] Kysar, above n 76, at 54.
[181] Kysar, above n 76, at 54.
[182] Burkett, above n 141, at 115.
[183] Tunks, above n 98, at 84.
[184] See Sir Hugh Kawharu's translation of the Māori text of the Treaty in IH Kawharu (ed) *Waitangi Māori and Pakeha Perpsectives of the Treaty of Waitangi* (1989, Oxford UP, Melbourne) at 319. The Treaty principle of active protection has been well-recognised since *New Zealand Maori Council v Attorney-General* [1987] NZLR 644 (CA) ("the Lands case").

varying degrees, through co-management or consultative decision-making pathways.[185] However, this often results in Māori being consulted or invited to participate in Government processes.[186] Many scholars argue that this is insufficient to recognise Māori rights of kaitiakitanga because it is not true co-governance as it does not allow Māori to be decision-makers and is contingent on Parliamentary supremacy. The Waitangi Tribunal Ko Aotearoa Tēnei report identified that much of our law fails to achieve partnership and instead further marginalises Māori.[187] Therefore, the Waitangi Tribunal recommends the development of new partnership bodies to protect Māori taonga, including the environment.[188] Establishing a parallel track for climate action, though still ultimately through the western entity of the judiciary, may provide Māori with another avenue to exercise their kaitiakitanga over the land. Whilst this is hardly a perfect solution, in that it is not a grant of rangatiratanga, as an interim step it may provide some redress.

(d) Wider benefits of litigation

Kysar argues that litigation itself could also be beneficial because the discovery process could reveal other issues or environmental impacts, which may not have been adequately reported.[189] Further, forcing corporates to reveal their exact emissions may enable us to link those emissions to environmental changes, and requiring corporates to submit records of their emissions, requires them to engage in record-keeping in the first place, which is often a hurdle to enforcing climate reduction targets.[190] In *Smith* each of the defendants submitted comprehensive records of their emissions, to demonstrate that they were compliant. Thus, litigation may have two benefits; providing additional motivation for corporates to comply with their existing obligations, and to force companies against which claims are made to account for their emissions.

Thus, there are several concerns about using tort law to respond to climate change, particularly in terms of the nature and purpose of tort law and the implications of

[185] Weavers, above n 102, at 696.
[186] Waitangi Tribunal *Ko Aotearoa Tēnei: Report on the Wai 262 Claim Release*d (2 July 2011) waitangitribunal.govt.nz/news/ko-aotearoa-tenei-report-on-the-wai-262-claim-released/.
[187] Waitangi Tribunal *Ko Aotearoa Tēnei: Report on the Wai 262 Claim Release*d, above n 186.
[188] Waitangi Tribunal *Ko Aotearoa Tēnei: Report on the Wai 262 Claim Release*d, above n 186.
[189] Kysar, above n 76, at 54.
[190] Ganguly, Setzer and Heyvaart, above n 48, at 854.

applying it to climate change. However, these concerns may not be as significant as first thought, especially as there does not seem to be a cohesive theory of tort and in light of the significant effects of climate change. Further, there may be benefits to imposing tortious liability, through risk allocation and loss spreading, a parallel regulatory track, avenues for Māori to exercise kaitiakitanga and rangatiratanga, and incentivising compliance with GHG reduction obligations and record-keeping.

IV Negligence, Public Nuisance and the Challenges of Climate Change

Previously we have discussed whether there is a need for and the potential benefit of a novel climate change tort. This section will consider the existing torts of negligence and public nuisance, which were used in *Smith* and other similar cases to bring climate change claims and identify some of the major hurdles in applying these torts to climate change. This section will not address all the challenges raised in *Smith* but will focus on those that are particularly relevant to climate change claims.[191]

Public nuisance is often regarded as the main environmental tort.[192] It was initially developed in the 1100s as a criminal cause of action for infringements to the rights of the Crown.[193] Over time it has developed into a tortious action, allowing individuals to recover damages for harm to "rights common to the public such as roadway safety, air and water pollution, disorderly conduct and public health".[194] Today, the purpose of public nuisance has been described as responding to "injury to the property of mankind".[195] Therefore, public nuisance is primarily about protecting public rights.[196]

Smith defines public nuisance as "any nuisance [that] is public which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects".[197] *Smith* held that

> a person commits a public nuisance who: (a) does an act not warranted by law, or (b) omits to discharge a legal duty, 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.[198]

[191] This section will not consider all the challenges faced. These are the challenges that are present in both claims and which are useful to consider in developing a novel tort. However, future research may wish to consider the other factors, including for example, the role of illegality in public nuisance.
[192] Fisher, Lange and Scotford, above n 169, at 77.
[193] Shelson, above n 146, at 196.
[194] Shelson, above n 146, at 196.
[195] Grinlinton, above n 55, at 77.
[196] Merrill, above n 154 at 8.
[197] *Smith,* above n 4, at [56] citing *Attorney General v PYA Quarries Ltd* [1957] 2 QB 169 (CA) at 184 per Romer LJ.
[198] *Smith,* above n 4, at [56] citing *R v Rimmington* [2005] UKHL 63, [2006] 1 AC 459 at [5]-[7].

Satisfaction of this criterion enables the Attorney General to bring a claim on behalf of those affected.[199] Alternatively an individual can bring a claim if they can show "particular, direct and substantial harm" above that suffered by the general public.[200] This is known as the special damage rule and requires that they suffer "special damage, peculiar to himself from the interference with the public right".[201]

Negligence was officially developed in 1932 in *Donoghue v Stevenson* but reflects longstanding attempts to protect people from dangerous or careless behaviour.[202] The basic premise is "you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour".[203] A neighbour is someone who is "so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected".[204] The key idea behind negligence is that in some instances a duty of care will be owed by one person to another. Therefore, negligence requires; a duty of care; a breach of that duty; damage to the plaintiff was caused by the breach; and that the damage was a sufficiently proximate consequence of the breach.[205] The major challenge in negligence is determining when a duty should apply.

There is on-going debate about what is required to establish a duty of care. *Anns v Merton London Borough Council* held that a duty would prima facie be established if there was a sufficiently proximate relationships between the wrongdoer and the person suffering the damage so that the harm was reasonably foreseeable to the wrongdoer.[206] If so, a duty would exist unless there were policy considerations negating the duty.[207] Although this analysis was rejected in Australia, the New Zealand Courts have continued to apply the *Anns* formulation.[208] In *Smith* Wylie J adopted the most recent iteration of this, as

[199] *R v Rimmington,* above n 198, at [7].
[200] *R v Rimmington,* above n 198, at [7].
[201] *Boyce v Paddington Borough Council* [1903] 1 Ch. 109.
[202] Todd, above n 53, at 59.5.2.01.
[203] *Donoghue v Stevenson* [1932] AC 562 (HL) at 580 cited in Todd, above n 53, at 59.5.2.01.
[204] *Donoghue v Stevenson*, above n 203, at 580 cited in Todd, above n 53, at 59.5.2.01.
[205] Todd, above n 53, at 59.5.1.
[206] *Anns v Merton London Borough Council* [1978] AC 728 (HL) at 751–752.
[207] *Anns* above n 207 at 751–752 cited in Todd, above n 53, at 59.5.2.02.
[208] See *Caparo Industries plc v Dickman*, [1990] 2 AC 605 (HL), and Todd, above n 53, at 59.5.2.02.

articulated in *North Shore City Council v Attorney-General* and affirmed in *Carter Holt Harvey v Minister of Education*.[209] Thus,

> 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 negate finding a duty.[210]

In *Smith* it was argued that by emitting GHGs leading to climate change, the defendants had materially interfered with Smith's public rights and breached their duty of care, resulting in a range of harms, including economic loss, cultural loss, loss of fisheries and landing sites, burial caves and cemeteries, loss of cultural fisheries and harm from the adverse health impact from climate change.[211] Although the claims in negligence and public nuisance are different, there are common features in Wylie J's analysis, which may hinder potential climate change claims. This section will consider these elements in turn, in order to understand the challenges of applying the current torts to climate change.

A Foreseeability and Proximity

The first issue is the requirement for foreseeability and proximity. These concepts form a key part of the duty of care assessment in negligence and *Ball v Consolidated Rutile Ltd* suggests they apply when determining which damage is recoverable in public nuisance, as well as negligence.[212] There is also overlap between them and the need for particular, direct and substantial harm under the special damage rule in public nuisance.

In *Smith,* it was held that the harm was not foreseeable because it was not argued that the defendants' particular emissions led to the particular damage to Smith and because the

[209] *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 (*The Grange*) at [158]-[160] and *Carter Holt Harvey v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78 (2016) at [14].
[210] *Smith,* above n 4, at [76].
[211] *Smith,* above n 4, at [10].
[212] *Ball v Consolidated Rutile Ltd* [1991] 1 Qd R 524 (SC QLD) cited in Atkin and McLay, above n 118, at 218

emissions were insignificant in comparison to global emissions.[213] Thus, even if the emissions were stopped today, the damage would likely still occur.[214] Similarly, for the public nuisance claim, Wylie J held that Smith had not experienced special damage beyond what the general public suffered, including other "iwi, hapū, and other land owners and members of the public who live in or use the coastal/marine area".[215] Wylie J concluded that the damage pleaded was neither particular nor direct because it is a manifestation of the general effects of climate change and that any harm is not a direct effect of the defendants' activities but indirect and consequential.[216] Therefore, meeting the requirements of foreseeable and proximate harm and special damage may be difficult for climate change for several reasons, as follows.

1 Foreseeability

First, there is the issue of reasonable foreseeability between the pleaded harms and the actions. This is a screening mechanism for imposing liability and requires that the damage be a foreseeable consequence of the action.[217] In the negligence analysis, it was held that the harm was not foreseeable because there was no specific link drawn between the defendant's individual emissions and the pleaded harm.[218] For public nuisance it was held that the harm was an indirect and consequential result of the emissions, because they had emitted or supplied substances that emitted GHGs, which contributed to global warming, which in turn is causing the harm to Smith.[219] Therefore, climate change poses a challenge because we are unable to make links between specific emissions and harms; rather it is a chain of causation.[220] A similar challenge arose in the early tobacco and asbestos cases, although Ganguly and others argue that the climate change situation is more complicated.[221] However, Grossman argues that although there is a chain of causation, the harm has been foreseeable since at least the Intergovernmental Panel's 1990 Report.[222] Further, he argues these companies have control over their emissions

[213] *Smith,* above n 4, at [82].
[214] *Smith,* above n 4, at [82].
[215] *Smith,* above n 4, at [62].
[216] *Smith,* above n 4, at [62].
[217] The Grange, above n 209, at [157].
[218] *Smith,* above n 4, at [82].
[219] *Smith,* above n 4, at [63].
[220] Grossman, above n 173, at 22.
[221] Ganguly, Setzer and Heyvaart, above n 48, at 857.
[222] Grossman, above n 173, at 27.

and thus, their impact and there is no intervening factors to negate causation.[223] Therefore, he suggests liability may be able to be imposed, especially against groups of large global emitters.[224] Alternatively, Ganguly and others suggest that some progress is being made in 'attribution science', which may allow climate change claimants to establish a specific connection and therefore, more easily meet the foreseeability requirement.[225] Thus, although imposing liability without a specific link remains a challenge, Grossman and Ganguly both suggest that it may be possible, either on the basis of general emissions in specific circumstances, or with developments in 'attribution science'.

2 Substantiality

Second, climate change may struggle to prove substantiality.[226] Tort generally requires that the tortious conduct be a "substantial factor" in causing the harm, in order to attributive liability.[227] As such, in public nuisance the special damage rule requires that the harm be substantial. *Smith* held that the harms pleaded were no more substantial than those suffered by others.[228] This is despite the fact that Smith is a member of the local iwi and hapū , and that the harm pleaded was to customary rights, which are held by a limited group of people. Spencer states that it is not clear what the threshold is for special damage; the English Courts have not said whether only one person must have suffered the damage or whether multiple people can suffer a the same substantial harm.[229] However, the Canadian Courts have held that the harm suffered by only one person can qualify.[230]Therefore, although the threshold for 'substantial' is unclear, other jurisdictions' analysis suggest that the harm may have to be very significant and/or to a very limited group, in order to succeed in public nuisance. This is challenging in light of the nature of climate change as a diffuse and dispersed phenomena, experienced by everyone, to varying degrees.[231]

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[223] Grossman, above n 173, at 27.
[224] Grossman, above n 173, at 27.
[225] Ganguly, Setzer and Heyvaart, above n 48, at 857.
[226] Grossman, above n 173, at 25.
[227] Grossman, above n 173, at 25.
[228] *Smith,* above n 4, at [62].
[229] JR Spencer "Public Nuisance: A Critical Examination" (1989) 48(1) The Cambridge Law Journalist 75 citing *Hickey v. Electric Reduction Company of Canada Ltd*. (1970) 21 D.L.R. (2nd) 368.
[230] Spencer, above n 229, at 75 citing *Hickey v. Electric Reduction Company of Canada Ltd*, above n 229.
[231] Kysar, above n 9, at 4.

Similarly, in negligence reasonable foreseeability requires a "reasonable risk" of damage in order to fairly impose liability.[232] This applies regardless of whether the action did in fact contribute to or cause the harm.[233] Therefore, it is argued that regardless of the actual ability to attribute harm, the defendants' emissions are too comparatively small to have generated a foreseeable risk of harm. This poses a significant challenge for climate change claims because although we know that overall climate change causes these effects, the Courts may not be willing to make the specific link on the basis of general connectivity, especially where parties are at risk of significant liability.

That said, this is effectively a *de minimus* argument in that it reasons that even where there is harm, if that harm is small or only a small proportion of the total harm, it should not be pursued. The *de minimus* principle is a common response to climate change litigation; for example, in *Genesis Power Ltd v Franklin District Council ENC Auckland* it was argued that consent should be granted because the wind farm in question was relatively small, and thus, the impacts would be relatively small.[234] However, the Courts have tended to reject these arguments. In *Environmental Defence Society (Incorporated) v Taranaki Regional Council*, the Court held that the overall impact of the power station would be more than *de minimus* because of the cumulative nature of climate change.[235] Subsequently, the National Board of Inquiry stated that a collective approach was required to respond to climate change, least it become the next tragedy of the commons.[236] Thus, the Courts have previously declined *de minimus* arguments in relation to emissions. Although this reasoning related to RMA consenting decisions, it suggests that the Courts may not be as receptive to *de minimus* arguments in relation to climate change, and thus, this may not be as effective in challenging these claims.

[232] *Smith,* above n 4, at [80].
[233] Todd, above n 53, at 59.5.3.01.
[234] *Environmental Defence Society (Incorporated) v Taranaki Regional Council* A203/05, 21 December 2005 cited in Sarah Baillie "The Consideration and Regulation of Climate Change Effects under the Resource Management Act 1991" (LLB (Hons) Dissertation, University of Otago, 2012) at 34.
[235] *Environmental Defence Society v Taranaki Regional Council* ENC Auckland A184/02, 6 September 2002 cited in Baillie, above n 234, at 34.
[236] Board of Inquiry Proposed Taranaki Power Station Air Discharge Effects (Report and Recommendation of the Board of Inquiry Pursuant to Section 148 of the Resource Management Act 1991, 1995) cited in Baille, above n 234, at 34.

3 Proximity

Finally, proximity posed a challenge in both claims. Proximity is a key part of the duty of care inquiry in negligence but is notoriously difficult to establish in novel cases.[237] *Smith* states that proximity is "a means of identifying whether the defendant was someone most appropriately placed to take care in the avoidance of damage to the plaintiff." [238] Therefore it has been referred to as an artificial concept because it is more about the reasonableness of imposing liability than the actual relationship.[239] In *Smith,* there is no physical proximity, nor a proximate relationship.[240] Furthermore, Wylie J asserts that the companies are not the most appropriately placed to deal with these issues because they require collective action.[241] Therefore, Wylie J held there was no proximity. Similarly, in public nuisance, Wylie J held the harm was not a direct result of the emitters' actions, but merely consequential, noting that even if the emissions stopped today the harm could not be stopped. [242] Therefore, he argued that there is insufficient connection between the emitters and the harms.

The issue of proximity is a significant one for climate change; as identified it does not conform to the traditional relationship of harm and thus, causation is difficult to prove.[243] The lack of physical proximity should not be fatal; as we have seen in the leaky building cases, the Courts have been willing to establish proximity on the basis of the commercial relationship, and despite the contractual matrix between the parties, where it was deemed necessary. [244] This reflects the idea that tort is ultimately about the public interest and that proximity is just a screening mechanism to determine who should bear the loss. Thus, there may be scope for the Courts to impose liability in the public interest, given the significant impact climate change has on everyone.

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[237] The Grange, above n 209, at [158].
[238] *Smith,* above n 4, at [91].
[239] Todd, above n 53, at 59.5.2.05.
[240] *Smith,* above n 4, at [92].
[241] *Smith,* above n 4, at [92].
[242] *Smith,* above n 4, at [63].
[243] Kysar, above n 9, at 4.
[244] *Carter Holt Harvey Ltd v Minister of Education* [2015] NZCA 321, (2015) 14 TCLR 106 (2015) at [42]-[43] cited in Scott William Hugh Fletcher "Who Are We Trying to Protect? The Role of Vulnerability Analysis in New Zealand's Law of Negligence" (2016) 47 Victoria University of Wellington Law Review 19 at 22.

However, this raises concerns about indeterminate and disproportionate liability due to the nature of climate change.[245] *Smith* suggested that, were a claim allowed the defendants could be liable for the full harm from climate change, even though their contribution is proportionately small, and that they could be liable to everyone.[246] In *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* the Court declined the claim on the basis that it would result in an "inherently expansive and unacceptably indeterminate" duty.[247] Similarly, in *Sutradhar v Natural Environment Research Council*, the House of Lords held that the Council's failure to highlight, in their report, arsenic in the water was not a breach of a duty of care, because there was no proximity between the parties due to the vast category of potential claimants (the entire population of Bangladesh).[248] Therefore, the Courts have shown reluctance towards imposing potentially unlimited liability and may be similarly reluctant to expand proximity in climate change claims. Thus, the lack of direct relationship may pose a significant hurdle for climate change claims in both public nuisance and negligence.

B Causation

The next major issue is causation.[249] Torts generally require the plaintiff to show causation between the emitters' action and the harm suffered.[250] Causation is considered to be an essential element, especially for actions involving damages because it prevents parties from being liable for harm they did not cause.[251] It is typically assessed through a two-stage inquiry involved causation in fact and in law. The former is assessed through the 'but for' test.[252] The latter applies where the "test is satisfied but the conduct is not

[245] *Smith,* above n 4, at [94] and as noted in The Grange, above n 209, at [159].
[246] *Smith,* above n 4, at [95].
[247] *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 16.
[248] Todd, above n 53, at 59.5.5.02 citing *Sutradhar v Natural Environment Research Council* [2006] UKHL 33, [2006] 4 All ER 490.
[249] Kysar, above n 9, at 29.
[250] Todd, above n 53, at 59.20.2.
[251] David Hillel, W Paul McCague and Peter F. Yaniszewski "Proving Causation Where the But For Test Is Unworkable" (2005) 30 The Advocates' Quarterly 216 at 218.
[252] Geoff Mclay, David Neild and Bruce Pardy "Damage and Damages in Negligence" in Sir Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed. Thomson Reuters, New Zealand, 2011) at 51.2.4.3 and Hillel, McCague. and Yaniszewski, above n 251, at 218.

seen as the cause".[253] This second element was not addressed in *Smith* and will not form a significant part of this discussion.[254]

Smith held that 'but for' could not be applied to harm from GHG emissions because Smith could not argue that without each defendant's particular emissions, the damage would not have occurred.[255] This goes to the nature of climate change, as a dispersive and complicated phenomena, with many cumulative causes and wide-reaching effects.[256] However, the Courts have faced this issue before, in the tobacco and asbestos cases.[257] In *Fairchild v Glenhaven Funeral Services Ltd* 'but for' was deemed inapplicable because in cases of asbestos exposure leading to the development of mesothelioma, only one exposure was required and thus it was unclear which instance of exposure lead to the cancer.[258] Instead, it was held that causation could be inferred, provided "it was clear: (1) how a loss had occurred; (2) that the defendant's breach of duty had increased the risk of that loss; (3) that a breach of duty by one of a number of employers must have been responsible; and (4) that there was no means of showing which".[259] Thus, parties were deemed to be liable where they materially contributed to the risk of the harm.[260] *Smith* considered whether this could apply to climate change, but identified two key issues*;* first, whether *Fairchild* applies in New Zealand and second, the factual differences between *Smith* and *Fairchild.*

Fairchild has not been officially endorsed in New Zealand.[261] Although it's application has been discussed several times, the right case has not emerged and the Court of Appeal has

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[253] Todd, above n 53, at 59.20.3.
[254] Were the 'but for' test to be satisfied in a climate change claim, this may become an issue if the Court considers that there has been an intervening event or the chain of causation has been snapped. However, this is not something that Wylie J engaged with and therefore, will not form part of my discussion. Further, theorists such as Grossman have suggested intervening causation may not be a significant issue for climate change see, Grossman above n 173, at 25.
[255] *Smith,* above n 4, at [83].
[256] Kysar, above n 9, at 4.
[257] Hillel, McCague and Yaniszewski, above n 251, at 21 and Ganguly, Setzer and Heyvaart, above n 48, at 857.
[258] *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 (HL) at 309.
[259] *Fairchild,* above n 258, at 309.
[260] This was discussed in detail in *Accident Compensation Corporation v Ambros* [2008] 1 NZLR (CA) at [27]-[35]. A similar test was proposed in the United States, for example *Athey v. Leonati* (1996), 140 D.L.R. (4th) 235 at [32] cited in Hillel, McCague and Yaniszewski, above n 251, at 219.
[261] Todd, above n 53, at 59.20.2.03(4) and *Smith,* above n 4, at [87] citing *Accident Compensation Corporation v Ambros* above n 260 at [35].

noted some reservations about the test.[262] However, Todd suggests that it could apply in New Zealand.[263] The extent of *Fairchild* is also unclear. [264] *International Energy Group Ltd v Zurich Insurance plc UK Branch* indicates that it likely applies to circumstances other than mesothelioma, but Todd cautions that limits will necessarily be imposed. [265] Therefore, it is unclear if and to what extent *Fairchild* applies in New Zealand.

More significantly however for Wylie J, were the factual differences between *Smith* and *Fairchild*. The key factor in *Fairchild* was the lack of scientific knowledge, which prevented attribution of liability between the two potential causative agents, which had the same effect.[266] Accordingly, the test does not apply where there are two (or more) potential different causes.[267] Climate change is arguably very similar to *Fairchild* because there is one causative agent but many potential sources. However, the distinguishing factor is that it is not that any one of the emitters must have caused the loss but we cannot prove which one, it is that no one emitter has caused the loss; they are cumulatively responsible. Therefore, Wylie J held that *Fairchild* cannot apply. This may pose a significant challenge. However, Todd states that the question of causation is often one of policy.[268] Therefore, this may be a question of the danger posed by climate change and the Court's willingness to step in. If so, the analysis in chapters one and two suggests there may be sufficient judicial willingness and demand for climate action to enable a solution to be developed. Furthermore, 'attribution science' is improving, making it increasingly possible to draw connections between specific emissions and harms, though Kysar notes this is highly fact dependent.[269] Alternatively, causation and liability may be established on the basis of proportionate emissions. In *Saul Luciano Lliuya v RWE*, RWE was deemed responsible for 0.47 percent of all industrial emissions and therefore, liable for 0.47 percent of the costs of the harm.[270] Therefore, although the test for causation poses a

[262] *Accident Compensation Corporation v Ambros* above n 260 at [35]
[263] Todd above n 54 at 59.20.2.03(4).
[264] *International Energy Group Ltd v Zurich Insurance plc UK Branch* [2015] UKSC 33, [2016] AC 509 at [98] cited in Todd above n 54 at 59.20.2.03(4)
[265] *International Energy Group Ltd v Zurich Insurance plc UK Branch*, above n 264, cited in Todd, above n 53, at 59.20.2.03(4).
[266] Todd above n 54 at 59.20.2.03(3) and *Accident Compensation Corporation v Ambros* above n 260 at [34].
[267] *Accident Compensation Corporation v Ambros* above n 260 at [34].
[268] Stephen Todd "Tort" (2002) 4 New Zealand Law Review 619 at 632.
[269] Ganguly, Setzer and Heyvaart, above n 48, at 857 and Kysar, above n 9, at 33.
[270] *Saul Luciano Lliuya v RWE*, above n 78, cited in Ganguly, Setzer and Heyvaart, above n 48, at 853.

significant challenge, there may be justification for and the ability to develop an alternative.

The standard of causation for public nuisance is unclear.[271] *Southport Corporation v Esso Petroleum Ltd* held that public nuisance requires the plaintiff to prove that the defendant caused the nuisance and then it is up to the defendant to show they did not cause the harm.[272] Thus, the threshold may be lower than negligence. Similarly, the Wisconsin Court of Appeal held the standard of causation for public nuisance is distinguishable from that for negligence because it requires proof of causation of the nuisance, not of the harm.[273] If so, causation in public nuisance may pose less of a challenge then in negligence, because the applicant would only have to prove the defendant contributed to global GHG emissions, not that those emissions necessarily caused the harm. That said, there is still an issue of which test will apply. *Smith* held that 'but for' could not apply to public nuisance as well. Therefore, to prove causation, the applicant may have to argue that the material contribution test applies to public nuisance and demonstrates that the defendant materially contributed. Recently, the California Court of Appeal held that causation could be established where the "defendants' conduct was a substantial factor in bringing about the injury, damage, or loss", which required 'only that the contribution of the individual cause be more than negligible or theoretical.'"[274] Therefore, if this was the standard imposed in New Zealand, proving causation in public nuisance may not pose as significant a hurdle, but this is yet to be tested.

C Remedies

As noted above, although Smith did not apply for damages, Wylie J acknowledged that someone else could, citing concerns about indeterminate and open-ended liability and

[271] See Steven Sarno "In Search of a Cause: Addressing the Confusion in Proving Causation of a Public Nuisance" (2009) 26(1) Pace Environmental Law Review 225.
[272] *Southport Corporation v Esso Petroleum Ltd* [1954] 2 QB 182 (CA) at 197 cited in Maria Hook "Reasonable Foreseeability as an Element of Nuisance" (2016) 47 Victoria University of Wellington Law Review 267 at 280.
[273] Sarno, above n 271, at 227 citing *City of Milwaukee v NL Indus., Inc.*, 691 N.W.2d 888, 892- 93 (Wis Ct. App. 2004).
[274] Joshua K Payne and Jess R Nix *Waking the Litigation Monster: The Misuse of Public Nuisance* (US Chamber Institute for Legal Reform, Washington, 2019) www.instituteforlegalreform.com/uploads/sites/1/The-Misuse-of-Public-Nuisance-Actions-2019-Research.pdf at 20 citing *People v. ConAgra Grocery Prods. Co*., 227 Cal. Rptr. 3d 499, 529-34 (Ct. App. 2017).

the ability for future claimant's to seek damages.[275] In particular, Wylie J highlighted the vast potential for claimants stating that "everyone is a polluter and therefore a tortfeasor and everyone is a victim and therefore a potential claimant".[276] These concerns are a significant hindrance to potential climate change claims.

Damages are the typical remedy for negligence and are generally calculated to compensate for the harm suffered.[277] The typical remedies for public nuisance are criminal sanctions or an injunction to abate the nuisance.[278] In New Zealand, damages are available, but injunctions are far more common.[279] However, to claim damages, the harm must have been a reasonably foreseeable result of the defendant's conduct.[280]

The scope for damages leads to concerns that because tortious liability is joint and several, an emitter could be held liable for the full extent of the damage from GHG emissions, not just their emissions.[281] In England, the Courts have begun to consider the issue of liability for indivisible harm.[282] *Fairchild* held that the parties should be proportionately liable and that consideration could be given to the intensity of the exposure and the type of asbestos.[283] However, the Compensation Act 2006 promptly legislated over this, signalling a shift back to joint and several liability.[284] In New Zealand *Tulloch v Wellington Harbour Board* held that where one boat was blown into another, the former could be liable for the damage to the extent that the boat being there increased the harm.[285] Therefore, proportionate liability has been considered. The Law Commission review joint and several liability in 2012 in response to the leaky building and financial crisis and the significant issues of liability they posed.[286] The Commission assessed the alternatives to

[275] *Smith,* above n 4, at [98].
[276] *Smith,* above n 4, at [98](b).
[277] Todd, above n 53, at 59.25.1.
[278] Merrill, above n 154, at 17.
[279] *Coldicutt v Ffowcs-Williams* AP130-SW00 at [14]. There have been very few successful cases, for example *Fuller v MacLeod* [1981] 1 NZLR 390, but the majority of claims (successful and unsuccessful) seemed to be for injunctions rather than damages.
[280] Todd, above n 53, at 59.10.3.03 citing *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd* [1967] 1 AC 617 (PC) at 639.
[281] *Smith,* above n 4, at [98].
[282] Todd, above n 53, at 59.20.2.02.
[283] Todd, above n 53, at 59.20.2.03(2) citing *Fairchild* above n 258.
[284] Law Commission *Review of Joint and Several Liability* (NZLC, IP32, 2012) at 7.9.
[285] *Tulloch v Wellington Harbour Board* (1903) 23 NZLR 20 (SC) cited in Todd, above n 53, at 59.20.2.03(2).
[286] Law Commission *Review of Joint and Several Liability,* above n 284, at 1.11.

joint and several liability, but determined that the positive impacts did not outweigh the negative effects, and the need for fairness and efficiency in liability.[287] The Commission reiterated this in their 2014 report, raising concerns about the quantity of compensation and reallocation of losses and stating that where the decision lay between a plaintiff having to bear the risk of an absent defender versus a wrong-doer bearing the risk of their co-defendant, the latter was preferable.[288] Thus, the Law Commission has consistently declined to impose proportionate liability, either for some or all torts. As such, the Courts may not be willing to impose it here, and therefore, concerns about indeterminate liability may continue to pose a challenge for claims in negligence and public nuisance.

These concerns are also reflected in the Courts unwillingness to impose an injunction and Wylie J's concerns that the Court would not adequately be able to enforce the injunction.[289] Relatedly, there are concerns about whether it is appropriate for the Courts to step in at all.[290] In the United States, the Courts have stated that making decisions about the impact of GHG emissions leading to climate change is to "make a policy judgement rather resolve the dispute through legal and factual analysis" and to make a "policy decision about who should bear the cost of global warming".[291] Thus, there may be opposition to judicial intervention. However, the Courts *have* previously stepped in, through the common law, to respond to public need, such as the application of negligence to leaky buildings.[292] If it can be argued as in chapter two that there is a gap in the regulatory response to climate change and that there is a wider shift towards regulating and responding to GHG emissions leading to climate change, then the judiciary may deem it appropriate to step in.

Overall, Wylie J's analysis of the claims in negligence and public nuisance in *Smith* demonstrates some of the key challenges of applying these torts to climate change. Although, some of these concerns may not be as significant as first thought, it is clear that applying these torts to climate change poses some on-going issues, especially in relation

[287] Law Commission *Review of Joint and Several Liability,* above n 284, at 5.34.
[288] Law Commission *Liability of Multiple Defendants,* above n 166, at 3.37.
[289] *Smith,* above n 4, at [108].
[290] *Smith,* above n 4 at [98].
[291] *Native Village of Kivalina,* above n 48, at 876.
[292] *Carter Holt Harvey Ltd v Minister of Education* (2015), above n 254, at [42]-[43].

to causation, liability and the potential remedies, which a novel tort may wish to avoid. The following chapter will, therefore discuss what such a tort may look like.

V Characteristics of a Novel Climate Change Tort

Thus far, it has been established that:

- There is an opportunity to consider a novel climate change tort;
- There is a potential gap in the current legislative and regulatory framework,;
- There is a wider drive for climate change response in the law;
- A climate change tort could be beneficial; and
- That applying the existing torts of negligence and public nuisance to climate change poses some on-going challenges.

In *Smith* the cause of action pleaded was a duty "to cease contributing to damage to the climate system, dangerous anthropogenic interference, with the climate system and adverse effects of climate change through their emissions of [GHGs]".[293] However, no attempt was made to explain how this might function. Therefore, this section will consider some of the features a novel tort may need to have to succeed in responding to climate change.

A What are the Rights, Duties and Obligations?

At its most basic, an novel climate change tort would need to identify a right, duty and obligation and a legally competent or interested organisation, who is willing and able to engage in the litigation and enforcement processes.[294]

As pleaded by Smith, the duty in a novel climate change tort would be one to not emit GHG leading to climate change. Thus, the obligation on emitters would likely to be to reduce or stop entirely GHG emissions to mitigate climate change. Kysar suggests that this duty and obligation could be assessed by reference to the calculable planetary boundaries.[295] Under this method, a quota system could be implemented on a national

[293] *Smith,* above n 4, at [15].
[294] Grinlinton, above n 55, at 151.
[295] This concepts argues that there are a set of nine planetary boundaries within which humanity can continue to thrive, including CO_2 concentration, ocean acidification, stratospheric ozone, nitrogen emissions, phosphorus, global freshwater use, chemical pollution, atmospheric aerosol and the rate of biodiversity loss. Johan Rockström, Will Steffen, Kevin Noone, Åsa Persson, F Stuart Chapin, Eric Lambin, Timothy M Lenton, Marten Scheffer, Carl Folke, Hans Joachim Schellnhuber, Björn Nykvist, Cynthia A. de Wit, Terry Hughes, Sander van der Leeuw, Henning Rodhe, Sverker Sörlin, Peter K Snyder, Robert Costanza, Uno Svedin, Malin Falkenmark Louise Karlberg, Robert W Corell, Victoria J Fabry, James Hansen, Brian Walker, Diana Liverman, Katherine Richardson, Paul Crutzen, Jonathan Foley "Planetary boundaries: Exploring the Safe Operating Space for Humanity" (2009) 14(2) Ecology and Society 32 and Kysar, above n 9, at 11.

and international scale based on the total acceptable level of emissions, which could be reallocated out on a per-capita basis.[296] Under this model, the majority of New Zealanders would be in breach of their allocation.[297] Therefore, a more nuanced calculation of the reduction obligation would likely be required. However, this does demonstrate that there is an ability and reference point for this calculation.

In terms of the right being infringed, in *Smith* the harms cited were expressed as a breach of public and private rights. Although, negligence was developed to ensure people carrying out 'public' activities, which required care and skill do a good job and, thus has a public interest component, it is about private rights.[298] In particular, negligence is about private rights to person and property.[299] Wylie J seems to accept the harms in *Smith* are the sort covered by negligence and private rights.[300] Public nuisance is about public rights. However, it is unclear what a "public right" is.[301] *Attorney General v PYA Quarries Ltd* considers a range of cases and commentary on this issue but does not determine the issue.[302] Wylie J did not consider whether the harms pleaded were in fact a breach of public rights.[303] However, this suggests that a climate change tort could be about either public or private rights, or both.

Tortious liability is typically about private rights, focussing on rights to personal security and property.[304] Therefore, a climate change tort may be about protecting individual personal and property rights from the adverse effects of climate change. However, climate change is often viewed as a public interest issue.[305] Therefore, the climate change tort may be focussed on public rights. This aligns with the purpose of the tort as a strategic claim focussed on initiating climate action, rather than vindicating individual

[296] Kysar, above n 9, at 11.
[297] Kysar, above n 9, at 12.
[298] Todd, above n 53, at 59.5.2.
[299] Todd, above n 53, at 59.5.5 noting that liability is not available for personal injury in New Zealand because of the Accident Compensation Scheme.
[300] *Smith,* above n 4, at [82].
[301] *Attorney General v PYA Quarries Ltd,* above n 197 at 900.
[302] *Attorney General v PYA Quarries Ltd,* above n 197, at 900.
[303] *Smith,* above n 4, at [62].
[304] Grinlinton, above n 55, at 148.
[305] For example it is commonly compared to the Tragedy of the Common's see Board of Inquiry Proposed Taranaki Power Station Air Discharge Effects, Report and Recommendation of the Board of Inquiry Pursuant to Section 148 of the Resource Management Act 1991 (1995) cited in Baillie, above n 234, at 34 and Fisher, Bettina and Scotford, above n 169, at 86.

rights. This would also be beneficial because everyone would have the right to claim because everyone is affected by climate change. However, public nuisance requires additional illegality alongside the inference with public rights, and to make an individual claim, you must demonstrate individual harm.[306] Although the on-going role of this illegality is unclear, this suggests that a climate change tort may also need to have these additional requirements, to vindicate public rights. This may be difficult, especially as emissions tend to be highly regulated and the emitters in *Smith* were all compliant. Therefore, it may be preferable to have the claim focussed on private rights. This would result in a more traditionally tortious cause of action, which may be more readily accepted. Further, limiting the application to private rights may limit liability, which would reduce concerns about indeterminacy.

Alternatively, it could be argued that a climate change tort should be about both public and private rights. As discussed earlier, the public private divide is not clear.[307] Further, negligence and public nuisance both have public and private elements; public nuisance through the special damage rule and negligence through policy considerations. Therefore, there is already evidence of the blurring of public and private rights in tort and so this would not necessarily be problematic. As such, a climate change tort, could have elements of public and private rights or like negligence, be about private rights, but with a public concern.

B Foreseeability and Proximity

The second challenge to tortious climate change claims identified in *Smith* is the requirement for foreseeability and proximity, which are elements of negligence and to some extent public nuisance through the special damage requirement. These requirements significantly limit the ability to claim for climate change-induced harms, due to the nature of climate change and the relationship between the parties.[308] Therefore, to successfully respond to climate change, a novel tort may need to shift away from these particular requirements.

[306] The on-going purpose or necessity of the double liability requirement is unclear. However, this is not something this dissertation will be addressing. The latter is because of the special damage rule.
[307] Harlow, above n 156, at 241.
[308] Kysar, above n 9, at 17 and Merrill, above n 154, at 9.

It is unlikely that a novel tort could remove this requirement together.[309] In particular proximity (from which we can draw parallels to directness) is argued to be inherently tortious, because "if the injury is too 'remote' from the defendant's conduct, then it is not deemed to be tortious".[310] Thus, Merrill suggests that what makes a tort a tort is the localised relationship between the defendant's conduct and the harm, from which the impact diminishes with distance.[311] If this is the case, some relationship is likely required. That said, the courts have already moved past requiring strict physical proximity and have further expanded the duty where necessary, for example, leaky buildings.[312] As discussed, this demonstrates the Courts' ability to adapt tort in response to emerging social crises, including leaky building liability, which was justified because of the significance of purchasing a house and the need for secure habitation.[313] Thus, tort may be able to reimagine foreseeability and proximity in response to societal need.

Furthermore, the Supreme Court held that these requirements are a screening mechanism, to determine whether liability should be imposed and to limit the volume and nature of nature of claims.[314] Therefore, this issue may be one of policy, as to whether corporate emitters should be liable for the harm their emissions have contributed to through climate change.[315] Although Wylie J demonstrates a reluctance towards this, citing concerns about indeterminate and disproportionate liability, chapter two suggests there may be sufficient justification.[316] Therefore, the resolution of this is for the judiciary, who must decide whether to step in, given that foreseeability and proximity are screening mechanisms for imposing liability and is thus a question of policy. Although Wylie J expressed reluctance to do so in *Smith*, the analysis in chapter two suggests that there may be sufficient reason for the Courts to do so.

[309] Merrill, above n 154, at 9.
[310] Merrill, above n 154, at 9.
[311] Merrill, above n 154, at 9,
[312] Tobin, above n 155, at 154-155.
[313] *Spencer on Byron,* above n 139, at [168]–[169].
[314] The Grange, above n 209, at [159] in relation to negligence. The role of special damage in public nuisance has not been so well considered.
[315] Todd, above n 268, at 632.
[316] *Smith,* above n 4, at [98].

C Causation and Liability

The second issue is causation. Todd states that this too is question of policy.[317] It is a general tortious principle that one cannot be responsible for a loss suffered unless the they were the cause of the loss.[318] Torts typically require causation in fact and in law, requiring claimants to show that the defendant's action was "an effective cause of the harm".[319] It must also be proven that there is sufficient proximity between the action and the harm as to warrant the imposition of liability.[320] Causation in fact is typically proven through the 'but for' test but as discussed in chapter four, for climate change it is often not possible to argue that but for the defendant's emissions, the damage would not have been caused, due to the dispersed and diffuse nature of its causes and effects.[321] Therefore an alternative means of assessing causation may be required.

As discussed in chapter four, this is not a novel issue; 'but for' has been deemed to be unworkable in several instances.[322] Furthermore, the House of Lords has stated that there is no universal test for causation.[323] One solution may be to adopt the standard of *Fairchild* material contribution in New Zealand.[324]Although the applicability of *Fairchild* to the nature of the harm caused by climate change was questioned by Wylie J, as discussed in chapter four, another Court may be willing to differ in light of the significant concerns about and impact of climate change. This could be beneficial in that it would be a more workable than 'but for' and is already somewhat accepted. Another option may be the tests for causation in public nuisance. Although the law in this area is unclear, the California Court of Appeal held that causation could be established where the "defendants' conduct was a substantial factor in bringing about the injury, damage, or loss, which required 'only that the contribution of the individual cause be more than negligible or theoretical.'"[325] This test is fairly similar to the *Fairchild* material contribution test, but does not raise the same factual concerns. Therefore, this may be a viable solution. Either

[317] Todd, above n 268, at 632.
[318] Todd, above n 53, at 59.20.1.
[319] Todd, above n 53, at 59.20.1.
[320] Todd, above n 53, at 59.20.1.
[321] Kysar, above n 9, at 4.
[322] Hillel, McCague. and Yaniszewski, above n 251, at 218.
[323] *Kuwait Airways Corp v Iraqi Airways Co* (*No3)* [2002] UKHL 19 [2002] 3 All ER 209 at [128] cited in *Fairchild* above n 258 at 314.
[324] *Fairchild*, above n 258, cited in Todd, above n 53, at 59.20.2.02.
[325] Payne and Nix, above n 274m at 20.

way, evidentially the assessment of causation is an issue that a novel climate change tort would have to resolve. Climate change harm does not conform to the traditional Anglo-American understanding of tort, and therefore, tests based on these conceptions are always going to struggle to adapt.[326] Thus, a new or different test may be required. However, *Fairchild* demonstrates that tort has adapted before to novel issues, and therefore, could again.

D Remedies

The primary aim of a tortious damage remedy is to put the person back where they would have been but for the harm.[327] However, this may be difficult for climate change claims, due to the concerns about disproportionate liability and the cumulative nature of the problem.

Smith sought a declaration that each emitter had caused or contributed to the breach of the duties and public nuisance, through their emissions and injunctions were sought to require each defendant "to produce or cause zero net emissions from its activities by 2030".[328] Damages were not sought, although Wylie J was concerned that damages would be available to other claimants and that they could be burdensome.[329] In particular, Wylie J was concerned that potential defendants could be jointly and severally liable for the effects of climate change, and that recognising the duty would generate indeterminate and open-ended liability.[330]

Proportionate liability as discussed above, has been proposed as a solution to this problem. Proportionate liability was considered by the New Zealand Law Commission and was briefly available in the United Kingdom before it was removed by legislation. In its report, the Law Commission cited concerns about ineffective compensation and loss allocation. However, if the climate change tort was about initiating climate action, rather than necessarily compensating the individual, these concerns might be lessened. Furthermore, in other jurisdictions, proportionate liability is already being imposed for

[326] Kysar, above n 76, at 52.
[327] Grinlinton, above n 55 at 176.
[328] *Smith*, above n 4, at [2].
[329] *Smith,* above n 4, at [98].
[330] *Smith,* above n 4, at [98].

climate change, such as *Saul Luciano Lliuya v RWE*.[331] The Law Commission did consider whether proportionate liability should be imposed for leaky building claims specifically, but ultimately decided that this would not result in better buildings nor in the absence of a comprehensive warranty scheme, better outcomes.[332] Although leaky buildings and climate change are clearly distinguishable crises, this does suggest there may be a lack of support for this option.

An alternative may be to remove damages entirely as a remedy. Whilst damages are the most common remedy and often considered the purpose for torts, not all torts grant them. [333] For example, for torts like public and private nuisance damages are uncommon.[334] Further Linden argues that compensation is not the only goal of tort because if it was it would have been replaced long ago.[335] Therefore, it would not necessarily be problematic to remove damages as a remedy. Although, it is often the potential for a monetary remedy that engages both parties in the tortious litigation, the purpose of this tort would not be about monetary compensation. Further, Ganguly and others suggest that even when climate change claims fail, like those for asbestos and tobacco, the mere prospect of or the bringing of a claim, may be effective in initiating action.[336] Therefore, even without damages, such a claim may still be very effective.

The alternative to damages would be an injunction or even a declaration. In *Smith* Wylie J expressed concerns about imposing injunctions as well, on the basis that it may conflict with Parliamentary supremacy and create conflicting obligations on emitters. [337] Therefore, the Courts may be reluctant to impose injunctions. Thus, the ideal remedy for climate change may in fact be a declaration.[338] Traditionally declarations have not been perceived as the strongest of remedies. However, a declaration against a corporation

[331] *Saul Luciano Lliuya v RWE,* above n 78.
[332] Law Commission *Liability of Multiple Defendants,* above n 166, at 4.15.
[333] Todd, above n 53, at 59.25.1.
[334] Merrill, above n 154, at 14. In New Zealand damages are available (*Coldicutt v Ffowcs-Williams*, above n 279 at [14]) but are uncommon. Most of the cases have related to road blockages or frontage rights, and in those instances the common remedy is an injunction to stop the infringement, for example *Fuller v MacLeod*, above n 279.
[335] Linden, above n 118, at 5.
[336] Ganguly, Setzer and Heyvaart, above n 48, at 865.
[337] *Smith*, above n 4, at [98].
[338] Todd, above n 53, at 59.25.05 citing *Re Chase* [1989]1 NZLR 325 (CA) at 332–334 per Cooke J and 337 per Somers J states that declarations are available as a common law remedy for torts where it is appropriate, such as where no real compensation is sought.

stating for example that their emissions are beyond what is required to mitigate climate change or that they have breached a duty of care to an individual or group in society, could be quite powerful. Climate change is increasingly perceived as not just a social harm, but a financial one. As the commercial sectors awaken to climate concerns in relation to insurance, green investment and climate change-related financial disclosure, the corporate response to climate change will inevitably become more important and scrutinised. A declaration for breaches of a climate duty against a corporate could have wider financial and reputational ramifications for them which could encourage them to act. Thus, it may be effective in initiating the climate action this tort is aimed at. Further, as discussed in chapter three, the potential for a tortious claim may also encourage improved reporting and regulatory compliance. Therefore, the possibility of a climate change claim, even without the potential for damages may motivate corporates to reduce their emissions. Even where claims are unsuccessful, the discussion in chapter four suggests there is significant potential for positive effects from climate change claims.

Therefore, even if 'only' a declaration were available, the impact of a climate change tort could still be significant. Although it does not have the direct financial incentive that damages offer, over time successful and unsuccessful claims may result in financial and practical consequences for the corporates against which these claims are brought and in turn achieve the sort of action this tort is intending.

In conclusion, the development of a novel tort would need to consider the sorts of rights being protected, issues of foreseeability and proximity, causation and liability, in terms of the remedies available and the nature of the liability. Although these features pose challenges for a novel climate change tort, due to the nature of climate change, this chapter has shown some of the ways in which tort could develop to bypass these challenges and ultimately responded to climate change.

Conclusion

This dissertation has considered the potential for a novel climate change tort in light of *Smith.* The purpose of such a tort would be to bring private claims against corporates to initiate wider climate action. Under the approach in *Hosking* for the courts to be willing to develop a novel tort there needs to be a gap in the law which that tort could fill and a wider demand for the tort.

In chapter one it was established that there is a gap in New Zealand's mitigative and adaptive response to climate change and in chapter two, that there is a wider justification in our domestic and international law, for a greater climate change response. Chapter three considered first the purpose of a novel climate change tort and wider tort law. It established that there is no cohesive theory of tort law that constrains the development of a novel climate change tort. Chapter three then discussed some of the potential challenges to and benefits of applying tort to climate change. Chapter three concluded that although there are concerns about the applicability of tort to climate change, tort may actually be well-suited to respond to climate change concerns. Further there are likely a range of benefits to a climate change tort, including risk and loss reallocation, a parallel regulatory track, benefits to Māori and incentivising compliance with GHG reduction obligations and record-keeping. Notably this dissertation has demonstrated that even where tortious climate change claims fail, there is the potential for them to initiate wider change. Chapter four identified and discussed the hurdles Smith encountered in applying the current torts of negligence and public nuisance to climate change. Chapter four established that climate change poses a particular challenge for tort in regard to the traditional tortious understandings of proximity, causation and liability. This goes to the nature of climate change as a diffuse and dispersed phenomenon, rather than the traditional tortious harm of A here injures B there.

Finally, therefore, this dissertation has argued that in order to succeed a novel climate change tort would likely need to protect both public and private rights, reconceive the requirements for foreseeability and proximity to reflect the different nature of the harm, adopt a different assessment for causation and, if damages are available, be met with proportionate liability or not be met by damages at all. Although the existence and nature of a novel tort is ultimately to be determined by the judiciary, there is significant demand

and justification for a tort as a source of climate action, and therefore we should push the boundaries of tort to respond to the threat of climate change.

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