SAMUEL BAKER

SMITH V FONTERRA: A PATHWAY FORWARD THROUGH PUBLIC NUISANCE?

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Abstract

This paper asks the question of whether the Supreme Court of New Zealand can, and if so, whether it should, allow the public nuisance cause of action to proceed to full trial in its upcoming judgment in Smith v Fonterra Co-Operative Group Ltd. In answering this question, the barriers raised by the High Court and Court of Appeal in their respective decisions to strike out the cause of action, are examined in detail. These barriers can be split into two distinct categories – 'doctrinal' and 'institutional'. Doctrinally, there are difficulties in satisfying the 'special damage rule' required to establish standing, as well as with defining a principally justifiable class of defendant, and most importantly, with establishing causation. Institutionally, there are additional concerns that a climate change action exceeds the scope of what is understood to be 'public nuisance', that allowing such an action would undermine the legislature's existing regulatory response, and in any case, that the Courts are not well-equipped to provide appropriate remedies. In response to both sets of concerns, this paper seeks to provide a doctrinal framework built on past precedent, as well as a set of institutional justifications, through which each difficulty could conceivably be overcome. Were the Supreme Court to adopt such a framework, it is argued that the tort of public nuisance could co-exist alongside legislative regulation, enhancing New Zealand's response to climate change instead of undermining it. While allowing Smith to proceed to full trial would require a shift in the paradigm of public nuisance, it is contended that the existential nature of the threat dictates that the Supreme Court should be unafraid to do so, engaging its legal imagination in order to 'do its part' in combatting climate change in New Zealand.

Keywords: "*Smith v Fonterra*", "Public Nuisance", "Supreme Court", "Doctrinal", "Institutional"

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I Introduction

Public nuisance has been variously described as an "ugly duckling tort",[1] and "a historical survival that does not fit easily into modern law,"[2] which perhaps should be "cast off into the box of antique legal trinkets with no modern use."[3] Such appraisals, however, have not deterred attempts to use the tort to address novel societal issues including, most notably, climate change. Since 2004, several so-called 'climate nuisance' suits have been brought in the United States, seeking to hold oil companies responsible for the effects of climate change.[4] In 2020, the first such case in New Zealand, *Smith v Fonterra*, was brought against seven of the country's largest emitters, seeking injunctive relief for a breach of three torts including public nuisance. However, the cause of action has thus far found little success, having been struck out by both the High Court, and Court of Appeal.

These judgments represent a difficult paradox. On one hand, the Courts' dismissive attitude to what is undoubtedly an existential threat is frustrating, and deeply unsatisfactory. On the other, the only way any common law Court may source legitimacy in using the power of private law to combat such problems is by accommodating them into some existing legal doctrine. Moreover, Courts are faced with further institutional concerns as to whether public nuisance is even the correct vehicle through which to address climate change, particularly given existing legislative response. These are both questions which now fall to New Zealand's Supreme Court to answer, having heard the case in August of 2022 – *can* the tort of public nuisance apply to climate change, and if so, *should* it?[5]

This paper addresses that paradox, canvassing both the doctrinal and institutional concerns raised by the lower Courts before proposing a pathway through which a sympathetic Supreme Court could conceivably overcome them, allowing the case to proceed to full trial. It will firstly be argued that a legitimate doctrinal framework, both logically sound and consistent with past precedent, does exist for the purposes of a climate nuisance action.

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[1] Professor Geoff McLay "The New Zealand Courts and Climate Change: Too Much For Tort?" (CCCS Global Public Law Seminar, Melbourne Law School, online, 5 May 2022).
[2] Michael Jones (ed) Clerk and Lindsell on Torts (22nd ed, Sweet & Maxwell, London, 2018) at [20-04].
[3] Leslie Kendrick "The Perils and Promise of Public Nuisance" (Research Paper No. 2022-41, University of Viriginia, 2022) at 8.
[4] Kate Markey "Air Pollution as Public Nuisance" (2022) 120(1) Mich L Rev 1535 at 1561.
[5] Supreme Court of New Zealand "Smith v Fonterra Co-Operative Group Ltd" (Media Release, 8 August 2022).

Subsequently, the potential for the tort to function alongside New Zealand's regulatory response, supplementing rather than undermining its operation, will be explored and affirmed. While allowing a case like *Smith* to proceed to trial would undoubtedly require a shift in the paradigm of public nuisance, it will be argued that such a shift is not only possible with sufficient legal imagination, but necessary, and desirable.

II What is public nuisance?

Before discussing the relationship between public nuisance and climate change, it is first necessary to understand the operation of the tort generally. Categorically, nuisance can be split into two types – private and public. While private nuisance aims to protect the rights of owners and occupiers in relation to land, public nuisance focuses on protecting the rights belonging to members of the public generally.[6] The Court of Appeal in *Smith* held that the most authoritative modern definition is that outlined by the House of Lords in the 2004 case of *R v Rimmington*:[7]

> A person is guilty of a public nuisance (also known as common 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, ... or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all her Majesty's subjects.

Not every interference with a public right is actionable in public nuisance, however. The nuisance complained of must be "both substantial and reasonable" before it can be actionable, reflecting the policy consideration that there are some daily inconveniences that citizens are expected to tolerate.[8] There is no universal rule as to which interferences constitute a public nuisance; rather, it depends on "a variety of considerations and a balancing of conflicting interests" in any given case.[9]

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[6] Jones, above n 2, at [20-01].
[7] *R v Rimmington* [2005] UKHL 63, [2006] 1 AC 459 at [45] per Lord Bingham.
[8] *Smith v Fonterra Co-Operative Group Ltd* [2021] NZCA 552, [2022] 2 NZLR 284 [*CA Judgment*] at [41].
[9] Jones, above n 2, at [20-02].

A difficulty in defining the tort is determining how many people have to be affected by a nuisance for it to be classified as "public".[10] The classic case of *Attorney-General v PYA Quarries Ltd* held that a public nuisance is one which is "so widespread in its range or so indiscriminate in its effect" that it should be held to be "the responsibility of the community at large" to put a stop to it.[11] Whether a given section of the community is large enough, however, remains a question of fact and degree based on the particular circumstances.[12] Because of this requirement, public nuisance cases were traditionally brought by the Attorney-General as a representative of the community affected.[13] However, as the tort developed, it became accepted that individuals may also bring an action for public nuisance in their own name if they suffer "greater hurt or inconvenience than any other man".[14] This so-called 'special damage rule' was affirmed in New Zealand as early as 1869, with the Court of Appeal holding that an individual must have suffered damage that is "particular, direct, and following upon the individual immediately from the [interference]."[15] The exact formulation of the rule in New Zealand law remains a contentious element of the tort, and has posed notable difficulties in *Smith*.

In respect of remedies, New Zealand law allows for both common law damages for past harm, as well as equitable relief by injunction for continuing harm.[16] In the United States, plaintiffs in climate nuisance cases have often sought the former, alleging that they will suffer monetary loss as a result of flooding and other extreme weather caused by climate change.[17] By contrast, the plaintiffs in *Smith* instead seek injunctive relief, imploring the court to require the defendant emitters to achieve net zero emissions.[18] Which of these remedies is more appropriate in the context of a climate nuisance action has become a contentious issue during the *Smith* litigation, but largely falls outside the scope of this paper, which will focus purely on the merits of injunctive relief. Regardless, this choice of remedy is characteristic of the flexibility provided by public nuisance, and in part explains its attractiveness to plaintiffs seeking to combat novel societal issues. However, using a cause of action "developed in medieval England to allow the crown to remove impediments from

[10] "Nuisance: What is a "Public" Nuisance?" (1957) 33 NZLJ 229 at 229.
[11] *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169, [1957] 2 WLR 770 (CA) at 191 per Denning LJ.
[12] "What is a "Public" Nuisance?", above n 10 at 229.
[13] CA Judgment, above n 8, at [44].
[14] CA Judgment, above n 8, at [45].
[15] *Mayor of Kaiapoi v Beswick* (1869) 1 NZCA 192 at 207.
[16] CA Judgment, above n 8, at [53].
[17] Markey, above n 4, at 1536.
[18] *Smith v Fonterra Co-Operative Group Ltd* [2020] NZHC 419, [2020] 2 NZLR 394 [*HC Judgment*] at [12].

public roads and waterways" to address an issue as complex as climate change creates its share of problems, as can be seen in *Smith*.[19]

III Smith v Fonterra

A Background

In early 2020, Michael John Smith brought proceedings in the High Court against seven defendant companies, each of which either directly releases greenhouse gases, or supplies products which release greenhouse gases when burned.[20] The statement of claim raised three causes of action in tort – negligence, breach of an inchoate duty, and public nuisance.[21] In respect of the latter, Mr Smith alleged that by releasing greenhouse gases, the defendants contribute to "dangerous anthropogenic interference with the climate system", and thus interfere with "public health, safety, comfort, convenience and peace."[22] Moreover, Mr Smith argued that himself as a customary landowner, as well as the Māori communities he represents, are "particularly vulnerable" to the effects of climate change for economic, cultural and spiritual reasons.[23] He sought a declaration that the defendants have each "caused or contributed to a public nuisance", as well as an injunction supervised by the Court requiring each defendant to reach net zero emissions by 2030.[24] This pleading was later amended to instead seek net zero by 2050, with intermediate targets in 2025, 2030 and 2040.[25] In response, each defendant applied to strike out Mr Smith's claim, alleging that it raised no reasonably arguable cause of action.[26] Some of the defendants also argued that the issues raised are "non-justiciable and polycentric questions of public policy" that would be more appropriately dealt with by Parliament.[27]

The High Court upheld the defendants' strike out application, largely on the basis of significant doctrinal difficulties with Mr Smith's case, holding that the public nuisance

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[19] Kendrick, above n 3, at 4.
[20] HC Judgment, above n 18, at [2].
[21] HC Judgment, above n 18, at [2].
[22] HC Judgment, above n 18, at [8] and [11].
[23] HC Judgment, above n 18, at [10].
[24] HC Judgment, above n 18, at [12].
[25] *Smith v Fonterra Co-Operative Group Ltd* Appellant's Synopsis of Submissions on Appeal to the Supreme Court at 55-56.
[26] HC Judgment, above n 18, at [20].
[27] HC Judgment, above n 18, at [12].

action was "clearly untenable" and had no realistic chance of succeeding at trial.[28] On appeal in early 2022, the Court of Appeal came to a similar conclusion, once again holding that the cause of action was "clearly untenable", albeit with a stronger institutional focus framed around the question, "what should be the response of tort law to climate change?".[29] That was not the end of proceedings however, with the Supreme Court granting leave to appeal to hear the case in late August of 2022.[30]

Whilst outside the scope of this paper to provide a full breakdown of the two Courts' reasoning, the next two sections will highlight their key concerns with the public nuisance cause of action. Such issues are both doctrinal and institutional in nature, and will likely form the primary focus of the Supreme Court in coming to their eventual decision on whether or not public nuisance should be struck out for a third and final time.

B Doctrinal issues

On examination of the decisions of the High Court and Court of Appeal, there are three key reasons raised as to why public nuisance *can't* apply to climate change.

First is the difficulty of satisfying the special damage rule, considering the wide-ranging effects of climate change on every type of New Zealander. The Court of Appeal noted that there does not appear to be one "universally accepted formation" of the rule, with some cases requiring a different kind of damage than that suffered by the general public, while others allow damage of the same kind, but more severe.[31] Although the Court purported to adopt the most liberal formation possible, namely whether the harm "appreciably exceed[s] that suffered by the general public," it nonetheless stated that the harm suffered by Mr Smith does not sufficiently exceed that which is also experienced by other New Zealanders, including landowners, iwi and hapū.[32] This mirrored the conclusions of the High Court, which held that the damage suffered by Mr Smith is a mere manifestation of the effects of climate change, effects which will be experienced by a great deal of other individuals.[33]

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[28] HC Judgment, above n 18, at [73].
[29] CA Judgment, above n 8, at [1] and [92].
[30] *Smith v Fonterra Co-Operative Group Ltd* [2022] NZSC 35.
[31] CA Judgment, above n 8, at [75].
[32] CA Judgment, above n 8, at [82].
[33] HC Judgment, above n 18, at [62].

The second barrier is establishing a class of defendants for a harm which every person in the world is at least partly responsible for committing.[34] The Court of Appeal saw no principled basis for singling out any of the seven defendants, since none of them standing alone make a material contribution to climate change.[35] If any of the defendants' actions were to constitute a tort, then every entity and individual in New Zealand would be liable, a conclusion doubtless to have "sweeping social and economic consequences".[36]

The final and most significant barrier raised by both Courts is causation. Because New Zealand's overall contribution to climate change is so small, it is difficult to say that any of the defendants in a public nuisance action meaningfully 'caused' the harm. While the Court of Appeal acknowledged the existence "nuisance due to many" cases, where the 'but for' test is not applied and defendants can be liable even if their actions would not individually constitute a nuisance, it did not see climate nuisance as a "natural and rational extension" of those principles.[37] All of those cases were said to have involved a "finite number of known contributors", allowing a significant enough number to be brought before the Court for the nuisance to be abated.[38] This is clearly not the case with climate change. This reasoning was echoed in the High Court's judgment, which held that there was "no sufficient relational or causal link between any of the defendants' activities and the claimed damage".[39]

C Institutional issues

The Court of Appeal judgment in particular also presents three reasons as to why public nuisance *shouldn't* apply to climate change, even if it were doctrinally possible.

The first concern is whether collective action problems as complex as climate change come within the paradigm of public nuisance, or indeed, of tort law generally. The Court of Appeal adopted a traditionalist view on this issue, rejecting the plaintiff counsel's plea that they "be bold" in extending the law, and instead holding that the common law should proceed via "incremental development and not radical change".[40] For the Court, allowing an action in

[34] CA Judgment, above n 8, at [18].
[35] CA Judgment, above n 8, at [19].
[36] CA Judgment, above n 8, at [19].
[37] CA Judgment, above n 8, at [90]-[92].
[38] CA Judgment, above n 8, at [92].
[39] HC Judgment, above n 18, at [67].
[40] CA Judgment, above n 8, at [14]-[15].

climate nuisance to proceed would "subvert doctrinal coherence", and in doing so, expand public nuisance outside of the traditional bounds of tort law generally.[41] As such, the Court held that common law tort claims are simply incapable of addressing the issue of climate change, instead favouring a "sophisticated regulatory response".[42]

This links to the Court's second concern, that permitting claims against specific emitters is an "inefficient and ad hoc way of addressing climate change" and likely to undermine the policy goals of the government's regulatory response, namely that such regulation be "effective, efficient and just".[43] For the Court, a legislative regulatory regime, given its ability to treat all emitters even-handedly and source legitimacy in Parliament's democratic mandate, is a preferable means of combatting climate change, one which climate nuisance actions would only serve to undermine.

Finally, there is a further concern that even if the tort did have a legitimate role to play in addressing climate change, Courts are ill-equipped to provide effective remedies capable of properly abating the nuisance. In implementing injunctive relief of the particular nature sought, the Court would effectively be creating a "court-designed and court-supervised regulatory regime", a system requiring a level of expertise, accountability and democratic participation lacked by the judiciary.[44] As such, climate nuisance actions would be rendered largely ineffective, even if allowed to proceed.

The following sections will critically evaluate each of these concerns, and in doing so propose both a potential doctrinal framework and a set of institutional justifications through which the Supreme Court can and should allow *Smith v Fonterra*, or a climate nuisance action like it, to proceed to trial.

IV Can public nuisance apply to climate change?

A The special damage rule

[41] CA Judgment, above n 8, at [15].
[42] CA Judgment, above n 8, at [16].
[43] CA Judgment, above n 8, at [27] and [33].
[44] CA Judgment, above n 8, at [26].

For a plaintiff to establish standing to sue in any public nuisance case, they must satisfy the aforementioned special damage rule. Intuitively, it makes sense for some sort of standing rule to be imposed on potential plaintiffs to any climate change-related action, given that its effects are felt to some extent by almost every individual on Earth. To allow recourse to the courts without some sort of bar would therefore be to create a virtually limitless class of plaintiffs. This reasoning aligns with the stated rationale of the rule, which is the prevention of a "multiplicity of trivial or theoretical cases" against the same defendant in respect of a singular interference with the rights of the public.[45] This was affirmed by the Court of Appeal in *Smith*, which also approved a secondary justification, namely that the rule reflects the "constitutional role of the Attorney-General to represent the public interest".[46]

While these justifications are valid, the formulation of the rule adopted by both the High Court and Court of Appeal is nonetheless open to criticism. Many commentators argue that the special damage rule as commonly understood is inherently paradoxical, creating a tension with the rationale behind the tort itself. By proving that the damage they have personally suffered is 'special' in kind or degree, a plaintiff is required to distinguish themselves from others around them who claim that their rights have also been interfered with.[47] As a consequence, it can be said that the plaintiff whose injury *least* resembles that of other members of their community has the greatest chance of success, despite their claim in public nuisance being founded on an interference with a right held by the public generally.[48] Because of this paradox, a defendant whose conduct similarly harms a large group of people will have a greater chance of escaping liability in public nuisance, a trend which seemingly undermines the interests which the tort is expected to protect.[49] This trend is particularly problematic in the case of climate change, due to the commonality in effects experienced by large sections of society.[50]

Does this mean the rule as currently understood should be abolished entirely? While this argument was never authoritatively considered by the Court, doing so could certainly have

[45] David Bullock "Public Nuisance and Climate Change: The Common Law's Solutions to the Plaintiff, Defendant and Causation Problems" (2022) 85(5) MLR 1136 at 1141.
[46] CA Judgment, above n 8, at [85]-[86].
[47] Matthew Russo "Productive Public Nuisance: How Private Individuals Can Use Public Nuisance to Achieve Environmental Objectives" (2018) 5 U Ill L Rev 1969 at 1995.
[48] At 1996.
[49] Maria Hook and others "Tort to the Environment: A Stretch Too Far or a Simple Step Forward?" (2021) 33 JEL 195 at 204.
[50] Bullock, above n 45, at 1140.

the effect of 'opening the floodgates' to innumerable claims in public nuisance.[51] David Bullock, counsel for Mr Smith, contends that taking such drastic a step is unnecessary. Instead, he claims that there is authority, both in New Zealand and abroad, which would allow the Supreme Court to re-interpret the rule in a way which would permit a claim like Mr Smith's, whilst still maintaining a "coherent and workable tort".[52] Bullock's argument is that an action in public nuisance alleges a mere *theoretical* injury to each member of a community, whereas the standing rule creates the additional requirement for any such member to prove they also suffered some *actual* injury "particular to them" before they are able to sue.[53] Three Canadian fishery cases are used as illustration for this proposition. While the relevant caused a theoretical injury to the public's right to fish, the plaintiff fishermen also suffered real economic loss to their businesses, loss particular to them which "ought to have sufficed to give standing."[54] When understood in this way, the rule would not preclude multiple parties similarly damaged by an interference, from all having suffered 'special damage'.[55] For Bullock, the fact that there are many coastal landowners or iwi with interests damaged by the effects of climate change should not preclude them from suing in public nuisance, rather they can all sue, having all suffered particular (and actionable) damage to their own property.[56]

While it is outside of the scope of this paper to examine the tikanga Māori aspects of Mr Smith's pleadings in detail, climate change clearly has the potential to significantly harm, or even destroy, his way of life. If he is nonetheless unable to obtain standing to sue in public nuisance, questions may be asked as to whether the rule is operating in a just and fair manner. Were the Supreme Court to adopt the formulation suggested however, Mr Smith's pleaded "loss of his whenua and harm to a taonga of his whānau" *would* constitute actual injury specific to him, satisfying the standing rule.[57] Analogy can be drawn to *Native Village of Kivalina v. ExxonMobil Corporation*, a case brought by members of an Alaskan coastal village forced to relocate due to erosion caused by melting sea ice.[58] Whilst the prospect of increased coastal erosion theoretically affects innumerable populations around the world,

[51] Hook, above n 49, at 204.
[52] Bullock, above n 45, at 1140.
[53] Bullock, above n 45, at 1142.
[54] Bullock, above n 45, at 1144.
[55] Bullock, above n 45, at 1146.
[56] Bullock, above n 45, at 1147.
[57] Above n 25, at 27.
[58] *Native Village of Kivalina v Exxon Mobil Corp* 696 F 3d 849 (9th Circuit 2012).

the damage claimed in the case was specific to the plaintiffs' village and their indigenous interests, and can therefore be understood as 'special damage'.[59] Although that case occurred in the technical context of standing for federal claims under the US Constitution, it is argued that its underlying principles are transferrable, and lend support to the suggested approach.

This re-interpretation is not without issues, however. Currently, more than 49,000 properties are exposed to coastal flooding in New Zealand, with a predicted increase to over 140,000 with 1.2m of climate change-related sea level rise.[60] Under Bullock's formulation, each of these landowners has suffered (or will soon suffer) some damage particular to their property such that they would have standing to sue in public nuisance. Therefore, if the rule simply required evidence of 'actual' injury, it is unclear whether it would continue to fulfil the traditional purpose of preventing a multiplicity of claims. It is questionable whether these fears of the 'floodgates' opening are actually well-founded in reality, however, given the significant cost to plaintiffs of high-profile litigation. Additionally, in the particular context of injunctive relief, once one injunction has been granted against a defendant, there would appear to be little reason to pursue further action against that same defendant. Resultingly, while the number of *potential* claims would be enormous were the special damage rule to be reformulated, it appears unlikely that the majority of these claims would actually come to fruition. As such, it appears doctrinally possible for the Supreme Court to permit standing in public nuisance for climate change plaintiffs like Mr Smith, avoiding the paradox posed by the special damage rule in its current form.

B Class of defendants

If the above analysis defines a legitimate plaintiff, legal issues remain over defining a legitimate class of defendant, considering that the greenhouse gases which cause climate change "result from cumulative emissions of millions or billions of emitters since the onset of the industrial revolution."[61] Because almost every person on the planet contributes in some way, it is difficult to delineate a class of actors who can be held as "peculiarly

[59] At 853-854 per Judge Thomas.
[60] NIWA *Coastal Flooding Exposure Under Future Sea-level Rise for New Zealand* (March 2019) at 31.
[61] Michael Gerrard "What Litigation of a Climate Nuisance Suit Might Look Like" (2012) 12(2) SDLP 12 at 12.

responsible" for the effects of climate change.[62] This difficulty has led to *reductio ad absurdum* illustrations like the prospect of Grandma being held liable for climate change harms, because her choice to drive to church on Sunday instead of walking exceeded her annual emissions budget.[63] While most would agree that Grandma should escape liability, it is unlikely that the same is true about the 15 companies which are said to cause around 75% of New Zealand's emissions.[64] Whilst at different ends of the spectrum, however, both Grandma and these 15 entities are net-positive emitters contributing to the effects of climate change. The challenge, therefore, is providing a principled basis for distinguishing between the two extremes, a process which the Court of Appeal labelled as an "indefinite and inevitably far-reaching process of line drawing."[65]

One way that such a line can be drawn by the Supreme Court is to simply apply conventional principles of actionability in public nuisance. As already discussed, the law allows for some interferences with public rights which, while inconvenient, are not actionable public nuisances.[66] Such interferences can be described as *de minimis non curat lex* – "a trifling matter does not concern the law."[67] This rule recognises that there are some "intangible injuries" which "must be accepted as the price of living in society", in respect of which no relief should be granted.[68] Applying this to climate change, emissions which cause "trivial or immaterial consequences" to other members of society can be seen as *de minimis*.[69] Bullock extends this analysis by delineating ordinary, domestic tasks like personal travel and home heating as "primary" emissions, and extraordinary endeavours such as large-scale agriculture and energy generation as "secondary" emissions.[70] Generally, only secondary emitters, to the extent that they fail properly to offset their emissions, may be defendants in a public nuisance action, with the vast majority of primary emitters failing to cross the *de minimis* threshold.[71]

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[62] Douglas A Kysar "What Climate Change Can Do About Tort Law" (2011) 41 (1) Env Law 1 at 18.
[63] At 16.
[64] *Smith v Fonterra Co-Operative Group Ltd* [2022] NZSC 35 Appellant's Submissions to the Court in Support of Application for Leave to Appeal at 6.
[65] CA Judgment, above n 8, at [27].
[66] Bullock, above n 45, at 1148.
[67] Bullock, above n 45, at 1150.
[68] Bullock, above n 45, at 1151.
[69] Bullock, above n 45, at 1152.
[70] Bullock, above n 45, at 1152.
[71] Bullock, above n 45, at 1153.

This is possibly the most coherent legal line possible in respect of a problem as complex as climate change, but it is not without difficulties. Whilst the liability of large secondary emitters is clearly covered, the potential liability of primary emitters remains a challenge. Bullock's own analysis acknowledges this, suggesting that an individual who "takes long-haul flights nearly every week" may well cross the *de minimis* threshold, although one that "runs their air conditioning slightly lower than another" likely would not.[72] This calls into question exactly where any proposed threshold would lie in respect of individual, primary emitters. A further difficulty lies in the liability of the class of entities that sell products which release greenhouse gases when burned.[73] Z Energy, one of the seven defendants in the *Smith* litigation, has voluntarily offset its operational, or "secondary" emissions for several years, such that it is a net zero emitter in this respect.[74] Considering that the rest of its emissions stem from the everyday use of its products by customers, the majority of which are "primary" activities, should these actors still be liable? Mr Smith argues they should, considering that they "known, intend and encourage end use consumers to burn their products".[75] Regardless, such questions are difficult to reconcile with the above principled framework. As a result, this conception of liability begins as clear cut when dealing with large, industrial net emitters like many of the defendants in *Smith*. However, the lines become increasingly murky in regard to both large individual emitters, as well as those companies whose emissions are primarily non-operational.

As with the special damage rule though, an exercise in pragmatism is necessary. Considering that New Zealand's emissions are top-heavy towards a small subset of emitters, any plaintiff seeking injunctive relief from a party much outside of the aforementioned 15 companies would experience diminishing returns, particularly against the immense costs of litigation. As a result, while the actual pool of defendants may be relatively large, the amount that will practically be sued is likely much smaller, reducing the risk of arbitrary outcomes as feared by the Court of Appeal. Moreover, the line separating those emissions which are *de minimis* and those which are actionable does not need to be exhaustively defined by the Supreme Court in the first instance. Rather, as is typical of the common law, a body of precedent based on the factual circumstances of individual emitters could be built up over a series of

[72] Bullock, above n 45, at 1153.
[73] Kysar, above n 62, at 18.
[74] Z Energy "Accelerating the journey to net zero" (26 May 2022) <https://www.z.co.nz/about-z/news/accelerating-journey-to-net-zero/>
[75] Above n 25, at 3.

public nuisance actions, iteratively creating a more certain class of defendant. As such, there not only presently exists a doctrinal framework through which the Supreme Court could principally justify the liability of the defendants in *Smith*, but also the potential to iterate further on this into the future.

C Causation

The most complex doctrinal issue that falls to the Supreme Court, as was made clear by the Court of Appeal, remains that of causation. There are two significant causational issues which must be overcome in respect of any potential climate nuisance action. Firstly, attempting to apply the traditional 'but for' causation test raises a so-called "consequentialist alibi", that any individual defendant's emissions are too insignificant to make a difference.[76] This is particularly so in New Zealand, whose gross 7.5 tonnes of greenhouse gas emissions made up just 0.17 per cent of the world's total in 2018.[77] According to scholar Douglas Kysar, "it is only in combination with millions of other emitters" that the global greenhouse effect "becomes a radical and potentially devastating climactic experiment."[78] Secondly, there is the issue of temporality – most greenhouse gases persist in the atmosphere and warm the planet for decades or even centuries.[79] Plaintiffs therefore have to contend with historical emissions dating back to the start of the industrial revolution, when attempting to establish causation.

However, these issues are less significant in respect of public nuisance than other torts such as negligence. Causation is generally construed more liberally because of the tort's focus on whether there has been "unreasonable injury" to the *plaintiff*, as opposed whether there has been "unreasonable conduct" by the *defendant*.[80] As such, public nuisance does not typically require the defendant to engage in any particular acts towards the plaintiff, but rather only to in some way contribute to a rights-interfering state of affairs.[81] The Court of Appeal in *Smith* acknowledged this, holding that authority does exist for a defendant to be liable when they are one of many contributing to a nuisance, even if their actions alone would not

[76] Kysar, above n 62, at 35.
[77] Ministry for the Environment *New Zealand's Greenhouse Gas Inventory Snapshot 1990-2019* (April 2021).
[78] Kysar, above n 62, at 35.
[79] Kysar, above n 62, at 40.
[80] Thomas W Merrill "Is Public Nuisance a Tort?" (2011) 4(2) JETL 1 at 16.
[81] At 17.

necessarily cause the harm – the 'but for' test is not applied.[82] Moreover, the issue of temporality is also minimised when the relief sought is injunctive, seeking to restrain defendants from future emissions as opposed to recovering damages for harms caused by emissions from the past. From a causation perspective, these features make public nuisance best suited in tort "address complex collective action problems connected to important common resources, often caused by multiple sources", and explain why it has become so popular in respect of climate change.[83] Indeed, public nuisance is no stranger to dealing with harmful emissions, having contributed to abating smoke pollution during the industrial revolution.[84] Mr Smith also draws on a number of 19th century river pollution cases in his submissions, proceedings which were successful despite it being unclear what pollution was coming from which factories, or even whether all the polluters were before the court.[85] The argument is that these cases demonstrate a historical willingness of the Courts to hold emitters liable for a nuisance which would occur independently of their contribution, so long as it can be proven that they in some way contributed to that interference.

As discussed above however, the Court of Appeal held that applying these principles to climate change would not be "a natural and rational extension" of them.[86] The river pollution cases involved a 'finite' number of emitters, which when brought before the Court, formed either a majority or at least a determinate fraction of that pollution.[87] As a result, responsibility could be apportioned fairly and the nuisance abated. The circumstances are different in respect of climate change, which involves an enormous number of emitters, only a tiny fraction of which can possibly be brought before the Court. This calculus is further complicated by the fact that greenhouse gases do not "directly and locally impair human health and ecosystems" in the same way as smoke or water pollution.[88] However, if the standard of causation in public nuisance is accepted to be whether "the defendant's conduct can be identified as forming any part of an interference with a public right" then should the defined number of contributors, or their presence before the Court, even matter?[89]

[82] CA Judgment, above n 8, at [90].
[83] Bullock, above n 45, at 1155.
[84] Markey, above n 4, at 1552.
[85] McLay, above n 1.
[86] CA Judgment, above n 8, at [92].
[87] Above n 25, at 29-32.
[88] Kysar, above n 62, at 17.
[89] Bullock, above n 45, 1166.

In a rapidly advancing legal context, many Courts are showcasing willingness to use contemporary attribution science to precisely calculate the extent of an actor's contribution to climate change.[90] As such, it is increasingly less practical to argue "the infeasibility of disaggregating defendants' contributions to climate change" as a valid defence.[91] It therefore seems open for the Supreme Court to hold that a defendant is a legal 'cause' of a particular nuisance so long as their contribution, however small, can be quantified as forming part of the interference. This is consistent with the approach adopted in the American case of *Comer v. Murphy Oil USA*, where is was held that an indirect causal relationship will suffice as long as there was "a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant."[92] The relevant test was simply whether the emissions in question "cause[d] or contribute[d] to the kinds of injuries alleged by the plaintiffs."[93] Such a framework would provide no defence to a party arguing that that other contributions to the nuisance may still continue, nor that stopping their own contribution may not abate the interference.[94]

While it appears doctrinally possible for the Supreme Court to adopt a causal framework of this nature, questions remain over whether such an approach is appropriate in tort law. As such, the following section will examine the 'scope' of public nuisance, with a view of determining whether adopting the above recommendations is both appropriate, and desirable.

V Should public nuisance apply to climate change?

A The scope of the tort

A significant policy concern of the Courts in *Smith* was that extending the scope of public nuisance to cover climate change, as proposed by this paper, would be "radical" and "contrary to the common tradition".[95] These concerns are shared by many scholars, with the use of public nuisance as something of a "super tort"[96] to address a variety of complex

[90] *Lliuya v RWE AG* Higher Regional Court Hamm, Az 5 U 15/17, 30 November 2017.
[91] Kysar, above n 62, at 37.
[92] *Comer v Murphy Oil USA* 585 F 3d 855 (5th Circuit 2009) at 864 per Judge Dennis.
[93] At 865 per Judge Dennis.
[94] Bullock, above n 45, at 1166.
[95] CA Judgment, above n 8, at [15].
[96] Merrill, above n 80, at 4.

societal issues described as an unprecedented application of the tort, beyond its appropriate bounds.[97] Many of these so-called "traditionalist" critiques are rooted in the idea that public nuisance was never intended for these type of problems, and should therefore be limited to the set of situations which it covered at some earlier point in time.[98] There are numerous examples of judges relying on such arguments to block novel actions in public nuisance, with the New Jersey Supreme Court mentioning the word "tradition" twelve times and "history" twenty-three in its rejection of a claim against lead paint producers.[99] However, considering that public nuisance is now several centuries old, there are questions over what a return to "tradition" would actually look like. As mentioned, the tort has a history of addressing pollution during the industrial revolution, an application which could not have possibly been envisioned by the first public nuisance plaintiffs. In turn, the tort's contemporary application to climate change would be similarly inconceivable to a Victorian river pollution plaintiff. The reality is a slow and gradual expansion in the scope and application of the tort over multiple centuries in response to "far-reaching transitions" in quality and standard of life, each of which would appear "radical" when viewed from some earlier perspective.[100] Public nuisance has always been reactive to the issues of the day, so to deny standing on the basis of "tradition" would be to contradict the tort's very nature.

A further concern is that accommodating climate change within the doctrine of public nuisance would cut across the role of tort law more generally, "built as it is on a paradigm of harm in which A wrongfully, directly and exclusively injures B."[101] Defendants have a right to ask whether it is just and equitable to be liable in tort for harm which would occur entirely independently of their actions, or for that matter, independently of the actions of every emitter in New Zealand. This is particularly the case given the enormous costs on businesses of imposing injunctions of the kind sought. These concerns have led climate change to be described as "the paradigmatic anti-tort", an issue so complex that it gives Courts "ample reason … to prevent climate change tort suits" from reaching trial.[102] This attitude is clearly present in both *Smith* judgments, with the Courts opting to express

[97] Markey, above n 4, at 1540.
[98] Kendrick, above n 3, at 36.
[99] Kendrick, above n 3, at 36.
[100] Liz Fisher "Climate Change, Legal Change and Legal Imagination" (13 December 2021) UCL Centre for Law and Environment < https://www.ucl.ac.uk/law-environment/blog-climate-change-and-rule-law/climate-change-legal-change-and-legal-imagination>
[101] Kysar, above n 62, at 3.
[102] Kysar, above n 62, at 4.

sympathy for the plaintiff's plight, but direct legal responsibility elsewhere. As mentioned however, this attitude is deeply unsatisfactory given the existential threat posed by climate change, described even by the respondent counsel as "a problem with no equivalent in our history".[103] In their own right, vulnerable plaintiffs have a right to ask whether it is just and equitable that they should bear the greatest costs of climate change, and because one defendant is not capable of causing the nuisance on their own, whether no defendant can be held liable at all. As such, it is clear that if tort itself is to remain relevant in addressing the complex, inter-connected issues of our time, some paradigm-shifting is required.

This perspective is reflected in Liz Fisher's concept of 'legal imagination', defined as "the collective mental constructs that are deployed by lawyers and legal scholars in thinking about law and how it operates".[104] For Fisher, engaging with legal imagination is crucial in relation to climate change given its unprecedented complexity, which has led to a "lack of existing grooves of legal reasoning".[105] Fisher contends that "responding to climate change requires change"[106] – lawyers and judges alike should attempt to *evolve* the way they conceive existing law in light of these new circumstances, rather than abandoning that law because it "isn't fit for purpose".[107] If not, then there is a danger of creating a "binary", where our understanding of law becomes fixed and the only way forward is through the very same radical departure feared by the Court of Appeal.[108] Were the Supreme Court to adopt a similar focus on "tradition", it may become difficult to find any appropriate legal avenues to confront such a novel issue, short of creating entirely new ones. This analysis is consistent with that of Kyzar, who counsels against judicial retrenchment into "a narrow, classical liberal conception of tort" in response to climate change, arguing that to do so would be "at the long-term risk of the social relevance and viability of the tort system".[109]

An example of such legal imagination can be seen in the case of *State of the Netherlands v Urgenda Foundation*. In that case, the Supreme Court of the Netherlands upheld their Court of Appeal's decision in directing the State to reduce greenhouse gases by the end of 2020

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[103] *Smith v Fonterra Co-Operative Group Ltd* Synopsis of Submissions for First to Fifth Respondents on Appeal to the Supreme Court at 5.
[104] Fisher, above n 100.
[105] Fisher, above n 100.
[106] Fisher, above n 100.
[107] Professor Liz Fisher "Climate Change, Accountability and Adjudication" (CCCS Global Public Law Seminar, Melbourne Law School, online, 5 May 2022).
[108] Fisher, above n 107.
[109] Kysar, above n 62 at 48.

by at least 25% compared to 1990.[110] In response to arguments that the Netherlands' contribution to climate change "is very small and reducing emissions … makes little difference on a global scale", the Court held that the State still had a duty to 'do their part' to reduce emissions, as far as their capabilities allowed.[111] Although that decision was made in the particular context of human rights and involved the State as opposed to defendant companies, the reasoning of the Court nonetheless represents the sort of paradigm-shifting which could, and should, be adopted by the Supreme Court in *Smith*. Although public nuisance clearly cannot *solve* climate change in its own right, the existential magnitude of the problem dictates that the Courts should at least *try*, as opposed to simply flagging the issue as non-justiciable in tort. Given the existence of a legitimate doctrinal framework, it is argued that the Supreme Court should exercise legal imagination in evolving the way that they conceive this law, even if doing so may extend beyond the traditionally understood paradigm of tort.

B Regulatory response

A secondary concern is the Courts' clear preference that climate change be handled exclusively by the legislature. For the Court of Appeal, involving the common law was seen as "ineffective, inefficient and likely to be socially unjust".[112] This was not always the case – public nuisance originally emerged in an "unpoliced and unregulated" society, regulating risks of harm to the public "long before regulation was assumed to be an important and proactive government responsibility."[113] However, over the course of the 20th century, the administrative model of government gradually expanded to overtake public nuisance as the primary form of societal risk regulation.[114] In the present day, it is widely acknowledged that the legislature is best placed to resolve matters of public right.[115] This is particularly so with issues implicating large numbers of individuals with conflicting interests, such that the majority agree that a particular activity is bad, but disagree as to how the costs of that wrong should be apportioned.[116] It seems obvious that the best institution to make these decisions

[110] *The State of the Netherlands v Urgenda Foundation* Supreme Court of the Netherlands, 19/00135, 20 December 2019 at [7.5.1].
[111] At [5.7.7]-[5.8].
[112] CA Judgment, above n 8, at [35].
[113] Russo, above n 47, at 1977.
[114] Thomas W Merrill *Public Nuisance as Risk Regulation* (Columbia Law and Economics, Working Paper No. 655, 9 November 2021) at 16.
[115] Merrill, above n 80, at 32.
[116] Merrill, above n 80, at 32.

is that which represents society's preferences and carries a democratic mandate – the legislature. As a result, it is unsurprising that the Courts feel uncomfortable imposing additional liability on emitters already complying with statutory requirements. For some commentators, allowing the Courts to make determinations as to the liability of private actors for their emitting activities "would represent a major shift in policy making from popularly-accountable legislatures to courts."[117]

However, it is argued that the Supreme Court may adopt a different perspective on the relationship between public nuisance and legislative regulation, where the two are not seen as mutually exclusive but instead enjoy "an essentially pluralist relationship in which each [is] equally important in complementary ways."[118] There is a significant body of historical precedent which shows that public nuisance can work symbiotically with other regulation, achieving positive outcomes in both the short- and long-term.[119]

In the short term, public nuisance can perform a "gap-filling function" to supplement statutory environmental policy.[120] The high global volume of climate nuisance litigation suggests that many sources of regulation are currently failing to achieve a fair balance between "the entitlement to clean air and the entitlement to pollute."[121] This is no less true of New Zealand's response to climate change, which despite 20 years of regulation, has failed to prevent greenhouse gas emissions from *continuing to rise*.[122] Biogenic methane generated through agriculture, which constitutes 37% of New Zealand's national emissions, also continues to be excluded from regulation, indicating that farmers' rights to pollute are still being prioritised.[123] To date, three major judicial review actions have been brought in respect of New Zealand's climate change response, alleging that government policy is unsuitable to deliver on international commitments.[124] These examples evidence a strong discontent with climate policy in New Zealand, likely forming the initial motivation for the

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[117] Merill, above n 80, at 33.
[118] Ben Pontin "Nuisance Law and the Industrial Revolution: A Reinterpretation of Doctrine and Industrial Competence" (2012) 75(6) MLR 1010 at 1034.
[119] Markey, above n 4, at 1541.
[120] Russo, above n 47, at 1985.
[121] Markey, above n 4, at 1566.
[122] Hook, above n 49, at 197.
[123] Hook, above n 49, at 197.
[124] *Students for Climate Solutions Inc v Minister of Energy and Resources* [2022] NZHC 2116; *Lawyers for Climate Action NZ Inc v Climate Change Commission* [2021] NZHC 2832; *Thomson v Minister for Climate Change Issues* [2017] NZHC 733, [2018] 2 NZLR 160.

Smith litigation. Resultingly, it is argued that public nuisance is uniquely placed to provide plaintiffs with an "individual, reactive, short-term" remedy while legislative regulation is re-formulated to properly achieve its targets.[125] Granting an injunction against Dairy Holdings, milk suppliers who emit large amounts of methane, would make a good example, compelling a significant agricultural emitter to proactively decrease its climate impact before the first attempts to bring agriculture within New Zealand's regulatory framework even begin.[126]

In the long term, public nuisance can also help to create better climate policy by serving as a driver for a "later, more extensive regulatory effort".[127] The publicity from any victory in a public nuisance suit, or even from such a suit simply being allowed to proceed to full trial, would undoubtedly apply significant "legal, political and moral pressure" on the government to legislate more effectively.[128] As such, high-profile litigation like *Smith* can theoretically serve as a catalyst, creating political capital for law-making institutions to better combat the issue of climate change. Lawmakers can also evaluate the merits of any remedy granted by the Courts in formulating their own, subsequent regulatory response. Alternatively, it has been suggested that judicial control over emissions "is such an obviously bad idea it will serve as the stimulus for a movement to adopt a better one".[129] That is to say, the prospect of judge-made climate change law will be such daunting prospect to political and industry leaders that any form of legislative regulation will seem like a "lesser evil".[130] As such, while not a substitute for proper legislative regulation, climate nuisance actions can nonetheless play a significant role in both empowering and motivating Parliament to create better law.

One issue with such an approach is judicial preference-shaping. For some critics, it is inappropriate for a judge to rule a certain way in a case for the purpose of "stimulat[ing] political reform the judge regards as desirable."[131] To do so would be to adopt a "political conception" not typical of the judicial role.[132] However, many of the benefits discussed

[125] Randall S Abate "Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time" (2010) 85 Wash L Rev 197 at 243.
[126] Climate Change Response (Emissions Trading Reform) Amendment Bill 2019 (186-3).
[127] Markey, above n 4, at 1558.
[128] Abate, above n 125, at 245.
[129] Merrill, above n 80, at 32.
[130] Merrill, above n 80, at 32.
[131] Merrill, above n 114, at 25.
[132] Merrill, above n 114, at 21.

above arise purely as *side effects* of actions in climate nuisance being allowed to proceed in the first place, not as the result of any conscious preference-shaping. As such, it is argued that even allowing these cases to reach full trial will invariably result in better climate law-making in New Zealand, regardless of which decision a judge may reach in any particular case and without the requirement of any form of judicial bias. Moreover, as New Zealand's ultimate law-making body, Parliament maintains the mandate to supersede judicial decision-making, should it disagree with the verdict reached in any given case.

Whilst legislative regulation remains preferable as a *primary* means of combatting climate change, these tools are by no means perfect. Currently, New Zealand's regulatory response is lacking significantly in providing the outcomes required to escape the worst effects of climate change. It is therefore argued that public nuisance can and should act as a "backdrop and partner" to regulation in its goal of limiting warming to 1.5˚C, as opposed to being pre-empted by it.[133] Were the Supreme Court to permit such an approach, it is argued that the quality of New Zealand's climate change response would enhanced not undermined, both in the short and long term.

C Remedying the nuisance

Independent of the aforementioned policy issues, there remains a further institutional concern that Courts are *practically* ill-equipped to provide adequate remedies to the interferences complained of. Scholar Thomas Merrill argues that judges are limited in their capability to "collect and process large quantities of information about social problems", and particularly to "evaluate that information when it implicates disputed issues of science or economics".[134] Mirroring the Courts' concerns in *Smith*, Merrill contends that the judiciary lacks the fundamental scientific, economic and technological knowledge and resources to create appropriate remedies for highly technical issues like climate change.[135] As such, they are incapable of actually abating the nuisance.

As already acknowledged, it is true that public nuisance cannot *fix* climate change. However, it is argued that this reality should not prevent a plaintiff in any given case from

[133] Kysar, above n 62, at 5.
[134] Merrill, above n 80, at 32.
[135] Merrill, above n 80, at 33.

nonetheless seeking to stop any defendant's ongoing interference with their rights. Insofar as the Supreme Court is willing to accept that tort law must 'do its part' to combat climate change as suggested above, then the lack of a remedy capable of fully abating the nuisance should not be a barrier to a deserving plaintiff. If the tort is made out, then the plaintiff has suffered harm which warrants relief, regardless of the impacts of that relief on the overarching issue of climate change. The *Hamlin* line of cases pertaining to negligent building inspection lend support to this point.[136] Mr Smith's counsel argue that those cases did not seek to "use the law of negligence to solve Aotearoa's leaky building crisis", but instead used the tort to resolve each individual case in front of them, resulting in consequent developments in policy.[137]

Whilst important, these arguments still do not address the point that practically, Courts lack the *technical* expertise to fashion remedies of the kind sought by Mr Smith. However, considering that the seven defendants are already legislatively required to both measure and report their emissions, it is questionable whether simply overseeing a linear reduction in those emissions is actually beyond the technical capabilities of the Supreme Court.[138] Given the significant resources available, coupled with the Courts' history of providing technical relief in areas of the law such as the aforementioned leaky building cases, this appears not to be the case. It is therefore argued that Court of Appeal's appraisal of the relief sought as a "court-designed and court-supervised regulatory regime" is not an entirely accurate one.[139] As argued by Mr Smith's counsel, the prospective injunctions simply "call upon the court to abdicate its core judicial function of remedying civil wrongs", leaving complex issues of policy and regulation to be resolved, as is customary, by Parliament.[140] Whilst unusual, the Supreme Court is also not entirely unprecedented in providing such relief, with the Hague District Court in 2021 having granted a landmark injunction against Royal Dutch Shell, compelling the company to reduce its emissions by 45% by the end of 2030.[141]

As such, the Supreme Court is both capable and globally precedented in granting relief of the nature sought. Moreover, even if the Court were to hold that injunctive relief is

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[136] Above n 25, at 13.
[137] Above n 25, at 13.
[138] Climate Change Response Act 2002.
[139] CA Judgment, above n 8, at [26].
[140] Above n 25, at 59.
[141] *Vereniging Milieudefensie v Royal Dutch Shell Plc* The Hague District Court, C/09/571932 / HA ZA 19-379, 26 May 2021 at [4.4.55].

prohibitively complex, it is argued that the declarations secondarily sought could nonetheless have the expressive value of asserting the plaintiff's belief, and that of society, that more should be done to combat climate change.[142] As a result, whether or not any of the relief sought is capable of actually 'abating' the nuisance in the conventional sense, it is argued that this should not act as a barrier on a plaintiff's prospects for success in any climate-related action.

VI Conclusions

As is clear from both the High Court and Court of Appeal judgments in the landmark case of *Smith v Fonterra*, there are no shortage of issues facing the Supreme Court in its decision of whether or not to strike out the public nuisance cause of action for a third and final time. There remain significant difficulties with satisfying the special damage rule, selecting a principally justifiable class of defendant, as well as establishing causation. However, as is explored in the above analysis, none of these are insurmountable. By drawing on a mix of precedent and established legal principles, this paper provides a doctrinal framework through which a willing Supreme Court *can* overcome each of three aforementioned difficulties, and in doing so, allow public nuisance to proceed to full trial.

The reality of climate change is that many of its potential harms are urgent, and cannot afford to wait for the lengthy (and often ineffective) methods employed by the legislature. As such, it is argued that the Supreme Court should adopt a collaborative, rather than exclusive, relationship between public nuisance and regulation in New Zealand. While there remain significant countervailing policy concerns in the way of such an approach, as canvassed by this paper, it has perhaps come time to recognise that upholding these concerns may no longer serve the public interest.[143] Rather, it is argued that the Court should be unafraid to exercise its 'legal imagination', expanding and evolving the paradigm of what is understood to be 'public nuisance', as has so often occurred in the tort's history. Whilst not well-placed to independently abate the nuisance of climate change, the *Smith* litigation nonetheless represents an opportunity for the Courts to 'do their part' in combatting this generational, existential issue – and thus *should* proceed to full trial.

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[142] Markey, above n 4, at 1567.
[143] Hook, above n 49, at 204.

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