Change the System Not the Climate — A Principled Look at *Smith v Fonterra Co-operative Group Ltd*

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Climate change litigation is increasingly becoming an attractive pathway in the fight against governmental and commercial apathy towards climate change action. In New Zealand, the case of Smith v Fonterra Co-operative Group Ltd *sought to limit the emissions of our biggest corporate polluters through the common law. Smith's claims in public nuisance and negligence were struck out. However, the third action — an inchoate climatic tort — could be pleaded at trial. This article examines Smith's claim — a public right to private liability for greenhouse gas emissions — through the lens of climate justice. It explores the tenability of a novel tort for climate through traditional and contemporary theories of tort liability. It argues that corrective justice and economic efficiency are ill-suited to the challenges of a modern climatic tort. However, in turning to tikanga Māori and the foundations of public nuisance, there may be an opportunity to create a base for a tortious public right.*

1. INTRODUCTION

Climate change is one of the greatest challenges of our era. It has been described as a "wicked problem" as it presents incredible complexity, requires timely

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action, and lacks a central authority to address it.[1] In the legal sphere, climate change has caused a flood of litigation, multifarious in both its users and in its application. Public and private litigation has been pursued worldwide with plaintiffs ranging from children to countries, to corporations.[2]

The High Court decision of *Smith v Fonterra Co-operative Group Ltd* concerns itself with climatic liability in tort law.[3] The plaintiff Mr Smith sought relief in nuisance, negligence, and in a third action that would create a public right to private liability against seven different New Zealand-based greenhouse gas emitters for their damage to the climatic system.[4] The plaintiff sought an injunction, not damages. The first two actions were struck out but the third action — an inchoate tort — was allowed to be pleaded at trial.[5]

This article focuses on Smith's third action. It analyses the tenability of this tortious public right to private liability from first principles. First, it considers the right Smith claimed and evaluates whether it could be achieved through Smith's case as pleaded. Secondly, it interrogates the classical and contemporary foundations of tort law and examines whether these principles support liability for this kind of right. It concludes that prominent foundations of tort law — corrective justice and economic efficiency — do not support such a right. However, foundations can shift, and contemporary ideas may provide an opening for the novel tort in the future.

2. THE RIGHT IN *SMITH V FONTERRA CO-OPERATIVE GROUP LTD*

The third action in *Smith* focused on the creation of a novel tort. Smith claimed that the seven defendants in the case owed him a duty at law to:[6]

1 Kelly Levin and others "Overcoming the tragedy of super wicked problems: constraining our future selves to ameliorate global climate change" (2012) 45 Policy Sci 123.

2 See generally Pooja Upadhyay "Climate Claimants: The Prospects of Suing the New Zealand Government for Climate Change Inaction" (2019) 23 NZJEL 187; and Theodore Okonkwo "Protecting the Environment and People from Climate Change through Climate Change Litigation" (2017) 10 JPL 66 at 66.

3 *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419 at [6]–[12].

4 At [6]–[12].

5 At [109].

6 At [5].

> … cease contributing to damage to the climate system, dangerous anthropogenic interference with the climatic system and adverse effects of climate change through their emissions of greenhouse gases.

The litigation was used as a way to regulate the emissions of greenhouse gases.[7] Smith asked for an injunction that would require each emitter to reduce emissions from their activities annually, achieving net-zero emissions by 2030.[8] He referred to future losses and gave evidence that the defendants' release of greenhouse gases will contribute to the adverse effects of climate change.[9] His demand that the defendants undertake a fast-tracked emissions reduction (at a faster rate than Intergovernmental Panel on Climate Change recommendations) was based upon the idea that "the dangers associated with climate change are so significant that a precautionary approach is required".[10]

2.1 Climate Justice

Underpinning Smith's action is the idea of climate justice. Climate justice is framed as an inequality: those who are the most vulnerable to the harmful effects of climate change are the least responsible for the emissions that fuel it.[11] Climate justice adopts a multi-scalar analysis, as climate change disproportionately threatens least developed nations just as it most threatens disadvantaged communities and individuals.[12] For example, Bangladesh is forecast to face the worst effects of climate change despite contributing to less than 0.36 per cent of global emissions,[13] and lower socio-economic communities in Auckland are predicted to be more vulnerable to climate change.[14] The inequality is also fiscal: the ability to pay for the cost of

7 This is compared to other categories of climate change litigation as discussed in Helen Winkelmann, Chief Justice of New Zealand, Susan Glazebrook and Ellen France, Judges of the Supreme Court of New Zealand "Climate Change and the Law" (Asia Pacific Judicial Colloquium, Singapore, 28–30 May 2019) at 40.

8 *Smith v Fonterra Co-operative Group*, above n 3, at [12].

9 These adverse effects include sea-level risk, risks to food and water security, increasing extreme weather events, and economic losses: at [8].

10 At [7].

11 Maxine Burkett "Climate Justice and the Elusive Climate Tort" (2012) 121 Yale LJ F 115 at 115.

12 Sam Barrett "The necessity of a multiscalar analysis of climate justice" (2012) 37 Progress in Human Geography 215.

13 *Climate Change Profile: Bangladesh* (Ministry of Foreign Affairs of the Netherlands, April 2018).

14 Auckland Council Research and Evaluation Unit *Climate Change Risks in Auckland* (TR2019/019, 2019).

mitigation and adaptation to the changing climate[15] varies according to socio-economic status.[16]

Furthermore, climate justice is recognised in various legal agreements. The Paris Agreement is based on the principle of "common but differentiated responsibility and respective capabilities" resulting in flexibility to each nation's nationally determined targets,[17] and New Zealand's Climate Change (Zero Carbon) Amendment Act 2019 (Zero Carbon Act) considers the distributional impacts of climate change.[18] These laws highlight the communal nature of climate change, as the Paris Agreement encourages collective thinking for an aggregated target,[19] and the Zero Carbon Act sets up an all-encompassing emissions reduction framework.[20] However, the effectiveness of these instruments to achieve their stated aims is debatable. The Paris Agreement has no legal enforcement mechanisms for a failure to meet targets,[21] and in New Zealand the Zero Carbon Act appears to restrict the court to declaratory remedies for non-compliance.[22]

Who then should be liable for "a collective action problem so pervasive and so complicated as to render at once both all of us and none of us responsible"?[23] The pursuit of a public right to private liability is one response, as plaintiffs file suits as collective bodies, rather than as individuals.[24] Targeting private emitters[25] — those who supply, produce, support, or combust products which emit greenhouse gases — has been a popular but unsuccessful litigation strategy

15 Chambwera and others estimate that global adaptation and mitigation costs are in the range of US$70 billion to 100 billion a year: Muveve Chambwera and others "Economics of adaptation" in Christopher B Field and others (eds) *Climate Change 2014: Impacts, Adaptation, and Vulnerability — Part A: Global and Sectoral Aspects. Working Group II Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, Cambridge, 2014) at 17.4.3.

16 For example, a rich landowner in the United States may be able to construct a seawall to protect against sea-level rise, whereas a farmer in Bangladesh who cannot access the money or the resources may be forced to flee their property.

17 Paris Agreement (opened for signature 22 April 2016, entered into force 4 November 2016) UN Doc FCCC/CP/2015/10/Add.1, preamble.

18 Climate Change Response (Zero Carbon) Amendment Act 2019.

19 Paris Agreement, above n 17, at 3.

20 At pt 1A subs 5Q.

21 Paris Agreement, above n 17.

22 At pt 1B subs 5ZM(2).

23 Douglas A Kysar "What Climate Change Can Do About Tort Law" (2011) 41 Environmental Law 1 at 4.

24 In Geetanjali Ganguly, Joana Setzer and Veerle Heyvert "If at First You Don't Succeed: Suing Corporations for Climate Change" (2018) 38 Oxf J Leg Stud 841, the authors discuss strategic private climate litigation where plaintiffs range from shareholders to villages to states.

25 Ganguly, Setzer and Heyvert, above n 24, at 841–842.

worldwide.[26] Despite setbacks, litigation continues.[27] Outrage grows with news that fossil fuel companies worked to discredit climate science,[28] and with the publication of studies that show that only 90 corporations have been responsible for 63 per cent of global emissions from the Industrial Revolution through to 2010.[29]

In New Zealand, some of the Justices of the Supreme Court have noted extra-judicially that, potentially, "the demand for climate justice will be a demand the courts struggle to satisfy"[30] and have highlighted that particular groups such as indigenous peoples will be especially affected.[31] For Māori, climate change is predicted to disproportionately exacerbate many of the inequalities they already face in accessing health, infrastructure and natural resources.[32] Given this injustice, the voice of indigenous groups must not be forgotten in the search for an environmentally just public right. There is an aspect to environmental justice that is unique to Māori in their cultural connection to the land as tangata whenua and their history of dispossession and alienation from it.[33] The aspirations of Māori in this field are varied.[34] In Smith's claim, indigenous environmental justice centres around its substantive aspect:[35] that Māori will face a greater environmental burden due to climate change. However, it is now apparent that there is specific scope for Māori values to be addressed through the common law. In 2013 *Takamore v Clarke* established that New Zealand must recognise tikanga values (the Māori world-

26 Okonkwo discusses various unsuccessful cases against emitters in Australia, the United States, Canada, and the United Kingdom: Okonkwo, above n 2, at 67–72.

27 Okonkwo, above n 2, at 74.

28 Briony Bennett "Big Oil, Big Liability: Fossil Fuel Companies and Liability for Climate Change Harm" (2019) 23 NZJEL 153 at 165; Shannon Hall "Exxon Knew about Climate Change almost 40 years ago" (26 October 2015) Scientific American <www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/>.

29 See Richard Heede "Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010" (2014) 112 Climatic Change 229. For an updated (not peer-reviewed) estimate see Climate Accountability Institute "Carbon Majors" (8 October 2019) <www.climateaccountability.org/carbonmajors.html>.

30 Winkelmann, Glazebrook and France, above n 7, at 136.

31 At 153.

32 Darren N King, Guy Penny and Charlotte Severne *The climate change matrix facing Māori society* (New Zealand Climate Change Centre, Wellington, January 2010).

33 Catherine J Iorns Magallanes "Access to Environmental Justice for Māori" (2017) 15 YB NZ Juris 142.

34 Iorns Magallanes describes three goals: the respect of Māori as decision-makers, the recognition of their cultural values in both decision-making and the law, and equality in these processes: at 143.

35 See Iorns Magallanes, above n 33, at 147.

view) in the common law.[36] As Māori are more likely to be victims of climate change, the extent to which tikanga may allow for Smith's claim must be an important consideration.

3. TORT LAW

The discussion so far has suggested that Māori are likely to suffer greater losses as a result of the continuing emission of greenhouse gases. Stephen Todd notes that "loss can always be left to lie where it falls. The rules of tort determine when it should be shifted to another."[37] This considered, the bigger question, "Why does the loss shift?" has a less definite answer. The principles and policies that underpin tort law are varied, although there is debate as to what variations are valid. On the one hand, theorists like Ernest Weinrib take a formalistic view in which the structure of the law dictates what goals can be pursued through it. This view would limit the rationality of tort law to its core properties, which Weinrib argues must take the form of either distributive or corrective justice.[38] This approach prevents the exploration of other rationalities such as economic efficiency or tikanga, and confines the process of developing the law to mapping fixed tortious concepts to novel situations.[39] On the other hand, Jules Coleman argues that an instrumentalist account of the law must be followed to explore the foundations of legal doctrine. Such an approach means that the substantive ambitions of the law mould its structure, so tort law's current principles can be compared to alternative policies not yet recognised by the law of tort but apparent in the wider law.[40]

Anchoring these theories in the goals of this article, an instrumentalist approach to the law is necessary. Law and legal values are not stable or fixed and are being constantly evaluated by the courts. A new tort is founded by a court's decision that a value ought to be protected if it considers that the current structures are unfit for purpose. This maintains the law's legitimacy as a promoter and challenger of ideas in a changing world. In turn, a novel tort also looks at the foundational values of the current tort regime. These may also be unfit, but this can only be decided by critically evaluating them against Smith's claim.

36 *Takamore v Clarke* [2012] NZSC 116, [2012] 1 NZLR 573 at [164].
37 Stephen Todd and others (eds) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [59.1.4].
38 See generally EJ Weinrib *The Idea of Private Law* (Oxford University Press, Oxford, 2012): and Jules L Coleman *Risks and Wrongs* (Cambridge University Press, New York, 1992) at 10.2.
39 Coleman, above n 38, at 10.2.
40 At 10.2.

4. TO WHAT EXTENT DO THE PRINCIPLES AND POLICIES THAT UNDERPIN TORT LAW SUPPORT LIABILITY FOR SMITH'S PROPOSED PUBLIC RIGHT TO PRIVATE LIABILITY?

4.1 Corrective Justice

Corrective justice is a moral theory that underpins tort, and it stands in opposition to the theory of liability founded in economic efficiency. Its roots lie in Aristotle's *Nicomachean Ethics* and it is premised on the idea of involuntary transactions,[41] and restoration. In the instance of an involuntary transaction such as a negligent act, the party that gains should restore the loss of the other through a penalty. The sum of this equilibrium is corrective justice.[42] Two main categorisations of the principle have been developed, one by Jules Coleman and the other by Ernest Weinrib.[43]

Jules Coleman asserts that every theory of corrective justice must account for three things: human agency, rectification, and correlativity.[44] Agency means that only losses stemming from a human agent be claimed.[45] Rectification signifies that corrective justice claims are claims to repair wrongful losses, and correlativity means there is an isolation of the parties which renders corrective justice only appropriate to them.[46] Coleman's theory of corrective justice consists of two parts: the annulment theory and the relational norm. Annulment suggests that corrective justice only annuls wrongful losses, and the relational norm imposes a duty of individual responsibility to repair wrongs and losses. Coleman's mixed theory does not require that the duty of rectification must be discharged by the injurer. Someone other than the injurer can justly volunteer to discharge the duty, but the pool of victims is limited to only those who have been wronged.[47]

Similarly, Ernest Weinrib's theory is founded on the relationship and duties between the victim and the injurer. It is based on the Kantian right: "the sum

41 This means involuntary actions that reciprocally affect the parties to the transaction.

42 James Gordley "Tort Law in the Aristotelian Tradition" in David G Owen (ed) *The Philosophical Foundations of Tort Law* (Oxford University Press, New York, 1997) 131 at 131.

43 Stephen R Perry "The Moral Foundations of Tort Law" (1992) 77 Iowa L Rev 449 at 449.

44 Jules L Coleman "The Practice of Corrective Justice" (1995) 37 Ariz L Rev 15 at 26.

45 At 26.

46 At 26–27.

47 Jules L Coleman "The Mixed Conception of Corrective Justice" (1992) 77 Iowa L Rev 427 at 443.

of conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom".[48] Weinrib thinks that the discrepancies in the gains and losses of the parties are normative, and are measured against the governing norm of the Kantian right. The liability of the defendant results in the rectification of these normative gains and losses "in a single bipolar operation".[49] Only the plaintiff is entitled to recover in their own right as a victim, as the normative bond is only against the person that the defendant owed a duty to.[50]

4.1.1 Corrective justice and climate justice

At first glance, corrective justice appears to fit the demands of climate justice. Scholars such as Daniel Farber and Matthew Adler see promise in its usage for climate change liability.[51] The case of the *Native Village of Kivalina v ExxonMobil Corporation* illustrates this point well.[52] In this case, the villagers claimed that climate change reduced the sea ice that protected their town from coastal storms. The subsequent destruction of their lands forced them to contemplate relocation costing US$95–400 million.[53] The defendant, ExxonMobil, is a carbon major and has contributed 41.9 billion tonnes of carbon dioxide to the atmosphere since 1965.[54] ExxonMobil's historic emissions have been traced to an identifiable change in global mean temperature rise.[55] Accordingly, in this case there seems to be an identifiable victim, injurer and loss. However, when these notions are unpacked further, they unravel. Exxon may make an attractive "injurer" but even if their emissions could be sufficiently attributed, there is a wrongdoer identity problem.[56] The complex chains around greenhouse gas emissions mean that the losses and gains cannot tidily cancel each other out. Exxon may have gained monetarily from the supply

48 Weinrib, above n 38, at 95.
49 At 136.
50 At 143.
51 See generally Daniel A Farber "Basic Compensation for Victims of Climate Change" (2007) 155 U PA L Rev 1605; and Matthew D Adler "Corrective Justice and Liability for Global Warming" (2007) 155 U PA L Rev 1859.
52 *Native Village of Kivalina v ExxonMobil Corp* 663 F Supp 683 (2009).
53 At 869.
54 Matthew Taylor and Jonathan Watts "Revealed: the 20 firms behind a third of all carbon emissions" *The Guardian* (online ed, London, 9 October 2019) <www.theguardian.com/environment/2019/oct/09/revealed-20-firms-third-carbon-emissions>.
55 B Ekwurzel and others "The rise in global atmospheric CO2, surface temperature, and sea level from emissions traced to major carbon producers" (2017) 144 Clim Change 579.
56 Eric A Posner and Cass R Sunstein "Climate Change Justice" (2008) 96 Geo LJ 1565 at 1595–1596.

of fossil fuels but this gain is not entirely theirs. Societies that combusted the fuel may have also benefited, including whole chains of transactions and actors relying on fossil fuels over various generations. A single bipolar action denies this complexity and oversimplifies the problem.

Yet Daniel Farber in his case for climate compensation refutes this limit to corrective justice, and thinks that this demand for precision with moral claims is unnecessary in our complex modern world.[57] What matters to Farber is not a precise matching of individual wrong to individual harm, but that we can impose morality on serious harms created by modern societies.[58] Despite the attractiveness of this simplification, Farber accepts that this focus would not respond to the mismatch of individual contribution. Looking holistically, Farber denies the importance of individual corporation contribution which is key to *Smith*. Instead, Farber looks to the accountability of states relative to other states.[59] In *Smith*, a conception of corrective justice where differences in individual responsibility are not considered would be fatal. Climate justice in *Smith* turns on corporate individual actions being weighed against the collective, rather than a shared onus of moral responsibility.

Moreover, all theories of corrective justice limit liability to identifiable parties, meaning those individuals who gain and lose out of a situation. Coleman identifies this limitation, stating that a person does not "have a claim in corrective justice to repair in the air, against no one in particular".[60] In *Smith*, it is hard to label a distinct climate loss suffered by the public,[61] because if only some of the population suffer due to a climatic event like sea-level rise, it is a stretch to give the right to claim to all people. Further, corrective justice limits liability temporally; its obligations are confined to past actions. Corrective justice does not support future victims like the village of Kivalina, who have not yet been forced to relocate. On these bases, corrective justice is an unsuitable foundation for Smith's claim.

4.2 Economic Efficiency

The idea that tort law deters actions provides a basis to consider whether it can be judged by economic efficiency.[62] This economic explanation of the law relies

57 Daniel A Farber "The Case for Climate Compensation: Justice for Climate Change Victims in a Complex World" [2008] Utah L Rev 377 at 397.
58 At 397–398.
59 At 400.
60 Coleman, above n 44, at 26.
61 Defined as the sum of ordinary people in general in the Oxford English Dictionary <www.oed.com/view/Entry/140404?rskey=njnihU&result=1&isAdvanced=false#eid>.
62 Todd and others, above n 37, at [59.1.4].

on the assumption that individuals are rational maximisers of wealth, and that the role of the law acts to moderate the relative prices attached to alternative individual actions.[63] There are several varied economic approaches to tort law that have both normative and positive dimensions.[64] The positivist dimension explains tort law by showing how economic theory matches up with tortious concepts,[65] whereas the normative dimension makes conditional claims about the desirable goal of tort law and what the rules of liability ought to be.[66] As this article is focused on the foundation of a novel tort, it will employ the latter approach.

Calabresi develops an economic theory of law through the lens of accident prevention.[67] It is grounded in a forward-thinking view of tort law that aims to incentivise behaviour that is maximally efficient (maximises wealth) for society.[68] To Calabresi, wealth in itself does not constitute social improvement unless combined with other goals of utility or equality.[69] He denies that economic efficiency is separate from the idea of justice. Tort law must reduce cost, but is constrained, as the cost reduction process must comply with our general sense of fairness.[70]

It primarily does this through deterrence,[71] and secondarily through imposing costs on the party best equipped to deal with the loss.[72] In practice, general deterrence is created through liability and treats accident costs of liability just as it treats other costs of goods and activities. If "all activities reflect the accidents costs they 'cause', each individual will be able to choose … whether an activity is worth the accident cost it 'causes'".[73] As the activity that causes an accident has a higher cost, the individual is deterred from it. However, this does not address the issue of who liability should be imposed on. Calabresi encourages a more holistic approach to this question, stating that no single goal suggests

63 Francesco Parisi "Positive, Normative and Functional Schools in Law and Economics" (2004) 18 Eur J Law Econ 259 at 262.

64 There is also an emerging functional approach which looks at the link between individual preferences and social outcomes but this is irrelevant for this article: see Parisi, above n 63.

65 See generally Centro G Veljanovski *Economic Principles of Law* (Cambridge University Press, Cambridge, 2007); and William M Landes and Richard A Posner "The Positive Economic Theory of Tort Law" (1980) 15 Ga L Rev 851.

66 See generally Guido Calabresi *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, New Haven, 1970).

67 Calabresi, above n 66.

68 Calabresi, above n 66.

69 Guido Calabresi "An Exchange: About Law and Economics — A Letter to Ronald Dworkin" (1980) 15 Hofstra L Rev 553.

70 Calabresi, above n 66, at 25–26.

71 At 68–70.

72 Calabresi, above n 66.

73 At 70.

what any particular system of liability should be.[74] Generally, there should be no judgment for the plaintiff unless it minimises costs going forward; courts should engage in a forward-thinking analysis.[75]

Similarly, other theorists do not attach a general rule to the imposition of liability.[76] Posner thinks that the goal of maximising wealth is both the best positive and normative guide to tort law. In this conception of economic efficiency, wealth is defined broadly to include the value of all economic and non-economic goods and services (life, leisure, freedom).[77] In Posner's theory, wealth maximisation resonates with other moral traditions in tort law. It is the intersection of wealth maximisation with other moral principles that provides a comprehensible theory of what tort should do.[78]

The public right to private liability in *Smith* has similarities with Calabresi's accident prevention model. Climate justice mirrors the dual aims of accident prevention; it wants to reduce the costs of climate change mitigation[79] and tries to achieve fairness in the distribution of these costs through targeting the biggest contributors. The short-term wealth that greenhouse gas emissions produces benefits society now, through job creation and increase in gross domestic product. However, it does not achieve the equality Calabresi deems necessary, as the future costs it produces are to the detriment of the long-term wealth of society.[80]

Furthermore, the rationale behind *Smith* is consistent with Posner's idea that tort must maximise wealth in a holistic sense. Climate change issues do not only pose risks to the material financial value of goods and services,[81] but also to the value of human rights to life, culture and subsistence.[82]

Despite the overlap in principle between *Smith* and economic efficiency, the translation of these principles into the imposition of liability becomes more

74 At 34.

75 Michael Pressman "The Compatibility of Forward-Looking and Backward-Looking Accounts of Tort Law" (2016) 15 UNH L Rev 45 at 52.

76 Landes and Posner describe how the economic model can be used to decide negligence or strict liability but does not provide a general view to when liability should be imposed in a novel case: above n 65.

77 Richard A Posner "Wealth Maximisation and Tort Law: A Philosophical Inquiry" in David G Owen (ed) *The Philosophical Foundations of Tort Law* (Oxford University Press, New York, 1997) 99.

78 Posner, above n 77.

79 Chambwera and others, above n 15.

80 Nicole Glanemann, Sven N Willner and Anders Levermann "Paris Climate Agreement passes the cost-benefit test" (2020) 11 Nat Commun 1.

81 Simon Dietz and others explain how climate change poses risks generally to global asset values in "'Climate value at risk' of global financial assets" (2016) 6 Nat Clim Change 676.

82 Daniel Bodansky "Introduction: Climate Change and Human Rights: Unpacking the Issues" (2010) 38 Ga J Int'l & Comp L 511.

difficult. If the overarching goal of economic efficiency is to deter, it must be asked whether this is achieved in Smith's case. Deterrence implies choice, whereas the nature of an injunction is to impose an action. The imposition of an injunction on emissions takes away the emitter's ability to choose to lower their emissions themselves. It is not equal in this restriction of freedom as it leaves others who pollute less (the public) with the choice to partake in activities that produce emissions. The choiceless scenario violates the individual liberty at the heart of economic efficiency — that individuals know the best way to maximise wealth for themselves.[83]

Who is best equipped to deal with the loss is also up for debate. Calabresi discusses various methods of liability which help decide who is in the best position to pay: general and social insurance, fault and enterprise liability, loss spreading, and deep pocket methods.[84] *Smith* tries to impose a deep pocket loss-spreading method of liability that puts a large burden on a certain group to minimise social and economic dislocation.[85] Given the global nature of climate change, New Zealand emitters make a minuscule contribution to the global emissions budget.[86] To hold them liable and not other emitters like the carbon majors may do injustice in itself. Finally, there is no guarantee that imposing liability on the defendant would reduce future costs. The pervasiveness of climate change means that unless action is taken on a global scale, the future costs of climate change are unlikely to diminish. All things considered, economic efficiency is not a suitable base for Smith's inchoate tort.

4.3 Tikanga Māori

Tikanga is not a singular concept.[87] It is rich in its depth and varied in its application. It originates in the descendants of Kupe, as Justice Joseph Williams describes:[88]

> The system of law that emerged from the baggage Kupe's people brought and the changes demanded of his descendants by the land itself have come to be

83 Parisi, above n 63, at 262.
84 Calabresi, above n 66, at ch 4.
85 At 40.
86 New Zealand as a whole contributes to 0.17 per cent of the total global greenhouse gas emissions: per Statistics New Zealand "New Zealand's greenhouse gas emissions" (18 April 2019) Stats NZ <www.stats.govt.nz/indicators/new-zealands-greenhouse-gas-emissions>.
87 Richard Benton, Alex Frame and Paul Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013).
88 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1 at 2.

> known as tikanga Māori: "tika" meaning correct, right or just; and the suffix "nga" transforming "tika" into a noun, thus denoting the system by which correctness, rightness or justice is maintained.

This first law of Aotearoa that Williams J recounted[89] represents a set of beliefs, values and practices that applies to the affairs of Māori groups and individuals.[90] Williams J regards tikanga's key values as follows:[91]

- whanaungatanga or the source of the rights and obligations of kinship;
- mana or the source of rights and obligations of leadership;
- tapu as both a social control on behaviour and evidence of the indivisibility of divine and profane;
- utu or the obligation to give and the right (and sometimes obligation) to receive constant reciprocity; and
- kaitiakitanga or the obligation to care for one's own.

However, these core values are debatable, as tikanga can vary by iwi and hapū.[92] Professor Sir Hirini Moko Mead includes noa and ea, the practice of restoring balance, in his description of values that underpin tikanga.[93] Durie J adds wairua (spirituality) and aroha (love, generosity) to the list.[94] What this variation in interpretation underscores is that tikanga is not static, and like the Western conception of law, it adapts and grows to accommodate change and difference in society and practice.[95] Whether tikanga has been upheld is measured against tikanga's ideal form.[96] Just as tort law is idealist in its belief that corrective justice can be fully achieved through compensation, tikanga is idealist in its application of justice that compares a practice of tikanga against a perfect standard of performance. This involves a wide assessment of values and considers whether they have been met to the appropriate level.[97]

Yet tikanga is not severed and separate from the law inherited from the British colonisers — what Williams J refers to as the second law of New Zealand. He argues that there is a third law active in Aotearoa today. A fused system in which the recognition and application of the first law has changed

89 At 2.
90 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 19.
91 Williams, above n 88, at 3.
92 At 3.
93 Mead, above n 90, at 33.
94 ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission, January 1994) at 4–5.
95 Mead, above n 90, at 7.
96 At 30.
97 At 30.

the application and culture of the second.[98] The Supreme Court's decision in *Takamore* appears to attest to this view. It held that Māori customary law directly influenced the New Zealand common law around burial rights.[99] It regarded the right to determine the burial location, and although ultimately Ms Clarke's rights as the executrix were deemed stronger than the cultural claim in tikanga, the case is significant in its recognition that tikanga is no longer an independent source from the law, but rather one value of many that the law considers.[100]

Precisely what *Takamore* stands for is not without controversy. Coates argues that *Takamore* left the law in a confused state. The meaning of tikanga as a "value" of the common law is uncertain as it did not define what other values are to be weighed.[101] Furthermore, *Takamore* did not explicitly address whether customary law in the common law system is based on the doctrine of continuity and the *Public Trustee v Loasby* tests.[102] This means that it is unclear if Māori custom can trump other common law rules.[103] The present article is framed upon the conception that tikanga *can* be weighed up against other common law values. However, it recognises that there is disagreement with this view.[104] Moreover, the author acknowledges that there is tension with the incorporation of tikanga in the common law, as judges become deciders of what the applicable tikanga is.[105] These are all meritorious arguments, but it is beyond the scope of this article to examine them in depth.

Williams' idea of evolution is strengthened by Meads' description of "ngā ahi e ngiha mai nei" — the fires that flare up — citing how the Māori world is increasingly dealing with global issues that come close to home.[106] He states that Māori tradition and values can help confront the new fires where there is a whakapapa (genealogy) that can be linked or a principle that the issue

98 Williams, above n 88, at 33.

99 *Takamore v Clarke*, above n 36, at [164].

100 At [169].

101 Natalie Coates "What does Takamore mean for tikanga? — Takamore v Clarke [2012] NZSC 116" (February 2013) Māori LR <https://maorilawreview.co.nz/2013/02/what-does-takamore-mean-for-tikanga-takamore-v-clarke-2012-nzsc-116/>.

102 *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC) held that Māori custom could be recognised in the common law provided that several tests were satisfied.

103 Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" [2015] NZ L Rev 1 at 12.

104 See generally Coates, above n 103.

105 Williams, above n 88, at 5; and Emma Marguerite Gattey "Do New Zealand Courts Regard Tikanga Māori as a Source of Law Independent of Statutory Incorporation? Or is Anglo-inspired Common Law Still 'the sole arbiter' of Justice in New Zealand?" (LLB (Hons) Dissertation, University of Otago, 2013) at 58.

106 Mead discusses Māori dealing with questions around genetically modified organisms, organ transplants and in-vitro fertilisation: above n 90, at 263.

can be held against.[107] However, he cautions that the position given by the framework will only be *an* answer, not *the* answer.[108] In *Takamore*, the Court went through a similar practice, deciding that tikanga was not *the* answer in the case at hand.[109] This reasoning has a direct effect on Smith's case, as the court's ability to legally associate[110] the two legal systems opens the possibility to tikanga being relevant as a foundational value for an inchoate tort.

Climate change and climate justice are one of the fires that the Māori world is grappling with. The evaluation of tikanga's values against Smith's claim will test the third law's theory of being conscious of both the first law and the second.

4.3.1 Concepts within tikanga

(i) Whanaungatanga

The Law Commission's report on Māori custom and values aptly states: "Of all of the values of tikanga Māori, whanaungatanga is the most pervasive."[111] Whanaungatanga is a reciprocal right,[112] describing the weaving strands of relationships between all things: people, the physical world and the spiritual world.[113] Whakapapa (genealogy) labels and links these relationships, as in traditional Māori society a person's identity was defined through these connections.[114] Whanaungatanga created legal sense, the allocated rights descending from the original title-holder and the legal interest created by conquest (raupatu) or transfer (tuku) giving the right its foundation. However, these foundations to rights were fragile until consummated, which was done by creating connections to the line of the original title-holder. Tuku was not settled when actioned, rather it marked the incorporation of the transferee into the community of the original title-holder.[115] As whanaungatanga deals with all relationships, this legal sense is as relevant to human relationships as it is to relationships with the physical and spiritual world.[116] This notion colours

107 At 268–269.
108 At 263.
109 *Takamore v Clarke*, above n 36, at [169].
110 Coates, above n 103, at 5, borrowing from Nicole Roughan "The Association of State and Indigenous Law: A Case Study in 'Legal Association'" (2009) 59 UTLJ 135.
111 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [130] (footnotes omitted).
112 Mead, above n 90, at 31.
113 Law Commission, above n 111, at [130].
114 At [130].
115 Williams, above n 88, at 4.
116 At 4.

the application of tikanga as it sets the normative background of this article's analysis.

(ii) Kaitiakitanga

Kaitiakitanga is usually described today as the exercise of guardianship, especially over natural resources.[117] It has variations to encompass responsibilities in relation to artefacts, buildings and social relations.[118] In an environmental sense it has statutory recognition and is defined by the Resource Management Act 1991 as also inclusive of the ethic of stewardship.[119] It offshoots from whanaungatanga as it states that no right to a resource can endure without the right-holder maintaining a relationship with it.[120] It is holistic and recognises that this relationship gives each generation an inherited requirement to protect and care for the natural world, not only for themselves but for successive generations.[121]

(iii) Utu and muru

Utu means return in the sense of giving a response, reciprocity, or compensation. Its purpose is to restore balance and maintain whanaungatanga.[122] Muru was a form of utu used to compensate for certain offences, but is no longer practised.[123] It was not limited to the individual and it could also be between two groups of whānau (extended families), or even involve hapū (descent groups). Given this reach, compensation could also apply to the wider group, not only to the individual who acted.[124] It involved a sort of legalised plunder and applied to offences from adultery to situations that the Pākehā legal system today would consider as negligence.[125] For example, a campfire that spread and burnt a tree associated with an ancestor was punishable by muru,[126] and the owner of pigs that had wandered onto an urupā (burial ground) was subject to muru too.[127]

117 Benton, Frame and Meredith, above n 87, at 105.
118 At 105.
119 Resource Management Act 1991, s 2.
120 Williams, above n 88, at 4.
121 Selwyn Hayes "Defining Kaitiakitanga and the Resource Management Act 1991" (1998) 8 Auckland U L Rev 893 at 894.
122 Mead, above n 90, at 132.
123 Rāwiri Taonu "Te ture — Māori and legislation: Māori traditional law" (20 June 2012) Te Ara — the Encyclopedia of New Zealand <www.TeAra.govt.nz/en/te-ture-maori-and-legislation/page-1>.
124 Law Commission, above n 111, at [135].
125 Mead, above n 90, at 121.
126 At 129.
127 Benton, Frame and Meredith, above n 87, at 264.

(iv) Mauri

Mauri is an essence, which gives a thing its character. It encompasses both the essential quality of a being and the object in which it is located. There is no direct English translation but it is close to the Greek notion of *thymos*, embracing consciousness, activity, rationality, and emotion.[128] It integrates ecosystems and objects as well as social groups and individuals.[129] Mauri should be guarded against loss or pollution as this deprives it of its spiritual connection and the object's welfare diminishes.[130] In recent times, the idea of mauri has applied to the debate around genetically modified animals, some seeing that the mixing of an animal's mauri in creating transgenic animals is wrong.[131]

4.3.2 Tikanga and climate justice

(i) Public right

In the knowledge that tikanga can only offer an influential perspective, Smith's claim for a public right to a stable climate against private emitters may draw on tikanga in many ways. The Māori creation story introduces the concept of the climate, as Ranginui (the sky father) and Papatūānuku (the earth mother) were forced apart by Tāne te Waiora and Rangi Hāpainga who is now the tāhuhu or ridge pole which upholds the sky. Amongst the children of Ranginui and Papatūānuku, Rangi Hāpainga and Rangi Whakataka (the first heaven) make up earth's atmosphere. The lower body of Ranginui is the protective cover for Papatūānuku against Tama Nui te Rā, the sun, and represents the stratospheric ozone layer.[132] In Māori cosmology, the disagreement between the various children over the separation of their parents has created an environmental struggle, the earth's climatic events based on these sibling relationships.[133] Based on this background, some scholars consider that the climate has a mauri and the human-induced pollution of the atmosphere depletes this mauri, impacting upon the abilities of the various entities to fulfil their functions in the overall web.[134]

Kaitiakitanga, the obligations of guardianship, may also support a right to a stable climate. It is central to maintaining the mauri of all life.[135] The idea of each generation having an inherited responsibility over the natural world

128 See definition of mauri at 239.
129 At 239.
130 At 246–247.
131 At 251.
132 Andrea Tunks "Tangata Whenua Ethics and Climate Change" (1997) 1 NZJEL 67 at 71–72.
133 At 73.
134 At 81.
135 At 84.

for future generations addresses the inequality that climate change will affect generations that have not contributed to the problem.[136] Moreover, the public right that Smith sought is not foreign to tikanga; whanaungatanga embraces the idea of collective responsibility and collective right.[137] This right–responsibility correlation is emphasised further in the practice of utu and the historic form of muru. Compensation could be against the wider group, despite the action by the individual.[138]

(ii) Private liability

The public–private bridge that Smith tries to build insists that corporations have liability to a wider group for harms caused by their activities. This premise is not foreign to tort law, as product liability for millions of goods going out in the world has already extended ideas around the scope of impact and the pool of victims.[139] This concept is also not foreign to tikanga, as it historically governed relationships between separate private groups in a tribal setting: obligations existed from group to group as well as obligations within the group by individuals to the group and vice versa.

Despite tikanga's prima facie compatibility as a premise of Smith's tort, following *Takamore* it must be weighed against the wider situation and other values.[140] The prospects for a public right to private liability certainly may be tenable under tikanga, but there are questions as to whether this is appropriate given the nature of climate change. Climate change is not a simple case where one group has wronged and another is suffering. Instead, there is a sliding scale of damage where it is the *amount* of contribution, rather than the contribution itself, that is targeted. However, the emitters that Smith targets are not carbon majors and their emissions alone were not claimed to be readily traced to identifiable harms.[141] On the one hand, it may be that whanaungatanga and kaitiakitanga gives force to the idea of the public as a connected group with common rights, enforceable against members who disproportionately damage them. On the other hand, tort's orthodox "but for" barrier to liability means that a relationship between the harm and the private actor may be difficult to establish.[142] Tikanga's value of kaitiakitanga — that sees us all responsible as caretakers of the environmental web — will be weighed against classical liberalism — that limits liability in tort to discrete harms in complex net-

136 See Eric A Posner and David Weisbach *Climate Change Justice* (Princeton University Press, Princeton, 2010) at 119.
137 Benton, Frame and Meredith, above n 87, at 524.
138 Law Commission, above n 111, at [135].
139 Kysar, above n 23, at 41.
140 *Takamore v Clarke*, above n 36, at [152].
141 *Smith v Fonterra Co-operative Group*, above n 3, at [8].
142 Kysar, above n 23, at 30.

works.[143] It may be that imposing a tort which regulates emissions rebalances the mauri of the climate, but that this focus upsets the separation of powers and the government's role as a policy-maker.[144] To what extent the values of tikanga can act as a platform for a new tort can only be tested through the court. Nevertheless, it is a powerful factor that has the potential to shift the paradigms of our current system.

4.4 Public Nuisance — Public Rights Within Tort Law

The tort of public nuisance is alive in our common law. It started its life as a common law crime, against "any nuisance [that] is 'public' which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects".[145] These interests were broad and included the common law right of unobstructed passage along highways and navigable waterways, fishing rights, public health and safety, and public morality.[146] The tort of public nuisance arose in the 16th century when the common law recognised the rights of a private citizen to bring a civil action for special damages, for any special hurt they suffered over and above the rest of the community.[147] This special damage rule is still present for individual claims, but for general public nuisances, it is the Attorney-General who brings the action forward.[148]

Public nuisance's criminal origins appear to sever it from the norms of tort, and some commentators disagree with its presence in tort law.[149] Such an argument is advanced by Merrill, who considers that public nuisance contains numerous features atypical of tort law.[150] He states that, cumulatively, these features mean that public nuisance is a public action, associated with

143 At 38.

144 Mark Latham, Victor E Schwartz and Christopher E Appel "The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart" (2011) 80 Fordham L Rev 737 at 760.

145 *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169 (CA) at 184 per Romer LJ.

146 Todd and others, above n 37, at [59.10.3.01].

147 At [59.10.3.01].

148 *Smith v Fonterra Co-operative Group*, above n 3, at [56]–[61].

149 See generally Thomas W Merrill "Is Public Nuisance a Tort?" (2011) 4(2) J Tort L 1; John Murphy *The Law of Nuisance* (Oxford University Press, Oxford, 2010) at 19; and JR Spencer "Public Nuisance — A Critical Examination" (1989) 48 Cambridge LJ 55 at 79–85.

150 For instance, public nuisance protects public not private rights; was historically only for activity indictable as a crime; is predominantly enforced by public officials, not private claimants; is traditionally focused on the existence of a condition, not the defendant's conduct; and typically does not result in a reward of damages, and never did so in actions brought by public authorities: Merrill, above n 149, at 7.

criminal liability, initiated by public officials and implemented through criminal sanctions.[151] Others, like Spencer, view the common law's expansion to public nuisance as going against the principle of *nulla poena sine lige* — in other words, that the limits of the criminal law should be discoverable in advance and no one should be punished for conduct that was not a criminal offence at the time it was committed.[152] The norm that tort deals with breaches of duties owed to particular people is to many a strong indicator that public nuisance should not be conceptualised as a tort.[153]

In New Zealand, public nuisance remains a part of the common law, despite some of its historic applicability being superseded by statute.[154] Wylie J's approach to liability in *Smith* shows how the criminal history of the tort influences its interpretation today. A degree of wrongdoing must be attained, as a public nuisance is committed through acts not warranted by law and with failures to discharge legal duties. His Honour had difficulty in accepting Smith's argument that interference with an alleged public right constituted unlawful conduct per se, without a requirement for additional unlawfulness.[155] Smith's individual claim to public nuisance was struck out, but the Court did not bar separate proceedings brought by the Attorney-General.[156]

Nevertheless, there is a line of reasoning that plants the public right to private liability very much in the realms of tort law. Neyers gives an alternate rights-based conception of public nuisance through the examination of the Kantian philosophy of Arthur Ripstein.[157] Ripstein argues that all people are born with a right to be their own master, but that this right is subject to two limits. First, the right of every other human being to be their own master. Second, as the right is innate it may not be alienated. Ripstein labels the first right the "rightful honour" and states that a person cannot enter a society that does not provide guarantees for these rights. Of these guarantees, the most important is the provision of public highways. This is because highways allow for transactions between private individuals on private land. They must be public to provide equal access to this freedom of transaction. A society without these highways would make you systematically subject to the choices of others, violating your rightful honour.[158] Neyers links this theory to the creation of

151 At 19–20.
152 Spencer, above n 149, at 78.
153 JW Neyers "Reconceptualising the Tort of Public Nuisance" (2017) 76 Cambridge LJ 87 at 90.
154 For example, Health Act 1956, ss 29–35; Crimes Act 1961, s 145; Summary Offences Act 1981, ss 32–38; and Resource Management Act, pt 12: Todd and others, above n 37, at [59.10.3.01].
155 *Smith v Fonterra Co-operative Group*, above n 3, at [68]–[73].
156 At [65].
157 Neyers, above n 153, at 95.
158 At 94–96.

public nuisance, as the prevention of the obstruction of highways creates a right that is consistent with the public's rightful honour.[159] For other public rights to qualify, Neyers posits that the rights would have to be recognised by the common law, share the same analytic structure,[160] and be consistent with equal freedom and rightful honour.[161]

4.4.1 Public rights and climate justice

Public nuisance was struck out in *Smith*, but Neyers' theory of public nuisance is helpful as it shows how a public right can stand on its own feet as a form of tortious liability. It illustrates that tort law may care about public rights to private liability if the right is consistent with equal freedom and rightful honour. The public right sought in *Smith* would limit the freedom of the individual to pollute, aiming to reduce and eventually eliminate emissions of certain companies. At first, this demand appears contrary to equal freedom and rightful honour. Companies are the only ones asked to show restraint and there is no reciprocal duty on the other individuals that form the collective public. However, all depends on how the duty is conceptualised, as Kysar states:[162]

> … no one wants to see Grandma held responsible for climate change harms because she drove to church on Sunday when she could have walked, even if her weekly devotion puts her above an annual emissions budget.

Climate change may limit the capacity of an individual to be their own master, as climate health has direct impacts on the extent to which people can access health, adequate food and housing.[163] If differing actors have differing contributions to a problem, then the extent to which a duty is reciprocal between actors should consider the difference in contribution. Equal freedom should consider the equality of the reciprocal duty, rather than whether an obligation is the same for both actors. It follows that if Smith's novel tort restricts the freedoms of some to pollute excessively without imposing the duty on all, it can still uphold the notion of rightful honour and equal freedom. It illustrates how the idea of common but differentiated liability is tenable within tort.

This analysis is compatible with the idea that tort law has never fully been able to reconcile its ideals. The tension between the liberty of movement and

159 At 96–97.

160 Neyers describes the analytic structure as a right to make use of the land of another granted by the proprietor of that land to members of the public: at 97.

161 At 97.

162 Kysar, above n 23, at 14.

163 Rosalind Cook and Eljalill Tauschinsky "Accommodating human values in the climate regime" (2008) 4(3) Utrecht Law Rev 18 at 19.

protection from harm is described by Ewing and Kysar to have created a gap "between tort law's principles and its implementation".[164] To Ewing and Kysar this gap is productive as it provides space to reconcile principles and adapt tort doctrines to changing situations.[165] Certainly, conceptualising the public right in public nuisance in this way creates space for a general public right to be fashioned consistently. It would enable meaningful exploration of the conflict at the heart of tort and provide a starting point for a public right to private liability.

5. CONCLUSION

Smith begs consideration of how the injustices of climate change can be confronted in a new way through the creation of a tortious public right to private liability. In this article's journey through the foundations of tort law, the extent to which its various theories are open to this right have been tested. At first instance, the traditional foundations of corrective justice and economic efficiency appear supportive of the right. However, corrective justice is blind to future victims and limited to specific harms; economic efficiency's focus on individual choice and future loss prevention is not suitable for a right that imposes limits and does not guarantee success. Despite this, tort law is not static and by turning to contemporary additions like tikanga and the values behind public nuisance, space can be opened for a novel tort. Tikanga illustrates a contemporary value system in which environmental public rights could lead to private liability, and the underpinnings of public nuisance show how the open texture of tort law can fashion the basis of a right.

At the time of writing, Smith's case has yet to proceed to trial. There is still more work to be done. How these foundations will stand up against each other is yet to be determined. In court, ideas like tikanga may challenge the primacy of traditional tort law interpretation, or it may be that tort law is not seen as the best place to provide for Smith's right. To conclude, this is a contest of legitimacy; it is uncertain which direction the court will take. Tort, in looking creatively, may find that contemporary approaches are not as far removed from current norms as they may seem.

164 Benjamin Ewing and Douglas A Kysar "Prods and Pleas: Limited Government in an Era of Unlimited Harm" (2011) 121 Yale LJ 350 at 378.

165 At 378.