Smith v Fonterra & Ors [2024] NZSC 5: is climate changing the law of torts?

Phil Page, Gus Griffin

The recent Supreme Court decision *Smith v Fonterra* considered arguments on the potential liability of individual greenhouse gas (**GHGs**) emitters through common law tort (known as a legal wrong).

The Supreme Court was ruling on an application to strike out a claim in tort damage caused by climate change. The Appellant (**Smith**) is a Ngāpuhi and Ngāti Kahu elder, and climate change spokesperson for the Iwi Chair Forum. The respondents are claimed to be New Zealand's seven largest greenhouse gas emitters, together responsible for more than one third of New Zealand's greenhouse gas emissions.

Smith claims the respondents have contributed materially to the climate crisis and have damaged, and will continue to damage, his whenua and moana, including places of significance to him and his whānau. In support of this claim, Mr Smith brought causes of action in public nuisance, negligence, and breach of a proposed new "climate system damage" duty to cease contributing to damage to the climate system. Mr Smith further relies on principles of tikanga Māori to "inform the legal basis of the pleaded causes of action and the development of the common law of New Zealand".[1] He seeks injunctions requiring the respondents to reduce emissions from 2025 and achieve zero net emissions by 2050. Alternatively, he seeks a (potentially suspended) injunction requiring the respondents to immediately cease emitting or contributing to net emissions.

The Court of Appeal had previously found that the claim relating to climate system damage was doomed to fail. The Supreme Court, in dismissing the strike out application, considered that:[2]

> [2] … Differing from that Court, we consider the application of orthodox, long-settled principles governing strike out means this claim should be allowed to proceed to trial, rather than being struck out pre-emptively. As we observe later in the judgment, reinstatement of the claim and allowing it to proceed to trial is not a commentary on whether or not it will ultimately succeed.

At the heart of the difference in approach between the Court of Appeal and the Supreme Court is its approach to causation. The Court of Appeal held that where granting an injunction restraining these seven defendants would do nothing to abate the nuisance, then the claim was untenable. The Supreme Court did not agree that was necessarily so. How the law of torts should respond to cumulative causation in a public nuisance involving

[1] At [59].
[2] At [2].

greenhouse gas emissions should not be answered without evidence and policy analysis at trial.

The Supreme Court unanimously determined that Mr Smith's claim was not "bound to fail". That is ultimately a matter to consider at the substantive hearing. Successfully resisting the strike out does not mean that Smith will succeed at trial.[3] However, the Court's commentary exhibits a definite intrigue for this potential for common law progression against a background of increasing climate change related disasters and phenomena, at home and abroad.

What gap in the common law would a climate tort fill?

The thrust of the respondents' argument is that if the common law intervenes in controlling GHGs it would create a parallel and inconsistent regulatory regime. They argued that Parliament had not prohibited GHG emissions, through the Climate Change Response Act 2002 (**CCRA**) or by other means, so it should not be the role of the Court to do so. They say that this is squarely a job for Parliament and something that legislation already provides for.

The Court found that policing effects on the environment of GHG emitters' activities was through the Resource Management Act 1991 (RMA).[4] The CCRA is only a companion measured designed to operate alongside the RMA in relation to GHG emissions. The RMA regulates effects of human activity on the environment, and seeks to mitigate the effects of environmental processes (i.e. climate related risk and natural hazards) on humans. This is achieved through environmental policies, standards, and rules, and through local authority consenting functions. The Supreme Court found that these controls tend to reduce, but not remove, the potential for nuisance and environmental tort actions. In fact, s 23 of the RMA expressly preserves access to these common law rights of action.[5]

Therefore, the Supreme Court concluded that Parliament had left a pathway open for the common law to operate, develop and evolve with the statutory landscape. This would not displace the common law by the interposition of permits, immunities, policies, rules and resource consents.[6] Parliament has therefore retained that possibility of a common law response to damage caused by GHG emissions.[7]

[3] At [84]. See also *Couch v Attorney-General* [2008] NZSC 45
[4] At [99].
[5] At [96].
[6] At [101].
[7] At [100].

A possible climate change tort?

The decision focuses on the public nuisance claim. In the Supreme Court's view, the principles governing public nuisance ought not to stand still in the face of massive environmental challenges attributable to human economic activity. The common law, it says, where not clearly excluded, responds to challenge, and change in a considered way, through trials involving the testing of evidence.8 That is to say that whether the claim is successful should be the subject of evidence and submissions so that its merits can be properly assessed.

The Court acknowledges that the common law has not grappled with a crisis as all-embracing as climate change. Comparisons are drawn to the common law response to a dramatic increase in the risk of accidents following the industrial revolution.9 The Supreme Court says that the contemporary response was a mixture of the flawed and the inspired, directly referencing the duty of care based on neighbourhood in Donoghue v Stevenson.10 The Court notes that climate change engages comparable complexities, albeit at a "quantum leap scale enlargement".11 And it hints that where the Courts got it wrong, their decisions were revised by the legislature either enlarging or limiting its reach. In this context, it was not for the Supreme Court to strike out a claim that Parliament had not curtailed.

Although the Court repeatedly states that evidence and policy analysis will be required to determine how the law of torts should respond to Mr Smith's public nuisance claim,12 the Supreme Court's observations have certainly opened the door to the possibility.

If Smith is successful it may set a global precedent for the judicial response to climate change and may spark parliamentary intervention. Rumblings of that kind are already coming out of Wellington.

What does this mean for you?

Right now, not much. The Supreme Court has not decided anything other than Smith can have his day in Court. To our minds, the Supreme Court's comments on cumulative causation in a public nuisance case offers the most interesting opportunities and risks for emitters. A potential outcome of this case could be a decision that holds that it is no defence to say that the damage would have happened anyway. Individuals may be held responsible for their contribution to damage caused by collective action.

---

[8] At [172].
[9] At [156].
[10] At [156].
[11] At [157].
[12] At [166]