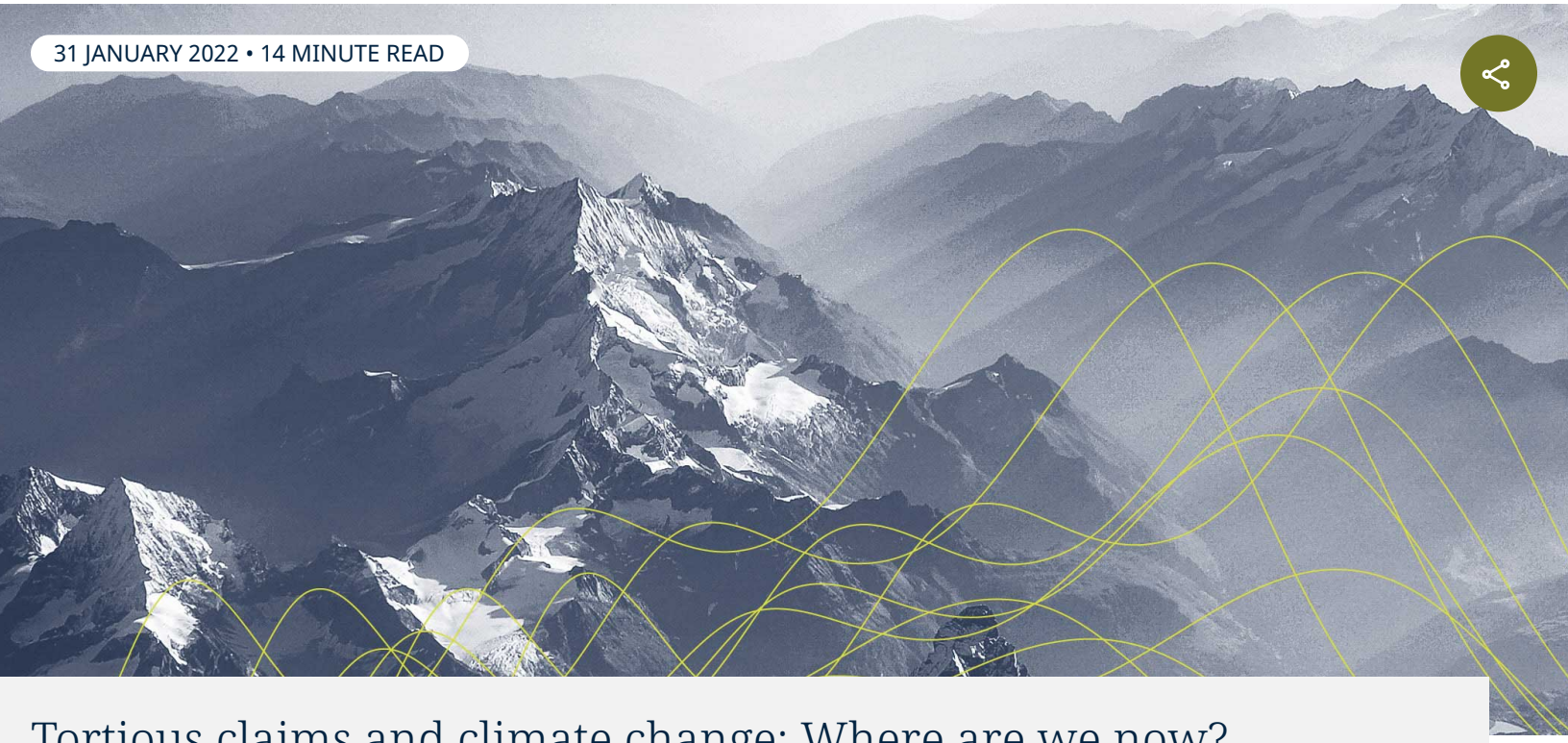

31 JANUARY 2022 • 14 MINUTE READ

Tortious claims and climate change: Where are we now?

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INTRODUCTION

"What should be the response of tort law to climate change? That starkly put is the key issue raised by this appeal."

So begins the recent judgment of the Court of Appeal of New Zealand in *Smith v Fonterra*,[1] in which the court considered whether to strike out a cause of action based on a novel tortious duty of care to "cease contributing to damage to the climate system," which had been left open by the court below.

Below we take a look at the decision and its implications for the rapidly growing body of climate change litigation around the world.

FACTS

This appeal relates to a claim brought in the High Court of New Zealand by Michael John Smith, an elder of Ngāpuhi and Ngāti Kahu (two Māori Iwi, or tribes, based in northern New Zealand) and the climate change spokesperson for the Iwi Chairs Forum.

The respondents were seven New Zealand companies that Mr Smith alleged contribute to the emission of greenhouse gases. These included the operators of power stations, steel mills and dairy factories that burn coal; a coal mine; and an oil refinery.

Mr Smith's original claim sought a declaration that the respondents had contributed to climate change or breached duties of care owed to Mr Smith, and an injunction requiring them to be "net zero" by 2030. The claim contained three causes of action, all based on the law of tort:

1. public nuisance;
2. negligence; and
3. a proposed new tort described as "breach of duty"; to "cease contributing to damage to the climate system, dangerous anthropogenic interference with the climate system, and the adverse effects of climate change through their emission of Greenhouse Gases into the atmosphere".[2]

The respondents each filed a defence, then applied to strike out the claim, arguing that it disclosed no arguable cause of action and the matters raised were beyond the remit of the court.

On 6 March 2020, the High Court struck out the public nuisance and negligence claims and refused to grant the injunction.[3] But the court declined to strike out the claim based on a proposed new tort. Although there were "significant hurdles" to be overcome, the court concluded that was an issue which should be explored at trial.

Mr Smith appealed that decision in relation to the nuisance and negligence claims. The respondents cross-appealed the decision declining to strike out the novel tort claim. The appeal and the cross-appeal were heard together in February 2021 by the Court of Appeal, which issued its judgment on 21 October 2021.

DECISION

Role of tort law

The court began by considering the question of whether the law of tort is, in principle, the appropriate mechanism for dealing with the issue of climate change. The court found that it is not, for several largely policy-based reasons:

- First, the claim was brought against a small subset of emitters without any basis for singling them out from other similar emitters. If the claim were to succeed, every business and individual that has not achieved net zero emissions would also be acting unlawfully,[4] which was likely to result in ongoing litigation with arbitrary outcomes.[5]
- Second, the claim was framed using the concept of "net zero," meaning that emitting activities could still be lawful, provided the emitter engaged in carbon offsetting (eg planting trees, purchasing carbon credits). Not only would this require the court to establish its own mechanism for assessing such offsets (which it did not have the expertise to do) but it would also imply that the activities to which the tort applied were not in themselves unlawful. The court found that "[t]his is not the domain of tort law."[6]
- Third, there was no remedy available to meaningfully address the harm complained of. It was accepted that damages were not appropriate, but the court also found that an injunction would not work because administering it would require "a level of institutional expertise, democratic participation and democratic accountability" that the court simply did not have.[7]

The court concluded that "the magnitude of the crisis which is climate change simply cannot be appropriately or adequately addressed by common law tort claims pursued through the courts. It is

quintessentially a matter that calls for a sophisticated regulatory response at a national level, supported by international coordination."[8]

Decision on the three causes of action

On the three causes of action relied on by Mr Smith, the court found as follows.

Public nuisance:

- The damage claimed was not particular to Mr Smith, but rather affected all citizens of New Zealand equally (ie the claim failed to satisfy the "special damage rule").
- The claim lacked sufficient causation – the damage was not a direct consequence of the respondents' actions, but rather followed from a series of intervening steps, such as a global increase in temperatures and a corresponding rise in sea levels.

Negligence:

- Though the alleged harm was reasonably foreseeable, there was insufficient proximity of relationship (either physical or temporal) between the respondents' actions and the harm to Mr Smith.
- The vulnerability of the claimant (see below) was a relevant factor when establishing a duty of care, but this was outweighed by policy arguments (eg the risks of opening the floodgates to limitless future claims and potential conflict with existing legislation).

New tort:

- The claim suffered from the same issues as the public nuisance and negligence claims.
- It would not have fitted within the remit of the courts, which should be limited to one of "incremental development and not one of radical change";[9] the appropriate mechanism for dealing with this crisis is government legislation and regulation.

HOW DOES THIS DECISION FIT WITHIN WIDER TRENDS?

ROLE OF TORT LAW – INTERNATIONAL DEVELOPMENTS

England and Wales

Though the English courts have not yet seen any climate-specific cases seeking to expand the use of tortious causes of action, there are some cases that suggest how the court may approach these issues.

In 2019, the English Supreme Court found that claims made by individuals in Zambia against Vedanta Resources Plc (a UK-incorporated parent company) and its Zambian subsidiary, seeking damages for loss suffered as a result of waste discharged from the subsidiary's copper and based on what the defendants argued were "novel" duties of care, were arguable.[10]

The Supreme Court found that the liability of parent companies for the actions of their subsidiaries is not, by itself, a distinct category of liability in negligence, but simply a reiteration of "the legal principles … as would apply in relation to the question whether any third party was subject to a duty of care in tort owed to a claimant dealing with the subsidiary".[11]

So issues of incremental extension of the boundaries of tort law did not apply. In this case, the UK Supreme Court also made similar points to the Court of Appeal of New Zealand about radical change

being the remit of parliament and not the courts.

In subsequent cases, however, English courts have been willing to consider novel applications of tort law in their relevant factual context. In *Begum v Maran* (UK) Limited [2021] EWCA Civ 326, the English Court of Appeal found that it was *at least arguable* that two principles were applicable in a novel duty of care context:

1. that the existence of a duty could not be extinguished by the involvement of third parties, if those third parties acted in the way that was or could be anticipated; and
2. that the usual rule that there is no liability in tort for the harm caused by the intervention of third parties does not apply where the defendant is responsible for a state of danger which may be exploited by the third party. This may pave the way for more novel arguments in the future.

Australia

Earlier this year, the Federal Court of Australia found that a novel duty of care was owed by the Minister for the Environment to Australian children not to cause them harm resulting from the extraction of coal by approving an extension to the Vickery coal mine in New South Wales.[12] The court found that the alleged duty of care existed on the basis that:

1. the risk of harm was reasonably foreseeable;
2. the Minister had direct control over the risk; and
3. Australian children are extremely vulnerable to "climatic hazards".

Interestingly, points 1 and 2 were arguments also made by Mr Smith in *Fonterra v Smith*, though the New Zealand Court of Appeal only accepted 1.

Netherlands

As a civil law jurisdiction, the Netherlands does not have the same system of incremental development in tort law as in New Zealand and other common law jurisdictions. Instead, the Dutch courts are able to consider the liability of defendants under an "unwritten duty of care" in the Dutch Civil Code

In 2019, for example, the Dutch Supreme Court found that the Dutch government had a duty of care to take climate change mitigation measures to meet its fair contribution toward the UN goals on climate change.[13]

That decision was followed by two further decisions in the Netherlands that accepted a parent could be liable for the acts of its subsidiary (in the factual circumstances described, as a matter of Nigerian common law).

The reasons for these two decisions were then brought together in an award of a mandatory injunction against a parent company, forcing it to amend its group-wide policies to provisions designed to accelerate emissions reductions.

US

Civil litigation in the US related to the impacts of climate change lacks the human-rights component seen in a growing number of cases around the world. But it's still a diverse and growing area of the law,

often raising novel theories of liability under laws not crafted with climate in mind.

Many plaintiffs, including state and municipal authorities, have sued for damages in state courts under common law theories sounding in nuisance and products liability.[14] Defendants in these cases have sought federal jurisdiction over questions that are bound up in national policy.[15]

Climate is also emerging as a key issue in securities litigation, with shareholders and regulators scrutinising companies for exposure to climate risk, including transition risk, and for failing to adequately disclose or mitigate that risk.

Moves by the Biden Administration and the Securities and Exchange Commission to make corporate climate disclosures mandatory may encourage such claims. But many questions remain unanswered about the ultimate viability of civil litigation as a tool to combat climate change, and corporate climate regulation is all but guaranteed to face judicial review. Climate litigation will remain a prominent fixture in US courts for the foreseeable future.

INDIGENOUS PEOPLES AND JUST TRANSITION

Another interesting aspect of the New Zealand case is Mr Smith's status as an elder of two Māori Iwi and a representative of the Iwi Chairs Forum and the interrelation with wider development of "just transition" cases.

Just transition is a concept that captures the challenges for workers, communities and countries associated with a shift to a low-carbon economy and the need to ensure the burdens and benefits of climate action are distributed across society, including those most vulnerable.

For example, cases might arise where individuals become unemployed as a result of a governmental ban on coal mining. But the concept applies equally to those who, like Mr Smith and those he represents, are particularly vulnerable because of where they live or their way of life.

Mr Smith argued that his interest in coastal land, which contained customary sites and resources (such as waka landing places, burial caves and seasonal food gathering camps), made him particularly vulnerable to the effects of climate change.[16]

As explained above, the court accepted that vulnerability was a relevant factor when establishing a duty of care, but found in this case that the damage claimed by Mr Smith did not "sufficiently exceed" the degree of harm to other citizens of New Zealand.[17]

However, those most vulnerable to the effects of climate change will naturally include who depend on coastal land for their way of life, such as indigenous peoples around the world.

For example, a class action was recently filed by a group of Torres Strait Islanders against Australia, seeking an order that Australia reduce emissions by 74% by 2030 on the basis that it owes them a duty of care to take reasonable steps to protect them, their traditional way of life and their marine environment.[18] The claim relies partly on "distinctive customary culture, known as Ailan Kastom, which creates a unique spiritual and physical connection with the Torres Strait Islands."[19]

CONCLUSION

Claimant lawyers around the world continue to test the boundaries of tort law

In the New Zealand case, the first instance court had refused to strike out the proposed "new tort" on the basis that climate change might lead to an increased ability to model the possible effects of emissions by the time of the trial.

The Court of Appeal disagreed, citing a concern that "otherwise any claimant would be able to proceed to trial simply by asserting a new tort."

But as climate science allows for greater accuracy in attributing the effects of climate change to specific causes – or in factual circumstances where foreseeability, proximity and causation can more easily be shown – the courts may allow more claims to proceed, at least to evidential stages.

In the interim, judges in common law jurisdictions at least, are likely to continue to defer to domestic legislation.

In this case, the Court of Appeal explained that it was difficult for them to make findings that were not consistent with the obligations imposed by the key regulatory instrument in New Zealand (the Climate Change Response Act 2002 (as amended in 2019 and 2020).

There are, of course, international agreements on climate change already in place as well, such as the UN Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement.

Legislation, both domestic and international is likely to grow in scale and prominence following COP26, which may help crystallise the duties of governments, companies and other stakeholders.

But such legislation is unlikely to resolve the issues raised by the court in this case, such as the absence of causation and many courts' lack of ability to impose appropriate sanctions.

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[1] *Smith v Fonterra Co-Operative Group Ltd* [2021] NZCA 552 (21 October 2021), Judgment, paragraph 1.

[2] Judgment, paragraph 118.

[3] Smith v Fonterra Co-operative Group Ltd [2020] NZHC 419 (6 March 2020).

[4] Judgment, paragraphs 18-19.

[5] Judgment, paragraph 27

[6] Judgment, paragraphs 20-24.

[7] Judgment, paragraphs 25-26.

[8] Judgment, paragraph 16.

[9] Judgment, paragraph 15.

[10] *Vedanta Resources Plc v Lungowe* [2019] UKSC 20 (10 April 2019). This case is now to proceed to trial. The latest development is that on 27 March 2020 the High Court granted Vedanta's application for a Group Litigation Order, in order to consolidate various sets of proceedings relating to the same underlying claims *(Lungowe v Vedanta Resources Plc* [2020] EWHC 749 (TCC)).

[11] Citing Sales LJ in [2018] EWCA Civ 1532, see judgment paragraph 36.

[12] *Sharma v Minister for the Environment* [2021] FCA 560 (27 May 2021). Final declaration issued 8 July 2021. Minister appealed on 13 September 2021. 15 September 2021 Minster granted approval for the proposed mine. Appeal heard 18-20 October 2021.

[13] *Urgenda Foundation v Netherlands, Supreme Court of the Netherlands*, Number 19/00135, 20 December 2019.

[14] *See, e.g.*, 960 F.3d 570 (9th Cir.), 462 F. Supp. 3d 31 (D. Mass. 2020); *Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 13 2019); 393 F. Supp. 3d 142 (D.R.I. 2019); 388 F. Supp. 3d 538 (D. Md.); 294 F. Supp. 3d 934 (N.D. Cal. 2018).

[15] See also 141 S. Ct. 1532 (2021) (considering potential bases for federal jurisdiction in climate suits); 993 F.3d 81, 93 (2d Cir. 2021) (distinguishing between rulings in cases filed in state court and cases filed in federal court in the first instance).

[16] Judgment, paragraph 55.

[17] Judgment, paragraph 82.

[18] See case of *Pabai Pabai & Anor v Commonwealth of Australia*, ID622/2021 and paragraph 81 of the statement of claim, filed on 26 October 2021.

[19] See paragraph 54(d) of the statement of claim, filed on 26 October 2021.

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