

# Tortious Claims for Climate Change Damage to Proceed in Common Law Courts

15 February 2024

In a unanimous decision in *Smith v Fonterra & Ors* [2024] NZSC 5, the New Zealand Supreme Court has given the green light for a novel climate change claim to proceed to a full trial, refusing the Respondents' application for summary dismissal. This is the first time that a claim based on tortious liability for damage caused by climate change will be tested at the merits stage in a common law jurisdiction. The decision is likely to be influential in other common law jurisdictions.

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## Background

The claim was brought by Michael Smith, a climate change activist and an elder of the indigenous New Zealand tribes of Ngāpuhi and Ngāti Kahu, against seven corporates allegedly responsible for one-third of New Zealand's total reported greenhouse gas ("GHG") emissions.

Mr Smith raised three causes of action in tort: (i) public nuisance; (ii) negligence; and (iii) a novel tort based on a purported duty to cease contributing to damage to the climate system. Mr Smith sought declarations that the Respondents' activities were unlawful together with injunctive relief, requiring a peaking of the Respondents' emissions by 2025 and linear reductions to net zero by 2050, or, in the alternative, an immediate cessation of GHG emissions.

The first instance court struck out the claims in public nuisance and negligence, but declined to strike out the claim based on the proposed climate system damage tort. The Court of Appeal struck out all three causes of action, based on the overarching concern that climate change is "*quintessentially a matter that calls for a sophisticated regulatory response at a national level supported by international co-ordination*".

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## Are Common Law Climate Claims Precluded by Statute?

At first instance, the High Court found that the recognition of a common law duty of care on GHG emitters would have required "*the Courts to engage in complex polycentric*

issues, which are more appropriately left to Parliament”, which would be “inconsistent with Parliament’s regulation of emissions”. Similarly, the Court of Appeal agreed that Parliament’s authority should be respected and that to “superimpose a common law duty of care [was] likely to cut across that [legislative] framework, not enhance or supplement it”. The lower courts were also concerned by the potential divergence between common law and statute, which could result in emitters having to comply with parallel obligations.

The Supreme Court accepted that “the common law has not previously grappled with a crisis as all-embracing as climate change” [156], but noted that tort law had previously responded to other significant crises, such as the challenges brought by the industrial revolution. The Supreme Court stressed the interdependence of the common law and statute, and the role of legislation in supplementing lacunae in the law of torts. It further concluded that it was “inherently unlikely” [97] that, in the absence of clear parliamentary intention, the Climate Change Response Act 2002 (an act implementing international climate change obligations) excluded access to common law rights of action. The Court found that “Parliament had not pre-emptively excluded a common law response to damage caused by GHG emissions. On the contrary, it has retained that possibility” [100] and has “left a pathway open for the common law to operate, develop and evolve” [101].

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## Is Public Nuisance a Viable Route to Climate Liability?

The Supreme Court affirmed the Court of Appeal’s finding that actionable public nuisance claims for climate damage had been pleaded by the Plaintiff. It also found that independent illegality by the Respondents was not a necessary element of a cause of action in public nuisance. The Court observed, however, that the rationales for the so-called “special damage rule”, requiring damage suffered by the Plaintiff to be different from damage suffered by other members of the community, “are not now particularly convincing” [149]. The Court therefore considered that the rule “requires reconsideration in a 21<sup>st</sup> century context, in which the implications of ubiquitous harms such as pollution...are more evident and better understood, and in which class actions and active judicial case management have developed and are better able to meet fears of an oppressive multiplicity of actions” [151]. Whilst the Supreme Court did not go so far as to abolish (or affirm) the special damage rule, it distinguished between the general effects of climate change on humanity, and the Plaintiff’s legal and indigenous customary (or tikanga) interests in the alleged damage to coastal land, which “go beyond a wholly common interference with public rights” [152].

The Court of Appeal had considered that the issue of causation presented a fatal obstacle to Mr Smith’s claims, due to the lack of any sufficient connection between the pleaded

harm and the Respondents' activities. The Supreme Court, however, recognised that there are numerous authorities where defendants were found to have caused public nuisances despite individual householders or other industrial users also contributing to the pollution; for example, by discharging pollutants into rivers. The Supreme Court's approach emphasised the principle that a defendant must take responsibility for its contribution to a common interference with public rights, and that its *"responsibility should not be contingent on the absence of co-contribution or be in effect discharged by the equivalent acts of others"* [164]. However, the Supreme Court reserved the question of how the law of torts should respond to cumulative causation in a public nuisance case involving novel climate harms and newer technologies for trial, which would involve extensive analysis of evidence and policy considerations.

Ultimately, the Supreme Court determined that the principles governing public nuisance *"ought not to stand still in the face of massive environmental challenges attributable to human economic activity"* [172] and recognised the ability of common law to respond to the challenge through trials involving the testing of evidence. In doing so, it did not consider the obstacles so overwhelming as to warrant strike-out and, importantly, emphasised that *"the courts must be measured as to the pre-emptive denial of access to justice where it is incontestable that the respondents' actions form a part of a collective activity causing a plaintiff substantial harm"* [173].

Separately, the Supreme Court did not consider the viability of the remaining causes of action in negligence and the novel climate change damage tort, instead allowing them to proceed on the basis that summarily dismissing those claims would be unlikely to produce a material saving in hearing time or other court resources.

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## The Role of Customary Law in Climate Claims?

An important element of Mr Smith's claims was that his tikanga-based connection to the environment means that the injury to the environment also constitutes injury to himself. Although New Zealand common law had previously engaged with tikanga in tort actions, the Court of Appeal held that these matters did not assist in formulating the claim in tort, finding that legislative regulation was already consistent with tikanga. Whilst the Supreme Court did not express a view as to whether the principles would support the imposition of liability, it acknowledged that the specific loss pleaded is partly tikanga-based. Therefore, the *"trial court will need to grapple with the fact that Mr Smith purports to bring proceedings not merely as an alleged proprietor who has suffered loss, but as a kaitiaki [guardian] acting on behalf of the whenua [land], wai [fresh water] and moana [sea] – distinct entities in their own right. And it must consider some tikanga*

*conceptions of loss that are neither physical or economic. In other words, addressing and assessing matters of tikanga simply cannot be avoided” [188].*

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## Comment

While the Supreme Court stressed that its refusal to strike-out the claim was “*not a commentary on whether or not the claim will ultimately succeed*” [86], this significant decision could signal that common law causes of action may be more frequently deployed in climate change claims against private entities. The extent to which the common law is equipped to respond to polycentric, complex issues of climate change remains to be seen at trial, but the Supreme Court’s invitation to the lower courts to respond to a crisis as all-embracing as climate change suggests that the orthodox approach to the evolution of the common law is likely to be re-evaluated. The decision is likely to be influential in other common law jurisdictions, particularly in countries where customary values are integrated within the legal system.

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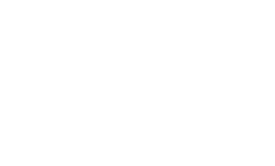
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