A NEW WAVE OF CLIMATE CHANGE LITIGATION? CONSIDERING THE WIDER IMPLICATIONS OF SMITH V FONTERRA

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The Supreme Court of New Zealand has recently allowed a case to proceed to trial which, in part, proposes a new common law tort – imposing a duty *"to cease materially contributing to: damage to the climate system; dangerous anthropogenic interference with the climate system; and the adverse effects of climate change".*

The court refused a strike out application on the basis of the primary cause of action alone – the common law tort of public nuisance. The remaining two causes of action (one of which is the novel tort) were also allowed to proceed on the basis that this would not impact the costs or time required for the case.

Whilst, on the face of it, this decision appears to pave the way for further developments in tortious claims relating to climate change, it was a procedural decision which followed existing procedural rules applicable in New Zealand. The claimant had also amended his particulars of claim following earlier decisions of the lower court, further emphasising aspects of the claim related to his status as a representative of New Zealand's indigenous population, who enjoy a special status under both New Zealand and international law.

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The court was also very clear that refusing to strike out the application was not indicative of the eventual likelihood of success.

THE FACTS

In 2022, Michael Smith, an elder of Ngāpuhi and Ngāti Kahu, brought a claim in tort against New Zealand's seven largest greenhouse gas ("GHG") emitters. The respondents represented the dairy industry, as well as the energy and gas, steel, fuel and coal industries. Mr Smith alleged that the respondents were collectively responsible for more than one third of New Zealand's GHG emissions in 2020-2021.

Mr Smith alleged that the respondents had materially contributed to the climate crisis and were continuing to do so, in the process causing damage to Mr Smith's land and water "*including places of customary, cultural, historical, nutritional and spiritual significance to him and his whānau* (extended family)". Mr Smith raised three common law causes of action:

1. Public Nuisance – this includes physical loss of land, loss of value of land, damage to customary resources and sites, ocean warming and acidification affecting customary fisheries, loss of land and species that are spiritually and culturally significant and adverse health impacts.

2. Negligence – the respondents owe a duty of care to not operate their businesses in a way that will cause the claimant loss.

3. A new tort imposing a duty "*to cease materially contributing to: damage to the climate system; dangerous anthropogenic interference with the climate system; and the adverse effects of climate change*".

The High Court ruled to strike out the first two causes of action. On appeal, the Court of Appeal decided to strike out all three causes of action. The Supreme Court reversed this decision refusing to strike out any of the causes of action.

THE DECISION

The Supreme Court refused the respondents' application to strike out the causes of action. It held that a "*measured approach*" should be taken when striking out a claim that "*is novel, but at least founded on seriously arguable non-trivial harm*", "*even if attribution to individual respondents remains difficult*".

The court specifically considered the following questions:

1. Are common law actions over GHG emissions excluded by statute?

2. Is a public nuisance claim bound to fail?

3. Can tikanga (Māori custom) inform the formulation of torts claims?

1. Are common law actions over GHG emissions excluded by statute?

New Zealand has a suite of legislation that covers climate change and GHG emissions. This includes the Climate Change Response Act ("CCRA") which outlines the legal framework for New Zealand to meet its internationally-set GHG reduction targets; the Resource Management Act ("RMA") which requires decision makers to consider climate change and the Emissions Trading Scheme ("ETS") which is a tool for GHG emissions reduction. None of these prevent or prohibit the emission of GHGs.

The Court of Appeal held that Mr Smith's claim was inconsistent with parliamentary policy and legislation and bringing private litigation could require companies to comply with more stringent obligations than those imposed by law.

The Supreme Court, on the other hand, found no such inconsistency. If Parliament had intended to exclude the nuisance caused by climate change from the remit of the courts, it would have expressly stated that. Not only did none of the legislation purport to exclude the right of individuals to bring a claim in common law, but in the RMA, the right to bring a common law claim was specifically preserved.

"The Supreme Court refused the respondents' application to strike out the causes of action."

2. Is a public nuisance claim bound to fail?

Distinguishing the position under English law, the Supreme Court agreed with the Court of Appeal that parallel unlawfulness between common law and criminal or civil law was not a prerequisite in New Zealand and that there was no need for Mr Smith to have suffered "special damages" – i.e. damages which are distinguishable from general harms suffered – but that in any event Mr Smith and those he represents had "*both a legal interest and distinct tikanga interests*", therefore meeting the requirements of the special damages rule for standing.

The Supreme Court also disagreed with the Court of Appeal's position that climate change could not be adequately addressed by common law tort claims and there was no need for Mr Smith to show that "but for" the actions of the defendants, Mr Smith would not have suffered loss and damage. It was enough for the case to proceed that they had made a substantial contribution and the effect of that contribution would be a factual matter for trial.

In satisfying all four questions, the Supreme Court found that a public nuisance claim was not bound to fail and therefore allowed the claim. Further, it found there would be no material benefit (for example in saving time or costs) in striking out the other two causes of action, which all related to the same fact set and the same damage.

3. Can tikanga (Māori custom) inform the formulation of torts claims?

The Supreme Court of New Zealand found that tikanga has a long history of application to common law claims. The court noted that the trial court will be required to consider tikanga concepts of loss that are not merely economical, and it will need to consider Mr Smith as a representative of his whenua (land), wai (fresh water) and moana (sea).

THE IMPACT ON OTHER JURISDICTIONS

> "Both cases sought mandatory injunctions to cause downwards revisions on GHG emissions aligned with the obligations of the relevant state."

At first glance, it is tempting to draw a comparison between this case and the *Milieudefensie v Shell* case in the Netherlands. Both cases sought mandatory injunctions to cause downwards revisions on GHG emissions aligned with the obligations of the relevant state.

However, the cases are based on materially different legal principles. *Milieudefensie* was a civil law case that sought to import international law obligations into domestic law through a concept within the Dutch civil code referred to as "unwritten law". *Smith v Fonterra*, on the other hand, seeks to take a more domestic approach, using established common law principles and local indigenous law principles to establish a duty not to harm the environment.

As with *Milieudefensie*, it is doubtful that this case will have substantial influence on English law. This case is heavily reliant on indigenous principles and the relationship between indigenous custom and common law in New Zealand.

In Australia, a common law jurisdiction much closer to home that also has an indigenous population, the common law has still developed differently to that of New Zealand. The court explained that, in New Zealand, there is a general proposition that tikanga Māori (Māori custom) should inform common law. However, in Australia, this relationship between indigenous customary laws and common law has not been entrenched within the legal system in the same way.

That is not to say that, if the case proceeds to an evidential trial and published judgment, it would not have a more significant influence on other common law jurisdictions, where tort law and the law of public nuisance have not developed in a divergent way.

Smith v Fonterra remains a case to watch.

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