



Causing climate change...a new tort? A cross-jurisdictional review

New Zealand | Australia | United Kingdom | United States

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Introduction

There is currently a global movement in common law jurisdictions for plaintiffs to use the court system to evoke change and develop climate change jurisprudence. Notably, in New Zealand we have recently seen a new tort of ‘breach of duty’ claimed in an attempt to make various companies responsible to the public for their emissions.

Following the New Zealand Court of Appeal decision of *Smith v Fonterra Co-operative Group Limited* [2021], Kennedys experts in New Zealand, Australia, the United Kingdom and United States provide a cross-jurisdictional review of the risk of this potential new tort also emerging in their respective countries.

New Zealand

New Zealand holds a ‘clean and green’ image, so it was an appropriate jurisdiction for a court to be asked to determine whether a new tort of ‘breach of duty’ should be imposed on companies that either emit greenhouse gases or produce/ supply products which release greenhouse gases when they are burned.

Smith v Fonterra Co-operative Group Limited [2021]

In *Smith v Fonterra Co-operative Group Limited* [2021], the plaintiff, Mr. Smith, is an elder of two Maori tribes Ngāpuhi and Ngāti Kahu, and he is also the climate change spokesperson for the Iwi Chairs’ Forum. In summary, he claimed that seven large New Zealand companies were causing climate change by emitting greenhouse gases, and that they owed him a duty of care not to cause such damage.

The plaintiff issued proceedings in the High Court.

The claim relied on three causes of action in tort: public nuisance, negligence, and a proposed new tort described as breach of duty.

The plaintiff sought declarations and an injunction to stop the defendants from producing such greenhouse gases, effectively seeking zero emissions. The defendants applied to strike out the claim on the basis that it had no prospect of success. The Court of Appeal agreed.

The plaintiff, in support of asking the court to uphold the new tort to prevent climate change, urged the Court of Appeal to be bold, submitting that it was part of the tradition and strength of the common law that it was responsive to changing times.

The Court of Appeal held that to accede to such a request, “would in fact be contrary to the common law tradition which is one of incremental development and not one of radical change...”.

“ The issue of climate change cannot be effectively addressed through tort law. Rather, this pressing issue calls for a sophisticated regulatory response at a national level, supported by international co-ordination. ”

New Zealand Court of Appeal, 2021



Climate change implications

From a liability perspective this decision will be welcomed by a number of companies and their insurers in New Zealand. The niggly issue however, is that the High Court has signalled that the task of imposing liability for greenhouse emissions, thereby causing climate change, sits with parliament.

This decision may result in New Zealand's legislators imposing more harsh and strict statutory liabilities on companies and their directors for greenhouse gas emissions.

The approach to the welcoming of a new tort of climate change is in its infancy in New Zealand. It is focused on common law principles rather than specific regulations, which appear to have greater influence on countries located in Europe and Northern America.

Australia

So far in Australia, we have seen claimants target novel duty of care claims against the government rather than corporations.

In 2021, school students in the *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] case were able to establish that the [Minister for Environment owed children a duty of care](#) when considering an application for a mining licence (though that decision is currently on appeal).

Torres Strait Islanders proceedings

Most recently, a group of Torres Strait Islanders have filed proceedings against the Commonwealth Government, claiming it owes a duty to protect them, their traditional way of life and the marine environment from the current and projected impact of climate change.

This group of islands between far north Queensland and Papua New Guinea has already seen higher average surface temperature, ocean acidification, significant sea level rise (6cm per decade since 1993), and harm to human health.

The claimants argue that the Commonwealth assumed responsibility for its protection by reason of a number of programs, and should have taken reasonable steps to avoid the risk of climate harm by having regard to the best possible science. However, as one of the most prolific emitters of greenhouse gases worldwide, the claimants argue the Commonwealth has failed in that duty.

Claims against corporations

Outside of negligence, we are also seeing a [raft of new and novel claims](#) against corporations, including for misleading conduct, non-disclosure, regulatory breaches and discovery requests.

While the focus may well shift to the private sector in Australia, such claims will be dependent on the common law for the time being, with The Greens' Liability for Climate Change Damage (Make the Polluters Pay) Bill 2021 (Cth) having been withdrawn on 30 November 2021.

United Kingdom

An action was launched last year by three young adults, supported by environmental campaigning group, Plan B, against the UK Government, alleging its failure to produce plans to reduce UK emissions constitutes a breach of their human rights.

The claimants' judicial review application was refused in December 2021 and the claimants have since lodged an appeal to the Court of Appeal. It is worthy to note that this is not a claim asserting any physical harm or injury, as in the Sharma decision and so may struggle to make headway.

[Plan B Earth and Others v. Secretary of State for Transport \[2020\]](#)

Plan B was also the leading claimant in the Supreme Court decision of [Plan B Earth and Others v. Secretary of State for Transport \[2020\]](#). This decision considered the proposed expansion of London's Heathrow airport by way of a third runway.

The claimants alleged that the secretary violated implicit obligations under the UK Planning Act to consider:

- The advice of the Committee on Climate Change.
- The UK Government's obligations under the Paris Agreement.
- The commitment to review its national climate change targets in light of the Paris Agreement.

The claimants additionally alleged violations of the Human Rights Act 1998.

The Court of Appeal held that the government erred by not taking the Paris Agreement and the government's climate change policy explicitly into account.

The Supreme Court reversed that decision, allowing the approval process for a third runway at Heathrow Airport. This was on the grounds that the government sufficiently took into account climate impacts with regard to its previous, and less stringent, climate change goals, which was the legal position at the time the Airports National Policy Statement was drafted.

ClientEarth proceedings

Since this Supreme Court decision, we have seen more claims made against both the government and corporates for alleged breaches in climate change legislation and the Human Rights Act.

Direction of travel is that these claims will increase, as evidenced by ClientEarth who issued proceedings against the government in January 2022, alleging that the UK Net Zero Strategy itself is in breach of climate change legislation. In addition, ClientEarth argues that the government has failed to meet legal carbon budgets and in doing so, has contravened the Human Rights Act by impacting on young people's right to life and family life.

We will continue to monitor the proceedings and the approach taken by the court, but it is difficult to see ClientEarth overcoming causation issues.

Additionally, the coroner's inquest of *Ella Adoo-Kissi-Debrah* [2020] resulted in the coroner finding that air pollution was a significant factor of the child's death. In his report to the government, the coroner argued that the government needed to go further in its attempt to decrease existing legal binding targets to reduce particulate matter pollution.



Whilst there have been no reported further claims in this arena since December 2020, it is certainly an issue that is likely to be raised again.

United States

Well over two-thirds of global climate-change litigation is filed in the United States. These cases fall into several categories of claims, including, among others:

- Social activist groups filing litigation against state and federal government entities.
- Cities, other local government entities, and states filing litigation against corporations for their alleged detrimental impact to climate change.
- Activist shareholders seeking changes in corporate governance around how they handle issues related to climate change.
- Shareholder derivative and securities litigation filed against corporations. This includes allegedly false or misleading statements about combating climate change made by corporations and/or their directors and officers.

Juliana et al. v. United States of America et al.

With regard to social activist group litigation, there have been two recent developments in two cases that are being closely watched in the press.

In *Juliana et al. v. United States of America et al.* filed in 2021, a group of youths from Oregon and their guardian (climatologist James Hansen) sued the United States. They alleged that the government's practices of encouraging and permitting the combustion of fossil fuels violates the government's public trust-related obligations, along with the public's right to due process.

The case was eventually dismissed on appeal by the Ninth Circuit on the grounds that the plaintiffs lacked proper standing to bring the case, in that the relief being sought exceeded the court's powers. However, rather than attempt to appeal the case to the United States Supreme Court, the plaintiffs moved to amend their case by narrowing the relief sought.

The Oregon Federal District Court is now considering that new complaint. In the interim, several other cases similar to the Juliana case have been filed in various state courts. For example, in January 2022, the Alaska Supreme Court issued a decision dismissing a case filed by 16 Alaskan youths who were attempting to sue the state over its climate policies. In that lawsuit, the plaintiffs alleged that the state government's practices of supporting fossil fuels violated their constitutional rights, in that it was increasing the impact of climate change.

Ultimately, the Alaskan court held that the issues raised by the plaintiffs should more properly be decided by the executive and legislative branches of government.

However, the decision was close, with the court being split 3-2, with the dissent specifically recognising a constitutional right to a “liveable climate”.

Fourth Circuit Court of Appeals

With regard to cases brought by cities and states against corporations, there will be considerable focus on the case of *BP P.L.C. et al. v. Mayor and City Council of Baltimore*. In this case, Baltimore’s Mayor and City Council (City) sued various energy companies in Maryland state court alleging that they concealed the environmental impacts of the fossil fuels they promoted.

In this lawsuit, the Fourth Circuit Court of Appeals heard oral arguments in January 2022 about whether the case properly belonged in federal court or the more plaintiff-friendly state court. In fact, this is the second time the Fourth Circuit has heard oral argument on this question.

While BP and the other gas company defendants argued that federal courts should have exclusive rights to hear climate change cases against such companies, the Fourth Circuit reportedly appeared to have reservations about the argument.

The outcome of the case could have important ramifications on many similar lawsuits filed in other jurisdictions of the United States, so the decision will be closely watched.

Other government entities have tried to bring about change by bringing lawsuits against oil companies under state false advertising laws and/or Consumer Protection Acts. In fact, Vermont’s Attorney General TJ Donovan filed such an action in September 2021, joining a growing group of similar cases filed by Attorney Generals in Rhode Island, New York, Massachusetts, Minnesota, Delaware, Connecticut and the District of Columbia.

The new Vermont action alleges that the defendants misled consumers about their respective company’s contributions to climate change in violation of state laws.

In this regard, it would not be surprising to see additional similar litigation filed by other states in 2022.

Finally, given the nature of the cases being filed against corporations in the United States by cities and state governments, as well as the increased regulatory oversight and scrutiny, it is entirely foreseeable that other follow-along litigation could be filed against such companies. For example, derivative or even potentially securities fraud litigation could be filed against a company and its D&Os to the extent there is any type of a finding that the company misrepresented the impact that its products or operations had on climate change generally.

Comment

As the above case examples illustrate, there is currently a global movement in the common law jurisdictions where claimants seek to use the court system to evoke change and to develop a climate change jurisprudence.

[The IPCC \(International Panel on Climate Change\) Report](#), published on 28 February 2022, confirms global temperatures are currently 1.1 °C above pre-industrial levels, with temperature rise currently projected to overshoot the recommended 1.5 °C target over the next 20 years. This is in spite of the growing numbers of national and corporate net zero targets.

The IPCC Report may spur this global movement on and we may see an increase of climate litigation alleging breach of duty. If successful, such duties of care could fall not only on governments, but also onto companies and their directors.

While cover will ultimately depend on the facts and specific policy terms, it is essential that insureds and insurers recognise where future risk may arise.



Get in touch

If you would like to discuss any of the issues raised in this report in more detail, please reach out to your Kennedys client relationship partner or get in touch with any of the contacts listed below.

To find out more about our services, expertise and key contacts, go to:

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