Lecture Series

NZILA
New Zealand Insurance Law Association

Climate litigation & the development of private law claims after *Smith v Fonterra*

Simon Ladd

10 March 2025

NZILA Lecture 2025

Climate litigation and the development of private law claims after Smith v Fonterra

10 March 2025

Simon Ladd

SHORTLAND CHAMBERS

Contents

1. Competing contentions: the ability of the common law to respond
2. Regulatory responses: leaving space for the common law to respond
3. Public nuisance: what the Court held in *Smith v Fonterra*
4. What the judgment says about the development of private law claims
5. Developing areas of private law claims

1. Competing contentions: the ability of the common law to respond

“In our view, 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 co-ordination.” [2021] NZCA 552 at [16]

“It may indeed be beyond the capacity of the common law to resolve climate change in fact, but we are not presently convinced, at this stage of the proceeding, addressing only strike out, that the common law is incapable of addressing tortious aspects of climate change.” [2024] NZSC 5 at [154]

2. Regulatory responses: leaving space for the common law to respond

UN Framework Convention on Climate Change (UNFCCC) ratified in 1993

Climate Change Response Act passed in 2002

Emissions Trading Scheme introduced in 2008

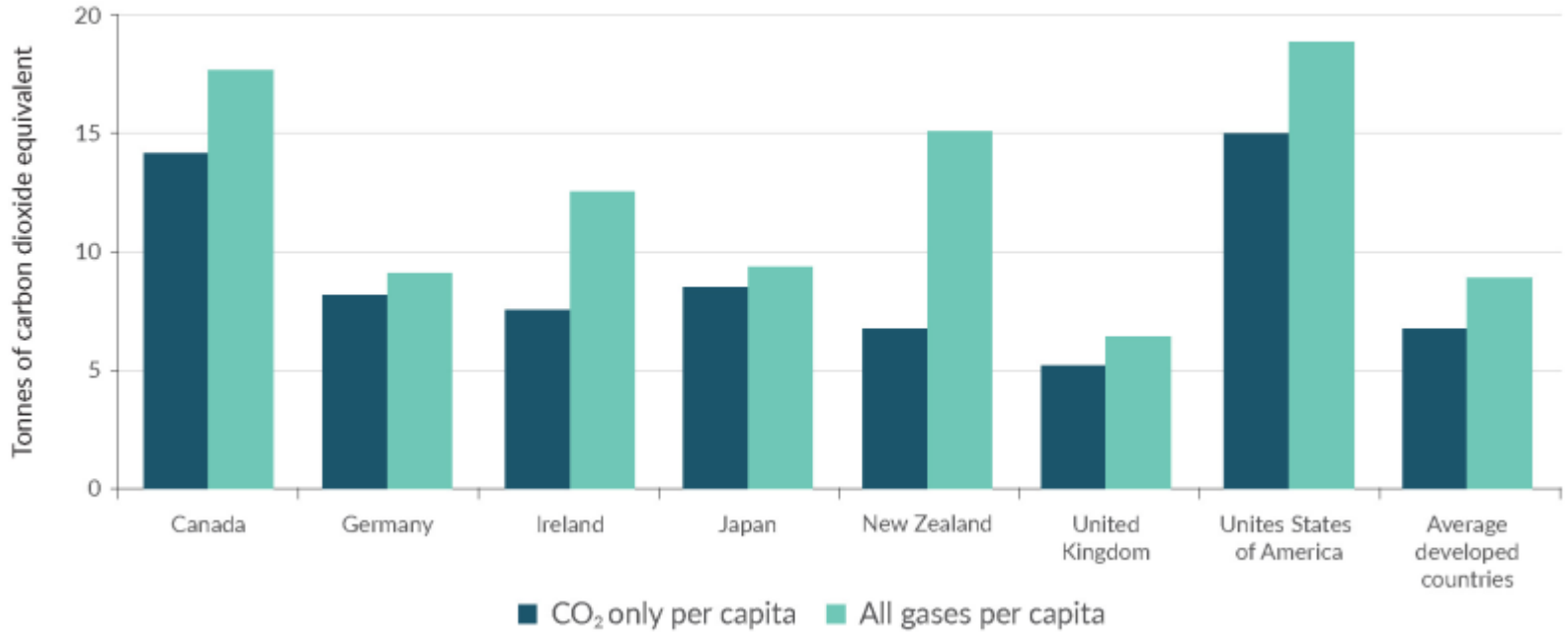
Paris Agreement signed in 2016

Between 1990 and 2022:

- NZ's gross GHG emissions **increased by 14%**, peaked in 2006 and have been declining since 2019
- NZ's net GHG emissions (gross GHG emissions combined with emissions / removals from the LULUCF sector) **increased by 33%**

(NZ's Greenhouse Gas Inventory 1990-2022: https://environment.govt.nz/publications/new-zealands-greenhouse-gas-inventory-19902022-snapshot/#2024-snapshot-infographic)

Figure 7: International comparisons for per-capita emissions (in tonnes of CO_2-e) in 2021



Climate Change Response (Zero Carbon) Amendment Act 2019

- 2050 targets – CO2 net zero by 2050; Methane 10% reduction by 2030, 24-47% reduction by 2050
- Requires Gov't to set 5-year emissions budgets
- Projections consistent with 1st emissions budget being met, but estimate has high uncertainty
- Significant risks to meeting 2nd and 3rd emissions budgets and the 2030 biogenic methane target (agriculture, transport, cannot be made up by additional forestry planting)

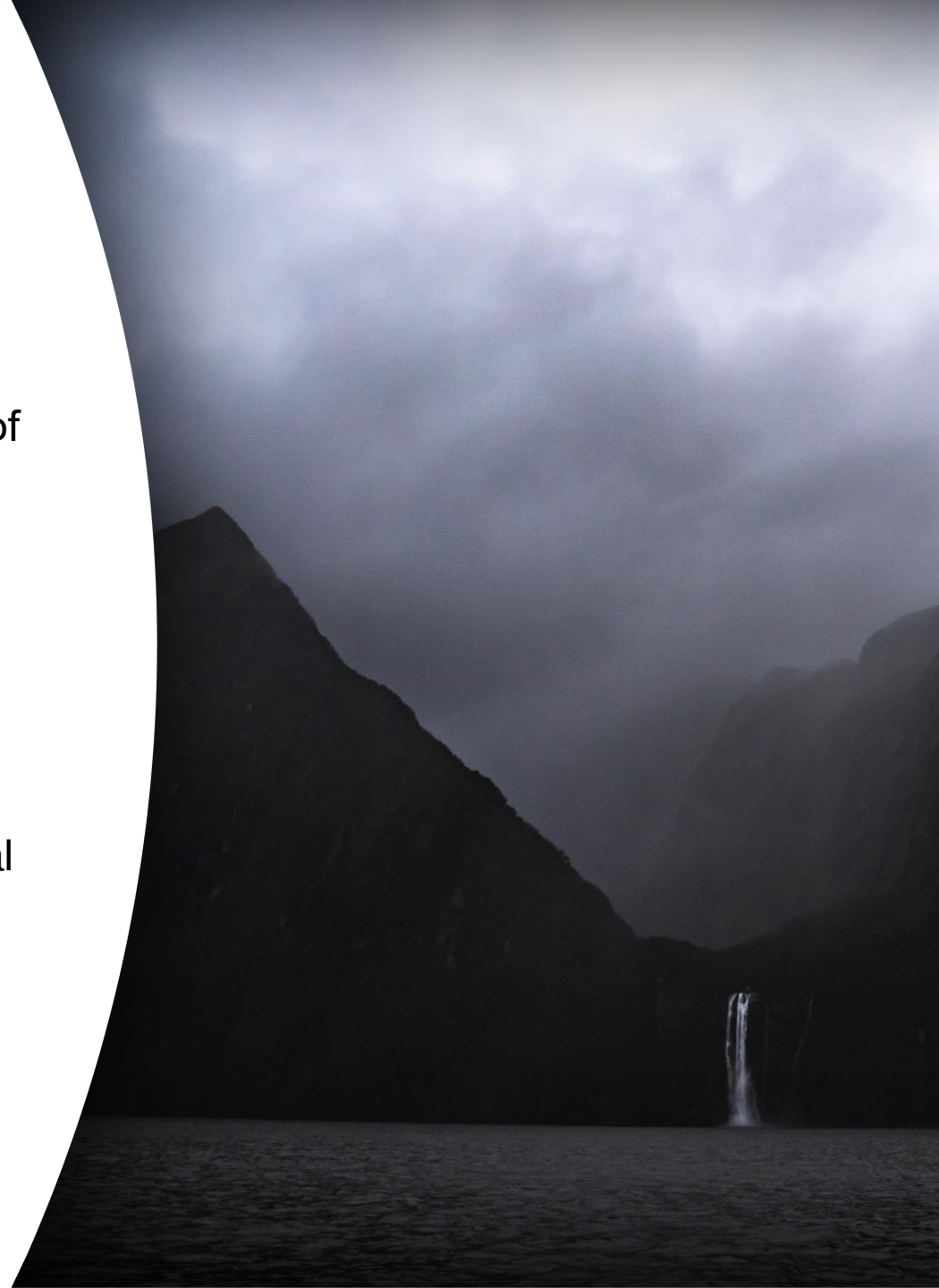
(Climate Change Commission 2024 Monitoring report: https://www.climatecommission.govt.nz/our-work/monitoring/emissions-reduction-monitoring/erm-2024/erm-2024-summary/)

3. Public nuisance: what the Court held in *Smith v Fonterra*

“Differing from [the Court of Appeal], 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 ... allowing it to proceed to trial is not a commentary on whether or not it will ultimately succeed.” ([2])

“But we reiterate the point made above at [84]—a refusal to strike out a cause of action is not a commentary on whether or not the claim ultimately will succeed.” ([143])

“As we have said already, real caution is necessary before pre-emptively disposing of a claim where seriously arguable non-trivial harm is in issue …. 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, where it is not clearly excluded, responds to challenge and change in a considered way, through trials involving the testing of evidence.” ([172])



Mr Smith’s causes of action

- Public nuisance
- Negligence
- Proposed climate system damage tort

- All of the argument in the Court concerned public nuisance; see [174] *What about the remaining causes of action?*

Approach to strike-out

- “[A] measured approach to strike out is appropriate where a claim – whether in negligence, nuisance or otherwise – is novel, but at least founded on seriously arguable non-trivial harm. That is so even if attribution to individual respondents remains difficult. In such a case the common law should lean towards receipt of the claim, and full evaluation based on evidence and argument at trial, over pre-emptive elimination.” ([83])

- Access to civil justice by those who have a tenable case that they have been harmed

- Concern plaintiffs will otherwise go without a remedy, based on a pre-emptive evaluation

Are common law actions excluded by statute?

- Two aspects:
  (1) Is this an area in which the courts should leave Parliament to act?
  (2) Does the statutory scheme of the CCRA exclude tort actions?

- The Court of Appeal held that policy factors negated common law liability, reflecting concerns about institutional capability, the risk of cutting across the goals and scheme of the CCRA, and the appropriate role of the courts in the face of climate change.

- The Supreme Court recognised the first question but focused on the second, concluding "Rather, [Parliament] has left a pathway open for the common law to operate, develop and evolve (if that is thought to be required in this case)":

  (1) No clear and unmistakable terms excluding common law claims.

  (2) "[T]he ETS neither authorises nor immunises GHG emissions."

Are actionable public rights tenably pleaded?

- Mr Smith pleaded that rights to public health, public safety, public comfort, public convenience and public peace are adversely affected by climate change.

- These rights fall tenably within (or bear sufficient relation to) the particular rights identified in *Rimmington* as providing foundation for a public nuisance pleading.

Independent illegality is not required

- Parallel unlawfulness is not a prerequisite in New Zealand
- Not readily apparent why, as a matter of policy, liability in tort for public nuisance – substantial common injury to rights to life, health, property or comfort of the public – should need to be dependent on an alternative underlying illegality
- The primary limit is the need for the defendant's act or omission to substantially and unreasonably interfere with public rights before it is actionable
- The focus is not on the legal character of the act or omission but rather its adverse effect

Standing: the special damages rule

- Is the damage suffered by the plaintiff different from that suffered by other members of the community?

- The rule is historic (connected to the tort's origin in the crime of public nuisance), predates 20th century developments in class actions and case management, and has been questioned (see *Fleming's The Law of Torts*)

- In public law, NZ takes a liberal approach to standing in cases involving the public interest

- The rule needs review in the context of full evidence and associated argument

- In any case, Mr Smith has a tenable claim to meeting its requirements because of his pleading of damage to coastal land and distinct tikanga interests

Sufficient connection or causation

- The respondents would have it that climate change's range and diffuse and disparate causes exceed the capacity of the common law for response

- "Another assessment, that might arise after the benefit of evidence and a full trial, may be that climate change is different in scale, but a consequence of a continuum of human activities that may or may not remain lawful depending on whether the harm they cause to others is capable of assessment and attribution."

- We are required to assume that the consequences of the emissions attributable to the respondents' activities is harm to the land and other pleaded interests of Mr Smith

- The respondents are very substantial emitters of GHGs or suppliers of fossil fuels that release GHGs when burned by others

Sufficient connection or causation

- Drew analogy with industrial revolution cases of river and air pollution. In sewage disposal and smelting, there is a mix of public and private harm and public and private good, and the common law has had to mediate liability for the former
- Not necessary that all defendants contributing to a nuisance must be before the court
- Does not follow that the “but for” causation that dominates the tort of negligence should serve the same function in the tort of public nuisance
- How the law of torts should respond to cumulative causation in a public nuisance case should be answered with evidence and policy analysis
- Whether the respondents’ actions amount to a substantial and unreasonable interference with public rights is an issue for trial, which will depend on evidence, including of tikanga, and also analysis of policy factors and consideration of human rights obligations

Relief

Mr Smith seeks two alternative injunctions:

(1) **Peaking emissions** (by 2025), followed by **linear reductions** (to 2030, 2040), zero net emissions in 2050, supervised by the Court

(2) Alternatively, **immediate cessation** (which may be suspended)

And a declaration defendants have unlawfully caused or contributed to a public nuisance through their emitting activities

Injunctions

Alternative 1 would require the High Court to supervise an injunction for 25 years:

- No New Zealand precedent.
- Issue not just burden on administration of justice but also institutional capability.
- Concerned the CA: “Courts do not have the expertise to address the social, economic and distributional implications of different regulatory design choices.”

Alternative 2 recognises the challenge of a 25-year injunction but runs hard into the third-party issue: what effect will an injunction have on third parties who are not before the Court?

- Disrupting the use of petrol, gas and coal “proscribes most economic activity, and many of the activities that form an integral part of every individual’s daily life” (CA [22]).

Some elderly precedent for suspended injunctions: *Borough of Birmingham* case (England) and *Abraham and Williams* (NZ)

- But *Birmingham* is a precautionary tale: 35 years to final resolution of the claim (by defendant buying plaintiff’s land); and Johnsonville stockyards continued 9 years after CA’s judgment

Conclusions on injunctive relief

"[W]e acknowledge that Mr Smith may face obstacles in obtaining any remedy requiring cessation (by injunction)." ([171])

- Closer, more conventional examination of causation is commanded by a claim for damages, requiring attribution of particular loss to a particular action or omission

- But injunctive relief involves a different inquiry: "As an equitable remedy involving a substantial measure of discretion in the calibration of remedial impact, a somewhat different approach to connection and causation may be available, as compared to a common law claim for compensatory damages."

Declaration

“Nor do we overlook the declaratory remedy sought. The utility of the declaration of inconsistency jurisdiction in public law suggests the court should not dismiss the power of purely declaratory relief in private law.” ([171])

4. What *Smith v Fonterra* says about the development of private law claims

Courts around the world are grappling with the same substantive tensions:

- Sense that regulatory responses are not working; effects of climate change worsening
- Belief that common law can contribute
- Need to respond to maintain legitimacy of law and judicial institutions
- Scale, seriousness of problem demands responses
- Scale, seriousness of problem highlights institutional limits of courts
- Causes of climate change (historic + current emissions, local + global) such that responses in individual cases unlikely to avoid harm
- Prohibiting emitting activities also proscribes economic activity and activities that form an integral part of every individual's every-day life
- For these reasons, should decisions to proscribe emitting activities be made by democratically elected decision-makers?

4. What *Smith v Fonterra* says about the development of private law claims

On a narrow view, the Supreme Court has said that Mr Smith's proceeding involves novel claims that should not be struck out and need to be determined "in the fertile fields of trial, not on the barren rocks of a strike out application."

But, in my submission, it would be wrong to take a narrow view of the Court's judgment.

- The Court is well aware that courts in other jurisdictions have rejected private law claims in tort, giving greater weight to the concerns that counsel against relief
- The Court has acknowledged the doctrinal obstacles to relief, especially around duty, causation, and relief itself
- Although the Court also acknowledged a need to express its reasons "succinctly", on each issue the Court favoured developing public nuisance in a way that enhances the ability of the common law to address climate change
- The Court has landed firmly in favour of the view that there is a role for the common law in private law claims against emitters

4. What *Smith v Fonterra* says about the development of private law claims

In doing so, the Court has gone further than common law courts overseas:

- Signalled willingness to adapt the common law to address climate change: the law should not stand still
- Declined to defer to statutory regimes or to put weight on the legality of the defendants' actions
- Liberalised requirements of public nuisance or signalled willingness to do so, including as to standing and causation
- Willing to import public law concepts into private law
- Declined to address a central issue: whether the relief sought will prevent or mitigate the pleaded harm to Mr Smith; entertained the possibility that the courts might grant declaratory relief only if liability was established

5. Developing areas of private law claims

Cases of climate litigation have more than doubled since 2015

Most remain against national and sub-national govt's

Grantham Institute's global trends in climate change litigation 2024 snapshot

- 233 new climate cases in 2023
- 2666 total cases (Sabin Center's Databases)
- US 129 new cases, 1745 in total
- 55 countries

Predominantly public defendants

- **Government framework cases** (110 since 2015) 1/3rd successful
  Challenge ambition, implementation of climate policy responses
  Klimaseniorinnen v Switzerland, European Court HR – failure to act breaches ECHR
- **Integrating climate consideration cases** (97)
  Integrate climate considerations into decisions on projects or sectoral policies
  Licensing / development of new fossil fuel production, electricity generation
- **Failure to adapt cases** (64)
  Challenge gov't or company for failure to address climate risks
  Friends of the Earth / 2 idvl's vs UK – 3rd National Adaptation Programme

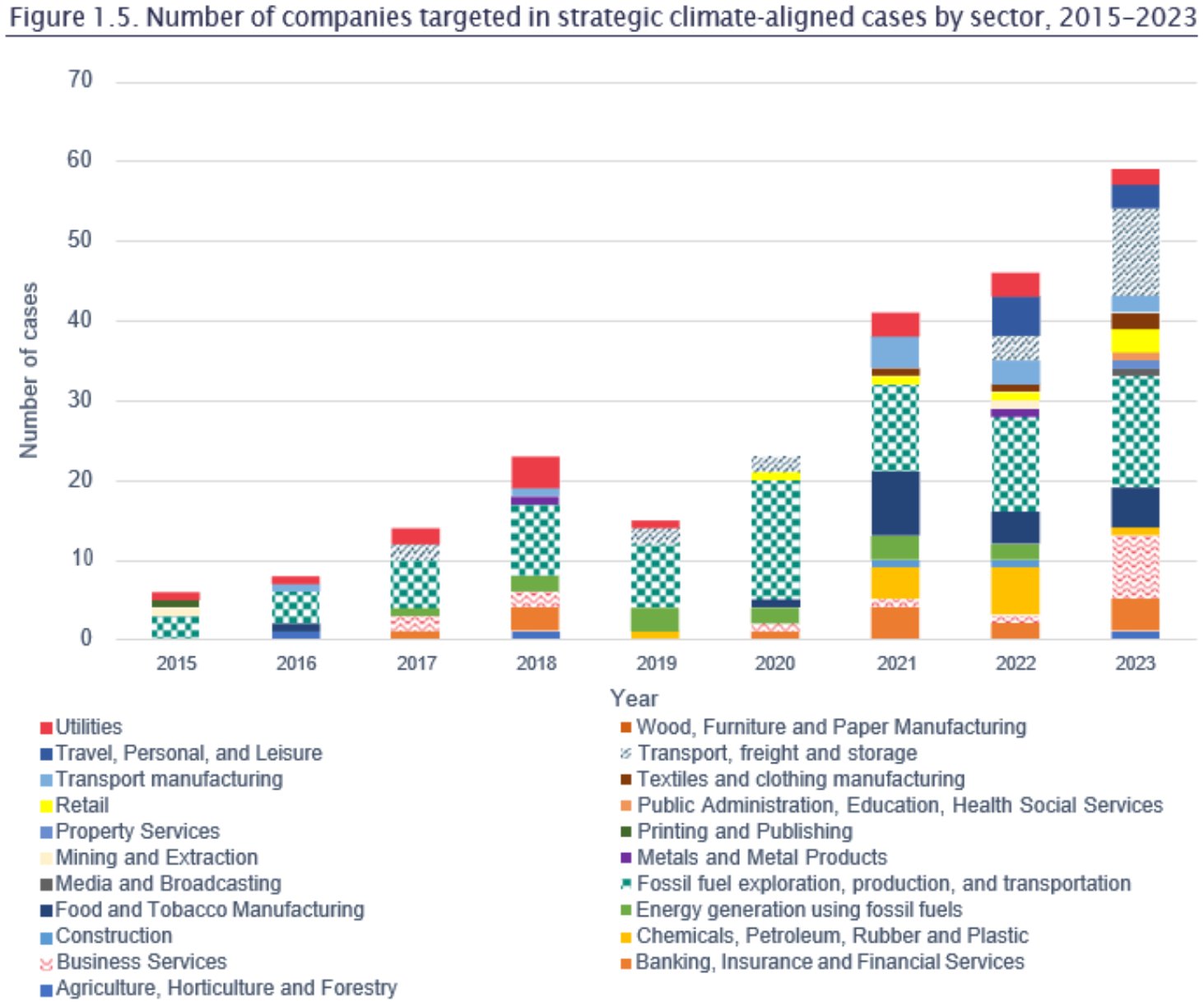
Corporate defendants

- **Corporate framework cases** (22; all outside US) Half successful
  Seek to require companies to change policies and corporate governance
- **Transition risk cases** (17)
  Management of carbon transition by directors, officers
  Enea to sue former directors who had supported investment in cancelled coal-fired power plant
- **Green-washing cases** (140) 54 of 77 to date successful
  Claims around climate neutrality of products and services (transport, energy)
  Cases include financial products and services – *ASIC v Vanguard* AUD$12.9m fine for misleading ESG claims re investment fund
- **Polluter-pays cases** (34; mostly US) Unsuccessful but most remain open
  Monetary damages for contribution to harmful climate effects
  Subnational govt's against Carbon Majors

Types of private law claims

- Claims seeking damages or injunctive relief to mitigate the effects of climate change
- Shareholder derivative actions under Companies Act duties (to act in the best interests of the company and to exercise reasonable care, skill and diligence) – failures to plan for or adapt to climate change (disclosures, investment decisions, engagement in emitting activities)
- Greenwashing claims under consumer protection laws – misleading claims about the environmental impact of products or actions (95 complaints to NZCC 1 Jan 22 to 1 July 24)
- Regulatory claims – failure to comply with climate disclosure requirements
- Professional negligence claims – failing to properly account for climate-related weather risks (e.g., design and construction consultants)

Figure 1.5. Number of companies targeted in strategic climate-aligned cases by sector, 2015–2023



Private law claims engaging liability insurance

- General and public liability
- D&O
- PI cover
- Claims for defence costs and liability coverage
- Often on a claims-made basis, so long tail risks
- Emerging disputes on coverage (*AES Corp v Steadfast Insurance*: harms arising form intentional GHG emissions did not represent an “accident” or “occurrence” under general liability policies because the emissions were the “natural or probable consequences of an intentional act”)

Bank of England, Results of the 2021 Climate Biennial Exploratory Scenario

- Data from ten participating general insurers
- For seven hypothetical legal cases brought against insureds, insurers were asked what percentage of their D&O, PI, and general liability insurance policies would be likely to pay out if legal claims were successful

Some resources

1. University of Melbourne Law School climate litigation database for Australia, New Zealand and the Pacific Islands: https://law.app.unimelb.edu.au/climate-change/#jurisdiction.
2. Sabin Center for Climate Change Law at Columbia Law School has databases of US and Global climate change litigation. The link for New Zealand is: https://climatecasechart.com/non-us-jurisdiction/new-zealand/
3. Grantham Institute: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/06/Global-trends-in-climate-change-litigation-2024-snapshot.pdf
4. UN Environment Programme Global Climate Litigation Reports: https://wedocs.unep.org/bitstream/handle/20.500.11822/43008/global_climate_litigation_report_2023.pdf?sequence=3
5. Bank of England 2021 Climate Biennial Exploratory Scenario: Results of the 2021 Climate Biennial Exploratory Scenario (CBES) | Bank of England

Lecture Series

NZILA
New Zealand Insurance Law Association

Climate litigation & the development of private law claims after *Smith v Fonterra*

Simon Ladd

10 March 2025