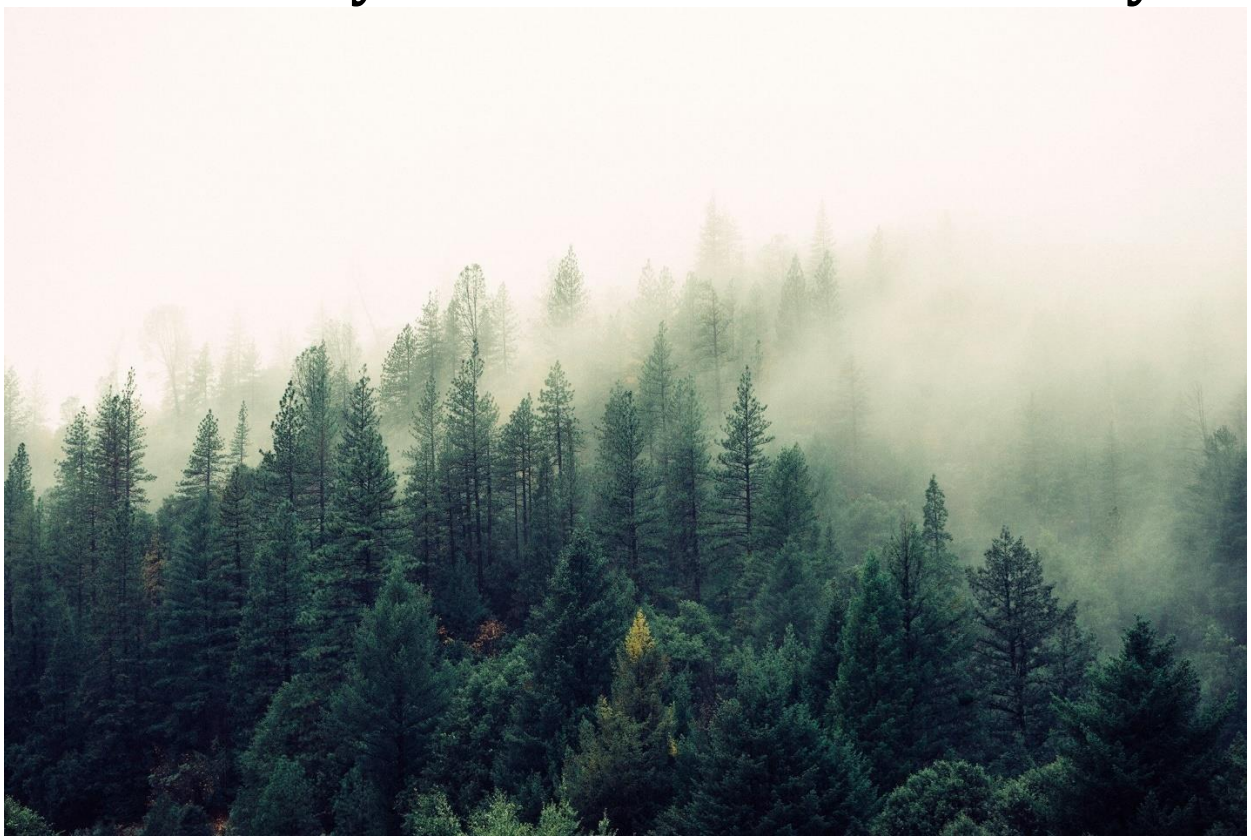
Smith v Fonterra Co-Operative Group Ltd: a Timely Reminder of Tort Liability



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In the first week of February, the Supreme Court released the long-awaited decision in *Smith v Fonterra Co-Operative Group Ltd*. This unanimous decision is doubtlessly one of the most significant decisions in New Zealand climate change litigation to date. The purpose of this short article is not to talk about climate change. Rather it is to highlight how this case, and the Supreme Court's decision last year in *Young v Attorney-General*, serve as a reminder of the potential liability of tort law when working under the RMA.

As RM practitioners, we are used to living and breathing everything relating to the RMA and the plethora of documents under it. When approached by a client who wants advice on a project, the first question to mind is usually 'is the activity permitted'? The second is 'is the activity consentable'? After consulting the relevant plans, national direction, and provisions in the RMA, if the answer to either question is yes, then that is often where the inquiry stops. However, the decision in *Smith* emphasizes the need for a further question: 'is there potential tort liability'?

A tort is a type of civil claim arising when one person wrongs another. Unlike the RMA, they are not created by Acts of Parliament but rather from centuries of case law developed by the

Courts. One of the advantages of torts is they allow a person to claim monetary compensation in the form of damages from the person who has wronged them.

The decision in *Smith* does not say anything particularly new on the subject of torts and the RMA. However, it does highlight aspects of established law which are often forgotten.

What's the case about?

The case in *Smith* concerns an application by Mr Smith, an elder of Ngāpuhi and Ngāti Kahu, for claims against several large organisations in New Zealand. Mr Smith claims that the companies are liable to interests he represents for their contributions to climate change. He claims liability under three distinct torts: public nuisance, negligence, and a novel tort of causing damage to the climate system.

The claims have previously been struck out by the High Court and Court of Appeal on the grounds that they were not reasonably arguable. The Supreme Court has now overturned the strikeout and reinstated the claims. The Court was careful to state in its decision that it is not finding that Mr Smith's claim will succeed. Mr Smith will still need to prove his claim at trial. However, the Court found that Mr Smith's arguments were sufficiently grounded in law that he should be given his day in court.

Torts and the RMA

In reaching its decision, the Court summarised how the RMA, an Act of Parliament, interacts with tort liability which stems from the common law. In the words of the Court "the RMA regulates the environmental effects of human activity and, conversely, mitigation of the effects of environmental process on humans. It does this through environmental policies, standards, and rules, and through local authority consenting functions. These controls tend to reduce, but not completely remove, the potential for nuisance and the need for resort to environmental tort actions".[1] The Court specifically notes that section 23 of the RMA preserves the access to tort claims.

The Court refers favourably to a High Court decision from the early 2000's which makes this position plain. *Hawkes Bay Protein Ltd v Davidson* concerned a claim for private nuisance against a meat processing plan in Napier for excessive odour. In defending the claim, the plant owner pointed to the fact that the neighbourhood was industrially zoned and that they had a resource consent.[2] The High Court rejected that defence. The Court held that "planning consent changes the character of the neighbourhood by which the standard of [a] reasonable user falls to be judged."[3] However, "planning authorities cannot authorise nuisances and even if there be compliance with planning permission, such is not a defence to a nuisance action … Any planning consent has no relevance if the activity is otherwise an actionable nuisance". To paraphrase, while the existence of a resource consent will be taken into account when determining the character of an area, a person can still be liable even if they comply with their resource consent.

Types of tort liability

There are many different types of torts which can lead to liability in different circumstances. The decision in *Smith* was concerned primarily with the tort of public nuisance. In contract *Hawkes Bay Protein* concerns private nuisance. The legal tests for each tort are

complex but too extensive to cover here.[4] However, it is worth considering the circumstances in which liability could arise in an RMA context.

The Court in *Hawkes Bay Protein* found the defendants liable for private nuisance despite having a resource consent. Another quintessential example of private nuisance is the flow of water and debris from one property to another. After the devastation of Cyclone Gabrielle, this is particularly relevant to the question of forestry slash. There is a real argument that a forester or landowner who allows slash to flow onto neighbouring land will be liable for private nuisance for the damaged cause. Is it reasonable for a neighbour to tolerate slash accumulating on their land? If not, liability will likely follow.

The case law says that liability can occur even when a forester has complied with all their resource consent. It is perhaps surprising that, following Cyclone Gabrielle, there has not been reported litigation for nuisance caused by slash. This, perhaps, illustrates the point that this is a largely overlooked area of the law.

The Supreme Court has recently released a judgment concerning a person's liability for nuisances which they did not cause. In *Young v Attorney-General*, the Supreme Court considered a question of liability for damage caused by a slip during the Canterbury earthquakes.[5] In this case, it was accepted that a party can be liable for private nuisance even for some natural condition of the land (in this case, the risk of a slip). The Supreme Court also noted that a landowner can be liable for a nuisance on their land caused by a third party if they fail to take a reasonable action to remedy it. For example, in *Sedleigh-Denfield v O'Callaghan*, a defendant was liable for a flood caused by a drainpipe on their land becoming clogged with leaves.[6] This even though it was the Council who installed the drainpipe, not the landowner.

In these cases, the duty owing to the landowner is a "measured" duty only to do what is reasonable in the circumstances. The *Young* case largely concerned whether this measured duty had been met and what factors may be taken into account. Ultimately, in the *Young* case, the defendant was found to have met their measured duty and so was not liable.

Conclusion

When it comes to the interface between the RMA and torts, the Supreme Court decisions in *Smith* and in *Young* do not say anything new. But they do say what is often forgotten.

It is not my intention to suggest that tort liability will always be relevant. Torts are legally complex and highly fact specific. Since tort claims are the province of the general courts, they are expensive and time consuming. For many this will rule out their relevance. I would not be surprised, however, if we see a resurgence in tort claims. Whether this is an opportunity, or a warning, will depend on the person.

Court of New Zealand media release :
https://www.courtsofnz.govt.nz/assets/cases/2024/MR-2024-NZSC-5.pdf

[1] *Smith v Fonterra Co-Operative Group Ltd* [2024] NZSC 5.

[2] *Hawkes Bay Protein Ltd v Davidson* [2003] 1 NZLR 536 (HC).

[3] At [19].

[4] There are many other property related torts including negligence, trespass, stock trespass and the tort in *Rylands v Fletcher*.

[5] *Young v Attorney-General* [2023] NZSC 142.

[6] *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 (HL).