

# Climate and interesting court cases

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**R**oyal Dutch Shell has been ordered by a court in the Netherlands to dramatically reduce its global emissions.

I have previously opined that local government faces risk from these types of lawsuits too. Many councils have declared climate emergencies and the public are increasingly willing to hold local government to account if public works and policies do not align with climate change commitments.

The Shell judgment was based on Dutch and European law, but ultimately the court found that climate change has right to life implications and, because Shell had pledged to uphold human rights, it was incumbent upon it to take steps to meet the commitments it had made to its shareholders and the wider public.

The oil giant was found to owe a duty of care and the level of its emission reductions should be brought in line with the Paris Climate Agreement. To do this, it must cut its emissions by 45 percent compared to its 2019 levels by the end of 2030.

It is the first time a company has been legally obliged to align its policies with the Paris Climate Agreement. The decision only applies in the Netherlands, but it is believed it will be precedent setting elsewhere, including in New Zealand.

Before our Court of Appeal is a case where a novel climate change duty of care was pleaded. The application of the Royal Dutch Shell case in that appeal will be fascinating.

The New Zealand judgment came out last year. It was a strike out application in a case brought by Michael Smith (a climate spokesperson for the iwi chairs forum). He claimed a customary interest and tikanga in land in Northland and sued: Fonterra; Genesis Energy; Dairy Holdings; NZ Steel; Z Energy; The NZ Refining Company; and BT Mining.

Each of the parties sued was an industry that released greenhouse gases into the atmosphere or supplied products which released greenhouse gases when they are burned.

The statement of claim raised three causes of action (all in tort): Public nuisance; negligence; and breach of an inchoate duty.

Smith sought declarations that each defendant had unlawfully caused or contributed to a public nuisance or breached a duty of care. He also sought injunctions that each defendant produce zero net emissions from its activities by 2030.

Smith did not seek damages and nor did he seek costs (because he claimed to be bringing the proceeding in the public's interest and because he had pro bono representation).

All defendants applied to strike out the claims against them,

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arguing the matters raised were non-justiciable and should be left for parliament to determine.

New Zealand is a signatory to the Paris agreement, the long-term goal (2050) of which is to keep the increase in global average temperature to below 2°C above pre-industrial levels, limiting the increase to 1.5°C.

New Zealand's 2019 amendments to the Climate Change Response Act 2002 reflect the goals of that agreement. The defendants argued that their activities were lawful, reductions had already been achieved, with one claiming there was no technology available that would allow it to meet Smith's 2030 target.

Most argued that their emissions would ordinarily be regarded as trifling. In reply, Smith argued that despite compliance with relevant regulatory regimes, this did not prevent the defendants from being liable to him in tort, asserting he will suffer "special harm" from the defendants' actions.

The court noted that Smith's claim raised "novel issues" that had never been raised in New Zealand before. The court dismissed the public nuisance and negligence causes of action, holding that they were untenable.

Smith did not refer to any legal obligations when pleading the inchoate duty, as that duty is not analogous to any existing duty. Wylie J doubted its recognition could be described as a gradual step (regarding the development of tort law) or a step-by-step expansion of negligence law and it would be a "significant hurdle" to persuade the court to recognise a new legal duty.

Nevertheless, Wylie J did not strike out that cause of action, potentially opening the door to a new tortious duty for corporates and one that now has a Dutch precedent in support. **LG**