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Details of Filing

Document Lodged:	Submissions
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File Title:	MINISTER FOR THE ENVIRONMENT (COMMONWEALTH) v ANJALI SHARMA & ORS (BY THEIR LITIGATION REPRESENTATIVE SISTER MARIE BRIGID ARTHUR)
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FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL

No. VID 389 of 2021

On appeal from a Single Judge of the Federal Court of Australia

MINISTER FOR THE ENVIRONMENT
Appellant

ANJALI SHARMA

First Respondent

ISOLDE SHANTI RAJ-SEPPINGS

Second Respondent

AMBROSE MALACHY HAYES

Third Respondent

TOMAS WEBSTER ARBIZU

Fourth Respondent

BELLA PAIGE BURGEMEISTER

Fifth Respondent

LAURA FLECK KIRWAN

Sixth Respondent

LUCA GWYTHER SAUNDERS

Seventh Respondent

APPELLANT'S SUPPLEMENTARY SUBMISSIONS ON

SMITH v FONTERRA CO-OPERATIVE GROUP LTD [2021] NZCA 552

Filed on behalf of the Respondent
File ref: 20206340

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1. In *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552 (***Smith***), the New Zealand Court of Appeal held that "climate change simply cannot be appropriately or adequately addressed by common law tort claims" ([16]). It dismissed an appeal against a decision to strike out a claim that a duty of care was owed by 7 respondents (being companies that either emitted GHG into the atmosphere or supplied products that would release GHG when burned) "to take reasonable care not to operate its business in a way that would cause … loss by contributing to dangerous anthropogenic interference with the climate system" ([94]).[1] In doing so, the Court relied on:

   (a) the over-arching consideration that "the issue of climate change cannot be effectively addressed through tort law" ([28]). "[C]ourts are … ill-equipped to address the issues that the claim raises" ([116]), which call for "a level of institutional expertise, democratic participation and democratic accountability that cannot be achieved through a court process" ([26]). Further, actions brought "against subsets of emitters [are] an inherently inefficient and ad hoc way of addressing climate change" and apt to result in "arbitrary outcomes and ongoing litigation", drawing the courts into "an indefinite, and inevitably far-reaching, process of line drawing" ([27]). For those reasons, rather than being addressed through tort law, climate change "calls for a sophisticated regulatory response at a national level, supported by international co-ordination" ([28]).

   (b) the absence of a "direct relationship" and "causal proximity"[2] between the plaintiff and the respondents ([103], [113]), in circumstances where: (i) it was conceded that none of the respondents makes a material contribution to climate change ([19]); and (ii) even when regard is had to alternative methods of establishing causation,[3] liability could never be established by the plaintiff when "the class of possible contributors is virtually limitless and on any view it cannot be said that [he] would not have been injured but for the negligence of the named defendants" ([112]). Notably, the Court rejected the argument that it was sufficient, at the duty stage, to show that the respondents "have contributed to climate change and continue to do so" ([106]; cf RWS [62], T185.4-14); and

   (c) the extent to which "recognition of a duty would create a limitless class of potential plaintiffs as well as a limitless class of potential defendants … [who] would be subjected to indeterminate liability and embroiled in highly problematic and complex contribution

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1 Additionally, the Court allowed the respondents' cross-appeal against the primary judge's refusal to strike out the plaintiff's novel tort claim ([124]-[126]). In this appeal, the respondents drew the Court's attention to the primary judge's decision on that claim: T205.12-16.

2 Under Australian law, while proximity is no longer regarded as a "unifying principle", it is useful to the extent that it "gives focus to the inquiry" by "express[ing] the nature of what is in issue": *Sullivan v Moody* (2001) 207 CLR 562 at [46]-[48]. See also *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at [38], [75] and [330].

3 The judgment (at [107]-[109]) discusses the approaches to causation in *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32; *Clements v Clements* [2012] 2 SCR 181; and *Sindell v Abbott Laboratories* 26 Cal 3d 588 (1980).

arguments on an unprecedented scale" ([116]). It would also be "contrary to the common law tradition which is one of incremental development and not … radical change" ([15]).

2. Incoherence of the posited duty of care with New Zealand's international obligations and the *Climate Change Response Act 2002* (NZ) was an additional aspect of the Court's reasons for rejecting the duty ([29] – [33], [116]). But the Court's reasoning was plainly not limited to that issue (eg [18], [19], [25] and [27]).

3. The Court of Appeal's reasoning about the fundamental difficulties with the recognition of a novel duty of care in this context apply with equal force in the present case. Its observations about the policy issues involved in the response to climate change and the impediment they create to the recognition of a common law duty of care resonate with the submissions that the Minister has already made. The respondents' assertion that *Smith* can be distinguished on the basis that New Zealand has adopted particular measures in legislation that are not replicated in Australia does not do justice to the Court of Appeal's actual reasoning. It was central to the Court's acceptance that "climate change simply cannot be appropriately or adequately addressed by common law tort claims" ([16]) not just that the problem calls for a national and international response, but also that the diffuse nature of the causes of climate change, including the fact that no one contributor of GHG emissions makes "a material contribution to climate change" ([19]), makes the law of tort, which is directed to the responsibility of individuals to other individuals, simply inapt to respond to the risk of harm caused by climate change.

4. The Court recognised the novelty of a tort claim arising in circumstances where every person everywhere is (to varying degrees) both responsible for causing, and a victim of, the relevant harm ([18]). The absence of a principled basis for distinguishing a particular person as liable for the harm caused by climate change is an overwhelming obstacle to attempts to impose tortious liability for such harms ([19], [116]). And, for the reasons already advanced by the Minister, the attempt to distinguish the position of the Minister from companies such as the defendants in *Smith*, whose conduct may more directly contribute to climate change, should not be accepted. The "relationship or the proximity … of the governed to those who govern" (T199.4) cannot be a sufficient basis to warrant imposing a duty of care of the posited kind upon the Minister if there is no equivalent duty upon companies whose operations actually cause the emission of GHG. Further, the basis on which the respondents sought to confine the duty of care to the Children in this case is arbitrary and unsatisfactory, with the result, as recognised in *Smith* ([116]), that the proposed duty of care would in truth create "a limitless class of potential plaintiffs".

29 October 2021

Stephen Donaghue Stephen Free Zoe Maud