Material contribution:

An alternative to legislators getting cold feet in an overheating world?

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June 2026

The law of tort provides tools which should and hopefully will be deployed in climate-related litigation. However, as things stand, they have been fashioned as solutions for problems of a different era and lesser magnitude. In particular, the tests around causation do not naturally fit with climate-related and biodiversity loss harms. This blog will look at how existing legal tests deployed in personal injury cases might be harnessed to help hold those who damage the environment and climate system to account.

The ongoing New Zealand Supreme Court case of Smith v Fonterra and others[1] saw an interlocutory appeal of a decision to strike out the claimant's claim in tort. The pleaded case comprises three causes of action relating to damage caused by climate change. §§3 and 4 of the judgment in the interlocutory appeal records that: "…*Mr Smith alleges that the respondents have* ***contributed materially*** *to the climate crisis and have damaged, and will continue to damage, his whenua and moana, including places of customary, cultural, historical, nutritional and spiritual significance to him and his whānau. Mr Smith raises three causes of action in tort: public nuisance, negligence and a proposed new tort involving a duty, cognisable at law, to cease materially contributing to: damage to the climate system; dangerous anthropogenic interference with the climate system; and the adverse effects of climate change*."

At §10 the Court elegantly summarised the rationale for the claimant's tort claim: "*He submits his claim fits within the traditional role of the courts, the common law and the law of torts. As he puts it, the respondents are wronging him, and he seeks the courts' aid to have them stop. No re-invention of tort law is required. The questions raised warrant a trial and determination upon evidence*". The claimant won his strike-out appeal and the evidence in Mr Smith's case was to be presented at trial in April 2027. However, there is significant doubt over the case progressing to a final hearing. Mr Smith faces seven commercially powerful defendants. He has the hurdles of fitting his arguments and evidence relating to climate-related harms within the existing structures of tort, public nuisance and negligence and, additionally, persuading the court that it would be just and equitable to advance the law to create a new duty to cease materially contributing to damage to the climate system. Satisfying the Court would be a significant challenge.

However, it seems that the New Zealand Government's cage has been rattled, presumably by the potential new tortious claims to confront those who generate greenhouse gases by their commercial activity. The NZ government is not a defendant in the Smith v Fonterra litigation, yet on 11 May 2026 the NZ Government announced that it has decided to amend the law to prevent the courts from making certain civil findings of

[1] SC 149/2021 [2024] NZSC 5

liability for climate change damage caused by greenhouse gases[2]. On 19 May 2026, Lawyers for Climate Action wrote an open letter to the NZ Government urging it to abandon proposed amendments to the Climate Change Response Act 2002 to limit legal liability for damage caused by climate change impacts.[3] On 18 June 2026 a coalition of climate litigants announced that they had taken the NZ Government's tort prohibition proposals to the UN special rapporteur[4].

The abovementioned political developments in New Zealand, following the success for Mr Smith in his interlocutory decision, are both disappointing and concerning for the development of tort-based climate litigation elsewhere. Notwithstanding, it is intriguing to speculate why shutting down the potential for development of the law of tort is being planned. The substantive case for the claimant Mr Smith is already very challenging given that his case effectively involves persuading the NZ court to extend the boundaries of the law of tort. As New Zealand is a stable democracy it is hard to imagine that a careful reappraisal of causation tests could amount to judicial activism and thereby interfere with the delicate dance between the separation of powers. The government's plans are particularly surprising since the July 2025 ICJ Advisory Opinion on Climate Change obliges States "*to act with due diligence and "to use all the means at [their] disposal*"[5] to fulfil their international obligations to address the climate crisis. Interfering with the development of the common law could be seen as contrary to this State obligation to address the climate crisis.

There is some considerable overlap between tort law and the polluter pays principle. Superficially, the polluter pays principle is a beguilingly simple idea. The individual or entity polluting the environment should bear the cost of preventing, managing or remedying the problems and damage so caused. If polluters know that there will be adverse consequences for pollution, then it is presumed that this will act as a disincentive for the polluting activities.

In articulating the polluter pays principle for the first time in an international instrument in 1972[6] the OECD[7] was aiming to encourage the rational use of environmental resources and to avoid distortions in international trade and investment[8]. From its economic policy origins, the polluter pays principle has evolved into a distinct field where in "*polluter pays' litigation, part of a rapidly expanding landscape of climate litigation targeting state and non-state actors, claimants must establish a causal relationship between a defendant's greenhouse gas emissions and a specific incidence of past or future harm*."[9]

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[2] Climate change tort law change | New Zealand Ministry of Justice
[3] Open letter to the NZ Government: Climate tort law prohibition
[4] (1) Post | LinkedIn
[55] §175 ICJ Advisory opinion
[6] In the Council Recommendation on Guiding Principles Concerning the International Economic Aspects of Environmental Policies C(72)128 (1972)
[7] Organisation for Economic Co-operation and Development
[8] Principles of International Environmental Law Phillipe Sands et al (firth edition) Cambridge [241]
[9]

A recent paper by the Grantham Research Institute on Climate Change and the Environment[10] emphasises, however, that polluter pays litigation is very difficult and with very limited success to date. "*Since 2015, more than 80 polluter pays cases have been filed against major industrial emitters (Setzer and Higham, 2025). However, to date, none of these cases have succeeded on both factual and legal grounds*". The paper also points out that none of the jurisdictions where the cases were brought had a special climate tort, nor a provision for claimants to seek compensation for climate-related losses. Therefore, such claimants had to try to use existing doctrines and laws.

In both tort and polluter pays litigation, causation is the main obstacle with the burden of proof on claimants. Often a one claimant David, against a hulk of a Goliath. If a claimant can bolster his case by teaming up with other claimants, this generates all the additional challenges of marshalling and coordinating group litigation; inevitably with huge costs challenges; often against a slick army of well-resourced corporate lawyers. And further hobbled by the evidential practicalities and complexities of causation.

However, a potential answer to the causation polemic might be development of the principle of material contribution. In Smith, the NZ Supreme Court summarised the heart of Mr Smith's tort allegations as being that the respondents are "wronging him". His argument on causation includes that the court "*should now recognise an alternative approach to causation whereby multiple contributors who factually contribute to a harm bear causal responsibility even if the harm would have occurred without that contributor's particular contribution*."[11] In response, the Fonterra defendants argue that "*climate change raises insurmountable problems for liability—particularly ones of standing and causation—where everyone both contributes to, and is adversely affected by, GHG emissions, and where it is not possible to link, evidentially, emissions to the harm suffered by plaintiffs*. [The Fonterra defendants] *say that for the law to evolve in the way advanced by Mr Smith would introduce open-ended liability for defendants and dramatically disrupt economies.*"[12] Therefore, as things stand, causation hurdles protect greenhouse gas emitters from the consequences of their activities which, they suggest, benignly prevent disruption of economies. Presumably, the fact that climate change and biodiversity loss are fatal to economic stability was not a matter which was addressed in the arguments before the New Zealand Supreme Court at the strike-out appeal.

Whilst it is noted that different jurisdictions approach causation differently, in the UK context, personal injury disease litigation might suggest some of the principles from which causation tests in climate system damage and polluter pays litigation could evolve, including litigation when pollution causes damage to health.

In personal injury litigation it is recognised that there are three tests of causation. The starting point is the classic "but for" test where an easily identifiable event sets off a chain

[10] "Constructing the causal chain: attribution science in polluter pays climate litigation" Authors: Noah Walker-Crawford, Nicholas Petkov, Jameela Joy Reyes and Emily Theokritoff - First published June 2026

[11] §141

[12] §11

reaction resulting in identifiable injuries and losses which, absent an accident, would not have occurred.

The fields of disease litigation and medical negligence have evolved tests of "material contribution", emanating from the case of Bonnington Castings v Wardlaw[13], which are applied in dynamic situations where more than one harmful event has occurred and where tortious and non-tortious processes have occurred concurrently or consecutively, when there is more than one potential wrongdoer and also when it cannot be shown that the breach was the sole cause of damage.

Interestingly, when looking for parallels with the climate and biodiversity crises, industrial diseases and clinical negligence events often unfold over a period of time (which can be months or years in the context of industrial diseases). Disease and clinical negligence where material contribution tests are engaged also often involve tipping points. The body fights to restore physiological homeostasis and so can tolerate a degree of challenge and physiological "insult". However, there comes a point of overwhelm beyond which damage is caused. (In the context of clinical negligence litigation, the tort is often delay on the part of medical professionals; incorrect diagnosis or a failure to provide the correct treatment in a timely manner). A "material contribution" test can also accommodate the susceptibilities and vulnerabilities of individual litigants. Instinctively, these features have much in common with the fact that ecosystems typically have to reserve and be able to absorb a significant degree of disruption. Healthy biological systems continue to operate and attempt to restore ecological balance until a dramatic and irreversible step change occurs.

In the UK, the jurisprudence of material contribution has also evolved over recent years with the highest courts confronting what "material contribution" means. Does "material contribution" require a claimant to prove that, absent the defendant's negligence, the claimant would not have suffered loss (with a claimant having to prove a negative proposition)? Alternatively, in a complex situation with multiple "insults" and/or multiple defendants, and where the degree of tortious "insult" cannot be shown precisely, is it enough if the tortious event, events or processes only added to the physiological burden which tipped the body into damage. Waller LJ in the case of Bailey v Ministry of Defence held[14]: "*In a case where medical science cannot establish the probability that 'but for' an act of negligence the injury would not have happened but can establish that the contribution of the negligent cause was* ***more than negligible****, the 'but for' test is modified, and the claimant will succeed*."[15]. Following Bailey, where there is scientific uncertainty, the contribution to injury/loss/damage can be established if the contribution was more than *de minimis*.

The third test of causation available in personal injury litigation in very narrow circumstances is the test of material contribution to *risk*. Material contribution to risk is

[13] [1956] AC 613
[14] [2008] EWCA Civ 883
[15] §46

currently limited to asbestos-caused mesothelioma following the case of Fairchild[16] and, arguably, asbestos-related lung cancer (Heneghan[17] where mesothelioma and lung cancer are said to be "legally indistinguishable"). The so-called "Fairchild exception" and a relaxation of the causation rules came about against a background of features which are very specific to mesothelioma. These include that, firstly, mesothelioma (which is always fatal) very rarely appears without a clear history of exposure to airborne asbestos dust; secondly, epidemiology had demonstrated that even exposure to very small quantities of asbestos dust could cause mesothelioma; but, thirdly, when the precise process which triggered the malignant disease at the cellular level could not be identified. The more asbestos dust a victim had been exposed to, then the greater the degree of risk of fatal disease the victim had also been exposed to.

Consequently, both the material contribution and material contribution *to risk* tests have evolved to accommodate scientific uncertainty; uncertainty not only about the degree to which the particular tortious agent has caused the damage and loss, but also uncertainty regarding the precise biological mechanism whereby the loss and damage have been generated. And this all comes against the background of biological/physiological systems naturally trying to avoid damage and disease by default, by trying to bring the body back into a dynamic state of homeostasis.

Given that we humans are animals and part of, and dependent upon, the wider ecosystems it is intriguing to glimpse the possibilities of causation tests of material contribution and even material contribution to risk being developed and deployed to compensate for, and thus disincentivise, damage to the climate system and ecosystems. The fact that these tests accommodate damage to dynamic systems, and not just damage flowing from a one-off insult, creates the possibility of application of these tests to vibrant, living interdependent biological structures; whether ecosystems, large organisms such as mammals or even perhaps communities.

As the NZ Justices concluded in Smith[18], "*The common law has not previously grappled with a crisis as all-embracing as climate change. But in the 19th and early 20th centuries it had to deal with another existential crisis, albeit one of lesser scale, when the industrial revolution dramatically enlarged the risk of accidents .... The law's response was a mixture of the flawed ... and the inspired (e.g. the duty of care based on neighbourhood, expounded by Lord Atkin in Donoghue v Stevenson).*"[19] Regardless of whether Smith makes it to trial, climate-conscious lawyers can be inspired by the potential of existing tortious legal tools used in court proceedings to address the novel problems created by the existential climate crisis. This potential is all the more important at a time when democratic and political processes continue to give legislators cold feet in an overheating world.

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[16] Fairchild v Glenhaven Funeral Services Limited [2002] UKHL 22
[17] Heneghan v Manchester Dry Docs [2016] EWCA Civ 86 where the Court of Appeal confirmed the decision of Jay J
[18] §156
[19] [1932] AC 562 (HL)