

Addressing climate change through tort law: Implications of *Smith v Fonterra*

James Every-Palmer KC and Daniel Kalderimis

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1. Introduction

2. *Smith v Fonterra* in context: Current state of climate change litigation

- Level of ambition challenges
- Compliance with climate legislation
- Requiring public decision-makers to take account of climate issues
- Holding emitters directly responsible
- Greenwashing claims (to ensure consumer choice is effective)

3. Strike-out: What it is and isn't; what was decided

4. The role of tikanga

- Tikanga is the Māori common law, and is the first law of Aotearoa New Zealand. It consists of templates and frameworks to guide actions and outcomes. The term 'tika' means 'to be right'.
- Potential role of tikanga Māori in *Smith v Fonterra* at trial
 - Potential influence on development of tort law
 - Alleged loss includes as kaitiaki of his whenua, wai and moana

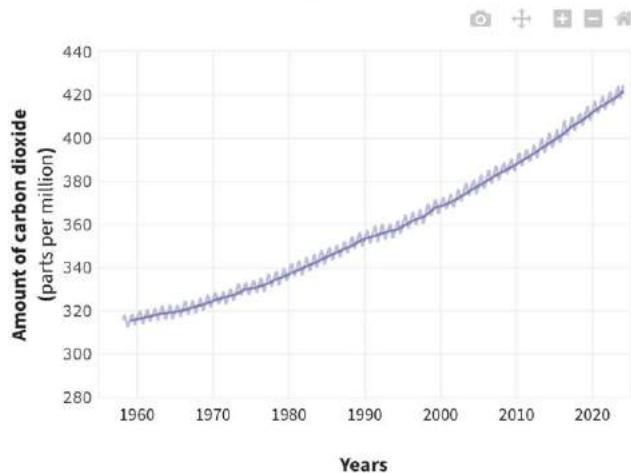
5. Perspectives on *Smith v Fonterra*

Climate change: An intergenerational externality wrapped inside a collective action problem

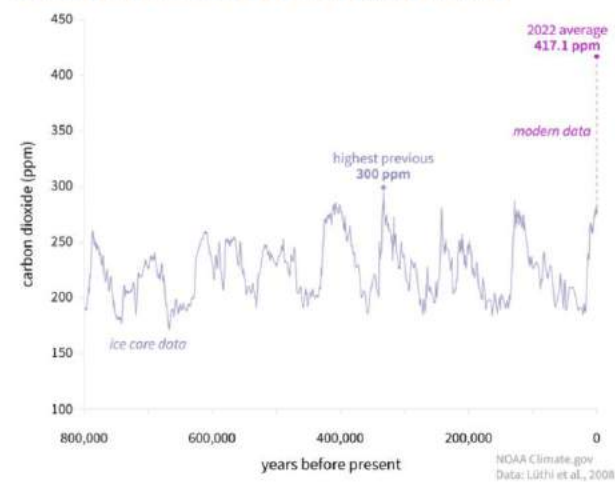
- Greenhouse gas emissions produce a negative externality
- The causal chain between emissions and harm is complex:
 - Multiple sources, normal activities, effects dispersed temporally and geographically, uncertainty, etc
 - Intergenerational: harms from emissions today will arise for generations to come
- Coase theorem: When information and transaction costs are low, the market will produce an efficient solution to the problem of nuisances without regard to where the law places liability. But here transaction costs are extremely high, so a market failure is inevitable.
- The geographic and temporal distribution of climate impacts also suggests regulatory failure:
 - State action imposes costs on today's voters for the benefit of tomorrow's voters
 - States also face a prisoners' dilemma: Best course globally is for everyone to take appropriate steps, but the rational course for an individual nation may be for *faux* ambition and shirking

Consistent with this theory, the world is tracking towards a suboptimal outcome (say 3°C warming) with carbon prices at much less than the social cost (~\$US200/tonne)

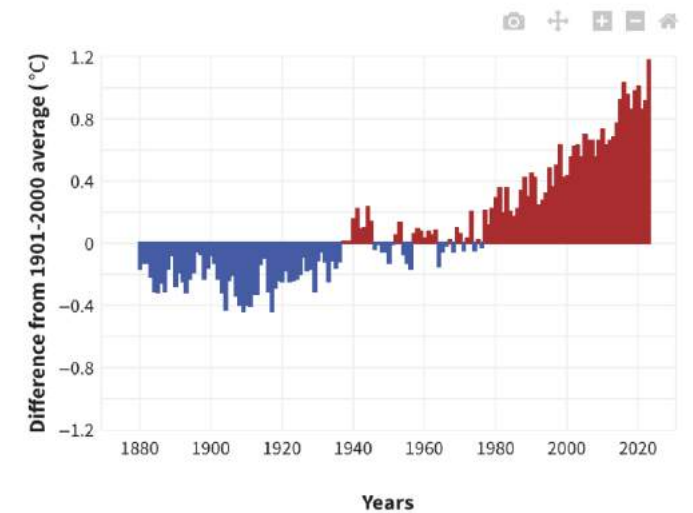
ATMOSPHERIC CARBON DIOXIDE



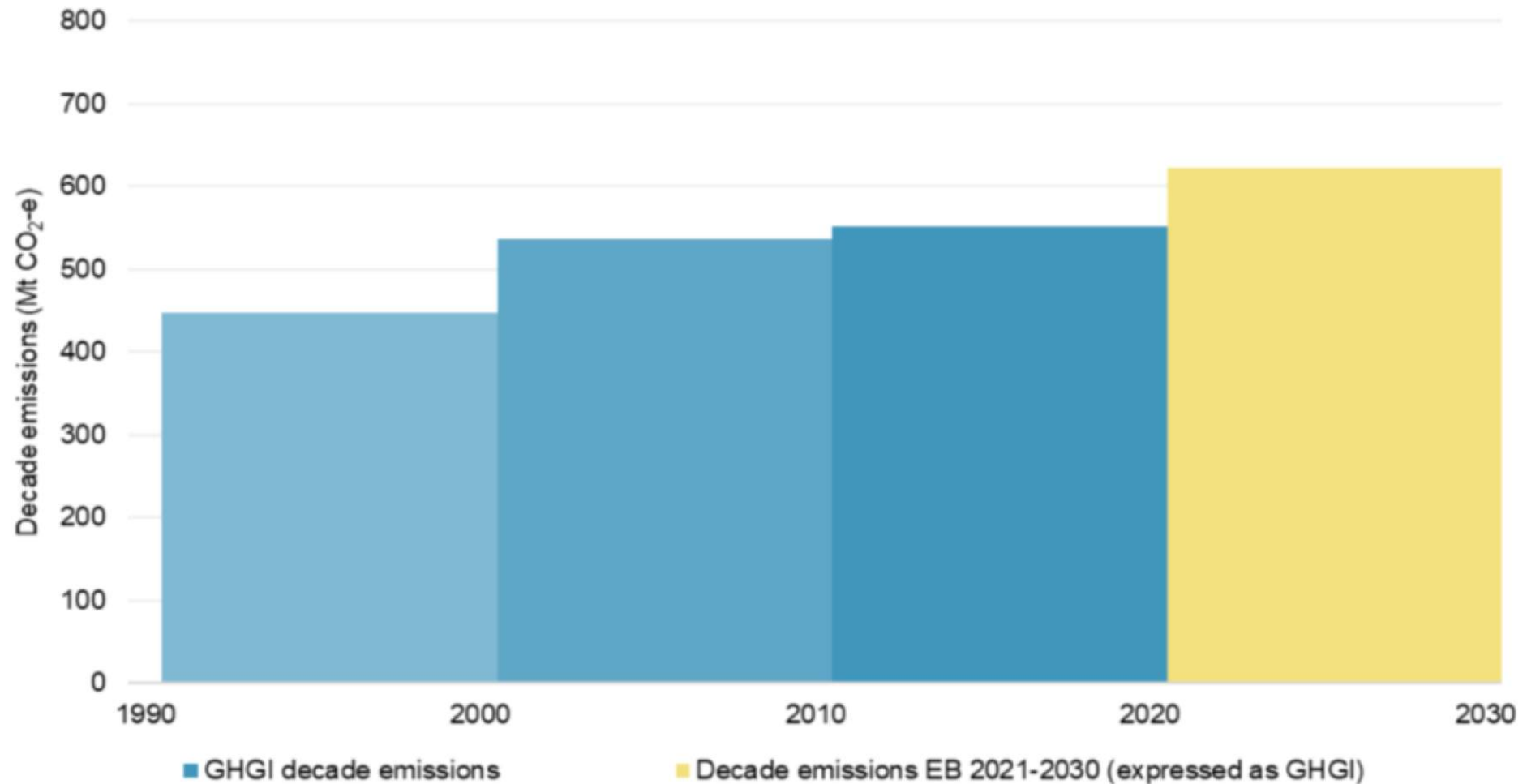
CARBON DIOXIDE OVER 800,000 YEARS



GLOBAL AVERAGE SURFACE TEMPERATURE



New Zealand's track record fits with the theory too...



Returning to *Smith v Fonterra* ...

- The Court of Appeal said “no role for tort law here”:

“... 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.”

An alternative view in the spirit of Coase and given the risk of regulatory failure

- Corollary of Coase theorem is that when transaction costs are high, the initial allocation of rights is extremely important (because likely determinative)
- In the economic analysis of tort law, the purpose of liability rules is to internalize externalities (eg from pollution)
- Courts may have institutional advantages which overcome some of the obstacles to welfare maximising State action on climate change:
 - Intergenerational thinking (protection against burdens being offloaded into the future)
 - Mutual advantage for nations overall: Courts overcame a collective action problem in relation to the development of the rules of private international law (conflicts of law)

What might “climate comity” look like?

- In private international law, common law courts generated principles of comity in terms of which laws to apply and when to enforce judgments in cross border cases
- Rules were developed by courts in different countries for mutual benefit, not narrow self-interest (eg choice of law, enforcement of foreign judgments)
- Comity principles could be developed in relation to climate change
 - Each country has its share of remaining carbon budget for 1.5/2°C and so must make a fair share of reductions (common but differentiated)
 - Aggregation of global and temporal consequences to domestic emitters

What might an appropriate liability rule look like?

- The issue of property rights between current polluters and future generations is novel. That is, the present *de facto* position (no liability) is not a conscious choice.
- Following Coase and the importance of initial allocation, how might a property right in favour of future generations be expressed?
 - Tort: Imposing liability for “substantial and unreasonable” emissions
 - Human rights: Recognising the right to a stable environment free from the adverse impacts and vagaries of climate change
- The detail of what this means in practice for a particular country could be supplied by the climate comity principles
- Result: Judicial guard rails on inadequate State action could address the intergenerational externality and the collective action problem