Climate Claimants: The Prospects of Suing the New Zealand Government for Climate Change Inaction

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As communities are feeling the effects of climate change and as the Earth's prognosis is becoming more severe, citizens are getting restless. They are dissatisfied with their governments and the international system. Consequently, citizens around the world are suing their governments for inaction on climate change. These climate claimants are pursuing unique and interesting legal arguments. Some are invoking human rights law, arguing that the government's inaction on climate change has led to negative climate change effects on citizens. Others are arguing that their governments owe a duty to them, as trustees, to look after public trust assets like the atmosphere. What is clear is that climate change claims against governments are on the rise, with over 1000 cases logged in Columbia Law's database. This article looks at some of the causes of action being pursued and analyses them against the New Zealand legal system. In particular, it explores human rights, environmental law, the public trust doctrine and negligence. It compares and contrasts jurisdictions where claims have been successful and assesses whether similar arguments would be viable in New Zealand. The nature of the state, parliamentary supremacy and the role of the courts are core ideas that underpin every cause of action. The article concludes that any cause of action in New Zealand, purporting to sue the government for climate change inaction, will be difficult. While such

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a claim in New Zealand would be challenging, the article argues that there is real value in trying.

1. INTRODUCTION

Climate change poses one of the greatest threats to Earth. It involves a change in the mean and/or variability of the climate's properties, by natural and/or anthropogenic processes, for an extended period of time.[1] Large-scale industrialisation has increased the amount of greenhouse gases (GHGs) in the atmosphere, warming the climate.[2] The Intergovernmental Panel on Climate Change (IPCC) paints an alarming picture of Earth's prognosis. Heat waves, droughts, floods and cyclones will further disrupt ecosystems, food production, water, infrastructure, mortality and health.[3] Climate change could exacerbate political conflicts and poverty.[4] The severity of effects is only expected to increase as the global climate heats up.[5]

Climate change requires global solutions. Accordingly, international law has tried to respond. The United Nations Framework Convention on Climate Change 1992 led to the Kyoto Protocol 1997 (Kyoto) and the Paris Agreement 2015 (Paris). Paris proposes to keep warming under 2 degrees Celsius from pre-industrial levels.[6] Despite widespread ratification of these treaties, state sovereignty and global market pressures stifle progress.[7] Under Paris, each state can determine its own emissions reductions. So far, none of the G20 countries are on track to mitigate climate change.[8]

1 Working Group II Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change "Summary for Policymakers" in *Climate Change 2014: Impacts, Adaptation, and Vulnerability — Part A: Global and Sectoral Aspects* (Cambridge University Press, Cambridge, 2014).
2 Intergovernmental Panel on Climate Change [IPCC] *Global Warming of 1.5°C: Summary for Policymakers* (IPCC, Switzerland, 2018) at 6.
3 At 6.
4 IPCC, above n 2, at 8 and 20.
5 At 8 and 20.
6 "Paris Agreement" United Nations Climate Change <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>.
7 Eric C Ip "Globalisation and the Future of the Law of the Sovereign State" (2010) 8 ICON 635 at 639.
8 Rob Picheta "No G20 countries are meeting climate targets, says report" (14 November 2018) CNN <https://edition.cnn.com/2018/11/14/europe/g20-climate-targets-fossil-fuel-report-intl/index.html?utm_source=fbCNN&utm_term=link&utm_medium=social&utm_content=2018-11-14T13%3A40%3A22>.

Consequently, citizens are suing their governments for climate change inaction. In March 2018, Columbia Law logged over 1000 suits.[9] Some claimants have been successful. In *Urgenda Foundation v The State of the Netherlands* (*Urgenda*), the courts ordered the Dutch Government to set their GHG reductions target higher, finding the previous target to be insufficient as it breached the government's duty to protect citizens against life-threatening climate change.[10]

This has had a ripple effect, reaching the shores of Aotearoa. In 2017 a law student, Sarah Thomson, brought a case against New Zealand's Minister for Climate Change Issues, to review national GHG reduction targets.[11] Since December 2018, when this article was originally submitted as a dissertation, an iwi leader, Mike Smith, has brought a case in the High Court alleging that the New Zealand Government has a duty through the Treaty of Waitangi to protect Māori interests and accordingly seeks a Crown declaration that it will halve GHGs.[12] Smith has also filed court proceedings against a number of large companies claiming negligence, public nuisance and a novel tortious duty.[13]

Meanwhile, the Climate Change Response (Zero Carbon) Amendment Act 2019, committing to reducing GHG emissions to zero by 2050, passed almost unanimously. This is progress. However, democracy is fickle. In the United States, President Trump is unravelling the efforts of former president Obama, relaxing regulations on coal and intending to withdraw from Paris.[14] Progress cannot be taken for granted. It is increasingly important to watch climate change

9 Damian Carrington "Can climate litigation save the world?" *The Guardian* (online ed, London, 20 March 2018) <https://www.theguardian.com/environment/2018/mar/20/can-climate-litigation-save-the-world>.

10 *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)* The Hague Court of Appeal Netherlands C/09/456689/HA ZA 13-1396, 9 October 2018.

11 *Thomson v Minister for Climate Change Issues* [2017] NZHC 733, [2018] 2 NZLR 160.

12 "Iwi leader to sue government for 'failing to protect Maori' from effects of climate change" (16 July 2019) Stuff <https://www.stuff.co.nz/environment/climate-news/114278978/iwi-leader-to-sue-government-for-failing-to-protect-maori-from-effects-of-climate-change>; and "Iwi leader's climate change case against government: papers filed" (18 July 2019) RNZ <https://www.rnz.co.nz/news/te-manu-korihi/394706/iwi-leader-s-climate-change-case-against-government-papers-filed?fbclid=IwAR2k4kY2ZNXXs7Z6us4rW1bUsfGK-Tfe7h3vCMy6d5TMfmEWngfMxZCq2YY>.

13 Catrin Owen "Fonterra, Genesis Energy and Z sued for 'failing' to protect against effects of climate change" (30 August 2019) Stuff <https://www.stuff.co.nz/business/115411159/fonterra-genesis-energy-and-z-sued-for-failing-to-protect-against-effects-of-climate-change>. In March 2020 the High Court struck out two of the three claims (all but the novel tortious duty); see *Smith v Fonterra Cooperative Group* [2020] NZHC 419.

14 Gregory Wallace "5 things the Trump admin has done to go against its climate change warning" (10 December 2018) CNN <https://edition.cnn.com/2018/12/10/politics/climate-change-trump-report-epa-cop24/index.html>.

litigation unfold overseas and consider how and whether a tenable argument could be run in New Zealand.

This article considers the causes of action available to New Zealanders seeking to sue their government for climate change inaction. While there are many routes being explored, it focuses on human rights, environmental law, the public trust doctrine and negligence. After the dissertation was originally submitted, Winkelmann CJ, Glazebrook J and France J presented a helpful paper, exploring overseas climate cases and outlining other causes of action.[15] This piece of extrajudicial writing highlights how important and topical climate change litigation is.

Part 2 of this article focuses on human rights. It reviews *Urgenda* and assesses whether a similar claim could be run using the New Zealand Bill of Rights Act 1990 (BORA). Climate claimants can also mount arguments around existing environmental laws, offering an avenue that may not require judicial activism. Accordingly, part 3 explores the Resource Management Act 1991 (RMA), the Climate Change Response Act 2002 (CCRA) and Paris. Climate claimants have also revived the ancient public trust doctrine — a fiduciary obligation on states to protect the commons. Part 4 discusses the availability of the doctrine in New Zealand and grapples with the important constitutional questions the doctrine raises. Part 5 examines the potential of negligence to impose liability for climate change effects.

This article argues that any claim against the New Zealand Government would pose challenges. It suggests applying a rights- and ecology-oriented approach to judicial review and environmental law. Overall, it concludes that there is value in exploring how to use the courts to deliver us from the brink of an ecological crisis.

2. HUMAN RIGHTS

Climate change promises displacement, mental illness, disease and death.[16] United Nations institutions have recognised the intrinsic link between climate change and human rights.[17] A UN report stated that climate change would affect a number of rights, including the rights to life, adequate food, housing and safe drinking water.[18]

15 Helen Winkelmann, Susan Glazebrook and Ellen France "Climate Change and the Law" (paper presented to Asia Pacific Judicial Colloquium, Singapore, May 2019).

16 Working Group II, above n 1.

17 Jacqueline Peel and Hari M Osofsky "A Rights Turn on Climate Change Litigation?" (2018) 7 TEL 37 at 42.

18 Armelle Gouritin "Potential liability of European States under the ECHR for failure to take appropriate measures with a view to adaptation to climate change" in Michael Faure

Consequently, citizens are seeking redress through human rights and constitutional law. Claimants argue that the state's failure to mitigate climate change threatens/breaches human rights. Citizens from the Netherlands, Pakistan, Colombia and Nigeria have been particularly successful in establishing the rights–climate link.

Dutch environmental group the Urgenda Foundation claimed that the government's emissions targets violated the state's constitutional duty of care to its citizens. The original target was a 17 per cent reduction of emissions below 1990 levels by 2020, whereas Urgenda argued for 25 per cent. Claimants relied on the right to life and to "private and family life".[19] In 2018 the Netherlands Court of Appeal held that these rights applied to climate change and that they imposed an obligation on the state to take measures to avoid the future infringement of rights.[20] The duty involves taking precautionary measures to prevent breaches of rights when there is a real and imminent threat to them.[21]

The Court assessed the link between anthropogenic emissions and global warming, the consequences of warming above 2 degrees Celsius, and the increasing severity of effects of prolonged inaction.[22] Accordingly, the Court agreed to a reduction of 25 per cent, finding that there was a real threat of dangerous climate change that would pose a serious risk of death and disruption to family life.[23] The Advocate and Prosecutors General advised the Supreme Court to uphold the case.[24] The case illustrates how citizens can use human rights to impose a duty of care on states, thereby improving climate change mitigation efforts.

In Pakistan, an agriculturist argued that the government's failure to take serious climate change measures affected Pakistanis' human rights.[25] The Lahore High Court confirmed that floods, droughts, water and food security necessitated protection of the rights to life, human dignity, property, information and a healthy, clean environment.[26] The Federal High Court of Nigeria also

and Marjan Peeters (eds) *Climate Change Liability* (Edward Elgar, Cheltenham, 2011) 134 at 138.

19 European Convention of Human Rights, arts 2 and 8.

20 *Urgenda*, above n 10, at [41].

21 At [43].

22 At [44].

23 At [45] and [51].

24 Dana Grugmand "Court Advisors Urge Dutch Supreme Court to Uphold historic Climate verdict" (13 September 2019) Climate Liability News <https://www.climateliabilitynews.org/2019/09/13/urgenda-dutch-supreme-court-appeal/>.

25 *Leghari v Federation of Pakistan* HC Lahore HCJD/C-121, 4 September 2015.

26 At [6].

held that the rights to life and dignity of the person include the right to a clean, poison/pollution free, healthy environment.[27]

Similarly, Colombian youth brought a claim against their government, alleging that it had not adopted the appropriate measures to face climate change, ultimately affecting Colombians' human rights.[28] The Supreme Court held that the fundamental rights to life, health, minimum subsistence and enjoyment of human dignity were substantially linked to the ecosystem.[29] It held that the inability to access fresh water, breathe pure air and enjoy a healthy environment affected Colombians,[30] and that it was up to the government to respond to this problem.[31] Consequently, the Court ordered various government actors and departments to formulate action plans, adopt measures for reducing deforestation, and implement land management plans.[32]

Since these cases, a plethora of human rights claims have sought to hold governments accountable for climate change effects. For example, in *Juliana v United States*, young claimants argued that the US federal government's inaction towards fossil fuel production breached their fundamental rights to life, liberty and property.[33] In the District Court of Oregon, Judge Aiken stated that fundamental rights had been infringed.[34] Droughts, low water levels and algal blooms affect the plaintiffs' food access, personal safety and revenue.[35] In early 2020 the Ninth Circuit Court found the relief sought to be beyond its constitutional powers and left the issue to the political branches of government.[36]

2.1 Challenges

While some claimants have successfully employed human rights to sue governments for climate change inaction, others face obstacles. One challenge is attributing climate change effects to particular parties. Climate change is an international threat; never paying heed to geopolitical borders. In some cases,

27 *Gbemre v Shell Petroleum Development Company Nigeria Ltd* Federal High Court of Nigeria FHC/B/CS/53/05, 30 November 2005.

28 *Future Generations v Ministry of Environment and Others* Supreme Court of Justice Bogotá 11001 22 03 000 2018 00319 00, 4 April 2018.

29 At 13.

30 At 13.

31 At 34.

32 At 45.

33 First Amended Complaint for Declaratory and Injunctive Relief (2015) Case No 6:15-cv-01517-TC.

34 *Juliana v United States of America* 217 F Supp 3d 1224 (2016) at 33.

35 At 19.

36 John Schwartz "Court Quashes Youth Climate Case Against the Government" *The New York Times* (online ed, New York, 17 January 2020) <https://www.nytimes.com/2020/01/17/climate/juliana-climate-case.html>.

the effects of decades of GHGs are only being realised now, adding temporal complexities.

Uncertainty about causation, however, can be overcome. In *Urgenda*, the Court said there was a "real risk" to human rights.[37] The Court did not labour over the technicalities of causation and instead referred to the precautionary principle. The principle says that in the face of scientific uncertainty, states should take precautionary measures to deal with the causes of climate change/ mitigate its effects, and that scientific uncertainty is not an excuse to postpone such measures.[38] Perhaps climate claimants can invoke this principle to overcome issues of factual uncertainty.

Claimants from countries without written constitutions may also struggle. Human rights are more strongly enforced by judiciaries when entrenched in a written constitution that imposes a duty on states to give effect to fundamental rights, and on courts to strike down legislation that is inconsistent with those rights. In the Pakistani case, for example, the right to life is preserved in a written constitution that also authorises the High Court of Lahore to make an order to enforce that right.[39]

In New Zealand, Parliament is supreme and the courts' role is limited. Harlow and Rawlings view parliamentary supremacy as creating a system where rights are claimed through the political process, rather than the judicial one.[40] Furthermore, judges are "neutral arbiter[s]" with limited and apolitical roles.[41] Nevertheless, some believe this is changing. Lord Cooke famously said that some rights run so deep that even Parliament could not override them.[42] Former Chief Justice Elias has said extrajudicially that the legislature works "*under* the law of the constitution".[43]

Lastly, various legal systems define the state's role differently, affecting whether a state duty is likely to be imposed. For example, the Colombian Constitution says the state's "[s]overeignty resides exclusively in the people".[44] The goal of the state is to serve the community, protect all individuals and to fulfil its social duties.[45] In the successful cases discussed, the sovereign is viewed as a body that serves people or a higher cause. As these states already

37 *Urgenda*, above n 10, at [50].

38 United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994) at 3.

39 The Constitution of Pakistan 1973, s 199(1)(c).

40 Carol Harlow and Richard Rawlings *Pressure Through the Law* (Routledge, Oxon, 1992) at 5.

41 At 113.

42 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 406.

43 Sian Elias "Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round" (2003) 14 PLR 148 at 162 (emphasis added).

44 Constitution of Colombia 1991, arts 1 and 3.

45 Article 2.

take responsibility for social policy, imposing a state duty to mitigate climate change is more justifiable.

New Zealand, however, has a rule of law, concerned with freedom from arbitrary state action and interference (rather than taking active responsibilities towards its people).[46] The divergent expectations of the state reduce the relevance of successful overseas cases to New Zealand. Perhaps, then, New Zealanders should think about how climate inaction can amount to a form of state interference.

2.2 New Zealand Bill of Rights Act 1990

BORA scrutinises acts[47] (and potentially omissions)[48] committed by a branch of government or authorised power. BORA involves analysing specific statutory provisions to determine whether these limit a human right, whether the limitation is justified (necessary and proportionate), and whether a rights-consistent interpretation of the provision can be given.[49] Legislation would need to be analysed thoroughly, applying the steps above to each relevant provision. This approach is far narrower than that of successful overseas precedents, which look not at specific statutory provisions, but at the government's overall duty to prevent rights infringements.

Even if BORA applied more flexibly, the rights themselves are relatively narrow. Successful overseas cases rely heavily on the right to life whereas BORA preserves the right not to be deprived of life.[50] Some jurisdictions have interpreted this broadly to mean the right to a healthy environment.[51] Judge Aiken in *Juliana* said, "certain rights may be necessary to enable the exercise of other rights, whether enumerated or unenumerated".[52] Therefore, "the right to a climate system capable of sustaining human life is fundamental to a free and ordered society".[53]

In contrast, the New Zealand courts have determined that "life" strictly refers to fatality and does not refer to broader concepts like quality of life, poor housing, health systems and law enforcement.[54] BORA is to be interpreted purposively.[55] The White Paper for BORA says s 8 is intended to regulate

46 Duncan Webb, Katherine Sanders and Paul Scott *The New Zealand Legal System: Structures and Processes* (4th ed, LexisNexis, Wellington, 2010) at 134.

47 New Zealand Bill of Rights Act 1990 [BORA], s 3.

48 *Laws of New Zealand* Human Rights (online ed) at [7].

49 *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

50 BORA, s 8.

51 *Mehta v Union of India* [1987] 4 SCC 463.

52 *Juliana*, above n 34, at 31.

53 At 32.

54 *Lawson v Housing New Zealand* [1997] 2 NZLR 474 (HC).

55 Interpretation Act 1999, s 5.

"abortion, capital punishment, self-defence … use of deadly force to effect arrest, prevent escape, or control disorder".[56] Accordingly, the right to life in New Zealand is limiting.

Claimants could invoke the right of non-discrimination.[57] Prohibited grounds of discrimination include colour, race, disability, age, and sex.[58] Climate scientists predict that climate change will disproportionately affect vulnerable people, particularly those affected by "poverty, gender, age, minority status" and disability.[59] Specific groups of claimants are emerging. The Union of Swiss Senior Women for Climate Protection challenged government inaction, "[b]ecause older women are particularly susceptible to intense and frequent heat waves".[60] Heat waves are indeed predicted to significantly impact on the elderly.[61] Climate change is also predicted to disproportionately affect Māori.[62]

Part of the test to establish a BORA discrimination claim involves determining whether there is differential treatment towards the claimant group/person.[63] The specific decision (for example, setting GHG reduction targets) must have differential effects between Māori and non-Māori so that Māori are at a material disadvantage to non-Māori.

Jones argues that Māori are disproportionately exposed to negative health outcomes, making them more susceptible to the negative health effects of climate change.[64] A relationship to the natural environment is important to Māori health. Māori also have interests in industries that climate change is likely to affect such as primary industries.[65] Consequently, Jones says the Māori economy will suffer, causing flow-on effects to health.[66]

However, as with any climate change case, it will be difficult to establish a causative nexus between emissions targets, global warming, the climatic impacts of global warming and the specific effects on Māori. Furthermore, the test for discrimination does not seem to apply to broad omissions such as the failure to legislate — only to specific provisions. At this stage, climate

56 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] 1 AJHR A6.
57 BORA, s 19.
58 Human Rights Act 1993, s 21.
59 Peel and Osofsky, above n 17, at 44.
60 "English Summary" KlimaSeniorinnen <https://klimaseniorinnen.ch/english/>.
61 Joseph Smith and David Shearman *Climate Change Litigation: Analysing the Law, Scientific Evidence & Impacts on the Environment* (Presidian Legal Publications, Australia, 2006) at 147.
62 Rhys Jones and others "Climate Change and the Right to Health for Maori in Aotearoa/New Zealand" (2014) 16 Health and Human Rights 54.
63 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.
64 Jones, above n 62.
65 At 56.
66 At 55.

change and a BORA discrimination claim is an uneasy fit. However, the courts have said that BORA should be interpreted broadly.[67] Through judicial activism the courts could significantly modify the existing framework to allow for a successful climate discrimination claim.

Claimants could also look to minority rights. A person from an ethnic/religious/linguistic minority "shall not be denied the right … to enjoy the culture, to profess and practise the religion … of that minority".[68] Māori, as tangata whenua, have a strong and spiritual relationship with the natural environment. Some argue that climate change inaction could lead to "cultural genocide" for indigenous groups because climate effects would displace people from their traditional lands, thereby interfering with their ability to maintain sovereignty and cultural relationships with that land.[69] A similar argument could be made for iwi located on the coast, for example, as they are forced to adapt to the effects of sea-level rise.

Since the courts will be reluctant to paint broad brushstrokes as in *Urgenda*, a human rights claim will not be straightforward. Nevertheless, if a BORA claim is successful, the courts can declare a legislative provision to be inconsistent with BORA.[70] Note, though, that parliamentary supremacy compels courts to apply statutory provisions.[71] The government may, however, pay damages to an individual whose rights have been breached.[72] If the government is liable to pay damages, and fears future claims, the government could be prompted to take action. However, this action could be enacting legislation that limits recoverable damages or excludes government liability for climate change altogether. Unfavourable legislation is always a risk, highlighting the importance of civic engagement.

Furthermore, some argue that a human rights framework is an undesirable way to address climate change. Smith and Shearman argue that in situations of scarcity, human rights are futile because scarcity means not everyone can realise their rights.[73] Thus, the environmental crisis must be dealt with through an ethics of commons involving trade-offs not entitlements.[74] A human rights approach to climate change is also viewed as anthropocentric, not ecocentric, in that the environment is not treated as intrinsically valuable.[75] It allows the

67 *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA).

68 BORA, s 20.

69 Randall S Abate "Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time" (2010) 85 Wash L Rev 197 at 209.

70 *Moonen v Film and Literature Review Board of Review* [2000] 2 NZLR 9 (CA).

71 BORA, s 4.

72 *Simpson*, above n 67.

73 Smith and Shearman, above n 61, at 40.

74 At 40.

75 Klaus Bosselmann *The Principle of Sustainability: Transforming Law and Governance* (2nd ed, Routledge, New York, 2017) at 148.

environment to be destroyed unless and until humans are affected. This is problematic as environmental effects can be latent and irreversible damage may have already occurred by the time we attribute the harm to the defendant's acts/omissions.

Notwithstanding these concerns, we need immediate climate action. Reframing climate change as an issue based on the impacts on *people* might be more effective than technical arguments,[76] which fail to strike a chord with people. In a democracy, striking a chord matters.

A workable alternative to a BORA claim is the recognised crossover between judicial review and BORA.[77] Judicial review can include a claim that the decision-maker failed to consider a mandatory relevant consideration; or irrationality, that a decision is so unreasonable that no reasonable authority could have come to it.[78] Executive acts like ministerial decisions are subject to judicial review.[79] Judicial review-type claims are already used widely and frequently in the RMA context by environmental interest groups such as the Environmental Defence Society and Royal Forest and Bird Protection Society. It would be interesting to invoke BORA and international human rights law (for example, race- and gender-based conventions) to scrutinise natural resource licensing/consenting decisions. International treaties provide a wider pool from which to draw rights and are useful interpretive tools.[80]

While the remedies for judicial review are discretionary, they are powerful. The court can order writs requiring actions or omissions of an official, quashing decisions, and providing equitable remedies (for example, injunctions and declarations).[81] These orders can ultimately bring about a different outcome. Overall, judicial review is an attractive option because it provides more opportunity to consider a variety of instruments (for example, international treaties and BORA), is more widely applicable than a provision-focused BORA claim, and offers powerful remedies.

3. ENVIRONMENTAL LAW

Claimants are using existing domestic law to achieve environmental protection ends. In South Africa, claimants challenged the decision to commission a new coal-fired power station, on the grounds that a climate change impact statement

76 At 67.

77 *Taylor v Chief Executive of Department of Corrections* [2015] NZAR 1648 (CA).

78 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 (HCA) and *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

79 Webb and others, above n 46, at 128.

80 *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA).

81 Judicial Review Procedure Act 2016, s 16.

(required by the relevant statute) was not completed.[82] This part of the article looks at some of New Zealand's domestic and international environmental law at the time of writing and assesses litigation potential.

3.1 Resource Management Act 1991

3.1.1 Resource consents

Some of New Zealand's most notable climate change cases to date are Resource Management Act issues. Certain RMA provisions have been interpreted in a way that dilutes or excludes adequate consideration of climate change. Resource consent applicants, affected parties and those who make submissions on applications could challenge the interpretation of these provisions.[83]

Under s 104 of the RMA, when evaluating resource consents, decision-makers must have regard to "any actual and potential effects on the environment of allowing the activity". This has been interpreted to exclude consideration of the impacts on climate change that *indirectly* flow from the activity. In *West Coast ENT Inc v Buller Coal Ltd*, the Supreme Court determined whether decision-makers deliberating on resource consents for activities that ultimately enabled coal mining (for example, making roads and facilities) could consider the effects of burning that coal on climate change.[84] The fact that the actual burning of the coal would occur overseas raised interesting questions.

The majority held that s 104E of the RMA expressly precluded climate change considerations for GHG discharge consents. Therefore, decision-makers considering activities ancillary to GHG discharge consents are also precluded from considering climate change. They said the consequences of burning coal overseas were too remote from the ancillary activities.

In her dissenting judgment, Elias CJ said that the "ancillary activities" should be viewed not as ancillary but as consents in their own rights. She also said that the inclusion of renewable energy in the RMA shows that the legislation contemplated a relationship between activities and the effects on climate change.

Critically, the majority determined that the definition of "cumulative effects" (under "effects" in s 104) does not include the effect of an individual activity in conjunction with other polluters to the overall global GHG effect.[85] It refers to a number of different effects from the activity that amount to a cumulative effect.

82 *Earthlife Africa Johannesburg v Minister of Environmental Affairs* [2017] ZAGPPHC 58.

83 "Appeal Rights" Environment Guide <http://www.environmentguide.org.nz/rma/resource-consents-and-processes/appeal-rights/>.

84 *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 21.

85 Resource Management Act 1991 [RMA], s 2.

Elias CJ rejected this interpretation, preferring the case law approach that all GHG effects contribute cumulatively to the global atmosphere.[86]

The Supreme Court is not bound to follow its own decisions so this approach can be dispensed with if strong arguments are posed. Scientific evidence on the global nature of climate change could demonstrate that burning coal exacerbates or does nothing to mitigate climate change, regardless of where it is burned. The resource consent enables the extraction of coal, and that coal will be burned. Arguably, the majority's finding could be viewed as contradictory. On the one hand, the "ancillary" consents are sufficiently related to the discharge of GHGs so that s 104E should apply to limit climate change considerations. At the same time, the "ancillary" consents are held to be too remote from the actual burning of coal overseas. Thus, the Court treats non-discharge consents as both closely linked to GHGs and too remote from GHGs. This area can be explored in future, but the case is an example of the fact that the RMA is rife with room to argue on interpretation.

Consent authorities can impose conditions on consents, requiring applicants to comply with certain instructions. Some believe the courts have avoided imposing climate-change related conditions. In *Environmental Defence Society Inc v Auckland Regional Council*, the plaintiff sought to impose a condition to plant trees to offset the carbon dioxide a power station would produce.[87] Despite the Environment Court acknowledging scientific consensus on cumulative anthropogenic emissions globally, and that the proposed emissions would result in an adverse effect "of some consequence", it held that carbon offsetting was a matter for central government, and that it did not have enough evidence to assess the effects of the proposed condition.[88]

The courts' reluctance to impose carbon sinks as conditions can be overcome. Resource consents may be granted on "any condition that the consent authority considers appropriate".[89] This discretion is broad but the condition must be reasonable,[90] and must be directly connected to an "adverse effect" of the activity on the environment.[91] "Adverse effect" poses a challenge to enforcing climate change-related conditions.[92] Due to the limiting interpretation of "effects" under the RMA when it comes to climate change, the courts might be reluctant to impose climate change-related conditions. These issues would

86 *Environmental Defence Society Inc v Taranaki Regional Council* EC Auckland A184/2002, 6 September 2002.

87 *Environmental Defence Society Inc v Auckland Regional Council* [2002] NZRMA 492 (EnvC).

88 At [86]–[88].

89 RMA, s 108.

90 *Environmental Defence Society Inc v Auckland Regional Council*, above n 87, at [87].

91 RMA, s 108AA(1)(b)(i).

92 Section 108.

need to be fought. Claimants would need to argue for "adverse effects" to be interpreted widely to include indirect effects on climate change to unlock the scope of conditions.

Arguably, the conditions regime explicitly envisions imposing conditions relating to carbon sinks. A carbon sink can involve planting trees.[93] Conditions may include requiring services/works like "the protection, planting, or replanting of any tree …".[94] Thus, the RMA expressly provides for the planting of trees, whether or not it is framed as carbon offsetting.

3.1.2 International obligations

There is growing scope to challenge regional and territorial authority discretion, using international obligations such as Kyoto and Paris. Treaties are not enforceable in law until they are incorporated into domestic legislation.[95] They generally only colour statutory interpretation where legislation is ambiguous.[96]

However, the High Court has confirmed that a statutory discretionary power is to be interpreted consistently with New Zealand's international obligations where applicable.[97] The courts have also said New Zealand is required to refrain from acts which would defeat the object and purpose of an international obligation.[98] Furthermore, Elias CJ said in a dissenting judgment that she could not see why councils could not consider the implications of emitting carbon dioxide on New Zealand's international obligations.[99]

The RMA is rich with statutory provisions that provide opportunities for climate claimants to encourage decision-makers to consider climate change adaptation *and* mitigation.

3.2 Climate Change Response Act 2002

Under the CCRA, the Minister for Climate Change Issues sets emissions targets. Thomson challenged the Minister in the High Court, asking whether the CCRA provision giving the Minister discretion to set and review targets (s 224)

93 "What are carbon sinks?" (1 November 2016) Fern <https://fern.org/campaign/forests-and-climate/what-are-carbon-sinks>.
94 RMA, s 108(2)(c).
95 *Environmental Defence Society Inc v Auckland Regional Council*, above n 87.
96 *The Kaimanawa Wild Horse Preservation Society Inc v Attorney General* [1997] NZRMA 356 (EnvC).
97 *Thomson*, above n 11, at [88]. See also *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214 for developments in UK climate litigation on this point.
98 *Environmental Defence Society Inc v Auckland Regional Council*, above n 87.
99 *Genesis Power Ltd v Greenpeace NZ Inc* [2009] 1 NZLR 730 (SC). Compare Annie Cao "Climate Change Considerations in Energy Decision-Making: A Comparative Analysis" (2014) 11 NZJEL 111.

required her to review the 2050 target after a new IPCC report was published. The Court held that it was implicit in the section that the publication of a new IPCC report required the Minister to consider whether the target should be reviewed.[100] Although the Minister did not comply with s 224, the Court did not make an order because the government had already changed (and expressed a 2050 net zero carbon target). This is an excellent example of challenging the government based on the existing statutory framework.

At the time of writing, the CCRA is in the midst of change with the new Climate Change Response (Zero Carbon) Amendment Act 2019. The Act states that no remedy is available for the government's potential failure to meet the 2050 target or emissions budgets, and that the target/budgets are not enforceable in a court of law (s 5ZJ). Instead, these are permissive considerations. While this limits the scope of judicial challenge, there are still areas of statutory discretion in environmental law that citizens must pay very close attention to.

3.3 Paris

Thomson also sought judicial review of the 2030 emissions target set under Paris, arguing that the Minister failed to take into account relevant considerations.[101] While these claims failed, the Court's discussion was critical. The fact that Paris had not been incorporated into domestic legislation did not preclude the Court from hearing the issue. Critically, the subject matter of climate change was not defeating in this case. This is vital as the courts are generally unwilling to inquire into political issues, and unfortunately climate change has been politicised.[102] After reviewing climate change litigation overseas, the Court said:[103]

> … it may be appropriate for domestic courts to play a role in Government decision making about climate change policy. … The courts have recognised the significance of the issue for the planet and its inhabitants and that those within the court's jurisdiction are necessarily amongst all who are affected by inadequate efforts to respond to climate change. The various domestic courts have held they have a proper role to play in Government decision making on this topic, while emphasising that there are constitutional limits in how far that role may extend. … Remedies are fashioned to ensure appropriate action is taken while leaving the policy choices about the content of that action to the appropriate state body. … The importance of the matter for all and each of us warrants some scrutiny of the public power …

100 *Thomson*, above n 11, at [94].
101 At [99].
102 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA).
103 *Thomson*, above n 11, at [133]–[134].

This case shows the encouraging shift away from the courts treating climate change as an untouchable no-go zone. Overall, environmental law provides ample scope for judicial challenge. While many cases have failed to integrate climate change considerations into decision-making, *Thomson* shows that it is worthwhile trying.

4. PUBLIC TRUST DOCTRINE

The public trust doctrine (PTD) is being revived in domestic courts. It can be used to impose a duty on states to enact climate change policies based on its premise that a sovereign owes a responsibility to the governed to manage public goods wisely.

The PTD has origins in Roman law. Justinian is a commonly cited source: "By the law of nature these things are common to mankind — the air, running water, the sea, and … the shores of the sea".[104] The PTD is considered to be widely applicable because it underpins the very existence of a sovereign government — "an inherent constitutional restraint on legislative power".[105] PTD principles have been found in the writings of philosophers like John Locke, who said, "… there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them".[106] Over time, this jurisprudence has entered legal systems and has the potential to be revived for climate change.

Under the PTD, states are trustees that owe a fiduciary duty to current and future citizens.[107] While the PTD can apply to various natural resources, this part of the article focuses on the atmosphere as a trust asset.[108] Governments must safeguard the atmosphere for future beneficiaries — protecting against "generational theft".[109] The duty arises when the state asserts sovereignty over its people and ends when that sovereignty ends.[110] The duties include:

(a) Preventing trust property from becoming private property.[111]

104 Mary Christina Wood "Atmospheric Trust Litigation Across the World" in Ken Coghill, Charles Sampford and Tim Smith (eds) *Fiduciary Duty and the Atmospheric Trust* (Ashgate, Farnham, 2012) at 115.
105 At 106.
106 John Locke *Second Treaties of Civil Government* (1609) at s 149.
107 Wood, above n 104, at 106.
108 At 105.
109 At 110.
110 At 108.
111 At 106.

(b) Governments cannot let private interests cause harm to the trust property.[112] This would affect the application of resource consenting, imposing a more onerous burden to ensure adverse effects are avoided altogether. Claimants would also need to argue that territorial and regional authorities are "the state".

(c) Governments must protect the atmosphere from damage.[113] This is an "active duty of vigilance" to prevent an asset decaying.[114] Questions remain about what constitutes damage to the asset, how much damage is acceptable, and how it is monitored. Where the RMA balances various interests, the PTD provides an environmental bottom line.

Wood says courts could order the government to set/amend GHG emissions targets at a level deemed acceptable based on fiduciary duty, or make a declaratory judgment outlining the duty and breach.[115] There are obvious concerns about this approach, including the role of the courts, parliamentary supremacy, and lack of expertise. To overcome these difficulties, Wood proposes a formula for how targets could be judicially determined: consider the country's share of global, per capita and historic emissions, the purpose of emissions-causing activities, and how resistant the state has been to reducing emissions.[116]

4.1 International Application

The courts will look overseas for guidance. The US and India are particularly interesting case studies.

In *Illinois Central Railroad v Illinois*, the Supreme Court said the state could not abdicate its trust obligation.[117] In this case a lake and surrounding land were found to be "held in trust for the people of the State …".[118]

The State of Rhode Island has brought a claim against fossil fuel companies arguing that they have interfered with the use/enjoyment of public trust resources such as fisheries, shores, plants, animals and coastal resources.[119] Rhode Island sourced the doctrine from the state's constitution, which preserves citizens' entitlement to enjoy rights and privileges related to the natural environment. It also says it is Rhode Island's prerogative to regulate these

112 At 108.
113 At 108.
114 At 110.
115 At 127 and 142.
116 At 135.
117 At 108.
118 *Illinois Central Railroad Co v Illinois* 146 US 387 (1892).
119 *Rhode Island v Chevron Corp* Complaint Filed (2018) Case No PC-2018-4716.

resources. This will be an interesting case as the Rhode Island Government is assuming its own trusteeship responsibilities over the environment.

In *Juliana*, claimants argue that the government has failed to protect trust resources — atmosphere, water, seas, seashores and wildlife.[120] They argue for their "legal right to inherit well-stewarded public trust resources".[121] In the District Court of Oregon, Judge Aiken held that the federal government holds public assets (the territorial seas) on trust for citizens, and that because some of the plaintiffs' injuries are ocean acidification from temperature rise, the plaintiffs had a case for harm to public trust assets.[122] Judge Aiken said that the public trust obligation cannot be displaced with legislation.[123]

The Indian Supreme Court, in *Mehta v Kamal Nath*, held that granting a lease to a resort thereby allowing dredging and the redirection of a river would violate the PTD.[124] They sourced the PTD from English law and natural law, stating that laws of nature imposed by the natural world should inform social institutions.[125] Later, in *MI Builders Pvt Ltd v Radhey Shayam Sahu*, the courts found that the PTD could also be derived from the constitutional right to life.[126]

4.2 New Zealand

There are a number of ways New Zealand can adopt the PTD, the Magna Carta 1297 being one. It established the notion that "the King is made by the law and is bound by the law".[127] Clause 33 demands that fish-weirs (trappings that obstructed waterways) be removed from certain river bodies.[128] This has been read as indicating that the King "use[s] his powers for the benefit of his subjects".[129] Through this, the sovereign is seen as acting on behalf of the interests of subjects, akin to a fiduciary duty. The Magna Carta is still part of New Zealand law,[130] former Chief Justice Elias (extrajudicially) calling it "morally entrenched" in our society.[131] A second source is the concept of *jus publicum*. Derived from Roman law, it is a form of governance where the

120 *Juliana*, above n 34, at 42.
121 First Amended Complaint for Declaratory and Injunctive Relief, above n 33, at [92].
122 *Juliana*, above n 34, at 42.
123 At 49.
124 *MC Mehta v Kamal Nath* 1 SCC 388 (1997).
125 At 388.
126 *MI Builders Pvt Ltd v Radhey Shayam Sahu* (1999) INSC 228.
127 Dame Sian Elias "The meaning and purpose of the Treaty of Waitangi" (2015) Maori LR 3 at 10.
128 Magna Carta 1297, cl 33.
129 "Clause 33" The Magna Carta Project <http://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_33>.
130 Webb and others, above n 46, at 141.
131 At 10.

government owns property held in trust for the public. In New Zealand, it has been limited to the public right of navigation and fishing.[132] Thirdly, the government could owe a fiduciary duty to its citizens. Lastly, there might be rights akin to the PTD derived from the Treaty of Waitangi. Fiduciary law and the Treaty of Waitangi is explored in further detail below.

The courts have addressed the idea of a government-owed fiduciary duty in *Waitakere City Council v Estate Homes Ltd.*[133] The Court read the PTD into a fiduciary duty owed by local authorities to ratepayers. The critical statement of Thomas J in the Court of Appeal is:[134]

> The perception of a trust persists in modern democratic theory today and has been extended to central government. It has been invoked in support of a public trust doctrine imposing a trustee or trustee-like obligation on elected representatives who derive their power from the people they serve.
>
> The constitutional basis for the notion is not untenable. It rests on the sovereignty of the people. Under a democracy, Parliament is "supreme" … but the people remain sovereign and enjoy the ultimate power which that sovereignty confers …
>
> … as sovereignty remains with the people the elected government remains answerable to them in the exercise of their delegated power.

These are helpful comments, but were made in a very different context. Climate claimants may struggle to extend this principle to local authority management of natural resources. In the Environment Court, judges have said that fiduciary duty is "not an appropriate basis for the Environment Court to intervene in a local authority's decision to carry out a public work", stating that the decision concerns elected members of council rather than the RMA.[135]

Furthermore, New Zealand's government, as inherited from England, is vastly different to a state that exists to serve its people (recall the Colombian Constitution). The sovereign is the head of state in New Zealand.[136] As a constitutional monarchy, legal citizenship requires swearing allegiance to the

132 Ruby Haazen "The Viability of Public Trust Litigation in New Zealand Against Carbon Emitters" (LLB(Hons) Dissertation, University of Auckland, 2012) at 34.

133 *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149 (CA).

134 At 410.

135 *Omokoroa Ratepayers Association Inc v The Western Bay of Plenty Regional Council* EnvC A102/04.

136 The Constitution Act 1986.

Queen and obeying her laws.[137] The Queen is the supreme ruler, deriving power from her status, not the demos. It is difficult to infer a fiduciary duty in light of this. In addition, imposing a court-regulated fiduciary duty on the government allows the courts to enter the policy-making realm, yet the separation of powers requires that no branch of government encroach on the functions of others.[138]

The Treaty of Waitangi is an interesting potential source of the PTD. Wood says the PTD exists where a sovereign "derives its power from the people (as distinguished from a totalitarian government or despotic monarchy)".[139] Hobson claimed British sovereignty over the North Island by cession through the Treaty, and over the South Island by terra nullius[140] (ie unoccupied land).[141] However, Māori lived and practised tikanga in the South Island. Sovereignty, then, rests on the Treaty.

There are two versions, one Māori and one English. While people have tried to reconcile the two treaties, their meanings are arguably distinct. In the English version, Māori cede sovereignty to the Crown but get exclusive and undisturbed possession over their lands, estates, forests, fisheries and other property they possess. In te Tiriti, Māori maintain their sovereignty but grant the Crown kāwanatanga/governorship.[142]

The Waitangi Tribunal has said that kāwanatanga involves a duty to make effective and efficient policy.[143] It is the exercise of effective and responsible government in exchange for the right to govern.[144] This duty includes the right to ensure resources are used in an efficient and effective way.[145] Arguably then, if climate change policy is lacking or ineffective, thereby threatening sovereignty over traditional lands, Māori have a claim. However, this interpretation is limited to the Waitangi Tribunal, and would be difficult to run in the courts.

Furthermore, the judiciary may not be the best forum in which to challenge the sovereignty of Parliament, as the courts derive their authority from Parliament.[146] In *Berkett v Tauranga District Court*, the High Court held that it was obliged to give effect to legislation notwithstanding any attack on what led

137 "Citizenship Ceremonies" New Zealand Government <https://www.govt.nz/browse/passports-citizenship-and-identity/nz-citizenship/how-to-apply-for-nz-citizenship/citizenship-ceremonies/>.
138 Webb and others, above n 46, at 123.
139 Wood, above n 104, at 116.
140 "Hobson proclaims British sovereignty over New Zealand" New Zealand History <https://nzhistory.govt.nz/hobson-proclaims-sovereignty-over-all-of-new-zealand>.
141 "Terra Nullius" Oxford Reference <http://www.oxfordreference.com/view/10.1093/acref/9780195557558.001.0001/acref-9780195557558-e-3278>.
142 Wood, above n 104, at 132.
143 Waitangi Tribunal *Matua Rautia: The Report on the Kōhanga Reo Claim* (Wai 2336, 2013).
144 Waitangi Tribunal, above n 143.
145 Waitangi Tribunal, above n 143.
146 Constitution Act 1986; Supreme Court Act 2003.

to its enactment from a constitutional perspective.[147] Furthermore, the courts will not comment on Bills due to the principles of non-interference and comity between the judiciary and the legislature.[148] Thus, the courts are unlikely to assess the validity of legislation or the efficacy of legislative policy.

In sum, each argument requires judicial activism and considerable evolution of law. The courts have a relatively limited constitutional role. In jurisdictions where the PTD is surfacing, the courts have more power. The Indian judiciary, for example, is dynamic in shaping the law and "plays a central determinative role in the governance of modern India".[149] The same cannot (and should not) be said for the unelected New Zealand judiciary.

As with human rights, integrating the PTD into judicial review is less controversial. The PTD can inform the exercise of statutory duties. This way, the PTD does not blatantly challenge sovereignty or enter policy-making. This increases the chances of the PTD being adopted. While this is a diluted version of the PTD, Harlow and Rawlings have poignantly observed that "[t]he radical who questions the substance of the separation [of powers] is apt to suffer most".[150]

5. NEGLIGENCE

Tort law is a way to claim compensation for climate change-related damage. Torts is no stranger to environmental litigation. Private nuisance claims around the world have provided access to compensation.[151] Some see negligence as an attractive avenue for litigation because the categories of negligence are growing.[152] This part of the article looks at the merits of pursuing a negligence claim to impose liability and encourage governments to develop climate change policy. It focuses on two-party negligence, causing property damage to farmers.

Firstly, the farmer must have suffered harm. Flooding, drought, disease and toxic algae are climate change effects.[153] The economic losses from droughts

147 *Berkett v Tauranga District Court* [1992] 3 NZLR 206 (HC).

148 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84.

149 Lavanya Rajamani and Shibani Ghosh "India" in Richard Lord and others (eds) *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, Cambridge, 2012) 139 at 154.

150 Harlow and Rawlings, above n 40, at 157.

151 Carrington, above n 9.

152 Giedrė Kaminskaitė-Salters "Climate change litigation in the UK: its feasibility and prospects" in Michael Faure and Marjan Peeters (eds) *Climate Change Liability* (Edward Elgar, Cheltenham, 2011) 165 at 177.

153 Royal Society Te Apārangi *Human Health Impacts of Climate Change for NZ Evidence Summary* (Royal Society Te Apārangi, New Zealand, 2018); Westpac NZ *Climate Impact Report* (Westpac NZ, New Zealand, 2018).

in New Zealand from 2007 to mid-2017 totalled over $720 million.[154] This can affect food supply.[155] Bushfires will significantly impact on forestry.[156] Studies on the impact of drought on rural males and affected farmers show an increased risk of depression and suicide.[157] Climate change causes three categories of harm: direct property damage (crops), consequential loss (lost profits), and mental injury (depression due to loss of livelihood and purpose).

5.1 Duty of Care

Establishing a duty of care in novel cases involves assessing proximity, policy and, ultimately, whether it is fair, just and reasonable to impose a duty.[158] Plaintiffs would claim that the government owes a duty of care to farmers to mitigate/adapt to the effects of climate change.

5.1.1 Proximity

The first question is whether there is a relationship of proximity between the parties, such that the government should have reasonably foreseen the possibility of harm occurring to farmers if they were careless.[159] This will also be relevant when establishing remoteness — whether the kind of injury that occurred was foreseeable.[160] A successful claim needs to prove that if regulators do not have adequate strategies for climate change mitigation/adaptation, it is reasonably foreseeable that farmers will suffer.

Science can prove that human activities have caused global warming.[161] Warming of 1.5 degrees Celsius causes hot extremes and an increased probability of drought and adversely affected ecosystems.[162] The IPCC also shows that communities that are dependent on agriculture are at higher risk of global warming effects.[163]

154 Motu *Drought and Climate Change Adaptation: Impacts and Projections* (Motu, New Zealand, 2018) at 2.
155 Motu, above n 154, at 9.
156 Westpac NZ, above n 153, at 14.
157 At 12.
158 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA). [Ed. In *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419, claims based on public nuisance and negligence against corporations causing greenhouse gas emissions were struck out as too remote.]
159 At [156].
160 *Attorney-General v Geothermal Produce Ltd* [1987] 2 NZLR 348 (CA).
161 IPCC, above n 2, at 6.
162 At 9.
163 At 11.

However, a point often raised in climate litigation is the idea that one country's efforts alone will not curb warming. In *Thomson* an affidavit states, "if New Zealand did nothing and the world did nothing, the cost would be exactly the same as if New Zealand made significant effort and the rest of the world did nothing".[164] The government in *Urgenda* argued that the Netherlands should not be required to reduce GHG emissions on its own, because emissions must be reduced globally. The Court rejected the argument because states would otherwise argue that they should not be required to reduce emissions unless other states are also required to — a demand outside the courts' jurisdiction.[165]

Furthermore, the cumulative nature of emissions causing global warming means every contribution pushes us nearer to the 1.5 degrees Celsius mark. Even if our emissions reductions will not make a difference, governments are changing. New Zealand's efforts could encourage others to follow suit. Proximity could be argued.

5.1.2 Policy

The policy analysis evaluates the reasons for/against imposing a duty. The arguments in favour of a duty are:

(1) Deterrence: If governments are increasingly held liable for damage, governments may be deterred from being complacent about policy action.
(2) Vulnerability:[166] Farmers are particularly vulnerable to the effects of climate change because they rely on the environment. Their vulnerability is compounded because insurance is no longer a sufficient alternative remedy — climate change is making insurance less affordable to those at risk.[167] Lastly, the state, having information, legal powers and funding, is in a position of power.
(3) Councils have previously owed a tortious duty. *Hamlin* held a local authority labile for a building inspector's negligence.[168]
(4) The Crown Proceedings Act 1950 allows an action in tort against the government (but note the Crown will not be liable unless there is an actionable tort against a Crown servant, which also adds complexities).[169]

Arguments against a duty are:

164 *Thomson*, above n 11, at [136].
165 *Urgenda*, above n 10.
166 *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 at [62].
167 Miriam Bell "Climate Change Insurance Threat" (30 November 2018) Good Returns <https://www.goodreturns.co.nz/article/976514016/climate-change-insurance-threat.html>.
168 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).
169 Crown Proceedings Act 1950, s 6.

(1) Floodgates:[170] Allowing a claim would open the floodgates for people to challenge government policy and influence behaviour through liability. There is a legitimate public interest in allowing governments to pursue and change their agenda independently, without being sued.
(2) Indeterminate liability:[171] If governments owe a duty to farmers to implement climate change policy, governments would be potentially liable for all policy decisions. Governments are constitutionally mandated to act in accordance with the will of their constituents. If citizens elected a government that took no action on climate change, imposing a duty would make governments liable under tort for doing what was required of them constitutionally. Furthermore, the government would be measured against the standard of care of a reasonable government/agent.[172] It could be difficult and democratically problematic for a court to decide what a reasonable state body would do. That is a matter for citizens to vote on.
(3) A court is more likely to establish a duty if the defendant's conduct is a positive act. The government's failure to implement sufficient climate change policy is an omission. This could be overcome if the claim challenges policies that result in emissions/deforestation.

Overall, there are important constitutional factors that militate against imposing a duty.

5.2 Causation

Causation is considered to be the biggest legal challenge to establishing climate liability.[173] The global and scientifically complex nature of climate change means no storm can be directly linked to a particular emission. The climate system involves "sophisticated feedback systems" and "non-linear interactions".[174] Droughts have no clear start or end date, making them an uncomfortable fit in a legal framework that requires certainty of facts.[175] The chain of causation for climate change is long, exposing a claim to a raft of *novus actus interveniens*.[176]

170 *South Pacific*, above n 158.
171 *South Pacific*, above n 158.
172 *Blyth v Birmingham Waterworks Co* (1856) 156 ER 1047 (Exch).
173 Miriam Haritz "Liability *with* and liability *from* the precautionary principle in climate change cases" in Michael Faure and Marjan Peeters (eds) *Climate Change Liability* (Edward Elgar, Cheltenham, 2011) at 19.
174 Smith and Shearman, above n 61, at 115.
175 Motu, above n 154, at 2.
176 At 19.

Nevertheless, some argue applying causation to climate change would not be radical.[177] The causation issue is not deterring claimants. In fact, a Peruvian farmer is pursuing a claim against a power company in Germany for the melting of a glacier in the Andes mountains.[178]

Over time, negligence has developed causation to apply to a range of cases. Academics argue that the *Fairchild* test is well suited to climate change and would improve the likelihood of success for plaintiffs.[179] Under *Fairchild*, where there is a known single cause of harm, parties will be liable if they caused a "material increase in the risk of harm".[180] If "material increase" refers to adaptation measures, *Fairchild* may be helpful. Even if a drought was not directly the state's fault, resource management decisions heavily affect the water cycle.[181] Thus, economic research institute Motu says local government plays an important role in adaptation measures.[182] These actions/inactions could have materially increased the risk of harm to farmers.

5.3 Remedies

An objective of torts is to compensate — putting the farmer back into the position they would have been in had the tort not occurred (ie if the government had adequate adaptation/mitigation measures to minimise harm from extreme weather).[183] Contributory negligence will reduce damages if the plaintiff is at fault.[184] Innovative arguments could be run. Firstly, scientists have known about climate change or at least droughts for decades. Each farmer could mitigate and adapt to the risk of effects themselves. It could also be argued that citizens contributed to their own harm by electing a government with insufficient climate policies. Lastly, the agriculture and dairy sector, although a victim of climate change, also contributes to emissions. These could reduce damages and dilute the deterrent effect.

Overall, negligence is difficult to establish. However, it is a growing area of law, changing with society. Climate change surrounds us with novel fact scenarios, waiting to come before the courts.

177 Kaminskaitė-Salters, above n 152, at 183.

178 Ucilia Wang "German Court Oks Potentially Groundbreaking Climate Lawsuit" (30 November 2017) Climate Liability News <https://www.climateliabilitynews.org/2017/11/30/germany-rwe-peru-farmer-saul-luciano-lliuya/>.

179 Smith and Shearman, above n 61, at 110.

180 *Fairchild v Glenhaven* [2003] 1 AC 32 (HL).

181 Motu, above n 154, at 2.

182 At 4.

183 Kaminskaitė-Salters, above n 152, at 169.

184 Contributory Negligence Act 1947, s 3.

6. CONCLUSION

This article has explored various causes of action against the government for climate change inaction. None of the options have provided a clear pathway to win a climate change case without significant challenges.

The human rights framework through BORA is narrowly enforced and the current rights do not extend to rights to a healthy environment. The absence of a written constitution, and the comparatively limited role of the state and the courts, means the existing rights are unlikely to be read broadly or enforced vigorously. Furthermore, the PTD would require a drastic departure from what courts are willing to find. Nevertheless, decision-makers could consider climate change through human rights, the PTD and international law frameworks as a matter of judicial review. Lastly, negligence poses significant roadblocks to imposing a duty and establishing causation. However, because negligence is a developing area of law, change is possible.

The common denominator that threatens the success of each claim relates to our Westminster system. This means no claim will be straightforward. Inevitably we must ask, what is the point?

On the one hand, there are no real alternatives. Wood says that we remain in a climate crisis, pointing to meaningless international negotiations and insufficient domestic commitments.[185] Faure and Peeters argue that although government regulation should be the primary means to mitigate climate change, litigation still plays an important role.[186]

Furthermore, not all lawsuits are brought for the sole purpose of winning. Sometimes they are brought despite certainty of failure. Harlow states, "[h]ard cases may make bad law but they can also make good publicity".[187] Publicity can turn an isolated case into a "crusade".[188]

Litigation can pressure governments to change. The threat of litigation could compromise business certainty, compelling industries to demand government action.[189] Additionally, litigation can raise awareness about gaps in the law, instigating reform.[190]

185 Wood, above n 104, at 150.

186 Michael Faure and Marjan Peeters "Concluding remarks" in Michael Faure and Marjan Peeters (eds) *Climate Change Liability* (Edward Elgar, Cheltenham, 2011) 255 at 272.

187 Harlow and Rawlings, above n 40, at 300.

188 At 4.

189 Smith and Shearman, above n 61, at 12.

190 Hari Osofsky "Adjudicating Climate Change Across Scales" in William CG Burns and Hari M Osofsky (eds) *Adjudicating Climate Change: State, National and International Approaches* (Cambridge University Press, New York, 2009) at 383.

Others are more cynical about the utility of climate change litigation. Spier argues that mass litigation against governments is a poor strategy.[191] If a claim is successful, governments would have less funding for climate change mitigation.[192] Spier advocates for a more realistic approach.[193] Climate change requires urgent action. The longer it takes to curb emissions the more devastating the effects will be.[194] Litigation involves research, scientific advancements, the piecemeal development of precedents and the delays of court procedure. Litigation is expensive, especially if the object is not to win and get compensated but to serve the development of the law towards climate change ends. Moreover, Parliament can enact legislation to nullify a decision — recall the Foreshore and Seabed Act 2004.

Notwithstanding all of these limitations, there is still hope. Achieving change through the English common law is not new.[195] The dictum in *Waitakere* on the PTD and the Court's attitude shift on climate change in *Thomson* are encouraging developments. Responding to the latter judgment, Thomson calls the case a "win for people and our future".[196] She notably says, "one case paves the way for another, and each success is a stepping stone for the next case".[197] Furthermore, three Supreme Court Justices of New Zealand have recognised, albeit extrajudicially, litigation potential for the climate cause, particularly around statutory interpretation.[198] The tsunami of climate claims worldwide will hopefully set useful precedents for climate litigation in New Zealand. In 2020, we watch courtrooms, captivated, as climate claimants prepare for battle.

191 Jaap Spier "High noon: prevention of climate damage as the primary goal of liability?" in Michael Faure and Marjan Peeters (eds) *Climate Change Liability* (Edward Elgar, Cheltenham, 2011) 47 at 48.

192 At 48.

193 At 48.

194 IPCC, above n 2.

195 Harlow and Rawlings, above n 40, at 12.

196 Sarah Thomson "I took the climate change minister to court and won — kind of. Now I'm looking at you, James Shaw" (4 November 2017) The Spinoff <https://thespinoff.co.nz/society/04-11-2017/i-took-the-climate-change-minister-to-court-and-won-kind-of-now-im-looking-at-you-james-shaw/>.

197 Thomson, above n 196.

198 Winkelmann and others, above n 15, at [41]. [Ed. In *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419, claims based on public nuisance and negligence against corporations causing greenhouse gas emissions were struck out. The Court left open a third claim based on an inchoate duty yet to be identified.]