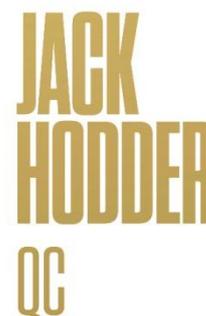


CLIMATE CHANGE LITIGATION: WHO'S AFRAID OF CREATIVE JUDGES?



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1 Introduction

- 1.1 Local government is required to plan and act to meet the current and future needs of local, district and regional communities. This in turn requires prudent stewardship of resources and good quality risk management.
- 1.2 Those objectives have always been challenging. But now the challenges have been compounded by the strengthening of the consensus on the imminent impacts from significant climate change reflecting human activities.
- 1.3 This short report assumes the correctness of that consensus, and addresses the legal dimension of those compounded risks for local authorities. It seeks to explain that the combination of, first, climate change concerns, and, second, common law systems such as ours, has already created serious litigation risks for governmental agencies, including local government – ie, risks of damages awards.
- 1.4 More specifically, the English speaking world is now into the third decade of legal thinking about climate change litigation. Just late last year, the Auckland University Law Review published a detailed 21 page article which concluded that:

The necessity of responding to plaintiffs seeking remedies for harm due to climate change will inevitably mean that judges use the inherent, creative element of the common law to mould remedies to provide relief.¹

- 1.5 The passion and ingenuity behind such plaintiffs should not be underestimated. Nor should the corresponding risks to government defendants from a likely sustained campaign of litigation. Not just central government but also local government.
- 1.6 Accordingly, this report suggests that New Zealand local government leaders must understand and focus on credible responses to the following points:
- (a) There are an increasing number of climate change cases being litigated around the world, mainly brought by private individuals against public authorities.
 - (b) Groups and individuals are getting more and more creative with bringing claims – unless central government steps in, the judiciary will likely play a greater role in developing legal rules in this area.
 - (c) Current local government litigation risk mostly relates to decisions to limit development (short-term judicial review). In the future it seems likely to extend to the consequences of *allowing* development and failing to implement adaptation measures (e.g. from homeowners suffering the physical and economic consequences of climate change in the *longer term*).
 - (d) There has not yet been any large damages claim in relation to failure to implement adaptation measures in New Zealand. However, it may be only a matter of time.
 - (e) In the New Zealand statutory context, it is up to local authorities to consider carefully the consequences of decisions to take or not take steps – for example, adaptation measures such as controlling development and protecting coastal regions. With limited guidance from central government,

¹ Saul Holt QC and Chris McGrath "Climate Change: Is the Common Law up to the Task?" (2018) 24 Auckland University Law Review 10.

they require lots of evidence and information to make decisions that will withstand legal challenge.

- (f) A more fundamental solution would sensibly recognise that anthropogenic climate change is a major “negative meta-externality” requiring collective action on the broadest scale, and funded on the broadest base (i.e. central government taxation).

2 Local government responsibilities

2.1 The Local Government Act 2002 Act includes repeated expectations of effective local government, not least playing a broad role in meeting current *and future* needs of their communities for good quality:

- (a) local infrastructure;
- (b) local public services;
- (c) performance of regulatory functions [s 3, s 10].

2.2 “Good quality” means effective, efficient and appropriate to present and *anticipated future circumstances* [s 10(2)].

2.3 “Core services” include the avoidance or mitigation of natural hazards, which include subsidence, sedimentation, wind, drought, fire and flooding [s 11A].

2.4 Decision making must take account of the interests of future as well as current communities, and diversity within such communities [s 14].

2.5 Thus regard must be had to:

- prudent stewardship of resources;
- planning effectively for future management of assets;
- taking a sustainable development approach;
- maintaining and enhancing the quality of the environment;
- the reasonably foreseeable needs of future generations [s 14].

2.6 Decision making requires:

- identifying all reasonably practicable options;
- assessing options’ advantages and disadvantages;
- if a significant decision regarding land or water, taking into account Māori culture and traditions [s 76, s 77].

2.7 Views presented to local authorities must be considered with an open mind [s 82].

2.8 Long term planning (10 years minimum) is required, providing a long-term focus for local authority decisions, activities – and how rates, debt and levels of service might be affected [ss 93, 93B, 96].

2.9 Financial management is required to be prudent and promote the current and future interests of the community, including provision for expenditure needs identified in the long term plan [s 101].

2.10 A long term plan must include:

- a financial strategy covering:
 - land use
 - capital expenditure on network infrastructure, flood protection and flood control works;

- other significant factors affecting the demand for and provision of services [s 101A];
 - an infrastructure strategy, for at least 30 years [s 101B].
 - Local authorities must also have a liability management policy, covering both borrowing and “other liabilities” [ss 102, 104]. And be mindful that the Crown is *not* liable to contribute to the payment of local authorities’ debts or liabilities [s 121].
- 2.11 Further, under the Resource Management Act 1991 (“RMA”), local authorities exercising powers must have particular regard to maintenance and enhancement of the quality of the environment, and to the effects of climate change [s 7].
- 2.12 Also under the RMA, local authorities’ functions extend to controlling the effects of the use or development of land, including to avoid or mitigate natural hazards [s 31].
- 2.13 And the New Zealand Coastal Policy Statement 2010 requires local authorities to “ensure” that coastal hazard risks are managed and identified for a period of at least 100 years, taking account of climate change, and applying a precautionary approach.
- 2.14 Thus New Zealand local government has been allocated major statutory responsibilities which relate to, or are affected by climate change, and provided with some powers to undertake those responsibilities.
- 2.15 Further, with statutory responsibilities and powers, and permanent (and solvent) existence, local authorities are an obvious potential defendant if and when climate litigation gains greater traction here.

3 The “Common Law” and Creativity

- 3.1 An appreciation of any litigation risk requires some understanding of the role of judges in declaring and making law. This has two components: first, interpreting legislation enacted by, in our country, Parliament; and, second, refining and “developing” the common law.
- 3.2 To explain briefly, the common law is a general description of legal rules which exist outside legislation. These rules are sometimes called “judge-made law”. The essential rules of the law of contract, the law of trust, and the law of torts, are prominent examples.
- 3.3 “Torts” is our legal jargon for “wrongs” – things for which A can sue B without relying on a statute or a contract. The classic forms are where A is struck by B – with a baseball bat (assault) or a vehicle (negligence). But the scope of torts has expanded dramatically (“developed”) in the past century or so. Careless statements or exercises of powers may be held negligent, making the defendant liable to compensate for economic loss. The leaky buildings litigation saga is a leading example, needing little elaboration for New Zealand local government.
- 3.4 While common law rules are mostly settled and stable, they may overlap untidily. And they usually have a moral underpinning. Judicial perceptions of this moral dimension change over time. In tort, especially negligence, this includes ideas of protection of the vulnerable, sanctioning of careless conduct, and loss spreading.
- 3.5 Changes to the common law come from the appellate courts who restate the law in major and usually “hard” cases. In New Zealand, our Supreme Court and Court of Appeal look with interest at what their common law (and English speaking) counterparts do in the UK, Australia and Canada. Their collective output involves

a steady and accumulating flow of written reasoning. Major cases often involve policy choices about whether to refine or extend legal boundaries.

- 3.6 Another aspect of our common law is the fairly recent recognition that the “common law of New Zealand” either includes or must have some regard to *tikanga*. However, as a form of customary law, the contents of *tikanga* must be proved by evidence. The longer term implications of this are unclear.
- 3.7 In addition, while legislative rules are written in and passed within the Parliamentary process, their precise meaning may not be clear. That meaning will only be settled by interpretation by, ultimately, our appellate courts. And in this interpretation work, the courts will have regard to the inferred legislative purpose as well as the actual statutory text. And, where relevant, they may seek consistency with the rights specified in the New Zealand Bill of Rights Act 1990.
- 3.8 In other words, judges – principally those in appellate courts – have some scope for choice when interpreting statutes. This is especially so for those statutes using general language. Some may recall the unexpected reach of a few words in the State-Owned Enterprises Act 1986:

Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

- 3.9 In 1987, those words were held by the Court of Appeal to signify a partnership between Pakeha and Māori. That would have been inconceivable 50, 100 or 150 years earlier.
- 3.10 Additional scope for judicial choices (and creativity) has been provided by Parliament in the Bill of Rights Act. Its impact is difficult to summarise, but one significant consequence is the ascendancy to the judiciary of lawyers taught that the Act provides potentially powerful bets for judicial creativity. To date, that creativity has been relatively muted. But it really is too soon to know whether that will continue. A fairly recent article by two Otago Law School academics concluded that:

The New Zealand experience [with this Act] shows that the only certainty is that *some* judicial innovation under such instruments will occur, but just *how much* and to *what ends* is deeply uncertain.²

- 3.11 In short: the law provides binding and enforceable remedies. But the law changes. So judges matter.

4 The logic of modern Climate Litigation

- 4.1 In the USA, where the Constitution’s checks and balances have often produced legislative stalemate, and the courts can strike down legislation as “unconstitutional”, litigation has long had a political dimension. In particular, where there is a call for change to existing rules this may involve a series of proceedings which seek either to create enough attention and risk to get a response from government or Congress, or to persuade the courts themselves to order wide-ranging remedies. This process recognises and uses the “creative” aspect of the law, and the role of judges.
- 4.2 Those dynamics have not escaped attention further afield, nor in the efforts of concerned parties to see “something done” to address issues arising from greenhouse gases and climate change.

² Andrew Geddis and MB Rodriguez Ferrere “Judicial Innovation under the New Zealand Bill of Rights Act – Lessons for Queensland” (2016) 35 University of Queensland Law Journal 251.

- 4.3 It is also relevant that legal imagination (or creativity) is most frequently explored and published by legal scholars. Such scholars often have an understandable interest in matters that are new or could be changed. New Zealand law schools are no different. And senior advocates and judges are kept reasonably well informed on what areas are receiving attention from such legal scholars.
- 4.4 Climate change is one such area. The earliest US legal academic writing in this field dates from the late 1990s. Now there are many specialist legal journal services with this focus as well as dozens of articles in other law journals every year. Not to count the more informal sources of information on “climate change law”.
- 4.5 To take tort law, and especially the law of negligence, as an example, the dynamics of seeking change to rules by suing government agencies – whether central or local government – is well described in the legal literature on climate change.
- 4.6 Those dynamics recognise that the existing rules around negligence are not likely to produce immediately effective results in any particular case. But they recognise, as almost all lawyers (and judges) understand, that over time negligence has changed to reflect judges’ perceptions of the needs of contemporary society – not least those least able to protect themselves.
- 4.7 Further, the lawyers working with those seeking change understand that it just takes one decision to change perceptions and the law itself. There are many judge-made legal rules applied today that were regarded as heresy only a decade or so ago.
- 4.8 In tort, as mentioned, the traditional issue involves some variation on A having struck B. In climate change litigation, there are many thousands of As (emitters) and many millions of Bs (those whose life or property is at risk from the consequences of climate change). But there are also government agencies who are – or are expected to be – in the middle. These features confound the easy application of negligence rules in climate change litigation. But it is difficult to disagree with, say, Professor Douglas Kysar of the Yale Law School when he argues that (1) faced with the scale of problems that climate change creates, judges in tort cases will make a choice between being irrelevant or adapting tort law principles to deal with the complexities of a “barrage” of climate change litigation; and (2) at some point, possibly quite soon, they will choose adaption over irrelevance.³
- 4.9 Professor Kysar notes the description of global warming as “the mother of all collective action problems”, and as a “super wicked problem”. His argument is that if government agencies and legislatures do not address these problems – and to date they have not achieved a great deal – then courts will reshape tort law to fill the vacuum. He concludes:
- If scientists are even remotely correct in their assessment of harms to be expected from greenhouse gas emissions, then climate change will enter prominently into tort law’s evolutionary dynamics.
- 4.10 Can we explain away this analysis as academic and/or American? In my view, that would be unwise. Consider two modern changes in the law of negligence relevant to New Zealand. First, English courts have in asbestosis cases involving successive employment by different employers effectively removed the previous need to prove that a specific period of exposure (and employment) resulted in the disease.

³ Douglas Kysar “What Climate Change can do about Tort Law” (2011) 41 Environmental Law 1.

- 4.11 Second, and closer to home, this month our Court of Appeal will hear the Crown's appeal against the High Court's conclusions that the Ministry of Agriculture and Forestry ("MAF") was negligent in issuing an import permit for kiwifruit pollen in 2006/07, and that a specific 2009 import consignment caused the Psa outbreak which became evident in late 2010.⁴ In essence, the existence of the statutory powers to regulate biosecurity risk was held to establish a relationship where kiwifruit growers relied on, and were owed a (novel) duty of care by, MAF. This case is significant for anyone involved with the exercise of regulatory powers – as local authorities often are.

5 A sample of recent overseas Climate Litigation

- 5.1 There are now many climate change cases around the world. The cases outlined below are but a sample. They indicate that:

- (a) Courts are prepared to make factual findings that climate change is related to anthropogenic CO2 emissions.
- (b) Some courts are also prepared to be creative about remedies.
- (c) Some courts feel that is simply wrong to disregard, or leave to the executive or legislative branches, the need to address problems associated with anthropogenic climate change.
- (d) The courts find a basis for their intervention in expansive approaches to a "duty of care" in the torts of negligence or nuisance, and in human rights.

- *American Electric Power Co (USA)*

- 5.2 In 2004, a number of US states together with New York City and several non-profit land trusts, commenced proceedings against five large firms operating fossil-fuel fired power plants, alleged to be the largest CO2 emitters in the USA.

- 5.3 These proceedings alleged public nuisance under federal common law, or breaches of state tort law, because public lands, animal and plant habitats, infrastructure and human health were at risk from climate change to which the defendants' emitting activities had contributed. The proceedings sought court orders that would require each defendant to cap and then reduce its emissions by a specified percentage each year over at least 10 years.

- 5.4 A Federal Court of Appeals held that these claims were credible. But in 2011, the federal common law claims were held to be legally untenable by the US Supreme Court because the common law had been supplanted in this area by a federal statute, the Clean Air Act. The state law claims were removed back to the lower courts. It does not appear that these have proceeded further.

- *Asghar Leghari (Pakistan)*

- 5.5 In 2015, the Lahore High Court upheld a farmer's claim against the Federation of Pakistan that the government's inaction and delay in implementing its climate change policy violated his fundamental constitutional rights to life and dignity.

- 5.6 The Court ordered the government to appoint a focal person on climate change, to prepare a list of adaptation measures to be completed by the end of 2015, and to report back to the Court. Further, the Court also established a Climate Change Commission to help the Court monitor compliance and progress on an ongoing basis.

⁴ *Strathboss Kiwifruit Limited v Attorney-General* [2018] NZHC 1559.

5.7 The Court stated that:

climate change is a defining challenge of our time and has led to dramatic alterations in our planet's climate system. For Pakistan, these climatic variations have primarily resulted in heavy floods and droughts, raising serious concerns regarding water and food security. On a legal and constitutional plane this is [a] clarion call for the protection of [the] fundamental rights of the citizens of Pakistan, in particular, the vulnerable and weak segments of the society who are unable to approach this Court.⁵

- *Juliana v United States (USA)*

5.8 In 2016 (and again in 2017), a Federal District Court rejected attempts to strike out a claim challenging inaction by the US President and various executive government agencies (e.g. the Department of Energy, the Environmental Protection Agency) in regulating the burning of fossil fuels, in the face of knowledge of its effects in destabilising the climate systems and of the need for urgent action.

5.9 The claims rely on constitutional principles to allege that such inaction was (a) a breach of the rights of individuals to life, liberty and property, and (b) a violation of a "public trust" obligation – to hold natural resources in trust for the people and for future generations. The remedies sought are declarations of breach, and an order requiring the protection of a "national remedial plan".

5.10 In particular, Judge Aitken rejected the defendants' arguments that these were "political questions" which the courts could not address. In her conclusion, she said:

plaintiffs likely could not obtain the relief they seek through citizen suits brought under the Clean Air Act, the Clean Water Act, or other environmental laws. But that argument misses the point. This action is of a different order than the typical environmental case. It alleges that defendants' actions and inactions – whether or not they violate any specific statutory duty – have so profoundly damaged our home planet that they threaten plaintiffs' fundamental constitutional rights to life and liberty.⁶

5.11 And Judge Aitken also quoted from a paper produced by another Judge:

The current state of affairs ... reveals a wholesale failure of the legal system to protect humanity from the collapse of finite natural resources by the uncontrolled pursuit of short-term profits ...

The [courts] can, and should, take another long and careful look at the barriers to litigation created by modern doctrines of subject-matter jurisdiction and deference to the legislative and administrative branches of government.⁷

- *Lliuya v RWE AG (Germany)*

5.12 In late 2017, an appellate court in Germany allowed a climate change proceeding against a private emitter to move to the evidence stage. The claim is brought by a Peruvian citizen who alleges that his home is at risk because it is located below a glacial lake in the Andes, and the lake is increasing in volume because of glacial melt.⁸

⁵ *Ashgar Leghari v Federation of Pakistan* [2015] W.P. No. 25501/2015 at 6.

⁶ *Juliana v United States* 217 F Supp 3d 1224 (D. Or., 2016), at 1261.

⁷ Alfred Goodwin "A Wake-Up Call for Judges" (2015) *Wisconsin Law Review* 785 at 785, 788.

⁸ *Lliuya v RWE AG* [2015] Case No. 2 O 285/15 Essen Regional Court (Germany).

- 5.13 The defendant is RWE AG, Europe's largest energy company. It is alleged that its subsidiaries' power plants have contributed 0.4% of all anthropogenic GHG emissions since the Industrial Revolution.
- 5.14 The claim seeks from RWE a 0.47% contribution (as "compensation") to the costs (apparently some 4M euros) of preventative measures to avoid a glacial lake defrost flood.
- 5.15 The legal basis for the claim would be described in our law as private nuisance: a liability of A where A's activities cause unreasonable interference to B's usual enjoyment of B's land. Our law also recognises public nuisance: where A's activities materially affect the reasonable convenience of a class of other persons.
- 5.16 The *Lliuya* case faces many hurdles under German law, but is continuing. As a recent legal article observed, the claim has already made "extraordinary progress through the German courts".⁹

- *Urgenda Foundation (Netherlands)*

- 5.17 In October 2018, the Hague Court of Appeal upheld a 2015 District Court judgment which ordered the State of the Netherlands to increase its reduction target for 2020 CO₂ emissions, relative to 1990, from 14-17% to at least 25%. The claimant had sought a 40% reduction.
- 5.18 The facts accepted by the District Court, and not challenged on the appeal, included the "insight" that the parts per million CO₂ equivalent needs to be limited to 430 ppm by 2100 to avoid the maximum safe temperature rise (since the Industrial Revolution) of 1.5%. And that:

There is a direct, linear link between anthropogenic emissions of greenhouse gases, partially caused by combusting fossil fuels, and global warming. Emitted CO₂ lingers in the atmosphere for hundreds of years, if not longer.

As global warming continues, not only the severity of its consequences will increase. The accumulation of CO₂ in the atmosphere may cause the climate change process to reach a 'tipping point', which may result in abrupt climate change, for which neither mankind nor nature can properly prepare.¹⁰

- 5.19 The claim was based on Article 2 (right to life) and Article 8 (right to private and family life) of the European Convention on Human Rights, which extend to environment-related situations. The Court concluded:

... it is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life. As has been considered above by the Court, it follows from Articles 2 and 8 ECHR that the State has a duty to protect against this real threat.¹¹

- 5.20 The Court of Appeal then held that the 25% minimum reduction ordered by the District Court was "in line with the State's duty of care", and the State's own target was not protected by any "political question" or "margin of appreciation" defences.

⁹ Vedantha Kumar and Will Frank "Holding Private Emitters to Account for the Effects of Climate Change: Could a Case Like *Lliuya* Succeed Under English Negligence Laws" (2018) 2 CCLR 110 at 123.

¹⁰ *Urgenda Foundation v the State of the Netherlands (Ministry of Infrastructure and Environment)* [2015] HAZA C/09/456689 at 12.

¹¹ At 13.

6 So what (for New Zealand)?

- 6.1 It is possible to think that these cases could not succeed in New Zealand. We have a healthy judicial respect for parliamentary sovereignty, and limited appetite for “grandstanding” or “political” litigation. We do not have a constitution which allows or encourages the courts to override legislation. And our common law rules on, say, negligence create major problems for climate change litigants who seek to establish a private law duty of care, or causation.
- 6.2 Nevertheless, there are local indications that, in some form, climate change litigation will get real traction. These include the following.
- 6.3 In the leaky building cases, the New Zealand courts found clear signs in the Building Act that territorial authorities were meant to “ensure” that building work complied with the Building Code, and that this responsibility translated into a duty of care owed to residential home owners (including future owners), and now extended to commercial buildings. As is well known, the cost to local bodies and their insurers has been huge. In other countries, notably the UK, a different result has been reached in such cases. But the New Zealand courts’ generally “liberal” reputation has been confirmed on the basis of apparent Parliamentary intention, fairness to the vulnerable and common law dynamics.
- 6.4 In 2013, our Supreme Court held, in the *Buller Coal* case, that the RMA directed central but not local government to address global climate change issues. This meant that, contrary to the opposition from conservation groups, emissions from burning West Coast coal in India was not relevant to relevant resource consents for the local mining operations. However, the Court’s judgment was by a 4:1 majority, the Chief Justice dissenting. And the majority decision has been subjected to critical commentary by legal commentators, and cited as a reason for further legislative change.
- 6.5 In late 2017, in the *Thomson* case, the High Court upheld a judicial review challenge to the Minister for failing to review the 2050 emission reduction targets under the Climate Change Response Act 2002. The Court heard evidence on the effects of climate change (not contested by the Crown), and concluded that:
- (a) the non-review of the 2050 target had failed to take into account as a mandatory relevant consideration the IPCC’s recent report;
 - (b) in considering the 2050 target, the effect of climate change on the low-lying islands of Tokelau was also a relevant consideration.
- 6.6 Further, the High Court rejected the Crown’s argument that climate change issues involved policy judgements and were not appropriate for judges to determine. The Court considered US, Canadian and English cases, as well as the *Urgenda* case, and stated:¹²
- 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. The IPCC reports provide a factual basis on which decisions can be made.
- 6.7 In 2018, as noted earlier, the High Court held that MAF’s biosecurity regulatory powers gave rise to a private duty of care to New Zealand kiwifruit growers. This was acknowledged as a “novel” duty but in part justified by analogy with the leaky building case law and by the vulnerability of the growers. Even if the High Court

¹² *Thomson v Minister for Climate Change Issues* [2017] NZHC 733 at [133].

judgment is modified on appeal, it illustrates that our judges may have few qualms about a prolonged post-mortem on statutory decision-making, and a major (and expensive) extension of negligence law.

- 6.8 In late 2018, as noted earlier, the Auckland University Law Review published a major article by two barristers with Australian practices and a strong interest in climate litigation. Their article is entitled “Climate Change: Is the Common Law up to the Task?” Their answer, following a review of, among other things, the *Buller Coal* case and the *Adani Mining* litigation in Australia, is “Yes”. In essence, they agree with Professor Kysar’s analysis: courts confronted with many climate change lawsuits are likely to expand the boundaries of tort law.
- 6.9 Just a few weeks ago, a well-regarded litigator, Davey Salmon (one of the counsel in the *Buller Coal*, *Thomson* and kiwifruit cases), presented a provocative paper to a conference in Auckland. His “thoughts” on climate litigation in New Zealand were powerful and valuable. And they seemed to me to be well received by many in the audience – which included a respectable proportion of New Zealand’s senior judges.
- 6.10 Salmon’s general thesis was consistent with that of Professor Kysar, albeit from a New Zealand perspective:

There are policy reasons why it will be argued that some climate change issues are better dealt with by legislation than by the courts. But I suggest that the courts are particularly well-placed to comprehend and process the problem. As seen in the Treaty of Waitangi and human rights spheres, our courts are capable of heavy lifting on difficult issues.

... absent a meaningful legislative response to climate change, we can expect a significant role for the courts. We are in the early days, but I predict various New Zealand Bill of Rights Act arguments, a more engaged approach to judicial review on unreasonableness/irrationality grounds, perhaps a novel tort case, and to the extent the arguments succeed, plenty of jurisprudence about remedies.¹³

- 6.11 His thesis is in significant part founded on the proposition that it is the courts, and not politicians in Cabinet or Parliament, which will take a careful evidence-based approach to climate litigation issues. And that, once they are “educated” about these issues, judges may well try to adapt the law to do something about addressing them.
- 6.12 More generally, in a small country such as ours, judges are well used to considering and drawing lessons from cases with similar issues that have been decided overseas. Such decisions are in no way binding here, but they may be intellectually persuasive and provide examples of creative decision-making for a New Zealand judge tasked with deciding novel issues.

7 Preparing for the next (legal) revolution ...

- 7.1 Since, say, 1970, various aspects of New Zealand law have undergone radical change – to the extent that the scale might have seemed revolutionary to earlier generations. Examples include: what used to be known as divorce, illegitimacy, and matrimonial property; the influence of the Treaty of Waitangi; and no fault accident compensation.
- 7.2 Those changes are enacted or encouraged by new legislation. But the impetus for such changes often included the opinions of legal scholars and judges

¹³ Davey Salmon, “Thoughts on Climate Change Litigation in New Zealand”, 31 January 2019 (paper presented to Legal Research Foundation Conference to mark the retirement of the Chief Justice, Sian Elias).

expressing criticisms of the status quo. And sometimes seeking more creative ways of interpreting and applying the existing legal rules.

- 7.3 To repeat: the law changes. So judges matter. And it is not difficult to conclude that a barrage of climate litigation is a risk for New Zealand local government.
- 7.4 As always, identifying a risk is infinitely easier than removing it. But it is a necessary start.
- 7.5 The strengthening consensus on anthropogenic climate change and its adverse consequences indicates issues which in some cases will materialise only over decades. And there are many interests in play: owners and users of private assets; those undertaking local use changes and developments; insurers; publicly owned assets; central government and taxpayers; local government and ratepayers.
- 7.6 If major climate litigation, involving large monetary claims, does occur in future years, it will involve an *ad hoc* inquiry into fault and apportionment of responsibility for any one or more of thousands of exercises of statutory powers, or alleged failures to exercise such powers.
- 7.7 This will almost inevitably feature the distortions of hindsight:

In the way in which litigation proceeds, the conduct of the parties is seen through the prism of hindsight. A foreseeable risk has eventuated, and harm has resulted. The particular risk becomes the focus of attention. But at the time of the allegedly tortious conduct, there may have been no reason to single it out from a number of adverse contingencies, or to attach to it the significance it later assumed.¹⁴

The obvious unpredictability of this adds further complexity to the nature of climate litigation risk.

- 7.8 In the face of such risks, with impact on most and perhaps all parts of any country, the idea of national standards and solutions seems obvious. In New Zealand, appropriate legislation also seems obvious. We have a long history of public welfare legislation backed by taxpayer funding, and our legislation does trump the common law (including by enacting immunities or limitation defences against litigation risks).
- 7.9 I will not venture into details of the shape of “appropriate” legislation. But I suggest that some refined and expanded version of the EQC system justifies serious investigation. At a conceptual level, that would involve expansion of the range of “natural hazards” covered by a protective legislative scheme. And the ultimate backstop would be the Crown and its general taxation powers.
- 7.10 The political and economic ramifications and difficulty of handling the risks which climate litigation would bring – and reflect – may also deserve the label “super wicked”. But it seems to me that doing nothing requires a surprising level of bravery.¹⁵

JE Hodder QC
7 March 2019*

¹⁴ *Rosenberg v Percival* (2001) HCA 18, (2001) 205 CLR 434, per Gleeson CJ at [16].

¹⁵ Often legal-speak for foolhardiness.

*And with thanks to Nina Opacic, a graduate student of Victoria University of Wellington, for research assistance.

New Zealand Cases

- *Thompson v Minister for Climate Change Issues* [2017] NZHC 733.
- *West Coast Ent Inc v Buller Coal* [2013] NZSC 87.

Overseas Cases

- *In re Vienna-Schwechat Airport Expansion* [2017] W109 2000179-1/291E (Austria).
- *Earthlife Africa Johannesburg v the Minister of Environmental Affairs and others* [2017] 65662/16 (South Africa).
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