Paper for Commonwealth Lawyers Association workshop on "Strategic climate litigation: a case study of the Pacific"

By Dr Chris McGrath - 30 August 2023

Aim

This workshop aims to empower lawyers acting for people harmed by climate change.

It uses a case study from the Pacific as window to explore opportunities for strategic climate litigation, with lessons for other jurisdictions.

General reference

This paper will summarise the key points of the workshop. A more detailed analysis of the 10 steps for identifying opportunities for climate litigation was published in 2020 and is available online to complement the brief summary here.[1]

Key points:

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- A global challenge for lawyers now and in coming decades is to find remedies for people harmed by climate change.
- Widespread liability for climate change already exists under current national laws but is largely unrealised at present.
- Transnational liability for climate change arises under both the common law and statute for actions in one country that result in damage in another country.
- Transnational litigation between private individuals provides an avenue to sue under existing domestic laws in national courts for harm caused by emissions in other countries, such as Australia, and compel payment for damages through existing frameworks in many countries recognising foreign money judgments.
- The human rights protected under many Pacific constitutions (Appendix 1) offer valuable causes of action for transnational climate litigation, coupled with common law claims such as public nuisance.
- In cases where there are multiple sources of harm, such as climate change, legal liability for individuals typically arises from making a "material contribution" to the harm.
- Limitation periods for many causes of action are not a barrier to climate litigation as damage such as sea level rise from past carbon pollution is ongoing, therefore, a cause of action continues to arise for many claims such as common law claims for public nuisance.
- In assessing damages for climate change, such as forced relocation of villages, awards for exemplary damages to remove commercial profits of polluters should play a substantial role, applying similar reasoning to the PNG Supreme Court in *Rimbunan Hijau (PNG) Ltd*

[1] Chris McGrath "Identifying Opportunities for Climate Litigation: A Transnational Claim by Customary Landowners in Papua New Guinea against Australia's Largest Climate Polluter" (2020) 37(1) Environmental & Planning Law Journal 42-66, available at http://envlaw.com.au/cla/. A recording of the workshop will also be available at that link.

v Enei [2017] PGSC 36; SC1605 at [51], given the ongoing enormous greenhouse gas emissions and extraction of fossil fuels in countries such as Australia, which are done for naked commercial profit in total disregard and disrespect for the rights and interests of people of small island states in the Pacific and elsewhere impacted by climate change.

- Transnational claims for climate damages are strategic litigation in the sense they are undertaken for wider purposes than simply the specific legal remedy between the parties before the court. Their strategic purposes include to:
    - empower people and communities suffering from climate damage to take action and fight for justice in their own national courts, thereby providing access to justice;
    - demonstrate widespread legal liability exists under current laws and many people can claim compensation for the harm they suffer from climate change;
    - demonstrate that large climate polluters can be held liable for the damage they knowingly or wilfully cause for commercial profit;
    - encourage a wave of litigation against climate polluters undertaken by commercial law firms and litigation funders; and
    - deter companies and industries undertaking or financing climate polluting activities for profit, thereby mitigating future climate change.

This paper will expand briefly on several of these key points.

Impacts of climate change are already occurring and will increase in the future driven predominantly by burning fossil fuels in industrialised countries

Many countries in the Pacific and other small island states are already being impacted by climate change and are expected to be severely impacted by climate change in the future. The Intergovernmental Panel on Climate Change (**IPCC**) found in its most recent report:

> Small islands are increasingly affected by increases in temperature, the growing impacts of tropical cyclones (TCs), storm surges, droughts, changing precipitation patterns, sea level rise (SLR), coral bleaching and invasive species, all of which are already detectable across both natural and human systems (*very high confidence*).[2]

These impacts on people in the Pacific are primarily caused by emissions of greenhouse gases (**GHGs**) from the burning of fossil fuels in industrialised countries such as the United States of America (**USA**), China and Australia.

International negotiations and litigation between countries cannot compel payment for loss and damage. Industrialised countries such as the USA and Australia refuse to accept any legal liability to pay for loss and damage in other countries.

In terms of international legal liability – that is, liability between nations – industrialised countries, including Australia, have so far stifled any effective international mechanism to pay developing countries for climate change loss and damage.[3] Countries such as the USA and Australia that have caused most of the harm are willing to pay some form of *voluntary*

[2] IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability*. *Contribution of Working Group II to the Sixth Assessment Report of the IPCC*, Cambridge University Press, 2022, Ch 15 (Small Islands), p 2045.
[3] See Reinhard Mechler et al (eds), *Loss and Damage from Climate Change: Concepts, Methods and Policy Options* (Springer, 2019); Erin Roberts & Mark Pelling "Loss and damage: an opportunity for transformation?" (2020) 20(6) *Climate Policy* 758-771; Daniel Puig "Loss and damage in the global stocktake" (2022) 22(2) Climate Policy 175-183.

contribution to fund adaptation in developing countries, but are resolutely opposed to accepting or paying for any legally binding liability for the harm they have caused.[4]

There are opportunities for international litigation on climate change between countries,[5] but none that can compel a country such as the USA or Australia to pay for loss and damage due to climate change. Two current examples of international litigation that, while worthy in their aims, cannot compel large GHG emitters to pay for loss or damage are:

(a) the request for an Advisory Opinion from the International Tribunal for the Law of the Sea (**ITLOS**) submitted by the Commission of Small Island States on Climate Change and International Law in 2022 on the obligations under the *United Nations Convention on the Law of the Sea* to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change and to protect and preserve the marine environment in relation to climate change;[6] and

(b) the advisory opinion from the International Court of Justice (**ICJ**) on the legal obligations of States under international law in relation to climate change sought after a resolution by the United Nations General Assembly sponsored by a coalition led by the Republic of Vanuatu.[7]

Transnational litigation between private individuals provides an avenue to sue under existing domestic laws for harm caused by emissions in other countries and compel payment for damages

Transnational liability is a term that can be used in different ways but here is intended to mean legal liability that spans two or more domestic legal systems. It is intended here to be distinguished from litigation occurring between nations under international law (i.e. *international litigation*) as well as litigation occurring in a purely domestic legal setting, such as a personal injuries claim involving a car accident in a single country (i.e. *domestic litigation*).

Transnational liability arises under both common law and statute for actions in one country that result in damage in another country.[8] The position at common law is that a person may be liable for an act done outside the territory of a state that has a result inside the territory of a state. In *Secretary of State for Trade v Markus* [1976] AC 35 at 61, Lord Diplock, referring to *R v Ellis* [1899] 1 QB 230, said:

> "That case is well-established authority for the proposition that, in the case of what is a result crime in English law, the offence is committed in England and justiciable by an English court if any part of the proscribed result takes place in England."

Transnational liability for climate change can logically arise for "result offences" and this reflects the normal choice of law rules in private international law. For example, under choice of law rules Australian courts favour the law of the place where the tort occurred (the *lex loci*

[4] See, e.g., Ellsa Calliari, Swenja Surminski and Jaroslav Myslak, "The politics of (and behind) the UNFCCC's loss and damage mechanism", Ch 6 in Mechler, n 2, pp 161-162; Margaretha Wewerinke-Singh & Diana Hinge Salili "Between negotiations and litigation: Vanuatu's perspective on loss and damage from climate change" (2020) 20(6) *Climate Policy* 681-692.

[5] See, e.g. Christina Voigt "The potential roles of the ICJ in climate change-related claims" in Daniel Farber and Marjan Peeters (eds) *Climate Change Law* (Edward Elgar, 2016) 152.

[6] See https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/.

[7] See https://www.vanuatuicj.com/resolution. See also, Voigt, n 5.

[8] See Andrew Gage and Margaretha Wewerinke, "Part II – Transnational litigation and climate damages litigation" in "Taking Climate Justice into Our Own Hands: A Model Climate Compensation Act", Vanuatu Environmental Law Association and West Coast Environmental Law, 2015, pp 14-21.

delicti).[9] Normally, the place where the tort occurred is the place where the injury occurred (the *lex loci damni*), irrespective of the country in which the event giving rise to the injury occurred.[10] Thus, one of the standard reasons for a domestic court exercising jurisdiction over foreign defendants – often called a court's "long arm jurisdiction" – is "where the proceedings, wholly or partly, are founded on, or are for the recovery of damages in respect of, damage suffered in the State caused by a tortious act or omission wherever occurring."[11] In PNG, for example, service outside the jurisdiction is permitted when, amongst other things, "the proceedings are founded on, or are for the recovery of, damage suffered wholly or partly in PNG caused by a tortious act or omission wherever occurring."[12]

Legal liability arises from a "material contribution" to the harm

While climate change is caused by the actions of billions of people around the world, any person (including a company) whose GHG emissions make a "material contribution" to the harm caused by climate change is a potential defendant for domestic or transnational litigation. Liability under the common law, including the principles of causation, varies across jurisdictions and are heavily affected by statute. However, across the differences in jurisdictions and statutes, a common principle is that where two or more causes combine to bring about harm, an act is legally causative if it "materially contributes" to the harm.[13] As a judge of the High Court of Australia, McHugh J, said in *Henville v Walker* (2001) 206 CLR 459, 493 [106]:

> If the defendant's breach has "materially contributed"[14] to the loss or damage suffered, it will be regarded as a cause of the loss or damage, despite other factors or conditions having played an even more significant role in producing the loss or damage. As long as the breach materially contributed to the damage, a causal connection will ordinarily exist even though the breach without more would not have brought about the damage.

A majority of the High Court of Australia (French CJ, Gummow, Crennan and Bell JJ) recognised the origins of the concept of a "material contribution" in causation for tort in *Strong v Woolworths Ltd* (2012) 246 CLR 182 at 192–193 [22] (references in original):

> The expression can be traced to developments in the law of nuisance in Scotland in the nineteenth century.[15] In a case in which several factories had contributed to the pollution of a river [*Duke of Buccleuch v Cowan* (1866) 5 M 214], the defendant factory owner was held liable in nuisance for the discharge of pollutants from his factory which had "materially contributed" to the state of the river. Liability was not dependent upon proof that the pollutants discharged by the defendant's factory alone would have constituted a nuisance.[16]

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[9] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; [2000] HCA 36; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491; [2002] HCA 10; Robert Pietriche, "The Ascendancy of the lex loci delicti: The Problematic Role of Theory in Australian Choice of Tort Law Rules" (2015) 16 *Melbourne Journal of International Law* 86.

[10] See the discussion of differences in the US, UK and Australia in Owen Webb, "Kiobel, the Alien Tort Statute and the Common Law: Human Rights Litigation in this 'Present, Imperfect World'" (2013) 20 *Australian International Law Journal* 131, 153–154.

[11] Quoting the now repealed *Supreme Court Rules 1970* (NSW) Pt 10 r 1A, discussed in *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491; [2002] HCA 10. Now, to similar effect, see *Uniform Civil Procedure Rules 2005* (NSW) r 11.4 Sch 6(a)(ii) which allows service outside Australia without leave where "when the claim is founded on a tortious act or omission in respect of which the damage was sustained wholly or partly in Australia".

[12] Order 6, rule 19 of the *National Court Rules* 1983 (PNG).

[13] See also the argument that any positive contribution to the mechanism by which an injury occurred should be recognised as a "causal" contribution made by Jane Stapleton, "Unnecessary Causes" (2013) 129 *The Law Quarterly Review* 39.

[14] *Bonnington Castings Ltd v Wardlaw* [1956] AC 613, 620 (Lord Reid).

[15] The history is traced in Sandy Steel and David Ibbetson, "More Grief on Uncertain Causation in Tort" (2011) 70 *Cambridge Law Journal* 451, 453.

[16] *Duke of Buccleuch v Cowan* (1866) 5 M 214.

Most Pacific countries have adopted the common law as a core component of their legal systems (Appendix 1) and, therefore, the principles of liability for a "material contribution" following the decision in *Duke of Buccleuch v Cowan* (1866) 5 M 214 and subsequent case law, such as *Strong v Woolworths Ltd* (2012) 246 CLR 182, are applicable in them.

As a practical example of a single company that can be regarded as legally liable for climate change, Australia's largest single direct (scope 1) GHG emitter is AGL Loy Yang A Pty Ltd. It operates a large brown coal-fired power station, which emits around 18.5 million tonnes of carbon dioxide equivalents (**t CO_2-e**) of GHGs per year. It has operated the power station since 1997 and plans to operate it to 2035, a period of nearly 40 years.[17] In 2016, it emitted 18.7 million (**M**) tCO_2-e, which:[18]

- were 0.05% of global emissions in that year (China's emissions were 30%);
- if it were a country, would have made it the 87th largest GHG polluting country globally;
- were larger than the annual emissions of over 100 countries in that year (including Kenya (16.3 MtCO2-e/yr) with a population of 53 million);
- were over twice the national emissions of PNG (9.1 MtCO2-e/yr) with a population of over 9 million people; and
- were over 10 times the national emissions of Fiji (1.7 MtCO2-e/yr).

It is a simple, compelling argument to say to a judge (in PNG or another similar country):

> "This single company has emissions twice the entire nation of PNG. Its emissions are greater than 100 nations. Clearly, its emissions are a *material contribution* to climate change."

People in Pacific countries suffering impacts from climate change can sue Australian companies in Pacific courts, then enforce an award of damages in Australia

Many Pacific countries have constitutions protecting human rights, including the right to life and the right not to be deprived of property without compensation,[19] as well as common law causes of action such as negligence, nuisance and trespass (Appendix 1).

Applying normal principles for transnational liability, summarised above, people in Pacific countries can sue in their own (domestic) courts for the harm they are suffering due to climate change driven by emissions in countries such as Australia, then enforce an award of damages under the existing framework in Australia for the recognition of foreign judgments, the *Foreign Judgments Act 1991* (Cth).[20]

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[17] See McGrath, n 1. Since that article was written, the closure of the power station has been moved forward from 2045 to 2035.

[18] Based on GHG in 2016 reported at: https://www.worldometers.info/co2-emissions/co2-emissions-by-country

[19] Note the recent decision of the United Nations Human Rights Committee (**HRC**) in relation to a communication under the Optional Protocol to the *International Covenant on Civil and Political Rights* (**ICCPR**) by Torres Strait Islanders that Australia had violated articles 2, 6, 17, 24 and 27 of the ICCPR by failing to take adequate action to reduce emissions or pursue proper climate change adaptation measures on the Torres Strait Islands. The HRC found that Australia's failure to adequately protect Torres Strait Islanders against adverse impacts of climate change violated their rights to enjoy their culture and be free from arbitrary interferences with their private life, family and home: *Billy v Australia* (CCPR/C/135/D/3624/2019), UNHRC, 22 September 2022.

[20] For more detail, see the discussion in McGrath, n 1, pp 62-65.

Appendix 1: Pacific countries with constitutions protecting human rights, incorporating the common law as part of their legal systems & English language laws[21]

No	Country	Constitution with human rights	Common law	English laws & courts
1.	American Samoa	✓	✓	✓
2.	Cook Islands	✓	✓	✓
3.	Fiji	✓	✓	✓
4.	Federated States of Micronesia	✓	✓	✓
5.	Kiribati	✓	✓	✓
6.	Marshall Islands	✓	✓	✓
7.	Nauru	✓	✓	✓
8.	Niue	✗	✓	✓
9.	Nouvelle Calédonie	✓	✗	✗
10.	Palau	✓	✓	✓
11.	Papua New Guinea	✓	✓	✓
12.	Pitcairn Islands	✓	✓	✓
13.	Samoa	✓	✓	✓
14.	Solomon Islands	✓	✓	✓
15.	Tokelau	✓	✗ [22]	✓
16.	Tonga	✓	✓	✓
17.	Tuvalu	✓	✓	✓
18.	Vanuatu	✓	✓ (mixed system combining English common law, French civil law and customary law)	✓ (English & French)

[21] Based on Paclii (http://www.paclii.org/). The Commonwealth of the Northern Mariana Islands (CNMI) and Guam, both self-governing territories of the USA, while included on Paclii, are excluded from this list as they are not countries. New Caledonia, a territory of France, has been included to contrast the English-based jurisdictions. Pitcairn Islands, while an overseas territory of the UK, is also included due to its written constitution.
In relation to laws of Pacific countries, see Jennifer Corrin & Vergil Narokobi, *Introduction to South Pacific Law* (5th ed, Intersentia, 2022); and Jennifer Corrin & Tony Angelo (eds), *Legal Systems of the Pacific* (Intersentia, 2022).

[22] In Tokelau: the "sources of law are, in descending order of priority, [the] Constitution, General Fono Rules [statutes made by the Parliament of Tokelau], Village Rules, the custom of Tokelau, and the general principles of international law" (: *Constitution of Tokelau 2006*, s 12(4)); and "There is no right to claim damages for other than property loss in any action at Tokelau law" (: *Crimes, Procedure and Evidence Rules 2003* (Tokelau), s 143; Corrin & Narokobi, n 2, p 319). Contract rules are codified in the *Contract Rules 2004* (Tokelau).