

SURVIVAL STRATEGIES FOR CLIMATE LITIGATORS

Dr Chris McGrath¹

Lawyers representing victims of climate change (and other environmental and human rights abuses) against governments and large corporations face substantial barriers for access to justice. Climate litigation against governments and large corporations is often a difficult war of attrition, involving very complex legal and factual disputes, huge stress and effort. Cases can stretch over many years with very limited resources against opponents with effectively unlimited resources. The personal toll can be very high, especially in the context of the aching sense of loss from the catastrophic damage that is unfolding due to climate change. This article suggests five survival strategies for climate litigators to build personal and professional resilience and to help avoid burnout and depression.

Content warning: This article discusses depression, anxiety and suicide.

I INTRODUCTION

The content of this article will seem like a foreign language to lawyers who have “ethical apathy”² and are uninterested in little more than money and prestige in their careers. But it is not aimed at them. It is aimed at young lawyers: who care about people and the world we live in; who will work trying to find remedies for many clients and places who suffer damage due to climate change; who recognise their responsibility to help protect society in responding to the climate crisis we face, where enormous losses are already being suffered. We can call people who take on these roles in their careers “climate litigators”.

A global challenge for lawyers now and in coming decades is to find remedies for people who are and will be harmed by human-driven climate change. There is nothing particularly exceptional about this idea given the current reality of climate change and that a core job of lawyers is to find remedies for our clients. As lawyers, we need to understand the facts and the law sufficiently to advise our clients on the best course of action to avoid or remedy

¹ LLB (UQ), BSc (UQ), LLM (QUT), PhD (QUT). Barrister. Website: <<http://www.envlaw.com.au>>. Thanks to Rachna Nagesh, Thomas Moore, Jemima Jacobson, Susheena Subramaniam and Yonnie Lipshatz for helpful comments on drafts of this article.

² Brian Preston, ‘Climate Conscious Lawyering: Five Ways that Lawyers can Implement a Climate Conscious Approach in their Daily Legal Practice’ (2021) 95 *Australian Law Journal* 51, 65.

legal problems they face, including seeking compensation when our clients have been harmed by others.

In terms of understanding the facts, we know that extensive and severe damage is already occurring and will occur to billions of people, trillions of dollars of property and ecosystems driven largely by greenhouse gas emissions from fossil-fuels. For instance, at present levels of warming of around 1°C mean global temperature rise,³ Australia has already experienced catastrophic bushfires in the 2019/2020 summer that caused an estimated A\$1.9 billion in damage⁴ and multiple Australian ecosystems are collapsing.⁵

The harm caused by climate change will increase massively in coming decades even if the global community achieves the objectives of the *Paris Agreement* to stabilise mean global temperature rises beneath the hard target of 2°C or the aspirational target of 1.5°C above pre-industrial levels.⁶ For instance, if mean global temperatures rise to 1.5°C above pre-industrial levels, most coral reefs are expected to be lost around the globe, including Australia's iconic Great Barrier Reef, while at 2°C virtually all coral reefs are expected to be lost, severely impacting hundreds of millions of people who depend on them for food.⁷ Much of this harm – such as inundation of entire islands in the Pacific to the point of

³ See Intergovernmental Panel on Climate Change, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2021) ('IPCC 2021') <<https://www.ipcc.ch/report/ar6/wg1/#FullReport>>.

⁴ Insurance Journal, 'Insured Losses for 2019/2020 Australia Bushfires Estimated at A\$1.9B (US\$1.3B): PERILS' (Article, 7 July 2020) <<https://www.insurancejournal.com/news/international/2020/07/07/574617.htm>>.

⁵ Dana M. Bergstrom et al, 'Combating ecosystem collapse from the tropics to the Antarctic' (2021) 27(9) *Global Change Biology* 1.

⁶ *Paris Agreement to the United Nations Framework on Climate Change*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force generally on 4 November 2016 and for Australia on 9 December 2016).

⁷ Intergovernmental Panel on Climate Change, *Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-industrial Levels and Related Global Greenhouse Gas Emission Pathways* (WMO, 2018) 10, 226, 229–230, 235, 254 <<http://www.ipcc.ch/report/sr15/>> ('IPCC 2018'); Chris McGrath, 'Paris agreement goals slipping away & with them Australia's chance to save the Great Barrier Reef' (2019) 36(1) *Environmental and Planning Law Journal* 3.

extinction⁸ and displacement of entire populations⁹ – will be impossible to prevent or fully redress. But perfection is not the measure of the law; nor are legal remedies refused merely because they do not fully redress harm.¹⁰

At present, lawyers representing clients who have suffered damage due to climate change typically face large disparities in the resources available for their clients in suing governments and large corporations that have caused the damage. Lack of resources is a key limiting factor to climate litigation at present, not lack of liability.¹¹ Even so, the legal obligations for climate change, such as company directors' duties, are rapidly evolving at present and this will continue into the future.¹² Some remarkable wins are occurring, such as the recent ground-breaking decision in *Sharma v Minister for the Environment* [2021] FCA 560, in which Bromberg J found (at [491] and [513]) a novel duty of care existed under which that the federal Environment Minister “has a duty to take reasonable care to avoid causing personal injury to the Children when deciding ... to approve or not approve [a coal mine expansion]”.

In this context, particularly the enormous scale of damage being suffered, we can expect to see litigation related to climate damages expand exponentially in coming decades. A tidal wave of climate litigation is coming.

⁸ Kya Raina Lal, 'Legal Measures to Address the Impacts of Climate Change-induced Sea Level Rise on Pacific Statehood, Sovereignty and Exclusive Economic Zones' (2017) 23 *Te Mata Koi: Auckland University Law Review* 35.

⁹ Thea Philip, 'Climate Change Displacement and Migration: An Analysis of the Current International Legal Regime's Deficiency, Proposed Solutions and a Way Forward for Australia' (2018) 19(2) *Melbourne Journal of International Law* 1.

¹⁰ Saul Holt and Chris McGrath, 'Climate Change: Is the Common Law up to the Task?' (2018) 24 *Te Mata Koi: Auckland University Law Review* 10, 11.

¹¹ 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 and Planning Law Journal* 42, 45.

¹² See, eg, Noel Hutley SC and Sebastian Hartford Davis, *Climate Change and Directors' Duties* (Further Supplementary Memorandum of Opinion, 23 April 2021) <<https://cpd.org.au/2021/04/directors-duties-2021/>>.

My aim here is to help lawyers representing victims of climate change (and other environmental and human rights abuses) against governments and large corporations where a lack of resources poses an immense barrier for access to justice. Litigation against governments and large corporations is often a difficult war of attrition, involving very complex legal and factual disputes, huge stress and effort stretching over many years. The personal toll can be very high, especially in the context of the aching sense of loss from the catastrophic damage that is unfolding due to climate change. My career over the past 20 years has included many large climate cases and I have endured many, soul-shattering losses.¹³ One such loss was failing to stop the Adani Coal Mine despite, in my view, overwhelming evidence against it in terms of impacts to groundwater, threatened species and climate change, coupled with the economic and financial stupidity of the mine.¹⁴

I have learnt from these losses that, to survive, climate litigators need to build personal and professional resilience to avoid burnout and depression. The survival strategies discussed in the next section may also be helpful for others working to protect the climate, though the examples given relate to litigators.

II SURVIVAL STRATEGIES

A Five survival strategies for climate litigators

I suggest that five survival strategies for climate litigators are:

1. Be kind to yourself: remember why you started your journey.
2. See your career as a marathon, not a sprint.
3. Recharge regularly:
 - get enough sleep
 - exercise

¹³ See Environmental Law Australia (Website) <<http://www.envlaw.com.au>>. This is my website; it provides case studies of many of the cases I have acted in.

¹⁴ For a case study of this litigation, see Environmental Law Australia, 'Carmichael Coal ('Adani') Mine Cases in Queensland courts' (Web Page) <<http://envlaw.com.au/carmichael-coal-mine-case/>>.

- spend time with your friends, your family and doing things you love
 - take weekends off (turn off the news) and holidays
 - connect, collaborate with, and be inspired by others on a similar journey.
4. Accept that it is rational to despair in the face of the crises facing the Earth. Move beyond acceptance of that to work for positive change despite the potential for failure.
 5. Choose to use the skills and tools you have to save what you can. Choose to fight to protect the people and places you love.

I will unpack each of them a little to explain the background to them and their intended meaning.

B Unpacking your survival strategies a little

1 Be kind to yourself: remember why you started your journey

Several years ago, a friend of mine committed suicide. We'd been good friends growing up and I remembered him as a happy boy I liked playing with. We'd lost touch after school for 20 years but he contacted me out of the blue when we were both in our early 40s. I was surprised and excited to hear from him and I was looking forward to seeing him when he next passed through Brisbane, where I live. A couple of months later, I learnt he committed suicide. I went to a memorial service for him and could not understand what had gone so wrong for my friend in his life. I never learnt the reason why he committed suicide, but I wondered if it started with him not being kind enough to himself; seeing what he saw as his own imperfections and failures in life not balanced by the many successes he'd had.

I've thought about my friend's death many times since and the lesson I take from it is that I need to be kind to myself and forgive myself for my many failures and inadequacies.

While I work hard and hold degrees in science, law and a PhD, I know I am only an average lawyer and there are many, far better lawyers: they are smarter, speak and write better than I do. As a climate litigator I typically face opponents who represent government and major corporations who have effectively unlimited resources to defend their cases. They hire the best lawyers that money can buy, so I see my own inadequacies and lack of skill on an almost daily basis. No matter how much I work, I know I'll never be as good as them. I know that

and I forgive myself for it. Climate litigation can involve huge amounts of work and there are very few lawyers who are willing to do that work for no fee or only nominal payment. My clients often have little or no money, so much of my work is pro bono (that is, done as a service for the community in the public interest for no fee). I know that if I didn't represent them, often they would have no barrister willing to represent them. In that context, I forgive myself for not being a brilliant lawyer. I resolve to work hard and try to make up for lack of skill through sheer effort and time.

I also remind myself that I originally chose to study law and science (in ecology) to try to protect the environment (and, thereby, help and protect the people and places I love like the Great Barrier Reef). I remind myself that is why I started my journey and I see my legal career in that context. It helps me a lot not to lose hope and despair at my lack of skill.

If you've read this far, I am sure you also have a deep reason for starting your law career that involves helping people.

2 See your career as a marathon, not a sprint

I learnt this second strategy many years ago as a keen (though not very good) distance runner but I think the metaphor will have meaning for others too. We all know from running at school and in our lives that you can only sprint for a short distance before you need to stop or slow down. Even if you haven't run a marathon, you know anyone running one needs to pace themselves so they don't hit a wall of fatigue that forces them to stop, exhausted before the finish.

In a similar way to someone who sprints at the start of a marathon then burns out, I've seen many people enter the conservation sector and/or work for community legal centres who work extremely hard in poorly paid roles, only to leave the sector, exhausted (or looking for a job that pays more money) after a few years.

If you study law in your early 20s, you should expect your career will last around 40 years. If you work to protect the environment and our community as a climate litigator, you will waste a huge amount of the potential contribution you can make to protecting the world if you burn yourself out after a few years.

You need to pace yourself and think about the long-term. There will be periods when you are extremely busy, working weekends and late into the night but they should be the exception, not the norm. If they are the norm, you risk burning yourself out early. If you do, that will be a huge loss of your potential contribution over the lifetime of your career. Pace yourself, see your career as a marathon lasting 40 years, not a sprint that will be over in a few years.

An important part of pacing yourself for this marathon is to look after your mental well-being and only engage with what you feel capable of doing and at a pace you can cope with. You need to be very aware of your personal mental state and take ownership of it.¹⁵ Problems like depression and anxiety are various and complex, often overlapping with multiple parts of your life. Pace yourself and take care of your mental well-being amidst all of the complexity and pressures of your life and your career.

In her inspiring book, *A Field Guide to Climate Anxiety*, Sarah Jaquette Ray talks of resisting burnout by practising self-care so that you can heal and prioritise daily. She lists among the most effective methods of self-care practical things such as: get enough sleep; foster a support network; celebrate successes; and seek beauty and pleasure.¹⁶ These ideas reflect a strategy I call “recharge regularly”.

3 *Recharge regularly*

Coupled with seeing your career as a marathon and pacing yourself, another strategy for surviving is to recharge yourself (and your spirit) regularly. Five very practical things you can do to recharge are to:

- get enough sleep;
- exercise;
- spend time with your friends, your family and doing things you love;
- take weekends off (turn off the news) and take holidays;

¹⁵ I thank a former student of mine for raising these points with me on an anonymous basis.

¹⁶ Sarah Jaquette Ray, *A Field Guide to Climate Anxiety: How to Keep Your Cool on a Warming Planet* (University of California Press, 1st ed, 2020) 132.

- connect, collaborate with, and be inspired by others on a similar journey.

These strategies are commonly recommended by psychologists and groups helping people cope with anxiety, depression and burnout both in general,¹⁷ and specifically in relation to climate change.¹⁸ Sarah Jaquette Ray calls them “self-care” to heal and avoid burnout.¹⁹

These seem obvious, but they are easy to forget in the pressure of a busy career. Early in my career as a barrister I would routinely work through the weekend and for several years did not take holidays because there was always something urgent that I felt I had to prepare for. After a few years I realised that even if I did take time off, I felt guilty about not being at work. I realised that was a red flashing light warning me what I was doing wasn't healthy or sustainable. I made a conscious effort to try to work 9am-5pm Monday to Friday and to see taking time off on the weekend as a reward for solid work during the week. I go bushwalking to recharge and reconnect with nature. I also try to lock in regular, longer holidays to recharge either walking in wilderness somewhere or with my family. Like many people who work to protect the natural world, I find the solitude and peace of wilderness and nature have a tremendous revitalising effect. For me, this has been vital to surviving for two decades. I think similar strategies will be vital for you too.

You can also be recharged by connecting and collaborating with like-minded people or seeking comfort and inspiration from a community.²⁰ This can help greatly to overcome feelings of loneliness and isolation. So, connect with others on a similar journey.

¹⁷ See, eg, Beyond Blue (Website) <<https://www.beyondblue.org.au>>.

¹⁸ See, eg, Ray (n 19) 132; Good Grief Network (Website) <<https://www.goodgriefnetwork.org/>>; Psychology for a Safe Climate, (Website) <<https://www.psychologyforasafeclimate.org/>>; and Is This How You Feel? (Website) <<https://www.isthishowyoufeel.com/>>.

¹⁹ Ray (n 19) 132.

²⁰ Thanks to Jemima Jacobson, Susheena Subramaniam and Yonnie Lipshatz for this point.

4 *Accept that it is rational to despair in the face of the crises facing the Earth. Move beyond acceptance of that to work for positive change despite the potential for failure.*

This fourth survival strategy is based on the insights of Joanna Macy about despair and empowerment.²¹ She writes that it is rational to feel despair in the face of the crises facing the Earth such as climate change and collapse of biodiversity; however, we need to move beyond that to work for positive change despite the potential for failure.²² Practice active hope:²³

- Take in a clear view of reality.
- Identify your vision for what you hope will happen.
- Take active steps to help bring that vision about.

I find this such an important and powerful insight in the context of the tsunami of science showing the unfolding climate crisis that we face now and the political gridlock stopping emergency action to solve this crisis. It is easy (and perfectly logical) to despair looking at this present reality, yet hope is an essential part of success. We all need hope and taking action is the best way to keep it alive.

As Viktor Frankl wrote after surviving the Holocaust in World War II, our fundamental freedom is the freedom to choose how we respond to any situation and the circumstances we face in our lives, however, terrible.²⁴

²¹ See Joanna Macy (Website) <<https://www.joannamacy.net/main>>.

²² See, eg, Joanna Macy and Chris Johnstone, *Active Hope: How to Face the Mess We're in without Going Crazy* (New World Library, 2012).

²³ Ibid.

²⁴ Victor Frankl, *Man's Search for Meaning* (originally published 1946; Pocket Books, 1985).

In helping despairing inmates of Nazi concentration camps choose to fight for survival despite the atrocities committed against them daily, he said (emphasis in original):²⁵

What was really needed was a fundamental change in our attitude toward life. We had to learn ourselves and, furthermore, we had to teach the despairing men, [women and children] that *it did not really matter what we expected from life, but rather what life expected from us*. We needed to stop asking about the meaning of life, and instead to think of ourselves as those who were being questioned by life – daily and hourly. Our answer must consist, not in talk and meditation, but in right action and in right conduct. Life ultimately means taking the responsibility to find the right answers to its problems and to fulfill the tasks which it constantly sets for each individual.

We are all being asked by our lives right now what we will do to stop the climate crisis worsening. Maintaining hope is crucial for taking action to answer this enormous global challenge. As Al Gore said, “lots of people go from denial to despair [about climate change] without pausing in between.”²⁶ The common outcome of denial and despair is that we don’t take action. If we deny something is a problem, there is no need to take action because there isn’t a problem to deal with. If we despair about a problem, we don’t need to take action because there is nothing we can do. We need to work in between these two extremes to take action. The action of young people like Greta Thunberg refusing to surrender to catastrophe and demanding change is a great source of hope for the future. Keep in mind too the inspiring words of Nelson Mandela: “Every important change in history was impossible until it happened.”

In working for the future we want, we need to provide positive solutions to address climate change, widespread biodiversity loss and poverty. We need to understand and practice in working for positive solutions that to succeed, environmental programs must be linked to jobs and poverty alleviation.²⁷ As the late Nobel Peace Laureate from Kenya, Wangari Muta

²⁵ Ibid 98.

²⁶ Al Gore, *An Inconvenient Truth* (Paramount Classics, 2006).

²⁷ Van Jones, *The Green Collar Economy* (Harper Collins, 2008).

Maathai said: “You cannot protect the environment unless you empower people, you inform them, and you help them understand that these resources are their own, that they must protect them.”

5 *Choose to use the skills and tools you have to save what you can. Choose to fight to protect the people and places you love.*

Many ecosystems are already collapsing due to climate change and further, incalculable losses are inevitable under current global policy settings²⁸ but we can choose to use the skills and tools we have to save what we can. Our children will inherit whatever we can save. Doing nothing, curling up into a ball and crying, will not save anything. Having said this, I curl up into a ball and cry over large losses like failing to stop the Adani Coal Mine knowing the damage that will occur. Crying and feeling immeasurable loss is natural in the reality we currently face but it should not stop you taking action.

We all have different skills and levels of ability for saving what we can in the current climate crisis. Whatever skills you have, you can choose to apply them to fight for solutions.

We need to recognise that we must fight for the future we want. It is obvious from the tsunami of scientific reports on the climate crisis the world faces while our governments continue to support unlimited exploitation of coal and other fossil fuels that being nice, passively expecting others to be reasonable and that our governments will take action necessary to prevent climate change is not working at present.

“Fighting” in this context does not mean acts of aggression but refusing to passively accept unacceptable outcomes and actively working to avoid those outcomes through any non-violent political, public and personal actions available to you. Don’t accept unacceptable behaviour or government policies. Under current policies of the Australian and State governments, Australia is on course to lose the Great Barrier Reef.²⁹ That is simply not acceptable, and we should fight against it in any way we can.

²⁸ Bergstrom (n 8) and IPCC 2018 (n 7).

²⁹ McGrath (n 10).

As lawyers, one of the key tools we have is litigation to protect and seek remedies for our clients. For climate litigators facing large and well-resourced opponents, the litigation we work on can be a very difficult war of attrition. You will need courage and tenacity to succeed and to survive the hard losses in your career. Narrowing and avoiding disputes through negotiation and compromise are important and you should always pursue them where possible but sometimes you need to fight, and you will need courage and tenacity to do this.

In this battle to protect our climate it is not just the big wins, like *Sharma v Minister for the Environment* [2021] FCA 560, that make a difference. Even small, seemingly incremental wins can play an important role.³⁰ Many thousands of lawyers have roles in this fight.

Linked to this, make a spirit of service part of who you are and your future. Several years ago I was reminded of the importance of seeing our roles as lawyers in a spirit of service by Richard Bourke, an inspiring Australian lawyer working for US prisoners facing the death penalty.³¹ Some self-interest is healthy, but it should not be 100% of our worldview. Humanity's strength is our ability to collaborate and support each other. We need to rekindle a spirit of service as a core of who we are as a community. We also need to actively work to change the culture of our society so that a core tenet of our culture is restoring the health of global ecosystems as the foundation for our prosperity.

³⁰ Justine Bell-James and Sean Ryan, 'Climate change litigation in Queensland: a case study in incrementalism' (2016) 33(6) *Environmental and Planning Law Journal* 515.

³¹ See Richard Bourke's inspiring TEDx talk at TEDx Talks, 'Killing people is always wrong | Richard Bourke | TEDxSydney' (YouTube, 2 July 2015) <<https://www.youtube.com/watch?v=gVSPVe4mQ5k>>.

III CONCLUSION

Lawyers who care about people and the world we live in will increasingly face climate change issues in their practice. They will face the task of trying to find remedies for many clients and places who suffer damage due to climate change. The challenges of this litigation and the personal and professional pressures you will face are immense. I hope the strategies outlined in this article will help you protect your clients and society in responding to the climate crisis we face, where enormous losses are already being suffered.³²

³² I highly recommend Sarah Jaquette Ray's book (n 19) for more survival strategies and inspiration.