GRACE HOLDEN

CLIMATE LITIGATION AND AN IMPLICIT RIGHT TO A HEALTHY ENVIRONMENT

Proposing a rights-based approach to climate litigation in Aotearoa

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Abstract

New Zealand – currently – does not have effective climate litigation. The approaches deployed in climate cases fail to produce favourable outcomes for both the plaintiff and the planet. This existing deficiency in what could be a central aspect of a productive national climate change regime raises concerns considering the severity and immediacy of the climate crisis. To address this inefficiency, this paper proposes an alternative approach to climate litigation – an approach grounded in human rights. In deploying this approach, a plaintiff could argue that the Court should interpret the right to life under section 8 of the New Zealand Bill of Rights Act as implicitly encompassing a right to a healthy environment. This right confers a positive obligation of active protection on the New Zealand Government, an obligation that has been invoked, due to the direct threat climate change poses to the right to a healthy environment. However, the Government has failed to fulfil this obligation, thereby violating the plaintiff's rights. This approach, although no silver bullet, has the potential to reform the effectiveness of New Zealand's climate litigation, and assist in ensuring an ambitious national climate change regime.

Key words: **'**climate litigation', 'human rights', 'climate change', 'right to a healthy environment', 'right to life'

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I Introduction

Climate change is heralded "as the biggest challenge facing humanity in modern times."[1] Human emissions of greenhouse gases as a result of burning fossil fuels has caused, and will continue to cause immense damage to our environment and its inhabitants - including us.[2] An unprecedented and unpredictable shift has occurred in our climate, resulting in warmer temperatures, extreme weather events, disappearing glaciers, and rising sea levels.[3] Species are going extinct at a rate that is 100 to 1,000 times faster than normal, and this pace of extinction is estimated to continue to accelerate.[4] This loss of biodiversity, and the damage to ecosystems caused by climate change, is estimated to cost trillions of dollars every year.[5] Between 2030 to 2050, climate change is expected to cause approximately 250,000 additional deaths annually from malnutrition, malaria, diarrhoea and heat stress alone.[6] Climate change poses severe risks for New Zealand, causing more extreme weather events, reducing water supply, threatening food security, spurring sea levels to rise which threatens coastal populations, and increasing the spread of diseases.[7] Furthermore, there is a finite time within which climate change must be addressed,[8] to avoid "severe, pervasive and irreversible impacts for people and ecosystems".[9]

In the face of the behemoth that is the climate crisis, it is crucial that all states are equipped with tools to both adapt to and mitigate the effects of climate change. Furthermore, if the goal set in the

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[1] *Smith v Fonterra Co-operative Group Ltd* [2022] NZCA 552 at [2].
[2] David R Boyd *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, Toronto, 2012) at 10.
[3] Helen Winkelmann, Susan Glazebrook and Ellen France "Climate Change and the Law" (paper prepared for the Asia Pacific Judicial Colloquium, Singapore, May 2019) at [139].
[4] David R Boyd, above n 2, at 11.
[5] TEEB *The Economics of Ecosystems and Biodiversity: Mainstreaming the Economics of Nature: A synthesis of the approach, conclusions and recommendations of TEEB.* (Progress Press, Malta, 2010) at 8.
[6] WHO "Climate change and health" (30 October 2021) World Health Organisation <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health> at para. 1.
[7] Barrie Pittock and David Wratt "Australia and New Zealand" in Intergovernmental Panel on Climate Change *TAR Climate Change 2001: Impacts, Adaptation, and Vulnerability* (Cambridge University Press, Cambridge, 2001) 591 at 593 - 594.
[8] The Climate Clock, available at <https://climateclock.net/>, tracks global warming in real time. At the time of writing this paper, the clock estimates that there are less than 10 years until Earth has reached 1.5℃ of global warming above pre-industrial levels.
[9] Intergovernmental Panel on Climate Change *Climate Change 2014: Synthesis Report Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC, Geneva, 2014) at [2.1].

Paris Agreement to limit the increase in the global average temperature to 1.5℃ above pre-industrial levels is to be achieved,[10] these tools must work effectively.

In Aotearoa, one of our tools is not working effectively - climate change litigation. The current approaches taken by plaintiffs - through tort law, or judicial review-based claims - is failing to produce favourable outcomes for productive climate action.[11] However, an alternative is available.

This paper asserts that a rights-based approach to climate litigation will reform the utility of New Zealand's climate litigation as a tool to better assist in the resolution of the climate crisis. This approach, drawing from ground-breaking cases such as *Urgenda Foundation v State of the Netherlands,*[12] and *Leghari v Federation of Pakistan,*[13] argues that the government's failure to take effective and meaningful action towards mitigating and adapting to climate change violates the plaintiff's right to life. The basis for this violation is the contention that the right to life includes the right to a healthy environment, an interpretation made possible from international precedent, commentary in and out of New Zealand's courts, and the United Nations General Assembly Resolution on the right to a clean, healthy, and sustainable environment.[14] This approach is not only likely to be accepted by the New Zealand judiciary - it is likely to result in favourable outcomes for plaintiffs. However, rights-based climate litigation is not offered as a silver bullet. Instead, this paper asserts that this approach to climate litigation will likely be far more effective than existing approaches in New Zealand to incite productive climate action.

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[10] Paris Agreement Under the United Nations Framework Convention on Climate Change 3156 UNTS (opened for signature 22 April 2016, entered into force 4 November 2016), art 2. The 26th Conference of the Parties (COP26) affirmed that "well below 2℃ above pre-industrial levels" in article 2 of the Paris Agreement should be interpreted as limiting the increase in the global average temperature to 1.5℃ above pre-industrial levels, as noted in UNFCCC Authors "Presentation - Outcome COP 26" (12 May 2022) UNFCCC <https://unfccc.int/sites/default/files/resource/Presentation%201%20-%20Outcome%20COP%2026.pdf> at 4. Accordingly, this paper has adopted this same target.

[11] This paper, as elaborated in Part II Section B, acknowledges that the effectiveness of climate litigation is not confined to cases where a climate-oriented plaintiff succeeds. For more discussion on this point, see Laura Burgers "Should judges make climate change law?" 2020 9(1) Transnational Environmental Law 55. However, this paper maintains that on the whole, climate litigation, as a result of the approaches taken by plaintiffs, is not positively contributing to New Zealand's climate change regime.

[12] *Urgenda Foundation v State of the Netherlands* The Supreme Court of the Netherlands, 19/00135, 20 December 2019 (English Translation).

[13] *Leghari v Federation of Pakistan and others*, Lahore High Court, W.P. No. 25501/ 2015 (14 September 2015).

[14] *The Human Right to a Clean, Healthy and Sustainable Environment* GA Res 76/ 300 (2022).

Part II of this paper provides a definition to climate change litigation and emphasises the benefits that accompany effective climate litigation. Part III provides an overview of climate litigation in New Zealand, highlighting its integral deficiencies. Part IV advances this paper's central proposal - that a rights-based approach to climate litigation is possible in New Zealand and is likely to be effective. After providing an overview of the use of rights-based litigation in other jurisdictions, this section details the central components to this proposed approach. This section, although not shying away from potential barriers, will provide indicators from existing case law, extrajudicial comments, and academic literature of the likely success of rights-based climate litigation in New Zealand. Prior to concluding, this paper will affirm the likely positive effect the proposed rights-based approach could have on climate litigation in New Zealand, and the climate change regime as a whole.

II Climate Change Litigation - A Tool in the Arsenal

Prior to engaging in the development of this paper's central thesis, a definition of climate litigation and an overview of the effectiveness of climate litigation as a tool to assist in combating the climate crisis must be provided.

A Defining Climate Change Litigation

Climate litigation refers to cases brought before a judicial body, or other investigatory bodies, "that raise issues of law or fact regarding the science of climate change, or climate mitigation or adaptation efforts."[15] During its discussion of climate litigation in New Zealand, and whilst referring to international precedent, this paper will refer to cases within which these issues of law or fact were a main or dominant issue. Cases in which climate change or climate-related issues are not addressed in a meaningful way will not be included in this paper.[16] Within the broad class of climate litigation, various commentators have developed different categories of specific kinds of cases. Setzer and Higham provide the following categories, based upon the grounds of argument advanced by plaintiffs - compliance with climate commitments, challenging projects or policies, constitutional and human rights cases, liability claims, corporate and financial market cases, and

[15] Michael Burger and Justin Gundlach *The Status of Climate Change Litigation: A Global Review* (UN Environment Programme, Kenya, 2017) at 10.

[16] This paper employs the Sabin Centre for Climate Change Law "Climate Change Litigation Databases" (2011) <http://climatecasechart.com/> to discern what cases qualify as an instance of climate litigation.

adaptation-focused cases.[17] Most instances of climate litigation will span across more than one of these categories.[18]

B The Desirability of Effective Climate Change Litigation

Effective climate litigation can be an integral component of a productive national climate change response. An instance of climate litigation will be effective if it produces a favourable outcome to climate change action.[19] This favourable outcome may involve a court ruling in favour of a more efficient climate regulation or deciding that a decision-maker failed to adequately consider climate change as a relevant consideration. However, a case may also produce favourable outcomes, in spite of the plaintiff losing, as a result of new rights, obligations, or societal discussion created that could result in more stringent or progressive climate regulation in the future.[20]

There are a variety of manners through which climate litigation can create or support effective national responses to the climate crisis. Effective climate litigation can assist in ensuring that existing legal frameworks and obligations are abided by and fulfilled by both government and private actors.[21] Furthermore, climate litigation can fill the gaps in climate governance regimes, creating a more well-rounded response to the climate crisis.[22] Peel and Osofsky have demonstrated that climate litigation has a direct regulatory impact.[23] As a result of this impact, successful climate litigation can lead to an overall increase in a nation's ambition to tackle climate change.[24] Climate litigation can also have financial ramifications that may result in productive climate action - through reparations for climate-affected plaintiffs, by arguing against investments in the fossil fuel

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[17] Joana Setzer and Catherine Higham *Global Trends in Climate Change Litigation: 2021 Snapshot* (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London, 2021) at 17.
[18] At 17.
[19] At 19.
[20] At 20.
[21] Shaikh Eskander, Sam Fankhauser and Joana Setzer "Global Lessons from Climate Change Legislation and Litigation" (2021) 2 Environmental and Energy Policy and the Economy 44 at 46.
[22] At 46.
[23] Jacqueline Peel and Hari M. Osofsky *Climate change litigation: Regulatory pathways to cleaner energy* (Cambridge University Press, 2015).
[24] Navroz Dubash and others "National and Sub-national Policies and Institutions" in Intergovernmental Panel on Climate Change *Sixth Assessment Report, Climate Change 2022: Mitigation of Climate Change, the Working Group III Contribution* (Cambridge University Press, Cambridge, 2022) at 30.

industry,[25] or by fining highly emitting or polluting entities.[26] The latter is also one of the methods through which climate litigation can act as a deterrent on environmentally-harmful actions, resulting in a change to more environmentally-conscious behaviour.[27] Regardless of its final outcome, climate litigation can place climate change and the plight of the plaintiff into the social psyche, spurring both individual and collective climate-productive behaviour.[28] In spite of its numerous benefits, this paper does not propose that climate litigation is the sole answer to the climate crisis. Rather, the exercise of highlighting its utility, in conjunction with other mechanisms to combat global warming, emphasises the importance of effective climate litigation.

The following section provides an overview of climate litigation in New Zealand, highlighting the most common approaches taken by plaintiffs and their respective deficiencies, to ultimately assert that Aotearoa - currently - does not have effective climate litigation.

III Climate Change Litigation in New Zealand

A An Overview of the Existing Body of Climate Litigation in New Zealand

Climate litigation in New Zealand, in contrast to other jurisdictions, is in its "relative infancy".[29] However, alongside the rest of the world,[30] climate change- related claims are beginning to become frequent in our courts. Since 2002,[31] there have been approximately 26 cases that fit this paper's definition of climate litigation.[32] A comprehensive overview of each New Zealand climate case is not possible within this paper. Instead, this paper will elaborate on two instances of climate litigation - *Thomson v Minister for Climate Change Issues*,[33] and *Smith v Fonterra Co-operative*

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[25] At 31.

[26] Joana Setzer and Catherine Higham, above n 17, at 18.

[27] Navroz Dubash and others, above n 24, at 31. The deterrent effect of climate litigation can also be attributed to the retributional harm an administration or private entity may experience as a result of being a defendant to a climate change case.

[28] Joana Setzer and Catherine Higham, above n 17, at 18.

[29] Emmeline Rushbrook and others, "Climate change litigation: trending upwards" (12 February 2021) Russell McVeagh <https://www.russellmcveagh.com/insights/february-2021/climate-change-litigation-trending-upwards> at para 5.

[30] Joana Setzer and Catherine Higham, above n 17, at 4.

[31] 2002 saw the filing of what would be New Zealand's first instance of climate litigation - *Environmental Defence Society v Auckland Regional Council & Contact Energy Ltd* [20002] 11 NZRMA 492.

[32] This number is Sabin Centre for Climate Change Law database, above n 16, and the Grantham Research Institute on Climate Change and the Environment "Climate Change Laws of the World" (2021) <https://climate-laws.org/>. Three of these cases, at the time of writing, are pending a decision from the court.

[33] *Thomson v Minister for Climate Change Issues* [2017] NZHC 733.

Group Ltd,[34] - to provide insight into the various categories of arguments advanced by plaintiffs and their respective responses by the New Zealand courts.[35]

1 Thomson v Minister for Climate Change Issues

Thomson v Minister for Climate Change Issues (*Thomson*) was a judicial review proceeding challenging two decisions made by the Minister for Climate Change Issues (the Minister) - the 2050 target for reducing harmful greenhouse gas emissions under the Climate Change Response Act 2002, and the 2030 target set as part of New Zealand's Nationally Determined Contribution (NDC) under the Paris Agreement.[36] In relation to these decisions, the plaintiff advanced four causes of action. The first cause of action concerned whether the Minister was required to review the 2050 target due to the Fifth Assessment Report, or the AR5, of the Intergovernmental Panel on Climate Change (the IPCC).[37] The second cause of action was focused on the 2030 target, and alleged that, in determining New Zealand's NDC, the Minister failed to take into account relevant considerations.[38] This second cause of action flows into the third and fourth, which respectively assert that the NDC decision was irrational or unreasonable,[39] and that this irrationality warrants a writ of mandamus, requiring the Minister to make the NDC decision again.[40]

The Court ultimately decided that the application for judicial review was to be dismissed.[41] On the first cause of action, Mallon J accepted that the Minister was required to consider the AR5 to determine whether there had been any material changes through the publication of the Report which would be relevant to the 2050 target,[42] and she failed to do so.[43] However, since the hearing

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[34] *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419, [2022] NZCA 552.

[35] Both of these cases have also been acknowledged in literature and extra-judicial comments as principal cases in New Zealand's climate litigation jurisprudence. *Thomson* was regarded as "New Zealand's leading case" in this field by Helen Winkelmann, Susan Glazebrook and Ellen France, above n 3, at [51]. *Smith* is the first climate case in New Zealand to rely on the law of tort, opening up the opportunity for an entirely new approach to climate litigation, as acknowledged in Caroline Foster "Novel climate tort? The New Zealand Court of Appeal decision in *Smith v Fonterra Co-operative Group Limited and others*" 2022 24(3) Environmental Law Review 224 at 227. These acknowledgments further justify this paper's focus on these specific instances of climate litigation.

[36] *Thomson v Minister for Climate Change Issues*, above n 33, at [6].

[37] At [73].

[38] At [99].

[39] At [161].

[40] At [177].

[41] At [178].

[42] At [94].

[43] At [95].

of this case, a new Government, bringing in a new Minister, had been elected. The Labour-New Zealand First coalition, with the support of the Green Party, had announced a new 2050 target,[44] rendering Court ordered relief under this cause of action unnecessary.[45] The Court did not agree with the plaintiff's assertion that the Minister had made any reviewable error that warrants Court intervention when determining New Zealand's NDC.[46] The NDC was also not irrational or unreasonable in the eyes of the Court.[47] As a result of these two conclusions, Mallon J found it unnecessary to consider the fourth cause of action - a writ of mandamus.[48]

2 Smith v Fonterra Co-operative Group Ltd.

Smith v Fonterra Co-operative Group Ltd (*Smith*) saw New Zealand follow suit of other jurisdictions, namely the United States,[49] in which plaintiffs in climate cases advanced arguments based in tort law.[50] Michael Smith, of Ngāpuhi and Ngāti Kahu descent, as the climate change spokesperson for the Iwi Chairs' Forum and a representative of the customary interests of his whānau,[51] filed a statement of claim against seven corporations who were each either involved in an industry which released greenhouse gases into the atmosphere, or supplied products that released greenhouse gases when they were burned.[52] The statement of claim alleged that this release of greenhouse gases by the defendants was a contributor to the adverse effects of climate change and dangerous anthropogenic interference with the climate system,[53] and claimed that the defendants must promptly reduce their emissions reductions to counteract these contributions.[54] Against these assertions, the plaintiff advanced three causes of action - public nuisance,[55]

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[44] At [72].
[45] At [178].
[46] At [160].
[47] At [176].
[48] At [178].
[49] Helen Winkelmann, Susan Glazebrook and Ellen France, above n 3, at [23].
[50] For further and more in-depth discussion of *Smith*, see Maria Hook and others "Tort to the environment: A stretch too far or a simple step forward?: Smith v Fonterra Co-operative Group Ltd and Others [2020] NZHC 419" 2021 33(1) Journal of Environmental Law 195, and Akshaya Kamalnath "Corporate responsibility for climate change creates a new era in tort law? Hold your horses: Smith v. Fonterra Cooperative Group Ltd" 2020(4) The New Zealand Law Journal 129.
[51] *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419.
[52] At [2].
[53] At [8].
[54] At [9].
[55] At [10].

negligence,[56] and a new tort - a duty, cognisable at law, to stop contributions to climate change.[57] All of the defendants made an application to strike out these proceedings.[58]

The High Court struck out two of the three causes of action.[59] Wylie J found that the claim of public nuisance was untenable, as the damage claimed by Smith was not particular or direct,[60] the pleaded harm to Smith's interests and land was consequential and not the direct result of the defendants' own actions,[61] and this special damage requirement was necessary, in contrast to Smith's contentions, as it reflected the rationale of the tort.[62] Furthermore, the alleged interference with the rights of the public did not have any direct connection with the pleaded damage,[63] Smith did not allege that any of the defendants' actions were unlawful,[64] thus failing to satisfy a requirement of the tort,[65] and the interference with the alleged public right was not enough to compensate for this lack of unlawfulness.[66] The negligence cause of action was also found to be untenable, as the pleaded damaged could not be concluded as a reasonably foreseeable consequence of the defendants' actions,[67] and Smith both failed to satisfy the requirements for causation in fact,[68] and to successfully argue that his claim warranted the application of the *Fairchild* exception.[69] There was also a lack of proximity between Smith and any of the defendants',[70] and the finding of a duty of care would not only have placed an undue burden of legal responsibility on the defendants',[71] it also would create indeterminate liability.[72] Wylie J also concluded that policy considerations wholly sided against the finding of a duty of care.[73]

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[56] At [13].
[57] At [15].
[58] At [20].
[59] At [109].
[60] At [62].
[61] At [63].
[62] At [64].
[63] At [67].
[64] At [69].
[65] At [68].
[66] At [70] - [71].
[67] At [81].
[68] At [84].
[69] At [85] - [88]. See *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 (HL).
[70] *Smith v Fonterra Co-operative Group Ltd*, above n 51, at [92].
[71] At [95].
[72] At [96].
[73] At [97] - [98].

The High Court declined to strike out the third cause of action.[74] Wylie J noted his reluctance to find the recognition of this new tortious duty as untenable, highlighting instead the various different questions and issues that could be further explored at trial.[75] Smith appealed Wylie J's decision to strike out the first two causes of action, and the defendants' cross-appealed the Court's decision on the new tort claim.[76]

The Court of Appeal struck out all three causes of action, thereby dismissing Smith's appeal and allowing the cross appeal.[77] Although there was some disagreement between the two Courts on the public nuisance cause of action,[78] the Court of Appeal agreed with Wylie J's conclusion that this claim was untenable,[79] indicating that the main barrier was the lack of sufficient connection between the alleged harm and the respondents' actions.[80] The Court also agreed with the High Court's finding that the negligence cause of action was untenable, affirming each of the factors identified by Wylie J.[81] Contrary to the High Court, the Court of Appeal struck out the third cause of action.[82] In agreement with the respondents, the Court stated that the "mere fact of novelty" was not sufficient to combat a strike-out, and indicated that Smith failed to provide any scope to the new tort to warrant exploration at trial.[83] In a more general conclusion, the Court stated that the climate crisis could not be "appropriately or adequately addressed by common law tort claims pursued through the courts."[84] The Supreme Court has granted Smith leave to appeal against this Court of Appeal decision.[85]

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[74] At [104].
[75] At [103].
[76] *Smith v Fonterra Co-operative Group Ltd*, above n 1, at [11].
[77] At [12].
[78] Namely that the lack of an unlawful act precludes interference from being unreasonable, at [69] - [74], and the Court's position on the special damage rule, although this disagreement is mainly the result of the High Court being bound by precedent affirming the rule, as discussed from [75] - [87].
[79] At [93].
[80] At [88] - [92].
[81] At [117].
[82] At [126].
[83] At [124].
[84] At [16].
[85] The Supreme Court of New Zealand "Smith v Fonterra Co-operative Group Ltd" (media release, SC 149/2021, 8 August 2022) at 2. The Supreme Court has considered whether the Court of Appeal was correct to dismiss Smith's appeal and allow the respondents' cross-appeal. At the time of writing, a judgment has not yet been issued.

B The Deficiencies of the Current Approaches to Climate Litigation

Smith and *Thomson* exemplify, and for the latter established,[86] two of the leading approaches to climate litigation in New Zealand.[87] The following sections will highlight the deficiencies of these approaches, and the impact the deployment of such approaches has had on the outcomes of New Zealand's climate litigation.

1 A Lack of Winners

New Zealand has a noticeable lack of successful, climate-oriented plaintiffs. Out of the 23 decided climate cases in New Zealand, only three have produced favourable decisions for plaintiffs seeking climate productive action.[88] Accordingly, New Zealand has an approximately 13% success rate when it comes to climate litigation. In contrast, 58% of instances of climate litigation outside the United States[89] have outcomes favourable to climate action.[90] Although some difference between these two figures is to be expected,[91] this significant gap between the success of climate litigation internationally and domestically is indicative of a problem within New Zealand's climate litigation.

But what is the explanation behind this disproportionate lack of winners in New Zealand's existing body of climate litigation? It is not the result of New Zealand having a climate change-denying judiciary. New Zealand judges, both in and outside of the courtroom, have repeatedly recognised

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[86] Although *Smith* is the first and only climate case currently in New Zealand that deploys the law of tort, the potential for further cases under this approach, should the Supreme Court deny a strike-out of at least one of the three causes of action, warrants an analysis of the torts law approach to climate litigation.

[87] Out of the 23 decided instances of climate litigation, one was based in tort law (*Smith*), one was based in criminal law, two in immigration law, one in broadcasting standards, one in a combination of common law, statutory rights, and Te Tiriti o Waitangi, and 11 involved statutory interpretation disputes of the Resource Management Act 1991. Due to pending amendments to this legislation, and the ultimate shift that will occur to resource management litigation following these amendments, this paper has elected to not conduct analysis on the approach taken by plaintiffs in this line of cases. Accordingly, judicial review, as deployed in *Thomson*, comprises six out of the 23 decided climate cases, qualifying it as one of the main approaches to climate litigation in New Zealand.

[88] The Sabin Centre for Climate Change Law, above n 16, at 'New Zealand' jurisdiction.

[89] Joana Setzer and Catherine Higham, above n 16, at 10 note that data from the United States may be excluded within their report due to the differences in the volume of climate litigation in the US in comparison to the rest of the world, and the nature of the data acquired in and out of the US.

[90] Joana Setzer and Catherine Higham, above n 17, at 19.

[91] For example, other jurisdictions have had more instances of climate litigation, providing more opportunities to adapt arguments or causes of actions in accordance with the comments of the courts and ultimately succeed.

the growing impacts of climate change,[92] and have emphasised the need for effective and immediate action to resolve the impending crisis.[93] One could indicate that there has been some hesitancy within the New Zealand judiciary for the courts to consider climate matters.[94] However, such hesitancy has been restricted to judicial review cases within which decisions of high policy may be non-justiciable.[95] Multiple judgments have affirmed the justiciability of climate-based issues in New Zealand.[96] It is also unlikely to be the result of a lack of effective representation for climate-oriented plaintiffs. On the contrary, plaintiffs in New Zealand's climate litigation have been represented by some of the country's top litigators. For example, Davey Salmon, one of the King's counsel, has not only represented numerous plaintiffs in climate cases, he has done so working pro-bono.[97] Furthermore, there are organisations, such as the Lawyers for Climate Action New Zealand Inc, that have been formed to provide community groups and individuals with access to legal representation for climate cases at a reduced fee or a pro bono basis.[98] Instead, this paper contends that it is the causes of action advanced by plaintiffs - namely tort and judicial review claims - that are the primary cause of these unfavourable outcomes in New Zealand's climate litigation.

2 Difficult and Unproductive Causes of Action

The causative link between this lack of winners and the claims used by plaintiffs in New Zealand's climate litigation is the difficult, and potentially unproductive, nature of these causes of actions.

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[92] A limited array of examples include - *Smith v Fonterra Co-operative Group Ltd*, above n 1, at [2], *Thomson v Minister for Climate Change Issues*, above n 33, at [8] - [18], Helen Winkelmann, Susan Glazebrook and Ellen France, above n 3, at [138] - [147], and *Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107 at [13].

[93] Susan Glazebrook "Human Rights and the Environment" (paper prepared for the "Strategies for the Future: Protecting Rights in the Pacific" conference, Samoa, April 2008) at 46.

[94] *All Aboard Aotearoa Incorporated v Auckland Transport* [2022] NZHC 1620 at [82].

[95] Una Jagose QC *Te Pouārahi: The Judge Over Your Shoulder* (Crown Law, 2019) at [65]. Further elaboration on this point, in regard to the restrictions of judicial review in climate litigation, will be noted in the following section.

[96] *Thomson v Minister for Climate Change Issues*, above n 33, at [133] - [134], and *Hauraki Coromandel Climate Action Incorporated v Thames-Coromandel District Council* [2020] NZHC 3228 at [40].

[97] In *Smith v Fonterra Co-operative Group Ltd*, above n 34, as noted in David Williams "Mike vs the fossil fuel machine: Push for a new legal duty to the environment" (26 August 2022) Newsroom <https://www.newsroom.co.nz/mike-versus-the-fossil-fuel-machine> at para 12, and in *All Aboard Aotearoa Incorporated v Auckland Transport*, above n 92, as noted in LCANZI Committee "LCANZI Newsletter - April 2022" (8 April 2022) Lawyers for Climate Action NZ Inc. <https://www.lawyersforclimateaction.nz/newsletters/lcanzi-newsletter-april-2022> at para 2.

[98] LCANZI Committee "About Us" Lawyers for Climate Action NZ Inc. <https://www.lawyersforclimateaction.nz/about-us> at para 6.

The torts approach seen in *Smith* falls into the 'difficult' category. Most torts usually have multiple elements that a plaintiff must satisfy in order to succeed. Failure on the part of the plaintiff to demonstrate even one of these components will result in an unfavourable outcome. *Smith* illustrates just how many hoops a plaintiff has to jump through in order to be successful under this approach. The Court of Appeal affirmed that an individual will have committed a public nuisance if they do:[99]

> … an act not warranted by law, or [omit] to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, … or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all her Majesty's subjects.

This obstruction with public rights must be substantial and unreasonable,[100] and a defendant will only be liable if the harm or obstruction suffered by the plaintiff was reasonably foreseeable.[101] The tort of negligence requires the plaintiff to demonstrate that they were owed a duty of care by the defendant, and that this duty was breached, causing damage or harm to the plaintiff.[102] The plaintiff in *Smith* pleaded that the duty of care owed by the defendants was a novel one, requiring the Court to consider whether this harm was a reasonably foreseeable consequence of the defendants' actions, the degree of proximity between Smith and the defendants, and external policy matters.[103] Further obstacles exist if a plaintiff has to persuade a court to adopt an entirely new tort.[104] The fact that the Court of Appeal struck out all causes of action in *Smith,* a decision made only when the Court is certain that these three claims were so untenable they would not succeed in trial,[105] illustrates just how difficult it is to satisfy these tortious requirements in a climate case.

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[99] *Smith v Fonterra Co-operative Group Ltd,* above n 1, at [50]. This definition was first set out in *R v Rimmington* [2005] UKHL 63 at [10] and [45].
[100] *Smith v Fonterra Co-operative Group Ltd,* above n 1, at [41].
[101] At [52].
[102] *Smith v Fonterra Co-operative Group Ltd,* above n 51, at [74].
[103] *Smith v Fonterra Co-operative Group Ltd,* above n 1, at [96].
[104] At [118] - [126].
[105] At [38].

A further reason for this difficulty is that tort law approaches to climate litigation may require the plaintiff to make complex arguments and connections, some of which are, although scientifically possible, are viewed as legally impossible.

In *Smith,* the plaintiff acknowledged that the special damage to himself, his interests in land, and the interests of his whānau that had or will likely occur is the direct result of climate change and global warming, not the defendants' emitting activities.[106] In order for Smith to successfully indicate that the harm he had, or will, suffer was the direct result of the defendants' actions, thus satisfying a requirement of the tort of public nuisance, he would have had to attribute a particular entity's emissions to a climate event or fixed increase in the global average temperature. Stuart-Smith and others outline how attribution science, the discipline of linking observed trends or changes in climate-related events to human influence,[107] has the capability to provide evidence on the existing and projected impacts of individual actors' greenhouse gas emissions.[108] Accordingly, the science is there to make this argument possible. The problem is that courts tend to not accept this kind of evidence in causation arguments in tort-based climate litigation, due to its novelty, differences in standards for legal proof and scientific likelihoods, and the variation between approaches to framing attribution questions and the logic of legal causation.[109] Instead, courts perceive this causative link as being currently infeasible.[110] This outdated perspective results in the conclusions seen in *Smith,* in which the Court stated that if causation was based upon emitting activities alone, without individual attributions, every entity and individual in New Zealand would be responsible for damage under these tort arguments,[111] making the arguments themselves legally impossible.

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[106] *Smith v Fonterra Co-operative Group Ltd,* above n 51, at [62].
[107] Rupert F. Stuart-Smith and others "Filling the evidentiary gap in climate litigation" 2021 11 Natural Climate Change 651 at 651.
[108] At 653.
[109] At 651 - 652.
[110] At 654. This point is noted in Russell McVeagh "Tort claims - an unsuitable vehicle for addressing climate change" (1 November 2021) <https://www.russellmcveagh.com/insights/november-2021/tort-claims-an-unsuitable-vehicle-for-addressing-climate-change>.
[111] *Smith v Fonterra Co-operative Group Ltd,* above n 1, at [19].

It is these difficulties, in conjunction with specific complexities in the plaintiff's statement of claim,[112] that resulted in the Court of Appeal in *Smith* concluding that "the issue of climate change cannot be effectively addressed through tort law."[113]

Judicial review in climate litigation also has its difficulties. As in tort law, plaintiffs have to satisfy multiple requirements in order to be successful. In all judicial review claims, plaintiffs must demonstrate that the decision in question is of a kind that courts have the jurisdiction to review, namely that it is sufficiently public.[114] Furthermore, plaintiffs have to establish that the alleged flaw in the relevant decision-making process fits into one of the established grounds of review.[115] Once a plaintiff has overcome these justiciability hurdles, the Court must then be satisfied that the requisite test or threshold of the relevant ground of review has been made out. Most instances of climate litigation fall short at the justiciability hurdle, thus failing to even reach the substantive stage of the claim. In previous climate cases, courts have pointed to the 'high policy' nature of the decision,[116] or the fact that there are no applicable grounds of review,[117] as the basis for this lack of justiciability. Even if a plaintiff reaches the substantive stage, the focus of judicial review, except in extraordinary circumstances,[118] is on the decision-making process, rather than the actual decision.[119] Accordingly, if a decision-maker follows the requisite process which then results in a regressive or unambitious climate-based decision, the courts will usually be unwilling to intervene. This flaw in the use of judicial review in climate litigation is seen in *Thomson* where the Court acknowledged the lack of ambition in the Minister's 2030 target,[120] but concluded that it could not

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[112] At [18] - [27].
[113] At [28].
[114] Una Jagose *Te Pouārahi: The Judge Over Your Shoulder* (Crown Law, 2019) at 63.
[115] At 62.
[116] *All Aboard Aotearoa Incorporated v Auckland Transport*, above n 94, at [82].
[117] *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2012] NZHC 2297 at [185].
[118] The substantive grounds of review include unreasonableness, proportionality, substantive legitimate expectations, and substantive fairness, as noted in Dean Knight "Judicial Review: Practical Lessons, Insights and Forecasts" 2010 VUW-NZCPL002 at 8.
[119] It is important to note that this paper is not attempting to engage in the scholarship on the legitimacy or illegitimacy of the courts having the capability to review the substance of public decisions. Instead, this point indicates that the current nature of judicial review in New Zealand - where the courts can only largely look at the decision-making process - makes it a difficult mechanism through which to spur change and ambition in the nation's climate change regime.
[120] *Thomson v Minister of Climate Change Issues,* above n 33, at [176].

intervene as there was no reviewable error in the Minister's decision-making process.[121] These past cases demonstrate the difficulty that accompanies the use of judicial review in climate litigation, due to the numerous requirements that must be satisfied and the confined nature of the established grounds of review.

The use of judicial review in climate cases can also be classified as 'unproductive'. Even if a plaintiff is successful, the courts cannot change the decision to what the plaintiff contends it should be. Instead, a court usually only has the capability to direct the decision-maker to make their decision again, without the previous error.[122] Accordingly, the decision-maker may make the same decision again, rendering the proceedings unproductive from the perspective of a plaintiff seeking ambitious climate action. That is not to say that all successful judicial review-based climate cases are unproductive. The case of *Hauraki Coromandel Climate Action Incorporated v Thames-Coromandel District Council* spurred the Thames-Coromandel District Council to approve the signing of the Local Government Leaders' Climate Change Declaration,[123] an act the Council had previously rejected, thus spurring the proceedings.[124] Instead, this section emphasises that the relatively rare[125] instances of success in climate litigation where the mechanism of judicial review is deployed does not equate to productive development in the climate change regime, thus potentially rendering the litigation unproductive.

The current approaches to climate litigation in New Zealand are difficult, resulting in a lack of successful outcomes or productive change for climate-oriented plaintiffs. However, this existing reality does not mean that climate litigation is restricted to being an ineffective mechanism in New Zealand's climate change regime. This paper contends that effective climate litigation in Aotearoa is possible through plaintiffs' taking an alternative approach - one based in human rights.

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[121] At [179].
[122] Una Jagose, above n 114, at 66.
[123] Local Government Leaders' Climate Change Declaration 2017 at 9. The Declaration provides the actions that each of the signatory councils are committed to in an effort to create a low carbon and resilient New Zealand and urges the national Government to make it a priority to develop and implement a plan to do the same.
[124] *Hauraki Coromandel Climate Action Incorporated v Thames-Coromandel District Council,* above n 96, at [1].
[125] The phrase 'rare' is used here as *Hauraki Coromandel Climate Action Incorporated* is the only case in New Zealand, out of the six climate cases that deployed the mechanism of judicial review, where this approach produced a favourable outcome for the plaintiff and the climate.

IV Offering An Alternative

A The Use of Right-Based Climate Litigation In Other Jurisdictions

Human rights cases are growing increasingly popular within climate litigation in various different jurisdictions.[126] Under this approach, plaintiffs seek to use human rights grounds to address climate change.[127] There are various strategies through which plaintiffs seek to address climate change using this approach. Plaintiffs may point to inaction by their government to effectively address the climate crisis,[128] or fulfil its international obligations under bilateral or multilateral treaties.[129] Other cases involve private corporations, targeting their rate of emissions or pollution, asserting that such actions should be brought to an end.[130] It is these various strategies that result in most rights-based climate litigation falling into the category of 'strategic cases', where the plaintiffs' motives behind the litigation extends past themselves and instead desire to spur broader and productive societal change.[131]

All cases under this approach assert that these actions or inactions constitute a violation of the plaintiffs' rights. The most common rights-based argument deployed by plaintiffs relies on a right to a healthy environment, which is explicitly recognised in domestic law.[132] This approach was taken by plaintiffs in cases such as *EarthLife Africa*,[133] and *Salamana Mancera.*[134] The reason behind the frequency and success of this kind of rights-based climate litigation is a result of the high proportion of nations that recognise a right to a healthy environment in law.[135] Approximately 149 nations include explicit references to environmental rights or responsibilities within their

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[126] Joana Setzer and Catherine Higham, above n 17, at 32. Since 2015, Setzer and Higham identified 48 cases which invoked human rights arguments.
[127] Jacqueline Peel and Hari M. Osofsky "A Rights Turn in Climate Change" (2018) 7(1) Transnational Environmental Law 37 at 39.
[128] *Leghari v Federation of Pakistan and others*, above n 13.
[129] *Urgenda Foundation v State of the Netherlands*, above n 12.
[130] *Milieudefensie et al. v Royal Dutch Shell plc* The Hague District Court, C/09/571932/ HA ZA 19- 379, 26 May 2021 (English Translation).
[131] Joana Setzer and Catherine Higham, above n 17, at 12.
[132] Pau de Vilchez Moragues and Annalisa Savaresi "The Right to a Healthy Environment and Climate Litigation: A Mutually Supportive Relation" (28 April 2021) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3829114> at 7.
[133] *Earthlife Africa v the Minister of Environmental Affairs et al.*, High Court of South Africa Gauteng Division, Pretoria, Judgment, 6 March 2017.
[134] *Salamanca Mancera et al. v Presidencia de la República de Colombia et al.*, Tribunal Superior de Bogotá, Acción de Tutela, 29 January 2018.
[135] Pau de Vilchez Moragues and Annalisa Savaresi, above n 132, at 16.

national constitution.[136] This widespread recognition leaves countries without affirmed environmental rights, such as New Zealand, in the minority.[137]

Accordingly, in order for human rights-based climate litigation to operate in New Zealand, it would appear that Parliament would have to recognise the right to a healthy environment, either by amending existing rights legislation or through the creation of a written constitution that contains such a right. Palmer and Butler advocate for the latter approach, by including a right to a healthy environment within their proposed constitution.[138] This paper does not dispute that the creation of a constitution containing such a right would provide a basis for rights-based climate litigation and could transform the effectiveness of climate litigation in New Zealand. Instead, this paper is aware of the time and buy-in, both from the public and within government, that would be required to make such changes.[139] Whilst time intensive processes such as this are undertaken, the impending nature of the climate crisis requires action that can occur more immediately. The following sections assert that an alternative approach to rights-based climate litigation - an approach that does not rely on the time-consuming process of amending rights legislation or forming a written constitution - does exist.

B The Alternative

In recent years, an alternate approach to rights-based climate litigation has emerged.[140] This approach is employed in jurisdictions without a constitutional right to a healthy environment. Instead, plaintiffs allege that this right is included within more traditional political and civil rights,[141] such as the right to life,[142] the right to human dignity and liberty,[143] and the right to

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[136] David R. Boyd *The Status of Constitutional Protection for the Environment in Other Nations* (David Suzuki Foundation, Vancouver, 2013) at 6.
[137] At 9.
[138] Geoffrey Palmer and Andrew Butler *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand* (Victoria University Press, Wellington, 2018) at 304. Article 26(1)(a) provides that "everyone has the right to an environment that is not harmful to their health or well-being".
[139] Matthew Palmer and Dean Knight *The Constitution of New Zealand: A Contextual Analysis* (Bloomsbury Publishing Plc, London, 2022) at 242.
[140] Esmeralda Colombo "The Quest for Cosmopolitan Justice in Climate Matters" (2017) 2 Nordic Environmental Law Journal 25 at 25.
[141] *Leghari v Federation of Pakistan and others*, above n 13, at [12].
[142] At [12].
[143] *Juliana v the United States of America* 6:15-cv-1517-TC (D. Or. Jan. 14, 2016) at 10.

respect for private and family life.[144] Under this approach, plaintiffs assert that their government has offended or violated these rights, by failing to both take and commit to meaningful action to prevent dangerous climate change.[145] By putting forward this argument, plaintiffs are contending that these rights place a positive obligation or duty on their government that requires the implementation of preventative measures to safeguard rights from future breaches, rather than mere protection from immediate risks.[146] International principles and treaty norms, namely obligations under the Paris Agreement, are usually employed to support this contention.[147]

This approach to climate litigation is possible in New Zealand,[148] and has the capability to reform the effectiveness of the nation's climate change litigation. A plaintiff's claim based on this approach would centre on existing domestic law, namely the right to life under the New Zealand Bill of Rights Act.[149] Following the approach taken in other jurisdictions, this claim would assert that the right to life includes the right to a healthy environment. To support this interpretation of s 8, a plaintiff could rely on the United Nations General Assembly Resolution recognising the universal right to a clean, healthy, and sustainable environment.[150] Furthermore, a plaintiff would assert that the Court should interpret s 8 as imposing a positive obligation of active protection of the right to a healthy environment on the Government. International obligations and precedent could be cited to support this imposition. Following this assertion, a plaintiff would demonstrate that this positive obligation has been invoked, given the direct threat climate change poses to the plaintiff's right to a healthy environment. Finally, this claim would argue that the New Zealand

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144 *Urgenda Foundation v State of the Netherlands,* above n 12, at [5.2.3].

145 See *Leghari v Federation of Pakistan and others,* above n 13, at 3, and *Urgenda Foundation v State of the Netherlands,* above n 12, at [2.2.1].

146 See *Leghari v Federation of Pakistan and others,* above n 13, at 11, and *Urgenda Foundation v State of the Netherlands,* above n 12, at [5.2.2].

147 Esmeralda Colombo, above n 140, at 25.

148 There are two pending climate cases within which plaintiffs have advanced rights-based arguments - *Mataatua District Māori Council v New Zealand* [2016] WAI 2607, and *Lawyers for Climate Action New Zealand v The Climate Change Commission* [2021] CIV-2021-485-341. Furthermore, during the period within which this paper was being written, the High Court's decision in *Smith v Attorney-General* [2022] NZHC 1693 has been released, within which the plaintiff advanced an argument on s 8 of the New Zealand Bill of Rights Act 1990. Finally, the Human Rights Commission, as an intervener in the Supreme Court's case of *Smith v Fonterra Co-operative Group Ltd* [2022] SC 149/ 2021 at 1, submitted arguments based in human-rights law to inform the Court of the importance of human rights law in tort claims. However, it is important to note that all of these cases differ in their approach to human rights-based climate litigation that is presented in this paper.

149 New Zealand Bill of Rights Act 1990, s 8.

150 *The Human Right to a Clean, Healthy and Sustainable Environment,* above n 14, at 3.

Government has failed to fulfil this obligation, by failing to take effective action to adapt to climate change and limit the global average temperature increasing beyond 1.5℃, thus violating the plaintiff's right to a healthy environment, under their right to life. This paper will focus on the recent amendments made to the Climate Change Response Act 2002 by the Climate Change Response (Zero Carbon) Amendment Act 2019 as an example of this inaction.[151] The following four sections will further elaborate on each component of this claim, outlining arguments and evidence a plaintiff could advance under this approach, as well as highlighting comments from New Zealand's judiciary and academics that indicate the potential success of rights-based climate litigation.

[151] This paper does not assert that the only example of inaction when it comes to the climate crisis on the part of the New Zealand Government is the Climate Change Response (Zero Carbon) Amendment Act. Future plaintiffs could point to an array of legislation or policy, such as the failure to include the agricultural sector within the Emissions Trading Scheme, or the 'toothless tiger' of the climate emergency declaration, and so on.

1 The Right to Life, and a Healthy Environment

The statutory recognition of the right to life is included in the New Zealand Bill of Rights Act. The Act provides that "[n]o one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice."[152] The Act as a whole affirms New Zealand's commitment to the International Covenant on Civil and Political Rights (ICCPR),[153] with s 8 echoing the ICCPR's recognition that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of [their] life."[154] Traditionally, the right to life under the ICCPR has been associated with preventing arbitrary killing at the hands of the State.[155] However, the Human Rights Committee has reinforced that article 6, and other right to life provisions that stem from it, should not be interpreted so narrowly.[156] The right to life should be interpreted far wider, thereby encompassing additional rights, such as the right of individuals to enjoy a life with dignity, and the right to be free from acts or omissions that would cause their unnatural or premature death.[157] This wider interpretation has been recently affirmed in UN Human Rights Committee's decision on Torres Strait Islanders.[158]

In keeping with the wider interpretation of the right to life, a plaintiff under a rights-based approach to climate litigation would assert that the Court should interpret s 8 as encompassing a right to a healthy environment. It is important to note that this argument does not assert that environmental degradation, or a lack of effective climate action, does or will result in an imminent threat to the plaintiff's life. This clarification is not contending that this line of argument could currently or in the future be both possible and successful. Rising sea levels and the growing frequency and severity of weather events as a result of climate change do cause thousands of deaths around the

[152] New Zealand Bill of Rights Act, s 8.
[153] Title (b).
[154] *International Covenant on Civil and Political Rights* GA Res 2200A (XXI) (1966), art 6.
[155] Office of the High Commissioner for Human Rights "CCPR General Comment 6: The right to life (Article 16)" A/37/40 (30 April 1982) at [3].
[156] Human Rights Committee "General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life CCPR/C/GC/36" (30 October 2018) at [3].
[157] Human Rights Committee "Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016 CCPR/C/127/D/2728/2016" (24 October 2019) at [9.4].
[158] Human Rights Committee "Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 3624/ 2019" (22 September 2022) at [8.3].

world each year.[159] As the climate crisis persists and worsens, so too will this loss of life.[160] Instead, this argument maintains that in order for the plaintiff to effectively enjoy their right to life, they must also have a right to a healthy environment that is both acknowledged and protected.[161]

This right to a healthy environment would resemble the substantive environmental provisions seen in other nations' constitutions as discussed above,[162] guaranteeing the plaintiff the right to a clean, healthy, and sustainable environment.[163]

The central basis for the Court taking such an interpretation to s 8 is the United Nations' recent recognition of the right to a healthy environment.[164] After years of activism by environmental advocates[165] and the UN Human Rights Council's adoption of the right,[166] 161 states, including New Zealand,[167] affirmed that the right to a healthy environment was a universal human right.[168] Furthermore, the General Assembly reaffirmed that this right is a direct contributor to the full and effective enjoyment of all human rights,[169] including the right to life.[170] Although the Resolution does not place binding obligations on the New Zealand Government for our courts to enforce,[171] commentators have noted that this recognition could serve as an effective tool in climate cases,[172]

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[159] David Eckstein, Vera Künzel and Laura Schäfer *Global Climate Risk Index 2021* (Germanwatch, Berlin, 2021) at 5 provides that between 2000 and 2019, over 475,000 people lost their lives as a direct result of approximately 11,000 extreme weather events globally.
[160] Human Rights Committee, above n 156, at [9.5].
[161] David R. Boyd, above n 2, at 83.
[162] David R. Boyd, above n 136, at 12.
[163] *The Human Right to a Clean, Healthy and Sustainable Environment* A/HRC/Res/48/13 (18 October 2021) at 3.
[164] *The Human Right to a Clean, Healthy and Sustainable Environment*, above n 14, at 3.
[165] Maria Alejandra Serra Barney and Richard Harvey "The UN officially recognised the right to a healthy environment. Here's what that means." (9 August 2022) Greenpeace <https://www.greenpeace.org/international/story/55098/un-resolution-right-healthy-environment-legal-historic/> at para. 2.
[166] *The Human Right to a Clean, Healthy and Sustainable Environment*, above n 163, at 1.
[167] Maria Alejandra Serra Barney and Richard Harvey, above n 165, at para. 2.
[168] *The Human Right to a Clean, Healthy and Sustainable Environment*, above n 14, at 2.
[169] At 2.
[170] Maria Alejandra Serra Barney and Richard Harvey, above n 165, at para. 5.
[171] United Nations - Climate and Environment "UN General Assembly declares access to clean and healthy environment a universal human right" (28 July 2022) United Nations <https://news.un.org/en/story/2022/07/1123482> at para. 19.
[172] Nathan Cooper "How the new human right to a healthy environment could accelerate New Zealand's action on climate change" (20 October 2021) The Conversation <https://theconversation.com/how-the-new-human-right-to-a-healthy-environment-could-accelerate-new-zealands-action-on-climate-change-170187> at para. 10.

providing a precedent for plaintiffs[173] and emboldening judges to accept their arguments.[174] A plaintiff could assert that these affirmations - of the existence of the right and its connection to other human rights - by the international community, including New Zealand, provides a persuasive basis for the Court to interpret s 8 as implicitly encompassing the right to a healthy environment.[175]

Furthermore, it would not be novel for a court to take such an interpretation to a right to life provision. The Lahore High Court in Pakistan, following earlier Pakistani precedent,[176] affirmed that the right to life "includes the right to a healthy and clean environment".[177] The Irish High Court acknowledged that the right to life guaranteed a personal "right to an environment consistent with the dignity and wellbeing of citizens at large".[178] McLoughlin notes that, although the introduction or expansion of human rights is usually a democratic function, it is not illegitimate for the courts to exercise this process.[179] Accordingly, a plaintiff could assert that if a New Zealand court were to accept their argument and interpret s 8 as implicitly requiring the recognition and protection of the right to a healthy environment, it would have the authority of the General Assembly of the United Nations and international precedent behind it, with an indication of support from the New Zealand Government.[180]

This connection between the right to life and a right to a healthy environment has been acknowledged by some of the highest members of New Zealand's judiciary in an extrajudicial capacity. Glazebrook J indicated in a 2008 paper that the right to life "may provide a foundation

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[173] Maria Alejandra Serra Barney and Richard Harvey, above n 165, at para. 7.
[174] Annalisa Savaresi "The UN HRC recognizes the right to a healthy environment and appoints a new Special Rapporteur on Human Rights and Climate Change. What does it all mean?" (12 October 2021) EJIL: Talk! <https://www.ejiltalk.org/the-un-hrc-recognizes-the-right-to-a-healthy-environment-and-appoints-a-new-special-rapporteur-on-human-rights-and-climate-change-what-does-it-all-mean/> at para. 8.
[175] Andrew S. Butler and Petra Butler "The Judicial Use of International Human Rights Law in New Zealand" (1999) 29 VUWLR 173 at 189.
[176] *Leghari v Federation of Pakistan and others*, above n 13, at [12].
[177] *Shehla Zia v WAPDA* PLD [1994] SC 693.
[178] *Friends of the Irish Environment v Fingal County Council* [2017] IEHC 695 at [261].
[179] Jamie McLoughlin "Whither Constitutional Environmental (Rights) Protection in Ireland After 'Climate Case Ireland'?" (2021) 5(2) Irish Judicial Studies Journal 26 at McLoughlin caveats his statement with the acknowledgment that the judiciary may exercise this function, so long as it does not contravene existing provisions or, in Ireland's case, the Constitution.
[180] This indication is through New Zealand's vote in favour of the adoption of the Resolution.

for the right to an environment of quality".[181] More recently, her Honour, alongside Winkelmann CJ and France J, affirmed this connection,[182] noting that the enjoyment of the right to life requires a clean, healthy and safe environment.[183] These indications from both the Chief Justice and two members of the Supreme Court is indicative that a plaintiff could have great success in New Zealand's courts in advancing the argument that the right to a healthy environment can be implied within s 8 of the Bill of Rights Act.

However, it is not enough for the plaintiff to assert that their right to a healthy environment is implicitly recognised in the right to life under the New Zealand Bill of Rights Act - the right must accompany an obligation of protection.

2 Positive Obligations Under Section 8

Under this approach to climate litigation, a plaintiff would next assert that the right to life, and its implicit recognition of the right to a healthy environment established above, confers a positive obligation on the New Zealand Government. In other words, the Court should interpret s 8 of the Bill of Rights Act as a 'positive right'.

Traditionally, human rights have been categorised as positive or negative.[184] Negative rights are fulfilled when the government abstains from certain actions.[185] In contrast, positive rights impose a duty to act.[186] If s 8 was interpreted narrowly and negatively, a violation would only occur if the government committed specific actions that specifically deprived the plaintiff of their right to life and a healthy environment, such as the enactment of legislation that enabled a vast increase in New Zealand's greenhouse gas emissions. However, a central barrier to success under this interpretation is that the plaintiff would be required to demonstrate a direct causative link between these emissions and the violation of their rights. As discussed above regarding the deficiencies of climate

[181] Susan Glazebrook, above n 93, at 20.
[182] Helen Winkelmann, Susan Glazebrook and Ellen France, above n 3, at [23] affirm that the right to life is "clearly connected to climate change."
[183] At [20].
[184] Derek Bell "Climate change and human rights" (2013) 4 WIRES Climate Change 159 at 162.
[185] Zoe Brentnall "The Right to Life and Public Authority Liability: The Bill of Rights, Personal Injury and the Accident Compensation Scheme" (2010) 16 Auckland University Law Review 110 at 119.
[186] At 119.

litigation based in tort law,[187] this link is not currently accepted by the Courts, who instead view such breaches or damage as caused by climate change more generally rather than the actions of a particular defendant. In contrast, a positive interpretation of s 8 and its accompanying implications would require the government to actively protect the plaintiff's right to a healthy environment. Following this interpretation, inaction or insufficient protection by the government would result in a violation of these rights. Accordingly, to avoid the barriers that accompany other causes of action in climate cases, a plaintiff would likely have to persuade the Court that s 8 should be interpreted positively.

In suggesting how the Court should positively interpret s 8, a plaintiff could point to the approach taken by the Supreme Court of the Netherlands in the case of *Urgenda Foundation* (*Urgenda*).[188] In *Urgenda,* the Supreme Court was tasked with determining whether the Dutch Government was obliged to reduce the emissions of greenhouse gases originating from the Netherlands by the end of 2020, in comparison to 1990.[189] After outlining the danger and consequences of climate change that were accepted by all parties,[190] the Court had to determine whether the Dutch State was obliged to take measures to protect its citizens from dangerous climate change.[191] The plaintiff - a foundation dedicated to enforcing national, European, and international environmental treaties - asserted that this obligation arose from articles 2 and 8 of the European Convention on Human Rights (ECHR).[192] Article 2 protects the right to life.[193] The Court held that this right imposed a positive obligation on contracting states - including the Netherlands - to take "appropriate steps to safeguard the lives of those within its jurisdiction."[194] Should the State fail to take such steps when there was a real and immediate risk posed to its citizens, and the State was aware of that risk, it would breach the right to life.[195]

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[187] See Part III Section B(2).
[188] *Urgenda Foundation v State of the Netherlands,* above n 12.
[189] At [2.2.1].
[190] At [4.1].
[191] At [5].
[192] At [2.2.2].
[193] At [5.2.2]. Article 2 provides that "[e]veryone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."
[194] At [5.2.2].
[195] At [5.2.2].

By following this approach in *Urgenda,* a New Zealand Court could interpret s 8 as imposing a positive obligation on the Government to take appropriate and effective steps to safeguard its citizens when there is a real and immediate risk posed to their right to a healthy environment, included within their right to life. It is interesting to note that a plaintiff would not be breaking new ground by suggesting that the Court should adopt a similar interpretation of a rights provision as a European court, but rather following an extensive tradition.[196] In various cases, such as *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd,*[197] a New Zealand court whilst interpreting statutory rights will look to European Convention jurisprudence to explain the meaning and interpretation of closely related rights provisions. A plaintiff could assert that the Court would be following this established tradition when deploying the Supreme Court of the Netherlands' interpretation of article 2 of the ECHR to interpreting s 8 of the Bill of Rights Act.

In conjunction with indicating how the Court could positively interpret s 8, a plaintiff would also have to assert why the Court should take such an interpretation. The primary basis for this 'why' is based in international law, through New Zealand's commitment to the ICCPR, and its support of the UN Resolution on the right to a healthy environment.

The right to life in the ICCPR has always been heralded as supreme, and its protection of crucial importance to the fulfilment of all human rights.[198] However, in more recent commentary, article 6 has come to be regarded as requiring states to take positive steps to protect the right to life.[199] This requirement also accompanies an obligation on state parties to take appropriate measures to address conditions in society that may give rise to a threat to the right to life.[200] The necessity for this obligation was outlined as in order:[201]

> … to effectively protect the right to life, it is not possible to intervene at the very last minute and states need to deal with the causes of the violation'. Not dealing with the causes would

[196] Andrew S. Butler and Petra Butler, above n 175, at 176.
[197] *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72 at [91].
[198] Office of the High Commissioner for Human Rights, above n 156, at [1].
[199] Human Rights Committee, above n 157, at [21].
[200] At [22].
[201] Ginevra Le Moli "The Human Rights Committee, Environmental Protection and the Right to Life" 2020 69 International and Comparative Law Quarterly 735 at 742.

be like 'closing the stable door after the horse has bolted'.

Accordingly, positive obligations of protection and pre-emptive action are now accepted requirements of the right to life in the ICCPR.[202] As noted above, the Bill of Rights Act was enacted to affirm New Zealand's commitment to the ICCPR.[203] The positive nature of the right to life under the ICCPR, and New Zealand's international obligations under the treaty, does not require the Court to take the same interpretation.[204] However, its basis for s 6, in conjunction with the pervasive recognition in the international sphere of the necessity for positive obligations on the State to ensure actual protection of the right to life, is persuasive.[205]

The New Zealand Government's support of Resolution 76/ 300 also validates the adoption of a positive interpretation of s 8.[206] The Resolution reaffirms that states have "the obligation to respect, protect and promote human rights", which encompasses the requirement to take precautionary measures to ensure effective protection of these rights.[207] This reaffirmation, in conjunction with the Resolution's recognition of the right to a healthy environment indicates that a positive interpretation should not be restricted to the right to life but extends to rights guaranteed within it. New Zealand's affirmation of the Resolution and the positive nature of the right to a healthy environment is a further compelling factor to support the adoption of a positive interpretation of s 8 by a Court.

Furthermore, a plaintiff could contend that the Court would not be breaking new ground in taking a positive interpretation of s 8, but instead continuing a tradition seen in earlier cases. Such a tradition is seen in *Wallace v Attorney-General* (*Wallace*).[208] *Wallace* is concerned with whether the events that ultimately lead to, and occurred after, the death of Mr Steven Wallace constituted

[202] Human Rights Committee, above n 158, at [8.3].
[203] New Zealand Bill of Rights Act, Title (b).
[204] *Wallace v Attorney-General* [2022] NZCA 375 at [114].
[205] Zoe Brentnall, above n 185, at 114.
[206] *The Human Right to a Clean, Healthy and Sustainable Environment*, above n 14.
[207] At 3.
[208] *Wallace v Attorney-General* [2021] NZHC 1963, [2022] NZCA 375.

a breach of his right to life.[209] Within this decision, the Court had to determine whether s 8 can be interpreted as requiring an "ICCPR-complaint investigation" into potentially unlawful deprivations of life by State actors.[210] The Court of Appeal, in agreement with the High Court,[211] concluded in the affirmative - such an investigation "is necessary to give effect to the inherent right to life".[212] Accordingly, s 8 was interpreted to confer an implied right to an ICCPR-complaint investigation into potentially unlawful deaths for which the State may be held responsible.[213] Here, the Court of Appeal, by conferring obligations of permanence and action on the State, is interpreting s 8 positively. This tradition is also seen in the case of *Ministry of Transport v Noort Police v Curran* (*Ministry of Transport*), where the Court acknowledges that the New Zealand Bill of Rights Act calls for a "generous interpretation suitable to give individuals the full measure of the fundamental rights and freedoms referred to" within the Act.[214] Furthermore, Glazebrook J, in an extrajudicial capacity, noted the increasing trend of wide and positive interpretations of the right to life within climate litigation, and leaves open the possibility that New Zealand's courts could do the same.[215]

This paper does not contend that *Wallace*, or *Ministry of Transport*, constitutes a binding precedent for a positive interpretation of s 8. The subject-matter of these cases and the topic of this proposed instance of climate litigation are two distinguishable circumstances. Instead, these cases and the approach taken by the courts, coupled with her Honour's comment, is indicative of willingness from New Zealand courts to take a generous and positive interpretation of the right to life in circumstances that require it. This paper asserts, and so too could a plaintiff, that the continuation of this generous interpretation of s 8 is demanded in this line of climate litigation, given the urgency and severity of the climate crisis.[216]

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[209] *Wallace v Attorney-General*, above n 204, at [1] - [8].
[210] At [8] and [10].
[211] At [112].
[212] At [117].
[213] At [132].
[214] *Ministry of Transport v Noort Police v Curran* [1992] 3 NZLR 260 at 277.
[215] Susan Glazebrook, above n 93, at 21.
[216] See Introduction.

It is here that it would be remiss to fail to note the recent climate case of *Smith v Attorney-General,*[217] and the High Court's comments on a similarly contended interpretation of the right to life under the Bill of Rights Act. Smith - the same plaintiff as in *Smith v Fonterra Co-operative Group Ltd* - contended that the New Zealand Government had taken inadequate climate change mitigation measures from the moment it became aware of the causes and effects of climate change, until present day.[218] Amongst other causes of action,[219] the plaintiff alleged that this inaction constituted a breach of ss 8 and 20 of the New Zealand Bill of Rights Act.[220] Under this claim, Smith contended that s 8 imposed positive obligations on the Crown to take effective measures in relation to climate change.[221] However, Grice J concluded that this interpretation was not possible.[222] This conclusion was based on comments made by the Court of Appeal as to the relatively narrow scope of s 8,[223] the rejection of the plaintiff's contention that the right to life included a right to dignity,[224] the issue of causation between climate change and a real and identifiable risk to the right to life,[225] and disagreement with the precedent raised.[226]

This paper, with the utmost respect, does not perceive this judgment as impactful on its thesis, nor its assertion that s 8 can be interpreted as imposing positive obligations on the New Zealand Government. In *Smith,* Grice J was bound by precedent that a higher Court could ultimately challenge - precedent that also does not bind this paper. Furthermore, Grice J had to release her judgment during the Supreme Court's hearing of the *Smith v Fonterra Co-operative Group Ltd* case, and thus may have reserved a more ambitious judgment in light of the pending judgment. This paper took a different approach to *Wallace* and past precedent concerning interpretations of the right to life by New Zealand courts, rendering Grice J's conclusion on this aspect of Smith's claim inapplicable. Ultimately, this conclusion as to the impact of *Smith* arises from the differences

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[217] *Smith v Attorney General,* above n 148.
[218] At [3].
[219] Smith also asserted that this inaction constituted a breach of the Government's duty to protect the plaintiff and his future descendants from the adverse effects of climate change, at [2], and a breach of the Treaty of Waitangi and its accompanying duties owed to the plaintiff and those he represents, at [34].
[220] At [33].
[221] At [174].
[222] At [195].
[223] At [176], citing *AR (India) v Attorney-General* [2021] NZCA 291 at [38].
[224] At [177].
[225] At [178] - [184].
[226] At [185] - [194].

between the plaintiff's rights-based approach and that presented in this paper. In this paper, a plaintiff is suggested to rely on the right to a healthy environment arising from the right to life as the basis for their rights argument, rather than relying on the written contents of s 8 as seen in *Smith.*[227] It is this distinction in this central right that makes the approach put forward by this paper more tenable than that in *Smith,* and Grice J's comments largely inapplicable.

Once a plaintiff has asserted that the Court should adopt a positive interpretation of s 8, their next step in this rights-based approach is to demonstrate that this positive obligation has been imposed on the Government.

3 The Imposition of a Positive Obligation

In order to assert that the Government has an obligation to protect and safeguard their right to a healthy environment, a plaintiff would have to demonstrate that climate change poses a real and immediate risk to this right.[228]

A 'real risk' is one that is genuine.[229] An 'immediate risk' requires imminence.[230] This requirement does not mean that the risk has to materialise within a short period of time.[231] The risk may materialise in the longer term, but it must at least be likely to occur,[232] and directly threaten the plaintiff.[233] Furthermore, a risk will only meet this threshold if it is reasonably foreseeable.[234] In other words, it is not enough for this risk to just exist - the State must also know or ought to know of its existence and the threat it imposes on the plaintiff's right to a healthy environment.[235]

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[227] This distinction, for example, renders the High Court's comments on how there is no 'real and identifiable' risk to the right to life caused by climate change, at [193], as uninfluential, as the risk will be to the right to a healthy environment which, as the following section will outline, is more easily demonstrated.

[228] This section is based on the assumption that the Court will adopt a similar interpretation of the requirements of the imposition of a positive obligation of protection as the Supreme Court of the Netherlands in *Urgenda.* See Part IV Section B(2) of this paper.

[229] *Urgenda Foundation v State of the Netherlands,* above n 12, at [5.2.2].

[230] At [5.2.2].

[231] At [5.2.2].

[232] Human Rights Committee, above n 157, at [2.9].

[233] *Urgenda Foundation v State of the Netherlands,* above n 12, at [5.2.2].

[234] Human Rights Committee, above n 157, at [9.4].

[235] *Smith v Attorney General,* above n 148, at [188].

The right to a healthy environment, implied under s 8 of the Bill of Rights Act, guarantees the plaintiff access to a clean, healthy, and sustainable environment.[236] Accordingly, the plaintiff is entitled to:[237]

> … the right to breathe clean air … along with access to clean water and adequate sanitation, healthy and sustainable food, a safe climate, and healthy biodiversity and ecosystems.

Climate change inherently threatens each of these aspects of a New Zealand plaintiff's right to a healthy environment.[238] The growing greenhouse gas emissions as a result of the burning of fossil fuels that are spurring climate change are degrading air quality.[239] Rising sea levels and increasingly frequent weather events threaten to make coastal freshwater environments more saline, whilst longer droughts are placing increasing pressure on existing water supplies.[240] All of these aspects of climate change are inhibiting access to clean water. This rise in sea levels is also rendering certain environments unsafe or inhabitable.[241] For example, areas of Nelson are deemed unsafe at times due to increased flooding, even in calm weather.[242] This increase in the length and frequency of droughts is also likely to cause food shortages,[243] thereby restricting access to healthy and sustainable food. Climate change is starting, and will continue, to threaten New Zealand's biodiversity,[244] with increasing temperatures allowing more pests to survive in New Zealand's environment,[245] whilst coastal erosion and rising sea levels render habitats more saline and uninhabitable.[246] Each of these impacts are both real and imminent, and have

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[236] *The Human Right to a Clean, Healthy and Sustainable Environment*, above n 14, at 3.
[237] Human Rights Council "Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: Report of the Special Rapporteur" A/HRC/40/55 (8 January 2019) at [17].
[238] Climate change is conceptualised here as including both the acts that cause and contribute to climate change, as well as the consequences climate change has on humans and our environments.
[239] Ministry for the Environment and Stats NZ *New Zealand's Environment Reporting Series: Our Freshwater 2020* (2020) at [18].
[240] At 71.
[241] At 71.
[242] At 67.
[243] At 71.
[244] At 60.
[245] Helen Winkelmann, Susan Glazebrook and Ellen France, above n 3, at [139], see footnote 300.
[246] Ministry for the Environment and Stats NZ, above n 239, at 70.

been recognised by New Zealand's Government and judiciary.[247] Some impacts, such as the rise in sea levels and growing drought, have already begun to impact the right to a healthy environment, thereby becoming evident actualities rather than immediate risks.[248]

The impact climate change has on the right to a healthy environment is not a hidden fact from the Government, nor is it a recent revelation. The IPCC's First Assessment Report, released in 1990, outlined the catastrophic impact of increasing greenhouse gas emissions and the effect these emissions could have on the climate.[249] This report played a key role in the creation of the United Nations Framework Convention on Climate Change (UNFCCC), which New Zealand adopted in 1992.[250] Since 2009, the Government has had in place an emissions reduction target under the UNFCCC and other subsequent multilateral environmental treaties.[251] To formulate such targets, the Government has had to reflect upon its emitting behaviours and the impacts that arise from these emissions.[252] Accordingly, a plaintiff could assert that the New Zealand Government has known of the potential and actual impacts climate change has on the right to a healthy environment for, at a minimum, 13 years.

As climate change poses a real and imminent risk to the plaintiff's right to a healthy environment, and the New Zealand Government knew of this risk, the State was obliged, already at least 13 years ago, to take steps to counter this threat. As the threat of climate change has already begun to materialise and impact this right, this obligation required the Government to lessen or soften the

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[247] At 67, by the Ministry for the Environment, *Hauraki Coromandel Climate Action Incorporated v Thames-Coromandel District Council*, above n 96, at [50], *AD (Tuvalu)* [2014] NZIPT 501370-371, 4 June 2014 at [28] and Helen Winkelmann, Susan Glazebrook and Ellen France, above n 3, at [20].

[248] At 71.

[249] Intergovernmental Panel on Climate Change *Climate Change: The IPCC 1990 and 1992 Assessments* (Digitization and Microform Unit, UNOG Library, 2010) at [1.0.3].

[250] Ministry for the Environment "New Zealand and the United Nations Framework Convention on Climate Change" (17 June 2022) <https://environment.govt.nz/what-government-is-doing/international-action/nz-united-nations-framework-convention-climate-change/> at para. 2.

[251] At para. 13.

[252] Seen in, for example, Ministry for the Environment "Latest update on New Zealand's 2020 net position" (17 June 2022) <https://environment.govt.nz/what-government-is-doing/areas-of-work/climate-change/emissions-reduction-targets/latest-update-on-new-zealands-2020-net-position/>.

impact of this materialisation.[253] In the modern context of climate change,[254] this obligation requires New Zealand to do its part in limiting the increase in the global average temperature to 1.5°C above pre-industrial levels.[255] However, the Government has failed to do so.[256]

4 The Government's Breach of Section 8

As the final step in this rights-based approach, a plaintiff could assert that the net-zero target adopted by New Zealand through the Climate Change Response (Zero Carbon) Amendment Act (the Amendment Act) constitutes a failure on part of the Government do its part in keeping the 1.5°C target alive and combat the climate crisis.[257] As discussed above,[258] this failure means that the State has not fulfilled its positive obligation imposed under s 8 of the Bill of Rights Act, to protect the right to a healthy environment from the real and imminent threat of climate change. Accordingly, the New Zealand Government has breached the plaintiff's right to a healthy environment implied under the right to life.

To justify this focus on the Amendment Act and its net zero target, a plaintiff could point to the intended purpose of the Act. The Amendment Act was described as providing:[259]

> … a framework by which New Zealand can develop and implement clear and stable climate change policies that contribute to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5° Celsius above pre-industrial levels; and allow New Zealand to prepare for, and adapt to, the effects of climate change …

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[253] *Urgenda Foundation v State of the Netherlands*, above n 12, at [5.3.2].
[254] Given the 1.5°C target in the Paris Agreement Under the United Nations Framework Convention on Climate Change, above n 10, art 2. The reasoning for this particular target is specified above at footnote 10.
[255] This phrasing is drawn from *Urgenda Foundation v State of the Netherlands*, above n 12, at [5.7.1].
[256] Climate Action Tracker "New Zealand - Country Summary" (15 September 2021) <https://climateactiontracker.org/countries/new-zealand/>.
[257] "Keeping 1.5°C alive" was the slogan adopted in COP26, as seen in New Zealand Foreign Affairs & Trade "Keeping 1.5 alive: COP 26 and what comes next for Aotearoa New Zealand" <https://www.mfat.govt.nz/en/environment/climate-change/working-with-the-world/building-international-collaboration/cop26-and-what-comes-next-for-aotearoa-new-zealand/>.
[258] See Part IV B(3).
[259] Climate Change Response (Zero Carbon) Amendment Act 2019, s 4. This purpose is also reflected in Ministry for the Environment "Climate Change Response (Zero Carbon) Amendment Act 2019" (5 April 2021) <https://environment.govt.nz/acts-and-regulations/acts/climate-change-response-amendment-act-2019/> at para. 1.

Here, the Amendment Act is not only described as the main framework to enable the creation of future climate policies, but also highlighted as being the mechanism that should enable the Government to assist in meeting the 1.5℃ threshold. Furthermore, the net zero target was acknowledged as playing a central role to New Zealand assisting the global effort to keep the increase in the global average temperature to 1.5℃ above pre-industrial levels.[260] Given its ambitions and purpose, the Amendment Act is a worthy focus for determining whether the Government has fulfilled its positive obligations to protect the plaintiff's right to a healthy environment.[261]

It is important to note here that the positive obligation under s 8 requires the State to take "reasonable and suitable measures" to protect the right to a healthy environment.[262] Clearly, neither this paper or a plaintiff has the hindsight to assert whether the ambitions set out in the Amendment Act will be met or exceeded. Furthermore, the fact that the Government was unsuccessful in deterring the harm to the right does not mean it did not meet this obligation.[263] What a plaintiff can assert, however, is that the Amendment Act and its net zero target should constitute a reasonable and suitable measure *as written.* It is here that the basis for the contention that the Government has breached the right to a healthy environment lies.

A plaintiff could assert that the Amendment Act does not constitute a reasonable and suitable measure to protect the right to a healthy environment due to the deficient and flawed nature of the net zero target. The Amendment Act states that net accounting emissions of greenhouse gases are required to be at zero - greenhouse gases produced are equal to greenhouse gases removed from the atmosphere - by the beginning of 2050.[264] However, this target does not include a specific kind of greenhouse gas emissions - biogenic methane - within its ambit. Instead, these emissions are

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[260] Vicky Robertson *Climate Change Chief Executives Board - Advice on a new 2050 emissions reduction target* (Ministry for the Environment, November 2018) at [9].
[261] This focus on the Amendment Act was the result of comments made in Helen Winkelmann, Susan Glazebrook and Ellen France, above n 3, at [33], in which the Chief Justice and the Justices indicated that the statute, whilst in its Bill form, could provide a focus for climate litigation.
[262] *Urgenda Foundation v State of the Netherlands*, above n 12, at [5.3.3].
[263] At [5.3.4].
[264] Climate Change Response (Zero Carbon) Amendment Act 2019, s 8 and Climate Change Response Act 2002, s 5Q(1)(a).

taken into account in a separate provision.[265] These emissions, in spite of constituting over 40% of New Zealand's total greenhouse emissions,[266] only need to be 10% less than 2017 emissions by 2030,[267] and 24 - 47% less than 2050.[268] Furthermore, emissions caused by international aviation and shipping currently lie outside of the scope of the net zero target.[269] This decision to exclude key high emitting sectors and particularly harmful greenhouse gas emissions from the net zero target demonstrates the purpose of such targets. The IPCC articulates that reaching and sustaining net zero emissions by 2050 would limit global warming to 1.5℃.[270] However, this articulation assumes that all kinds of emissions and greenhouse gases are included within the target,[271] not just those that have been picked and chosen by policymakers. If other States were to follow New Zealand's footsteps and adopt this same net zero target,[272] global warming would exceed 3℃ above pre-industrial levels - double the target in both the Paris Agreement and the Amendment Act.[273] This inherent deficiency of New Zealand's net zero target, coupled with the flawed exclusion of emitting sectors and harmful biogenic methane emissions, negates the conclusion that the Amendment Act constitutes a reasonable and suitable measure to protect the right to a healthy environment.

Furthermore, this target will likely not become a reasonable and suitable measure, given the limited and ineffective mechanisms provided in the Amendment Act to review and adjust the target. The Amendment Act provides the Climate Commission the ability to review the net zero target.[274] This

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[265] Climate Change Response (Zero Carbon) Amendment Act 2019, s 8 and Climate Change Response Act 2002, s 5Q(1)(b).
[266] Ministry for the Environment "New Zealand's greenhouse gas emissions" (23 February 2022) StatsNZ <https://www.stats.govt.nz/indicators/new-zealands-greenhouse-gas-emissions> at para. 5.
[267] Climate Change Response (Zero Carbon) Amendment Act 2019, s 8 which inserts Climate Change Response Act 2002, s 5Q(1)(b)(i).
[268] Climate Change Response (Zero Carbon) Amendment Act 2019, s 8 which inserts Climate Change Response Act 2002, s 5Q(1)(b)(ii).
[269] Climate Change Response (Zero Carbon) Amendment Act 2019, s 8 which inserts Climate Change Response Act 2002, s 5R.
[270] Intergovernmental Panel on Climate Change *Special Report: Global Warming of 1.5℃ - Summary for Policymakers* (Cambridge University Press, Cambridge, 2018) at [C.1]
[271] At [A.2.2].
[272] This hypothetical is aware that different countries have different parts to play, reflecting historical contributions and current economic status and development, when it comes to combating climate change. Instead, this hypothetical is intended to demonstrate the extent of the unreasonableness of the net zero target.
[273] See graph in Climate Action Tracker "New Zealand - Country Summary" (15 September 2021) <https://climateactiontracker.org/countries/new-zealand/>.
[274] Climate Change Response (Zero Carbon) Amendment Act 2019, s 8 which inserts Climate Change Response Act 2002, s 5S.

review may be in regard to the timeframe of the target,[275] or the extent of emissions reductions available.[276] On the face of it, this power of review of the Climate Commission appears a promising mechanism through which the above deficiencies of the net zero target could be addressed. However, the Commission may only recommend a change to the 2050 target if "significant change" had occurred within a finite list of areas.[277] Accordingly, mere ineffectiveness ingrained within the existing target would be an unsuitable ground to trigger review and recommendation. Furthermore, a recommendation from the Climate Commission does not ensure change. Instead, the Minister has a 12-month window to advise the Commission as to the Government's response.[278] Not only is this window at odds with the urgency of the climate crisis that such recommendations will be responding to, but the fact also that only a response is required, rather than action, demonstrates the toothless nature of this mechanism of review. Accordingly, a plaintiff could assert that the Climate Commission's power of review is not likely to render the Government's unsuitable and unreasonable measure of protection reasonable nor suitable.

As the Government has failed to implement reasonable and suitable measures to fulfil its positive obligations imposed by s 8 of the New Zealand Bill of Rights Act, it has breached the plaintiff's right to a healthy environment.

To remedy this breach, and close out their rights-based argument, a plaintiff could seek for the Court to declare that the Government has committed a breach of the right to a healthy environment, implied under the right to life, by failing to uphold its positive obligation to implement reasonable and suitable measures to protect this right. A plaintiff could also seek a declaration of inconsistency from the Court between the Bill of Rights Act and the Climate Change Response (Zero Carbon) Amendment Act.[279] Unlike other jurisdictions, a plaintiff could not contend that the Court should

[275] Climate Change Response (Zero Carbon) Amendment Act 2019, s 8 which inserts Climate Change Response Act 2002, s 5T(1)(a).
[276] Climate Change Response (Zero Carbon) Amendment Act 2019, s 8 which inserts Climate Change Response Act 2002, s 5T(1)(b).
[277] Climate Change Response (Zero Carbon) Amendment Act 2019, s 8 which inserts Climate Change Response Act 2002, s 5T(2).
[278] Climate Change Response (Zero Carbon) Amendment Act 2019, s 8 which inserts Climate Change Response Act 2002, s 5U.
[279] As a result of the newly passed New Zealand Bill of Rights (Declaration of Inconsistencies) Amendment Bill, ss 7A and 7B require the Government to both be notified and respond to a Court-issued declaration of inconsistency.

strike down the Amendment Act or require the Government to recognise the right to a healthy environment in statute. The absence of a supreme constitution, and the enforceability powers it could confer to the courts, inhibits the extent of remedies available to the plaintiff. This limitation could impact the potential impact of rights-based climate litigation in New Zealand. However, a plaintiff could still seek less conventional remedies. Following the footsteps of other New Zealand climate litigants,[280] a plaintiff could seek any other relief as the Court determines appropriate to enable the protection of the right to a healthy environment. In doing so, a plaintiff is not stepping outside the traditional ambit of relief of the New Zealand courts. Instead, they are leaving open the possibility of an ambitious, and perhaps revolutionary, grant of relief.[281]

Even with this comparatively limited array of remedies available, this paper contends that the proposed rights-based approach is still a promising offering to reform the effectiveness of New Zealand's climate litigation and assist the nation's climate change regime as a whole.

V The Positive Effect of Rights-Based Climate Litigation in New Zealand

The offered rights-based approach is unlikely to encounter the same deficiencies that plague existing approaches to climate litigation in New Zealand. This approach does not require the plaintiff to make legally impossible causation arguments that restrict tort law approaches to climate litigation.[282] Furthermore, the proposed approach does not have as complex 'hoops' that plaintiffs asserting tort or judicial review causes of action must jump through. This paper recognises that this rights-based approach does have multiple stages, the first two of which involve the Court adopting ambitious interpretations of s 8 of the Bill of Rights Act. However, as Part IV emphasised, there are various indications that the New Zealand judiciary would be willing to accept these arguments. Furthermore, once a plaintiff has successfully advanced this proposed approach, future plaintiffs will merely have to point to this past precedent for the existence of the right to a healthy environment and the imposition of a positive obligation under s 8, before asserting the Government's breach. Lastly, plaintiffs will not be required to fit their claim into the fixed and

[280] For example, seen in *Smith v Fonterra Co-operative Group Ltd*, above n 51, at [16].
[281] Andrew Geddis and M. B. Rodriguez Ferrere "Judicial Innovation Under the New Zealand Bill of Rights Act - Lessons for Queensland?" 35(2) University for Queensland Law Journal 251 at 282.
[282] This deficiency was discussed in Part III B(2). The manner in which this proposed approach avoids this deficiency was noted in Part IV B(2).

narrow grounds that accompany judicial review proceedings. Instead, a plaintiff has the far broader task of outlining how the Government's actions, or inaction, constitutes a violation of its positive obligations under the right to a healthy environment. Accordingly, although it will still have its difficulties, particularly for the first few plaintiffs to make such an argument, this rights-based approach is likely to not face the same encumbrances that impact existing approaches to climate litigation.

Consequently, this approach is likely to result in more 'wins' for plaintiffs and the climate. This increased chance of success is not solely caused by the reduction in difficult, narrow, and at times impossible, arguments - it is a by-product of arguments based on the right to a healthy environment.[283] Research conducted in other jurisdictions has demonstrated that when the right to a healthy environment is invoked, the success rate of climate cases increases.[284] Although this correlation does not guarantee success, this increased chance of a favourable outcome is promising, particularly when reflecting on the low success rate of the current state of New Zealand's climate litigation.[285] Therefore, this rights-based approach also has encouraging chances of addressing and changing New Zealand's noticeable lack of winners in climate litigation.

The use of the right to a healthy environment further accelerates the wide benefits of effective climate litigation.[286] The nature of the rights-based approach, by highlighting aspects of legislation that constitute a failure on the part of the Government to fulfil its positive obligations under s 8, provides specific clarification as to where shortcomings exist in the current climate change regime.[287] Furthermore, until the New Zealand Government explicitly recognises a separate right to a healthy environment, this approach provides plaintiffs with a pathway to vindicate breaches to this right. Both of these effects of rights-based climate litigation demonstrate the manner in which this proposed approach can effectively fill gaps in the national climate change regime.[288] This offered rights argument also has the effect of setting a standard as to what New Zealand's

[283] Jacqueline Peel and Jolene Lin "Transnational Climate Litigation: The Contribution of the Global South" (2019) 113 American Journal of International Law 679.
[284] Pau de Vilchez Moragues and Annalisa Savaresi, above n 132, at 6, and David R Boyd, above n 2, at 248.
[285] See Part III B(1).
[286] See Part II B.
[287] David R. Boyd, above n 2, at 235.
[288] Shaikh Eskander, Sam Fankhauser and Joana Setzer, above n 21, at 46.

environment should be - at the very least, a safe, healthy, and sustainable one. Accordingly, rights-based approaches to climate litigation not only increase climate ambition, it ensures that the Government cannot make any rollbacks.[289] Peel and Osofsky indicate that climate litigation based in human rights, in comparison to the more traditional scientific and legally technical arguments, are proven to be more publicly salient.[290] As a result, this proposed approach has the potential to motivate stronger public participation in climate issues,[291] and an increase in climate-conscious behaviours.[292] Lastly, the use of a rights grounded cause of action in climate litigation has the benefit of drawing environmental protection and climate action into New Zealand's general rights framework.[293] Consequently, the environment and its overall quality will receive the same fervour and protection that other recognised rights receive in legal, political, and social spheres.[294]

VI Conclusion

Climate change arguably constitutes the largest challenge that humanity has ever faced. If immediate, productive, and wide-spread action is not taken, life on our planet will change drastically – and for the worse. In the face of such a problem, it is crucial that each aspect of each nation's climate change regime is working efficiently and effectively. However, this paper has demonstrated that this is not the case in New Zealand. Climate litigation, namely the current approaches taken in climate cases, is failing to produce favourable outcomes for both the plaintiff and the planet. However, this current predicament is not permanent. The deployment of a human rights approach, grounded in the implied right to a healthy environment under the right to life, has the potential to both be accepted by New Zealand's judiciary, and reform the effectiveness of Aotearoa's climate litigation. This paper did not propose that effective climate action will be the silver bullet needed to radically limit the increase in the global average temperature. However, the use of this proposed approach, within an ambitious national climate change regime, has the potential to ensure that Aotearoa does its part in ensuring a safe and sustainable future.

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289 David R. Boyd, above n 2, at 236.
290 Jacqueline Peel and Hari M. Osofsky, above n 127, at 67.
291 David R. Boyd, above n 2, at 239.
292 Jacqueline Peel and Hari M. Osofsky, above n 127, at 67.
293 Susan Glazebrook, above n 93, at 29.
294 At 30.

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