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# ‘Property Purgatory’

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## Abstract

Climate change will place increasing numbers of homeowners in ‘property purgatory’, a state of financial insecurity arising from the foreseeability of eventual damage and uncertainty about means to recover their losses. The impacts of climate change-induced sea level rise and storm events are now certain, and exposed properties will likely incur insurance, mortgage and value loss. These effects could occur prior to physical damage, and existing inequities will be magnified. Current legal and institutional arrangements offer no clear pathway for those affected to recover funds in order to relocate themselves. We position property purgatory as an immediate practical challenge for those affected seeking to recover their losses, and as a legal question regarding undefined responsibilities of central and local government.

**Keywords** property purgatory, sea level rise, adaptation, insurance, foreseeability, loss

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A worst-case scenario objectively and evidentially based, must, by definition, be a reasonable possibility – albeit the worst one.

(Justice Williams, *Weir v Kapiti Coast District Council*, 2013)

Research by NIWA (the National Institute of Water and Atmospheric Research) suggests that 50,000 residential properties in New Zealand are currently at risk from hazards arising from sea level rise and increased riverine flooding driven by climate change (NIWA, 2019, p.8). The same research states that a mean sea level rise of 0.3 metres from current levels could bring the number of exposed properties to 70,000, a rise that could occur by 2050 (ibid., pp.9, 30). This trajectory will continue beyond 2050, with challenging implications for property owners. This is a novel circumstance for which New Zealand’s legal and institutional arrangements are not well prepared.

Climate change-related hazards are already occurring in locations such as the Kāpiti Coast, Hawke’s Bay and Greymouth (Parliamentary Commissioner for the

Environment, 2015). As global mean temperatures continue to rise, the impacts of coastal and river flooding will increase and result in further damage and loss to property (Hayward, 2017; Meduna, 2015; Rouse et al., 2017). The increasing exposure of property to damage that we can now map and predict is likely to place many owners in circumstances of uninsurability against climate-related hazards (Storey et al., 2015). This combination of circumstances creates a novel situation for property owners, whereby losses are foreseeable but solutions are obscure and undefined. Under current policies, legislation and practice, it is not clear whether or how owners can recover their economic or material losses from climate change-related damage, or alternatively how they might fund relocation away from danger zones (Fleming et al., 2019; Hino, Field and Mach, 2017; Lovett, 2017). This novel and undefined circumstance is what we are calling 'property purgatory'.

The purpose of this article is to describe and qualify the problem. First we outline its key characteristics. We then discuss the implications of this problem becoming increasingly prevalent and unavoidable. We consider how property purgatory sits at the boundary of existing legal doctrine and poses a novel legal question regarding loss recovery. Lastly, we link property purgatory with broader themes of wealth, responsibility and fairness.

### Property purgatory

A real-life example illustrates the problem of property purgatory. Ms R lives in a coastal residential area. Her insurance was withdrawn in 2017 after her low-lying house was subjected to several instances of flooding and inundation as a result of extreme weather events. Her house eventually became uninhabitable. The outcome was that she had to live in a vehicle while continuing to pay the mortgage on an unusable and uninsurable house. This meant she could not sell (unless at a considerable loss, and assuming she could find a buyer); nor could she borrow money to make improvements to her property. No blame could be attributed to her, as she had purchased the property well before there had been indications of climate change exposure. She had no clear

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avenues by which to recover her loss; nor to practically remedy her situation. Short of acute and immediate danger to human health, the responsibilities of central and local government remain undefined in this situation, despite the extensive descriptive literature (Iorns and Watts, 2019). As this case shows, climate change-related losses like Ms R's are exacerbated by undermined responsibility and the anxieties felt by those hoping to recover their losses.

In its Roman Catholic doctrinal meaning, a person in purgatory waits with uncertainty for deliverance, by something or someone out of that person's control, to an outcome either good or bad (2 Corinthians 5:10). Purgatory implies a state of suffering, or at least an anxious waiting for judgement (Revelation 20:12). For those in Ms R's situation, this is an apt description. They will likely be unable to afford to protect their property from future damage, will have constraints on the ability to build protective structures, and will be unable to sell and move on without considerable loss (if they can sell at all) (*Gisborne v Falkner*, 1994). They will be in

property purgatory: living in uncertainty, emotionally strained, for an indeterminate period, suspended between terrible and good outcomes (Storey et al., 2015). It is a condition lacking agency, with little capacity to initiate deliverance because the parameters of recourse and responsibility are unclear.

Ms R's situation clearly illustrates an unnerving ambiguity in loss recovery. Her 'loss' includes the original function of her house as a dwelling place and the monetary and non-monetary values associated with this, but she is not barred from the property. She is barred from the usual means by which she should expect to enjoy her property as a dwelling and as an asset to fund other investment or her relocation.

Property purgatory comprises sequential stages of tangible loss. The first stage is the withdrawal of insurance, denying the owner a conventional method to recover loss of means. The second stage of loss is the impact such uninsurability has on a mortgage and the property value more generally; there will be instances of mortgagees divesting their mortgages on uninsured property (Iorns, 2018; Storey et al., 2015). These two stages compound into the third stage of loss, involving diminished capacity to sell the property to move on (should the person wish to) because of the loss in value. The three stages are all possible without any actual physical loss caused by some degree of damage to the property from climate-induced hazards. Unlike the previous three, this fourth stage of loss, from damage, can happen at any juncture in the timeline, and can worsen the purgatory if the owner has diminished ability to fund repairs.

In this way, the diminution of property value can and may often occur simply as a result of the foreseeability of damage becoming known (*Smill v Buller District Council*, 1997). Territorial authorities, through the requirement that they identify and communicate natural hazards to the public (discussed later), may unwittingly trigger a movement into the first stage of purgatory.

These, then, are the four stages of property purgatory: loss of insurance, loss of mortgage,<sup>1</sup> loss of financial means to relocate, and, at some point, physical damage and thus loss of means to enjoy the

property as a dwelling. If some form of recovery is sought, it will be at some point in these stages of loss that characterise property purgatory. Across all four stages, property value as a negotiating position will significantly diminish. Unless the owner has other assets, they will have limited practical or legal recourse by which to rectify the situation or recover their loss. This raises the question of how to develop principled legal doctrine that accounts for this new characteristic of quantifiable and foreseeable loss.

### The scope of property purgatory

In this article, property purgatory is considered in the context of the foreseeable damage associated with sea level rise, together with increasing frequency and severity of storm and flooding events (Oliver-Smith, 2016). Climate change-driven coastal hazards include coastal erosion, rising groundwater, increasingly high tides, flooding, ponding, and landward movement of mean sea level (Horton et al., 2020; Meduna, 2015). The concept is equally applicable to other hazards driven by climate change, but we do not pursue them in this article.

The scope of 'property', for the purposes of this article, comprises existing owner-occupied homes. We consider the implications of foreseeable damage to residential assets from impacts arising from climate change hazards, as described above. We touch on the implications for other classes of property (e.g. greenfield, rental, commercial, rural) in the article's conclusion.

### Beyond 'risk': foreseeable damage and loss

Risk is the likelihood of 'x' consequence for an asset over time (Grace, Kilvington and France-Hudson, 2019; Saunders and Kilvington, 2016). However, in exposed locations, climate change impacts such as coastal erosion and increasingly high tides are beyond 'risk' in this sense, as their likelihood is certain. There may be uncertainty regarding precise timeframes and severity of impact (Horton et al., 2020), but damage will certainly eventuate and thus is foreseeable.

Foreseeable damage arises from a combination of incremental change and more extreme events. Slow-onset damage

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from sea level rise, for example, compounds property exposure to extreme weather events (Hino, Field and Mach, 2017; Lawrence et al., 2015). Over time, the number of properties exposed to these impacts will increase, along with the severity of the impacts (Boston and Lawrence, 2017; Storey et al., 2015). Modelling of exposure and the capacity to predict and map the damage is being undertaken with increasing accuracy (NIWA, 2019; Parliamentary Commissioner for the Environment, 2015). This predictability of damage takes it beyond 'risk' into new legal territory.

In New Zealand, the parliamentary commissioner for the environment report *Preparing New Zealand for Rising Seas* uses Dunedin as an example (Parliamentary Commissioner for the Environment, 2015). The significant flooding experienced by South Dunedin in June 2015, which left a lasting physical and emotional legacy, is an example of a one in 100 years event (McNeilly and Daly, 2015; Parliamentary Commissioner for the Environment, 2015). This 'once in 100 years' scale of damage is

projected to occur every two years by 2065. In other words, by that time, every year will bring a 50% chance of what we currently consider to be severe damage. By 2100 this increases to a 100% likelihood (i.e., every tide bringing potential damage at this scale) (Parliamentary Commissioner For the Environment, 2015). The certain outcome, unless prior action is taken, will be economic and material losses.

### Insurance retreat

This shift in the likelihood from 'risk of damage' to 'foreseeable damage' will drive insurance retreat from exposed properties. Insurers are likely to respond initially by raising insurance premiums. This may make living costs, such as mortgage repayments, more unaffordable, especially for those on lower incomes. Once insurers consider a property's likelihood of damage is no longer a risk but a certainty, they will no longer insure. This may affect the owner's ability to obtain, or retain, mortgages, which (almost always) contain a covenant requiring the mortgagor insure the property from risk (Property Law Act 2007, s95 and schedule 2, part 1, cl 2(1)). The loss of insurance may lead to an owner being in default under their mortgage. This may bring the threat of the mortgagee exercising its power of sale (and enforcing the mortgagor's personal covenant to pay when the mortgage is not repaid in full following mortgagee sale). The financial implications for households are sobering (Hayward, 2017).

In Ms R's situation, her house suffered physical damage from flooding but it was the withdrawal of her insurance as a reaction to the (correct) expectation of foreseeable damage that constituted her initial loss. She therefore not only was unable to recover from flood damage via insurance, but further suffered a diminution of property value due to uninsurability stemming from the increasing likelihood of further damage. The insurance loss (reflecting the certainty of future damage) first plunges people into property purgatory; unaffordable physical damage, as the Ms R example shows, keeps them there. The result is a ratchet effect, with means to recovery diminishing as the person moves through the stages of property purgatory.

Exposed homeowners are in a situation of double peril from insurance retreat. First, for many people the withdrawal of private insurance is likely to catalyse these cascading impacts and economic losses long before significant physical damage from climate change. Second, property owners' usual loss recovery mechanism is through their insurance, whose very withdrawal has placed them in this position. Those affected will have to seek relief from somewhere else. They could choose to stay where they are and do nothing, or may not have the resources to seek relief, but ultimately their property will suffer the predicted physical damage and become unliveable. If there are no routes to resolve this lack of access to means, the implications are for a ghettoisation of foreseeably impacted locations, which will particularly affect the less wealthy who have no alternative place to live.

#### The role of local authorities

To whom will people turn? Their first thought is likely to be their local authorities – possibly their regional council, but more likely their territorial local authority (city or district council) (Local Government Act 2002, ss5(1), 21, 39). Regional and territorial authorities have differing responsibilities to mitigate the impacts of hazards such as land instability, flooding and earthquakes (Grace, Kilvington and France-Hudson, 2019; James, Gerard and Iorns, 2019; Palmer, 2012). These duties stem from their roles under statutes such as (inter alia) the Resource Management Act 1991 (RMA), the Public Works Act 1981, the Local Government Act and the Building Act 2004 (Cox, 2007; Palmer, 2012; Todd et al. 2016). We focus on territorial local authorities, because they will likely be the first point of contact for many homeowners confronting property purgatory.

Territorial local authorities are expected to manage risk speculatively; this is very clear in the statutory language that confers and details their powers and duties. They are required to understand and anticipate to a reasonable degree the level of hazard risk ahead of permitting potential subdivisions, land uses and new structures (RMA, s31(1)(b)(i)). Their duties also

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include administering building safety standards and civil defence emergency management (Building Act 2004; Local Government Act, s48J(1)(a)).

Territorial local authorities thus have tools to avoid future risky development, and indeed may have an obligation to do so where it is supported by expert information (RMA, s35(5)(j)). Some have already included hazard lines on planning maps to indicate areas at risk from climate change impacts. Rules for the hazard areas may, for example, prevent new subdivision, require minimum floor levels, or even prevent new structures altogether. Territorial local authorities also issue land information memoranda (LIMs) to advise potential purchasers of risks, and issue building certificates to confirm compliance of new buildings with required standards.

However, these mechanisms do not apply to hazards faced by existing buildings. These have existing use rights under the RMA (s10). Unless a building is unsafe, or residents are at immediate risk of harm, councils do not appear to have any responsibility for assisting owners in

property purgatory (Building Act 2004, s129(1)(a)).

Indeed, territorial local authorities may unintentionally cast property owners into the first stages of property purgatory due to the requirement that they make the public aware of the exposure of property to future damage. These actions, while falling squarely within their mandate, will ultimately have a ripple effect on the insurability or at least property values of those in the affected areas (*Weir v Kapiti Coast District Council*, 2015; *Smaill v Buller District Council*, 1998). Territorial local authorities have reason to be cautious in this space while the specifics of their responsibilities regarding climate change-related damage remain undefined although potentially within the scope of their more general responsibilities under the Local Government Act (s10(1)(b)).

#### The role of the state

Given the absence of any clear role for territorial local authorities with respect to losses faced by owners in property purgatory, does the state have a role? New Zealand has a well-established mechanism for loss recovery from some natural hazards, but this does not appear to apply to foreseeable damage from climate change.

Public insurance for earthquakes first began in 1944. The current form of the Crown entity the Earthquake Commission (EQC) was established in 1993 'to administer the insurance against natural disaster damage provided under this Act' (Earthquake Commission Act 1993, s5(1)(a)). EQC is a public institution that provides relief to those affected by damage caused by 'earthquake, natural landslip, volcanic eruption, hydrothermal activity, or tsunami; or natural disaster fire'. It also includes flood damage, but only to residential land, not residential buildings (s2(1)).

Its applicability to those suffering loss from property purgatory seems unlikely, especially as it clearly would not apply to the first three stages of property purgatory, nor to stage-four damage to dwellings from storm or flood. Furthermore, the Earthquake Commission Act permits EQC to limit its own liability in relation to flood damage (schedule 3, s5). Notably, it limits liability where the damage and loss is likely to be

recurring (schedule 3, s4(2)). Considering the scale of projections of damage to property associated with coastal climate change hazards, and in light of the statutory provisions guarding against potential indefinite liability, it is likely that loss recovery for any stage of property purgatory would be completely out of scope.

The role of EQC arguably reflects a national consensus regarding collectivisation of the risk from natural hazards. The Accident Compensation Corporation (ACC) similarly collectivises risk in the form of 'fair compensation for loss from injury' (Accident Compensation Act 2001, s3(d)). Climate change damage (both present and future) to property clearly falls outside a claim of 'personal injury' (s3).

Currently, therefore, and for the immediate future at least, New Zealand does not have a publicly funded instrument to assist property owners with climate change losses and damage (Boston and Lawrence, 2017; Kosolapova, 2011, p.189; Toomey, 2007). However, it is probable that the 'no fault' models of EQC and ACC, which collectivise risk and allocate funding on a no-fault basis, will inform the debate on future state-level responses to property purgatory. Boston and Lawrence argue the merits of public mechanisms that would fund compensation for climate change-related damage, and even managed retreat from highly exposed areas (Boston and Lawrence, 2017, p.24). Notably, they move the policy discussion beyond 'whether' public funding should be provided to 'how much, to whom, and on what conditions' (Boston, 2019a).

In sum, those in property purgatory who seek to recover their losses currently have nowhere to turn. The only possibility under current institutional and legal arrangements is a worsening outcome, as neither insurers, local authorities nor the state have the mandate to assist. New Zealand will have increasing numbers of property owners with no defined avenue for loss recovery (or help of any kind), and with property that is declining in liveability and value.

### Recovery by legal mechanisms

The novel premise of exposure to foreseeable damage rather than solely risk

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affects our reading of state and territorial authorities' obligations in natural hazard management. It is possible that statutory language around risk, as it is currently written, does not suit the novelty or character of the problems posed by climate change (Grace, Kilvington and France-Hudson, 2019).

While territorial authorities may affect property values by making public the severity of foreseeable damage to properties, they should not be blamed as the cause of property purgatory. As exposure predictions become more certain due to improving data, territorial authorities have a duty to act on that information; not to do so could be a recoverable cause of action (*Smaill v Buller District Council*, 1997; *North Shore City Council v Body Corporate 188529 And Ors CA*, 2010 (*Sunset Terraces*)). The undeveloped question is the existence of and/or extent of any duty towards owners in property purgatory, specifically regarding the 'proximity' (in the legal tort sense) of a territorial authority to property owners experiencing one or more of the stages of loss (Todd et al., 2016, 59.5.2.01). There is a possibility that New Zealand's legal landscape may reveal no such duty in statute or the common law. That said, such an assertion hardly waives the merit of enquiry. The nature of property purgatory means that the non-existence of a duty has

just as many implications as the existence of one; possibly even more so, as establishing the non-existence of a duty could be the final nail in the coffin for those seeking to recover their losses through formal means, as it lessens avenues to recovery by anything other than ad hoc measures. In this way, rather perversely, the dismissal of a novel duty at the outset does not bury the issue of property purgatory, but embalms it.

There will be no closure or progress with this issue without robust legal analysis. Parallels have been drawn with rulings determining public bodies' duty to take care for foreseeable earthquake risk (Iorns, James and Stoverwatts, 2020). The *Smaill v Buller District Council* case concerning a diminution of property value on the basis of local authority knowledge of earthquake exposure could be useful in considering how the action of local authorities' responses could result in claims of compensation for economic damage. That case is relevant because it recognises the implications of loss despite the absence of physical damage.

Issues relevant to property purgatory, including moral hazard and possible funding of relocation from the danger zone, are raised by the Quake Outcasts case. The ruling (which challenged the Crown's offers to buy back some land following the 2010–11 Canterbury earthquakes) extended a full price buyout offer to uninsured owners in the 'red zone', contrary to the earthquake recovery minister's plan (*Quake Outcasts v Minister for Canterbury Earthquake Recovery*, 2015). Despite providing for the uninsured claimants by ruling that the plan constituted an 'area approach', the wider implications are largely unresolved and it was made very clear that this in no way set a precedent for future cases. Similar questions are being raised in the context of damage due to sea level rise, but one-off, case-specific legal decisions will become increasingly unjustifiable as the number of cases increases (Tombs and France-Hudson, 2018).

### Loss recovery, wealth and fairness

At a broader level, property purgatory raises deeper questions about equity and fairness. Over 52% of New Zealand's wealth is from

property investment (Rashbrooke, 2015; Russel and Baucher, 2017). Foreseeable damage to property will eventually affect this key financial pillar of the country. Those who are less wealthy (especially those whose sole asset is a mortgaged dwelling) will be disproportionately affected by property purgatory, and this will exacerbate existing wealth inequalities. The less wealthy are also less able to mount legal challenges that might help legally define unanswered questions about loss recovery in this context.

Given the potential scale of climate change impacts, it is inevitable that some will argue for default to individual liability rather than a collective risk approach which will involve cost sharing through rates or taxes. Those arguing for strict individual liability with no option to recover losses would emphasise how people in exposed property have made a bad investment, property purgatory being just a consequence of their poor judgement. Though somewhat lacking in compassion, this is an understandable reaction (Neill and Neill, 2012). People are cautious with public money and want to see huge public projects thoroughly justified on a practical, fiscal and principled basis. Topics such as the extent of individual responsibility, whether to distinguish between informed owners and those who bought their property prior to the hazard exposure being public knowledge, and how to navigate potential moral hazard must be no small part of the discussion. Approaches will differ in how the exposure and consequences should be shifted to other groups, either socio-economic or generational (Boston, 2019b; Ellis, 2018). A conversation about responsibility is

necessary and inevitable (Boston and Lawrence, 2017; Fleming et al., 2019; Storey et al., 2015) and must incorporate consideration of fairness, equity and responsibility (Posner and Weisbach, 2010; Sovacool, Linnér and Goodsite, 2015).

Although this article has mainly focused on homeowners, the issue of property purgatory will also affect marae, community facilities, commercial property, rural property, reserves and other categories of property. The moral and financial arguments for shared responsibility will likely be stronger for some types of property than for others. For example, public infrastructure will have inherently different factors to consider as opposed to residential or commercial property. Communities will also be affected more generally as residential relocations and environmental damage start to have an impact on New Zealanders' strong attachments to land, place and community (Stephenson et al., 2018).

The foreseeable damage from climate change also raises an important issue too large to be covered in this article, regarding how local authority and Crown liabilities and responsibilities interact with obligations set out in the Treaty of Waitangi (Productivity Commission, 2019, pp.78–9; Local Government Act, ss14, 81(1)(a); RMA, s58M(a)). This will no doubt (and rightly so) extend to the ambit of local authorities in administering and operationalising climate change adaptation (Iorns, 2020; Todd et al., 2016).

### Conclusion

This article has identified and described a troubling novel phenomenon: property purgatory. It arises from the fact that

climate change hazards are shifting from 'risks' to 'foreseeable damage'. Once damage is foreseeable, insurance loss is very likely – the first stage of property purgatory. This may in many cases lead to the second stage of property purgatory, loss of mortgage. The third stage is loss of property value and thus the financial means to relocate. The fourth stage, involving physical damage from the hazard, may occur at any time during this process or subsequently. People in property purgatory are stuck, and currently there are no mechanisms to assist them to move on and even partially recover their losses.

There are property owners who have, or will have, a significant barrier to their ability to relocate away from an unacceptable housing situation. At a legal theory level, this raises questions about whether public bodies do or should have responsibilities for those facing foreseeable damage to their property. Until an approach to combat property purgatory is found, the atmosphere of uncertainty will immobilise those unfortunate enough to be caught in it, and existing inequities will be magnified.

Undeniably, the costliest option is to do nothing. Inaction under the circumstances posed by climate change will lead to people becoming entrenched in increasingly impoverished circumstances, and suffering the consequences in all aspects of their lives. Much work is required to identify and examine existing tools in law and policy that could address the stages of loss characterising property purgatory in order to prevent the worst-case scenario.

<sup>1</sup> We realise not all properties have mortgages and this stage will not apply to everyone moving through the phases of property purgatory. Additionally, it still is not clear how banks will respond to these circumstances.

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