

My idea for a strategic environmental litigation is to bring a case that re-establishes what is known as the Public Trust Doctrine, the common law principle that the Government holds certain of the nation's natural resources – the air, the rivers, the seas, the soil – on Trust for the benefit of all citizens, today and in the future.

To understand how this might work, we will start with a short story about a very intrepid swimmer, a lady known Melissa Compton.

In June this year Ms Compton, a 39 year old intensive care nurse from the Royal Shrewsbury Hospital set out to swim to the entire length of the River Severn, some 220 miles from its source in a peat bog in the Cambrian Mountains, to the mighty Bristol Channel.

I noticed the story on the BBC because I went to school in Shrewsbury, many moons ago, and we were forever doing school geography projects about the Severn; flow rates, erosion, oxbow lakes, and the like.

Unfortunately for Ms Compton, she had to temporarily suspend her charity swim after ingesting so much sewage she needed to be hospitalised.

"It was grey, it was murky, there was lots of debris in the water, and I could see toilet roll," she told reporters. "It's 2019, we should be able to clean up all of the waste we produce."

Something about that sentence really struck a chord with me, and on doing a bit of research I found out that just 5% of all the rivers in the Severn Basin are deemed to be at a 'good' ecological status.

That means 95% of rivers feeding the Severn are polluted, are not healthy, are, forgive the vulgarity, shitty.

At a national level 85% of all rivers in England and Wales are polluted. Two years ago, according to the World Wildlife Fund, 40% were polluted. Rivers are being used as open sewers, as poor Ms Compton found out to her detriment.

How can this be, in a modern prosperous nation like the United Kingdom, which prides itself on our preservation of the countryside? Who's in charge, and why aren't they doing anything about this?

The Environment Agency blames the water companies, and proudly points to the record fines it levied in 2018 on Southern Water for fouling up the Thames, the nation's most polluted river. The water companies say they've invested billions in environmental protection, and that nature is flourishing.

The government says it has a target that by 2021 at least one in five rivers will be ecologically good, and that that figure will shoot up to four in five rivers by 2027, just six years later, in order to meet the EU's Water Framework Directive.

Having scrutinised the government's plans, the World Wildlife Fund found that meeting the 2027 target would be 'very unlikely'.

The government says it will be held to account once the newly formed Office for Environmental Protection gets up and running, and once the new Environment Bill, the first in 20 years, is passed after we leave the EU.

But that bill will not make water resources management plans a statutory measure. In other words, the patchwork approach will continue between water companies, environment agency, and ministry. The classic English hodgepodge of different organisations doing their bit according to their job description, but without, it seems, anyone in overall control, anyone taking overall responsibility.

Which got me thinking. Who actually owns the River Severn? Who is responsible for the whole river, as a national asset, a piece of natural capital, from the Cambrian to the Bristol Channel. When Ms Compton was swimming the length of the Severn, whose river was she swimming in?

Is it the Queen's? The Crown Estate's? The government of the day? DEFRA's? Or the citizen taxpayers of the kingdom? It seems nobody really knows. Someone asked the Environment Agency who owns the Severn River under a Freedom of Information request, and the answer came back blank, according to their internet post.

In medieval times they knew the answer: The King owned all the rivers, and all the seashore, and all the land, and possibly all the air, but not for his exclusive possession, but rather he held those all for all his subjects and promised to keep them free for all, subject to public trust.

The public trust doctrine arose in Roman law, and has been called 'the oldest doctrine of environmental law'.

In the 1299 case (as yet not over ruled) of *Juliana the Washerwoman* who challenged the mayor of Winchester for cutting her off from the watercourse and she grated relief by King Edward I who held that water was available to all, and should not be polluted by anyone.

In the US, the public trust doctrine has been argued in dozens of cases since the 1970s, when the idea was brought to widespread attention by an academic article by Joseph Raz, that is one of the 100 most cited law reviews.

Raz argued that there are certain interests like air and water that are of such importance to citizens that they cannot be subject to private ownership, and so must be rightly considered as held in trust by the state for the public. It is the duty of the government to promote the interests of the public and therefore to preserve the common environment.

The point has recently been argued in the ground breaking American case, another *Juliana*, brought by teenagers from Oregon who are suing the US President and departments of state, for alleged violations of their constitutional rights because those organs of state have exercised sovereignty over the country's atmosphere and fossil fuel resources in a way that deliberately

allowed CO2 to build up to dangerously unsustainable levels, and threaten the claimants rights to life, freedom and property.

They also argued the defendants had violated obligations to hold certain natural resources in trust for the people of today and future generations.

Back over here, the public trust doctrine came to the attention of Lord Carnwath in 2015 Supreme Court case *Newhaven*. A case concerning public rights of access and recreational use of coastal beaches for, you guessed it, swimming.

The case came down on the side of the harbor excluding the public from the beach, due to statutory provision. It also chose not to overrule the only directly applicable case, the 1821 case of *Blundell and Catterall*, another swimming case, where the majority ruled that, absent a right established by usage and custom, there was no 'common law right for all the King's subjects to bathe in the sea and to pass over the seashore for that purpose'.

However, in a dissenting opinion, Justice Best said: "The shore of the sea is admitted to have been at one time the property of the King. From the general nature of this property, it could never be used for exclusive occupation. It was holden by the King, like the sea and the highways, for all his subjects. The soil could only be transferred, subject to this public trust".

Reviewing the more extensive case law on the public trust doctrine from the US, Lord Carnwath found it to be of "particular interest as an illustration of how the law in this country might have developed (and might yet develop) if the view of Best J had prevailed over that of the majority."

So, my case for The Good Law Project is let's over rule *Blundell*, let's follow Justice Best's line, let's return to *Juliana the Washerwoman*. Let's take Lord Carnwath at his word when he urges the judiciary to develop 'common laws of the environment' based on principles of sustainability.

Let's not wait around for Michael Gove and Chris Grayling and Boris Johnson to come up with environmental laws fit for the 21<sup>st</sup> century. Let's fill the giant hole that's going to be left when the UK leaves the EU by restoring the public trust doctrine to the heart of English common law.

In order to do that, let's bring a class action law suit by citizen tax payers and users of the River Severn against Her Majesty's Government for breach of its fiduciary duties under the public trust doctrine for acting, or failing to act, in ways deliberately harmful to the enjoyment of the natural capital of the River Severn for the Public Trust's life beneficiaries, the citizens of today, and against the interests in remainder of the Public Trust's future beneficiaries, the generations of citizens to come.

Let's subject the government to a fiduciary duty of environmental protection, a positive obligation to take active steps to secure public environmental rights, so that next time Melissa Compton wants to go for a swim in the Severn, she'll know there's been a breach of trust if she finds that toilet roll still floating around.