

Research Project by Hugh Macleod

'...the possibility of damages for those whose interests Urgenda represents, including current and future generations of Dutch nationals, is so great and concrete that given its duty of care, the state must make an adequate contribution, greater than its current contribution, to prevent hazardous climate change.' Hague District Court, June 23rd, 2015.

In light of the above landmark ruling - which found the Dutch government owed a duty of care to its citizens over action to mitigate climate change - critically evaluate the chances and possible outcomes of bringing a similar action in the English courts, with particular reference to *locus standi* under tort, public and international law.

Introduction

Who is responsible for the harms of climate change, now and as they worsen into the future? A primary school pupil would likely find the correct answer: Those who polluted the most, and those who had the power to stop them, but didn't.

Can the law clarify liability as succinctly?

In Holland it took a few tries. Despite the grave threat rising seas pose to a nation one-eighth below sea level,¹ the Hague District Court agreed with the Dutch government that its reduced greenhouse gas (GHG) emissions target did not make it liable to a local NGO, neither under its international treaty obligations, nor the European Convention on Human Rights (ECHR), nor under Article 21 of the Dutch Constitution, which obliges authorities, 'to keep the country habitable and to protect and improve the environment.'²

Yet it was liable under a simple duty of care to its citizens. For the first time in environmental law, a state's private law obligation to its citizens was set as a legally binding threshold of GHG emissions.

'In case of a reduction below 25-40%' by 2020, the State, 'fails in its duty of care and therefore acts unlawfully,' said the Hague court. In pursuing a target of only 17%, the State had acted, 'negligently and therefore unlawfully towards Urgenda'.³

The Court ruled the State must ensure Dutch emissions in the year 2020 will be at least 25% lower than those in 1990.⁴ This was ruled the minimum requirement for keeping global warming below 2C, the limit to dangerous climate change set by the United Nations Framework Convention on Climate Change (UNFCCC).⁵

While the State had discretion over fulfilling its duty of care, 'this discretionary power vested in the State is not unlimited: the State's care may not be below standard'.⁶

¹ Vanessa McKinney, 'Sea Level Rise and the Future of the Netherlands' (2007) ICE Case Studies 212

² *Urgenda Foundation and 886 Individuals v The State of the Netherlands (2015) Rechtbank Den Haag C/09/456689/HA ZA 13-1396 (English translation)* [4.42] [4.45], [4.52]

<<http://www.urgenda.nl/en/climate-case/legal-documents.php>> accessed 17 April 2017

³ *ibid* [4.86], [4.93]

⁴ *ibid* [5.1]

⁵ *The United Nations Framework Convention on Climate Change* (Rio de Janeiro 1992)

<https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf> accessed 19 April 2017

⁶ *ibid* [4.53]

Defences that Government, 'cannot be forced at law to pursue another climate policy', that it 'cannot be seen as one of the causers of climate change', that a 'high level of CO2 reduction can be expected to be achieved in the future through CO2 capture and storage', and that an 'additional reduction would hardly affect global emissions,'⁷ were all rejected.

The 'excess greenhouse gas emission in the Netherlands that will occur between the present time and 2020 without further measures, can be attributed to the State,' the Court ruled. Echoing the landmark US ruling in *Massachusetts v EPA*⁸, the harms associated with climate change were both 'imminent' and 'severe'.

In the wake of *Urgenda*, the Dutch people might now be considered as enjoying a substantive human right to a sustainable environment, an *a priori* duty of care obliging their Government to tackle climate change. (For the purposes of this paper, a 'sustainable environment' means one in which global warming remains under 2C.)

A 2017 report by the Committee on Climate Change (CCC) found sea level around Britain has risen 15 to 20 centimetres since 1900. Flooding and coastal change, risks to health, shortage of public water supply, risks to domestic and international food supply, and new and emerging pests and diseases are listed as among the top climate change risks to the UK.⁹

If the Government fails to meet its targets for reducing GHG emissions, is it merely another political failure - on a par with other important public issues such as NHS funding¹⁰ - or could the courts, as in Holland, set a threshold to hold the executive liable to citizens for the climate change harms they suffer as a result?

This paper will attempt to trace the contours of the English legal landscape in which such a question may one day resolve.

First, the UK's international treaty obligations regarding climate change will be considered in terms of the liability they impose on the Government and what rights, if any, they bequeath to its citizens.

Next, leading judicial review cases concerned with climate change will be assessed as illustrative of the public law avenues open, and the spaces closed, to courts and claimants seeking to assert rights to a sustainable environment.

Finally, the court's evolving approach to duty of care and causation in private law tort claims will be shown to have been radical in the service of public policy in cases of individuals harmed by pollution, whose precise origin was impossible to trace, opening a possible way forward for climate change litigants.

In each branch of law the prospects for *locus standi*, that is the ability of the claimant to demonstrate sufficiently close connection with an abuse of power to justify bringing legal proceedings¹¹, will be indicative of the margin of the duty of care owed by the State and the concomitant 'climate right' of the individual.

International law

The UK is a Party to the two principle treaties aimed at tackling climate change.

The UK ratified the Kyoto Protocol, the world's first climate change treaty, in May 2002, which obliged it to meet a legally binding commitment to reduce GHG

⁷ *ibid* [4.2], [4.66], [4.72], [4.78]

⁸ *Massachusetts et al. v Environmental Protection Agency et al.* (2007) Supreme Court of the United States 549 US 415 F [1a] [1b] <<https://www.law.cornell.edu/supct/html/05-1120.ZS.html>> accessed 17 April 2007

⁹ Committee on Climate Change, *UK Climate Change Risk Assessment 2017 Synthesis Report 2*

¹⁰ Denis Campbell and Sarah Marsh, 'Desperate Hospitals Beg Doctors To Take On Extra Shifts - At £95 An Hour' (*the Guardian*, 2017) <https://www.theguardian.com/society/2017/apr/14/desperate-hospitals-beg-doctors-to-take-on-extra-shifts-at-95-an-hour?CMP=Share_iOSApp_Other> accessed 19 April 2017

¹¹ Alex Carroll, *Constitutional and Administrative Law* (8th edn, Pearson 2015) 676

emissions by 12.5% below 1990 levels by 2012.¹² The UK exceeded this target, but a breach of a specific commitment under Kyoto – the UK is obligated to reduce its emissions by a total of 92%¹³ – could give rise to state liability under compliance mechanisms for Annex 1 parties. The case would eventually be heard before the International Court of Justice (ICJ), but no such case has yet been brought due to the political ramifications.¹⁴

Kyoto has now been overtaken by the global climate treaty negotiated under the UNFCCC. The UK is an Annex 1 Party to the FCCC which London ratified in December 1993 and which entered into force in March 1994. The 2015 Paris Agreement was the result of the 21st Conference of the Parties (COP) to the UNFCCC and defines how countries will implement their UNFCCC commitments after 2020. The UK ratified the Paris Agreement in November 2016.

Article 4(1) of the UNFCCC obliges the UK to vague commitments to promote and cooperate in the development of technologies that control anthropogenic GHG emissions. Article 4(2) obliges Government to, 'take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of GHGs and protecting and enhancing its GHG sinks and reservoirs.'¹⁵

There is little to no scope for enforcement of treaty obligations by individuals or concerned groups under the UNFCCC. Under Article 14(1), only a state or international organisation having the requisite authority could bring a case to the ICJ and even then,

"The difficulty would be the crushingly vague nature of the obligations, invariably drafted in such a way as to make it impossible to argue that any particular provision gives rise to a cause of action".¹⁶

A British NGO seeking to replicate *Urgenda* would have no standing either before the ICJ, or the International Tribunal for the Law of the Sea (ITLOS), the two international courts Sands identifies as most likely to rule on climate policy.¹⁷

Indeed, the ICJ has yet to issue a finding of fact on the science linking anthropomorphic GHGs to climate change, nor to rule that the 2C target now reflects an obligation under international law. It has not moved on from its 1996 ruling that the 'general obligation' of States to control pollution is now, 'part of the corpus of international law relating to the environment'.¹⁸

Hailed as 'the world's greatest diplomatic success',¹⁹ the landmark Paris Agreement commits the UK and others to 'holding the increase in the global average temperature to well below 2C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5C above pre-industrial levels'.²⁰

The Agreement, which went into effect in November 2016, contains only legally binding procedural commitments to 'prepare, communicate and maintain'²¹

¹² <https://unfccc.int/files/national_reports/initial_reports_under_the_kyoto_protocol/application/pdf/report_final.pdf> accessed 19 April 2017

¹³ *Kyoto Protocol to the United Nations Framework Convention on Climate Change* (Kyoto, 1997) Annex B

¹⁴ Richard Lord, *Climate Change Liability* (1st edn, Cambridge University Press 2012) 481

¹⁵ *The United Nations Framework Convention on Climate Change* (Rio de Janeiro 1992) Articles 4(1), 4(2)

https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/convenng.pdf accessed 19 April 2017

¹⁶ Phillippe Sands QC, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law' (Public Lecture at the United Kingdom Supreme Court 2015) 13

¹⁷ *Ibid*, 10

¹⁸ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996) ICJ, para 29

¹⁹ Fiona Harvey, 'Paris Climate Change Agreement: The World's Greatest Diplomatic Success' (*the Guardian*, 2017) <<https://www.theguardian.com/environment/2015/dec/13/paris-climate-deal-cop-diplomacy-developing-united-nations>> accessed 19 April 2017

²⁰ *The Paris Agreement of the United Nations Framework Convention on Climate Change 21st Conference of the Parties* (Paris 2015) Article 2(1)(a)

<https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf>

²¹ *ibid* Article 4(2)

successive emissions targets, known as Nationally Determined Contributions (NDCs) for five-year periods.

Each Party's NDC should 'reflect its highest possible ambition'²² but achievement of the target itself is not a legally binding obligation. Rather, Parties are legally bound to have their NDCs accounted for through an 'enhanced transparency framework'²³ that includes assessment by an expert committee that is 'non-adversarial and non-punitive.'²⁴

While still a member of the EU, the UK's NDC falls under the general commitment of the EU to achieve 'at least 40% domestic reduction in GHG emissions by 2030 compared to 1990.'²⁵ After it leaves the EU, by end March 2019, the UK will be required to submit its own NDC to the UNFCCC.

Fifteen months on from the Paris Agreement, a report by Carbon Market Watch found only three EU member states were on course to meet their treaty obligations, and the UK was not one of them.²⁶

Furthermore, global temperatures have already risen nearly 1C since 1880²⁷ and analysis of the NDCs under the Paris Agreement has found that even if fully implemented, they will lead to an estimated 2.7C rise by the end of the century.²⁸

At that level, according to a 2012 report by the World Bank, there is 'a risk of triggering nonlinear tipping elements' such as 'the disintegration of the West Antarctic ice sheet leading to more rapid sea-level rise' or 'Amazon dieback drastically affecting ecosystems' which would impact 'entire continents.'²⁹

Could a British NGO bring a case in the English courts arguing the UK's commitments under Paris do not go far enough to secure a sustainable environment? As a dualist state, a treaty ratified by Government does not alter domestic law unless and until it is incorporated into national law by legislation.

Courts will presume an intention by the Government to meet its treaty obligations, and those obligations may be persuasive on its reasoning. The UK's ratification of the Aarhus Convention, requiring public participation in environmental decision-making,³⁰ was referenced in a 2007 case as obliging the Government to 'the fullest public consultation'³¹ over nuclear energy policy.

But it is more generally true that the UK's international law obligations relating to climate change have 'scarcely' been referred to directly by the courts.³² So a citizen would have no *locus standi* to challenge government climate policy based on a treaty obligation.

²² *ibid* Article 4(3)

²³ *ibid* Article 13(1)

²⁴ *ibid* Article 15(2)

²⁵ 'Submitted Intended Nationally Determined Contributions (Indcs) | Center For Climate And Energy Solutions' (*C2es.org*, 2017) <<https://www.c2es.org/international/2015-agreement/indcs>> accessed 19 April 2017

²⁶ Arthur Neslen, 'Only Sweden, Germany And France Among EU Are Pursuing Paris Climate Goals, Says Study' (*the Guardian*, 2017) <<https://www.theguardian.com/environment/2017/mar/28/only-sweden-germany-france-pursuing-paris-climate-goals-study>> accessed 19 April 2017

²⁷ 'Landmark Climate Change Agreement To Enter Into Force' (*UNFCCC*, 2017)

<<http://newsroom.unfccc.int/unfccc-newsroom/landmark-climate-change-agreement-to-enter-into-force/>> accessed 19 April 2017

²⁸ 'World Energy Outlook 2016' (*Iea.org*, 2017)

<<http://www.iea.org/newsroom/news/2016/november/world-energy-outlook-2016.html>> accessed 19 April 2017

²⁹ 'Climate Change Report Warns Of Dramatically Warmer World This Century' (*World Bank*, 2017) <<http://www.worldbank.org/en/news/feature/2012/11/18/Climate-change-report-warns-dramatically-warmer-world-this-century>> accessed 19 April 2017

³⁰ *Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters* (Aarhus 1998)

³¹ *R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin) [49], [51]

³² Richard Lord, *Climate Change Liability* (1st edn, Cambridge University Press 2012) 477

Though soon to be irrelevant to British citizens, Article 230(4) of the EC Treaty requiring claimants demonstrate 'direct and individual concern'³³ has been similarly restrictive on campaign groups establishing *locus standi* to challenge EU environmental policy.³⁴

Public law

Locus standi under judicial review, the public law principle whereby decisions of public bodies may be reviewed by the courts,³⁵ has progressed rapidly from the infamous 1989 case of *Rose Theatre Trust*³⁶ which ruled the public had no standing to challenge the Secretary of State for the Environment, creating the 'legal anathema'³⁷ of an unreviewable decision.

Four years later, the Administrative Court found Greenpeace had standing as a 'responsible body with a valid interest in the matters raised and a substantial body of support in the area that might not otherwise have a voice.'³⁸ (Greenpeace was free to challenge a decision over dumping radioactive waste from Sellafield, but the successful defence was one of statutory provision.)

The court stretched standing even further for NGO World Development Movement, challenging government financing of a hydropower station in Malaysia. No party in the UK was directly affected, but given the 'likely absence of any other responsible challenger' and the 'importance of vindicating the rule of law' the court found WDM had 'sufficient interest'.³⁹

Thus, a British citizen seeking to challenge the State over climate change may well have their day in court, but an analysis of recent case law demonstrates the procedural rights safeguarded under judicial review are unlikely, as yet, to establish a substantive environmental right akin to the *Urgenda* case.

In 2007, Greenpeace succeeded in arguing Government's U-turn decision reintroducing nuclear power breached the public's 'legitimate expectation' for the 'fullest public consultation'.⁴⁰ The court ruled the consultation process 'very seriously flawed,' 'manifestly inadequate' and therefore 'procedurally unfair', but declined the request for a quashing order in favour of declaratory relief.

The government re-did the consultation and nine years later approved the GBP24.5 billion Hinkley Point C nuclear power station, likely to be the most expensive construction in history⁴¹ which critics warn is beset with risks.⁴²

Decision-making that took no account of the impact on climate change from a new concrete factory was not *Wednesbury* unreasonable,⁴³ according to the Court in the 2008 *Bassetlaw* case.⁴⁴

The threshold of *Wednesbury* is set high to allow Government a wide margin of discretion, but may not be an insurmountable barrier to climate-related cases,

³³ *Treaty establishing the European Community* (Nice, 2001) Part Five, Institutions of the Community, Title I: Provisions governing the institutions, Chapter 1: The institutions, Section 4: The Court of Justice, Article 230(4)

³⁴ *WWF-UK Ltd v Council of the European Union* [2009] ECJ C-355/08

³⁵ Civil Procedure Rules s.54

³⁶ *R v Secretary of State for the Environment Ex p. Rose Theatre Trust Co* [1990] 1 QB 504

³⁷ Karen Morrow, 'Worth the paper that they are written on? Human rights and the environment in the law of England and Wales' [2010] 1 JHRE 79

³⁸ *R v Inspectorate of Pollution Ex p. Greenpeace Ltd (No.2)* [1994] 4 All ER 329

³⁹ *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement*, [1995] 1 WLR 386

⁴⁰ *R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin)

⁴¹ 'What Is The Most Expensive Object On Earth? - BBC News' (*BBC News*, 2017)

<<http://www.bbc.com/news/magazine-36160368>> accessed 19 April 2017

⁴² 'Hinkley Point Is Risk For Overstretched EDF, Warn Critics' (*Ft.com*, 2017)

<<https://www.ft.com/content/78f1702a-79b7-11e6-97ae-647294649b28>> accessed 19 April 2017

⁴³ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223

⁴⁴ *R (on the application of Littlewood) v Bassetlaw District Council* [2008] EWHC 1812 (Admin)

including as it does the test of whether the public body has 'neglected to take matters into account which he ought to have taken into account.'⁴⁵

Subsequent case law decided in the wake of the Climate Change Act 2008 (CCA 2008) makes clear that impacts on climate change are very much matters which decision makers ought to take into account.

CCA 2008 establishes a duty on Government to report on policies for meeting its carbon budgets⁴⁶ and for all 'statutory undertakers' to assess the risks of climate change and actions taken.⁴⁷ Case law since CCA 2008 may be analysed in light of the key legally binding duties it sets out.

The most important is 'the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline.'⁴⁸ This target may be amended by order⁴⁹ but only after seeking advice from Parliament and the CCC⁵⁰, among others, and in the context of 'significant developments' in science or policy.⁵¹

The CCC, an independent body established by CCA 2008, advises the Secretary of State, who under the Act must set Carbon Budgets for five-year periods commencing from 2008.⁵² The first three Carbon Budgets set an emissions reduction target of 35% by the end of 2022. Responding to advice from the CCC, the 2009 Budget increased the interim 2020 target from 26% to 34%.

By the end of 2015, the CCC reported emissions had fallen to 38% below 1990 levels.⁵³ The fourth and fifth Carbon Budgets commit the UK to reductions of 50% by 2025, rising to 57% by 2030. The CCC states that meeting the fourth and fifth Budgets requires emissions to be reduced by an average of 2-3% per year across the economy from 2015 to 2030.⁵⁴

CCA 2008 does not provide for any sanctions for failure to meet its targets but as the targets are legally binding, Government is liable for judicial review.

A series of cases from 2009, however, demonstrated the Court's reluctance to rule in favour of climate policy when weighed against traditional government obligations to business and the economy.

Applicants in *Barbone* opposed the expansion of Stansted airport, arguing the minister had 'acted in breach of legitimate expectation' that 'all environmental impacts' would be taken into account, including increased GHG emissions. The court found no breach of the 1999 Town and Country Planning Regulations while making no mention of CCA 2008.⁵⁵

Just a year later, though, the Court found the minister's support for a third runway at Heathrow was a policy that was not 'immutable' but rather subject to review in light of climate change policy, symbolised by CCA 2008. However, the claimants' complaints about climate change 'did not require court intervention.' None of the issues relating to the impact on climate change from the expansion of Heathrow 'amounted to irrationality'.⁵⁶

⁴⁵ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223

⁴⁶ Climate Change Act 2008, s 14

⁴⁷ *ibid* s 70(1)(b)

⁴⁸ *ibid* s1(1)

⁴⁹ *ibid* s2(1)

⁵⁰ *ibid* s3(1)

⁵¹ *ibid* s2(2)

⁵² *ibid* s4

⁵³ Committee on Climate Change, *Meeting Carbon Budgets; 2016 Progress Report to Parliament*, 11

⁵⁴ *ibid* 11

⁵⁵ *Barbone v Secretary of State for Transport* [2009] EWHC 463 (Admin)

⁵⁶ *R (on the application of Hillingdon LBC) v Secretary of State for Transport* [2010] EWHC 626 (Admin)

The decisions in *Barbone* and *Hillingdon* contrast starkly with that of Austria's Federal Administrative Court⁵⁷ to block a third runway at Vienna-Schwechat airport, ruling recently that though the facility was of immediate economic benefit, it would increase national CO2 emissions by 2% by 2025, a figure at odds with the country's agreed national and international limits. The court relied both on the Paris Agreement, Austria's own Climate Protection Law and the environmental protection clause in the country's Constitution.⁵⁸

In *People and Planet*, an English court was asked, in the most direct way to date, to rule on the competing priorities of neo-liberal capitalism as opposed to climate change mitigation.

The NGO litigant proffered a seemingly common sense 'legitimate expectation': 'That when the Government exercises its powers, it does so with a view to preventing public money being spent on projects that have the most obviously detrimental impact on climate change.'⁵⁹

Having spent GBP45 billion of taxpayer's money bailing out Royal Bank of Scotland (RBS) HM Treasury was 70% shareholder. Given RBS's long history of investment in the fossil fuel industry,⁶⁰ should Government be expected to 'persuade or require'⁶¹ RBS to change its commercial lending practices?

The court found 'no arguable case' based on legitimate expectation from either government statements or commitments in the CCA. The Treasury's defence stated bluntly that 'nor was it the Government's aim to affect any wider changes in the institutions' policies, beyond promoting financial stability'.⁶²

Nine years on, Government still holds its 70% stake and RBS, through a series of disastrous policy decisions, has lost a further GBP58 billion, far exceeding its original bailout.⁶³

Would a future court case, presented with evidence of public taxes wasted on investments that fuel climate change, follow Justice Sales' judgment that, 'HM Treasury had a very wide discretion as to the matters which should be taken into account or left out of account in formulating its policy'?⁶⁴

Indeed, could recent Government policies abolishing subsidies to onshore wind farms,⁶⁵ hiking business rates on solar power companies six-fold⁶⁶, decreasing subsidies to rooftop solar panels by 64%⁶⁷ while increasing subsidies already in

⁵⁷ Frances Lawson, 'Is litigation the new frontier of climate change law?', (International Climate Change law blog, Six Pump Court, 13 March 2017) <<http://www.6pumpcourt.co.uk/2017/03/is-litigation-the-new-frontier-of-climate-change-law>> accessed 19 April 2017; 'Climate Law Blog » Blog Archive » No 3Rd Runway At Vienna Airport Because Adverse Climate Impacts Outweigh Short-Term Economic Benefits: Austrian Court' (*Blogs.law.columbia.edu*, 2017) <<http://blogs.law.columbia.edu/climatechange/2017/02/10/no-3rd-runway-at-vienna-airport-because-adverse-climate-impacts-outweigh-short-term-economic-benefits-austrian-court/>> accessed 19 April 2017

⁵⁸ The Austrian Constitution Article 10(12)

<https://www.constituteproject.org/constitution/Austria_2013.pdf?lang=en> accessed 19 April 2017

⁵⁹ *R (on application of People & Planet) v HM Treasury* [2009] 3020 EWHC (Admin)

⁶⁰ 'RBS Adopts Climate Rhetoric While Financing Global Warming' (*Banktrack*, 2017)

<http://www.banktrack.org/show/news/rbs_adopts_climate_rhetoric_while_financing_global_warming> accessed 19 April 2017

⁶¹ *R (on application of People & Planet) v HM Treasury* [2009] 3020 EWHC (Admin)

⁶² *ibid*

⁶³ Jill Treanor, 'Losses Of £58Bn Since The 2008 Bailout – How Did RBS Get Here?' (*the Guardian*, 2017) <<https://www.theguardian.com/business/2017/feb/24/90bn-in-bills-since-2008-how-did-rbs-get-here-financial-crisis->> accessed 19 April 2017

⁶⁴ *R (on application of People & Planet) v HM Treasury* [2009] EWHC 3020 (Admin)

⁶⁵ 'Earlier End To Subsidies For New UK Onshore Wind Farms - BBC News' (*BBC News*, 2017)

<<http://www.bbc.com/news/business-33177025>> accessed 19 April 2017

⁶⁶ 'UK Government Must Now Show Their Commitment To The Paris Agreement Through Climate Action On The Ground - Gardiner' (*Labour Press*, 2017)

<<http://press.labour.org.uk/post/153298886599/uk-government-must-now-show-their-commitment-to>> accessed 19 April 2017

⁶⁷ 'UK Announces Cut In Solar Subsidies - BBC News' (*BBC News*, 2017)

<<http://www.bbc.com/news/business-35119173>> accessed 19 April 2017

excess of GBP27 billion to fossil fuel companies,⁶⁸ and opening up the country to fracking⁶⁹ while simultaneously cancelling support for the carbon capture and storage the CCC says is of 'critical importance to meet the UK's climate targets at least cost'⁷⁰ ever be considered 'Wednesbury unreasonable' in an era of 'record-breaking'⁷¹ climate change?

It appears, for now at least, that under public law they could not.

Current Government policies produce a 'gap of around [...] 47% of the required emissions reduction' to meet the fifth Carbon Budget, according to the CCC.⁷² A leaked memo from the Energy Secretary predicts the UK falling 25% short on renewable energy commitments by 2020.⁷³ The solar rate hike brought installation of new panels to a six-year low⁷⁴ while a BBC audit of energy policy listed 15 government policy changes that would likely increase CO2 emissions.⁷⁵

Yet in *Solar Century Holdings*, a judicial review of Government's decision to end statutory support to renewable electricity generation two years earlier than promised, found no breach of legitimate expectation or fairness, nor any misuse of power.⁷⁶

The case is illustrative of the narrow ground on which such judicial reviews turn. The judgment is peppered with classic terminology of public law – 'discretion', 'rationality', 'reasonableness' – but makes no mention, in grounds for reasonable Government decision making, of how a premature end to renewables subsidies could impact GHG emissions, nor how the decline in subsidies to green energy contrasts with an increase in the double level of subsidies to fossil fuels.⁷⁷

The Court ruled that repeated assurances by the Executive that subsidies would run until 2017 were non-binding as they are 'constitutionally discrete' from the will of Parliament.⁷⁸ 'As to this a representation that a policy will continue until a specified date is not the same as a promise that it will *never* be changed even if circumstances change.'⁷⁹ The appeal case against the dismissal of judicial review failed in 2016.⁸⁰

Judicial reluctance to venture into the wider issues of climate change was again confirmed in a case on fracking brought by Friends of the Earth and some 2,000 local residents. Claimants argued the local council unlawfully failed to take into account the 'material indirect/secondary/cumulative climate change impacts'

⁶⁸ 'Empty Promises: G20 Subsidies To Oil, Gas And Coal Production' (ODI, 2017) <<https://www.odi.org/publications/10058-empty-promises-g20-subsidies-oil-gas-and-coal-production>> accessed 19 April 2017

⁶⁹ 'Go-Ahead For Gas And Oil Exploration Could Open Swathes Of UK Up To Fracking, Say Campaigners' (ITV News, 2017) <<http://www.itv.com/news/2015-12-17/green-light-for-gas-and-oil-exploration-could-open-swathes-of-uk-up-to-fracking-campaigners-warn/>> accessed 19 April 2017

⁷⁰ Committee on Climate Change, *Meeting Carbon Budgets; 2016 Progress Report to Parliament* 14

⁷¹ Damian Carrington, 'Record-Breaking Climate Change Pushes World Into 'Uncharted Territory'' (*the Guardian*, 2017) <<https://www.theguardian.com/environment/2017/mar/21/record-breaking-climate-change-world-uncharted-territory>> accessed 19 April 2017

⁷² Committee on Climate Change, *Meeting Carbon Budgets; 2016 Progress Report to Parliament* 13

⁷³ 'Energy Secretary Amber Rudd 'Misled' Mps On Renewables - BBC News' (*BBC News*, 2017)

<<http://www.bbc.com/news/science-environment-34774145>> accessed 19 April 2017

⁷⁴ 'Silence From Chancellor Leaves Rooftop Solar Facing Unprecedented Business Rate Hike - Solar Trade Association' (*Solar Trade Association*, 2017) <<http://www.solar-trade.org.uk/silence-chancellor-leaves-rooftop-solar-facing-unprecedented-business-rate-hike/>> accessed 19 April 2017

⁷⁵ 'Government Energy Policies 'Will Increase CO2 Emissions' - BBC News' (*BBC News*, 2017)

<<http://www.bbc.com/news/science-environment-34767194>> accessed 19 April 2017

⁷⁶ *Solar Century Holdings Ltd & Others v Secretary of State for Energy and Climate Change* [2014] EWHC 3677 (Admin)

⁷⁷ Tom Bawden, 'The UK Government Pays £6Bn A Year In Subsidies To The Fossil Fuel Industry' (*The Independent*, 2017) <<http://www.independent.co.uk/news/uk/politics/uk-government-pays-6bn-a-year-in-subsidies-to-fossil-fuel-industry-a6730946.html>> accessed 19 April 2017

⁷⁸ *Solar Century Holdings Ltd & Others v Secretary of State for Energy and Climate Change* [2014] EWHC 3677 (Admin) [66]

⁷⁹ *ibid* [72]

⁸⁰ *Solar Century Holdings Ltd v Secretary of State for Energy and Climate Change* [2016] EWCA Civ 117

arising from burning gas at Knapton power station.⁸¹ The Court ruled the council had acted lawfully in licensing fracking at the particular site without taking into account the environmental impacts of burning the gas at Knapton since that was 'some distance away' and governed by its own planning permission and environmental permit.⁸²

Furthermore, the council had acted lawfully in not requiring the operator to pay a financial bond in relation to any long-term environmental pollution impacts arising from the fracking.⁸³

Private law

To date, there have been no significant private law claims at English law directly on allegations of actual or anticipated damage from climate change.⁸⁴ Under the Crown Proceedings Act 1947⁸⁵ Government became liable in tort as if it were a private person and so may be sued by another legal person, just as in the *Urgenda* case.

While the tort of 'statutory duty' exists, the two principal torts in which a direct climate change-related claim is most likely to be brought are 'nuisance' and 'negligence'.

An assessment of the tests and relevant case law developed in the two types of tort suggest that while a successful climate change case, either against Government or a third-party polluter, may not be imminent, the existing jurisprudence certainly opens possibilities for such.

Private nuisance is confined to injuries to proprietary interests cause by another's unreasonable use of land, and may not be expanded to cover mere occupiers of homes, as the decision in *Hunter*⁸⁶ to overrule *Khorasandjian*⁸⁷ confirmed. Likely claimants would be large property owners, including local government bodies, suing on the basis of proprietary losses aggregated over time.⁸⁸

It was just such claimants, twelve US states and several cities, who brought suit against the Environmental Protection Agency in the landmark Supreme Court case of *Massachusetts*. The Court ruled by 5-4 that 'the harms associated with climate change are serious and well recognized' and that EPA's actions in refusing to regulate GHG emissions, despite its statutory duty to control air pollution, were 'arbitrary, capricious, or otherwise not in accordance with law'.⁸⁹

Though sea level rise had already swallowed land from Massachusetts, the *locus standi* of the State was resolved in the Supreme Court not on the basis of a private nuisance proprietary interest, but rather, following precedent in *Georgia*, on the basis of a personal injury to the State 'in its capacity of quasi-sovereign'.⁹⁰

English law allows for an action for damages in public nuisance in respect of personal injury and is defined as 'an unlawful act or omission which endangers the life, safety, health, property or comfort of the public'.⁹¹

⁸¹ *R (on the application of Friends of the Earth Limited, Frack Free Rydale (By David Davis and Jackie Cray) v North Yorkshire County Council v Third Energy UK Gas Limited* [2016] EWHC 3303 (Admin)

⁸² *ibid* [36]

⁸³ *ibid* [60]

⁸⁴ Richard Lord, *Climate Change Liability* (1st edn, Cambridge University Press 2012) 458; James Burton, Stephen Tromans QC and Martin Edwards, 'Climate Change: What Chance a Damages Action in Tort?' (UK Environmental Law Association, Issue 55, 2010)

⁸⁵ Crown Proceedings Act 1947, s 2(1)(a)

⁸⁶ *Hunter v Canary Wharf Ltd* [1997] AC 655

⁸⁷ *Khorasandjian v Bush* [1993] QB 727

⁸⁸ Richard Lord, *Climate Change Liability* (1st edn, Cambridge University Press 2012) 460

⁸⁹ *Massachusetts et al. v Environmental Protection Agency et al.* (2007) Supreme Court of the United States 549 US 415 F

⁹⁰ *State of Georgia, by its Attorney General, John C Hart, v Tennessee Copper Company* (1907) 206 US 230

⁹¹ *Corby Group v Corby Borough Council* [2008] EWCA Civ 463 (Dyson LJ)

The tort is actionable where a private individual has suffered particular damage over and above that suffered by the public generally. The release of harmful substances that affect a sizeable proportion of the public has recently been held actionable as public nuisance, such as an explosion from a petrol tank.⁹²

Importantly, acts which are otherwise intrinsically lawful may constitute public nuisance.⁹³ However, nuisance turns on the objective standard of the 'reasonable user,' allowing a possible defendant oil company a strong defence, given the essential nature of fossil fuels to the modern economy. Statutory authority is not a complete defence to an action in nuisance, however, as the exception in *Allen* established.⁹⁴

The more modern and vanguard tort is negligence, the 'neighbour principle' whereby individuals must avoid acts or omissions which they can reasonably foresee will harm their neighbour, first set out in *Donoghue v Stevenson*.⁹⁵

Given the media coverage of the connection between fossil fuels and climate change, a defendant polluter or regulator would struggle to argue harm such as property damage from rising seas or more frequent storms, or illness caused by heat waves, was not reasonably foreseeable.

Likewise, though a toddler today may not be an oil-major's *Donoghue* 'neighbour', the courts have used the later test in *Caparo* to extend the duty of care in situations where it considers it 'fair, just and reasonable'.⁹⁶

So, when British Petroleum makes another bid to drill for oil in the melt-waters of the Arctic, might a court in England find *Caparo* satisfied and impose liability for climate change negligence based, as Lord Atkin put it, 'upon a general public sentiment of moral wrongdoing for which the offender must pay'?⁹⁷

In *Nora McKenna*, Justice Neuberger's judgment suggested one avenue for an incremental expansion of the duty of care. A group of children claimed damages brought in nuisance against British Aluminium for 'emissions, noise pollution, and invasion of privacy from the defendant's neighbouring factory'.⁹⁸ None of the claimants had a proprietary interest and following *Hunter* and *Cambridge Water*,⁹⁹ the nuisance claims in tort would necessarily be dismissed for lack of standing.

However, Neuberger declined to do so, on the grounds of a 'powerful case' that under Article 8.1 of the ECHR, incorporated into domestic law by the Human Rights Act 1998¹⁰⁰ (HRA 1998), the claimant's right to 'private and family life' would not have been given effect to under the restrictions of tort.

The judgment was the first time in an environmental case where the rights established under HRA 1998 were held to be incompatible with *locus standi* in tort law.

Nearly a decade later, further evidence arose from case law of an incremental expansion of duty on polluters, again with a strong human rights component.

In *Dobson*, Thames Water was found liable to local residents for its negligent failure to control odour from its sewage facility. A statutory duty defence failed as Thames had 'failed to have reasonable regard for others.' Damages were awarded under negligence to those with proprietary interests, while a declaration that Thames had committed 'unlawful acts' incompatible with ECHR rights in violation

⁹² *Colour Quest Ltd v Total Downstream UK Plc* [2009] EWHC 540 (Comm)

⁹³ Richard Lord, *Climate Change Liability* (1st edn, Cambridge University Press 2012) 461

⁹⁴ *Allen v Gulf Oil Refining Ltd* [1981] AC 1001

⁹⁵ *Donoghue v Stevenson* [1932] AC 562, 580

⁹⁶ *Caparo Industries Plc v Dickman* [1990] UKHL 2

⁹⁷ *Donoghue v Stevenson* [1932] AC 562, 580

⁹⁸ *Nora McKenna & Ors v British Aluminium Limited* [2002] WL 498866

⁹⁹ *Cambridge Water Co Ltd v Eastern Counties Leather Plc* [1994] 2 AC 264

¹⁰⁰ Human Rights Act 1998 s 1(2)

of HRA 1998 s 6(1) was held to be 'just satisfaction' for claimants without proprietary rights.¹⁰¹

Though *McKenna* and *Dobson* demonstrate the Court's evolving approach to standing and duty of care in pollution cases, the steepest hurdle to climate change tort litigation will likely be causation. With seven billion people emitting GHGs, pinning damage on any one emitter, no matter how large, would appear impossible.

Here again, though, English law has evolved to meet the changing demands of justice.

The simple 'but for' causation test, established in Victorian times, has been supplanted in relevant cases with the Court's 'material increase in risk' approach first established in *Bonnington*¹⁰² and confirmed in *McGhee*¹⁰³ and *Fairchild*.¹⁰⁴

All cases concerned personal injuries caused to claimants negligently exposed to toxic substances at work, the exact origins of which it was impossible to establish. 'Such injustice as may be involved in imposing liability on a duty-breaking employer in these circumstances is heavily outweighed by the injustice of denying redress to a victim,' ruled Bingham LJ in *Fairchild*.

Proof, on balance of probabilities, that the wrongdoing of each employer had materially increased the risk to the employee that he might contract the disease was to be taken as proof that each employer had materially contributed to it.

The Lords ruling raises a tantalising prospect: Employees of the top eight fossil fuel companies - including BP - from which 20% of all manmade GHG emissions originate,¹⁰⁵ using the UK's new class action regime¹⁰⁶ to sue their employers for the wrongdoing of materially increasing their risk of contracting the 'disease' of climate change?

A hurdle in *Fairchild* might yet cause such a case to falter on causation. The single fibre of asbestos is 'inherently impossible'¹⁰⁷ for the claimant to prove as the cause of his mesothelioma, itself a discreet medical condition. Damage from climate change is not discreet, but cumulative, and therefore not 'inherently impossible' to prove.¹⁰⁸

¹⁰¹ *Dobson v Thames Water Utilities Ltd* [2011] EWHC 3253 (TCC)

¹⁰² *Bonnington Castings Ltd v Wardlaw* [1956] AC 613

¹⁰³ *McGhee v National Coal Board* [1972] 3 All ER 1008 HL

¹⁰⁴ *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22

¹⁰⁵ 'Just 90 Companies Are To Blame For Most Climate Change, This 'Carbon Accountant' Says' (*Science | AAAS*, 2017) <<http://www.sciencemag.org/news/2016/08/just-90-companies-are-blame-most-climate-change-carbon-accountant-says>> accessed 19 April 2017

¹⁰⁶ 'The New UK Class Action Regime - An Overview - Publications - Allen & Overy' (*Allenoverly.com*, 2017) <<http://www.allenoverly.com/publications/en-gb/Pages/UK-Class-Action-Regime.aspx>> accessed 19 April 2017

¹⁰⁷ *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22 [170]

¹⁰⁸ James Burton, Stephen Tromans QC and Martin Edwards, 'Climate Change: What Chance a Damages Action in Tort?' (UK Environmental Law Association, Issue 55, 2010) 27

Conclusion

Climate change is complicated. The science linking GHG emissions to global warming may be 'overwhelming',¹⁰⁹ but the resultant damage requires modelling by the world's super computers.¹¹⁰

The history of efforts by politicians,¹¹¹ parts of the media¹¹², and, most directly, the fossil fuel industry to obscure¹¹³ or confuse¹¹⁴ the causal risks of climate change is long and sordid.¹¹⁵

The requirement for a zero carbon future is a risk to political stability,¹¹⁶ for some economists, a risk to the very neoliberal model of capitalism that underpins Western democracy itself.¹¹⁷

Little wonder then that, as this paper has shown, the English Court appears - so far at least - reluctant to 'fetter the discretion' of Government by ruling as definitely as their Dutch counterpart in *Urgenda* on what constitutes a legal duty of care for the purposes of climate policy.

The treaty obligations of *Kyoto*, *Paris* and *Aarhus* establish no *locus standi* for claimants in the dualist English legal system, and domestic environmental case law makes little to no reference to international law.

The legally binding targets of CCA 2008 have so far all been met and up to 2030 exceed the UK's treaty obligations. Article 4 of the Paris Agreement sets out the goal of net-zero GHG emissions 'in the second half of this century'¹¹⁸ while CCA 2008 obliges an 80% reduction by 2050.¹¹⁹ But as discussed, the emissions targets under Paris are non-binding and so not a cause for legal action.

However, following *Greenpeace* and *World Development Movement*, NGOs would be very likely to establish *locus standi* in judicial review to challenge recent Government policies, set out above, that increase GHG emissions and plot a course for missing the fifth domestic Carbon Budget.

They would be much less likely, as *Barbone* and *Hillingdon*, *People and Planet*, *Solar Century*, and *Friends of the Earth* clearly demonstrate, to establish the kind of substantive *a priori* right to a sustainable environment that the courts in Holland and Austria appear to have ruled into law.

¹⁰⁹ Nicholas H Stern, *The Economics Of Climate Change* (1st edn, Cambridge Univ Press 2011) 3

¹¹⁰ Matt Peckham and Matt Peckham, 'The World's Most Powerful Climate Change Supercomputer Powers Up' (*TIME.com*, 2017) <<http://techland.time.com/2012/10/17/the-worlds-most-powerful-climate-change-supercomputer-powers-up/>> accessed 19 April 2017

¹¹¹ 'A Timeline Of Every Ridiculous Thing Trump Has Said About Climate Change' (*Newsweek*, 2017) <<http://www.newsweek.com/timeline-every-ridiculous-thing-trump-has-said-about-climate-change-576238>> accessed 19 April 2017

¹¹² 'Climate Change: This Is The Worst Scientific Scandal Of Our Generation' (*Telegraph.co.uk*, 2017) <<http://www.telegraph.co.uk/comment/columnists/christopherbooker/6679082/Climate-change-this-is-the-worst-scientific-scandal-of-our-generation.html>> accessed 19 April 2017

¹¹³ Damian Carrington, 'Shell Knew': Oil Giant's 1991 Film Warned Of Climate Change Danger' (*the Guardian*, 2017) <<https://www.theguardian.com/environment/2017/feb/28/shell-knew-oil-giants-1991-film-warned-climate-change-danger>> accessed 19 April 2017

¹¹⁴ Shannon Hall, 'Exxon Knew About Climate Change Almost 40 Years Ago' (*Scientific American*, 2017) <<https://www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/>> accessed 19 April 2017

¹¹⁵ Naomi Oreskes and Erik M. Conway, *Merchants of Doubt; How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming* (Bloomsbury 2010)

¹¹⁶ 'Amber Rudd Speech To The Business & Climate Summit - GOV.UK' (*Gov.uk*, 2017) <<https://www.gov.uk/government/speeches/amber-rudd-speech-to-the-business-climate-summit>> accessed 19 April 2017

¹¹⁷ Paul Mason, *Postcapitalism; A Guide to Our Future* (Penguin 2015) 247

¹¹⁸ The *Paris Agreement of the United Nations Framework Convention on Climate Change 21st Conference of the Parties* (Paris 2015) Article 4 <https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf> accessed 19 April 2017

¹¹⁹ Climate Change Act 2008, s 1(1)

It is private law that Stephen Tromans QC, the UK's 'leading practitioner in environmental law',¹²⁰ believes offers the necessary flexibility of legal landscape that might one-day host a successful climate change litigation.

'Moral imperative demanded a certain result, and their Lordships achieved it,'¹²¹ wrote Tromans about the evolution of causation in *Fairchild*, as described above.

That moral imperative was seen at work in *McKenna*, in the judgment of the man now leading the UK Supreme Court, Lord Neuberger, navigating the intersection between tort's duty of care and the positive human rights established by HRA 1998.

For now, we may conclude, along with Tromans, that the prospect of a successful climate change litigation seems 'remote'. But, as the veteran QC notes, 'when and if the effects of climate change begin to truly manifest themselves, not only in fact but in the public consciousness, the position could change very rapidly indeed.'¹²²

¹²⁰ 'Stephen Tromans QC - 39 Essex Chambers' (*39 Essex Chambers*, 2017) <<http://www.39essex.com/barrister/stephen-tromans-qc/>> accessed 19 April 2017

¹²¹ James Burton, Stephen Tromans QC and Martin Edwards, 'Climate Change: What Chance a Damages Action in Tort?' (UK Environmental Law Association, Issue 55, 2010) 28

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¹²² *Ibid* 28

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