REGULATING ANTHROPOGENIC CLIMATE CHANGE WITH TORT LAW

Authored by: Abdur-Razzaq Ahmed - Brown Rudnick

The conventional approach: The 2011 Queensland Floods case

The final chapter of the Australian '*Queensland Floods*' case[1] ended in early April 2022, 11 years after the devasting floods caused by rainfall of "*biblical proportions*" in early 2011. The floods claimed 35 lives, caused $2.38 billion damage, flooded 28,000 homes and left 100,000 people without power.

The extreme rainfall event was linked to the La Nina climate phase, which climate researchers say are only likely to increase because of global warming.[2] Linked to this, in 2015, U.S. and Australian scientists published research demonstrating that long-term warming of the Indian and Pacific oceans, primarily due to human activity, played an "important" role in the increased flooding risk to areas such as Queensland.[3] Three years after the floods, Mr. Rodriguez, the sole director of a sports store in the vicinity of Brisbane, commenced representative proceedings under Part 10 of the Civil Procedure Act 2005 (NSW) on behalf of a group damaged by the floods. The group of approximately 7,000 parties (primarily those with interest in the flooded land) brought a negligence and nuisance claim against three government organisations for the damage.

The defendants in the *Queensland Floods* case were all government organisations linked to the Somerset and Wivenhoe dams: Queensland Bulk Water Supply Authority (Seqwater), SunWater Limited and the State of Queensland. The plaintiffs argued the defendants were liable, either directly or vicariously through their flood engineers, having failed to use reasonable care in the conduct of flood operations to avoid the risk of harm to property.[4]

In referring to the Flood Operations Manual – a key document in respect of the expected standard of care – the plaintiffs argued the defendants were negligent on the basis they had breached the duty of care owed to over 200,000 people located downstream of the dams who would foreseeably be impacted by a failure to properly conduct flood operations. The plaintiffs alternatively argued the defendants' activities gave rise to liability in nuisance given the (preventable) floods caused interference with use and enjoyment of property.

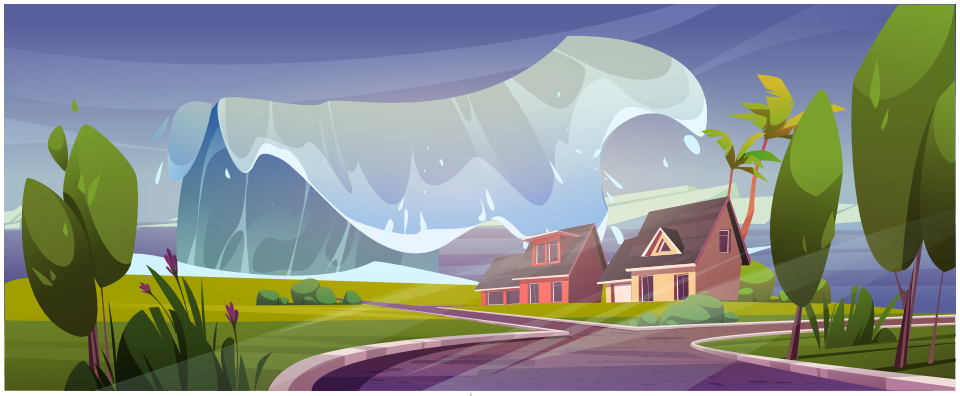
Despite being successful at first instance in 2019, Seqwater (deemed to be 50percent liable) successfully appealed on the basis that the standard of care was higher than the ordinary standard under Australian law. Despite that being the final word on Seqwater's liability, Sunwater and the State of Queensland paid an estimated AUD 440 million in compensation. The case serves as a historic example in which litigants have successfully held public infrastructure entities responsible for failing to adequately prevent and address the risks caused by climate change.

1 Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority trading as Seqwater (No 22) (2019) Aust Torts Reports 82-501; [2019] NSWSC 1657; [2021] NSWCA 206

2 Rhein, M., et al. (2013), Observations: Ocean, in Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, edited by T. F. Stocker et al., pp. 255–315, Cambridge Univ. Press, Cambridge, U. K.

3 Ummenhofer, C. C., A. Sen Gupta,M. H. England, A. S. Taschetto,P. R. Briggs, and M. R. Raupach (2015),How did ocean warming affect Australian rainfall extremes during the 2010/2011 La Niña event? Geophys. Res. Lett.,42, 9942–9951 doi:10.1002/2015GL065948

4 Fifth Amended Statement of Claim dated 29 September 2017



Barriers to tort liability

The *Queensland Floods* case was conventional in its approach and application of law, being a case against multiple parties for breaching duties of care in relation to systems or processes designed to *protect against* the effects of climate change. Such claims implicitly accept the ongoing effects of anthropogenic climate change and are primarily concerned with issues of scope, standard and breach of duty. In recent years however, judges in several jurisdictions have grappled with an increasing number of private law cases attempting to use tort law to contest the actions (past and future) of fossil fuel and energy companies directly:

A polycentric problem in New Zealand

The New Zealand case of *Smith v Fonterra* [2021] NZCA 552 served as the first appellate Commonwealth decision as to whether tort law could give rise to private law remedies for climate change issues. Mr. Smith, a climate change spokesperson for the Iwi Chairs' Forum (for indigenous Māori people), filed a case against seven high-emitting New Zealand companies in the agriculture and energy sectors, claiming that the defendants' actions constituted public nuisance, negligence, and breach of a duty to cease contributing to climate change. However, the Court of Appeal dismissed all of the causes of action and stated that "*every person in New Zealand — indeed, in the world — is (to varying degrees) both responsible for causing the relevant harm, and the victim of that harm".*[5] *In relation to the nuisance claim specifically, the Court observed there was "no identifiable group of defendants that can be brought before the Court to stop the pleaded harm*".[6] The decision indicated why a generalised tort claim against a few choice defendants is unlikely to succeed as a matter of policy given the difficulties in apportioning responsibility, and the vast number of people who were simultaneously the victims and the offenders of the alleged harm.

As French J said, it presented a "polycentric issue that is not amenable to judicial resolution."

Cumulative causation in Germany

Elsewhere in *Luciano Lliuya v. RWE AG* (Case No. 2 O 285/15), a German claim currently on appeal, a Peruvian farmer alleges that RWE, Germany's largest electricity producer, was a "*disturber by conduct*" who knowingly contributed to climate change by emitting greenhouse gases. The farmer alleges the defendants bear some responsibility for the melting of local glaciers and the consequential "adaptation" costs that are expected to be incurred in relation to flood protections. Whilst the case is brought pursuant to German Civil Code, the claimant's grounds of appeal noted the equivalence between the profile of greenhouse gas emissions and the concept of "multiple independent causes" of damage within tort law. The claimant argues that it is not appropriate to try and isolate the contributory emissions given there is a "*closed circle of causal agents*"[7] that gradually contributes to global warming. He further argues that despite that, each contributor therefore has its own causal impact based on the size of its contribution.

In formulating this argument, reference was made to two familiar English law cases: *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 and *McGhee v National Coal Board* [1973] 1 WLR 1, in which the House of Lords determined that a claimant need only demonstrate a particle attributable to a breach of duty (in this case a particle associated to greenhouse gases), made a material contribution to a harm. This test aligns with the "material increasing risk" test in *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, though the difficulty claimants are likely to face is demonstrating a proximate relationship with the defendant so as to give rise to a duty of care (in order to meet the Caparo test). This "proximity" obstacle may explain why cases relying on tort arguments have been few and far between and pose a significant legal problem to claimants in common law jurisdictions (such as England and Wales).

Lord Carnwath CVO, a former judge of the Supreme Court of the United Kingdom between 2012 and 2020, noted that private law claims against greenhouse gas emitters and energy companies for loss are ambitious. In relation to the RWE case specifically, he notes that from a common law perspective, the claim seems "*surprisingly ambitious, not least the attempt to link activities apparently lawful under German law, with damaging consequences as far away as Peru*".[8] This is one perspective among international legal circles that all appear to reach the conclusion that causation and breach of duty are two major obstacles to litigants relying on tort law in 'generic emissions' claims against carbon majors.

A proactive regulation tool for anthropogenic climate change

Many consider that the need for "backward-looking" climate-related litigation can be prevented (or at least limited) in the long-term by proactively using litigation (against greenhouse gas emitters, underlying facilitators of climate change and governments) in a more "forward-looking" context. Lord Carnwath identified this contrasting

5 French J at [18]

6 French J at [92]

7 Grounds of Appeal at page 20. Available at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20170223_Case-No.-2-O-28515-Essen-Regional-Court_appeal-1.pdf

8 "Climate Change and the Rule of Law" Bucerius School– Luther Lecture - Hamburg 22 March 2021

usage of the law as a "*bridge between scientific knowledge and political action*"[9] though noted that such litigation can claim more success when it is aimed at specific targets to ensure orders are enforceable and lead to effective and practical action. In considering the role of tort law in this context:

Company/shareholder action

Environmental, Social and Governance (ESG) has had a significant impact on corporate conduct and shareholder expectations in recent years. This evolution has been recognised by the legal community, particularly in relation to climate-related risks. It is likely that courts would now construe climate-related risks as reasonably foreseeable, given the breadth of disclosure requirements, standards and the increased shareholder focus. Boards that fail to respond appropriately could be found to have breached their duty of care and diligence as these cases suggest:

- In October 2021, *Ewan McGaughey et al v Universities Superannuation Scheme Limited* was filed in the English High Court against the directors of the University Superannuation Scheme (USS), a private pension scheme for academic staff in the U.K. and the largest private pension scheme in the U.K. The particulars of claim, which named 13 current directors and 18 former directors, pleaded negligence on the part of the directors for allegedly failing to consider the terms and consequences of the 2016 Paris Agreement. This could have potentially significant consequences for similar schemes, public entities and their directors in the U.K.
- Even more recently, ClientEarth commenced a derivative action against Shell for failing to implement a climate strategy that aligns with the goals of the Paris Agreement, which it alleges has led to a breach of directors duties under sections 172 and 174 of the Companies Act 2006.

Rights-based action

Litigants have also had some success in seeking declaratory relief from international courts through creative applications of the law in order to hold government and corporate activity accountable by reference to emission targets, statements of intent and (most notably) the 2016 Paris Agreement.

The *Urgenda*[10] case in the Hague District Court in the Netherlands and the *Leghari*[11] case in the Lahore High Court in Pakistan are notable examples where national courts upheld challenges to their governments' failures to implement effective policies to counter climate change. Both these cases shared a common thread by utilising human rights law as a proxy in climate change cases. Of particular interest in the Dutch case, the Court found the Dutch government had contravened its duty of care (under Articles 2 and 8 of the ECHR) to mitigate greenhouse gas emissions and protect the ECHR rights from the threat of climate change.

The future: the relevance of collective redress mechanisms for mass climate-related torts and the incentive for derivative actions

Collective redress

The 2011 Queensland floods and the subsequent class action is unlikely to be the last climate-related mass tort litigation. Whilst a climate-related event may be beyond control, the legal consequences are not. Well-defined groups alleging climate-linked mass-tort events are candidates for collective redress schemes as an alternative to lengthy and expensive litigation. The recent refinement of collective redress schemes has been driven in response to the "inequality of arms" that exists in the litigation of mass torts (in the personal injury sphere) and which is directly applicable to the circumstances of likely claimants in climate-related mass-tort litigation.[12]

The developments in attribution science and a greater awareness of the effects of climate change will also assist the resolution of legal issues such as foreseeability, remoteness, causation and the duty of care. Even where there are issues of liability, recent guidance from the Supreme Court in *Lloyd v Google* [2021] UKSC 50 demonstrates that representative proceedings can have an important early-stage role in resolving factual or legal issues that may otherwise prevent a redress scheme being an attractive solution. Taken together, parties can be disincentivised from litigation and incentivised to resolve matters without the involvement of Courts to shorten the period of resolution – the *Queensland Floods* case, for example, took eight years to resolve.

Further, the costs of climate-related litigation – both in terms of litigation costs and damages – are likely to be substantial. Such claims would undoubtedly carry an insolvency risk to corporate defendants, which further reinforces the relevance of collective redress mechanisms.

Corporate and derivative actions

The difficulties associated with "backward-looking" litigation founded upon tortious causes of action perhaps explains why "forward-looking" litigation has become far more appealing to litigants in recent years. This type of litigation aspiringly aims to bring greenhouse gas emissions and pollutants under control.

Activist shareholders are – as noted above – already using the law of tort as a proxy to hold directors of investee companies accountable to their legal duties to ensure targets and standards are adhered to. Disclosure and reporting standards also create an important incentive for shareholders to take action. The Greenhouse Gas Protocol, which is split into 3 "scopes" is the most widely used greenhouse gas accounting standard. Scope '3' is a catch-all that includes all other indirect emissions that occur in a company's value chain and may account for anywhere up to 90 percent of a company's broader carbon impact.[13] The Financial Conduct Authority recently published its disclosure rules for asset managers and pension providers, which requires the disclosure of scope 3 emissions from 2024.[14] There is a very realistic possibility then, that large institutional investors may use tort-based legal arguments against boards of investee companies, much like McGaughey and ClientEarth, as a tool (either openly or confidentially) to apply downward pressure on emissions and reduce their own scope 3 emissions.

9 "Climate Change and the Rule of Law" Bucerius School– Luther Lecture - Hamburg 22 March 2021

10 Urgenda Foundation (on behalf of 886 individuals) v The State of the Netherlands (Ministry of Infrastructure and the Environment), First instance decision, HA ZA 13-1396, C/09/456689, ECLI:NL:RBDHA:2015:7145, ILDC 2456 (NL 2015), 24th June 2015, Netherlands; The Hague; District Court

11 Leghari v. Federation of Pakistan (2015) W.P. No. 25501/201

12 R Nayer and T McDonnell (2021). A New Normal: Instituting Redress Schemes to Resolve Mass-torts. Journal of Personal Injury Law 1-58

13 https://www.carbontrust.com/news-and-events/insights/make-business-sense-of-scope-3

14 Policy Statement 21/24