

20

ESSEX
STREET

Remedies & Causation in Climate Change Litigation

Simon C. Milnes

What is climate change litigation?

Lawyering, in contentious cases, that seeks to further the objectives of the Paris Agreement (2015)

1. Administrative Law
2. “Super”-law (constitutional law, human rights)
3. Private law remedies against private actors (contracts, torts)
4. Public/regulatory remedies against private actors
5. Defending anti-regulatory / anti-environmental lawsuits

What is climate change litigation?

For example ...

1. Administrative Law – **Massachusetts v. EPA, 549 U.S. 497**
2. “Super”-law (constitutional law, human rights)
 - **Juliana v. United States (D. Or.)**
 - **Colombia Deforestation**
3. Private law remedies against private actors (contracts, torts)
 - **Huaraz case (Saúl Luciano Lliuya v. RWE)**
4. Public/regulatory remedies against private actors
 - **Conservation Law Foundation v. Exxon**
5. Defending anti-regulatory / anti-environmental lawsuits
 - **West Virginia v. EPA (D.C. Cir.)**

The challenge of causation

- Laws and legal systems generally not built to handle:
 - “wicked” problems
 - diffuse interacting causes
 - uncertainty and probabilistic assessments of causes
 - billions of polluters
- Example: **Saúl Luciano Lliuya v. RWE**

The challenge of causation



The challenge of causation



The challenge of causation

Essex District Court:

“... according to the principle of ‘conditio sine qua non’, any action or inaction is causal which, had it not occurred, would result in the effect in question being undone. In cases of multiple actions by different actors, none of the respective actions could hypothetically not occur without the effect being undone ...

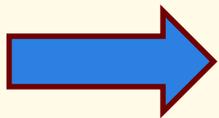
The pollutants, which are emitted by the defendant, are merely a fraction of innumerable other pollutants, which a multitude of major and minor emitters are emitting and have emitted. Every living person is, to some extent, an emitter. In the case of cumulative causation, only the coaction of all emitters could cause the supposed flood hazard. The past and future greenhouse gas emissions by the defendant would have to be hypothetically undone, and the supposed flood hazard being eliminated as a result. This is not the case.”

The challenge of causation

Hamm Regional Court:

- Contribution is sufficient for liability under § 1004 of the Civil Code
- Cited a commentary on an analogous provision in the Civil Code:

“If the impairments of several emitters regarded on their own are insignificant, as soon as they become significant in accumulation, injunction can be demanded against each emitter, until insignificance is reinstated.”



The crucial move: from ‘but-for’ causation to accepting “material contribution to the harm” as sufficient for liability.

Administrative law: causation as a bar to standing (USA)

- U.S. Const, Art III (“... *Cases and Controversies* ...”)
- **Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)**

“...our cases have established that the irreducible constitutional minimum of standing contains three elements.

First, the plaintiff must have suffered an "injury in fact" - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.

Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly traceable" to the challenged action of the defendant, and not ... the result of the independent action of some third party not before the court.

Third, it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision.”

Administrative law: causation as a bar to standing (USA)

Massachusetts v. EPA, 549 U.S. 497 (2007)

“EPA ... maintains that its decision not to regulate greenhouse gas emissions from new motor vehicles contributes so insignificantly to petitioners’ injuries that the agency cannot be haled into federal court to answer for them. ... That is especially so because predicted increases in greenhouse gas emissions from developing nations, particularly China and India, are likely to offset any marginal domestic decrease.

But EPA overstates its case. Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action. **Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.** ... They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more-nuanced understanding of how best to proceed. ... That a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law.”

Super-law

Colombia Deforestation Case:

Relative to the first of the aforementioned principles, there is no doubt that there is a risk of damage, given that according to the IDEAM, the increase in GHG emissions **resulting** from deforestation in the Amazon forest would generate an increase in Colombia's temperature between " *0.7 and 1.1 degrees Celsius between 2011 and 2040,* " while for the period " *between 2041 and 2070* ", the estimates indicate an increase between " *1.4 and 1.7* " degrees Celsius, to reach 2.7 degrees Celsius " *in the period between 2071 and 2100.* "

Juliana v. United States

"Going big" to jump the causation-standing hurdle.

Enforcing regulatory duties on private actors

Conservation Law Foundation v. ExxonMobil (D. Mass)

42 U.S.C. 6972

(a) ... any person may commence a civil action on his own behalf

(1) ...

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

Enforcing regulatory duties on private actors

Papua New Guinea Climate Change Management Act, 2015

77. DEVELOPMENT AND ADAPTATION STANDARDS.

(1) In addition to Section 74 and further to any requirement under any other law, a person or entity, before undertaking any or more of the following developments:

- (a) building and civil works; or
- (b) mining, both land based and seabed mining, operations; or
- (c) oil and gas, both land based and seabed extraction operations; or
- (d) agriculture and livestock; or
- (e) manufacturing; or
- (f) forestry; or
- (g) fisheries, both at sea and shore based fishing operations; or
- (h) energy; or
- (i) transport; or
- (j) any related activities,

shall comply with the minimum climate adaptation and compatibility standards and performance levels.

Thank you ...

Simon Milnes

20 Essex Street

smilnes@20essexst.com

DD: +44 207 842 6730

M: + 44 77 4349 3060