Climate change and the future of tort law: responding to systemic risk and expanding liability

Keynote Address
Planning and Environment Bar Association Annual Conference 2025
9 May 2025

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Introduction

Climate change is often described as a future threat, a looming crisis that will impact future generations. A decade ago, Mark Carney – then the Governor of the Bank of England and now Prime Minister of Canada – labelled it as the "Tragedy of the Horizon", reflecting the challenge of mobilising present-day action for risks that appeared at the time to be distant.[1] This conception of climate change as a future risk may partly explain the absence of tort law cases concerning climate change in England & Wales. Tort law, on a conventional view, is primarily backwards looking, focusing on apportioning liability for events that have already occurred.[2] In contrast, regulatory legislation is more readily able to look to the future, with the Climate Change Act 2008 creating a legally binding obligation for the government to achieve net zero by 2050 and introducing a system of carbon budgeting to give effect to this objective. This statutory framework has provided fertile ground for public law climate change challenges, with many claimants seeking, with some success, to compel the government to strengthen measures reducing emissions.[3] Planning law has also produced several climate change cases, most recently the Supreme Court's judgment in *Finch*[4], which will require planning authorities to assess the

[1] Mark Carney, 'Breaking the Tragedy of the Horizon – Climate Change and Financial Stability' (Speech at Lloyd's of London, September 2015) cited in Franziska Arnold-Dwyer, *Insurance, Climate Change and the Law* (1st edn, Informa Law from Routledge 2024) 1.

[2] John Gardner, 'Backwards and Forwards with Tort Law' in Joseph Keim Campbell, Michael O'Rourke and David Shier (eds), *Law and Social Justice* (MIT Press 2005).

[3] For example: *R ((1) Friends of the Earth Limited (2) ClientEarth (3) Good Law Project and Joanna Wheatley) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin) and *R ((1) Friends of the Earth Limited (2) ClientEarth (3) Good Law Project) v Secretary of State for Energy Security and Net Zero* [2024] EWHC 995 (Admin). For further discussion see: Ella Grodzinski and Stephanie David, 'Overarching Legal Framework' in Nigel Pleming KC and others (eds), *The Law of Net Zero and Nature Positive* (London Publishing Partnership 2025) 2.283-2.139.

[4] *R (Finch on behalf of the Weald Action Group) v Surrey County Council* [2024] UKSC 20.

environmental consequences of some forms of development far into the future.

However, it is now clear that the risks posed by climate change are no longer just a future problem. They are materialising in the present and being experienced by all of us with increasing effects. The Paris Agreement of 2015 was a landmark as an international agreement, but has not so far arrested climate change or its effects. The years 2023 and 2024 were in turn the hottest on record, with 2024 becoming the first year to breach the Paris Agreement's 1.5°C warming threshold. These rising temperatures are driving a cascade of other environmental consequences, including an increase in both the frequency and intensity of extreme weather events. The UK had a severe drought in 2022, which was the joint hottest summer on record,[5] and 2024 brought severe floods and the wettest 12 months in England since 1836.[6] There have been wildfires in Argentina, Australia, Chile and the United States, many of which have been amongst the worst ever recorded.[7] Beyond extreme weather, climate change is also causing profound biological and ecological disruption. Shifts in rainfall patterns and rising sea levels are altering ecosystems, with some species facing extinction while others migrate, threatening biodiversity. Human health is also affected, as warming expands the range of vector-borne diseases and exacerbates food and water insecurity. These environmental changes are in turn creating widespread physical and economic damage, including the destruction of property, personal injury, and financial losses from business and supply chain disruptions.

With this damage comes the question of who should bear the loss. That gives rise to issues of legal liability. As a result, in jurisdictions around the world there has been a steady rise in tort claims brought by those experiencing harm trying to recover their losses from others by seeking private law remedies for the consequences of climate change. In the United States, a wave of claims

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[5] 'Joint Hottest Summer on Record for England - Met Office' <https://www.metoffice.gov.uk/about-us/news-and-media/media-centre/weather-and-climate-news/2022/joint-hottest-summer-on-record-for-england> accessed 14 February 2025.

[6] 'National Drought Group Discusses Preparations for Extreme Weather' (*GOV.UK*) <https://www.gov.uk/government/news/national-drought-group-discusses-preparations-for-extreme-weather> accessed 14 February 2025.

[7] Copernicus, 'CAMS Global Wildfires Review 2024: A Harsh Year for the Americas' (5 December 2024) <https://atmosphere.copernicus.eu/cams-global-wildfires-review-2024-harsh-year-americas> accessed 30 April 2025; World Weather Attribution, 'Attribution of the Australian Bushfire Risk to Anthropogenic Climate Change' (10 January 2020) <https://www.worldweatherattribution.org/bushfires-in-australia-2019-2020/> accessed 30 April 2025.

have been brought, mostly framed under the common law at state level, against fossil fuel companies and emitters, seeking damages or injunctive relief on the basis of the torts of public and private nuisance, trespass, and negligence.[8] In the Netherlands, the duty of care in tort has been held to require both the government and the oil-company Shell to take steps to limit greenhouse gas emissions.[9] Most recently, last year in *Smith v Fonterra*[10] the New Zealand Supreme Court overturned the lower courts' decisions to strike out claims by a Māori elder and climate activist alleging that emissions from a group of New Zealand's largest carbon emitters constituted a public nuisance, negligence, and a breach of a novel climate system damage tort. Those claims, therefore, are likely to proceed to trial.

In this lecture, I explore how English tort law may respond to the expanding and systemic damage caused by climate change. Whilst I will discuss tort claims made against fossil-fuel companies in other common law jurisdictions, which I will refer to as 'mitigation cases', involving measures to avoid climate change emissions and their effects, I will also explore other interactions between climate change and tort law. In particular, I will discuss the role that tort law may play in adaptation to climate change, that is how tort law can 'respond to and manage the harms of climate change that can no longer be avoided through climate mitigation'.[11] In order for society to adapt to the consequences of climate change, those living with its impact will need to feel that the resultant costs are being distributed in a fair and just way.

In an article in 2023 Jim Rossi and JB Ruhl argue tort law is well placed to play a role in achieving this, by apportioning the costs of harm, creating incentives to manage risk, and providing compensation and other remedies to victims.[12] However, other commentators view the tort system as an expensive, cumbersome and incomplete tool for the regulation needed to adapt to

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[8] Karen C Sokol, 'Seeking (Some) Climate Justice in State Tort Law' (2020) 95 Wash. L. Rev. 1383; cited in Jim Rossi and JB Ruhl, 'Adapting Private Law for Climate Change Adaptation' (2023) 76 Vand. L. Rev. 827, 830.

[9] Urgenda Foundation v State of the Netherlands ECLI:NL:HR:2019:2006 (the tortious duty of care played a role at first instance, whilst the Dutch Supreme Court focused on human rights); *Milieudefensie v Royal Dutch Shell* ECLI:NL:RBDHA:2021:5337 (Hague District Court), ECLI: NL:GHDHA:2024:2100 (Hague Court of Appeal). The judgment has been appealed to the Supreme Court of the Netherlands, see: 'Climate Activists Take Shell Case to Dutch Supreme Court' *Reuters* (12 February 2025) <https://www.reuters.com/sustainability/climate-energy/climate-activists-take-shell-case-dutch-supreme-court-2025-02-11/> accessed 30 April 2025.

[10] *Smith v Fonterra* [2024] NZSC 5 (Supreme Court), [2021] NZCA 552 (Court of Appeal), [2020] NZHC 419 (High Court).

[11] Rossi and Ruhl (n 8) 1; Stephanie David, 'Net Zero and Nature Positive' in Nigel Pleming KC and others (eds), *The Law of Net Zero and Nature Positive* (London Publishing Partnership 2025) 1.20-1.22.

[12] Rossi and Ruhl (n 8).

climate change.[13] This reflects a wider debate about the suitability of tort law as a substitute for public regulation, and about the institutional competence of the courts as opposed to the democratic legislature to respond to novel issues faced by society.[14]

I will also examine how climate change may place pressure on and challenge some of the assumptions underpinning tort law. As Douglas Kysar has observed, although there has been a lot written and said about how tort law may impact on climate change, comparatively little has been said about how climate change will have an impact on tort law.[15] This includes both doctrinal assumptions about the foreseeability of processes in nature and more practical assumptions about the insurance system which stands behind so many tort cases as a loss distribution mechanism. The very substantial losses created by extreme weather means that insurers may experience liability in respect of it as crushing and as something beyond the reasonable capacities of insurance markets to distribute and absorb. They may therefore seek to limit their exposure by narrowing policy coverage or invoking exclusions more aggressively. This, in turn, could reshape the practical viability of tort claims to provide substantive relief from losses and could conceivably lead to a reshaping of tort doctrine itself.

As a sitting judge, I will not be expressing any conclusions on these issues. I naturally reserve my own views for if and when they are argued out fully in concrete cases. Instead, I will outline the lines of argument that it seems may be developed. Given the impact climate change will have on land use and the Supreme Court's decision in *Coventry v Lawrence*[16] that planning permission is no defence to liability in private nuisance, I hope this discussion is as relevant to decisionmakers involved in the planning system – such as developers and planning authorities, in so far as they may be exposed to liabilities in tort – and public authorities with regulatory responsibilities as it is to environmental lawyers.

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[13] Douglas A Kysar, 'The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism' (2018) 9 European Journal of Risk Regulation 48, 3.
[14] David Howarth, 'Muddying the Waters: Tort Law and the Environment from an English Perspective' (2001) 41 Washburn Law Journal 469; Kysar (n 13); James L Huffman, 'Public Nuisance: Public Rights, Private Rights, and the Common Good' (2022) 17 JL Econ. & Pol'y 314.
[15] Douglas A Kysar, 'What Climate Change Can Do about Tort Law' (2011) 41 Envtl. L. 1.
[16] [2014] UKSC 13.

1. Tort law's role in climate mitigation and adaptation

1.1 The relevant torts

In order to discuss tort law's potential role in climate change mitigation and adaption it is helpful first to outline the relevant torts. I will focus on the law of nuisance. Other torts, such as negligence, the rule in *Rylands v Fletcher* and trespass to land, are also relevant, but I omit them for the sake of brevity.[17] The law of nuisance has two distinct heads: private nuisance and public nuisance. Private nuisance can be traced back to the 15th century[18] and has played a significant role in the regulation of pollution and other environmental harms, in particular since the industrial revolution.[19] Whilst in the 1950s, Professor Francis Newark observed in his seminal article, 'The Boundaries of Nuisance', that nuisance was 'immersed in undefined uncertainty'[20], the modern law has been clarified in a number of recent Supreme Court decisions, including *Jalla*[21], *Fearn*[22] and last year's *Manchester Ship Canal*[23]case. Private nuisance has been described as a 'tort to land'[24] meaning that "in general terms, it is committed where the defendant's activity, or a state of affairs for which the defendant is responsible, unduly interferes with the use and enjoyment of the claimant's land".[25] The tort's focus on land is further reflected in the fact that the defendant's ground of responsibility is the possession and control of the land from which the nuisance proceeds.[26]

Importantly for climate change, it was confirmed in *Fearn* that "there is no conceptual or a priori limit to what can constitute a [private] nuisance"[27] and it includes smoke, vapours, fires, floods and other natural hazards. The inclusion of natural hazards stems from the Privy Council decision of *Goldman v*

[17] For discussion of these, see: Ashley Pratt, 'Property-Based and Other Torts' in Nigel Pleming KC and others (eds), *The Law of Net Zero and Nature Positive* (London Publishing Partnership 2025); Silke Goldberg and Richard Lord, 'England' in Jutta Brunnée and others (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press 2011).
[18] *R v Rimmington* [2006] 1 AC 459 [5] (Lord Bingham).
[19] Ben Pontin, 'The Common Law Clean Up of the "Workshop of the World": More Realism About Nuisance Law's Historic Environmental Achievements' (2013) 40 Journal of Law and Society 173.
[20] FH Newark, 'The Boundaries of Nuisance' (1949) 65 Law Quarterly Review 480, 480 quoting Erle C.J.'s undelivered judgment in Brand v. Hammersmith R. (1867) L.R. 2 Q.B. 223, 247.
[21] *Jalla v Shell International Trading and Shipping Co Ltd* [2023] UKSC 16, [2024] AC 595.
[22] *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4, [2024] AC 1.
[23] *Manchester Ship Canal Company Ltd v United Utilities Water Ltd* [2024] UKSC 22, [2024] 3 WLR 356.
[24] Newark (n 20) 482.
[25] *Manchester Ship Canal* (n 23) [6].
[26] Sedleigh-Denfield v O'Callaghan [1940] AC 880, 903 (Lord Wright).
[27] *Fearn* (n 22) [12].

Hargrave,[28] an Australian case in which a redgum tree was struck by lightning and set on fire. The defendant decided to let it burn out naturally rather than fully extinguishing it and the fire later spread to the claimant's property, causing damage. The Privy Council held the defendant was liable in nuisance because, although the initial lightning strike was an act of nature, once the defendant was aware of the danger to his neighbour's property, or ought to have been, he had a "measured duty of care"[29] to take reasonable steps to prevent the foreseeable damage it caused to his neighbour. This was adopted as the law in England by the Court of Appeal in *Leakey v National Trust*[30], where the National Trust was held liable for a natural landslip onto houses built under a hillside. This principle has therefore become known as the '*Leakey* duty' or the 'measured duty of care'.[31]

Whilst private nuisance is regularly used in everyday litigation, in climate change litigation academics and lawyers have placed most emphasis on the less well-known tort of public nuisance.[32] Public nuisance has an unusual status as both a criminal offence and a tort. As Lord Bingham explained in *Rimmington*[33]*,* its creation stems from the fact that some socially objectionable acts or omissions could not found an action in private nuisance because the injury was suffered by the community as a whole rather than by individuals and was unrelated to the occupation of land. Public nuisance therefore developed to cover a wide range of cases where public rights were infringed, including air and water pollution. Where public nuisance was used as a civil action, the Attorney General normally assumed the role of the claimant, acting for the community, the relevant part of the public, which had suffered.[34] However, as early as 1536, it was held that a member of the public could sue

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[28] *Goldman v Hargrave* [1967] 1 AC 645.
[29] ibid 653F (Lord Wilberforce).
[30] *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485.
[31] *Vernon Knight Associates v Cornwall Council* [2013] EWCA Civ 950. For further discussion of these cases see: David Sawtell, 'Implications of Climate Change for Property Rights and Obligations' in Nigel Pleming KC and others (eds), *The Law of Net Zero and Nature Positive* (London Publishing Partnership) 20.10-20.21.
[32] Thomas Merrill, 'Global Warming as a Public Nuisance' (2005) 30 Colum. J. Envtl. L. 293; Ken Alex, 'A Period of Consequences: Global Warming as Public Nuisance' (2007) 26 A Stan. Envtl. LJ 77; Randall S Abate, 'Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time' (2010) 85 Wash. L. Rev. 197; Matthew Russo, 'Productive Public Nuisance: How Private Individuals Can Use Public Nuisance to Achieve Environmental Objectives' [2018] U. Ill. L. Rev. 1969; David Bullock, 'Public Nuisance and Climate Change: The Common Law's Solutions to the Plaintiff, Defendant and Causation Problems' (2022) 85 The Modern Law Review 1136; Huffman (n 14); Linda S Mullenix, *Public Nuisance: The New Mass Tort Frontier* (Cambridge University Press 2023) <https://www.cambridge.org/core/books/public-nuisance/2E993C2563571BC525D7B108161E35DF> accessed 1 May 2025.
[33] *R v Rimmington* [2006] 1 AC 459.
[34] ibid [7].

in public nuisance if he could show that he had suffered particular damage over and above the ordinary damage suffered by the public at large.[35]

Following a recommendation by the Law Commission,[36] the crime of public nuisance has now been placed on a statutory footing by section 78 of the Police, Crime, Sentencing and Courts Act 2022. This provides that the offence is committed where (a) a person does an act, or omits to do an act that they are required to do by an enactment or rule of law, (b) which causes serious harm to the public or a section of the public, or obstructs their enjoyment of a right that may be enjoyed by the public at large, and (c) intends or is reckless as to their act or omission having that consequence.[37] 'Serious harm' is defined broadly as (a) death, personal injury or disease, (b) loss of, or damage to, property, or (c) serious distress, serious annoyance, serious inconvenience or serious loss of amenity. It is a defence if a person proves they had a reasonable excuse.[38] The Act specifically preserves the civil liability of any person for the tort of public nuisance.[39]

1.2 Mitigation cases

What role might nuisance have in climate change mitigation cases? As New Zealand has a similar common law tort system to our own, the claim in *Smith v Fonterra* against six of New Zealand's largest greenhouse gas emitters gives us an interesting insight as to the potential issues that could arise. The claimant's primary case was in public nuisance, so I will focus on this aspect of the claim. The lower courts in *Smith v Fonterra* considered that the claim was so weak that it was struck out. Just as in England & Wales, in New Zealand a strike out occurs where the court dismisses a claim without a full trial because it is untenable and cannot succeed.[40] The Court of Appeal held that, regardless of issues specific to public nuisance, any claim in tort was bound to fail as it would be inconsistent with the policy goals and scheme of New Zealand's Climate Change Response Act 2002. That Act is very similar to the UK's Climate Change Act, with the purpose of achieving compliance with the Paris

[35] ibid.
[36] Law Commission, *Simplification of the Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com No 358 2015).
[37] This is paraphrased.
[38] Police, Crime, Sentencing and Courts Act 2022, s 78(2).
[39] ibid s 78(6).
[40] *Smith v Fonterra* (NZCA) (n 10) [74]-[82].

Agreement and creating a system of carbon budgets and other measures to achieve this. The Court of Appeal held it would be wrong to create a parallel regulatory scheme in tort alongside the Act as this "would require a level of institutional expertise, democratic participation and democratic accountability that cannot be achieved through a court process".[41] The New Zealand Supreme Court disagreed, holding that it was normal for tortious liability to co-exist alongside statutory regulatory regimes. Moreover, there was a presumption that statute did not exclude common law rights of action and there was nothing in the 2002 Act which purported to do so.[42] It is interesting to note how similar this reasoning is to the UK Supreme Court's reasoning in *Manchester Ship Canal*, which considered whether the Water Industry Act 1991 excluded claims in nuisance and negligence against statutory sewerage undertakers. The UK Supreme Court, like that in New Zealand, unanimously held that, given the presumption against statute interfering with common law rights, there was nothing in the Act which provided a basis to exclude the claims.[43]

Turning to the specifics of the public nuisance claim, both the Court of Appeal and the Supreme Court accepted that public rights were engaged, including public rights to health and safety. The main disagreements between the Courts concerned standing and causation. As for standing, the Court of Appeal held that the claimant would not suffer any particular damage beyond that experienced by the rest of the population and therefore had no standing to bring the claim: the impacts of climate change were pervasive and not confined to individuals or to specific pieces of land.[44] In the alternative, the claimant had submitted that the particular damage rule should be abolished, relying on criticism of the rule by commentators[45], but this too was rejected by the Court of Appeal.[46] The New Zealand Supreme Court disagreed, holding that the particular damage test was met by claimant's interest in Māori fishing and cultural sites on coastal land that were likely to be especially impacted by rising sea levels. But the Supreme Court also went further by stating that it considered that the particular damage rule required reconsideration in the 21st

[41] *Smith v Fonterra* (NZCA) (n 10) [26].
[42] *Smith v Fonterra* (NZSC) (n 10) [92]-[101].
[43] *Manchester Ship Canal* (n 23) [129]-[130].
[44] *Smith v Fonterra* (NZCA) (n 10) [79], [82].
[45] Carolyn Sappideen and Prue Vines (eds) *Fleming's: The Law of Torts* (10th ed, Thomson Reuters, Sydney, 2011) [21.40], cited in *Smith v Fonterra* (NZCA) (n 10) [70]fn70.
[46] *Smith v Fonterra* (NZCA) (n 10) [87].

century: it noted that standing had been widened in judicial review and that modern class action procedures could be used to deal with any problems regarding multiplicity of actions in climate change. To my knowledge the particular damage rule has not yet been questioned in England & Wales and has been applied in recent cases.[47]

On causation the claimant accepted that they would not establish that 'but for' the defendants' emissions, he would not have suffered the claimed damage. The defendants were only a handful of the millions of persons responsible for global emissions and climate change would have happened without them. Therefore, the claimant instead argued that it was sufficient that the defendants' emissions had made a material contribution to the damage, relying on a series of 19th century English public nuisance cases concerning air and water pollution caused by multiple polluters where the courts had held their contribution was sufficient to establish liability.[48] The Court of Appeal held these cases did not assist the claimant as they concerned situations where all of the polluters were identifiable and before the Court.[49] The Supreme Court once again disagreed, noting that on a proper analysis many of the cases concerned multiple polluters of which only some, not all, were before the court.[50]

Accordingly, the Supreme Court held that the public nuisance claim was tenable and should proceed to trial. As this was merely a strike-out application, the merits were not fully examined, and we will have to wait for the trial to see how a common law system similar to our own addresses a climate mitigation claim like this.

1.3 Adaptation cases

Whilst it is unclear whether there will be any similar climate mitigation tort claims in England & Wales, it is very likely that there will be climate adaptation

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[47] *High Speed Two (HS2) Ltd v Persons Unknown* [2022] EWHC 2360 (KB) [90] (Knowles J).
[48] *Attorney-General v Council of the Borough of Birmingham* (1858) 4 K & J 528, 70 ER 220 (Ch); *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642 (HL); *Attorney-General v Leeds Corp* (1870) LR 5 Ch App 583 (Court of Appeal in Chancery); *Attorney-General v Colney Hatch Lunatic Asylum* (1868) LR 4 Ch App 146 (Court of Appeal in Chancery); *Rex v Neil* (1826) 2 Car & P 485, 172 ER 219; Woodyear v Schaefer 57 Md 1 (Court of Appeals of Maryland 1881); Blair v Deakin (1887) 57 LT 522 (Ch); *Crossley and Sons Ltd v Lightowler* (1867) LR 2 Ch App 478 (Court of Appeal in Chancery); *The Attorney-General for the Dominion of Canada v Ewen* (1895) 3 BCR 468 (BCSC); *Thorpe v Brumfitt* (1873) LR 8 Ch App 650 (Court of Appeal in Chancery); and *Lambton v Mellish* (1894) 3 Ch 163 (Ch), cited in *Smith v Fonterra* (NZSC) (n 10) [128]fn190.
[49] *Smith v Fonterra* (NZCA) (n 10) [92].
[50] *Smith v Fonterra* (NZSC) (n 10) [153]-[171].

tort cases. By this I mean claims responding to the harms created by climate change. A good illustration of this kind of case can be found in the claims arising out of the Californian wildfires that devastated parts of Los Angeles earlier this year, which are estimated to have resulted in up to 131 billion dollars of damage and economic loss.[51] Whilst California has been prone to wildfires in the past, scientists consider that an unusual lack of rainfall caused by climate change meant that vegetation was exceptionally dry, creating extreme conditions that intensified both the speed of spreading and the destructiveness of the fires.[52]

Three sets of claims arising out of the fires illustrate the kind of adaptation tort claims we might see in future. First, Los Angeles County and insurers have sued Southern California Edison, the primary electricity company for the region, alleging that their negligence in failing to de-energize power lines and maintain infrastructure contributed directly to the ignition of the fire.[53] Second, claims have been brought against the Los Angeles Department of Water and Power, alleging that the authority failed to maintain reservoirs and other water infrastructure, leaving firefighters without adequate water pressure during the fire.[54] Third, actions have been brought against insurance companies, alleging that they colluded to limit coverage for Californian homeowners at high risk of wildfires, pushing them onto the state's last-resort insurance plan that offers only basic coverage and higher premiums.[55] Whilst they are not at present the subject of any legal claim, planning failures are also said to be relevant to the fires, as a housing crisis pushed planning authorities and developers to build in areas particularly vulnerable to wildfire.[56]

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[51] UCLA Anderson School of Management, 'Economic Impact of the Los Angeles Wildfires' (3 March 2025) <https://www.anderson.ucla.edu/about/centers/ucla-anderson-forecast/economic-impact-los-angeles-wildfires> accessed 30 April 2025.

[52] World Weather Attribution, 'Climate Change Increased the Likelihood of Wildfire Disaster in Highly Exposed Los Angeles Area' (28 January 2025) <https://www.worldweatherattribution.org/climate-change-increased-the-likelihood-of-wildfire-disaster-in-highly-exposed-los-angeles-area/> accessed 30 April 2025.

[53] Daily Journal, 'Insurers Sue Edison over Eaton Fire as State Farm Rate Hike Faces Pushback' (10 March 2025) <https://www.dailyjournal.com/article/384148-insurers-sue-edison-over-eaton-fire-as-state-farm-rate-hike-faces-pushback> accessed 30 April 2025.

[54] Clara Harter, 'Lawsuit Alleges DWP Power Lines Played Role in Palisades Fire' (*Los Angeles Times*, 27 March 2025) <https://www.latimes.com/california/story/2025-03-27/ladwp-accused-of-hiding-role-power-lines-played-in-palisades-fire> accessed 30 April 2024.

[55] CBS News, 'Insurers Colluded to Limit Coverage in California Areas at High Risk for Wildfires, Lawsuits Allege' (22 April 2025) <https://www.cbsnews.com/news/insurers-california-wildfires-collude-limit-coverage-lawsuits-allege/> accessed 30 April 2024.

[56] Environmental Institute, 'Experts Warn L.A. Fires Are a Tragic Consequence of Climate Change and Zoning Practices' (21 January 2025) <https://environment.virginia.edu/news/experts-warn-la-fires-are-tragic-consequence-climate-change-and-zoning-practices> accessed 30 April 2024.

These claims are concerned with adaptation as they are not directed at emitters said to have caused climate change, but at the alleged failures of public authorities and companies in responding to and preparing for the harms it causes. They can be viewed as the tort system's attempt to distribute fairly the losses arising from climate change and so incentivise better preparedness for future climate-related events. For instance, Southern California Edison is now considering burying more of its wires underground in order to avoid the possibility of fires in future.[57]

The UK does not suffer wildfires on the scale seen in California – although wildfires are increasingly a problem here – but as an island nation surrounded by the sea and interlaced with rivers we are likely to see similar litigation arising out of flooding.[58] The Environment Agency's most recent national assessment of flood risk, published last year, states that 8 million – or 1 in 4 – properties in England will be in areas at risk of flooding by 2050.[59] There is also evidence that we grossly underestimate this risk: around half of the households at risk of flooding do not believe it will happen to them.[60] This is particularly relevant to planning, as developers and planning authorities are required to assess flood risk under the National Planning Policy Framework.[61] It is conceivable that if this is done inadequately both developers and public authorities could face claims in tort for losses that result. The are a number of previous cases which indicate how a court might deal with such claims.

In *Lambert v Barratt Homes*[62] the claimant's properties were situated near land owned by the local authority. The local authority had sold part of the land to a developer and retained the remaining part. The developer built a housing development and in doing so blocked a drainage ditch and culvert on its land.

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[57] Salvador Hernadez, 'Edison to Bury More than 150 Miles of Power Lines in Wake of Devastating L.A. County Firestorms' (*Los Angeles Times*, 11 April 2025) <https://www.latimes.com/california/story/2025-04-11/edison-to-bury-power-lines-in-wake-of-firestorms> accessed 30 April 2024.

[58] Sawtell (n 31) 20.07ff; Celia Reynolds and Philippa Jackson, 'Water' in Nigel Pleming KC and others (eds), *The Law of Net Zero and Nature Positive* (London Publishing Partnership 2025).

[59] Environment Agency, 'National Assessment of Flood and Coastal Erosion Risk in England 2024' (*GOV.UK*, 22 January 2025) <https://www.gov.uk/government/publications/national-assessment-of-flood-and-coastal-erosion-risk-in-england-2024/national-assessment-of-flood-and-coastal-erosion-risk-in-england-2024> accessed 30 April 2024.

[60] Environment Agency, 'National Flood and Coastal Erosion Risk Management Strategy for England: Executive Summary' (*GOV.UK*, 7 June 2022) <https://www.gov.uk/government/publications/national-flood-and-coastal-erosion-risk-management-strategy-for-england--2/national-flood-and-coastal-erosion-risk-management-strategy-for-england-executive-summary> accessed 8 May 2025 cited in Sawtell (n 31) 20.08.

[61] For example: NPPF, ch 14 Meeting the challenge of climate change, flooding and coastal change; *Flood risk assessments: climate change allowances* (27 May 2022); *Flood risk and coastal change* (25 August 2022).

[62] *Lambert v Barratt Homes Ltd* [2010] EWCA Civ 681.

As a result, water accumulated on the local authority's retained land and flooded the claimant's property. The claimant sued both the developer and the authority in private nuisance. The High Court held both liable under the measured duty of care, reasoning that the developer's construction had been negligent, and that the local authority's duty extended to abating the nuisance by building its own drainage ditches. The developer did not appeal, but the Court of Appeal reversed the decision in relation to the authority, holding that as the claimants could recover in full from the developer and the authority's public funds were limited, it would not be just also to hold the public authority liable.

In *Lambert* the court shifted liability away from the authority and onto the private sector. A different distribution of risk was decided on by the Court of Appeal in *Vernon Knight Associates v Cornwall Council*,[63] when looking at a public authority with landowner responsibilities of its own. The fact that a public authority was defendant affected the grounds of claim but did not lead to immunity. The claimant was the owner of a holiday park which suffered flooding when heavy rain ran off the road onto the claimant's land. The rain had been unable to drain properly due to blocked drains which the council was responsible for maintaining. The High Court held the council liable in nuisance. On appeal, after reviewing the authorities, Jackson LJ held that "in determining the content of the measured duty, the court must consider what is fair, just and reasonable as between the two neighbouring landowners. It must have regard to all the circumstances, including the extent of the foreseeable risk, the available preventive measures, the costs of such measures and the resources of both parties."[64] He considered that where the defendant is a public authority "the court must take into account the competing demands on [its] resources and the public purposes for which they are held".[65] He noted that this was a "somewhat daunting multifactorial assessment", but concluded that in this case the judge had reached the correct conclusion in holding the authority liable. The court therefore adopts a flexible test aimed at achieving a just result on the facts of the individual case, which may be suited to be adapted to dealing with the complex harms arising from climate change, where responsibility is likely to vary widely depending on the nature of the

[63] *Vernon Knight Associates v Cornwall Council* [2013] EWCA Civ 950.
[64] ibid [49(ii)].
[65] ibid [49(iii)].

hazard and the roles of different public and private bodies in a particular situation.

Another factor stressed in previous cases is foreseeability, illustrated by the *Holbeck Hall*[66] case concerning coastal erosion, which is another risk to property exacerbated by climate change. In *Holbeck Hall*, the owners of a hotel sued the local council after a major landslide caused by coastal erosion led to the collapse of their property. The council owned the cliff between the hotel grounds and the sea and had done some initial remedial work to the cliff which proved to be inadequate. At first instance the judge held the council had been negligent in failing to conduct geological investigations which would have shown further remedial work to protect the property was necessary. The Court of Appeal disagreed, holding that it was not fair to impose a duty on the council to conduct such investigations given that the occurrence of landslides was inherently unpredictable and the extent of the damage suffered by the claimant was not foreseeable by the council. Whilst this foreseeability test is now a settled part of the law, academics Rossi and Ruhl question whether this doctrine can operate in the same way given that in an age of climate change: "unprecedented extremes and novel conditions will be routine experiences".[67] They explain that in climate science this is referred to as "nonstationarity", the idea that past environmental patterns and baselines can no longer reliably predict future conditions. As a result, they argue that defendants – like the council in *Holbeck Hall* – should be held to a higher standard, so as to incentivise greater preparedness against unexpected risk. On the other hand, some scholars, such as Peter Cane,[68] are more sceptical of this kind of argument, arguing that tort law is ill-suited to be used as a substitute for environmental regulation, as judges are poorly placed to predict the wider societal impacts of their decisions and private disputes between two parties "are not geared toward the setting of aggregate environmental, health, and safety goals but rather toward settling matters of right and responsibility within a particular, localised relationship".[69]

A similar doctrine that may be impacted by climate change is the intervening cause concept and the Act of God defence. These derive from tort

[66] *Holbeck Hall Hotel Ltd v Scarborough BC* [2000] 2 W.L.R. 1396.
[67] Rossi and Ruhl (n 8) 841.
[68] Peter Cane, 'Using Tort Law to Enforce Environmental Regulations?' (2001) 41 Washburn LJ 427, 466.
[69] Kysar (n 13) 52.

law's tendency to conceive of nature as something independent of and beyond the control of human agency: it is the extraordinary rainfall[70] or lightning bolt that can act as an intervening cause and discharge a person from liability. Kenneth Kristl has observed that the liability discharging nature of these events – viewed as 'Acts of Gods' – relies on an ancient human tendency to "attribute the vicissitudes of the weather to divine intervention".[71] But, in the age of human induced climate change, nature is now systematically affected by human agency and what were once unpredictable, once-in-a-life time events have come to be frequent and expected. Kristl argues that this is likely greatly to reduce the applicability of the Act of God defence.[72]

Climate change is also likely to put pressure on other parts of the tort regime, particularly the insurance system which sits behind it. This can already be seen with flooding as, similar to the situation with wildfires in California, increased flood risk in the UK has meant insurers have begun to withdraw cover or impose prohibitively high premiums for properties in areas of high flood risk. In response, the Flood Re scheme has been established, a joint initiative between the UK government and the insurance industry designed to provide affordable flood insurance. But even this is limited, as the scheme is scheduled to end in 2039 and does not cover business properties.

The increasing absence of insurance is significant in two ways. First, a great deal of tort litigation is premised on the existence of insurance. Many claimants would not be able to bring their claims but for the funding of insurers and many claims are only worthwhile to pursue if the defendant is insured and 'good for the money'. If a decrease in the availability of insurance makes tort litigation less viable in terms of obtaining a practical result, this will impact on its ability to function as a mechanism to distribute the harms of climate change, as the courts can only act if claims are actually brought before them and the distribution effect is only achieved if claims are met after liability is established. Second, the availability or absence of insurance may impact the substantive outcomes in cases and the content of the common law. This is a matter debated in the case law and commentary. For example, in *Lambert* the Court of Appeal relied on the fact the claimants could recover from their

[70] *Nichols v Marsland* (1876) 2 Ex. D. 1.
[71] Kenneth T Kristl, 'Diminishing the Divine: Climate Change and the Act of God Defense' (2009) 15 Widener L. Rev. 325, 325.
[72] Kristl (n 71).

insurers as a reason not to hold the public authority liable.[73] However, in *Vernon Knight Associates*, Jackson LJ strongly questioned this finding and doubted whether the availability of insurance had any relevance to how liability should be distributed.[74] Nevertheless, academic commentary suggests that in reality it is difficult to disentangle tort law from the insurance scheme which typically lies behind it. For example, the authors of *Atiyah's Accidents* argue it is likely that "the steady expansion of liability for negligence during the past hundred years or so is partly due to the fact that insurance enables judges to give effect to their desire to compensate claimants without imposing undue hardship on defendants".[75]

Climate change imposes new, general and increasingly severe pressure on human societies. This in turn imposes pressures on our existing schemes for absorbing the risks which arise. Tort law and insurance markets operate in combination to achieve this. Where climate change calls in question the capacity of insurance markets to absorb the losses which are channelled through tort law liabilities, the integrated loss distribution system of tort law plus insurance is put in question. If the insurance side of that integrated system breaks down, the unspoken premises of tort law doctrine may be brought more to the surface and called in question in turn. Climate change could well impact on whether this trend continues if it means that insurance becomes less available and less comprehensive, particularly in relation to flooding or other natural hazards.

This direction of travel could pose challenges for tort law in various ways. For example, if the market cannot provide an effective means of fair distribution of risk, societies may tend to look to the state as a loss distribution mechanism of last resort. The state may be the only organisation which is capable of achieving the fair and effective distribution of these substantial and potentially overwhelming risks. So the issue of potential liability of state institutions in tort may become more acute. If it is only public authorities which have the practical ability to take action to mitigate climate change and only they have practical capacity to meet claims, through taxation, thereby achieving a form of distribution of loss, could one effect be an expansion of

[73] *Lambert* (n 62) [22].
[74] *Vernon Knight Associates* (n 63) [47].
[75] Peter Cane and James Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th edn, Cambridge University Press 2018) 236.

liability of public authorities in tort? Also, if nature is not viewed as something apart from human agency, but as something affected by human agency at a collective level, could state authorities come to be seen as appropriate legal persons to respond to legal claims?

At some level, the distinction I started with between mitigation claims and avoidance claims breaks down. This is because tort law has an important signalling or incentivisation function which feeds into the mitigation side, which function is promoted by the after-the-event loss distribution function which marries up with the avoidance side of the analysis. This perspective leads me to my concluding observations.

Conclusion

If the tort law plus private insurance market model of loss distribution breaks down, are we going to be looking at a movement towards a tort law plus state liability model to cope with the losses which arise? But that in turn will pose the old question which Patrick Atiyah posed about losses from motor accidents: is tort law really a better vehicle for distributing the losses which arise, or should there be a simpler model of automatic state compensation according to certain criteria, which meets the social need to cope with the losses which occur and has the additional benefit of being less expensive to administer?

The loss distribution issues which arise under the increasing pressures on society from climate change are of a quality and magnitude that it must be doubted whether gradual changes in tort law doctrine under the authority of the courts to develop the common law can adequately cope with them. It can be argued that the common law responded creditably to the pressures of industrialisation in the Victorian period, but it had several generations in which to do so and it was supplemented in important ways by legislation. I think the pressures from climate change are such that it is unlikely that how tort law develops in response will be determined solely by judges and the courts.

Even when society was responding to significant changes occurring in slower time in the Victorian period, Parliament had to step in to play a pivotal role in shaping tort law. For example, the Employers' Liability Act 1880 was introduced to address the limitations of common law tort protections for workers injured when working with new industrial processes. Later, no fault

worker compensation schemes were introduced; and then there was a general expansion of the health service and the welfare state. Similarly, one can point to the legislative regimes reviewed in the *Manchester Ship Canal* case which were introduced to supplement regulation by the common law. Parliament may well have to intervene again to create new statutory duties in tort or compensation schemes that respond directly to the novel risks posed by climate change, much as it has done in other contexts of social and economic upheaval.

On the other hand, if Parliament takes no action, and the pressures arising from the impact of climate change become increasingly extreme, the courts may find themselves – for want of a better alternative - drawn into determining the novel application, and potentially the expansion, of tort law standards in order to regulate the consequences, at least to some degree.

However, as in other areas of the law, it is likely that we will see interventions from both institutions, courts and legislature, with each playing a role in responding to the systemic risks and expanding range of losses arising from climate change. As so often in the law, a balance might have to be struck between development of the common law and statutory intervention, with questions of institutional competence and institutional legitimacy at the forefront of how that balance should be approached.

Thank you.