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# CLIMATE CHANGE AND THE INDIVIDUAL IN THE UK

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## 1. Introduction

### *1.1. Purpose and definitions*

Climate change litigation in the United Kingdom is largely constituted by public law challenges in a variety of policy areas.[1] The field is dominated by challenges arising from the grant or refusal of permission in relation to renewable energy projects or major emissions sources such as airports and incinerators, a few planning decisions relating to urban expansion (in particular, flood risk), various kinds of cases arising in the context of the EU ETS, and some criminal proceedings and human rights claims.[2] Most large-scale, direct climate actions are deliberate and formulated, underpinned by scholarly analysis, institutional support and carefully-thought-through strategy. They are expensive and require considerable resources. As such, most climate change litigation as commonly conceived of,[3] is by necessity a group endeavour. Of course, as I examine elsewhere, there there is a whole other arenas of small-scale litigation that touch on climate change issues that could create greater scope for actions by individuals or small organisations. In other words, there is a scope for climate change and in the individual, which takes place in multiple subtle ways, and is both deliberate and inadvertent. Although there could be some overlap, as I touch on below, individual action is more likely outside of the more conventional range of cases covered by the questionnaire.

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[1] Here, climate change litigation includes overt climate change cases or any action that might be reframed as such, for instance if the claimant sought relief for other harms but the case interfaced with climate policy. This is the approach taken by Hilson (2010).

[2] See http://climatecasechart.com/non-us-jurisdiction/united-kingdom/ (last accessed 25 April 2018) – although this is by no means a comprehensive database of all UK climate change cases.

[3] See Hilson (2010) or more formally, Markell and Ruhl (2012).

This chapter tackles various specific questions, considering the potential for individuals (or groups of individuals) to take direct legal action in response to climate change in the UK.[4] While these questions are set out in more detail earlier in this collection,[5] in brief it is asked whether an individual could bring the following kinds of cases:

- a challenge to a government for failure to meet its international climate change obligations;
- an action in human rights against a public or private body, for failure to meet its international climate change obligations;
- an action against a public actor charged to authorise major climate change infrastructure that would increase greenhouse gas emissions;
- any action against a public body that does not take steps leading to a failure to adapt to climate change;
- a case against a private actor whose conduct leads to an increase in greenhouse gas emissions; and
- any action against a pension fund for conduct which leads to an increase in greenhouse gas emissions.

I have taken a fairly broad approach, commenting on situations where individuals could, in theory, take action. I do not aim comprehensively to document climate litigation across the UK, or provide a deep analysis as to the prospects of any such action, but rather simply comment on the possibilities and challenges that might arise in this context.[6] Litigation in the context of climate change is beset with challenges, which may be doctrinal/substantive (such as the narrow grounds for judicial review, or constraints on the duty of care in negligence), procedural (such as restrictions on standing and short limitation dates), or access to justice issues (including those related to costs and funding). Litigation costs are of particular significance for this chapter because of the emphasis on the individual. I discuss these in the next section. I then tackle the specific questions set in two substantive sections dealing with public, then private, law.

[4] The UK encompasses four separate jurisdictions with diverging yet frequently similar rules and principles. I have approached the problem reflecting on the law in England and Wales. On occasion I shall make passing reference to case law or legislation from one of the devolved territories, but I shall not comprehensively comment on events there. This is not to say they are not important, because they are, but space does not permit a full review of all four jurisdictions. The Republic of Ireland is of course, a separate country.

[5] I refer to the IACL 'Climate Change and the Individual' Project of which my original report formed part. I have sought to organise my thoughts around the substantive law, but I explain my answers to the questions throughout.

[6] I have also focused overwhelmingly on the common law, and core statutes, but this is not to say that other forms of statutory or administrative proceedings may not play a similar role in some instances.

*1.2. Litigation costs*

Litigation in the UK is adversarial, time-intensive and expensive. This weighs on claimant litigants both in the upfront and ongoing expense of pursuing an action (which includes the fees of their legal representatives, but also fast-rising court fees, and experts costs). In addition, as soon as proceedings are issued the claimant is exposed to the risk of having to pay all of some of their opponents' costs if they lose on some or all of the issues, which can be a considerable deterrent.[7] Traditionally claimants could meet many of these challenges through a combination of legal aid, before-the-event insurance or conditional fee agreements combined with after-the-event litigation insurance, and in this context the prospect of recovery of inter-partes costs - including risk-based success fees - provided sufficient incentive for claimants to proceed, and for claimant lawyers to accept instructions, in more 'risky' cases. However most of these alternatives have been eroded in the last few decades of costs 'reforms'.

The UK is a member of the Aarhus Convention and various amendments have been enacted to the Civil Procedure Rules to comply with its provisions, in particular Art 9(4), which includes the requirement that the costs of bringing environmental cases must not be 'prohibitively expensive'.[8] In public law cases, the risk of costs exposure is relieved significantly by 'costs capping', which limits exposure for claimants who are members of the public, or individuals, previously to £5,000 for each person, now to a variable cap.[9] This requires the claimant make available details of his (or of those 'who stand behind him') financial resources, although this is now to be done in private. She would also not be able to anticipate her exposure to costs risk before she issued proceedings.[10] Conversely, defendants are subject to a £35,000 costs cap which means that successful claimants could not expect to recover their full inter-partes costs in the event of success.[11] It has been argued that these factors are more likely to discourage individuals from pursing environmental claims in the public interest.[12] The new rules also require that claimants declare when filing the claim, that they consider the Aarhus Convention to be applicable; while this may be less significant in climate cases as I allude to above, this still would potentially exclude less sophisticated and certainly unrepresented claimants. Finally,

[7] See generally Stech, Tripley and Lee (2009).
[8] UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted on 25th June 1998 at Aarhus
[9] CPR 45.44 and *RSPB, Friends of the Earth & ClientEarth v Secretary of State for Justice* [2017] EWHC 2309 (Admin)
[10] Lobo (2017)
[11] CPR 45.43(c)
[12] Bell (2017), pp 344 – 5.

contentious though the partial costs protection available in judicial review cases may be, there is no Aarhus protection for costs in private law claims, despite this seemingly being required by Article 9(3).[13] This means that claimants in private law environmental cases bear full costs risk.

## 2. Public law

As explained above, the rest of this chapter discusses the possibilities for individuals to bring various kinds of cases in the UK context. I have started with public law, in which the usual vehicle would be an application for judicial review.[14] This is a narrow and discretionary remedy; in the main it is used to tackle unlawful decision-making processes, and the scope for challenging a decision or point of policy directly on its merits is extremely limited.[15] In addition, there are limits on standing which requires that a 'sufficient interest' be demonstrated;[16] and short limitation periods which can present particular challenges given the complex and technical nature of environmental disputes.[17]

### *2.1. The Climate Change Act and challenges to policy*

A domestic action challenging a failure to meet international obligations presents overwhelming difficulty. Challenges to policy failure or lack of ambition are more likely to be brought in the context of domestic legislation, specifically the Climate Change Act 2008 (the Act). The Act seeks to reduce the UK net carbon account through successively stringent budgets, towards the achievement of a global target. It imposes an overarching duty on the Secretary of State to reduce the UK carbon account by at least 80% relative to 1990 (the baseline year) levels, by 2050; [18] a target which she is empowered to amend under certain circumstances.[19] Additional duties relate to the setting and meeting of carbon budgets,[20]

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13 CPR 45.41, *Morgan and Baker v Hinton Organics* [2009] EWCA Civ 107, *Austin v Miller Argent* [2014] EWCA Civ 1012.

14 There are cases in other jurisdictions where claimants seek to do this through private law cases, seeking to obtain a broad order in terms of the 'open standard' in negligence, see Cox (2016). I discuss private law cases below.

15 See for e.g. Macrory (2009)

16 Section 31 (3) Senior Courts Act 1981, although see *Walton v Scottish Ministers* [2012] UKSC 44 [90] – [94] and [152], [153].

17 Part 54.5 Civil Procedure Rules (CPR) and Fisher, Lange and Scotford (2013), pp 263 – 264.

18 Section 1(1) Climate Change Act 2008.

19 Section 2: "(1) The Secretary of State may by order amend [the carbon targets specified in section 1]. The power in subsection (1)(a) may only be exercised (a) if it appears to the Secretary of State that there have been significant developments in (i) scientific knowledge about climate change, or (ii) European or international law or policy, that make it appropriate to do so… " Section 6 contains similar provisions in relation to the amendment of the level of the carbon budgets in section 5.

20 Section 4(1). Save for the 2020 budget, which is to be 26% lower than the 1990 baseline (section 5(1)(a)). The Secretary of State has a power to set ranges for later years (section 5(1)(c), and he must also set indicative annual budget ranges for each year (section 12 (1) ).

annual and periodic reporting to Parliament, [21] a duty to prepare and report on 'proposals and policies' for meeting the carbon budgets, [22] The nature or content of the proposals or policies is not prescribed, [23] however the Secretary of State is also required to provide an explanation and modifying policy plan if the specified targets are not met.[24] The Committee on Climate Change (CCC) advises the Secretary of State and Parliament on the setting and achievement of budgets and targets, including the 2050 target,[25] and reports to Parliament concerning progress made towards specific budgets and targets, including reference to whether these are likely to be met.[26]

It is hardly surprising that questions would be asked concerning the nature and enforceability of the powers and duties under the Act. [27] It is widely argued that the Act's substantive obligations (of meeting carbon targets or budgets) are primarily of normative significance, given the difficulties that would be involved in meaningfully enforcing those duties. [28] However, even if the duties in the Act to achieve emissions targets were not susceptible to review, the procedural obligations in the Act are probably enforceable. There is also increasing attention on the decisions and actions taken by the Secretary of State further to her other duties and powers under the Act.[29]

A recent attempt sought to challenge the failure of the Secretary of State to exercise her power to increase the ambition of the emissions reduction target, [30] in accordance with developments in scientific understanding as well as increased global ambition under the Paris Agreement. [31] The claimants are an NGO 'Plan B Earth' and a small group of individuals, who brought a crowdfunding campaign to finance the litigation. They argued that the failure so to do was irrational and inconsistent with the claimants' human rights and the public sector equality duty. [32] The claimants did not obtain permission to proceed to a full hearing, as their action was not deemed arguable.[33] The decision has been appealed.

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[21] Sections 16, 18(1) and 20(1) and (2)
[22] Sections 13 and 14
[23] Stallworthy (2009).
[24] Section 18(8) and 19(1), and 20(6) in relation to the 2050 target
[25] Sections 3(1)(a) 2050 target or baseline year; section (7)(1)(a) amending target percentages; section 9(1)(a) and 34 consulting on carbon budgets and s22(1)(a) on the alteration of carbon budgets; 17(4)(c) on carrying amounts between budgetary periods; section 33(1), 34(1)(a) and (b)
[26] Section 36(1)(a) – (c).
[27] Stallworthy (2009) pp 243, also see Reid (2012). McMaster (2008) and Church (2015).
[28] McHarg (2011) particularly 477 – 9.
[29] Church (2015), Section B.2.
[30] Section 2(1)(a)
[31] Paris Agreement Article 2(1)(a). which the claimants said prescribed a global temperature goal of 'well below 2 degrees'
[32] Under Section 2(2)(a). The claimant's particulars of claim and pre-action correspondence may be found here: http://www.planb.earth/plan-b-v-uk.html
[33] *R (Plan B Earth and others) v SoS for BEIS* [2018] EWHC 1892 (Admin).

This is not to say that differently framed challenges might not succeed in time. The more recent reports of the CCC do not recommend increased emissions reduction ambition, the core reasons for which is that more work needs to be done in the design and implementation of policies to achieve the *existing*, less ambitious targets.[34] Current trajectories are not consistent with the reductions necessary to meet the fourth carbon budget and the past few governments have been characterised by a degree of chaos in climate and energy policy delivery.[35] The recent publication of the government's Clean Growth Strategy does not appear to have allayed concerns, and the Committee on Climate Change has stressed that *detailed and achievable policies* and measures must be enacted as a matter of urgency, in order to reach the extant targets.[36] As the Secretary of State is under a duty both to prepare and report on policies to support the achievement of targets under the Act,[37] it may well be a matter of time before further challenges arise in response to her failure to act in accordance with those duties.

*2.2. Climate change infrastructure*

I have also been asked whether it is possible to bring actions against state entities in relation to infrastructure that affects climate change. [There is certainly more traction in public law cases that challenge specific projects rather than broad challenges to the very political decisions made in framing climate change strategy per se.] In most instances these arise as challenges to a local administrative or national planning decision either granting or refusing permission for the construction of the desired infrastructure.[38] In many instances such actions are actually brought by individuals or groups of individuals, sometimes jointly with an NGO such as Friends of the Earth. Space and the purpose of this report do not permit an indepth review of all such actions and proposed actions, although as before, each action

[34] Committee on Climate Change (2016). 'Current policy in the UK is not enough to deliver the existing carbon budgets that Parliament has set. The Committee's assessment in our 2016 Progress Report was that current policies would at best deliver around half of the emissions reductions required to 2030, with no current policies to address the other half. This carbon policy gap must be closed to meet the existing carbon budgets, and to prepare for the 2050 target and net zero emissions in the longer term.' at 12. Also Committee on Climate Change (2017). Discussed in *R (Plan B Earth and others)* from p 21.
[35] Lockwood (2013). Also ClientEarth (2016) highlights similar issues, and makes a series of recommendations (in section 6), none of which have been followed.
[36] Committee on Climate Change (2018) especially pp 39 – 43.
[37] Section 13(1) and 14(1)
[38] Fisher, Lange and Scotford (2013) pp 807 - 836 explain these processes.

would be framed within the public law grounds for a challenge to the public authority decision, not as a broad climate change challenge per se.[39]

Specific actions include challenges in relation to airport expansion,[40] and arising from permission to construct cement factories,[41] and to commence exploratory works to assess the viability of gas streams for hydraulic fracturing.[42] At the time of writing a barrage of challenges have been brought to the proposed construction of a third runway at Heathrow Airport in London. One includes several local authorities, the NGO Greenpeace and the Mayor of London, Sadiq Khanm as claimants.[43]

In addition of course, individuals bring challenges in relation to infrastructure that is designed to support a low-carbon transition, typically renewable energy projects. There are a wealth of cases challenging both the granting and refusal of permission in such circumstances, although significantly individuals are more likely to bring challenges to the granting of permission for such projects, on the basis of local interests.[44] This could include local economic interests, but individuals could also raise concerns about the local environment, or landscape and heritage concerns. As I discuss elsewhere, in this way individuals are involved in climate change litigation without this necessarily being their focus or intention.[45] Litigation about wind farms is broadly accepted as climate change litigation, irrespective of the motives of and arguments made by the litigants. This and other more 'under the radar' kinds of litigation, that could impact climate change policy, represent the kinds of areas litigation by individuals could make a contribution.[46]

### *2.3. Human rights*

I am asked whether it would be possible for individuals bring a case against a government agency on the basis that human rights inaction has infringed their human rights. The

[39] Hilson (2010) discusses how the climate change 'grievance' in each case is introduced in distinct ways. It should also be noted that such decisions may also be contested via statutory appeal processes, not only judicial review – see Fisher, Lange and Scotford (2013) pp 837 – 844.
[40] *R (London Borough of Hillingdon) v Secretary of State for Transport* [2010] EWHC 626 (Admin)
[41] *R (Littlewoood) v Bassetlaw District Council* [2008] EWCA Civ 1611
[42] *Frackman v Secretary of State CLG* [2017] EWHC 808
[43] See http://stopheathrowexpansion.co.uk/news/2018/8/7/judicial-review-launched-against-third-runway. Another is brought by NGO Plan B (see https://planb.earth/plan-b-launches-legal-challenge-to-heathrow-expansion/).
[44] An interesting discussion of how these interests are balanced can be found in Jones (2016). A few examples: *Pugh v. Secretary of State for Communities and Local Government* [2015] EWHC 3 (the claimant argued that the protection of heritage assets outweighed the climate benefits of the proposed wind farm); *Wildland Ltd. and the Welbeck Estates v. Scottish Ministers* [2017] CSOH 113 (petitioners argued that the planning authorities reasons were inadequate given the impact of a windfarm on the region's distinct character and wilderness areas).
[45] Bouwer (2018).
[46] Bouwer (2018).

literature on human rights and climate change is vast.[47] Osofsky and Peel argue that lawsuits based on human rights claims represent a new generation of litigation, endorsed by their explicit linkage in the Paris Agreement.[48] They argue that, in '…parallel with these policy and legal developments at the international level, rights claims in climate change litigation seek to direct public and political attention to the detrimental human consequences of climate change, arguments that ultimately may be more persuasive in motivating action to address the problem.'[49] While this framing does bring a strong normative component to climate change issues, in terms of crystallising the immediacy of the impacts (particularly in relation to public health), more is needed to bring or indeed succeed in a human rights action.[50]

The UK has incorporated the European Convention on Human Rights into domestic law by means of the Human Rights Act 1998. The Act creates a remedy for violation of Convention Rights.[51] In addition, the Act requires courts to develop the common law in such a way as to ensure coherency and consistency with the provisions of the Act.[52] But this does not mean open season on rights claims. For instance, at present a series of 'civil rights' cases based on governmental failure to protect the 'atmospheric trust', causing climate change,[53] are currently before several US courts. The claimants are predominantly children, but it should be noted that these cases could not be considered to be brought by individuals: they are part of a 'co-ordinated litigation campaign'.[54] The public trust cases are rooted in academic work that establishes both the concept of an 'atmospheric trust', [55] as well as the scientific basis for the claim and the structured relief sought.[56] The prospects of atmospheric trust litigation in the UK have been considered, and there are mixed views as to the prospects.[57] It seems unlikely however that the UK courts would entertain freestanding civil rights cases of this nature. The recent *Plan B Earth* litigation was based in part on human rights arguments,

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47 Knox (2018).
48 Paris Agreement (FCCC/CP/2015/L9/Rev1), Preambular paragraph 11.
49 Peel and Osofsky (2018), p 4.
50 If brought in public law, any individual claimant would encounter the same procedural challenges as outlined above. He would also have to establish standing, demonstrate that the right was engaged: the claimant would have to establish the infringement of the right was direct and serious, whether any limitations were justifiable and the kind of obligations (positive or negative) imposed on the defendant by virtue of these. See Clayton and Tomlinson (2009). This, of course, is in addition to the scientific or evidentiary problems that a climate change action inevitably involves - Peel and Osofsky (2018), p 10.
51 Section 7 and 8.
52 Section 6(3)(a).
53 *Juliana v. United States*, Case No. 6:15-cv-01517-TC, 2016 WL 6661146 (D. Or. Nov. 10, 2016) [1].
54 *Juliana* [57]. Actions have been brought in several US states and actions are contemplated in other jurisdictions: see https://www.ourchildrenstrust.org/global-legal-actions.
55 This wave is underpinned by theoretical writing about the significance of the 'public trust' as a tool of natural resources governance: Wood (2014).
56 Hansen (2013). James Hansen is also a party to the proceedings.
57 Freedman and Shirley (2014) or less optimistically: Goldberg and Lord QC (2011), p 478. See however *Juliana* [24].

arguing that the Secretary of State's failure to increase the relevant targets infringed their rights to life, home and family life and not to be unfairly deprived of property.[58] The claimants also made arguments based on non-discrimination, on the basis that persons with protected characteristics would suffer disproportionately due to climate change.[59] Of course, these issues were deemed unarguable.[60]

Having said that, up to half of environmental law cases include a human rights component,[61] so it is unarguable that human rights have contributed to environmental law litigation in the UK, [62] and may contribute to any litigation about climate change. For instance, in litigation concerning the termination of subsidies for solar installations the claimants were successful in their arguments that the termination of the scheme infringed its rights to possession of property. [63] These actions were not brought by individuals as such, but are a good example of the less dramatic, under the radar litigation referred to above. Rather than using human rights arguments to tackle the whole of climate change, these cases did tackle a small aspect of climate change and energy policy (in this case, the dismantling of a renewable energy feed-in tariff).[64]

## 3. Private Law

### *3.1. 'Holy grail' cases*

I am asked whether individual claimants could bring an action against private bodies for climate change harms. Large-scale private law cases for climate harms against large-scale emitters, were first to be considered when scholars turned their attention to the topic of 'climate change litigation'. [65] The 'sexiness' of such proposed actions makes them interesting to scholars and something of the 'holy grail' for practitioners,[66] however private law doctrine

[58] Art 2, Art 8, A1P1 – see Claimants' Statement of Facts and Grounds, available at http://www.planb.earth/plan-b-v-uk.html
[59] Art 14 and under s 149 of Equality Act 2010 (the public sector equality duty)
[60] *R (Plan B Earth and others).*
[61] Bell (2017), p 344. For instance, the Plan B litigation includes a human rights head of claim, under Articles 2, 8, A1P1 and Art 14 - see Claimants Statement of Facts and Grounds from p 66.
[62] See also e.g. Clayton and Tomlinson (2009), Chapters 13 and 18.
[63] Under Article 1 Protocol 1 of the Human Rights Act 1998 – see *R (Homesun Holdings Ltd) v Secretary of State* [2012] EWCA Civ 28 and *Breyer Group plc and others v Department of Energy and Climate Change* [2015] EWCA Civ 408 (the latter case sought damages).
[64] Later cases making similar arguments in relation to the renewables obligation were not so fortunate: *Solar Century Holdings v Secretary of State* [2016] EWCA Civ 117
[65] E.g. Grossman (2003); Penalver (1998).
[66] Bouwer (2018), Section 2.1.

does not accommodate climate change well in this kind of context.[67] Despite the extensive writing on these kinds of cases and these doctrinal incompatibilities, these issues have not been aired in a courtroom, as all previous attempts have been dismissed as non-justiciable in the early stages.[68]

Considerable academic work has been done to seek to overcome the evidentiary barriers to hold large corporations to account for climate change. In particular, progressive scientific work has sought to identify the source of most historical global emissions, [69] their historical insight into the likely future consequences of these activities, [70] and the extent to which specific events might be said to be caused by (attributed to) climate change.[71] This work has generated a new generation of private law cases – the so-called 'carbon majors' litigation.[72] There are too many different sets of proceedings to detail each action in full, and while there are some variations, most are brought on the basis that the defendants' production and promotion of fossil fuels constitutes a public nuisance. All these actions are still at a fairly messy and contentious early stage as the parties seek to establish the appropriate forum and deal with preliminary procedural issues.[73] At the time of writing, the defendants have succeeded in early motions to dismiss in relation to two sets of proceedings: *City of Oakland v BP plc*[74] and *City of New York v BP plc*.[75] It is perhaps too early to comment comprehensively on the outcome of these cases, as the campaign of litigation is far from over, but the dismissal hearings struck a depressingly familiar tone: the field is occupied by statute,[76] and the broad scope of the proceedings warranted a political solution.[77]

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[67] Kaminskaite-Salters (2011); Goldberg and Lord (2011). Examples in the US include: Hunter and Salzman (2007); Kysar (2011) - a lengthy list of articles discussing this issue may be found at Kysar's note 3. Also Brunnee and others (2011); Weinbaum (2011).
[68] *Native Village of Kivalina v. ExxonMobile Corp* 9th Cir., No. 09-17490 (September 21, 2012); *Comer v. Murphy Oil USA*, 585 F.3d 855, 880 (5th Cir. 2009); *Comer v Murphy Oil USA, Inc* 839 F. Supp. 2d 849, 855-62 (S.D. Miss. 2012). Also the new carbon majors decisions, referred to below.
[69] Heede (2014); Ekwurzel and others (2017).
[70] Frumhoff, Heede and Oreskes (2015); Shue (2017).
[71] Marjanac and Patton (2018) .
[72] Burger and Gundlach (2017), pp 21 – 22.
[73] A fairly recent (at time of writing) summary and overview of these cases is available at Burger (2018).
[74] *City of Oakland v BP plc* 3:17-cv-06011 (2018).
[75] *City of New York v BP plcc* (2018) 18 Civ. 182.
[76] Applying *Native Villiage of Kivalina* – the claimants had sought relief for the 'production and sale' of fossil fuels, but the courts would not accept that their claims were based on emissions.
[77] Distinguished from Massachusetts v EPA 549 US 497 (2007) on the basis that EPA only sought to regulate six local coal fired electricity plants, not a broader section of the industry, including international activities.

Many of the high-emitting 'carbon majors' are registered or have interests in the UK.[78] On the face of it, this would suggest new possibilities to bring climate change tort cases in the UK courts. This is not the place for an indepth discussion as to the likely prospects of success or multiple challenges of large climate change tort cases, however I shall make a few passing observations. Any claimant in an action in negligence would still have to establish that the defendant owed him a duty of care. He would also have to establish on a balance of probabilities that the defendant's emissions caused his harm. Nothing in the attribution studies has or could resolve the first problem, or indeed, has met any test currently accepted by the UK courts for causation in tort law. Quite famously the UK courts have found creative ways to get around evidentiary difficulties in the face of pressing socio-political problems, specifically in relation to illness caused by exposure to asbestos, but it can not be assumed that this would be replicated in climate tort cases.[79] An action based on deceit may be more successful, but such actions may encounter other doctrinal difficulties.[80]

There remains the theoretical possibility of an action in private law against governments, seeking increased climate ambition or other relief. The hallmark action for this kind of case is *Urgenda Foundation v the Kingdom of the Netherlands*[81] in which the claimants (an NGO and group of citizens) sought an injunction in tort law requiring increased climate ambition from the Dutch government.[82] It is probably unlikely that a similar action would succeed in the UK, as the very specific framings of duty and harm present a significant jurisprudential hurdle in English tort law.[83] Courts do not like to impose tort duties on public authorities – where they do these are narrowly formulated and tend only to be found in very specific situations.[84] Moreover, it is likely that an action of this nature would be subject to stringent arguments about justiciability, and it is difficult to conceive of a case like *Urgenda* even being brought, let alone surviving a strike-out.[85]

### *3.2. Local authority / adaptation cases*

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[78] Heede (2014), p 237.
[79] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22., but see Hoffmann (2013) and comments in *Sienkiewicz v Grief (UK) Ltd* [2009] EWCA Civ 1159.
[80] For instance, to succeed in an action for deceit the claimant would have to show that he relied on the deception and that his damage flowed from the deceit.
[81] ECLI:NL:RBDHA:2015:7196. De Graaf and Jans' (2015).
[82] Peel and Osofsky (2018) particularly Section 3.1. argue that although cases like Urgenda doctrinally are pleaded as tort actions, they more closely resemble human rights reasoning. It is perhaps more accurate to say that the state's obligations in international and human rights law helped the court to articulate the tort duty.
[83] Van Zeben (2015), pp 349 – 352. Also see Lord (2011), pp 457 – 475.
[84] Lunney, Nolan and Oliphant (2017), pp 541 – 554.
[85] Lunney, Nolan and Oliphant (2017), pp 512 – 540.

I am also asked whether there is a possibility for an individual to bring proceedings against a public body arising from failures to take proper steps concerning adaptation. There has not been much in the way of climate change adaptation-type litigation in the UK.[86] There remains, of course, broad potential for high-level action that seeks to challenge the failure of central government or associated agencies properly to design and implement policies for risk resilience and adaptation to climate change.[87] However, it might be argued steps to adapt to climate change and prevent harm are more appropriately and effectively dealt with at a national or local government level.[88] The most obvious kinds of cases that are likely to be brought in relation to adaptation failures are in tort and / or human rights.[89] Similarly to the above, the role of human rights in private law cases is complex and nuanced, and freestanding human rights actions are the exception in private law,[90] and as such the following relates predominantly to tort.

Tort actions seeking compensation for damage would be brought in circumstances where climate risks materialise and the impacts are inadequately managed. Given the risk profile of the UK such actions are most likely to arise from winter flood events.[91] Depending on the damage caused – whether this was to a claimant's residence, or to farmland – this is the kind of case that lends itself more easily to individual action, although it is more likely that any such action would be a subrogated claim brought by an insurance company.[92] There is no actionable duty under statute,[93] and actions under the common law would be brought either in negligence or in nuisance. Liability in nuisance is limited,[94] and as before, establishing public authority duties of care is a notoriously difficult and complex area of the law of negligence. There is some precedent for holding local authorities liable in

86 There are a few recent cases, although in public law: *Wigan Metropolitan Borough Council v. Secretary of State for the Environment Transport and Regions* [2001] EWHC Admin 587 and *Goldfinch (Projects) Limited v. National Assembly for Wales* [2002] EWHC 1275 challenge the refusal or grant of planning permission on account of local flood risk.

87 While this shall not be explored in any depth here, the Climate Change Act 2008 does require the Secretary of State both to develop programs on (section 58) and report on risk in relation to (section 56) climate change adaptation. These are of course specific duties, and very little work has been done concerning their force and effect. See however my comments concerning legal action arising from the Climate Change Act in Section 2.1.

88 See e.g. Ruhl (2014) or more specifically Gill (2007).

89 For instance *Ashgar Leghari v. Federation of Pakistan* (W.P. No. 25501/2015) , although as Peel and Osofsky (2018) observe, this decision was driven by a uniquely activist judiciary: see n 100 and references therein. Also Carnwath (2016), p 9

90 Although the court will use human rights to fill gaps if necessary, as in most recently: *Commissioner of Police of the Metropolis v DSD and another* [2018] UKSC 11.

91 Committee on Climate Change (2016b), pp 32- 33. Other high risk areas include extreme heat and problems with water supply – space does not permit a discussion of other issues.

92 Merkin and Steele (2013).

93 Flood and Water Management Act 2010; Land Drainage Act 1991

94 *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66; [2004] 2 AC 42

circumstances where their conduct worsened or prolonged a flooding event.[95] As before, small localised cases in response to specific events are more likely both to be brought by individuals, then a larger case seeking to tackle all of UK adaptation policy. This is one area where individual climate change action is likely to increase in future, but probably not as envisaged in the questions.

*3.3. Pension funds / financial institutions*

Finally, I am asked whether an action is likely or possible against pension funds, or other financial institutions, on grounds that their activities in any way contribute to climate change. A similar action brought in the US unsuccessfully proposed a new tort of 'intentional investment in abnormally dangerous activities'.[96] For now, it is difficult to imagine precisely how such an action might be formulated, and for similar reasons to those stated above, it is unlikely that an action based in a failure to divest as causative of climate change.[97] In 2009, a group of NGO's sought to challenge the UK Treasury on account of its management of the investments of the Royal Bank of Scotland, a bank brought into public ownership subsequent to the financial crisis.[98] The claimants did not allege that the defendants conduct was in any way causative of climate harms; the application was brought on the basis that HM Treasury had not complied with various environmental and human rights commitments, in respect of which the claimant had a legitimate expectation. Permission was refused; in essence the court did not think that RBS's ownership profile created any additional duties in relation to social or environmental considerations.[99]

Perhaps more likely is litigation arising from the personal interests of investors and overexposure to risk brought about by a failings on the part of pension fund trustees or other investment bodies.[100] While it is probably premature to bring such proceedings now, there

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[95] *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74. In general, a duty of care does not arise in relation to omissions by public authorities, although they may be found liable if their conduct has made a situation worse. See *Capital Countries v Hampshire County Council* [1977] QB 1004 and Lunney, Nolan and Oliphant (2017) Chapter Nine.
[96] See *Harvard Climate Justice Coalition v President & Fellows of Harvard College* (2016) 90 Mass. App. Ct. 444 in which the claimants alleged a breach of fiduciary duty and proposed a new tort of 'intentional investment in abnormally dangerous activities' but failed to establish standing for either.
[97] For indeed, the Harvard case relied on an argument that the investment in the fossil fuel industry as the first step in a chain of causation that culminated in climate harms, see discussion in Franta (2017).
[98] *R (People & Planet) v HM Treasury* [2009] EWHC 3020 (Admin). This was a public law challenge that I am considering here because of the financial theme – I appreciate that this is a doctrinal mismatch.
[99] The claimant's three grounds based in legitimate expectations, irrelevant considerations and human rights, were all found to be unarguable.
[100] Richardson (2017), Section II. See e.g. *Lynn and Gonzalez v Peabody Energy* 2015 4:15CV00916 AGF. in which the claimants (Peabody employees) sought relief for a breach of fiduciary duty in the administration of their pension fund, which they alleged should have divested from Peabody holdings due known financial risks. The claims were dismissed for lack of standing.

have for several years been questions about the way in which the financial services industry has understood and communicated the risks that climate change posed to investments.[101] At the time of writing, in part due to a proactive approach to risk by relevant regulators, and in part due to a sustained campaign by the NGO ClientEarth,[102] amendments to relevant legislation have been proposed. These amendments that would require policies on climate risk (where these present a material financial risk) to be included in the statement of investment principles produced by trust-based occupational pension schemes.[103] It remains to be seen how effective these new provisions would be in encouraging climate-conscious investing by pension schemes and increasing engagement from scheme members; in any event the same campaign has established that pension fund trustees who fail to consider climate risk may not properly have fulfilled their common law fiduciary duty.[104] But should the occasion arise, again it is likely that any such proceedings would be brought by a group of claimants – presumably those with inadequate retirement provision or poorly performing investments - as losses of this nature are unlikely to affect lone individuals.

## 4. Conclusion

This report has examined the possibilities for individuals to take direct action through the courts in response to climate change. I have taken this to include groups of individuals, although as is well established, climate change litigation presents particular challenges which may present barriers to litigation by individuals (rather than, say, corporates, groups of individuals or NGOs).

As I explain above, in relation to most of the questions raised, the prospects for any kind of successful litigation in the UK are fairly limited. Claimants are presented with a host of challenges and barriers, chief amongst them, the incompatibility of our doctrinal law with the problems presented by climate change and political pressures. Specifically, in the UK, claimants are also met with high and uncertain litigation costs, and a legal culture of

[101] Specifically, the extent to which fund trustees and managers appreciated the distinction between climate change as an ethical or social issue, and climate change as a material financial risk to investments – see Law Commission (2014).
[102] See details on https://www.clientearth.org/pensions/.
[103] ClientEarth (2018); Department for Work and Pensions, 'Consultation on Clarifying and Strengthening Trustees' Investment Duties' (2018) The Occupational Pension Schemes (Investment and Disclosure) (Amendment) Regulations 2018.
[104] Such duties might include a failure properly to consider the impact of climate risk on the scheme investments, or having considered it, act to mitigate losses to the scheme, see: Bryant and Rickards (2016). From other jurisdictions see Richardson (n 98), Section II; Barker and others (2016).

conservatism that makes the extensive litigation seen in other jurisdictions, extremely unlikely.[105]

However, as I mention in a few places in this article and elsewhere,[106] there is and stands to be considerable litigation that bears on climate change litigation, that at present is passing under the radar because of a continuing preoccupation with specific kinds of cases. These kinds of actions are likely to have some impact in the context of the broader governance of climate change, and it is in relation to these kinds of cases – litigating to block wind farm development, suing a financial advisor due to a retirement fund deficient – that individuals are most likely to take climate change issues to the courts.

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[105] In particular, Australia and the US, the most active sites for climate change litigation – see Peel and Osofsky (2015) for just some examples.
[106] Bouwer (2018).

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