

CLIMATE CHANGE LITIGATION

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TOPICS

- Climate change; the science
- Climate change litigation
 - Claims against governments
 - Claims against corporations
 - Claims against 'carbon majors'
 - Securities and financial regulation claims
 - Insurance claims
 - Trends

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CLIMATE CHANGE; THE SCIENCE

- Six main greenhouse gases (GHGs)
 - Carbon dioxide (CO₂)
 - Methane (CH₄)
 - Nitrous oxide (N₂O)
 - F-gases
 - Hydrofluorocarbons (HFCs)
 - Perfluorocarbons (PFCs)
 - Sulphur hexafluoride (SF₆)
- Approximately 80% of GHG emissions are CO₂

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CLIMATE CHANGE; THE SCIENCE

- Carbon dioxide
 - Remains in the atmosphere for about 100 years
- Methane
 - 21 times as effective as CO₂ in trapping heat
 - Remains in the atmosphere for 11-12 years
- Nitrous oxide
 - 200 to 300 times as effective as CO₂ in trapping heat
 - Remains in the atmosphere for up to 150 years
- F-gases
 - 3,000 to 13,000 as effective as CO₂ in trapping heat
 - Remain in the atmosphere for up to 400 years

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CLIMATE CHANGE; THE SCIENCE

- According to 136 year records by NASA
 - 2019 was the globally hottest year
 - 2016 and 2020 were tied for the globally second hottest year
 - 2014 to 2020 were the hottest years ever recorded
 - Globally averaged temperature in 2020 had risen about 1.02°C more than the 1951 to 1980 mean temperature

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CLIMATE CHANGE; THE SCIENCE

- CO₂ levels in the atmosphere have increased by over 35% since the industrial revolution (18th and 19th centuries)
 - Over 1/3 of the increase has occurred since 1980
- Levels recorded at Mauna Loa Observatory, Hawaii
 - January 2015: 400.10 parts per million (ppm)
 - May 2019: 414.7 ppm
 - May 2020: 417 ppm
 - May 2021: 419 ppm

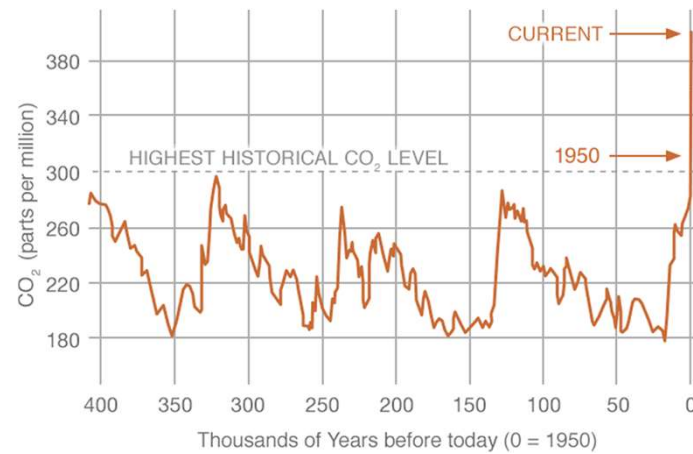
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CLIMATE CHANGE; THE SCIENCE

NASA: CO₂ LEVELS IN THE ATMOSPHERE

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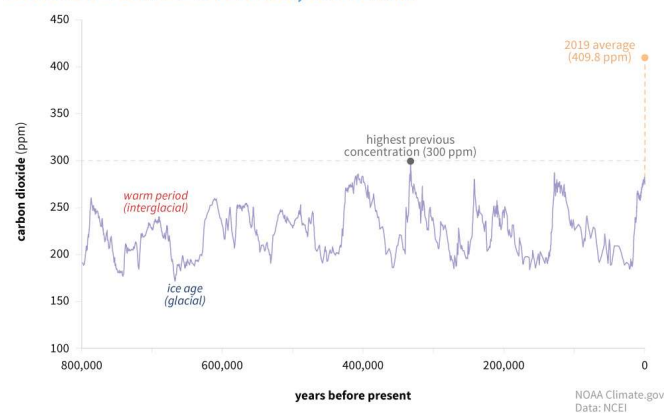


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CLIMATE CHANGE; THE SCIENCE

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CARBON DIOXIDE OVER 800,000 YEARS



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CLIMATE CHANGE: THE SCIENCE

- 9 August 2021: Intergovernmental Panel on Climate Change report
 - 'The scale of recent changes across the climate system as a whole and the present state of many aspects of the climate system are unprecedented over many centuries to many thousands of years'
 - 'Human-induced climate change is already affecting many weather and climate extremes in every region across the globe. Evidence of observed changes in extremes such as heatwaves, heavy precipitation, droughts, and tropic cyclones, and, in particular, their attribution to human influence, has strengthened since [October 2014]'
 - 'Global surface temperatures will continue to increase until at least the mid-century under all emissions scenarios considered. Global warming of 1.5°C and 2°C will be exceeded during the 21st century unless deep reductions in [CO₂] and other [GHG] emissions occur in the coming decades'

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CLIMATE CHANGE: THE SCIENCE

- IPCC August 2021 report (continued)
 - 'Low-likelihood outcomes, such as ice sheet collapse, abrupt ocean circulation changes, some compound extreme events and warming substantially larger than the assessed *very likely* range of future warming cannot be ruled out and are part of risk assessment'
 - 'From a physical science perspective, limiting human-induced global warming to a specific level requires limiting cumulative CO₂ emissions, reaching at least net zero CO₂ emissions, along with strong reductions in other greenhouse gas emissions. Strong, rapid and sustaining reductions in [methane] emissions would also limit the warming effect resulting from declining aerosol pollution and would improve air quality'

Sixth Assessment Report, Headline Statements from the Summary for Policymakers

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CLIMATE CHANGE; THE SCIENCE

- If global average temperature reaches 3°C above pre-industrial levels (which could occur by 2300), sea level is expected to rise by 2.7 to 5.1 metres, of which between 2 and 4 metres would be due to the melting of the Arctic and Antarctic ice sheets
- Difference in global average temperature of earth from coldest in last ice age (approximately 11,000 years ago) to today was about 8 to 10°C
- Total temperature increase from 1850-1899 to 2001-2005 was 1.4°C
- Temperature rise at the poles is faster than other parts of the world

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CLIMATE CHANGE LITIGATION

- Key categories of cases
 - Claims against governments
 - Claims against corporations
 - Claims against carbon majors
 - Securities and financial regulation claims
 - Insurance claims (three US cases; no non-US cases)
 - ABI has commented that the major impacts of climate change on insurers are
 - Weather-related events such as hurricanes, extreme freezes (claims for burst pipes in UK in early 2018 cost insurers £194 million in a three-month period), extreme heatwaves (claims for damage from subsidence by over 10,000 households in UK in 2018 cost insurers over £64 million), and flooding
 - Fall in value of assets in which insurers invest

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CLIMATE CHANGE LITIGATION

- Other types of cases
 - Freedom of information/public record cases
 - Environmental assessment and permitting
 - Cases against protestors
 - Cases by people seeking refuge or asylum due to threat of climate change
 - Cases concerning planning law

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CLIMATE CHANGE LITIGATION

- Best sources of climate change litigation
 - Sabin Center for Climate Change Law, Columbia Law School / Columbia University Earth Institute
<https://climate.law.columbia.edu/content/climate-change-litigation> and <http://climatecasechart.com/>
- Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science
 - <https://www.lse.ac.uk/granthaminstitute/>
- Centre for Climate Change Economics and Policy, hosted by University of Leeds and London School of Economics and Political Science
 - <https://www.cccep.ac.uk/>

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CLIMATE CHANGE LITIGATION

- Number of climate change cases between 1986 and 31 May 2021 (figures in parentheses are up to 30 May 2020)
 - Two main categories
 - Strategic cases: aimed to force a societal shift not just interests of the claimant(s)
 - Consideration of climate change in decision-making processes (e.g., planning; flooding or sea-level rise)
 - Total: 1,841 cases (1,650 cases)
 - US: 1,387 (1,213)
 - Non-US: 454 (374)
 - Australia: 115 (98) UK: 73 (62) EU: 58 (57)
 - Over 40%: climate change was the central legal argument (peripheral in other cases)
 - 58% had outcomes favourable to climate change action (32% unfavourable; 10 neutral)

Source: Joana Setzer and Rebecca Byrnes, Global trends in climate change litigation: 2021 snapshot (2 July 2021)

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CLAIMS AGAINST GOVERNMENTS

- *Commonwealth of Massachusetts v EPA*, 549 U.S. 497 (2007)
 - 1999: 19 organisations filed a petition requesting the US Environmental Protection Agency (EPA) to regulate GHG emissions from new motor vehicles under the Clean Air Act (CAA)
 - September 2003: EPA denied the petition
 - EPA considered that the CAA did not authorise it to issue regulations to address global climate change
 - Essentially considered that CO₂ is not a pollutant because it does not 'pollute' the air
 - Even if the EPA had such authority, it considered that it would be unwise to issue such regulations

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CLAIMS AGAINST GOVERNMENTS

- *Massachusetts v EPA* (continued)
 - Standing
 - Test for constitutional standing requires claimants to demonstrate that they have
 - A concrete and particularised injury that is either actual or imminent
 - The injury is fairly traceable to the defendant
 - A favourable decision is likely to redress that injury
 - US Supreme Court ruled that Massachusetts had standing because it had a particularised injury in its capacity as landowner of a substantial portion of coastal property
 - Injury was fairly traceable to the EPA because domestic automobiles emitted over 6% of global CO₂
 - Rulemaking would slow or reduce loss of the Massachusetts coastline

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CLAIMS AGAINST GOVERNMENTS

- *Massachusetts v EPA* (continued)
 - CAA is unambiguous that CO₂ is a pollutant
 - EPA is therefore authorised to regulate CO₂
 - EPA had stated that it had such authority in 1998 and had never disavowed it
 - EPA had not offered a reasonable explanation for its refusal to decide whether GHGs cause or contribute to climate change
 - Court did not reach issue of whether the EPA must make an 'endangerment finding' but held only that the EPA must ground its reasons for action or inaction in the CAA
 - Endangerment finding
 - a finding that current and projected concentrations of GHGs in the atmosphere threaten the public health and welfare of current and future generations
 - provides the basis for the EPA to issue regulations on GHGs under the CAA

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CLAIMS AGAINST GOVERNMENTS

- Atmospheric Trust litigation
 - Environmental NGOs and others have brought over 50 cases against the federal Government and States seeking to compel them to regulate climate change on behalf of present and future generations
 - Public trust doctrine
 - US Constitution
 - Substantive due process clause of the Fifth Amendment ('No person shall ... be deprived of life, liberty, or property, without due process of law ...') (applies only to the federal Government)
 - Equal protection clause (Fourteenth Amendment) ('... No State shall ... deprive any person of life, liberty, or property, without due process of law ...')
 - Ninth Amendment ('The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people')

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CLAIMS AGAINST GOVERNMENTS

- *Juliana v United States* (US District Court for the District of Oregon)
 - August 2015: 21 people aged 8 to 19, Earth Guardians and James Hansen of Columbia University (as guardian for future generations) alleged that the US Government had breached the equal protection provisions of the Fourteen Amendment and the substantive due process provision of the Fifth Amendment by endangering them and future generations with policies that contributed to climate change
 - Some of the children lived on farms affected by drought; others had lost their homes because of floods; others faced health issues because of forest fires
 - Requested US Government to create a 'national remedial plan' to stabilise the climate and 'restore the Earth's energy balance'
 - Main argument: 'government has known for more than 50 years that [CO2] produced by burning fossil fuels was destabilizing the climate system in a way that would significantly endanger plaintiffs, with the damage persisting for millennia'

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CLAIMS AGAINST GOVERNMENTS



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CLAIMS AGAINST GOVERNMENTS

- Key decisions and filings
 - November 2016: District Court denied defendants' motion to dismiss for failure to state a claim and lack of jurisdiction
 - 17 January 2020: Ninth Circuit ruled 2-1 to dismiss the action on the basis that the plaintiffs lacked standing to sue because climate policies must come from the legislative, not the judicial, branch of government (justiciability issue)
 - 10 February 2021: Ninth Circuit denied a petition for a rehearing *en banc* on the basis that the plaintiffs lacked standing
 - 1 July 2021: Plaintiffs filed motion for leave to amend and file second amended complaint
 - 6 July 2021: Six States led by New York filed a motion to leave to file a brief as *amicus curiae* in support of the plaintiffs

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CLAIMS AGAINST GOVERNMENTS

- *Urgenda Foundation v State of the Netherlands (Ministry of Infrastructure and the Environment)*
 - Action by an environmental NGO
 - Based on Dutch law that requires the State to have 'due care' for its citizens; also that the Netherlands had recognised, by signing international climate change conventions, that a failure adequately to reduce emissions would harm its citizens
 - Dutch target had been 17% lower than 1990 levels
 - (1990 levels are used as baseline levels under the UN Framework Convention on Climate Change and subsequently the Paris Agreement and various legislation for calculating targets for reducing CO2 emissions)

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CLAIMS AGAINST GOVERNMENTS

- *Urgenda (continued)*
 - 24 June 2015: Hague District Court
 - Applied principles of the Council of Europe Convention on Human Rights (ECHR) to interpret the Government's duty of care
 - Ruled that the State had a 'serious duty of care to take measures to prevent climate change' and to 'mitigate as quickly and as much as possible'
 - Ordered the Dutch Government to take more measures to reduce GHG emissions to ensure that Dutch emissions in 2020 will be at least 25% lower than those in 1990
 - 2015: Dutch Government appealed, raising 29 grounds of appeal

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CLAIMS AGAINST GOVERNMENTS

- *Urgenda* (continued)
 - 9 October 2018: Hague Court of Appeal ordered the Dutch Government to carry out measures to reduce GHG emissions by 25% by 2020
 - Ruled that climate change was sufficiently serious that the Dutch Government's failure to carry out more ambitious measures was a breach of article 2 (right to life) and article 8 (right to respect for private and family life) of the ECHR
 - Concluded that *Urgenda* had the right to invoke articles 2 and 8 directly on behalf of individuals
 - 20 December 2019: Dutch Supreme Court ruled
 - Dutch Government had breached its obligations under articles 2 and 8 due to the risk of dangerous climate change that could seriously affect the rights to life and well-being of Dutch residents
 - Dutch Government must reduce its emissions by a minimum of 25% by the end of 2020 compared to 1990 levels

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CLAIMS AGAINST GOVERNMENTS

- Dutch Government measures after *Urgenda*
 - Introduce new climate initiatives at a cost of EUR 3 billion
 - Includes scaling back the Netherlands' three coal-fired power stations (75% reduction in capacity and potential closure of one – all opened within the last five years)
 - Reducing cattle and pig herds – with compensation to farmers
 - Providing subsidies to homeowners to use less concrete and more plants in their gardens
 - Lowering speed limits to control emissions of nitrogen dioxide
 - Installing solar panels on all school roofs
 - More sustainable forestry
 - Alternatives for some polluting processes in industrial facilities

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CLAIMS AGAINST GOVERNMENTS

- *Friends of the Irish Environment CLG v Ireland* [2019] IEHC 747
 - Action by Friends of the Irish Environment CLG (FIE) an environmental NGO and corporate entity
 - FIE argued that the Irish Government's 2017 National Mitigation Plan did not meet requirements of the Climate Action and Low Carbon Development Act 2015
 - Plan set out measures to reduce emissions of CO₂ and to transition Ireland to a low carbon, climate resilient and environmentally sustainable economy by 2050
 - Government had breached the Irish Constitution and articles 2 and 8 of the ECHR
 - September 2019: High Court dismissed action
 - FIE had standing to bring constitutional and human rights claims but
 - 2015 Act does not require the plan to achieve specific intermediate targets; plan was only a 'piece of the jigsaw'

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CLAIMS AGAINST GOVERNMENTS

- *Friends of the Irish Environment* [2020] IESC 49
 - 31 July 2020: Irish Supreme Court ruled for FIE
 - Quashed the plan because it concluded that it was *ultra vires* (that is, it exceeded the Government's powers) because it fell 'well short of the level of specificity required ... to comply with the provisions of the 2015 Act'
 - A reasonable and interested member of the public could not know how the Government intended to meet the transition objective, and some policies in the plan were 'excessively vague or aspirational'
 - Court did not address human rights issues
 - Concluded that FIE did not have standing to bring them because it does not enjoy the right to life or the right to bodily integrity
 - Irish Government required to create a new, more ambitious National Mitigation Plan that complies with Ireland's national and international climate obligations

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CLAIMS AGAINST GOVERNMENTS

- 23 July 2021: Climate Action and Low Carbon Development (Amendment) Act 2021
 - Five-year carbon budgets beginning 1 January 2021; the first two with a 51% reduction target in GHG emissions by 2030 compared to reported emissions for the year ending 31 December 2018
 - National long-term climate action strategy every five years to achieve the 'national climate objective' of a 'climate resilient, biodiversity rich, environmentally sustainable and climate neutral economy' by 2050
 - Annually updated climate action plan to focus on short and medium term objectives
 - Specifically references the Paris Agreement
 - Minister for the Environment, Climate and Communications to report on progress, with other Ministers to report on progress on their areas of responsibility
 - Local authorities to prepare and adopt individual five-year climate action plans
 - Amends Planning and Development Act 2000 to require local authorities, when making their development plans, to include objectives to reduce GHG emissions and the necessity of adaptation to climate change, taking their climate action plans into account

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CLAIMS AGAINST GOVERNMENTS

- NB: UK Climate Change Act 2008
 - Section 1: 'It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline'
 - 2019: 80% revised to 100%
 - Established legally-binding carbon budgets (reductions from 1990 levels)
 1. 2008-2012: 25%
 2. 2013-2017: 31%
 3. 2018-2022: 37%
 4. 2023-2027: 51%
 5. 2028-2032: 57%
 6. 2033-2037: 78% (added in June 2021)

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CLAIMS AGAINST GOVERNMENTS

- *R (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214
 - Application for judicial review by five London boroughs, Mayor of London, Friends of the Earth, Plan B Earth, Greenpeace and a member of the public
 - Challenged issuance by Secretary of State for Transportation of 'Airports National Policy Statement: new runway capacity and infrastructure at airports in the South East of England', dated 26 June 2018 (ANPS) that favoured the development of a third runway at Heathrow Airport
 - Section 5(8) of the Planning Act 2008 provides that the reasons for the policy set out in a national policy statement, including the ANPS, 'must (in particular) include an explanation of Government policy relating to the mitigation of, and adaptation to, climate change'
 - 1 May 2019: Divisional Court had dismissed claims for judicial review of the ANPS

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CLAIMS AGAINST GOVERNMENTS

- *Plan B Earth* (continued)
 - Other grounds included breach of the Climate Change Act 2008, its relationship to the Paris Agreement, environmental issues, and human rights
 - Court of Appeal rejected most grounds but ruled that the Secretary of State failed to take into account the UK Government's commitment to the Paris Agreement when it issued the ANPS
 - Ruled among other things that section 5(8) required the Secretary of State to take the UK Government's commitment to the Paris Agreement into account because it was government policy
 - Secretary of State's failure to take it into account was irrational because it was 'obviously material' to his decision
 - 6 May 2020: UK Supreme Court granted right to appeal to Heathrow Airport Ltd and a company representing land owners at airport; UK Government did not appeal

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CLAIMS AGAINST GOVERNMENTS

- *R (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52
 - 16 December 2020: UK Supreme Court reversed
 - Due to the UK Government still developing implementation of the Paris Agreement, its formal ratification did not mean that it constituted government policy for purposes of the Planning Act
 - Secretary of State did not breach his duty under section 10 of the Planning Act by failing to have regard to the effect of GHG emissions or the effect of non-CO2 emissions created by the new runway after 2050
 - Secretary of State's approach was rational and lawful

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CLAIMS AGAINST GOVERNMENTS

- *R (on the application of Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004
 - 2019: UK Government commissioned a review to consider whether and if so how to continue with HS2
 - 11 February 2020: Government decided to proceed with HS2
 - 3 April 2020: High Court denied an application for judicial review by Chris Packham on the basis, among other things, that the UK Government had failed to take account of the project's GHG emissions in light of the Paris Agreement and the Climate Change Act
 - 31 July 2020: Court of Appeal denied the application for judicial review
 - Stated that it could be taken that the UK Government was aware of its commitments under the Paris Agreement and its responsibilities under the Climate Change Act and that it took them both into account in its decision
 - No evidence to the contrary

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CLAIMS AGAINST GOVERNMENTS

- *Packham* (continued)
 - Paris Agreement is an unincorporated international obligation not having the status of government policy on climate change
 - Also, whereas section 5(8) of the Planning Act 2008 sets out clear duties for decision making in respect of national policy statements, the UK Government was not constrained by the Climate Change Act in deciding to proceed with HS2

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CLAIMS AGAINST GOVERNMENTS

- *Neubauer v Germany* (German Supreme Constitutional Court, 21 April 2021)
 - Action by environmental activists (specified individuals), Fridays for Future, Greenpeace, Friends of the Earth and other NGOs against provisions in the Federal Climate Protection Act 2019
 - Aim of the Act: to implement Germany's obligations under the Paris Agreement
 - Provided for a gradual reduction in GHG emissions by at least 55% by 2030 compared with 1990 levels
 - Germany was seeking to achieve net zero emissions by 2050
 - Challenge was based largely on the Basic Law, especially article 20a
 - 'Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order'

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CLAIMS AGAINST GOVERNMENTS

- *Neubauer v Germany* (continued)
 - Court ruled that the 2019 Act was partially unconstitutional because
 - It did not specify reductions in GHG emission targets after 2030
 - Was incompatible with ‘fundamental rights to a human future’
 - ‘violates the freedoms of the complainants, some of whom are still very young’
 - 2019 Act does not provide sufficient reduction targets to comply with Germany’s obligations to reduce GHG emissions under the Paris Agreement
 - ‘More urgent and shorter term measures’ required to reduce the rise in average global temperatures to between 1.5C and 2C as set out in the Paris Agreement
 - Act is not sufficiently detailed to indicate how reductions will occur
 - Government must amend the Act by December 2022 to ensure Germany meets its 2030 GHG reduction goals and to specify how reduction targets for GHG emissions will be adjusted after 2031

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CLAIMS AGAINST GOVERNMENTS

- 25 June 2021: German Government amended the Climate Action Law
 - Deadline for achieving net GHG neutrality by 2045 instead of 2050
 - Reduce total anthropogenic GHG emissions as close to zero as possible, with remaining GHG emissions to be removed from the atmosphere by carbon capture, etc.
 - Reduction in GHG emissions to 65% by 2030 compared to 1990 instead of 55%
 - Specific targets for each year after 2030

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CLAIMS AGAINST GOVERNMENTS

- *Notre Affaire à Tous v France (Affaire du Siècle; Trial of the Century)*
 - 17 December 2018: Oxfam France, Greenpeace France, Notre Affaire à Tous and the Fondation pour la nature et l'homme (backed by over 2,000,000 signatures) claimed compensation from the French Government for ecological damage due to climate change for which the French Government was partly responsible
 - French Government rejected the claim
 - NGOs filed an action in the Paris Administrative Court
 - 3 February 2021: Court ordered the French Government to pay one Euro for moral prejudice for the lack of climate policies
 - Court stated that it would wait before deciding whether it was necessary to order the French Government to carry out measures to meet its commitments to reduce GHG emissions

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CLAIMS AGAINST GOVERNMENTS

- *R (Transport Action Network) v Secretary of State for Transport* [2021] EWHC 2095 (Admin)
 - Transport Action Network Limited (TAN) challenged the 11 March 2020 decision of the Secretary of State for Transport to adopt the £27.4 billion 'Road Investment Strategy 2: 2020-2025' (RIS2) under section 3 of the Infrastructure Act 2015
 - RIS2 sets out how Highways England will develop and construct 45 road schemes rolled over from RIS1 and five new schemes
 - Section 3(5) requires the Secretary, in adopting a RIS, to have regard in particular of the effect of the RIS on
 - a) 'the environment, and
 - b) the safety of highway users'

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CLAIMS AGAINST GOVERNMENTS

- *Transport Action Network (continued)*
 - TAN argued that the Secretary had failed to take into account
 - Objectives of the Paris Agreement
 - UK's net zero target for 2050 in the Climate Change Act
 - Fourth (2023-2027) and fifth (2028-2032) carbon budgets set out under the Climate Change Act
 - Secretary argued that he had taken them into account and, even if he had not, they were not 'obviously material considerations' to which he was legally obliged to have regard in his decision on RIS2

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CLAIMS AGAINST GOVERNMENTS

- *Transport Action Network (continued)*
 - Court ruled that due to the Secretary having taken the effects of climate change into account in RIS2, his judgement could only be challenged on grounds of irrationality
 - Following *Packham*, the Secretary was not required to have regard to the Paris Agreement
 - RIS2 is not an environmental decision-making document but is essentially a high-level investment strategy
 - Parliament had not indicated that RIS2 should specifically take account of its effect on climate change
 - No legal basis for the Secretary to have been advised by his officials of any assessment related to the fourth and fifth carbon budgets or a cumulative assessment of emissions over a longer period
 - Effect on carbon emissions from the five new schemes in RIS2 were *de minimis*
 - Secretary's approach was not irrational

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CLAIMS AGAINST GOVERNMENTS

- *Young People v UK Government*

- 1 May 2021: service of legal proceedings by three British individuals (Jerry Amokwandoh, Adetola Onamade and Marina Tricks backed by Plan B) on Boris Johnson, Rishi Sunak and Kwasi Kwarteng alleging that the UK Government has failed to honour its commitments under the Paris Agreement
- Alleged that the UK Government's ongoing support of fossil fuels constitutes a breach of their rights to life, family life and the prohibition of discrimination in the enjoyment of those rights under articles 2, 8 and 4 of the ECHR as enacted through the Human Rights Act 1998
- Also alleged that the UK Government is making a 'dishonest' claim to climate leadership and adherence to the Paris Agreement in that, instead of reducing GHG emissions urgently, it is among other things granting new oil and gas licences in the North Sea, investing billions of pounds in new roads, expanding aviation capacity and had backed the opening of a new coal mine in Cumbria

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CLAIMS AGAINST GOVERNMENTS



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- *Young People v UK Government* (continued)
 - 21 May 2021: UK Government filed summary grounds of defence (47 pages)
 - ‘Paris Agreement imposes no obligation on individual states to implement [its] goals in any particular way’ (para 30)
 - ‘provisions of the Paris Agreement on adaptation to climate change ... are even less prescriptive’ (para 31)
 - Except for ‘certain exceptional circumstances and with special justification (which does not apply in this case), the ECHR confers a responsibility on states to safeguard [ECHR] rights only within their own territories’ (para 36)
 - Noted, in particular, the claimants’ references to the planning system, and rejected them
 - 15 July 2021: UK Government filed further proceedings

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CLAIMS AGAINST GOVERNMENTS

- *Sharma v Minister for the Environment* (No 2) [2021] FCA 774
 - Putative class action by eight children concerning an extension of the Whitehaven Vickery coal mine
 - Alleged that burning coal extracted from the mine would exacerbate climate change and harm young people in the future
 - Sought an injunction under the Environment Protection and Biodiversity Conservation Act to stop the Federal Environment Minister approving the extension
 - 27 May 2021: Federal Court of Australia established a new duty of care based on the law of negligence to avoid causing personal harm to children
 - Considered the nature and extent of the harm likely to be suffered by the claimants including premature death from heatwaves and bushfires

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CLAIMS AGAINST GOVERNMENTS

- *Sharma (continued)*
 - 8 July 2021: Court issued a declaration that
The Minister 'has a duty to take reasonable care . . . to avoid causing personal injury or death to persons who were under 18 years of age and ordinarily resident in Australia at the time of the commencement of this proceeding arising from emissions of carbon dioxide into the Earth's atmosphere'
 - Rejected arguments by the Minister to limit the declaration to the claimants
 - Ruled that the duty applies to all Australian children because they have the same interests as the claimants

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CLAIMS AGAINST CARBON MAJORS

- *American Electric Power Company v Connecticut*
 - 2004: 8 States, City of New York and 3 land trusts brought a federal common law of nuisance action against 6 electric utilities that operated fossil fuel plants in 20 States
 - Alleged that GHG emissions from the defendants' operations were causing harm to human health and the environment by contributing to global warming
 - Sought an injunction for the utilities to reduce GHG emissions
 - 2005: District Court dismissed the actions on the basis of a non-justiciable political question

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CLAIMS AGAINST CARBON MAJORS

- *American Electric Power Company* (continued)
 - 2006: Second Circuit Court of Appeals vacated the case
 - Case did not raise non-justiciable political question
 - Claimants had standing to sue
 - Federal common law of nuisance applied to claims; had not been displaced by the CAA or EPA's rulemaking under the CAA
 - 20 June 2011: US Supreme Court reversed
 - Federal common law of nuisance claims were displaced by EPA's authority to regulate CO₂ under the CAA and the EPA's exercise of that authority
 - 4 justices concluded that at least some plaintiffs had standing; 4 concluded that no plaintiffs had standing (Justice Sotomeyer recused herself because she was involved in the 2nd Circuit decision)

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CLAIMS AGAINST CARBON MAJORS

- *Comer v Murphy Oil USA, Inc.*
 - 20 September 2005: persons whose property was damaged by Hurricane Katrina brought an action seeking compensatory and punitive damages from 147 oil, chemical, coal and other companies
 - Alleged that the defendants contributed to global warming adding to the strength of Katrina
 - 28 May 2010: Fifth Circuit Court of Appeals eventually dismissed the case
 - 10 January 2011: US Supreme Court denied mandamus petition

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CLAIMS AGAINST CARBON MAJORS

- *Native Village of Kivalina v ExxonMobil Corporation*
 - 2008: Inupiat village in Alaska filed an action against 24 oil, utilities and coal companies in the US District Court for the Northern District of California
 - Alleged public and private nuisance, civil conspiracy and concert of action
 - Alleged that GHG emissions had caused sea ice to melt and erode the shoreline around their village
 - Sought the cost of relocating the village (\$95 - \$400 million (£80 - £187 million))

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CLAIMS AGAINST CARBON MAJORS



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CLAIMS AGAINST CARBON MAJORS

- *Kivalina* (continued)
 - September 2009: District Court dismissed the action
 - Village did not have standing
 - Non-justiciable political question
 - 21 September 2012: Ninth Circuit Court of Appeals affirmed the District Court's ruling
 - 20 May 2013: US Supreme Court denied certiorari

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CLAIMS AGAINST CARBON MAJORS

- *People of the State of California v BP P.L.C., Chevron Corporation, ConocoPhillips, Exxon Mobil Corporation and Royal Dutch Shell PLC* (San Francisco Superior Court)
- *People of the State of California v BP P.L.C., Chevron Corporation, ConocoPhillips, Exxon Mobile Corporation and Royal Dutch Shell PLC* (Alameda County Superior Court)
 - 20 September 2017: both actions filed
 - Actions in public nuisance by San Francisco and Oakland alleging that the defendants marketed and produced fossil fuels knowing that the fuels would and did create a public nuisance including sea level rise and flooding
 - Sought funding to finance infrastructure to deal with rising sea levels

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CLAIMS AGAINST CARBON MAJORS

- *People of the State of California* (continued)
 - 20 October 2017: defendants removed both actions to the US District Court for the Northern District of California on the basis that they are governed by federal common law and presented substantial federal questions including the actions being displaced by the CAA
 - 27 February 2018: District Court denied motions by the claimants to remand the cases to State court
 - June 2018: District Court dismissed the actions on the basis of the CAA and judicial deference to policymakers
 - 26 May 2020: Ninth Circuit Court of Appeal
 - Denied motions by defendants to hear the cases in federal court
 - Ruled that both cases should be revived and sent back to the District Court to consider whether they should be heard in State courts
 - 14 June 2021: US Supreme Court denied defendants' petition to review Ninth Circuit's opinion

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CLAIMS AGAINST CARBON MAJORS

- *City of New York v BP P.L.C., Chevron Corporation, ConocoPhillips, ExxonMobil Corporation and Royal Dutch Shell PLC*
 - 9 January 2018: New York City filed an action in US District Court for the Southern District of New York
 - Alleged that the defendants produced 11% of all GHGs through oil and gas products sold by them and that they have known the adverse consequences of burning fossil fuels but engaged in misinformation campaigns to cast doubt on climate change that delayed regulation of the fossil fuel industry thus allowing them to protect their businesses and assets
 - Actions in public nuisance, private nuisance and trespass
 - Mentioned rebuilding costs from Hurricane Sandy
 - Based on internal documents, especially Exxon Mobil (Exxon) documents

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CLAIMS AGAINST CARBON MAJORS

- *City of New York v BP* (continued)
 - Sought an order for reimbursement of costs related to climate change and an injunction to abate public nuisance and trespass if the defendants failed to pay damages for past and permanent injuries
 - 19 July 2019: Court dismissed the action on the basis that the claims were based on the transboundary nature of GHGs from the worldwide production of fossil fuels, not production of fossil fuels in New York
 - 1 April 2021: Second Circuit Court of Appeal rejected New York's action
 - Federal common law claims were displaced by the CAA

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CLAIMS AGAINST CARBON MAJORS

- *Milieudefensie v Royal Dutch Shell plc*
 - 5 April 2019: Milieudefensie, Friends of the Earth Netherlands, other environmental NGOs and over 17,000 members of the public brought an action in the Hague Court of Appeals against Shell alleging that its contributions to climate change breach its duty of care under Dutch law and articles 2 and 8 of the European Convention on Human Rights
 - Plaintiffs sought a ruling that Shell must reduce its CO₂ emissions by 45% by 2030 compared to 2010 levels and to zero by 2050, in line with the Paris Agreement
 - Plaintiffs sought to extend the decision in *Urgenda* to private companies, arguing that given the Paris Agreement's goals and the scientific evidence regarding the dangers of climate change, Shell has a duty of care under the Dutch Civil Code and articles 2 and 8 of the ECHR

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CLAIMS AGAINST CARBON MAJORS

- *Milieudefensie* (continued)

- Plaintiffs argued that
 - Shell's long knowledge of climate change, misleading statements on climate change, and inadequate action to reduce climate change help support a finding of Shell's unlawful endangerment of Dutch citizens and actions constituting gross negligence
 - Shell is responsible for 1.8% of all CO₂ emitted by humans, a significant proportion of GHGs emitted since the late 1980s can be traced back to 25 companies including Shell, and that Shell's activities and products are responsible for approximately 1% of global GHG emissions each year
- 26 May 2021: Court ruled that Shell owed Dutch citizens a duty of care to reduce CO₂ emissions and must reduce them from its global operations (including suppliers and end users) by 45% compared to 2019 levels by the end of 2030
- 20 July 2021: Shell announced it would appeal; Court's order is provisionally enforceable, thus appeal does not suspend its obligations to reduce GHG emission as ordered by the court

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SECURITIES AND FINANCIAL REGULATION CLAIMS

- Exxon Mobil litigation

- 2015: Inside Climate News began an investigation of Exxon's role in climate change
 - July 1977: presentation by James F. Black, a senior scientist in the Research & Engineering Division of Exxon, at its headquarters on the dangers of climate change followed by a written version stating, among other things

'In the first place, there is general scientific agreement that the most likely manner in which mankind is influencing the global climate is through carbon dioxide release from the burning of fossil fuels'

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SECURITIES AND FINANCIAL REGULATION CLAIMS

STEVENS&BOLTON

- Exxon Mobil litigation (continued)
 - 1978: Black updated his presentation to more personnel including scientists and managers at Exxon
 - Warned that an estimated doubling of CO₂ in the atmosphere would increase average global temperatures by 2 to 3°C, and up to 10°C at the poles; rainfall could increase in some regions and desertification could occur in others
 - He stated that ‘Some countries would benefit but others would have their agricultural output reduced or destroyed’ and ‘Present thinking holds that man has a time window of five to ten years before the need for hard decisions regarding changes in energy strategies might become critical’

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SECURITIES AND FINANCIAL REGULATION CLAIMS

STEVENS&BOLTON

- ExxonMobil litigation (continued)
 - 1978 to late 1980s: Exxon carried out a detailed research programme into CO₂ from fossil fuels and its impact
 - 1980s: Exxon ended the research programme and began denying that climate change existed
 - November 2015: New York Attorney General (AG), Eric Schneiderman, issued a subpoena to Exxon demanding documents from 1 January 1977 including
 - Documents on climate change prepared for or by industry groups including the American Petroleum Institute, the U.S. Oil & Gas Association and the International Petroleum Industry Environmental Conservation Association
 - Documents related to Exxon's support or funding of advocacy groups involved in climate change
 - Marketing and advertising documents about climate change, including communications to employees and spokesmen about how to discuss the subject, as well as advertisements and other public-facing documents

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SECURITIES AND FINANCIAL REGULATION CLAIMS

STEVENS&BOLTON

- Exxon Mobil litigation (continued)
 - 2016: Maura Healey, Massachusetts AG issued a civil investigative demand to Exxon alleging that it breached State consumer protection rules and misled investors about the impact of fossil fuels on climate change and risks of climate change to its businesses
 - Demanded that Exxon provide internal documents from 1976
 - Exxon responded that
 - Massachusetts had no jurisdiction over it because it only franchised service stations in Massachusetts and did not have an actual business operation in the State
 - Demand breached the due process clause of the 14th amendment to the US Constitution because Exxon is a non-resident; headquartered outside Massachusetts

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SECURITIES AND FINANCIAL REGULATION CLAIMS

STEVENS&BOLTON

- Exxon Mobil litigation (continued)
 - June 2016: Exxon filed an action to stop Massachusetts and New York carrying out their investigations on the basis that the investigations sought to retaliate against Exxon for its views of climate change and thus breached its constitutional rights
 - January 2017: Massachusetts Superior Court ruled that Exxon must provide internal documents about impacts of fossil fuel combustion to AGs
 - 13 April 2018: Massachusetts Supreme Judicial Court affirmed an order from the Superior Court denying Exxon's motion to bar the Massachusetts AG pursuing the investigation
 - 7 January 2019: US Supreme Court declined to review Exxon's petition for a writ of certiorari seeking review of the Massachusetts Supreme Judicial Court's ruling

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SECURITIES AND FINANCIAL REGULATION CLAIMS

STEVENS&BOLTON

- Exxon Mobil litigation (continued)
 - October 2019: Massachusetts AG filed an action against Exxon alleging consumer and investor fraud
 - Alleged that Exxon hid its early knowledge of climate change and misled investors about the projected financial impact on its business
 - 30 July 2020: Exxon filed a notice indicating that it would seek to dismiss the action

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SECURITIES AND FINANCIAL REGULATION CLAIMS

STEVENS&BOLTON

- Exxon Mobil litigation (continued)
 - 24 October 2018: New York AG filed a fraud action against Exxon in New York State Supreme Court
 - Alleged that Exxon had perpetrated a 'longstanding fraudulent scheme – to deceive investors and the investment community ... concerning [its] management of the risks posed to its business by climate change'
 - Also alleged that Exxon had made materially false and misleading representations concerning the proxy cost of CO₂ that it claimed to use in simulations of the impact of future climate change regulations on its business
 - Sought an injunction, damages, and restitution for investors

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SECURITIES AND FINANCIAL REGULATION CLAIMS

STEVENS&BOLTON

- Exxon Mobil litigation (continued)
 - 10 December 2019: court dismissed New York AG's action with prejudice finding that he had failed to establish that Exxon had made any material misstatements or omissions that misled a reasonable investor about its practices or procedures for accounting for climate change risk
 - 10 January 2020: New York AG announced that they would not appeal the ruling
 - NB: issues relate only to fraud not responsibility for climate change

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INSURANCE CLAIMS

STEVENS&BOLTON

- *Steadfast Insurance Company v AES Corporation*
 - 2008: Steadfast (an indirect subsidiary of Zurich Financial Services) filed an action for declaratory judgment that it was not obliged to defend its insured, AES Corporation (an energy company), under commercial general liability policies for any damages for which AES was liable
 - AES was a defendant in the *Kivalina* action
 - Steadfast argued that the claims for property damage did not result from an 'accident', that the damage occurred before September 2003, the inception date for its policies, and GHGs are a pollutant and are barred by pollution exclusions in the policies
 - Policies provided cover for damage 'caused by an occurrence'
 - 'Occurrence' was defined as 'an accident, including continuous or repeated exposure to substantially the same general harmful condition'

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INSURANCE CLAIMS

- *Steadfast* (continued)
 - February 2010: Virginia Circuit Court granted Steadfast's motion for summary judgment and held that Steadfast did not have a duty to defend AES because there was no 'occurrence' as defined by the policies
 - September 2011: Virginia Supreme Court affirmed the Circuit Court's decision on the basis that the release of GHGs was not an 'accident' or an 'occurrence'
 - January 2012: Virginia Supreme Court granted a motion for a new hearing to AES
 - AES had argued that the court's decision was overly broad
 - April 2012: Virginia Supreme Court reaffirmed its previous holding on the basis that any alleged damages incurred by AES were due to its intentional acts in emitting GHGs and were not an 'accident' or an 'occurrence'

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INSURANCE CLAIMS

- *Pietrangelo v S & E Customize It Auto Corporation*
 - 2013: Small claims action
 - Plaintiff alleged that the defendant, a vehicle repair company, was negligent in failing to have flood insurance, resulting in the plaintiff not being fully compensated for damage to her vehicle caused by Hurricane/Superstorm Sandy whilst the vehicle was in the defendant's repair shop in Staten Island, New York
 - Court ruled that the repair company was not liable for failure to obtain insurance for the bailment of the defendant's vehicle
 - Court also ruled that the claimant had failed to show that the defendant was negligent

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INSURANCE CLAIMS

- *Pietrangelo* (continued)
 - Court further ruled that the negligence claim was barred by the 'act of nature' defence
 - Court stated, in what it termed 'merely intellectual speculation', that if it was true that climate change caused Sandy to become a superstorm, 'then the possibility exists that Sandy is not a pure "act of nature" but is the result of human activity'
 - Court did not reach this issue but commented that the act of nature defence would still be available because 'locating a source of the altered weather pattern might be impossible' and 'the proper party or parties could not be identified with any certainty so as to bring them into the court's jurisdiction'

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INSURANCE CLAIMS

- *Illinois Farmers Insurance Company v Metropolitan Water Reclamation District of Great Chicago*
 - 2013: Illinois Farmers Insurance Company, Farmers Insurance Exchange and various subsidiaries and related entities brought actions against the water reclamation districts for Greater Chicago, Cook County, City of Chicago and numerous other municipalities in negligent maintenance, failure to remedy known dangerous conditions and takings without just compensation
 - Alleged that the municipalities' failure to implement reasonable measures to manage storm water and increase capacity for managing the water after heavy rains in April 2013 had resulted in sewer water flooding its insureds' properties resulting in insurers making larger payments to their insureds
 - 2014: Insurers voluntarily dismissed the claims

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TRENDS

- Massive increase in climate change cases in recent years in and outside the US
- Increase in human rights arguments
 - E.g., *Urgenda*, *Juliana*, *Milieudefensie*, *Young People*
- Increase in claims based on the Paris Agreement and Constitutions
 - E.g., *Friends of the Irish Environment*, *Neubauer*
- Landmark claim against a carbon major
 - *Milieudefensie v Royal Dutch Shell* (appeal pending)
- Majority of claims are succeeding
 - But not in the UK or the US