**To what extent is there room to apply creatively common law doctrine to combat, in the UK courts, the damage to the environment resulting from climate change?**

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It is striking the frequency with which academics and activists around the world have, over the past two decades, enthused about the potential for common law to be used to combat environmental damage resulting from climate change. Indeed, recent commentary has drawn attention to the potential for UK common law to be used to this end, particularly claims for public nuisance and negligence. [[1]](#footnote-1) Yet there is a noticeable mismatch between the literature and the present situation, for there have been few instances of climate change litigation (CCL) in the UK, and none involving common law doctrine.[[2]](#footnote-2) This is perhaps a reflection of the UK context, not least the high costs of taking legal action[[3]](#footnote-3), plus the government’s already onerous commitment to reducing emissions.[[4]](#footnote-4) This analysis is sympathetic to these explanations. However, it is animated by a broader point – that there is limited room to apply common law doctrine creatively in the UK courts so as to combat environmental damage caused by climate change. Rather, this analysis will show that though the doctrines of nuisance and negligence lend themselves most readily to CCL[[5]](#footnote-5), there is limited room to apply them to damage to the environment that has resulted from climate change. The reasons for this are two-fold – a judicial reluctance to develop common law, and the difficulty of satisfying legal understandings of causation. This analysis begins with an overview of what has been identified as the potential utility of nuisance and negligence in future CCL, before going on to argue that judicial reluctance and legal models of causation will ensure that the promise of future CCL is unlikely to materialise.

**The Potential Utility of Nuisance and Negligence.**

Public nuisance can be defined as an act or omission which threatens the safety or health of the population at large. The latter is both a crime and a tort, but only actionable in tort when an individual has suffered particular damage over and above the public at large.[[6]](#footnote-6) The claimant must then prove that the damage he suffered is causally connected to the actions of the tortfeasor, and that the type of damage was reasonably foreseeable. There is some similarity here with claims for negligence. In general terms, negligence can be claimed when an individual owes a duty of care to another and then breaches that duty, with the result that the affected party suffers some form of loss as a consequence of the breach, provided that the damage was foreseeable.[[7]](#footnote-7)

It is not inconceivable that public nuisance or negligence could feature in future CCL. For example, the former has been identified as being of great utility in claims for environmental damage[[8]](#footnote-8), as a highly flexible doctrine that obviates the need for a proprietary interest or duty of care for a claim to be brought.[[9]](#footnote-9) Hypothetically, therefore, the doctrine may be of some help to claimants wishing to sue an emitter of voluminous amounts of greenhouse gases (GHG), or for a public body to bring a claim against a heavy polluter along the lines of recent cases in America.[[10]](#footnote-10) Granted, established case law on public nuisance involves smells, noise, etc rather than climate change-related pollution, but this is more of a characteristic of previous claims than a bar to new developments.[[11]](#footnote-11) Indeed, that, under a public nuisance claim, the claimant would need to show some special damage beyond that experienced by the general public may also be of use in future CCL, for it could nullify attempts by emitters like energy companies to claim that what they are doing is, on balance, a public good.[[12]](#footnote-12)

Within the context of CCL, greater attention has fallen on the potential of negligence. After all, its scope is much broader than public nuisance, and could be stretched to incorporate not only those who emit GHG from their land, but also those who produce and market fuel (which, when burned by others, releases GHG into the atmosphere), plus those who burn large amounts of fuels like the airline industry.[[13]](#footnote-13) Furthermore, the general trend of European courts has been to impose strict liability for environmental damage[[14]](#footnote-14); and, as the effect of climate change becomes more widespread, UK courts may be willing to evolve the doctrine of negligence, to find, for example, that an emitter of GHG owes a duty of care to others.[[15]](#footnote-15) Should such a duty be established, there would be considerable room for common law doctrine to be used to combat environmental damage resulting from climate change.

**Judicial Activism**.

Yet it is at this point that the arguments in favour of using common law to combat environmental damage need to be considered more fully. It is clear that there is potential utility for future claims for public nuisance and negligence, subject to future legal developments (e.g., the establishment of a new duty of care owed by polluters). But it must also be stressed that such developments are more hypothetical than tangible. Indeed, to go further and argue that there is real potential to combat environmental damage caused by climate change through common law doctrine is, I would suggest, mistaken, being premised on an unproven reliance on judicial activism to develop common law in such a way as to facilitate future CCL.

For example, amongst those who have advocated the utility of common law in future CCL[[16]](#footnote-16), plus those who have acknowledged its potential[[17]](#footnote-17), there is broad agreement that legal doctrine would evolve gradually, that incremental judicial activism will grow in tandem with the threats of climate change. Thus, according to James Burton, Stephen Tromans QC and Martin Edwards, judicial attitudes against producers of GHG will ‘gradually harden’ as the full effects of climate change become more apparent, in the same way that judges have grown more intolerant towards exposure to asbestos.[[18]](#footnote-18)

Yet judicial willingness to develop the common law is too often assumed rather than proven.[[19]](#footnote-19) It cannot be argued that the judiciary will be more willing to impose a common law duty of care on GHG emitters simply because legislative trends have moved in favour of greater regulation: the growth of statute may instead allow courts to absolve themselves from developing common law on the grounds of not wishing to step on Parliament’s toes or impose further restrictions on what has already been legislated upon (e.g., GHG emissions).[[20]](#footnote-20)

Moreover, it is not axiomatic that the more radical the effects of climate change, the more likely the judiciary is to develop common law. The decision of the House of Lords in *Cambridge Water Co Ltd v Eastern Counties Leather Plc*[[21]](#footnote-21) is instructive in this respect. Here, Lord Goff, delivering the majority opinion, found that strict liability in actions for nuisance was a matter for Parliament to decide. Indeed, Lord Goff held that it was inappropriate for the common law to be developed in such a way as to impose strict liability in actions for nuisance, notwithstanding new initiatives to protect the environment:

*…given that so much well-informed and carefully structured legislation is now being put in place for [the purpose of combating pollution], there is less need for the courts to develop a common law principle to achieve the same end […] indeed it may well be undesirable that they should do so.[[22]](#footnote-22)*

It is therefore inappropriate to rely upon judicial activism to develop common law in a way that facilitates CCL. Indeed, the arguments in favour of there being real potential to combat, through common law doctrine, environmental damage caused by climate change appears rather tenuous once judicial activism is disregarded.

**Causation**.

This pivots to the second reason why there is limited room to apply common law in future CCL – put simply, because legal notions of causation will inhibit attempts to find a defendant liable for damage caused by climate change. Indeed, even those who advocate for the potential of common law agree that the ‘but for’ test will only frustrate efforts to prove causal links between the actions of a British-based GHG-emitter and the effects of that emission in specific regions.[[23]](#footnote-23) Defendants will rightly argue that their emissions cannot be separated from the GHG that are spread by various industries around the world.[[24]](#footnote-24) For these reasons, faith is placed in alternative tests for causation, where the ‘but for’ test is disregarded in favour of models of causation with lower thresholds to satisfy (e.g., where the claimant does not need to prove a clear causal link between harm and damage, but instead only needs show that the defendant’s conduct made a material contribution to the damage).[[25]](#footnote-25)

However, although UK courts will depart from the ‘but for’ test in certain situations (e.g., where the scientific link between tort and damage cannot be made out, as in *Fairchild v Glenhaven*[[26]](#footnote-26)), this approach is no panacea, being so far limited to cases of either clinical negligence or the negligence of an employer.[[27]](#footnote-27) These cases are factually dissimilar to the types of action that could be brought in CCL. What is more, the Supreme Court has shown little appetite for expanding the application of *Fairchild*.[[28]](#footnote-28) Indeed, given that the decision in *Fairchild* was founded on the impossibility of determining causation, it may never be applied to CCL should the much-promised science emerge to hypothetically connect an act of GHG emission with a particular form of pollution.[[29]](#footnote-29)

Finally, there are further problems in relying on common law doctrine to combat environmental damage caused by climate change. For instance, it remains unclear as to how to place a claimant back in the position he was in before the wrong occurred, or how a court would acknowledge the benefits that have accrued, however modestly, from the emission of GHG.[[30]](#footnote-30) There is a further problem in that GHG can linger around for decades, frustrating any efforts to tie emission to subsequent harm.[[31]](#footnote-31) Moreover, after causation, perhaps the biggest issue is determining liability; and even although it has been suggested that courts may rely upon some assessment of market share in determining which emitters of GHGs were most responsible (and to what proportion) for environmental damage caused by climate change[[32]](#footnote-32), in the UK context this remains an academic issue only. The challenge of satisfying legal models of causation therefore remain considerable.

**Conclusion**.

For these reasons, there is limited room to apply common law doctrine to combat environmental damage caused by climate change. As has been argued, there is potential utility to the doctrines of public nuisance or negligence in future CCL, subject to developments that establish a duty of care between GHG emitters and others. This remains more hypothetical than realistic, however. Rather, there is at present no room to use common law to combat environmental damage caused by climate change. This is for two reasons. Firstly, those who argue in favour of common law do so with blind faith in the willingness of the judiciary to develop common law as the effects of climate change become more powerful. But, as this analysis has shown, there appears to be little evidence of this happening. In addition, assuming the judiciary were willing to develop common law doctrine, there is no obvious way of satisfying legal notions of causation without distorting extant legal authority. Courts have only been willing to move away from the ‘but for’ test in very limited circumstances, and there is little justification to suggest that they wold do so in future CCL. There are also issues over how the courts could determine liability with so many contributing to the effects of climate change. All of these reasons significantly limit the room to apply common law doctrine, however creatively, to combat environmental damage caused by climate change.

**Word Count: 2482.**

1. E.g., John Lowry and Rod Edmunds (eds), *Environmental Protection and the Common Law* (Oxford and Portland, Oregon: Hart Publishing, 2000); Giedrė Kaminskaitė-Salters, *Constructing a Private Climate Change Lawsuit Under English Law: A Comparative Perspective* (Great Britain: Kluwer Law International, 2010); and Daniel G. Hare, ‘Blue Jeans, Chewing Gum and Climate Change Litigation: American Exports to Europe’, *Utrecht Journal of International and European Law*, vol. 29, iss. 76 (2013), pp. 65-87. [↑](#footnote-ref-1)
2. Those UK CCL cases to emerge have exclusively been judicial reviews: e.g., *Plan B Earth and Others v Secretary of State for Business, Energy and Industrial Strategy and Another* [2018] EWHC 1892 (Admin). [↑](#footnote-ref-2)
3. India Bourke, ‘How UK Cities Could Start Suing Over Extreme Weather’, *New Statesman*, 29 March 2018 <available via: <https://www.newstatesman.com/politics/energy/2018/03/how-uk-cities-could-start-suing-over-extreme-weather>, accessed online 17 February 2019>. [↑](#footnote-ref-3)
4. On which, see Damian Carrington, ‘Can Climate Litigation Save The World?’, *The Guardian*, 20 March 2018 <available via: <https://www.theguardian.com/environment/2018/mar/20/can-climate-litigation-save-the-world>, accessed online 17 February 2019>. [↑](#footnote-ref-4)
5. This focus on nuisance and negligence is not to suggest that no other common law doctrine could be relied upon, but simply that these two doctrines are identified as having the most potential for CCL. [↑](#footnote-ref-5)
6. John Bates, William Birtles and Charles Pugh, *Liability for Environmental Harm* (London: LexisNexus UK, 2004), paras 2.83 to 2.87. [↑](#footnote-ref-6)
7. Michael A. Jones, Anthony M. Dugale and Mark Simpson (eds), *Clerk and Lindsell on Torts* (22nd Edition, Sweet & Maxwell 2017), para 8-04. [↑](#footnote-ref-7)
8. Richard Burnett-Hall, *Burnett-Hall on Environmental Law* (3rd Edition, Sweet & Maxwell, 2012), para 6-094. [↑](#footnote-ref-8)
9. Kaminskaitė-Salters, *Constructing a Private Climate Change Lawsuit*, p. 143. [↑](#footnote-ref-9)
10. As advocated in Hare, ‘Blue Jeans, Chewing Gum and Climate Change Litigation’, p. 85. [↑](#footnote-ref-10)
11. Silke Goldberg and Richard Lord, ‘England’ in Richard Lord, Silk Goldberg, Lavanya Rajamani and Jutta Brunnée (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge: Cambridge University Press, 2012), p. 462. [↑](#footnote-ref-11)
12. Kaminskaitė-Salters, *Constructing a Private Climate Change Lawsuit*, p. 143. [↑](#footnote-ref-12)
13. James Burton, Stephen Tromans and Martin Edwards, ‘Climate Change: What Chance A Damages Action in Tort?’, *E-Law*, iss. 55 (Jan 2010), p. 24. [↑](#footnote-ref-13)
14. Kaminskaitė-Salters, *Constructing a Private Climate Change Lawsuit*, p. 95. [↑](#footnote-ref-14)
15. Burton, Tromans and Edwards, ‘Climate Change’, p. 25. [↑](#footnote-ref-15)
16. For instance, see Kaminskaitė-Salters, *Constructing a Private Climate Change Lawsuit*. [↑](#footnote-ref-16)
17. E.g., Goldberg and Lord, ‘England’. [↑](#footnote-ref-17)
18. Burton, Tromans and Edwards, ‘Climate Change’, p. 25. Burton et al nevertheless argue that CCL will falter by being unable to satisfy legal notions of causation. [↑](#footnote-ref-18)
19. C.f., R. G. Lee, ‘From The Individual To The Environmental: Tort Law In Turbulence’ in Lowry and Edmunds (eds), *Environmental Protection and the Common Law*, pp. 77-90. [↑](#footnote-ref-19)
20. Robert Blackett, ‘Ten Inconvenient Truths About Climate Change Tort Claims’, Hunton Andrews Kurth LLP Blog, 20 June 2018 <available via: [https://www.lexology.com/library/detail.aspx?g=9f4f778b-efe4-4f99-80e2-55224832f5d9#](https://www.lexology.com/library/detail.aspx?g=9f4f778b-efe4-4f99-80e2-55224832f5d9), accessed 17 March 2019>. [↑](#footnote-ref-20)
21. [1994] 2 AC 264. [↑](#footnote-ref-21)
22. *Ibid*., at p. 305. [↑](#footnote-ref-22)
23. Kaminskaitė-Salters, *Constructing a Private Climate Change Lawsuit*, pp. 154-161. [↑](#footnote-ref-23)
24. Jonny Buckley, ‘Climate Change Litigation – Too Hot To Handle’, Leigh Day Blog, 17 October 2017 <available via: <https://www.leighday.co.uk/Blog/October-2017/Climate-change-litigation-too-hot-to-handle>, accessed 17 March 2019> [↑](#footnote-ref-24)
25. For an overview, see Jones, Dugale and Simpson, *Clerk and Lindsell on Torts*, para 2-32 to 2-34. [↑](#footnote-ref-25)
26. *Fairchild v Glenhaven* [2003] 1 AC 32. [↑](#footnote-ref-26)
27. Burton, Tromans and Edwards, ‘Climate Change’, p. 26. [↑](#footnote-ref-27)
28. Goldberg and Lord, ‘England’, p. 468, fn 87. [↑](#footnote-ref-28)
29. On scientific claims to quantify emissions, see Carrington, ‘Can Climate Litigation Save The World?’. [↑](#footnote-ref-29)
30. Blackett, ‘Ten Inconvenient Truths’. [↑](#footnote-ref-30)
31. Goldberg and Lord, ‘England’, p. 470. [↑](#footnote-ref-31)
32. E.g., Kaminskaitė-Salters, *Constructing a Private Climate Change Lawsuit*, pp. 174-177. [↑](#footnote-ref-32)