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ECHR Ruling May Pave Path For A UK Climate Damage Tort

By **Andreas Wildner, James Brady-Banzet and Maurits Dolmans** (May 14, 2024, 3:26 PM BST)

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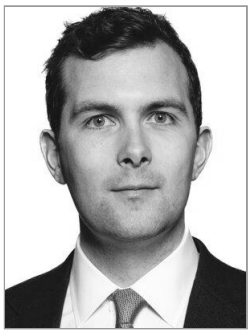

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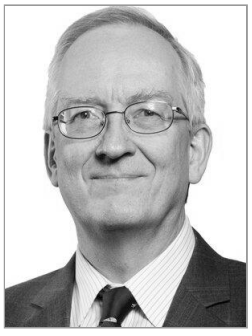

Maurits Dolmans

On April 9, the Grand Chamber of the European Court of Human Rights **handed down its decision** in Verein KlimaSeniorinnen Schweiz v. Switzerland.[1] Among other things, the court found that Switzerland had violated its obligations under Article 8 of the European Convention on Human Rights by failing to take adequate measures to mitigate climate change.

While the KlimaSeniorinnen decision will likely have a significant impact in several contexts, including litigation against states before domestic courts and the European Court of Human Rights, this article focuses on the significance of the judgment for English tort law claims.

The traditional view: There is no horizontal effect of convention rights in English law.

On the face of it, the European Convention on Human Rights only imposes obligations on contracting states, not on private entities or individuals. But, as Baroness Elizabeth Butler-Sloss said in the 2001 High Court of Justice of England and Wales decision in Venables & Thompson v. News Group Newspapers Ltd., "[t]hat is not, however, the end of the matter."[2]

Among other things, this is because, as some have argued,[3] the Human Rights Act 1998, Section 6, obligation — for public authorities to act in a way that is compatible with convention rights — may affect the court's interpretation and application of common law, even where no public authorities are involved.

As a matter of English law, it is well established that, as stated in the U.K. House of Lords' 2004 decision in Campbell v. Mirror Group Newspapers Ltd., the convention and the Human Rights Act 1998 do "not create any new cause of action between private persons," and that "courts will not invent a new cause of action to cover [as a consequence of a certain interest being protected by the European Convention on Human Rights] types of activity which were not previously covered."[4]

This was clearly established in the 2003 U.K. House of Lords decision in Wainwright v. Home Office,[5] where Baron Lennie Hoffman, who was a lord of appeal in ordinary at the time, stated that even a finding that convention rights were breached — as was the case in Wainwright[6] — does not require that courts should provide an alternative remedy, "which distorts the principles of the common law." [7]

However, a few points deserve mention in connection with this position.

First, while the courts should not distort established common law principles on the basis of convention rights per se, that does not mean that the common law does not develop. As Baron Donald Nicholls, who was a lord of appeal in ordinary at the time, highlighted in the 2005 U.K. House of Lords decision in National Westminster Bank PLC v. Spectrum Plus Ltd.,

> [t]he common law is judge-made law. For centuries judges have been charged with the responsibility of keeping this law abreast of current social conditions and expectations. That

> is still the position … Judicial development of the common law comprises the reasoned application of established common law principles, of greater or less generality, in current social conditions.[8]

The principles of tort law are an example of such "established common law principles" that can be further developed in the light of the climate crisis. And, in certain circumstances, even if rare, such development might also encompass the recognition of new tort law causes of action, as illustrated by cases such as the 1868 U.K. House of Lords decision in Rylands v. Fletcher[9] or the 1897 High Court decision in Wilkinson v. Downton.[10]

So, where existing causes of action are available, courts may take convention rights into account in interpreting them.[11] The question is then to what extent this can lead to an expansion of these existing causes of action.

A pragmatic, but narrow, third point is that, as a consequence of the Human Rights Act 1998, certain arguments weighing against imposing liability in some cases might lose force.

For example, in the 2003 case D v. East Berkshire Community NHS Trust,[12] the Court of Appeal of England and Wales, departing from earlier House of Lords authority,[13] held that local authorities owe a duty of care to a child in relation to the investigation of suspected child abuse.

The reasoning underpinning this decision was that previous cases were based on the policy rationale that allowing investigations — for the purpose of common law negligence cases — into the conduct of local authorities would have a negative impact on the provision of services for children. But, given that such investigations would now occur for purposes of parallel Human Rights Act 1998 claims, this policy reason fell away.[14]

More broadly, it seems that the impact of convention rights may be the greatest where there is a perceived gap in common law, which can conceivably be filled by extending existing causes of actions. Applying this rationale, convention rights will not lead to an extension of existing common law torts, or the creation of a new one, where parallel claims under the Human Rights Act 1998, [15] or other, specific statutory regimes,[16] can instead be pursued.

Importantly, however, statutory regimes do not seem to be available to require compensation for climate damage, and Human Rights Act 1998 claims are not available against private actors. The 2004 House of Lords decision in Campbell v. Mirror Group Newspapers is an example of a comparable situation.

The House of Lords expanded the tort of breach of confidence, with a significant part of its reasoning based on a consideration of convention rights. Notably, as has subsequently been observed about this case, privacy is an area in respect of which "the common law had long been regarded as defective".[17]

Similarly, in McKenna v. British Aluminium Ltd.,[18] a 2002 action in nuisance and based on the rule in Rylands v. Fletcher before the High Court, Judge David Neuberger — as he was known then — rejected the defendant's application for the claims to be struck out on the basis that the claimants had no proprietary interest in the land in question, which was a requirement under common law.[19]

This was on the basis that (1) he considered he "should proceed on the basis that the court should … develop the common law so as to be Convention-compliant";[20] (2) "in order for the court properly to give Article 8.1 any teeth, there must be a power to grant damages in respect of any breach of the right to respect for a person's private family life, home or correspondence";[21] and (3) "there is a real possibility of the court concluding that in light of … Article 8.1 now being effectively part of our law, it is necessary to extend or change the law."[22]

While subsequent case law does not seem to have cast any doubt on the rule that only those with a proprietary interest can sue in nuisance, McKenna remains an example of the courts contemplating developing the common law under the influence of convention rights.

In sum, it seems that convention rights could in certain cases lead to an extension of existing common law torts.

What causes of action may lend themselves to climate litigation?

Following from the above, the first question then becomes: What cause of action may claimants pursue in trying to hold private actors accountable in connection with climate change? Nuisance and negligence seem the most likely options.

Nuisance could be a cause of action.

In other common law jurisdictions, climate change litigation is already being brought on grounds of public nuisance.

For example, claims have alleged that companies have created or contributed to conditions that touch on multiple nuisance areas, including injury to health, offense to the sense, obstruction of the free use of property, and interference with the enjoyment of life and property.[23]

Similarly, earlier this year, the New Zealand Supreme Court, overturning a decision by the New Zealand Court of Appeal in Smith v. Fonterra Co-operative Group Ltd., allowed a public nuisance claim and other causes of action relating to damage caused by climate change to proceed to trial.

In that case, the claimant alleged that he would suffer various types of harm — such as loss of land, an impact on fisheries and adverse health impacts — caused by "anthropogenic interference with the climate system caused or contributed to by the respondents jointly and separately."[24]

Negligence is another pathway.

Another cause of action to consider may be common law negligence. In the Netherlands, the District Court of The Hague in the 2021 Vereniging Milieudefensie v. Royal Dutch Shell PLC case, [25] imposed on Royal Dutch Shell certain greenhouse gas emissions reduction obligations based on tort law principles of negligence.

Specifically, the decision was based on an "open norm" in the Dutch Civil Code, according to which "a tortious act is … an act or omission in violation … of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour." [26]

In accordance with this provision, a general duty of care under Dutch tort law requires anyone to take appropriate measures to avoid "knowingly or negligently endangering others" — "gevaarzetting" or endangerment — where (1) the damage is likely serious, (2) the damage is reasonably foreseeable, and (3) preventative action can be taken within the bounds of proportionality.

What constitutes a due level of care depends on the "norms prevailing in society," which can be derived from various sources.

These sources include, among other things, international soft law instruments — e.g., the Organization for Economic Cooperation and Development's guidelines for multinational enterprises and the United Nations' guiding principles on business and human rights — scientific consensus, e.g., reports by the Intergovernmental Panel on Climate Change; the Paris Agreement; and, importantly, Articles 2 and 8 of the European Convention on Human Rights.

The KlimaSeniorinnen judgment strongly reinforces this conclusion, as do several other developments, such as the enactment of the European Union's Corporate Sustainability Due Diligence Directive, including liability provisions.

While the duty of care conception in English tort law is not identical to that of the Dutch Civil Code, the common law too adapts to changing societal norms. Negligence was, in fact, a second ground of liability relied on in Fonterra,[27] and negligent product liability was also **pled** in the California Superior Court for San Francisco County's 2023 case The People of the State of California v. Exxon Mobil Corp., known as the California Claim.[28]

Could a new "climate damage tort" be developed?

While imposing liability related to climate change on the grounds of nuisance or negligence would represent a significant development of English tort law, the foreign cases referred to above suggest that such developments are conceivable.

The European Court of Human Rights' ruling is one of several international developments and

sources of climate change-related obligations. The new climate change dimension of Article 8 of the European Convention on Human Rights may well be an important factor in tipping the scales toward introducing tortious liability for climate change.

The New Zealand Supreme Court's decision to refuse the strike-out application in Fonterra confirms that this is not a hypothetical. While emphasizing that "a refusal to strike out a cause of action is not a commentary on whether or not the claim ultimately will succeed,"[29] the New Zealand Supreme Court considered that "[t]he principles governing public nuisance ought not to stand still in the face of massive environmental challenges attributable to human economic activity."[30]

The full examination of the claims at trial would involve an "analysis of policy factors and consideration of the human rights obligations," derived from "both domestic rights legislation and international instruments."[31]

Importantly, in addition, the New Zealand Supreme Court allowed claims to proceed to trial for "a proposed new tort involving a duty, cognisable at law, to cease materially contributing to: damage to the climate system; dangerous anthropogenic interference with the climate system; and the adverse effects of climate change."[32]

That English law is similarly adaptable was highlighted in the 2023 Court of Appeal decision in Tulip Trading v. Van Der Laan where the court, in the context of crypto-assets, refused to dismiss, at a preliminary stage, a claim alleging the existence of fiduciary duties in highly novel and unusual circumstances. Justice Colin Birss emphasized that, "if the facts change in a way which is more than incremental I do not believe the right response of the common law is simply to stop and say that incremental development cannot reach that far."[33]

Accordingly, while it remains to be seen how English courts and litigants will react to the KlimaSeniorinnen judgment, it may provide a powerful argument for the extension of English tort law to cover climate change-related losses.

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[1] Verein Klima Seniorinnen Schweiz and Others v. Switzerland (Application no. 53600/20). For a detailed analysis of the case, see here: https://www.clearygottlieb.com/-/media/files/alert-memos-2024/human-rights-and-climate-change-grand-chamber-of-european-court-rules-in-three-cases.pdf.

[2] Venables v News Group Newspapers Ltd [2001] 2 WLR 1038, [24].

[3] Douglas v Hello! Ltd (No 1) [2001] QB 967, [166] (Keene LJ); Campbell v MGN Ltd [2004] 2 AC 457 ("Campbell", accessible here), [132] (Baroness Hale): https://www.bailii.org/uk/cases/UKHL/2004/22.html.

[4] Campbell, [132]-[133] (Baroness Hale).

[5] [2004] 2 AC 406 (accessible here: https://www.bailii.org/uk/cases/UKHL/2003/53.html).

[6] Wainwright v UK (2007) 44 EHRR 40.

[7] [52].

[8] National Westminster Bank plc v. Spectrum Plus Limited and others [2005] 2 AC 680, [32]-[33].

[9] (1868) LR 3 HL 330.

[10] [1897] 2 QB 57.

[11] Campbell, [133] (Baroness Hale).

[12] [2004] QB 558.

[13] X (Minors) v Bedfordshire County Council [1995] 2 AC 633.

[14] D, [81].

[15] Smith v Chief Constable of Sussex Police [2009] 1 AC 225 and Michael v Chief Constable of South Wales Police [2015] AC 1732 ("Michael", accessible here: https://www.supremecourt.uk/cases/docs/uksc-2013-0043-judgment.pdf).

[16] Marcic v Thames Water Utilities Ltd [2004] 2 AC 42.

[17] Michael, [124] (Lord Toulson).

[18] [2002] EnvLR 30.

[19] Hunter v Canary Wharf Limited [1997] AC 655.

[20] McKenna, [36].

[21] McKenna, [43].

[22] McKenna, [52].

[23] The People of the State of California, ex rel. Rob Bonta, Attorney General of California v Exxon Mobil Corporation and Others No. CGC-23-609134 (Cal. Super. Ct. filed Sept. 15, 2023) (the "California Claim", accessible here: https://www.gov.ca.gov/wp-content/uploads/2023/09/FINAL-9-15-COMPLAINT.pdf), [245].

[24] Smith v Fonterra [2024] NZSC 5 ("Fonterra", accessible here: https://www.courtsofnz.govt.nz/assets/cases/2024/2024-NZSC-5.pdf), [62] – [65].

[25] Vereniging Milieudefensie v Royal Dutch Shell plc, NL:RBDHA:2021:5339 (May 26, 2021) ("Milieudefensie", accessible here: https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBDHA:2021:5339), currently under appeal. For a detailed analysis of the decision, please see here: https://www.clearygottlieb.com/-/media/files/alert-memos-2021/dutch-court-orders-shell-to-reduce-emissions-in-first-climate-change-ruling-against-company.pdf.

[26] Dutch Civil Code, Article 6:162(2).

[27] Fonterra, [66]-[70].

[28] California Claim, [289]-[302].

[29] Fonterra, [143].

[30] Fonterra, [172].

[31] Fonterra, [169].

[32] Fonterra, [71]-[72], [176].

[33] Tulip Trading Limited v van der Laan and others [2023] EWCA Civ 83.