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ARTICLE

Lessons from a Distorted Metaphor: The Holy Grail of Climate Litigation

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Abstract
This article examines the complex risks, costs and rewards of large-scale private law climate litigation – the climate litigation 'holy grail'. It argues that while these cases undoubtedly have heroic aspects, their impacts can be complex or difficult to understand. It uses overlapping theories of metaphor and narrative in law, and theories of private law, to make some critical observations about these cases. Distilling some core reflections from the grail legends, the article argues that success in these cases requires a nuanced understanding of victory and defeat, and more careful thinking about the character, aims, and effect of these pieces of litigation. These stories inspire constant reflection as to what the metaphor of the 'holy grail' might mean in this context, and the role that these cases play in the development of a narrative about climate litigation.

Keywords: Environmental law, Private law, Climate litigation, Mitigation, Loss and damage

1. INTRODUCTION: THE BURIAL OF THE DEAD

> Students of the Grail literature cannot fail to have been impressed by a certain atmosphere or awe of mystery which surrounds that enigmatic Vessel. There is a secret connected with it, the revelation of which will entail dire misfortune on the betrayer. If spoken of at all it must be with scrupulous accuracy.[1]

This article discusses the risks, rewards, contribution and significance of large-scale private law cases seeking relief from governments or major emitters in relation to

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1 J.L. Weston, *From Ritual to Romance* (Kindle ebook, Princeton University Press, 1932), Ch. X. The writer goes on to explain that the grail was such a secret thing that no woman could speak of it, which I intend to ignore, as did she.

climate harm. Drawing on literature that reflects on the use of stories and metaphor in the legal imagination,[2] I use the highly evocative grail legends to reinterpret a small selection of high-profile climate cases, exploring more deeply their character and implications. My purpose is to challenge the conception of the 'holy grail' as a zenith of achievement, part of a quest to 'solve' the problems of climate change in one heroic action. I seek to disrupt this metaphorical framing and draw on the grail legends to suggest that a grail quest can also be a story of hubris and missed opportunities, a jostling to be part of a story of valour. The complexity of these cases and the narrative around them makes them difficult to understand and their implications hard to interpret. For this reason, examining the contested grail legends can support an alternative understanding of their problematic nature.

It is very useful to commence this enquiry by thinking about the 'holy grail' types of case. I discuss a few of these, exploring their costs and possible implications for climate governance, highlighting core cautionary reflections that emerge from reading these cases through the grail stories. I have two main reasons for my case selection. Firstly, as these cases are well known, they are a useful vehicle through which to explore the complex role that private law can play in climate litigation. So, while this article is predominantly 'about' these high-profile cases, it can support reflection about the impacts of climate litigation in private law more generally. Secondly, the well-known nature of these cases makes them part of our narrative about the 'fight' against climate change, so it is useful to examine their contribution to that narrative.

The article is structured as follows. The next section (Section 2) is in three parts. Firstly, I briefly discuss the legends of the holy grail, exploring some of the complex themes inherent in these stories. Secondly, I comment on the importance of climate litigation, explaining why I call this category of case the 'holy grail' cases. Thirdly, I discuss private law theory and theories of narrative and metaphor in legal thinking, explaining how this helps to make the arguments I wish to make in this article. In the next two sections I discuss a small selection of 'holy grail' cases. I explain that it is useful to analyze these in terms of their broader instrumental role, using them as examples to support my wider arguments. The purpose of this article is not to look in depth at the prospects or doctrine of the cases; there is much excellent scholarship cited herein that does this. The purpose of the article is to take a critical and creative look at the meaning of these cases, questioning how they might contribute to a climate response. I do not need to take a chronological 'generational' approach,[3] but I approach these cases in relation to the dimension of climate change response they would or could affect.[4] I therefore look at mitigation, for which I discuss *Urgenda* (Section 3); I then examine the complex

[2] M. Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (Hart, 2020); M. Hanne & R. Weisberg (eds), *Introduction: Narrative and Metaphor in the Law* (Cambridge University Press, 2018).

[3] R.S. Abate, 'Atmospheric Trust Litigation in the United States: Pipe Dream or Pipeline to Justice for Future Generations?', in R.S. Abate (ed.), *Climate Justice* (Kindle ebook, Environmental Law Institute, 2016), Ch. 20.

[4] As suggested in K. Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30(3) *Journal of Environmental Law*, pp. 483–506, at 496–9.

interface between adaptation and loss and damage, discussing *Comer* v. *Murphy*, followed by some comments about the new 'carbon majors' cases (Section 4). Section 5 concludes. The titles of the sections are borrowed from T.S. Eliot's long poem *The Waste Land*, which is heavily influenced by grail myths and legends.[5]

2. A GAME OF CHESS: THE METAPHOR OF THE HOLY GRAIL IN CLIMATE LITIGATION

> He enters the hall and sees a game of chess. 'The two sides were playing against each other by themselves; the side he helped lost, and the other side's pieces shouted, absolutely as if they were real men.'[6]

2.1. *Core Lessons from the Legend of the Holy Grail*

The ancient legend of the quest for the holy grail features a (usually) lone wandering knight undertaking a treacherous journey, ostensibly to find and return the missing grail. He (sometimes they) sets out from home, naïve and untested, and becomes engaged in the all-consuming pursuit of the grail. He is challenged by a variety of quests and problems, sometimes returning 'victorious', and sometimes not. Far from being swashbucklers, these stories are complex, nuanced, and deeply symbolic. Certainly, they are apocryphal, and the true origins and meaning of both the grail legends and the grail itself are highly contested.[7]

The proliferation of stories through different eras and political events[8] accounts for the lack of a single, coherent grail story.[9] However, there is sufficient coherence and consistency to extract core themes and underlying meaning from the tales.[10] A 'core' story, extracted by Wood, is as follows:

> A mysterious vessel or object which sustains life and/or provides sustenance is guarded in a castle which is difficult to find. The owner of the castle is either lame or sick and often (but not always) the surrounding land is barren. The owner can only be restored if a knight finds the castle and, after seeing a mysterious procession, asks a certain question. If he fails, as the knight does, everything will remain as before, and the search must begin again. After wanderings and adventures (many of which relate to events which the young hero failed to understand the first time), the knight returns and asks the question which cures the king and restores the land. The hero knight succeeds the wounded king (usually called the Fisher King) as guardian of the castle and its contents.[11]

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5 And specifically by Weston, n. 1 above.

6 J. Markale, *The Grail: The Celtic Origins of the Sacred Icon* (Kindle ebook, tr. J. Graham, Inner Traditions International, 1999), Ch. 2.

7 See Weston, n. 1 above, Ch. XI and generally. There is a good overview of the background in E. Jung & M.-L. von Franz, *The Grail Legend* (Kindle e-book, Princeton University Press, 1998), Ch. I.

8 J. Wood, 'The Search for the Holy Grail: Scholars, Critics and Occultists' (2002) 22 *Proceedings of the Harvard Celtic Colloquium*, pp. 226–48. E.g., it is suggested that much of Malory's account was influenced by contemporary politics: the War of the Roses in England in 1455–85.

9 Ibid., p. 226.

10 Weston, n. 1 above, Ch. II.

11 Wood, n. 8 above, pp. 233–4.

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Further details appear in some of the stories. As the knight engages in the quest, he faces several tasks or challenges and is beset with confusion.[12] In many of the earlier quests he either fails entirely, only partially succeeds, or dies. His lack of success is attributable to his failure properly to understand 'the precise character of the task' before him,[13] and to ask the right questions at the right time. The knight usually does not comprehend what he needs to do, or precisely what it is that he seeks.[14] Powerful themes emerge: of high-stakes risk and reward, purity, self-realization, blood vengeance. For instance, the best-known versions stem from the Arthurian romances in which Lancelot, Gawain, Gareth and Galahad ride from Camelot to find the grail, which in this version is the vessel from the Last Supper.[15] Separated, the knights face different challenges, with themes of bravery, battles, and the absolution of sin from themselves and others. Only the purer of the knights can even see the grail,[16] with Galahad eventually finding and taking it, becoming king.[17]

It is never entirely clear what the holy grail actually is. In later retellings of the stories, the holy grail is frequently a vessel of blood belonging to Joseph of Arimathea.[18] However, this is certainly a reinterpretation of earlier versions, where the grail might be a vessel,[19] a stone,[20] a burial cloth,[21] or the achievement of an elevated state through a ritual initiation.[22] For my purposes the unseen and unknown nature of the grail is useful, as it forms part of an allegory of the pursuit of the unknown. What really matters is what the grail signifies in the stories: something indefinable and almost impossible to attain, which, if it is found, will solve all problems and right all wrongs.

An important theme in the romances is the poor health of the king (sometimes the Fisher King), and its inherent connection with the ecological devastation of the knight's adopted homeland. The tales vary: sometimes wasting of the land precedes the knight's endeavours,[23] and sometimes this is associated with his failure in the quest. For instance, one of the oldest iterations features Perlesvaux, whose failure to ask the expected questions plunges the Fisher King into decline and brings a curse upon the entire country, as well as the court of King Arthur.[24] Percival, too, encounters a

[12] Although many of these distractions may indeed be initiations: see Markale, n. 6 above, Ch. 1.

[13] Weston, n. 1 above, Ch. I.

[14] Markale, n. 6 above, Ch. 1 ('Percival hurls himself into this quest for the Grail with his head down in utter unconsciousness. But he still doesn't know which direction he should take').

[15] Sir T. Malory, *Le Morte d'Arthur* (University of Adelaide Press, 2014), Book XIII.

[16] Ibid., Book XI, Ch. 14 (the pure knight Percival (a virgin) is 'made whole by the holy vessel of the Sangreal', whereas the 'womanising' Gawain cannot see it).

[17] Ibid., Books X–XVII (Galahad dies in Book XVIII).

[18] This is the grail in the most widely read and significant of the original continuations, by Robert de Boron: see G.R. Murphy, *Gemstone of Paradise: The Holy Grail in Wolfram's 'Parzival'* (Oxford University Press, 2006), pp. 6–8. See also Jung & von Franz, n. 7 above, Ch. II; see also Malory, n. 15 above.

[19] Jung & von Franz, n. 7 above, Ch. VII.

[20] Murphy, n. 18 above, pp. 20–30; Jung & von Franz, n. 7 above, Ch. VIII.

[21] N. Currer-Briggs, *Holy Grail and the Shroud of Christ* (Ara Publications, 1984).

[22] Weston, n. 1 above, Ch. XIV.

[23] Weston, n. 1 above, Ch. XII (explaining that the environmental difficulties could be accounted for by the violation of the fairy guardians of the wells, represented in the tales by the theft of a cup).

[24] Markale, n. 6 above, Ch. 2.

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young girl who tells him that 'if he had asked the questions "What is the grail and who does it serve?" he would have healed the Fisher King and granted prosperity to his kingdom'.[25] In other versions the knight Gawain partially succeeds – through proper questioning he manages to bring about some ecological recovery and heals the Fisher King – although he does not find the grail.[26] In some, the knight Galahad does find the grail, but then it is lost, and he dies. Arthur dies thereafter.[27] In other versions, the waste land cannot be remedied by any quest and the sovereign cannot be healed.[28] Although we know, certainly from Malory, that Arthur was not happy about the cost of his best knights,[29] most versions do not address the opportunity cost of the quest or the 'cleaning up' – both of the waste land and the hero's damaged form – that needs to be done during and after.[30] Of course, none of the protagonist knights have any insight into the version of the story in which they find themselves.

Having outlined the contentious and labyrinthine nature of these stories, it might seem odd to assert that they may be instructive for anything, particularly for legal studies. However, their value as a metaphor for the 'holy grail' cases goes beyond the semantic: these stories are part of folklore, and this terminology encourages us to reflect on the vagaries, arduousness and great risks and rewards of such cases.[31] Despite their complexity, it is possible to distil a few core lessons that are helpful in understanding the cases I discuss.

Firstly, victory and defeat are not always clearly defined or distinct. For instance, in the legends does victory mean being able to see the grail, drinking from it, taking the grail, restoring the waste land, healing the King, survival, or blood vengeance? Secondly, the knights get better at being on a grail quest when they achieve clarity in 'the character of their quests': they understand the nature of their endeavour and ask the right questions. At some point, they know to ask what the grail is – what it is they seek – whom it serves, and hence, how to obtain it. This is a central concern in most of the stories: that any good fortune requires clarity in the quest. Thirdly, these are tales about hubris and missed opportunities; in as much as things rarely end well for the sillier knights, while they are busy on their quest their responsibilities at home (sometimes Camelot, sometimes their birth homes) are neglected and no other action is taken to restore the waste land. A fourth, more abstract, lesson is about narrative and the possibilities for reflection. As Little explains: 'Through story, complex issues and truths are brought and carried along together in a way that has deep cultural resonance, and that is accessible and made significant'.[32] The point is that these stories are

[25] Ibid., Ch. 1.

[26] Ibid., Ch. 1 (explaining that 'Gawain is skillful, courteous, diplomatic, courageous'. However, in Malory's version he cannot see the Grail because of his 'impure' ways).

[27] M. Zimmer Bradley, *The Mists of Avalon* (Penguin, 1998).

[28] T.S. Eliot, *The Waste Land* (Kindle e-book, Harcourt Brace & Co, 1934).

[29] Malory, n. 15 above, Book XIII, Ch. VIII.

[30] See, e.g., the reimagining in Zimmer Bradley, n. 27 above (Morgan Le Fay (Morgaine) nurses a dying King Arthur, reassuring him that he has not failed, despite not really knowing whether this is true, then retreats to do the work of maintaining what remains).

[31] I am grateful to Doug Kysar for this incisive description.

[32] G. Little, 'Developing Environmental Law Scholarship: Going beyond the Legal Space' (2016) 36(1) *Legal Studies*, pp. 48–74, at 68.

complex, contradictory, and their concepts of heroism and failure, bravery and hubris, neglect and obsession, risk and reward form part of our (Anglo-American) cultural narrative. While I have distilled three core 'lessons' for the purposes of this article, the aim of using complex stories is to encourage ongoing reflection – about purpose and intent, victory and defeat, risk and reward – beyond the legal space.

2.2. *Importance of Climate Litigation and the 'Holy Grail' Cases*

Before discussing the cases, I must explain the need for and relevance of litigation for global climate governance. Climate change derails economic, ethical and epistemological certainties. It challenges given types of behaviour and accepted 'goods' of society on a global level, and compels personal and structural self-examination on a level that is not only uncomfortable, but is also potentially futile unless coordinated with meaningful action. Without an adequate response, climatic changes stand to alter many global weather patterns, reducing habitability for many species, including humans.[33] Inherent in the very terminology used to describe our core response – mitigation – is the appreciation that we are engaging in a process of damage control.[34] This global issue demands a comprehensive response from states to coordinate extensive reductions in greenhouse gas (GHG) emissions, a chief driver for climate change.

The beginning of 2016 saw the adoption of the Paris Agreement,[35] which among its many achievements included consensus on the need to restrict warming 'to well below 2°C above pre-industrial levels and pursu[e] efforts to limit the temperature increase to 1.5°C above pre-industrial levels',[36] and to do so at pace.[37] The need for this stringency on temperature limits had been on the table for some time,[38] but member states in Paris also commissioned a special report from the United Nations' (UN) own scientific advisory body, the Intergovernmental Panel on Climate Change (IPCC), to discuss the impacts of above 1.5°C of warming.[39] The 2018 Special Report of the IPCC confirmed that restricting warming to 1.5°C – compared with 2°C – would be associated with safer levels of warming and significantly reduced risks, but would also require far-reaching changes, which are probably more difficult than anticipated.[40] The design of the Paris Agreement requires parties to make pledges, or nationally determined

[33] IPCC, 'Summary for Policymakers', in T.F. Stocker et al. (eds), *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2013), pp. 3–29.

[34] This is implicit in Art. 2 of the United Nations Framework Convention on Climate Change (UNFCCC) (New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: https://unfccc.int/resource/docs/convkp/conveng.pdf (which seeks to stabilize GHGs at a level that will 'avoid dangerous anthropogenic interference with the climate system').

[35] Paris (France), 12 Dec. 2015, in force 4 Nov. 2016 available at: http://unfccc.int/paris_agreement/items/9485.php.

[36] Art 2(1)(a) Paris Agreement.

[37] Art. 4.1 Paris Agreement.

[38] See fuller discussion below in Section 3.1.

[39] Decision 1/CP.21, 'Adoption of the Paris Agreement' (13 Dec. 2015), UN Doc. FCCC/CP/2015/10/Add.1, para. 21.

[40] IPCC, 'Summary for Policymakers', in *Global Warming of 1.5°C. An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-Industrial Levels and Related Global Greenhouse*

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contributions (NDCs), which specify the actions to be taken at the national and sub-national levels to contribute to this collective goal; however, it was plain from the outset that the pledged reductions were not sufficient to stay even within 2°C limits.[41]

The intervening years have seen some challenges: a series of vocal disavowals of commitment from a significant emitter,[42] fraught negotiations of the means of implementing the Paris Agreement, and difficulties in achieving a consensus-based adoption of the above-mentioned report and, with it, commitment to a 1.5°C limit.[43] Most significant for this article is the continuing shortfall in mitigation ambition required to keep warming within those 'safe' limits.[44] This was recognized at the 2018 Conference of the Parties (COP) in Katowice (Poland), the decisions of which stressed 'the urgency of enhanced ambition' in light of the growing recognition that the pledged emissions reductions will not be sufficient to reach the collective goal.[45] A global agreement on emissions reduction was always simply the starting point of a coherent and appropriate response, but these and other factors re-emphasize the need for other forms of governance, *including effective, strategic litigation*, to support climate response.

Until recently, significant high-profile successes in climate litigation arose from public law challenges. This makes sense, as public law litigation has more immediate potential to strong-arm regulators into action, responding to the 'institutional failure' that frequently drives climate litigation.[46] Of course, activity in the courts is not limited to headline cases; climate litigation is escalating globally and includes a range of subtle and strategic actions brought across scales of governance.[47] In several jurisdictions, for instance, administrative law challenges from both 'sides' have unarguably shaped domestic regulation relating to the production and consumption of energy.[48] Despite

Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty (IPCC, 2018).

41 J. Rogelj et al., 'Paris Agreement Climate Proposals Need a Boost to Keep Warming Well Below 2°C' (2016) 534(7609) *Nature*, pp. 631–39. See fuller discussion and sources below in Section 3.1.

42 J. Urpelainen & T.V. de Graaf, 'United States Non-Cooperation and the Paris Agreement' (2018) 18(7) *Climate Policy*, pp. 839–51.

43 S. Evans & J. Timperley, 'COP24: Key Outcomes Agreed at the UN Climate Talks in Katowice', *Carbonbrief*, 16 Dec. 2018, available at: https://www.carbonbrief.org/cop24-key-outcomes-agreed-at-the-un-climate-talks-in-katowice.

44 The Talanoa Dialogue was a cooperative process intended to take stock of collective efforts towards the joint goals of the agreement and to support the preparation of pledges, both under Art. 4 Paris Agreement: F. Lesniewska & L. Siegele, 'The Talanoa Dialogue: A Crucible to Spur Ambitious Global Climate Action to Stay Within the 1.5°C Limit' (2018) 12(1) *Carbon & Climate Law Review*, pp. 41–9; see also: https://unfccc.int/process-and-meetings/the-parisagreement/the-paris-agreement/2018-talanoa-dialogue-platform.

45 UN, 'Decisions Adopted at the Climate Change Conference in Katowice, Poland' (15 Dec. 2018), UN Doc. FCCC/CP/2018/10/Add.1, para 14, and generally Section III. The adoption of the Talanoa Dialogue was somewhat lukewarm: the COP decision only '[t]akes note of' (para 35) and '[i]nvites Parties to consider' (para 37) the 'outcome, inputs and outputs' of the Talanoa Dialogue.

46 E. Fisher, 'Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to Massachusetts v. EPA' (2013) 35(3) *Law & Policy*, pp. 236–60, at 240–1.

47 M. Wilensky, 'Climate Change in the Courts: An Assessment of Non-U.S. Climate Litigation' (2015) 26(1) *Duke Environmental Law and Policy Forum*, pp. 131–79.

48 H.M. Osofsky, 'The Role of Climate Change Litigation in Establishing the Scale of Energy Regulation' (2011) 101(4) *Annals of the Association of American Geographers*, pp. 775–82.

this, there is very little radical climate litigation. Most is 'business as usual',[49] raising few novel points and upsetting few apple carts. Arguably, this is indicative of the integration of climate litigation in mainstream practices, meaning that climate change is treated as a radical issue but forms part of the more routine practices of disaggregated governance that typify our response to climate change.[50] More mundane actions – such as low-value claims in the domestic courts – remain fairly under-utilized, although they are likely to increase as parties litigate localized climate damage if adaptation attempts fail to keep pace with change. The nature of 'inadvertent' climate litigation – for instance, where a litigated dispute affects climate policy but is not brought for that purpose – also remains under-explored.[51] Of course, it is not intuitively clear why low-value or obscure actions matter, and this is not the place for a full discussion. It is arguable, however, that the significance of these cases lies in their very ordinariness, making them easy to overlook even as they support or frustrate climate policy.[52]

I now turn to private law, which is usually seen as regulating rights and obligations between private parties. Private law disputes demand a focused analysis of foreseeability, reasonable standards of care, and acceptable social conduct. Far from being unsuited to tackle broader social issues, private law cases foster deeply normative enquiries that shape our understanding of socially acceptable conduct, including what this might mean in a climate context. Nevertheless, private law scholarship and practice in climate litigation remain oddly skewed, with considerable attention being paid to actions for climate harm against large-scale emitters[53] and its potential virtually ignored elsewhere.[54] The former are the types of case first considered when scholars turned their attention to the topic of climate litigation[55] and they form roughly the category of case to which I refer as the 'holy grail' of climate litigation. This term emerges in the literature in what was probably the first significant edited collection on climate litigation, where it is observed that:

> [a private action for damages is] seen as a kind of Holy Grail by environmental campaigners and as an unacceptable disaster scenario by sectors of industry which might have to bear the cost. The numbers of potential claimants and defendants in this type of action,

[49] D. Markell & J.B. Ruhl, 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual' (2012) 64(1) *Florida Law Review*, pp. 15–86, at 15 and generally.

[50] Fisher, n. 46 above, p. 242.

[51] Bouwer, n. 4 above.

[52] Ibid.

[53] D.A. Grossman, 'Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation' (2003) 28(1) *Columbia Journal of Environmental Law*, pp. 1–61; D. Hunter & J. Salzman, 'Negligence in the Air: The Duty of Care in Climate Change Litigation' (2007) 155(6) *University of Pennsylvania Law Review*, pp. 1741–94; E.M. Penalver, 'Acts of God or Toxic Torts: Applying Tort Principles to the Problem of Climate Change' (1998) 38(4) *Natural Resources Journal*, pp. 563–602; D. Kysar, 'What Climate Change Can Do About Tort Law' (2011) 41(1) *Environmental Law Reporter*, pp. 1–71 (a lengthy list of articles discussing this issue is found in Kysar at note 3); G. Kaminskaite-Salters, 'Climate Change Litigation in the UK: Its Feasibility and Prospects', in M. Faure & M. Peeters (eds), *Climate Change Liability* (Edward Elgar, 2011), pp. 65–89; J. Brunnée et al., 'Overview of Legal Issues Relevant to Climate Change', in R. Lord et al. (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, 2011), pp. 23–49.

[54] Bouwer, n. 4 above, pp. 499–501.

[55] Penalver, n. 53 above; Grossman, n. 53 above.

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> and the scale of potential compensation, are all huge, and indeed the very wide scope of such claims is one policy factor against their being permitted.[56]

Kysar also uses this metaphor, although more specifically, in relation to injunctive relief arising from the kind of action I discuss.[57] This descriptor appears sporadically throughout the academic literature,[58] where it consistently refers to mass private law litigation for climate harm. Significantly, it is also used by activists and practitioners, with very much the same meaning.[59]

Prior to 2015, 'holy grail' cases had been brought in the United States (US) only, and none had progressed to a substantive hearing.[60] This makes their continued relevance baffling, but as Hsu explains:

> [A c]ase – seeking direct civil liability against those responsible for greenhouse gas emissions – is the one that holds out the promise of being a magic bullet. By targeting deep-pocketed private entities that actually emit greenhouse gases … a civil litigation strategy, if successful, skips over the potentially cumbersome, time-consuming, and politically perilous route of pursuing legislation and regulation. [citation omitted] … Importantly, to maximize the impact of this kind of litigation, the relief sought should be for damages, not injunctive relief. Injunctive relief in a successful lawsuit would have the positive effect of mandating some action to reduce emissions, but then as a substantive matter the suit takes on the character of just another form of regulation, and a considerably less informed and sophisticated one.[61]

This encapsulates the thinking behind the early (and, arguably, current) holy grail litigation and indeed this argumentation is compelling. Yet, it also raises questions about the nature of these cases, whether they *can* achieve their stated aims, what a 'sophisticated damages award' might do, and whether a 'magic bullet' could indeed 'take out'

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[56] Brunnée et al., n. 53 above, p. 33.

[57] Kysar, n. 53 above, p. 43 ('[P]laintiffs seem best advised to identify presently realized injuries and to connect them to the ongoing nuisance of climate change, hoping to obtain in the process the holy grail of injunctive relief to address future harms [citation omitted]. Of course, as noted throughout this Part, that path faces numerous obstacles of its own').

[58] R.F. Blomquist, 'Comparative Climate Change Torts' (2012) 46(4) *Valparaiso University Law Review*, pp. 1053–75, at 1060; Bouwer, n. 4 above, pp. 484–5; J. Setzer & L.C. Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10(3) *WIREs Climate Change*, e580, p. 3; J. Thornton & H. Covington, 'Climate Change Before the Court' (2016) 9(1) *Nature Geoscience*, pp. 3–5; D. Noonan, 'Imagining Different Futures through the Courts: A Social Movement Assessment of Existing and Potential New Approaches to Climate Change Litigation in Australia' (2018) 37(2) *University of Tasmania Law Review*, pp 26–69, at 45.

[59] Perhaps most significantly (although not exclusively) by James Thornton of ClientEarth in London, ref the author's private notes from 'UCL Environmental Law and Policy Away Day', 39 Essex Street Chambers, London (UK), 16 Feb. 2018. The potential of 'holy grail' cases was also discussed at the 'Climate Change Law, Litigation and Governance' event at Warwick University (UK), 18 Feb. 2018: see S. Adelman & S. Hossain, 'Climate Change Law, Litigation and Governance – GNHRE', Apr. 2018. The term is also used by Richard Lord QC, ref the author's notes from 'Climate Change Liability, Some Issues', a talk at Schroders, 2 Nov. 2012.

[60] A good summary is provided in L. Butti, 'The Tortuous Road to Liability: A Critical Survey on Climate Change Litigation in Europe and North America' (2011) 12(2) *Sustainable Development Law & Policy*, pp. 32–66.

[61] S.-L. Hsu, 'A Realistic Evaluation of Climate Change Litigation through the Lens of a Hypothetical Lawsuit' (2008) 79(3) *University of Colorado Law Review*, pp. 701–57, at 714.

climate change. Indeed, part of the appeal of these cases is the grandiose desire to 'solve' climate change in one case.

In that context, it is worth taking a step back and asking some questions about what these cases really do, given the sustained energy and attention paid to them. This is a valuable endeavour for at least two reasons. Primarily, it is useful to ask some questions about what victory means, what the cases are intended to achieve, and whether these particular 'quests for the holy grail' are worth pursuing. This resonates with the grail lessons concerning the uncertain nature of a 'win', which ties to the difficult question of how to evaluate the impacts of climate cases more generally. It also means that asking the right questions and properly understanding what one is going after and why are crucial for success in such complex endeavours. There are secondary questions which are more complex to resolve and on which I do not seek a definitive conclusion, as these are points more for reflection. These questions ask how these cases and the commentary around them are contributing to the narrative about climate change and, to some extent, what the opportunity cost is of pursuing these cases. Before I discuss this, I need to explain my theoretical approach and why I think it is helpful.

2.3. *Problems of Knowing and the Use of Metaphor and Theory*

The theoretical approach to this article is complex and layered. As such, I think it is helpful immediately to explain these overlapping approaches, and how they support the arguments I want to make in this article. The purpose of the article is to stimulate reflection on the *aims, impact and meaning* of climate litigation. Of course, a rather obvious way of doing this would be to investigate the outcomes and impacts of the cases using empirical methods. Osofsky and Peel have undertaken socio-legal research – in particular, interviews to assess attitudes to and reflections on multilevel climate litigation in the two most significant jurisdictions for climate litigation, the US and Australia.[62] This does tell us what interested participants in those jurisdictions perceive the effect of climate litigation to be, but it certainly does not tell us everything that these cases do, or what these cases mean. Also, empirical scholarship is not the only way to do this. Setzer and Vanhala say that the 'third wave' of climate litigation scholarship is likely to examine the 'outcomes of climate change litigation, including how it has both influenced climate regulation and acted as such regulation', and is likely to do so through a variety of approaches nested in socio-legal studies, political science and social and political theory.[63] This includes a small body of work which looks at narrative and framing within climate cases,[64] and which can examine outcomes; it also contributes to

[62] J. Peel & H.M. Osofsky, *Climate Change Litigation* (Cambridge University Press, 2015). See also S. McCormick et al., 'Strategies in and Outcomes of Climate Change Litigation in the United States' (2018) 8(9) *Nature Climate Change*, pp. 829–33.

[63] Setzer & Vanhala, n. 58 above, pp. 5–6.

[64] Ibid., p. 6 (citing, e.g., G. Nosek, 'Climate Change Litigation and Narrative: How to Use Litigation to Tell Compelling Climate Stories' (2018) 42(3) *William & Mary Environmental Law and Policy Review*, pp. 733–803). I would add Fisher, n. 46 above (who explores the narratives emerging from legal scholarship with a focus on climate cases).

our understanding of the meaning and significance of these cases as part of a broader legal mobilization against climate change. I return to this point shortly.

Another way to appraise the impacts of litigation is to interpret it in the light of legal theory. The climate law literature tends to prefer a doctrinal focus, but there is a substantial scholarly project that examines and debates the instrumental properties of private law, providing a well-established and defensible theoretical account of the outcomes of tort cases.[65] As a starting point, the effects of private liability can include compensation for existing harm, deterrence of future harm, and the distribution of costs of accidents or other forms of wrongful behaviour.[66] It is well-established that the process and outcomes of private liability weigh directly on litigants, but the litigation as a whole has effects that extend beyond those immediately involved.[67] This broader circle might not only include repeat litigants but also those engaged in similar activities or with a similar risk profile.[68] I should emphasize that the theory is fortified by empirical studies in other areas. For instance, there is empirical evidence that corporations proactively manage liability risks in narrow instances where it was anticipated that liability could be proved.[69]

If we accept that private liability can have broader societal implications, then these would materialize irrespective of whether they are *actively pursued* as a goal. Similarly, to say that private law plays an instrumental role is a simple acknowledgement of the very public role that the courts play in society; it does not necessarily entail a call for instrumental decision making, or a flight from principle.[70] Judges frequently consider the broader implications of their decisions, particularly in environmental law cases, where the line between policy and law is particularly porous. This is not to say that the courts are doing anything wrong if they cannot take account of the 'multipolar' implications of any decision – clearly the task of a judge is to do justice for the individual litigants within the limits of the law. Indeed, the true effects of litigation are hard to

[65] R.A. Epstein, 'Beware of Prods and Pleas: A Defense of the Conventional Views on Tort and Administrative Law in the Context of Global Warming' (2011) 121 *Yale Law Journal Online*, pp. 317–33.

[66] G. Williams, 'The Aims of the Law of Tort' (1951) 4(1) *Current Legal Problems*, pp. 137–76. Similar arguments appear in tort scholarship and discussions of tort and environmental law. Particularly helpful is A. Robertson & T.H. Wu, *The Goals of Private Law* (Hart, 2009). See also M. Lee, 'Tort, Regulation and Environmental Liability' (2002) 22(1) *Legal Studies*, pp. 33–52; J. Lowry & R. Edmunds (eds), *Environmental Protection and the Common Law* (Hart, 2000). For an account of the interplay between private liability and insurance, in particular, refuting that any impact of private law is absorbed by insurance: R. Merkin & J. Steele, *Insurance and the Law of Obligations* (Oxford University Press, 2013), pp. 3–16.

[67] For a comprehensive discussion, see S. Hedley, 'Looking Outward or Looking Inward? Obligations Scholarship in the Early 21st Century', in Robertson & Wu, ibid, pp. 193–297.

[68] E.R. de Jong et al., 'Judge-made Risk Regulation and Tort Law: An Introduction' (2018) 9(Special Issue 1) *European Journal of Risk Regulation*, pp. 6–13, at 7.

[69] S. Halliday, C.D. Scott & J. Ilan, 'The Public Management of Liability Risks' (2011) 31(3) *Oxford Journal of Legal Studies*, pp. 527–50; D. Dewees & M. Trebilcock, 'The Efficacy of the Tort System and Its Alternatives: A Review of Empirical Evidence' (1992) 30(1) *Osgoode Hall Law Journal*, pp. 57–138; also W.J. Cardi, R.D. Penfield & A.H. Yoon, 'Does Tort Law Deter Individuals? A Behavioral Science Study' (2012) 9(3) *Journal of Empirical Legal Studies*, pp. 567–603.

[70] B.Z. Tamanaha, 'The Tension between Legal Instrumentalism and the Rule of Law' (2005) 33(1) *Syracuse Journal of International Law and Commerce*, pp. 131–54.

measure; and where this is attempted the 'expected' impacts are not overwhelmingly proven.[71] Also clear is that an instrumental effect of private law cannot be guaranteed to operate in a straightforward way; in particular, in relation to complex social problems or multi-party litigation it seems unrealistic to expect complex litigation about contested policy and scientific issues to yield simple regulatory messages. In essence, we do not know for sure what these cases do. Later I shall reflect on what this means for the understanding of claimants and their representatives of their objective and purpose before litigation commences.

To return to the question of narrative, climate cases contribute to the public conversation about climate change. This function is sometimes expressed as 'raising awareness', or introducing climate issues into public debate and political culture.[72] The translation of 'abstract scientific concepts into tangible impacts' helps the public to 'understand and relate … better' and supports the development of meaning and public knowledge about climate change,[73] with potential to engage 'moral intuitions' and encourage action.[74] We can take this further to think about how these very high-profile, well-publicized pieces of litigation contribute to the social narrative about climate change.

Yet, what does this add to anything? 'Law, as a domain of human enterprise, is fundamentally discursive in nature'.[75] For this reason, examining the narratives, myths and metaphors we use in legal thinking can support mutual understanding and make difficult concepts and experiences coherent and comprehensible.[76] Narrative processes are complex and can flow in multiple directions, revealing multi-layered meanings,[77] persuading the reader in one direction or another. Narratives are shaped and amplified by scholars who, in 'tidying up' the law,[78] contribute to the framing and our understanding of climate cases.[79] The discussion and reinterpretation of discrete disputes contributes to the stories we tell ourselves about climate change, developing the public understanding of issues of responsibility, danger, and effective action.[80] As such, commentators, including legal scholars, to some extent determine the character of a

[71] Dewees & Trebilcock, n. 69 above, pp. 108–12 (finding deterrence is weak in environmental law). M.G. Faure, 'Effectiveness of Environmental Law: What Does the Evidence Tell Us?' (2012) 36(2) *William & Mary Environmental Law and Policy Review*, pp. 293–336; Cardi, Penfield & Yoon, n. 69 above (finding no impact on behaviour).

[72] Peel & Osofsky, n. 62 above, p. 124; also generally Little, n. 32 above.

[73] Peel & Osofsky, ibid., p. 124.

[74] Nosek, n. 64 above, p. 753.

[75] D.T. Ritchie, 'The Centrality of Metaphor in Legal Analysis and Communication: An Introduction' (2007) 58(3) *Mercer Law Review*, pp. 839–46, at 839.

[76] M. Hanne & R. Weisberg, 'Introduction: Narrative and Metaphor in the Law', in Hanne & Weisberg, n. 2 above, pp. 1–12.

[77] Ibid.

[78] T. Hutchinson & N. Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review*, pp. 83–119, at 107.

[79] Of course, this is not the sole purpose of legal scholarship, or activism, and not to suggest that scholarly considerations are subservient to those of an instrumental nature; our job as scholars is not just polemical discussion, or commentary: see E. Fisher et al., 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21(2) *Journal of Environmental Law*, pp. 213–50, at 224 and 230–1.

[80] Nosek, n. 64 above.

decision, refining its message and implications, and in so doing constructing our public story about climate change. This tells us what this decision does.

It is not necessary, for this article, to look much further into critical perspectives on narratization.[81] Importantly for my purposes, narrative and metaphor work together as devices that help us in understanding how things 'hang together':[82] where the metaphorical process helps us to organize our perceptions, and narrative combines these perceptions in a coherent story.[83] It is easy to accept that legal reasoning relies on narrative; yet it is surprising how pervasive metaphor is in legal language and culture.[84] Metaphors have a distinct, dense, and sudden way of conveying meaning; they rely on mutual understanding or tacit knowledge of one subject to convey or force meaning to something else.[85] The process by which this happens is not simple or uniform.[86] Del Mar explains that the process of engaging with a metaphor is intensively participatory, engaging one on multiple levels in the imaginative process of coming to see one thing as another thing.[87] However, theorists have identified a tendency for most fields of study to use 'conventional metaphors or stock narratives';[88] so, in as much as these devices do open channels of thought and persuade the reader to engage in the imaginative work of seeing one thing as another,[89] where these become fixed they can also constrain thinking and leave out important perspectives.[90] Responding to a fixed metaphor is a fairly staid process, as metaphorical similarities become, according to Del Mar, 'congealed'.[91] For instance, 'the holy grail' is a fixed metaphor – even though most people know that we do not know what the holy grail is, they instantly understand what is meant when we refer to something as 'the holy grail'.

Simultaneously, metaphor can be disruptive or distortive. The use of novel metaphors can disrupt established thinking patterns, signalling the need for further thought, 'placing us on epistemic alert'.[92] If metaphor contains the 'distilled residue' of a story,

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81 Discussed in G. Olsen, 'On Narrating and Troping the Law: The Conjoined Use of Narrative and Metaphor in Legal Culture', in Hanne & Weisberg, n. 2 above, pp. 19–36, at 19.

82 L. Berger, 'The Lady, or the Tiger? A Field Guide to Metaphor & Narrative' (2010) 50(2) *Washburn Law Journal*, pp. 275–318, at 275.

83 Ibid.

84 Olsen, n. 81 above; E.G. Thornburg, 'Metaphors Matter: How Images of Battle, Sports and Sex Shape the Adversary System' (1995) 10 *Wisconsin Women's Law Journal*, pp. 225–81.

85 Thornburg, ibid.

86 E.g., Del Mar, n. 2 above; M.L. Johnson, 'Mind, Metaphor, Law' (2007) 58(3) *Mercer Law Review*, pp. 839–68; A. Philippopoulos-Mihalopoulos, 'Flesh of the Law: Material Legal Metaphors' (2016) 43(1) *Journal of Law and Society*, pp. 45–65. All have differing understandings of precisely what the cognitive process is that underlies this, and when and how this process happens. I will discuss Del Mar's work as I find it the most interesting. Resolving these differences is not necessary for the purposes of the article.

87 Del Mar, n. 2 above, Ch. 6 'Metaphors', pp. 278–339; also M. Del Mar, 'Metaphor in International Law: Language, Imagination and Normative Inquiry' (2017) 86(2) *Nordic Journal of International Law*, pp. 170–95.

88 Hanne & Weisberg, n. 76 above, p. 10.

89 L.L. Berger & K.M. Stanchi, 'Gender Justice: The Role of Stories and Images', in Hanne & Weisberg, n. 2 above, pp. 157–92, at 158.

90 Ibid.

91 Del Mar, n. 2 above, p. 308.

92 Del Mar, ibid., p. 281; Berger & Stanchi, n. 89 above, p. 174.

then metaphor can interact with narrative by disrupting the associations we have made,[93] forcing us into 'epistemic alert' and causing us to question our assumptions. This is the process I hope to stimulate with this article. By exploring the stories of the holy grail, I seek to challenge the easy assumptions about this metaphor, and to see whether the depth of these stories cannot force more thought about what grail quests are and what they mean. I combine this with more formal private law theory approaches to analyzing the effects of litigation in private law.

I am, of course, aware of the limits of this analysis. In as much as private law theory can provide food for thought as to the impacts, effects and meaning of certain kinds of legal case, it cannot provide definitive answers as to what these cases do. The same might be said for metaphorical analysis. I appreciate also that there are multiple reasons why this approach could be attacked. Why so much theory? Why not use one, or the other? Why not discuss the cases more, and fairy stories less? My answers are: I examined the grail legends to make sense of why these cases are sometimes called 'holy grail' cases. I used the theory that best supported the point I wanted to make in relation to both litigation outcomes and the narrative that surrounds these cases. A further possible challenge could be: if you want to find out what these cases do, design an empirical study. This is, of course, a different endeavour from the one undertaken here, and certainly a necessary one. However, my analysis does things an empirical study cannot and does not aim to do, which is to raise questions about the implications but also the meaning of these cases, to raise normative questions, and to encourage reflection on the contribution of 'holy grail' cases to narrative about climate change. It is to these cases that I turn now.

3. THE FIRE SERMON: *URGENDA* AND MITIGATION ACTION

The first decision in *Urgenda Foundation* v. *The Netherlands*[94] was a much-needed climate 'win' at a time when the prospects of any kind of effective climate action seemed tenuous. It was brought by a non-governmental organization (NGO), Urgenda, and hundreds of citizen claimants seeking relief for violations of human rights and under Dutch tort law on the basis that their government's lack of climate ambition was harmful to them and future generations. The claimants persuaded the District Court of The Hague that the Dutch government was liable in hazardous negligence on account of its inadequate climate policies, which at the time required a 17% reduction in GHG emissions by 2020, against a 1990 baseline, in accordance with European Union (EU) climate policy.[95] The 'tort' aspect of the case, brought under the Dutch Civil Code, is based on an

[93] Berger & Stanchi, n. 89 above, p. 163.

[94] *Stichting Urgenda* v. *The State of the Netherlands (Ministry of Infrastructure and the Environment)*, Rechtbank Den Haag [District Court of The Hague], C/09/456689/HA ZA 13-1396, 24 June 2015, ECLI:NL:RBDHA:2015:7196 (*Urgenda I*).

[95] The Netherlands had committed to this percentage reduction as part of the EU's climate policy, in terms of which the EU had given itself a 20% reduction target: see discussion in M. Peeters, '*Urgenda Foundation and 886 Individuals v. The State of the Netherlands*: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States' (2016) 25(1) *Review of European, Comparative & International Environmental Law*, pp. 123–9, at 124–6.

'open standard' of negligence, in terms of which the court can make a determination as to what is reasonable and lawful behaviour for 'due care exercised in society'.[96] Articles 2 and 8 of the European Convention on Human Rights (ECHR)[97] were used reflexively, as an 'interpretive tool' to inform the court's understanding of the duty of care, and (along with international law) 'the framework for and the manner in which the State exercises its climate policy'.[98] The District Court made an injunctive order against the government and thereby confirmed two standards: that (i) global warming should be limited to 2°C, and (ii) the Dutch government should reduce its emissions by at least 25% by 2020. The emissions reduction limit was the minimum level requested by the claimants.

Unsurprisingly, this decision went to appeal and in late 2018 the Court of Appeal in The Hague upheld the decision, requiring the Dutch government to change domestic policy to achieve a 25% emissions reduction by 2020, compared with 1990 levels.[99] The reasoning of the Court of Appeal, however, was very different as, while it upheld the tort decision of the court below,[100] most of its judgment focused on the question of whether the fundamental rights that had been invoked for their 'reflex effect' in the court of first instance[101] could in fact be applied directly under Dutch national law.[102] The Court of Appeal found that Urgenda could invoke Articles 2 and 8 ECHR directly, under Book 3 Section 305a of the Dutch Civil Code and Articles 93 and 94 of the Dutch Constitution.[103] However, as Roy explains:

> To clarify, this does not mean that the cause of action is violation of human rights. The cause of action is still a civil or private law claim that the State has not satisfied its duty of care … . [Urgenda] wanted the Appeals Court to reverse the opinion of the District Court that Articles 2 and 8 ECHR do not have binding value in determining the lawfulness of the State's exercise of the duty of care.[104]

What is most significant for the purposes of the article is that the court upheld the injunctive order, requiring a 25% reduction in Dutch emissions as against a 1990

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[96] *Stichting Urgenda* v. *The State of the Netherlands (Ministry of Infrastructure and the Environment)*, Gerechtshof Den Haag [The Hague Court of Appeal], C/09/456689/HA ZA 13-1396, 9 Oct. 2018, ECLI:NL:GHDHA:2018:2610, para. 4.3 (*Urgenda II*); Peeters, ibid., p. 124.

[97] Rome (Italy), 4 Nov. 1950, in force 3 Sept. 1953 (ECHR), available at http://www.echr.coe.int/pages/home. aspx?p=basictexts.

[98] J. Peel & H.M. Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law*, pp. 37–67, at 52. *The State of the Netherlands (Ministry of Infrastructure and the Environment)* v. *Stichting Urgenda*, Hoge Raad [Supreme Court], 20 Dec. 2019, ECLI:NL:HR:2019:2007, paras 4.42–4.52 (*Urgenda III*).

[99] *Urgenda II*, n. 96 above.

[100] Ibid., p. 76.

[101] *Urgenda III*, n. 98 above, para. 4.42.

[102] As this article focuses on the instrumental effect of these cases, it is not necessary to say much about the appeal decision, although this has quite a distinct flavour from *Urgenda I*, specifically showing more distinct human rights reasoning. It is still a tort claim: see P. Minnerop, 'Integrating the "Duty of Care" under the European Convention on Human Rights and the Science and Law of Climate Change: The Decision of The Hague Court of Appeal in the *Urgenda* Case' (2019) 37(2) *Journal of Energy & Natural Resources Law*, pp. 149–79, at 152–3.

[103] *Urgenda II*, n. 96 above, paras 34–36.

[104] S. Roy, 'Urgenda II and its Discontents' (2019) 13(2) *Carbon & Climate Law Review*, pp. 130–41, at 134.

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baseline by 2020, with costs. This subsequently went to appeal and a lengthy and detailed opinion of Advocate General Wissink and Procurator General Langemeijer urged the Supreme Court to uphold the Court of Appeal's decision on human rights grounds, alternatively in accordance with the open standard of negligence.[105] The Supreme Court upheld the decision in December 2019.[106]

Urgenda was deliberate and strategic litigation, initiated and prepared by seasoned environmental campaigners and litigators,[107] then brought in a judiciously chosen jurisdiction. It was the outcome of a long-term and carefully thought process of preparation. The action had the clearly stated purpose of compelling increased ambition on climate mitigation; specifically, the suit sought a commitment to an emissions reduction target that exceeded the reductions to which the Netherlands was already bound under EU law.[108]

The case set a remarkable precedent and was hailed as an incredible victory for climate activists. It was the first large-scale climate action based in tort law which proceeded to a substantive hearing, the first where the claimant 'succeeded', and the first occasion on which a court had determined the appropriate emissions reduction target for a developed state.[109] It is said to have improved ambition on climate mitigation (although see below). *Urgenda* inspired similar litigation,[110] as well as differently formulated cases seeking similar relief.[111] It has also been claimed that this created a groundswell of enthusiasm, which contributed to the relative success of COP-21 to the UNFCCC.[112] All this, of course, is speculative; yet I am reluctant to be overly critical of speculative or theoretical accounts of the 'effect' of *Urgenda* as, like the other cases discussed in this article, whether and how one might establish its full meaning

[105] *Urgenda II*, n. 96 above, paras 8.65, 8.78.

[106] *Urgenda III*, n. 98 above. This article was substantially completed prior to the Supreme Court decision on 20 Dec. 2019. Accordingly, I shall not discuss it in detail here but reference is made to it in various places.

[107] M. Minnesma, 'Hague Climate Change Verdict: "Not Just a Legal Process but a Process of Hope"', *The Guardian*, 25 June 2015, available at: http://www.theguardian.com/global-development-professionals-network/2015/jun/25/hague-climate-change-verdict-marjan-minnesma. See also R. Cox, *Revolution Justified* (Planet Prosperity Foundation, 2012).

[108] Further details in the decision or J. Lin, 'The First Successful Climate Negligence Case: A Comment on *Urgenda Foundation v. The State of the Netherlands (Ministry of Infrastructure and the Environment)*' (2015) 5(1) *Climate Law*, pp. 65–81. Further details on EU climate ambition and effort sharing in E. Woerdman, M. Roggenkamp & M. Holwerda, *Essential EU Climate Law* (Edward Elgar, 2015), Chs 2 and 5.

[109] R. Cox, 'A Climate Change Litigation Precedent: *Urgenda Foundation v The State of the Netherlands*' (2016) 34(2) *Journal of Energy & Natural Resources Law*, pp. 143–63, at 144; Cox explains the choice of a government over a polluter defendant: ibid., p. 146.

[110] E.g., *Friends of the Irish Environment* v. *The Government of Ireland* [2019] IEHC 747 and *Thomson* v. *The Minister for Climate Change Issues* [2017] NZHC 733. There are also plans for an '*Urgenda*' in Belgium (*Klimaatzaak* v. *Kingdom of Belgium and Others*, available at: http://www.klimaatzaak.eu/en) and France (*Commune de Grande-Synthe* v. *France*, available at: http://climatecasechart.com/non-us-case/commune-de-grande-synthe-v-france).

[111] E.g., *R (Plan B Earth and Others)* v. *SoS for BEIS* [2018] EWHC 1892 (Admin).

[112] N. 34 above. Heinrich Böhl Stiftung, 'Climate Justice: Can the Courts Solve the Climate Crisis?', *Tipping Point Podcast 2/5*, 30 Mar. 2017, https://www.boell.de/en/2017/03/30/tipping-point-25-climate-justice-can-courts-solve-climate-crisis.

and implications are uncertain. It may well be that the decision simply fitted within the general direction of travel.

The glamour of this case contributed to the expectation that litigation of this nature might 'save the world' – for a while, everybody wanted an *Urgenda*.[113] It has certainly generated a wealth of interesting and incisive scholarship[114] concerning the relationship between the decision and international law;[115] questioning its implications for EU climate law;[116] concerning the legitimacy of the decision and its implications for the separation of powers;[117] the formulation of the duty of care;[118] and whether the campaign could be replicated in other jurisdictions.[119] These are obvious topics of discussion, not least because of the fate of the previous generation of 'holy grail' cases, discussed in the next section. In the quest for whether the decision might survive or be replicated in other jurisdictions, there needs to be space for questions as to whether it should.

The critical analysis of *Urgenda* in the main has failed to distinguish the moral and strategic triumph of this first tort success from whether the result was good. This is the first linkage with the grail stories: there is not necessarily a connection between success and restoration, particularly when success is an undefined aspiration. Determining what 'good' might mean in this context can be difficult, but I would argue that, at the very least, a successful climate action should give us a reasonable guarantee of confining warming to safe levels or we end up in a Galahad-type story, in which we return triumphant with the grail but nevertheless we all die. Certainly, the decision is far from a victorious, restoring grail. It did require the Dutch government to increase its climate ambition, but the order was only provisional while the appeal process ran out,[120] and it would appear that little has been done in the interim to reduce emissions.[121] A Climate Act is proposed, but this is silent on ambition to 2020, the period that is subject to

[113] See, e.g., T. Baxter, '*Urgenda*-Style Climate Litigation Has Promise in Australia' (2017) 32(3) *Australian Environment Review*, pp. 70–83.

[114] Setzer & Vanhala, n. 58 above, p. 4 ('the *Urgenda* effect').

[115] Lin, n. 108 above; Peeters, n. 95 above; K. de Graaf & J. Jans, 'The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change' (2015) 27(3) *Journal of Environmental Law*, pp. 517–27.

[116] S. Roy, 'Distributive Choices in Urgenda and EU Climate Law', in M. Roggenkamp & C. Banet (eds), *European Energy Law Report XI* (Intersentia, 2017), pp. 47–68; Peeters, n. 95 above.

[117] M.A. Loth, 'The Civil Court as Risk Regulator: The Issue of its Legitimacy' (2018) 9(Special Issue 1) *European Journal of Risk Regulation*, pp. 66–78; L. Bergkamp & J.C. Hanekamp, 'Climate Change Litigation against States: The Perils of Court-made Climate Policies' (2015) 24(5) *European Energy and Environmental Law Review*, pp. 102–14.

[118] Cox, n. 109 above.

[119] This decision is not exportable to English tort law: J. van Zeben, 'Establishing a Governmental Duty of Care for Climate Change Mitigation: Will *Urgenda* Turn the Tide?' (2015) 4(2) *Transnational Environmental Law*, pp. 339–57, although see R.H. Weaver & D.A. Kysar, 'Courting Disaster: Climate Change and the Adjudication of Catastrophe' (2017) 93(1) *Notre Dame Law Review*, pp. 295–359, from 337.

[120] *Urgenda II*, n. 96 above, p. 66.

[121] B. Mayer, '*The State of the Netherlands* v. *Urgenda Foundation*: Ruling of the Court of Appeal of The Hague (9 October 2018)' (2019) 8(1) *Transnational Environmental Law*, pp. 167–92, at 174–5.

dispute in *Urgenda*, and the reduction targets to the mid-century, while stringent, are non-binding.[122]

So, how do we understand what this decision is and whom does it serve? The theory on the regulatory role of private law is complex and nuanced, potentially including a variety of standard-defining and compliance or enforcement functions.[123] This can include behaviour-forcing effects, as a defendant will modify practices to avoid liability. Complexities arise when the duties or standards held up as (for example) reasonable in a tort claim challenge the prevailing position on an issue.[124] This provides claimants with unique power to influence standard setting or challenge orthodox or conservative positions on matters of science (or policy disguised as science)[125] in the process of vindicating harm.[126] It also lets claimants take the initiative when other forms of regulation lag behind.[127] Private law, therefore, does not only deter behaviour but also defines what that behaviour should be. It also heralds tremendous potential for standards determined as 'reasonable' by judges, to inform and supplement lax regulation.[128]

The *Urgenda* courts purported to make an order that would limit warming to 2°C. Of course, the Netherlands had already committed to a 2°C warming limit in the multilateral negotiations under the climate regime at the COP in Cancún (Mexico).[129] Specifically, a decision paragraph describing the parties' shared vision recorded that the community:

> *recognises* that deep cuts in global greenhouse gas emissions are required according to science, and as documented in the Fourth Assessment Report of the [IPCC], with a view to reducing global greenhouse gas emissions so as to hold the increase in global average temperature below 2°C above pre-industrial levels, and that Parties should take urgent action to meet this long-term goal, consistent with science and on the basis of equity;
>
> *also recognises* the need to consider … strengthening the long-term global goal on the basis of the best available scientific knowledge, including in relation to a global average temperature rise of 1.5°C.[130]

[122] Specifically, an 'obligation to perform' in respect of a 95% reduction by 2050, and a 'best-efforts obligation' in respect of a 49% reduction by 2030. This is helpfully discussed by the Advocate General in *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) and Stichting Urgenda,* ECLI:NL:PHR:2019:1026, paras 4.32 and 5.68 (*Urgenda*, Advocate General).

[123] J. Steele, 'Assessing the Past: Tort Law and Environmental Risk', in T. Jewell & J. Steele (eds), *Law in Environmental Decision-Making: National, European, and International Perspectives* (Oxford University Press, 1998), pp. 107–38, at 109. See also P. Cane, 'Using Tort Law to Enforce Environmental Regulations' (2001) 41(3) *Washburn Law Journal*, pp. 427–68, at 451.

[124] Steele, ibid., pp. 130–3.

[125] K. Stanton & C. Willmore, 'Tort and Environmental Pluralism', in Lowry & Edmunds, n. 66 above, pp. 93–113, at 93–109.

[126] Lee, n. 66 above.

[127] J. Murphy, 'Noxious Emissions and Common Law Liability', in Lowry & Edmunds, n. 66 above, pp. 52–74, at 53.

[128] Ibid., p. 53.

[129] Decision 1/CP.16, 'The Cancún Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention' (10–11 Dec. 2010), UN Doc. FCCC/CP/ 2010/ 7/Add.1.

[130] Ibid., para. 1.2.4.

Of course, this commitment did not create a directly enforceable legal obligation, but this does not mean it has no legal effect.[131] As such, although COP decisions are non-binding, the Netherlands could be seen as having recognized and endorsed a norm of below 2°C in good faith some years earlier.[132] As such, arguably, by 2015 'both the adequacy and the feasibility of the 2°C target [settled by the court] was already contentious'.[133] Only a few months later it was agreed in Paris (France) that 'well below 2°C' with efforts to limit to 1.5°C is required to avoid dangerous interference with the climate system.[134] The fact that this strong temperature aspiration was possible in Paris is reflective of the fairly broad acceptance that 2°C of warming would be a veritable death sentence for many.[135] The Appeal Court acknowledged the global scientific consensus that warming should not exceed 2°C, and that insights over the last few years acknowledged that safe warming could not exceed 1.5°C,[136] as did the Supreme Court.[137] Indeed, on the day before the *Urgenda* appeal decision was handed down the special IPCC report confirmed the implications of warming exceeding 1.5°C (and the dramatic reductions in emissions required to reach this): not least, this includes huge distributive implications, given the severity of the likely impacts on the world's poor.[138]

Returning to the feasibility point, one of the reasons the Paris Agreement includes a commitment to peaking emissions as soon as possible[139] is that delaying emissions reductions makes the steeper reductions required later even more difficult.[140] One would expect a major historical and present emitter such as the Netherlands to do

[131] C.M. Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38(4) *International & Comparative Law Quarterly*, pp. 850–66.

[132] Ibid. For a detailed discussion of the relationship between the Dutch, the EU, and international temperature targets and emissions reductions goals see Lin, n. 108 above, Sections 3 and 6; discussed by the Court of Appeal in *Urgenda II*, n. 96 above, pp. 57–8, 72.

[133] M. Lee, 'The Sources and Challenges of Norm Generation in Tort Law' (2018) 9(Special Issue 1) *European Journal of Risk Regulation*, pp. 34–47, at 44

[134] Art. 2.1(a) Paris Agreement.

[135] This is not the place for an in-depth discussion of the multilateral climate negotiations or of developments in climate science. Suffice to say that this goal was undemocratically adopted in Copenhagen in 2009: see R.S. Dimitrov, 'Inside UN Climate Change Negotiations: The Copenhagen Conference' (2010) 27(6) *Review of Policy Research*, pp. 795–821; and since 2011, with the negotiations in Durban, a formulation of 'well-below 2°C' had been *de rigueur*: see, e.g., D. Bodansky, J. Brunnée & L. Rajamani, *International Climate Change Law* (Oxford University Press, 2017), pp. 114–6. Strong authoritative alternative views have confirmed that more stringent action is required: J. Hansen et al., 'Assessing "Dangerous Climate Change": Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature' (2013) 8 *PLOS ONE*, e81648, available at: https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0081648.

[136] *Urgenda II*, n. 96 above, paras 3.5 and 4.4.

[137] *Urgenda III*, n. 98 above, para. 4.3.

[138] IPCC, n. 40 above.

[139] Art. 4.1 Paris Agreement.

[140] The UN Environment Programme (UNEP) has emphasized the increasing urgency of making sharper emissions reductions, and the 'gap' between the trajectory of global emissions and what was required to stay within safe levels of warming: see, most recently, A. Olhoff & J.M. Christensen, *The Emissions Gap Report 2017: A UN Environment Synthesis Report* (UNEP, 2017); see also Cox, n. 109 above, p. 155.

more than the aggregate in terms of reductions, not less. This was acknowledged in the decision of the Court of Appeal, when it was stated:

> An even distribution of reduction efforts over the period up to 2030 would mean that the State should achieve a substantially higher reduction in 2020 than 20%. An even distribution is also the starting point of the State for its reduction target of 49% by 2030, which has been derived in a linear fashion from the 95% target for 2050. If extrapolated to the present, this would result in a 28% reduction by 2020.[141]

Relying on the 2007 IPCC report,[142] the High Court chose the minimum level of mitigation pleaded, which, as discussed in the decision, would mean it was 'as likely as not' to keep emissions within the temperature target.[143] The Court of Appeal, while delivering a very robust decision, made it very clear that it could not make an order for steeper emissions cuts to 2020, as the reduction limits had not been appealed against.[144] Therefore, even if the 2°C goal could keep warming within tolerable limits, it is arguable that a reduction in Dutch emissions by 25% (taken in the aggregate) is consistent with an equivalent risk of not meeting that, on the basis that it is 'as likely as not' that warming would be kept under 2°C with these percentage reductions. Indeed, until about 2010 the Netherlands assumed a reduction target of 30% compared with 1990 levels,[145] which was reduced in line with the EU reduction target 'without climatological substantiation',[146] and the claimant asked for up to 40% reduction in its pre-action correspondence and original pleadings. So why did the Court order a 25% reduction rather than, say, 28%, 30% or 40%? The answer is that after establishing that a 25% reduction constitutes the absolute minimum, it then considered that ordering a higher percentage would 'clash with the discretionary power' of the state. Given the politically charged subject matter, it noted that it should respect the government's policy-making role and exercise restraint; this, in essence, reflects long-standing concerns about the role and legitimacy of the courts within democratic governance.[147]

This, in essence, is the separation of powers struggle that lies at the heart of *Urgenda* and, in some sense, all 'holy grail' climate litigation, which is the capacity of and constraints on the courts to impose standards or make mandatory orders in areas that are considered the domain of politics. Throughout the appeal process the *Urgenda* courts have emphasized that the Dutch separation of powers is not absolute, because a judge's democratic power and authority is derived from democratically enacted legislation.[148]

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[141] *Urgenda II*, n, 96 above, para. 47, also para. 72.

[142] IPCC (S. Solomon et al., eds), *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2007). Throughout the *Urgenda* decisions the courts favoured the earlier 2007 reports, despite the 2014 report being available, which provided slightly better prospects for the 2°C goal, in short because most of the more ambitious scenarios relied on untested BECCS technologies, and as such allowed some overshoot, among other factors: see *Urgenda III*, n. 98 above, para. 2.19.

[143] *Urgenda III*, ibid., from para. 2.14.

[144] *Urgenda II*, n. 96 above, paras 3.9 and 7.5.

[145] Discussed in *Urgenda III*, n. 98 above, from para. 4.31.

[146] *Urgenda*, Advocate General, n. 122 above, para. 4.73.

[147] Ibid., para 4.96.

[148] *Urgenda III*, n. 98 above, paras 4.97–4.98. See also van Zeben, n. 119 above, pp. 352–6.

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This, of course, is magnified when the politics are so contentious or when issues of fundamental rights are at stake.[149] While an in-depth discussion of this issue probably exceeds the scope of this article,[150] suffice to say here that judicial restraint was exercised because of concerns about legitimacy and proportionality, as well as difficulties in understanding what the consequences of the decision might be. As the District Court itself acknowledged, 'the consequences of the court's intervention are difficult to assess'.[151] It was well aware that the decision would have far-reaching implications, which, because of the complex nature of the litigation, would be difficult to predict or control; it was also well aware that overreaching could give rise to grounds for challenge. Yet, it seems strange to suggest that this issue of principle could be resolved by exercising restraint in relation to the extent of the reductions ordered. Whether the District Court was correct to act as it did is surely a matter of law and cannot be determined quantitatively. Surely, once the Court sought to increase the emissions reduction target at all, the constitutional questions would not differ whatever the percentage reduction was.[152] However, in making this compromise the Court changed the character of the endeavour to some extent; while the *Urgenda* decision was rather radical from a lawyer's perspective, the Court chose a conservative path in terms of what it required for climate mitigation.[153]

If we think about what this means in terms of regulatory standards, we are left with a curious outcome. The District Court of The Hague took a decisive step and made an order that another organ of state must improve its climate ambition. In so doing it purported to influence regulation in a direct way and set two headline standards as to the extent of the action required, confirming the 2°C warming limit and that a 25% emissions reduction by 2020 was required further to achieve this, despite the questions outlined above as to whether these standards were consistent with an aggregate trajectory towards safe limits on warming. Here, we can make a further linkage with our grail lessons: finding and returning the grail, in and of itself, looks like a triumph, but it is only so in versions of the story that are so corrupted that the quest for the impossible becomes an end in itself. The holy grail of *Urgenda* was not going to restore the waste land, and proper enquiry should have shown that very clearly.

There is a further aspect to this. It seems unfair to criticize *Urgenda* for not achieving enough. We all know how litigation goes: outcomes are unpredictable, risks are high, and this first tort victory surely was an achievement. However, it might be suggested that the academic (and activist) community have not served the public, or the planet, well in their important 'tidying up' role[154] in terms of the narrative this has created

[149] *Urgenda II*, n. 96 above, paras 67–69.

[150] But see J. Verschuuren, '*The State of the Netherlands v Urgenda Foundation*: The Hague Court of Appeal Upholds Judgment Requiring the Netherlands to Further Reduce Its Greenhouse Gas Emissions' (2019) 28(1) *Review of European, Comparative & International Environmental Law*, pp. 94–8, at 96; van Zeben, n. 119 above, p. 352; de Graaf & Jans, n. 115 above, p. 523; Bergkamp & Hanekamp, n. 117 above.

[151] *Urgenda III*, n. 98 above, para. 4.100.

[152] As discussed above, but see, e.g., *Urgenda III*, n. 98 above, para. 4.86; the introductory comments of the Court of Appeal in *Urgenda II*, n. 96 above; *Urgenda*, Advocate General, n. 122 above, from para. 5.70.

[153] Lee, n. 133 above, p. 44.

[154] Hutchinson & Duncan, n. 78 above, p. 107.

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around the *Urgenda* decisions. This heroic framing risks contributing to a sense of complacency, an interpretation that the job is done, the grail is found, the quest was successful. However, any 'job done' attitude to this decision would crowd out the potential for conversations about the inadequacy of the reductions prescribed by the Court and, indeed, the lack of effect this seems to have had on Dutch climate policy. It is perfectly possible to applaud the valour of *Urgenda* while cautioning that its result is not necessarily consistent with safe limits on warming. Despite the scale of the achievement, this decision was not radical or disruptive, but was a deeply 'conservative',[155] business-as-usual outcome, which is as consistent with overshooting the temperature target as otherwise, even if the Dutch government had complied with the order.

4. DEATH BY WATER: LITIGATION FOR CLIMATE HARM

Forg[e]t the cry of gulls, and the deep sea swell
And the profit and loss …[156]

The relative conservatism of the *Urgenda* litigation can be contrasted with the radicalism of the first generation of 'holy grail' cases.[157] These earlier cases sought damages against the 'polluter' class of defendant, and were brought with the sense that they could be the 'magic bullet'.[158] These cases have a very different character from *Urgenda* in more than just their choice of defendant and relief sought, and focus on an event rather than climate policy more generally. While they might have had a secondary effect of forcing improved mitigation, the true quest of these cases was to recover the costs of climate harm from those perceived to have caused it.[159] These early cases, had they succeeded, would have been true game changers. This section will focus on the litigation arising from Hurricane Katrina in 2005. I shall outline it very briefly to begin.

4.1. Comer *v.* Murphy*: Loss and Damage*

Comer v. *Murphy*[160] was brought on behalf of a group of plaintiffs who had suffered loss and damage as a consequence of Hurricane Katrina in the US in 2005. The action

[155] Lee, n. 133 above, p. 44.

[156] Eliot, n. 28 above, Part IV.

[157] The evolution of climate litigation through generations is explained in Abate, n. 3 above. Other significant first-generation 'holy grail' cases are *American Electric Power Co* v. *Connecticut*, 131 S.Ct. 2527 (2011) (a nuisance case focused on abatement), and *Native Village of Kivalina* v. *ExxonMobil Corp*, 696 F.3d 849 (9th Cir. 2012) (in which the claimants sought damages for considerable harm), both of which were dismissed on federal displacement grounds. I have chosen *Comer* because of its interesting procedural history, which provides more detail in its decisions.

[158] See discussion above in Section 2.2.

[159] It is beyond the scope of this article, but this does raise interesting questions about the possibilities for differing motivations between litigants and their representatives in environmental or climate justice cases. The claimants were represented by Luke Cole, a seasoned environmental justice attorney, who acknowledges the complexity in motivations and functions in his own role: L.W. Cole, 'Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy Community Initiatives' (1994) 14(4) *Virginia Environmental Law Journal*, pp. 687–710. I am grateful to Doug Kysar for our discussion about this.

[160] *Comer* v. *Murphy Oil USA*, 585 F.3d 855, 880 (5th Cir. 2009).

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was brought in private law (including actions for unjust enrichment, civil conspiracy and aiding and abetting, public and private nuisance, trespass, negligence, and fraudulent misrepresentation and concealment) against two broad categories of defendant. One was a group of major emitters, from whom compensation was sought for the contribution their emissions had made to what can be called a climate disaster, Hurricane Katrina.[161] This group included various oil companies, as well as coal and chemical companies, joined as co-defendants in a series of preliminary hearings. The second group, financial institutions, included insurance companies that had failed to compensate the claimants for damage caused by the hurricane, as well as mortgage companies, on the basis that they had provided insufficient insurance to protect their own mortgaged property.

The procedural history of the *Comer* litigation is complex.[162] The original proceedings gradually suffered dismissal in a recusal fiasco,[163] which could be seen to reflect judicial refusal to engage at any cost. The reissued action – in public and private nuisance, negligence and trespass – was ultimately dismissed. A number of formal reasons were offered for its dismissal.[164] The plaintiffs lacked standing, as they were unable to establish a causal connection between the defendants' emissions and the harm.[165] The action raised political questions.[166] I shall refer to these loosely as 'justiciability' issues. These preliminary issues certainly were not unanticipated.[167] Of course, had any of the first-generation doctrinal cases been put to a substantive hearing, some knotty doctrinal problems would have arisen.[168]

The hallmark of this first generation of 'holy grail' cases – in which they crucially differ from cases like *Urgenda* – was the choice to seek compensation from contributors to and financial beneficiaries of our societal binge on fossil fuels, the most obvious

[161] All loss and damage cases will present quite distinct causation problems: see discussion in the articles cited at n. 53 above. In addition to the question of what caused the hurricane, it would appear that decades-long poor management of the Mississippi River Gulf Outlet shipping canal contributed to the scale of the devastation. Litigation brought on this basis has also been subject to mixed fortunes: see, however, *In re Katrina Canal Breaches Consolidated Litigation (Robinson)*, 647 F. Supp. 2d 644 (E.D. La. 2009), which provides a good account of the management problems and how these contributed to the storm surge.

[162] The history is summarized in *Comer*, n. 160 above, and in P.A. Woods, 'Reversal by Recusal? Comer v. Murphy Oil U.S.A., Inc. and the Need for Mandatory Judicial Recusal Statements' (2016) 13(2) *University of New Hampshire Law Review*, pp. 177–213; see also Weaver & Kysar, n. 119 above.

[163] Woods, ibid.

[164] Only three grounds are of relevance to this article. The defendants also succeeded on the first ground, *res judicata*, and limitation was in issue.

[165] This was not the only aspect of the standing enquiry in issue. The injury had to be 'fairly traceable' to the defendants: *Comer*, n. 160 above, p. 23. The plaintiffs were also unlikely to meet a more stringent test of 'proximate cause' under Mississippi law: 'The assertion that the defendants' emissions combined over a period of decades or centuries with other natural and man-made gases to cause or strengthen a hurricane and damage personal property is precisely the type of remote, improbable, and extraordinary occurrence that is excluded from liability': ibid., p. 35.

[166] *Comer*, ibid., pp. 24–9, distinguishing *Massachusetts* v. *Environmental Protection Agency* (EPA), 549 US 497 (2007). There was also a third, related point: that the plaintiff's action had been pre-empted by statute: ibid., pp. 30–2.

[167] Grossman, n. 53 above, pp. 33–7.

[168] As discussed in the literature cited at n. 53 above.

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targets for climate litigation.[169] Of course, a positive result could have set a powerful deterrent and supported emissions abatement, given that the defendants were all large-scale emitters. However, the character of these cases is different: their possible effect on broader climate policy may have been implicit, but the primary purpose of these cases was to seek redress for climate harm. It seems like an entirely obvious statement, but this was entirely radical.

Compensation is a core function of private law,[170] but what is 'distinctive' about private law actions is not just that the claimant stands to be compensated, but that she stands to be compensated by the defendant.[171] Tort can be called a 'responsibility-based mechanism', because making the defendant assume the costs of the claimant's harm (at least notionally) makes the defendant take responsibility for its conduct.[172] These first-generation cases have their legal and moral basis in the defendants' socially conflicted role as a significant emitter of GHG emissions in the past, present and (probably, the way things are going) future. In so doing, cases like *Comer* pre-empt what is, even now, a no-go zone in a contentious area – namely, compensation for climate loss and damage. I will return to this point later, when I discuss the carbon majors cases. There is more to say about the implications of *Comer*.

The compensatory functions of private law are inherently associated with this distributive or 'risk control' function.[173] By holding the defendant responsible, a successful climate tort would shift the cost of harm onto the party who allegedly caused it. Conversely, where seeking recompense through private law is unsuccessful, the costs of climate harm (or of taking preventative measures through adaptation) will fall to the claimant. This compensation/distribution function also operates between different potential defendants.[174] In this way liability, or the prospect thereof, explicitly or implicitly allocates the costs of activities or risks of new technologies between involved participants. This can also operate in a negative way; for instance, where the prospects of success are poor for doctrinal reasons, or because access to justice concerns prevent meaningful engagement by some parties, the claimant will be left to bear the burden of his own loss. Under such circumstances the costs and risks occasioned by the defendants' conduct remain where they naturally fall.

In *Comer* the court declined the opportunity to reallocate the cost of the defendants' high-emitting activities to them, leaving the most impecunious claimants without a meaningful day in court, and to bear their own loss, without recompense.[175]

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[169] Markell & Ruhl, n. 49 above, p. 78.

[170] Williams, n. 66 above, pp. 137 and 171–2.

[171] Cane, n. 123 above, p. 429.

[172] Ibid.

[173] Williams, n. 66 above.

[174] Williams, ibid., p. 170. Maybe this is obvious, but in complex multi-party actions the apportionment of liability among defendants and their insurers can be as contentious as primary liability. For instance, the broad trends in mesothelioma actions in English tort law range from securing compensation for the claimants (e.g., *Fairchild* v. *Glenhaven Funeral Services Ltd* [2002] UKHL 33) and struggles between defendants to reduce their portion of liability (e.g., *Barker* v. *Corus (UK) Plc* [2006] UKHL 20), to struggles between insurers to avoid bearing risk (*Durham* v. *BAI (Run Off) Ltd* [2012] UKSC 14).

[175] M. Burkett, 'Climate Justice and the Elusive Climate Tort' (2011) 121 *Yale Law Journal Online*, pp. 115–20.

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The refusal to adjudicate these matters raises all sorts of questions about the instrumental effects of adverse decisions, including dismissals, in climate cases. The rejection of these and similar cases on (broadly speaking) grounds of justiciability was an explicit judicial refusal to deal with climate change. However, interestingly, given the historic row about climate *science*, there is no suggestion that a denial of the problem underlies the decisions made.[176] In each of the first-generation cases the reluctance of the respective court stemmed from the perceived inappropriateness of it making determinations concerning both redress for climate harm and the future regulation of emissions.[177] The *effect* of the refusal decisions was implicitly to condone the defendants' activities and dodge the need for scrutiny of the defendants' past and ongoing activities. So, while moving the focus of large-scale climate litigation to governments does make sense from some perspectives – and, of course, while ultimately governments do, or should, regulate private behaviour – the truncation of private law cases against large-scale enterprises cuts off a mechanism to hold them to account in terms of their historical (and ongoing) conduct and behaviour.[178]

Comer and its generational contemporaries reinforce orthodox ideas about legitimacy and the correct constitutional 'place' for climate governance, specifically, with elected government; but these decisions were made hot on the heels of the abandonment by the US of the Kyoto Protocol,[179] just at a time when the effects of climate change were becoming obvious, as evidenced by the substance of the litigation. Litigation should afford a clear site of pressure against this kind of institutional failure,[180] and these cases represented the refusal of yet another government body to take responsibility for this issue. Of course, it is small wonder that the US federal courts did not wish to enter this fraught and politicized domain, although by refusing to hear these cases they did. The dismissed actions did nothing to reverse the significant distributive consequences of Katrina, in which the cost of climate harm was borne by the vulnerable claimants. Considering our grail lessons, while it is difficult to assess the harm that this judicial disengagement might have caused, arguably failed quests could only add to the appeal of trying again with better questions and more refined strategies,[181] but, from a narrative perspective, *Comer* (and decisions like it) could be read as reinforcing a sense of complacency about climate change.

[176] Wilensky, n. 47 above.

[177] 'Indeed, this prescribed order of decision making – the first decider under the Act is the expert administrative agency, the second, federal judges – is yet another reason to resist setting emissions standards by judicial decree under federal tort law': *Comer*, n. 160 above, citing *Connecticut*, n. 157 above, p. 2539. See also Fisher, n. 46 above, pp. 246–8.

[178] M. Burger & J. Gundlach, *The Status of Climate Change Litigation: A Global Review* (UNEP and Sabin Center for Climate Change Law, 2017), available at: http://columbiaclimatelaw.com/files/2017/05/Burger-Gundlach-2017-05-UN-Envt-CC-Litigation.pdf.

[179] Kyoto (Japan), 11 Dec. 1997, in force 16 Feb. 2005, available at: http://unfccc.int/kyoto_protocol/items/2830.php.

[180] Fisher, n. 46 above, p. 240.

[181] See discussion above and G. Ganguly, J. Setzer & V. Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38(4) *Oxford Journal of Legal Studies*, pp. 841–68.

The latest wave of private law climate cases seeks to hold so-called 'carbon majors' to account for their disproportionate contribution to the changing climate. The identification of this group rests on a study by Heede, which traced and attributed 63% of global carbon and methane emissions between industrial times and 2010, and about half of global emissions since 1988, to a group of 90 'carbon majors',[182] also determining the proportion of their 'contribution'.[183] The climate modelling is supported by a philosophical interpretation of the implications of the models of relative contribution, the relevant companies' knowledge of the risks of fossil fuel use, and active steps taken to hide and obfuscate that knowledge.[184] This research goes a long way towards connecting those defendants with climate harm, but it is not enough, alone, to meet the legal criteria for causation of climate harm. In addition, increasingly sophisticated event attribution studies seek directly to address some of the doctrinal problems that have been anticipated, specifically issues of foreseeability and causation.[185] It is not my project to predict the prospects of these actions,[186] and it remains to be seen whether this is enough to overcome all the doctrinal mismatches these cases face and whether the right questions were asked when these studies were commissioned. The 'carbon majors' work has already given rise to human rights complaints[187] and various sets of proceedings have been issued, most of which are brought by US states or cities, in US state courts, seeking to avoid the displacement issues that plagued earlier generations of cases.[188] A quite distinct set of proceedings, *Lliuya* v. *RWE AG*, have been brought by a Peruvian farmer, with the support of a German NGO, against a German power company in the German courts. Proceedings are brought under section 1004 of the German Civil Code, an action based on interference with ownership.[189]

Notably the character of the carbon majors tort cases is quite different from the first wave of loss and damage cases. So far, US carbon majors tort cases are brought on

[182] R. Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010' (2014) 122(1–2) *Climatic Change*, pp. 229–41.

[183] Ibid.; B. Ekwurzel et al., 'The Rise in Global Atmospheric CO_2, Surface Temperature, and Sea Level from Emissions Traced to Major Carbon Producers' (2017) 144(4) *Climatic Change*, pp. 579–90.

[184] P.C. Frumhoff, R. Heede & N. Oreskes, 'The Climate Responsibilities of Industrial Carbon Producers' (2015) 132(2) *Climatic Change*, pp. 157–71; H. Shue, 'Responsible for What? Carbon Producer CO_2 Contributions and the Energy Transition' (2017) 144(4) *Climatic Change*, pp. 591–6.

[185] S. Marjanac & L. Patton, 'Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain?' (2018) 36(4) *Journal of Energy & Natural Resources Law*, pp. 265–98, at 273–5; although see R.A. James et al., 'Attribution: How Is It Relevant for Loss and Damage Policy and Practice?', in R. Mechler et al. (eds), *Loss and Damage from Climate Change: Concepts, Methods and Policy Options* (SpringerOpen, 2019), pp. 113–54.

[186] Although see Ganguly, Setzer & Heyvaert, n. 181 above, pp. 850–5 (in relation to carbon majors and corporates).

[187] Most significantly by the Philippines: see A. Savaresi & J. Hartmann, 'The Impacts of Climate Change and Human Rights: Some Early Reflections on the Carbon Majors Inquiry', in J. Lin & D. Kysar (eds), *Climate Change Litigation in the Asia Pacific* (Cambridge University Press, 2020 forthcoming).

[188] L. Paddison 'Exxon, Shell and Other Carbon Producers Sued for Sea Level Rises in California', *The Guardian*, 26 July 2017, available at: https://www.theguardian.com/sustainable-business/2017/jul/26/california-communities-lawsuit-exxon-shell-climate-change-carbon-majors-sea-level-rises. Some complaints are available at: https://www.sheredling.com/press-room.

[189] W. Frank, C. Bals & J. Grimm, 'The Case of Huarez: First Climate Lawsuit on Loss and Damage against an Energy Company before German Courts', in Mechler et al., n. 185 above, pp. 475–82.

behalf of public bodies (usually county or city governments) in anticipation of the costs to them of dealing with climate impacts, frequently sea-level rise. The relief sought includes compensation for damage and abatement funds. These are legitimately viewed as adaptation cases, as state bodies seek to claw back the costs of keeping their cities or states habitable. There are various sets of proceedings,[190] and most are brought on the basis that the defendants' production and promotion of fossil fuels constitute a public nuisance. Some include additional heads of claim for trespass or in private nuisance.[191] The actions are either stayed or at a contentious early stage as the parties seek to deal with preliminary procedural issues – most significantly, the determination of the appropriate forum.[192] 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*[193] and *City of New York* v. *BP*.[194] The dismissal hearings struck a depressingly familiar tone: the field was occupied by statute as a matter of precedent at the federal level,[195] and the broad scope of the proceedings warranted a political solution.[196] It remains to be seen what happens on appeal.

Lliuya presents a slightly different set of arguments. The claimant seeks a contribution to the cost of dealing with the risk of glacial melt and associated catastrophes, in proportion to RWE's contribution as determined by the carbon majors study, calculated at 0.47% of total costs, or USD 21,000.[197] There are many reasons why a Peruvian action would be brought in the German courts,[198] and avoiding 'political question' arguments might well be one of them.[199] Despite a rocky ride through the

[190] A fairly recent summary and overview of these cases is available in M. Burger, 'Update: Upcoming Hearings on Motions to Dismiss Climate Change Nuisance Cases in California and New York', *Climate Law Blog*, 23 May 2018, available at: http://blogs.law.columbia.edu/climatechange/2018/05/23/update-upcoming-hearings-on-motions-to-dismiss-climate-change-nuisance-cases-in-california-and-new-york.

[191] *City of New York* v. *BP Plc*, 325 F. Supp. 3d 466; for updates see: http://climatecasechart.com/case/city-new-york-v-bp-plc.

[192] For a useful overview of the cases, and a discussion of how the claimants sought to avoid federal displacement through the use of state law, see T. Hester, 'Climate Tort Federalism' (2018) 13(1) *FIU Law Review*, pp. 79–101.

[193] *City of Oakland* v. *BP Plc*, 325 F. Supp. 3d 1017; for updates see: http://climatecasechart.com/case/people-state-california-v-bp-plc-oakland.

[194] *New York*, n. 191 above. A further set of proceedings, *County of San Mateo* v. *Chevron*, is at the pleadings stage for a jurisdictional hearing; updates are available at: http://climatecasechart.com/case/county-san-mateo-v-chevron-corp.

[195] Applying *Connecticut* v. *American Electric Power Co.* and *Native Village of Kivalina* v. *Exxonmobil Corp*., n. 157 above.

[196] Distinguished from *Massachusetts* v. *EPA*, n. 166 above, on the basis that the EPA sought only to regulate six local coal-fired electricity plants, rather than a broader section of the industry, including international activities. In this respect, a third point in both decisions related to the international nature of the defendants' activities.

[197] See K. Boom, J.-A. Richards & S. Leonard, 'Climate Justice: The International Momentum towards Climate Litigation', Heinrich Böll Stiftung, 2016, p. 22.

[198] This seems to be a feature of Global South climate litigation: see J. Peel & J. Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113(4) *American Journal of International Law*, pp. 679–726, at 709–15.

[199] Boom, Richards & Leonard, n. 197 above, p. 22.

lower courts, the claimant succeeded in the preliminary stages and the case will now proceed to the evidentiary stage.[200]

Applying our grail lessons, we are invited to think about the true character of these cases, the questions that need to be asked, what victory and defeat might mean in this context, as well as the possible costs of this kind of litigation. As before, these cases carry an air of moral conviction in a dire political context and, quite significantly, a context in which both international and domestic efforts on climate change are being dismantled. Like the knights' progressive learning in the grail stories, they also reflect the climate litigation movement's years of progressive learning of what works and what does not work.[201] They are brought in a setting where the discursive and scientific context is, perhaps, more receptive;[202] and their presentation reflects the learning from past quests.[203] The claimants and their lawyers have asked many of the right questions, and maybe we are getting closer to having successful private law climate cases.

While their essential character seeks protection against future loss, these cases could, if successful, have significant implications when it comes to climate change mitigation. Litigation has been demonstrated to alter corporate behaviour in other contexts. I am not suggesting that these are the 'magic bullet' referred to by Hsu, but it is difficult to argue with the proposition that if even one of these cases succeeds, it would permanently and inevitably alter the financial risk profile of the identified 'carbon majors'.[204] Yet, with the possible exception of *Lliuya*, it is more likely that they will fail, which is a risk that seems to be taken too lightly. Arguably, each failure is just paving the way for what will, eventually, be a successful climate tort case. This might happen, perhaps, with a narrower focus.[205] Moreover, the normative impact of a failed case can still be strong: it can still raise awareness of the problem, harm the defendant's reputation and might still be enough to change polluters' calculation of risk.[206]

'Signalling' from the bench that supports the claimant's purpose can also yield a contribution in what would otherwise be a failed case.[207] All these reflections point to the question of narrative – the kind of story that is constructed around these cases both during and following the litigation. Of course, the impact of these cases might play out quite differently. If they fail, the 'awareness' being raised could be the implicit suggestion that the claimants were not deserving of relief, that fossil fuel use is an inevitable

[200] Frank, Bals & Grimm, n. 189 above; for updates see: http://www.lse.ac.uk/GranthamInstitute/litigation/lliuya-v-rwe.

[201] Following the discussion in Abate, n. 3 above.

[202] Ganguly, Setzer & Heyvaert, n. 181 above.

[203] Also known to lawyers as precedence – for instance, issuing in the state courts to avoid displacement (whether this is ultimately successful), the more narrowly framed causes of action, the careful use of science, etc.

[204] Acknowledged by Judge William Alsup in *Oakland*, n. 193 above.

[205] One questions whether constraining the focus of the litigation to the 'promotion of phony science' would have found a more receptive audience: see remarks of Judge Alsup in *Oakland*, n. 193 above, para. 6.

[206] Ganguly, Setzer & Heyvaert, n. 181 above, p. 866. In *Oakland*, n. 193 above, Judge Alsup goes so far as to suggest that a campaign of this nature could make the defendant's business 'unfeasible'; his concern is for the 'public benefits' of fossil fuels: ibid., para. 14.

[207] Ibid.

social choice, and that the claimants are complicit. The 'judicial signalling' so far in the US carbon majors cases has done precisely this: applauding the social benefits of fossil fuels[208] or implicating the claimants in their use.[209] As such, failed 'holy grail' cases could either foster a sense of complacency or even justification, or contribute to a public perception that the courts are not going to help with climate action and that therefore other forms of legal and civil society mobilization need to be intensified and refocused.[210]

While contributing to mitigation might be an incidental effect of a successful 'holy grail' case, in climate terms these cases are about adaptation or climate loss and damage; in grail terms they concern the literal restoration of the waste land. The relief requested is not only compensation for harm but also funds for resilience or the prevention of future harm. A successful action would send a strong message that climate loss and damage must be compensated, and directly by those who can be shown to have contributed to and profited from the problem. The earlier discussion of *Comer* explored the implications of a defeat and the impunity this creates for emitters. The question remains: what does victory look like in these cases? On one hand, victory could mean that the claimant is in funds to repair, for instance, flood damage, and take other progressive steps towards managing, say, sea-level rise, protecting local residents and their livelihoods and property interests. Yet, in *Lliuya*, which seems most likely to progress at the moment, even if the claimant were successful and recovered full damages, he would not be in funds to do so, recouping less than half a percent of his calculated loss. If he sought an injunction, which is permissible under §1004 'if further interferences are to be feared', this could have a spectacular impact on RWE and the fossil fuel industry,[211] but it would not help with the costly work required to reduce risks from glacial melt. Of course, there would still be value in victory, both in terms of what the decision might establish for the future replicability of the action,[212] and the moral and political significance of the action, not least its recognition for the lay claimant.[213]

Yet, a win or loss could be more complicated than that. As with any litigation, a victory serves (or should serve) the claimant, but as with any strategic litigation, it also aims to serve a wider community. To an extent, the salient question is not whether most private actions for loss and damage are *possible*, but whether they are *desirable*. Tort claims of this nature raise quite significant questions about distributive justice, which sit uncomfortably with the still-controversial status and unsettled meaning of climate loss and damage in the global conversation.[214] If these cases become part of the

[208] *Oakland*, n. 193 above, per Judge Alsup, para. 8.

[209] *New York*, n. 191 above, per Judge Keenan, para. 16.

[210] A.-M. Marshall & S. Sterett, 'Legal Mobilization and Climate Change: The Role of Law in Wicked Problems' (2019) 9(3) *Oñati Socio-Legal Series*, pp. 267–74, at 272.

[211] Frank, Bals & Grimm, n. 189 above, p. 482.

[212] Boom, Richards & Leonard, n. 197 above, p. 23.

[213] Frank, Bals & Grimm, n. 189 above, pp. 480–1.

[214] L. Vanhala & C. Hestbaek, 'Framing Loss and Damage in the UNFCCC Negotiations: The Struggle over Meaning and the Warsaw International Mechanism' (2016) 16(2) *Global Environmental Politics*, pp. 111–29.

global climate narrative, what message do they convey about who is deserving of compensation and restoration from fossil fuel companies and other major emitters?

Understanding this requires some reflection on what loss and damage means in climate governance. This is not the place for a detailed exposition of the history and meaning of this contested term, but, suffice to say, loss and damage arising from climate change is recognized as a priority area in the climate change regime.[215] However, the conception and meaning of loss and damage,[216] possible routes to funding,[217] and the relationship between loss and damage and liability[218] are contested and precarious. This overlaps with the climate justice debate, where is it argued that the socially vulnerable need to be prioritized when it comes to rectification,[219] with the priorities based on need, redistribution, and rehabilitation rather than necessarily based on compensation for wrongful conduct.[220]

One also needs to ask serious questions about the purpose and effect of litigating for climate loss and damage in this way. Whom is it intended to benefit? Will this development have implications for loss and damage in the multilateral negotiations and, if so, who will be harmed? The slowness of the multi-party process and express reluctance of negotiation participants from developed countries[221] create significant gaps between rhetoric and action in vital areas.[222] This might mean that tort litigation ends up being the only route to redistribution.[223] It might come to this at some point, but to resign ourselves to this already could be to ride roughshod over fractious and delicate ongoing conversations, potentially causing diplomatic upset and jeopardizing fragile

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[215] L. Siegele, 'Loss and Damage (Article 8)', in D. Klein et al. (eds), *The Paris Agreement on Climate Change* (Oxford University Press, 2017), pp. 224–38.

[216] M. Mace & R. Verheyen, 'Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement' (2016) 25(2) *Review of European, Comparative & International Environmental Law*, pp. 197–214; V. Pekkarinen, P. Toussaint & H. van Asselt, 'Loss and Damage after Paris: Moving Beyond Rhetoric' (2019) 13(1) *Carbon & Climate Law Review*, pp. 31–49. I am grateful to Patrick Toussaint for some very helpful discussions.

[217] J.T. Roberts et al., 'How Will We Pay for Loss and Damage?' (2017) 20(2) *Ethics, Policy & Environment*, pp. 208–26; E.A. Page & C. Heyward, 'Compensating for Climate Change Loss and Damage' (2017) 65(2) *Political Studies*, pp. 356–72; R. Lyster, 'A Fossil Fuel-Funded Climate Disaster Response Fund under the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts' (2015) 4(1) *Transnational Environmental Law*, pp. 125–51 (suggesting a tax on major emitters, which may be better on distribution but unlikely on consensus).

[218] 'Whilst paragraph 51 of CP/21 explicitly excludes liability, it is clear from the rhetoric surrounding the conference, not least from the "victim" states, that liability, ultimately, may be necessary if sufficient support is to be provided to such states to allow them to adequately handle the loss and damage that they will suffer': E. Lees, 'Responsibility and Liability for Climate Loss and Damage after Paris' (2017) 17(1) *Climate Policy*, pp. 59–70, at 68; Mace & Verheyen, n. 217 above, pp. 205–6, and n. 72.

[219] H. Shue, *Climate Justice: Vulnerability and Protection* (Oxford University Press, 2016), pp. 180–94.

[220] M. Burkett, 'Loss and Damage' (2014) 4(1–2) *Climate Law*, pp. 119–30; I. Wallimann-Helmer et al., 'The Ethical Challenges in the Context of Loss and Damage', in Mechler et al., n. 185 above, pp. 39–62, at 47–52.

[221] See C. Okereke & P. Coventry, 'Climate Justice and the International Regime: Before, during, and after Paris' (2016) 7(6) *WIREs Climate Change*, pp. 834–51, from 844.

[222] Ibid.

[223] See S.M. Gardiner, 'Climate Justice', in J.S. Dryzek, R.B. Norgaard & D. Schlosberg (eds), *The Oxford Handbook of Climate Change and Society* (online version, Oxford University Press, 2011), Section 3.2 (for comments on broader forms of restitution).

yet important gains.[224] Litigation may not be a substitute for a multi-party process that addresses compensation and other aspects of climate loss and damage, particularly not if it might undermine that process.

Additionally, if the financial resources of defendants are finite, who will get there first? And last? In my view, the enormity of the quest represented by bringing one of these actions seems to inherently exclude the possibility that the most vulnerable could benefit from such actions. Certainly, most of the claimants in the pending litigation are public entities from affluent states in the developed world. This is not to suggest that they do not have legitimate grievances, but perhaps they should not be first in the queue when it comes to recovering for loss and adaptation costs from fossil fuel companies.

I am very conscious that the above considerations might be co-opted by others with adverse motives. As such, any suggestion that the pursuit of 'holy grail' litigation might not be entirely worthwhile needs to be advanced with some delicacy. Yet, the unpredictability of process and outcomes, as well as the impacts thereof, can make the implications of these cases difficult to know. They may achieve much, or they may achieve less than they purport to. It is only by asking the right questions that we can know which it is.

5. WHAT THE THUNDER SAID: CONCLUDING THOUGHTS

I have used the ancient stories of the quest for the holy grail to illustrate my thoughts and anxieties about some well-known climate cases. The grail legends are well known and deeply ingrained in our consciousness, where they are usually associated with the trope of the wandering knight, the lone hero, of endeavours and victories.[225] The knights' quests have an all-or-nothing, high-risk, high-return quality to them; this is probably why 'the holy grail' is often used as a signifier of a zenith of achievement, something difficult to achieve, but that can fix everything.

Reading these stories reveals complex tales of victory and defeat, of risk and reward, of the dangers of proceeding without a proper understanding of the complex character of the task ahead. The stories show that proceeding without asking these questions can have dire consequences – for the knight and (often) everyone around him. From these stories I have distilled three core lessons that provide critical insights into the complexities of large-scale climate litigation. Earlier I explained that some of the lessons we can learn from the stories are (i) the nuance and complexity in notions of victory and defeat; (ii) the importance of asking the right questions and ascertaining the character of one's own quest, before proceeding, and (iii) the significance of the costs of a failed quest. Beyond these distilled lessons, I have suggested that fitting these cases and the narrative around them within these stories can provide ongoing food for thought and reflection.

[224] M. Burkett, 'Reading between the Red Lines: Loss and Damage and the Paris Outcome' (2016) 6(1–2) *Climate Law* pp. 118–29, at 128.

[225] Weston, n. 1 above, Ch. XII (arguing that many of the later stories were simply hero romances and had lost the meaning of the legend).

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In that context, I have considered a very small selection of 'holy grail' cases, querying their *aims, goals,* and *character*. In so doing, I have made use of instrumental theories of private law to *ask some questions* about what these cases mean, whether they have been framed in a helpful way, and what the implications of *telling the 'wrong' story* about them might be. In particular, I look at what *victory* means or might mean in these cases.

Looking forward, as much as climate change is the responsibility of governments – and it certainly is – there seems to be an appetite for moral and financial adjustment from those who have benefited while causing harm to others.[226] This, of course, includes the consumption and production of fossil fuels, but also knowledge of the implications of these activities, combined with concerted obfuscation.[227] The question is how to do this. This is the difficult territory into which a court or claimant would venture in seeking to resolve these actions. A failure to reach some kind of substantive conclusion perpetuates polluter impunity for climate harm and fails to provide relief for some of those suffering the impacts of climate harm (although arguably, not those the most in need). Yet, a decision in favour of the claimants might cut across a delicate intergovernmental process, which, notwithstanding its glacial pace, could be fundamental for maintaining the moral consensus – and all-important action – on climate. Of course, one favourable carbon majors decision could accelerate progress on that front as well. Too many could change the financial profiles of the defendant major emitters and, in so doing, undermine the prospects of substantial loss and damage financing (perhaps by fossil fuel companies), assuming this is achievable under any other circumstances.

All these cases will have broad implications that extend beyond the discrete litigation. The problem is that their complexity makes these impacts difficult to predict, and it is difficult to know what questions to ask without knowing in which version of the story we are working, and the costs of getting this wrong. The question then is whether it is safe to proceed without knowing that, or whether the claimants are flogging a dead horse and their considerable efforts would be best focused elsewhere.

[226] M. Grasso & K. Vladimirova, 'A Moral Analysis of Carbon Majors' Role in Climate Change' (2020) 29(2) *Environmental Values*, pp. 175–95 (conceptualizing this as a non-homogenous duty of reparation).
[227] Ibid.

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