



Courts must provide climate change leadership in the absence of law-making progress

Don C Smith

To cite this article: Don C Smith (2021) Courts must provide climate change leadership in the absence of law-making progress, Journal of Energy & Natural Resources Law, 39:4, 385-391, DOI: [10.1080/02646811.2021.1982172](https://doi.org/10.1080/02646811.2021.1982172)

To link to this article: <https://doi.org/10.1080/02646811.2021.1982172>



Published online: 23 Nov 2021.



Submit your article to this journal [↗](#)



Article views: 1735



View related articles [↗](#)



View Crossmark data [↗](#)



Citing articles: 1 View citing articles [↗](#)



EDITORIAL

Courts must provide climate change leadership in the absence of law-making progress

While lawmakers round the world have struggled, often unsuccessfully, to enact meaningful climate change legislation, litigation-related activity is increasing, and some courts are moving assertedly ahead to deal directly with the threat. This new trend comes after years of limited success by environmentalists to ‘use the courts in their fight to slow the effects of climate change or to hold companies and governments accountable for the crisis’.¹

The trend is underscored by a recent report by the Grantham Research Institute on Climate Change and the Environment finding more than 1,000 climate-related cases have been filed since 2015 in comparison to about 800 cases filed between 1986 and 2014.²

The rise in litigation has been attributed to scientists and climate activists who ‘see the response by governments and corporations to the climate threat [as] weak compared to what is needed’, New York-based Sabin Center for Climate Change Law Fellow Korey Silverman-Roati has said, adding, ‘Litigation is increasingly seen as the only option to fight authorities when they are failing to appropriately address climate change’.³ And unlike the past when climate change cases were generally unsuccessful, the trend now appears to be changing. According to the Grantham report, in nearly 370 decided cases, outcomes favoured climate change action in 58 per cent, were unfavourable in 32 per cent, and had no clear impact in ten per cent.⁴

In particular, the report found an increase in the number of ‘strategic cases’, defined as those

where the claimants’ motives for bringing the case go beyond the concern of the individual litigant and aim to bring about some broader societal shift. For the most part, the

1 Bob Van Voris and Katharine Gemmell, ‘Europe Is Key Staging Ground for Climate Lawyers Dogging Big Oil’ (*Bloomberg Law*, 9 September 2021).

2 Joana Setzer and Catherine Higham, ‘Global Trends in Climate Change Litigation: 2021 Snapshot’, Centre for Climate Change Economics and Policy and the Grantham Research Institute on Climate Change and the Environment (July 2021) 4 www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf accessed 12 September 2021.

3 Nick Ferris, ‘Litigation Increasingly the “Only Option” When Big Emitters Fail to Address Climate Change’ (*Energy Monitor*, 12 August 2021 (last updated 20 August 2021)) www.energymonitor.ai/policy/litigation-increasingly-the-only-option-when-big-emitters-fail-to-address-climate-change accessed 12 September 2021.

4 Setzer and Higham (n 2) 5.

goals of the claimants in such cases will include advancing climate policies, creating public awareness, or changing the behaviour of government or industry actors.⁵

Seeking change through climate litigation may benefit plaintiffs in a number of ways, not least of which is the ‘institutional legitimacy’ attached to court rulings in many legal systems, thus providing ‘a broader systematic effect than their limited enforcement power might otherwise suggest is likely’.⁶ On the other hand, seeking court intervention in climate change matters involves significant hurdles including the conservatism of many courts when faced with difficult issues of policy, justice access barriers, and difficulties regarding how to handle scientific evidence.⁷

Background and two major court decisions

In the 2000s, the law and policy communities were considerably sceptical about the role courts might play in climate governance.⁸ But that scepticism has been replaced by significant interest as ongoing court cases and high-profile judgements have seized scholarly and public attention.⁹ In addition, the growth in ‘interest in courts as an avenue for pushing positive action on climate change is also a consequence of frustration with the inadequacy of government action’ to address the issue.¹⁰

Two recent court decisions illustrate how strategically argued cases are beginning to change the nature of climate-related actions. The breadth of the underlying approach is found in one case involving a private company, while the second involves a government environmental protection agency.

The Netherlands: Milieudefensie et al v Royal Dutch Shell PLC

In the first case, decided on 26 May 2021 and described as a ‘landmark case’,¹¹ *Milieudefensie et al v Royal Dutch Shell PLC*¹², a Dutch trial court in the Hague found that Shell ‘owed a duty of care to the plaintiffs to reduce [carbon dioxide] emissions from its operations by 45% by 2030 relative to 2019 emission levels’.¹³ The plaintiffs, the Friends of the Earth Dutch branch, had accused Shell of ‘violating human rights by not

⁵ *Ibid* 12.

⁶ Jacquelin Peel and Hari M Osofsky, ‘Climate Change Litigation’, *Annual Review of Law and Social Science* (18 May 2020), 33–34 www.annualreviews.org/doi/pdf/10.1146/annurev-lawsocsci-022420-122936 accessed 12 September 2021.

⁷ *Ibid* 33.

⁸ *Ibid* 22.

⁹ *Ibid* 34.

¹⁰ *Ibid*.

¹¹ ‘Shell: Netherlands Court Order Oil Giant to Cut Emissions’ (*BBC*, 26 May 2021) www.bbc.com/news/world-europe-57257982 accessed 12 September 2021.

¹² *Vereniging Milieudefensie v Royal Dutch Shell PLC*, Dutch version C/09/571932/ HA ZA 19-379, 26 May 2021 www.climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210526_8918_judgment.pdf; court-issued English translation C/09/571932/ HA ZA 19-379, 16 May 2021 (engelse versie) www.climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210526_8918_judgment-2.pdf both accessed 12 September 2021.

¹³ *Vereniging Milieudefensie v Royal Dutch Shell PLC*, English version, 4.1.4, www.climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210526_8918_judgment-2.pdf

adhering to the Paris Agreement's aim of limiting the increase of global temperatures'.¹⁴ One energy-focused publication, *EnergyMonitor*, said 'The ruling sent shockwaves across boardrooms worldwide'.¹⁵

A court spokeswoman said, 'The court understands that the consequences could be big for Shell, [b]ut the court believes that the consequences of severe climate change are more important than Shell's interests'.¹⁶ The spokeswoman went on to say, 'Severe climate change has consequences for human rights, including the right to life. And the court thinks that companies, among them Shell, have to respect those human rights'.¹⁷ During the trial, Shell pointed to steps it had already taken and is taking to reduce carbon emissions, but the court said that the company's 'intentions and ambitions' amounted largely to 'rather intangible, undefined and nonbinding plans for the long term'.¹⁸

The ruling was enormously important in a number of ways, not least of which was because it was 'the first legal decision in the world [that held] fossil fuel companies accountable for their contribution to climate change', according to Columbia University's Stern Center for Climate Change Law founder and faculty director Michael Gerrard.¹⁹ In addition, the court demanded 'a change in Shell's strategy for the future, setting a precedent not just for energy companies but all big greenhouse gas emitters'.²⁰

Roger Cox, one of the plaintiffs' lead attorneys, said,

This is a turning point in history. This case is unique because it is the first time a judge has ordered a large polluting corporation to comply with the Paris Climate Agreement. This ruling may also have major consequences for other big polluters.²¹

In the wake of the decision, Leiden University law professor Eric De Brabandere said the case will definitely 'inspire other cases'.²² He said the approach used by the plaintiffs is 'pushing the judge into a position where he or she is influencing changes in the law or policy. It goes beyond the traditional idea that the judge applies the law'.²³ Moreover, White & Case partner Mark Clarke said, 'The decision will undoubtedly embolden climate activists', noting:

The use of human rights-based arguments to compel private corporations to act on climate change has proven to be successful so we can expect to see increasing numbers of similar claims. Other energy and fossil fuel companies will now have to

¹⁴ Diederik Baazil, Hugo Miller and Laura Hurst, 'Shell Loses Climate Case That May Set Precedent for Big Oil (4)' (*Bloomberg Law News*, 26 May 2021).

¹⁵ Ferris (n 3).

¹⁶ Stanley Reed and Claire Moses, 'A Dutch Court Rules That Shell Must Step Up Its Climate Change Efforts' (*The New York Times*, 26 May 2021).

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Ferris (n 3).

²⁰ Anjli Raval, 'Dutch Court Sets Precedent on Cuts to Oil Major's Emissions that Is Likely to Embolden Climate Activities Across the Globe' (*Financial Times*, 28 May 2021).

²¹ 'Friends of the Earth Wins Climate Case against Shell' (*Friends of the Earth*, 26 May 2021) www.friendsoftheearth.eu/press-release/historic-victory-judge-forces-shell-to-dramatically-reduce-co2-emissions/ accessed 12 September 2021.

²² Reed and Moses (n 16).

²³ *Ibid.*

think even more carefully about what meaningful steps they are taking to cut emissions.²⁴

Several days after the decision was handed down, the *Financial Times* published an editorial predicting that in the long term, ‘western majors seem set to face unstoppable pressure to shift their business models into new areas such as renewable energy, carbon capture and hydrogen production’.²⁵ And yet the editorial noted that while climate campaigners had won important victories the last week of May,

it was not in itself a victory for the climate. As long as oil demand holds up, other producers – namely, state-dominated national oil companies [NOCs] – will be happy to step in to meet it Many NOCs, which together account for more than half of global oil production, privately scoff at what they see as some western majors’ willingness to consign themselves to decline.²⁶

Two months after the court decision, Shell confirmed its plan to appeal. In making the announcement, Royal Dutch Shell chief executive Ben van Beurden said,

We agree urgent action is needed [to address climate change] and we will accelerate our transition to net zero. But we will appeal because a court judgement, against a single company, is not effective. What is needed is clear, ambitious policies that will drive fundamental change across the whole energy system.²⁷

The company said

it was working toward increasing the scale and speed of its plans for cutting carbon emissions, but that the court ruling didn’t take into account the commitments it set out earlier this year to shift away from fossil fuels toward lower-carbon energy due to the timing of the hearings.²⁸

In response to the decision to appeal, plaintiffs’ lawyer Cox said, ‘The judges have passed a well-considered judgment on Shell in the verdict. We are confident that this judgment will be reaffirmed on appeal. The science is clear on the consequences of and solutions to dangerous climate change’.²⁹

New South Wales, Australia: Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority

Meanwhile and also in 2021, half a world away from The Hague, a court in New South Wales (NSW), Australia, has ordered the state’s Environmental Protection Authority

²⁴ Raval (n 20).

²⁵ ‘Big Oil Has Reached a Turning Point: Climate Activism, Not Necessarily the Climate, Has Scored Sizeable Wins’ (*Financial Times*, 29/30 May 2021).

²⁶ *Ibid.*

²⁷ ‘Shell Confirms Decision to Appeal Court Ruling in Netherlands Climate Case’ (*Shell*, 20 July 2021) www.shell.com/media/news-and-media-releases/2021/shell-confirms-decision-to-appeal-court-ruling-in-netherlands-climate-case.html accessed 12 September 2021.

²⁸ Sarah McFarlane, ‘Shell to Appeal Dutch Court Ruling on Emissions Cuts’ (*The Wall Street Journal*, 20 July 2021).

²⁹ Jillian Ambrose, ‘Oil Giant Shell Set to Appeal Against Ruling on Carbon Emissions’ (*The Guardian*, 20 July 2021) www.theguardian.com/environment/2021/jul/20/oil-giant-shell-set-to-appeal-ruling-on-carbon-emissions accessed 12 September 2021.

(EPA) to ‘develop environmental quality objectives, guidelines and policies to ensure environmental protection from climate change’.³⁰ The landmark ruling by Brian Preston, Chief Judge of the NSW Land & Environment Court, was based on a finding that section 9(1)(a) of the Protection of the Environment Administration Act 1991 included a duty to develop instruments to protect NSW from climate change.³¹ However, the ruling also noted that the authority ‘has a discretion as to the specific content of the instruments it develops’ under the statute.³²

In arriving at his decision, which the government will not appeal,³³ Preston rejected the EPA’s argument that the duty imposed under the statute did not require the authority to develop instruments to address climate change. He noted that what is required under the statute

will evolve over time and place in response to the changes in the threats to the environment ... On the evidence, at the current time and in the place of New South Wales, the threat to the environment of climate change is of sufficiently great magnitude and sufficiently great impact as to be one against which the environment needs to be protected.³⁴

In response to the ruling, NSW Nature Conservation Council said the ruling ‘should send a chill through the state’s most polluting industries, including the electricity and commercial transport sectors’.³⁵ Chief executive Chris Gambian said, ‘This is a great day for environmental justice’.³⁶ Gambian noted that ‘Most people will be astonished to learn the EPA has until now not regulated greenhouse gases, which are arguably our most dangerous environmental pollutants’, adding ‘But that will now have to change after the court found the EPA had a duty to address climate change’.³⁷

Conclusion

It is evident that ‘the power of the law as a climate action tool is gaining strength with activists filing an ever greater number of lawsuits in an attempt to hold big emitters accountable’.³⁸ While most cases to date have been filed by non-governmental organisations against governments,³⁹ Pinsent Masons partner Michael Fenn has provided a warning to UK businesses – a warning that could easily apply to businesses almost

³⁰ *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92, ¶ 149, 26 August 2021 www.caselaw.nsw.gov.au/decision/17b7569b9b3625518b58fd99 accessed 12 September 2021.

³¹ *Ibid* ¶ 16.

³² *Ibid* ¶ 16.

³³ Adam Morton, ‘NSW can “absolutely” stop using coal power by 2030, energy minister says’ (*The Guardian* 9 September 2021).

³⁴ *Ibid* ¶¶ 64, 69.

³⁵ ‘Landmark Court Ruling Puts NSW’s Biggest Climate Polluters on Notice’ (*Nature Conservation Council*, 26 August 2021) www.nature.org.au/media-releases/2021/08/landmark-court-ruling-puts-nsw-s-biggest-climate-polluters-on-notice/ accessed 12 September 2021.

³⁶ Peter Hannam and Miki Perkins, “‘Really Big Win’: NSW Environmental Watchdog Ordered to Address Climate Change” (*The Sydney Morning Herald*, 26 August 2021).

³⁷ *Ibid*.

³⁸ Ferris (n 3).

³⁹ *Ibid*.

anywhere – that ‘the growth of climate-related litigation is becoming a risk which UK businesses of all types cannot afford to ignore’.⁴⁰

Looking ahead, lawsuits filed in Europe will have a greater chance of success because in addition to the Shell decision, several other European courts have recently ruled in favour of climate activists’ claims.⁴¹ However, the picture in the United States is very different. Despite the fact that President Joe Biden has been referred to as a more ‘climate-friendly president’, New York-based Sabin Center Fellow Korey Silverman-Roati says climate-related litigation is ‘not going anywhere’ in the US.⁴² While the US Supreme Court ruled in *Massachusetts v US Environmental Protection Agency* in 2007 that the federal government can regulate carbon dioxide emissions,⁴³ there has been judicial reluctance – putting it mildly – to ‘impose liability for emissions’.⁴⁴ Moreover, successful lawsuits in the US against private companies seem entirely unlikely because of the US legal system. ‘A climate liability claim against a company or group of companies is always going to fail unless Congress changes the laws around liability. Until then, the courts are going to continue to punt the issue to the legislative branch’, Bloomberg Intelligence litigation analyst Brandon Barnes says.⁴⁵

It also seems likely that the types of claims and who they are brought against will broaden as the range of actors is more clearly identified. Of note, in this regard, is the financial sector, which will almost certainly face more scrutiny.⁴⁶

The role courts may play in adjudicating climate change-related matters was articulated clearly, carefully and in an exemplary fashion several years ago in an essay written by Judge Preston. In ‘The Contribution of Courts in Tackling Climate Change’,⁴⁷ Preston set forth nine specific ways courts can make a meaningful contribution, three of which are especially worthy of consideration:

- ‘Courts provide a public forum for persons who are affected by climate change to have their concerns and claims heard and determined. Any person with a justiciable claim is entitled to bring proceedings in a court of competent jurisdiction and have it heard and determined’.⁴⁸
- ‘[C]ourts have a duty, and will discharge that duty, to hear and determine justiciable climate change claims. Courts cannot and do not brush aside, defer consideration of, or filibust about the concerns and claims of people, unlike the political branches of government’.⁴⁹

⁴⁰ Michael Fenn, ‘Climate Change Litigation Risk Growing in UK’ (*Pinsent Masons*, 25 February 2021) www.pinsentmasons.com/out-law/analysis/climate-change-litigation-risk-growing-in-uk accessed 12 September 2021.

⁴¹ See eg decisions from the German Federal Constitutional Court, www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html; the Irish Supreme Court www.courts.ie/view/judgments/681b8633-3f57-41b5-9362-8cbc8e7d9215/981c098a-462b-4a9a-9941-5d601903c9af/2020_IESC_49.pdf/pdf both accessed 12 September 2021.

⁴² Ferris (n 3).

⁴³ *Massachusetts v Environmental Protection Agency*, 127 SCt 1438 (2007).

⁴⁴ Van Voris and Gemmell (n 1).

⁴⁵ *Ibid.*

⁴⁶ Setzer and Higham (n 2).

⁴⁷ Brian Preston, ‘The Role of the Courts in Tackling Climate Change’ (2016) 28 *Journal of Environmental Law* 1, 11–17 www.academic.oup.com/jel/article/28/1/11/1748464?login=true accessed 13 September 2021.

⁴⁸ *Ibid* 12.

⁴⁹ *Ibid.*

- ‘[C]ourts can assist in the progressive and principled development of climate change law and policy. This can be achieved not only by the “judicially declared legislative remand” requiring the legislature or executive to develop climate change laws and policies but also through judicial decisions creating legal precedents thereby building a common law for the environment’.⁵⁰

And yet despite the attraction of litigation to climate activists seeking a less carbon-intensive future, a stark reality is that actions against private companies will not alone bring carbon emissions down. There is the remaining challenge of how to address the workings of nationally owned oil companies. Christopher Frei, former World Energy Council secretary general, has noted that ‘most NOCs are mandated only to extract oil and gas. They do not have strategies in place to fulfill the Paris Agreement’.⁵¹ One way to force NOCs to acknowledge their actions regarding climate change would be the establishment of a global price on carbon.⁵² But of course, such a decision would have to take account of the struggle oil- and gas-producing countries have experienced for decades in diversifying their economies.⁵³

In summary, where lawmakers fail in their obligation to enact legislation that protects their citizens from the very real impacts of climate change, courts must act. The failure to do so will unquestionably lead to a deteriorating climate that benefits no one.

Don C Smith

Editor, Journal of Energy & Natural Resources Law
Sturm College of Law, University of Denver, Denver, CO, USA
 Email: dcsmith@law.du.edu

⁵⁰ *Ibid* 15.

⁵¹ Fiona Harvey, ‘Secretive National Oil Companies Hold Our Climate in Their Hands’ (*The Guardian*, 9 October 2019) www.theguardian.com/environment/2019/oct/09/secretive-national-oil-companies-climate accessed 12 September 2021.

⁵² *Ibid*.

⁵³ Greg Muttitt and Patrick Heller, ‘National Oil Companies and Climate Change: Economic Challenges and Potential Responses’ (*International Institute for Sustainable Development*, 4 May 2021) www.iisd.org/articles/national-oil-companies-climate-change accessed 12 September 2021.