

Litigating Loss and Damage as a Panacea for Abatement of Climate Change

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Abstract

In this era of pursuit of sustainable development climate change has been recognized as a global threat as it transcends boundaries in its causes and effects. Much of the aggravated increases in global climate are attributable to human activities. It becomes imperative that change in human behaviour and consequently control of such aggravating factors can safely be achieved through law and legal regulation. Climate change litigation is, in large part, a multi-pronged attempt by individuals, groups, non-governmental organizations (NGOs) and governments, to use the instrumentalities of the court to pressurize industrial greenhouse gas emitters and the government to reduce or regulate greenhouse gas emission. This paper advocates that the judiciary can be an appropriate forum for resolving issues surrounding the harm caused by global warming and climate change. It examines the rationale as well as the prospects of using the judiciary as a means of achieving a sustainable management of the climate system. It proffers strategies that will make litigation a viable option in abatement of climate change and in the resolution of disputes arising from the impact of global climate change. The concludes that an effective climate change advocacy demands for legal practitioners, environmental consultants and regulatory personnel who are competent, sufficiently well-informed and motivated to drive both the spirit and letter of the policies and other legal instruments through the court system.

Key words: litigation; loss and damage; abatement; judiciary; sustainable development; greenhouse gas emitters.

1.0. Introduction

Climate change has become one of the most important challenges currently facing humanity. Unfortunately it is widely predicted that climate change challenges will continue to be a major problem not only due to its complex and pervasive nature but also because of its long term impact on human health and the environment. Researches by the National Aeronautics and Space Administration (NASA) climate scientist, James Hasen¹ indicates that the rise in global average temperature is attributable mainly to increased emission of greenhouse gases. This position is supported by Bruce West and Nicola Scafetta.² According to them, most of the warming since the mid-20th century is likely attributable to the increase of greenhouse gases in the atmosphere.³ Although Lallanila⁴ estimated that the sun may have contributed about 25 – 35% between 1980 and 2000 to the increase in the average global surface temperature, what is basic however, is that the present rise in global temperature is induced by human activity. This assertion has been given a judicial node by the court in the case of *Environmental Defence Society v Auckland Regional Council and Contact Energy Ltd*,⁵ where the court

¹US Environmental Protection Agency, "Ozone Science: The Facts behind the Phase out", (19 August 2010) available at http://www.epa.gov/ozone/science/sc_fact.html (last assessed on April 23, 2015).

² Researchers at the Duke University, Durham in North Carolina of the United States of America

³ *Ibid.*

⁴ M. Lallanila: "What is Greenhouse Effect," (28 January 2015) available at <http://m.livescience.com/37743-greenhouse-effect.html> (last assessed on April 23, 2015).

⁵ [2002] NZRMA 492

acknowledged and accepted the fact that “the present scientific consensus is that the cumulative anthropogenic emission of carbon dioxide on a global basis contributes to climate change.”¹

Arguments as to major causes of global warming appear to have been laid to rest in the most recent Synthesis report (Fifth Assessment Report) of the Intergovernmental Panel on Climate Change (IPCC).² The report has it that human influence on the climate system is clear and recent anthropogenic emissions of greenhouse gases are the highest in history. This has led to atmospheric concentrations of carbon dioxide, methane and nitrous oxide that are unprecedented in at least the last 800,000 years. Also, their effects together with those of the anthropogenic driver have been detected throughout the climate system and are extremely likely to have been the dominant cause of the observed warming since the mid-20th century.³

Be that as it may, the bottom line is that we are presently witnessing a disturbing warming of the earth. In recent decades this warming has given rise to changes in weather pattern and climatic variables, with implications touching on environmental, social, economic and political aspects of our communities. Fiercer weather elements such as severe rain storms, hurricanes, droughts, rising sea-levels (with its attendant consequences such as increased frequency and more destructive floods) increased frequency of fires, poverty, malnutrition and series of health and socio-economic consequences, are but some examples. All these impacts affect different communities, groups and individuals.⁴ Sadly, the most dramatic impacts of climate change are expected to occur (and are already being experienced) in the world’s poorest countries, where rights protections are often weak. Only very gradually will these awful consequences reach those whose lifestyles and activities are most to blame. All this can be mitigated if countries, companies, industries and individuals play their role and reduce the emission of greenhouse gas.

The crux of the matter is that individuals, organisations and States believing that international and national climate change policies are not ambitious enough have resorted to litigations in order to abate climate change. According to Burns and Osofsky,⁵ climate change litigation was transformed from a creative lawyering strategy to a major force in transnational regulatory governance of greenhouse emission. The courts have become a critical forum in which the future of mitigating climate change or greenhouse gas emission regulation and responsibility for adaptation to climate change are debated. Victims of climate change impact are therefore resorting to litigation by evoking violation of their human rights, especially as they relate to loss and damage, as a surer way of extracting the obligation from companies and States to protect the environment in order to ensure justice and equity to the most vulnerable.

2.0. What is Climate Change Litigation?

Climate change jurisprudence is evolving rapidly and through diverse avenues. The failure by the international community to really address the effects of climate change and the dearth of appropriate, functional and effective legislative and executive attention by States has led to the engagement of the judiciary in combating greenhouse gas emission and climate change. Loss and damage claims against climate change impact is a relatively new phenomenon and has thus provided another key weapon in the environmental activists’ legal armoury, with the failure to take account of greenhouse gas emissions constituting a new basis for legal action. This trend signals a new era in environmental policy where domestic and international responsibilities interact and national and regional actors display unprecedented levels of cooperation and vision in their efforts to influence the actions of the public and private sectors that are responsible for accelerating the causes and courses of climate change. Increasingly, litigation is now seen as an avenue for change in the context of climate change policy.

¹ *Supra*, paragraph 88.

² Intergovernmental Panel on Climate Change, “Climate Change 2014 Synthesis Report, Summary for Policymakers” available at http://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_SPM.pdf (last assessed June 20, 2015), 2

³ Intergovernmental Panel on Climate Change, “Climate Change 2014 Synthesis Report, Summary for Policymakers,” *ibid*, 4

⁴ For instance, in 2013 Nigeria witnessed an unprecedented flooding that ravaged many states causing massive destruction of lives and property. In recent months in 2015 pockets of flooding incidents had occurred in the country. Report by the News Agency of Nigeria (NAN) reported that no fewer than 53 people have died in 11 states from floods that displaced more than 100,420 people this year. Also that thousands of houses, farmlands and property worth billions of Naira were also lost to the flood disasters in many local government areas affected in the northern states. The affected states are Kano, Sokoto, Zamfara, Kebbi, Kaduna Katsina, Jigawa, Bauchi, Gombe, Adamawa and Gombe. (See report by Premium Times: “National Tragedy: Floods kill 53, displace 100,420 People Across Nigeria,” [September 20, 2015, Premium Times, http://www.premiumtimesng.com](http://www.premiumtimesng.com), accessed on Tuesday, September 22, 2015)

⁵ W. C. Burns & H. M. Osofsky: “Overview: The Exigencies That Drive Potential Causes of Action for Climate Change”, in William C.G. Burns & Hari M. Osofsky (eds.): *Adjudicating Climate Change: State, National, And International Approaches I*, (2009)

To determine what qualifies as climate change litigation, this paper adopts the definition crafted by Markell and Ruhl:¹ “any piece of federal, state, tribal, or local administrative or judicial litigation in which a tribunal’s decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts.” Climate change litigation can then be seen as a litigation arising from a cause of action where climate change is the alleged causal factor in the context of a civil wrong, tort or delict such as negligence or nuisance, which has led to an alleged liability.² In view of these, climate change litigation is, in large part, a multi-pronged attempt by individuals, groups, non-governmental organizations (NGOs) and governments, to use the instrumentalities of the court to pressure industrial greenhouse gas emitters and the government to reduce or regulate greenhouse gas emission. Using the judiciary to achieve this had gained support from the judiciary itself when a US Court of Appeal in the case of *Connecticut v. America Electric Power Company*³ held that the judiciary can be an appropriate forum for resolving issues surrounding the harm caused by global warming.

While it may be reasonably straightforward to decide what amounts to litigation, it is more difficult to determine what amounts to climate change litigation. This is because present impact of climate change is the consequence of billions of everyday human actions: personal; commercial and industrial. To this extent, virtually all litigation could be considered as climate change litigation. Thus, climate change litigation in this context would arise if a climate change argument is explicitly presented as part of the claimant’s or defendant’s case.⁴

3.0 Rationale for Climate Change Litigation

Climate change has become a central challenge of our time affecting all levels of the legal system – local, state and national – as well as regulatory, legislative and judicial bodies throughout the world. To these bodies, since all people and companies are energy users, litigation will affect all and thus, becomes necessary.⁵ Sampson and Kaiser further opined that climate change is a global problem and thus in litigating climate change “we may all be plaintiffs and defendants in future climate change lawsuits.”⁶ They are of the opinion that whether an international climate change regime is achieved or not, the national, political and economic context, the attitude of the courts and society, the state of development of the law, environmental awareness and education all affect the litigation.

The above views are reinforced by the opinion of Christoph Schwarte and Ruth Byrne.⁷ According to them, the issue of climate change is urgent and the failure to act in time will have catastrophic consequences in many parts of the world. They acknowledged that a credible case for a legal wrong can be made in relation to climate change. Affected individuals, groups and countries may have a substantive right to demand the cessation of a certain amount of carbon dioxide (CO₂) emissions in order to limit further harm, and in some cases, secure their survival. They further believe that inter-State climate change litigation may help to create the political pressure and third-party guidance required to re-invigorate the international negotiations, within or outside the United Nations Framework Convention for Climate Change. To Schwarte and Byrne, a lack of progress following the abject failure of the Conference of Parties (CoP) in Copenhagen, 2009,⁸ may help to persuade a potential litigant.

¹ David Markell & J.B. Ruhl: “An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence Or Business As Usual?” 60 FLA. L. REV. 15 (2012). Also available at [http://web.law.columbia.edu/sites/default/files/microsites/climate-change/white paper - climate change in the courts - assessment of non u.s. climate litigation.pdf](http://web.law.columbia.edu/sites/default/files/microsites/climate-change/white%20paper%20-%20climate%20change%20in%20the%20courts%20-%20assessment%20of%20non%20u.s.%20climate%20litigation.pdf) (last assessed on May 23, 2015)

² P.O. Watchman, *Climate Change: A Guide to Carbon Law and Practice*, (Globe Business Publishing Ltd, 2008) quoted in Y. O. Ali, “Legal Profession and Climate Change in Nigeria” (n.d.) available at http://www.google.com/url?q=http://www.yusufali.net/articles/LEGAL_PROFESSION_AND_CLIMATE_CHANGE_IN_Nigeria.pdf&sa=U&ei=JRY4Vav5DYK6aefdgYgH&ved=OCAsQFjAA&usg=AFQjCNG-vCsWtHlctjBtc_28gEmf2Rs9JA (last assessed on March 5, 2015).

³ 131 S. Ct. 2527 (2011)

⁴ C. Hilson: “Climate Change Litigation in the UK: An Explanatory Approach (or Bringing Grievance Back in)”, (n.d.) available at www.Reading.ac.uk/web/FILES/law/Milan_Climate_Change_Litigation_in_the_UK_v2.pdf (last assessed on April 1, 2015).

⁵ B. Sampson and S. Kaiser: “Climate Change Litigation – How Soon is Now,” (June 2011) available at <http://whoswholegal.com/news/features/article/29096/climate-change-litigation-soon-now> (last accessed on October 13, 2014).

⁶ *ibid*

⁷ C. Schwarte and R. Byrne: “International climate change litigation and the negotiation process - Working paper”, (14 October 2010) available at http://www.google.com/url?q=http://www.caneurope.org/resources/doc_view/1942-field-international-climate-litigation-and-the-negotiation-process-oct-2010&sa=U&ei=1PBKVar1AcH-UvangOAO&ved=0CA0QFjAA&usg=AFQjCNFpg_b4GNkQsucorxkyqwlO7VoX9A (last assessed on May 7, 2015).

⁸ And indeed, in subsequent CoPs ever since, up to 2015 in Paris, France, never reached binding agreements. Such conferences are better regarded as more motions but no movement.

They reinstated that international judges should be able to take decisions that primarily reflect the need to protect the world's ecosystem and it's more than 7 billion inhabitants as a whole.

Even the IPCC stated that effective decision-making to limit climate change and its effects can be informed by a wide range of analytical approaches for evaluating expected risks and benefits recognizing the importance of governance, ethical dimensions, equity, value judgements, etc.¹ This reiterates the need for courts to spring into action in order to limit climate change.

However, Eric A. Posner² posits that litigation seems attractive to many people mainly because the more conventional means for addressing global warming – the development of treaties and other international conventions such as the Kyoto Protocol – have been resisted by governments. He asserted that litigation against foreign states based on international law is likely to fare poorly in domestic courts because of foreign sovereign immunity and other doctrines that limit the liability of foreign states and individuals, plus the weakness of international environmental treaties and customary law. Posner is of the opinion that the most promising avenue lies with domestic litigation, for instance, in the USA where the Alien Tort Statute (ATS) allows non-Americans to bring claims in US courts based on torts that violate treaties and customary international law and they can bring these claims against American and foreign corporations and government officials even if sovereign immunity bans claims against most states.

Posner's view however, seems not to be the generally accepted view among writers as there are some who are pro-climate change litigation. For instance, Brian J. Preston³ stated that the effect of climate change is overwhelming. Thus, in the absence of an international treaty and effective national responses to climate change, litigation provides an alternative and attractive pathway to encourage mitigation of the causes and adaptation to the effects of climate change. To Preston, the effects of climate change cases have been wide reaching, leading to the revision or formulation of government policies. He further was of the view that other cases that have come before the courts, particularly within federal courts, have been less successful, but have nonetheless highlighted areas in need of law reform.

Furthermore, Robert Blomquist⁴ is of the opinion that climate change litigation has been transformed from a creative lawyering strategy to a major force in transnational regulatory governance of greenhouse gas emissions. Blomquist approved of Hari Osofsky's view⁵ that climate change litigation plays socio-legal role in constituting "a formal part of the regulatory process" as well as serving as an "expressive," or "social norm creating" force. Blomquist further opined that the adjudication provides a mechanism for dialogue and awareness in a regulatory environment in which policies have not caught up with the problem.

The above positions are pointers to the fact that inability of States to reach an agreement on an internationally binding instrument to regulate greenhouse gas emission and stall climate change does not make the dream of combating climate change an illusion. Rather, what does not kill one makes one stronger and so climate change litigation erupted to enable aggrieved individuals, groups, NGOs and even States to bring claims against any greenhouse gas emitter, including governments and companies.

4.0. Prospects of Litigation in Combating Climate Change

Sources of claims in litigating loss and damage against impacts of climate change may be from the law of nuisance, law of negligence, infringement of human rights, making of false statements as to goods, liability for emissions charges in contracts and host of others. Constitutional law grounds may also be employed in litigating loss and damage against impacts resulting from climate change. This may be through the enforcement of some of

¹ Intergovernmental Panel on Climate Change, *op cit*, p. 17

² E. A. Posner: "Climate Change and International Human Rights Litigation: A Critical Appraisal," 155 *University of Pennsylvania Law Review* (2007), 1925, at 1925, also available at http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2727&context=journal_articles (last accessed on August 25, 2014), 1

³ B. J. Preston, "The influence of Climate change litigation on Governments and the Private Sector", (June 2007) available http://www.lec.justice.nsw.gov.au/agbbasev7wr/assets/lec/m4203011721754/preston_influence%20of%20climate%20change%20litigation.pdf (last assessed on August 25, 2014).

⁴ R. F. Blomquist, "Comparative Climate Change Torts", 46 *Val. U. L. Rev.* 1053 (2012). Also available at <http://scholar.valpo.edu/vulr/vol46/iss4/3> (last assessed on April 30, 2015).

⁵ W. C.G. Burns & H. M. Osofsky, *op cit*.

the constitutionally guaranteed rights, such as a right to life generally or a right to acquisition and ownership of property, a right to a clean and healthy environment, and a right to family life, in particular.

There are three ways that may be available to petitioners in using the judiciary to compel a redress of issues arising from climate change impact. According to Faure and Nollkaemper¹ these ways are: First, the petitioners who believe climate change harms them directly can sue the federal government or its agents challenging statutes, regulations, legal gaps and failure to act.² Second, petitioners can bring actions against private individuals and companies, alleging that the third parties' acts or omissions are contributing to climate change, thereby resulting in specific harm to the parties.³ Third, the petitioners can address climate change complaints against the government to international tribunals.⁴

In addition to the above three ways, as advocated by Faure and Nollkaemper, a government can bring an action against known emitters of greenhouse gases under the principle of State responsibility or the no-harm rule. The principle of State responsibility or the no-harm rule is a widely recognised principle of customary international law whereby a State is duty-bound to prevent, reduce and control the risk of environmental harm to other States.⁵ The legal precedent usually cited in this connection is the *Trail Smelter Arbitration*⁶ case. The case concerns a Canadian smelting company whose sulphur dioxide emissions had caused air pollution damages across the border in the United States of America (USA). The arbitral tribunal in that case determined that the government of Canada had to pay the United States compensation for damage that the smelter had caused primarily to land along the Columbia River valley in the USA. The tribunal concluded that there is an international principle that no State has the right to use or permit the use of its territory in such a manner as to cause injury in or harm to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury established by clear and convincing evidence.

Flowing from all these, a number of legal actions had been instituted against greenhouse gas emissions. For instance, private litigants have brought civil actions to enforce statutory environmental laws to require major emitters to mitigate greenhouse gas emissions⁷ or require government to take action to establish and enforce limits on greenhouse gas emissions on grounds of public trust. Private litigants have also resorted to the common law actions of nuisance and negligence to seek compensation for loss and damage suffered by reason of climate change impact caused in part by greenhouse gas emissions.⁸ They have as well taken citizen action to enforce mitigation of or adaption to climate change. Therefore, courts have moved beyond their primary function of resolving disputes between individuals and are now being used by public interest litigants as vehicles for achieving social change and sustainable development through acting as arenas for protest and political discourse.⁹

However, litigating climate change may have a number of shortcomings and weak areas such as the issue of non-justiciability, jurisdiction, standing, establishing causation, proper party to sue and be sued on the international plane and others. These should be borne in mind by any potential litigant.

5.0. Climate Change Litigation through the cases

Pursuing climate change through litigation has various potential outcomes: it may result in success; it may formally fail yet succeed in highlighting and publicising the problem; it may result in abject failure and be a setback in the attempt to pin blame and/or responsibility, finally and definitively, on state or private entities. Litigation may also be used to re-interpret existing legislation on climate change, force the creation of new laws

¹ M. G. Faure and A. Nollkaemper: "International Liability as an Instrument to Prevent and Compensate Climate Change," 23 *A STAN Environmental Law Journal*, 123 (2007)

² For instance people who had suffered loss or damage from, let's say flooding whose severity may be climate change induced, may bring an action against the Federal government

³ For instance communities in the Niger Delta region of Nigeria can bring an action against the Multinational Oil Producing companies and the Nigerian National Petroleum Corporation (NNPC) jointly for gas flaring which contributes to the emission of GHGs that have been indicted as contributing to climate change.

⁴ For example, communities adversely affected by problems associated with gas flaring, can sue the federal government for failure to enforce legislation against gas flaring.

⁵ P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment*, 3rd ed., (Oxford: Oxford University Press, 2009), 143

⁶ *Trail Smelter Arbitration: United States v Canada* (1931–1941) 3 UNRIAA, vol. III

⁷ See, *Gray v Macquarie Generation* [2010] NSWLEC 34; *Gray v Macquarie Generation (No 3)* [2011] NSWLEC 3

⁸ B. J. Preston, "Climate Change Litigation" 5(1) *Carbon and Climate Law Review* 3, Part 1 (2011) p. 4.

⁹ *Ibid*, 6

and regulations and ensure compliance with active laws, policies and agreements. In using litigation to combat climate change two approaches are suggested to be adopted by potential litigants. They are: proactive and reactive litigation.

According to Hilson,¹ proactive climate change litigation involves civil proceedings such as judicial review (public law) or tort-based (private law), which may be brought by a range of different litigants. An inspirational case such as the case of *Oposa v Factoran*,² decided by the Philippine Supreme Court, was a milestone in terms of environmental right litigation. In that case, several minors, represented and joined by their parents, filed a class suit on behalf of themselves, others of their generation and succeeding generations. In their complaint, the minors asserted that their constitutional right to a balanced and healthy environment was violated by the approval, by the Philippine Secretary of the Department of Environment and Natural Resources, of timber licence agreements granting permission to licence-holders to log in the country's remaining forests. The Supreme Court recognised the 'novel element' in litigating class suits for the protection of environmental rights. It decided that everyone, including minors, can sue not only for themselves and others of their generation but also on behalf of generations yet unborn. Following this, the Philippine Congress enacted laws relating to environmental protection.

Proactive climate change litigation may be divided into proactive anti-climate change litigation and proactive pro-climate change litigation. In the United Kingdom (UK) proactive anti-climate change claimants are divided into three categories.³ First are actions brought by the UK state or public authorities. One of such cases is the case of *United Kingdom v. Commission*.⁴ The case was brought by the European Union Member States (including the UK) against the European Commission. The European Union considered a carbon tax covering its member states prior to starting its emissions trading scheme in 2005. The UK had unilaterally introduced a range of carbon taxes and Climate Change levies to accompany the EU Emission Trading Scheme (EU ETS). In that case the UK successfully challenged the European Commission's rejection of her request to amend its National Allocation Plan (NAP) under the EU ETS. In the case of *Derbyshire Dales DC v. Secretary of State for Communities and Local Government*,⁵ two local authorities, Derbyshire Dales District and National Park Authority, contested the grant of planning permission to a climate friendly wind farm in the Peak District National Park. The action was unsuccessful on the grounds, *inter alia*, that the planning inspector had unlawfully determined an individual planning application by reference to strategic regional targets on renewable energy. The second type of proactive anti-climate change cases, are those cases brought by industry, which typically seek to challenge new climate change regulation which will affect its economic interests.⁶

The third in the proactive anti-climate change cases are those cases brought by the climate change denial movement who are sceptical, in particular, about the science behind climate change. Unlike the industry cases, these cases are not premised on economic interests surrounding climate change regulation, but rather involve an ideological antipathy to such regulation and/or the science underlying it. One significant case falling under this category is the case of *Dimmock v. Secretary of State for Children, Schools and Families*.⁷ In that case, Stuart Dimmock, a lorry driver, parent and school governor brought judicial review proceedings, arguing that sections 406-7 of the Education Act 1996 had been breached because of a lack of political neutrality in showing the Al Gore film, *An Inconvenient Truth*, in the UK Schools. The court ruled that there had to be a guidance accompanying the film to compensate for those aspects of it where Al Gore had moved beyond the views of the majority science on climate change.⁸

A number of proactive pro-climate change cases had been brought by individuals, NGOs and also by local authorities.⁹ In *Grainier Plc. v. Nicholson*,¹⁰ the claimant Tim Nicholson, brought proceedings in the

¹ C. Hilson, *op cit*

² *Juan Antonio Oposa and Others v. The Honourable Fulgencio S Factoran, Jr and Another* G.R. No101083, decided by the Philippine Supreme Court on 30 July 1993

³ C. Hilson, *op cit*, 5

⁴ [2005] ECR II-480; Case T-178/05. See N. S.Ghaleigh, "Emissions Trading before the European Court of Justice: Market Making in Luxembourg" quoted in D Freestone & C Streek (eds), *Legal Aspects of Carbon Trading: Kyoto, Copenhagen and Beyond* (Oxford: Oxford University Press, 2009).

⁵ [2009] EWHC 1729; [2010] 1 P & CR 19

⁶ C. Hilson, *ibid*, 5

⁷ [2008] 1 All ER 367

⁸ C. Hilson, *op cit*, 6.

⁹ *Op cit*

¹⁰ [2010] 2 All ER 253

employment tribunal following dismissal by his employer and he claimed discrimination under the Employment Equality (Religion or Belief) Regulations 2003. The regulations prohibit discrimination on the grounds of religion or belief, with belief defined as ‘any religious or philosophical belief.’ The preliminary question for the tribunal was whether a strong belief in anthropogenic climate change reinforced by what one might call ‘observant’ behaviour,¹ could amount to a philosophical belief for the purpose of the regulations. The judge found for the claimant and this decision was upheld by the Employment Appeal Tribunal.

In the case of *Massachusetts v EPA*,² the State of Massachusetts, together with 11 other States, three cities, two United States territories and several environmental groups sought an action for the review of the denial by the Environment Protection Agency (EPA) of a petition to regulate the emissions of four greenhouse gases, including carbon dioxide, under section 202(a)(1) of the *Clean Air Act*. This section provides that the EPA shall by regulation prescribe standards applicable to the emission of any air pollution from any class of new motor vehicles which, in the EPA’s judgment, causes or contributes to air pollution reasonably anticipated to endanger public health or welfare. The EPA’s denial of the rule-making petition flowed from its non-acceptance that greenhouse gases were air pollutants. But once litigation commenced, EPA also raised other procedural defences, including challenging the petitioners’ standing. The US Supreme Court upheld that the State of Massachusetts has standing to challenge the EPA’s denial of their rule-making petition. The Supreme Court applied the three-part test for standing in *Lujan v Defenders of Wildlife*,³ namely:

- (a) The plaintiff has suffered “an injury in fact” which is both concrete and particularised, and actual and imminent, as opposed to conjectural or hypothetical.
- (b) The injury is fairly traceable to the challenged action of the defendant.
- (c) There is a likelihood that the injury can be redressed by a favourable decision, as opposed to this being merely speculation.

The Supreme Court held that Massachusetts had suffered an injury in fact as owner of the State’s coastal land which is and will be affected by climate change-induced sea level rise and coastal storms. The fact that other States suffered similar injuries did not disqualify Massachusetts. The Supreme Court’s decision in *Massachusetts v EPA* above can be seen to have had some influences. First, the decision authoritatively upheld the State of Massachusetts’ standing to sue in relation to a climate change issue. Also, the decision in *Massachusetts v EPA* has provided a source of inspiration for other litigation in other jurisdictions, in particular the decision’s recognition that GHGs are air pollutants.

Further, in the case of *State of Connecticut, et al v American Electric Power Company Inc. et al*,⁴ (Manhattan Claim), an unprecedented public nuisance lawsuit was instituted by State authorities against eight US companies, namely American Electric Power Company, Southern Company, the Federal Tennessee Valley Authority, Xcel Energy Inc. and Synergy Corporation. The States sought an order to force the defendants to cap and reduce their CO₂ emissions. The plaintiffs claimed that the defendants, by failing to cap and reduce their CO₂ emissions, are contributing to climate change, which leads to: increased heat-related deaths due to more frequent heat-waves; increased respiratory illnesses due to increased smog; damage to property from coastal erosion, droughts and floods; widespread loss of species and biodiversity. The case was dismissed by Judge Preska who found that although the action was framed as a public nuisance action, the fundamental issue was a political rather than a judicial one. An appeal against this decision⁵ was filed and the court held that the Appellants’ claim did not present non-justiciable political questions and that the Appellant had standing to bring their nuisance law claims.

In *Re Australian Conservation Foundation v Latrobe City Council*,⁶ the Hazelwood coal fired power station, one of Victoria’s largest and significant contributor to the State’s overall greenhouse gas (GHG) emissions, reserves were due to run out in 2009. The owner applied to develop an alternative coal field which would prolong the plant’s operation until 2031. A panel set up under the Victorian Planning and Environment Act 1987 (P & E Act) and the Environment Effects Act 1978 to consider the extension of the station was instructed “not to consider matters related to greenhouse gas emissions from the Hazelwood Power Station.” Four environmental groups

¹ This is akin to religious observance, practice or manifesting one’s religion (as opposed to mere belief). The claimant’s witness statement was as follows: ‘I have a strongly held philosophical belief about climate change and the environment. I believe we must urgently cut carbon emissions to avoid catastrophic climate change.’

² 549 US 497, 127 S.Ct. 1438, 167 L.Ed.2d. 248 (2007)

³ *Lujan v Defenders of Wildlife* 504 US 555, 112 S.Ct.2130, 119 L.Ed.2d 351 (1992).

⁴ 406 F Supp 2d 265 (SDNY 2005)

⁵ 528 F3d 309 (2nd Cir 2009)

⁶ [2004] 140 LGERA 100

brought an action in the Victorian Civil and Administrative Tribunal alleging that the panel had breached section 24 of the P & E Act, which provides that the panel must consider all submissions referred to it. The question was whether the panel should have considered the environmental impacts of the GHG generated by the power plant's continuation. The Tribunal answered in the affirmative.

In another Australian case *Gray v The Minister for Planning*,¹ activist Peter Gray brought a successful action in Court requiring the climate change impacts of coal burning to be taken into account in the environmental assessment of coal mines. In the case, Gray argued that greenhouse gas emissions from the combustion of coal bought from the project by *third parties* should lawfully have been included in the detailed greenhouse gas assessment for the coal mine. In her decision, Justice Pain found for Gray on the ground that the principles of "environmentally sustainable development" (ESD) had not been considered. The failure to take into account the cumulative impacts of coal burning in contributing to climate change/global warming violated the fundamental ESD principles of intergenerational equity and the precautionary principle. Justice Pain found that there *was* a sufficiently proximate link between the mining of coal and the emission of greenhouse gases which contribute to climate change.

In Germany, an environmental and development group, Germanwatch, instituted legal actions challenging both state and private industry on their contributions to climate change. In 2004, in the case of *Bundes fur Umwelt und Naturschutz Deutschland eV & Germanwatch eV v Bundesrepublik Deutschland, vertreten durch Bundesminister fur Wirtschaft und Arbeit*,² Germanwatch and Friends of the Earth Germany initiated litigation to force the German Economics Ministry to reveal how decisions made by its export credit agency, Euler Hermes AG, contributed to climate change, with particular reference to the energy production projects funded by the agency. The case ended in a court settlement with a legal judgment rejecting the German government's claims that it was immuned from the freedom of environmental information laws and that the agencies' actions did not affect climate change.

In Nigeria, communities in the Niger Delta region of Nigeria in the case of *Gbemre v. Shell Petroleum Development Corporation of Nigeria Ltd and ors*,³ sued the Nigerian Government and Multinational oil companies over the continuous flaring of gas since oil production commenced in the country in 1958. In November 2005, the Federal High Court of Nigeria found in favour of the Applicants. The Court found that the gas flaring in the course of oil exploration and production activities in the Applicants' community was a gross violation of their fundamental right to life (including a healthy environment) and dignity of human person as enshrined in sections 33 and 34 of the Constitution of the Federal Republic of Nigeria 1999, as amended. The Court also found that the failure to carry out an Environmental Impact Assessment of the effects of the gas flaring activities was a clear violation of the provisions of the Environmental Impact Assessment Act⁴ and that any law that allowed continued flaring of gas is inconsistent with the Constitution, and therefore unconstitutional.

Although successes were recorded in the above cases, there are other cases which failed, though not on their merit but on technical grounds. For instance, in the case of *California v General Motors Corp et al*,⁵ the State of California sought to recoup, from General Motors, Toyota, Ford, Honda, Chrysler and Nissan, in public nuisance, damages incurred by the State due to climate change, allegedly caused in part by Greenhouse gases emitted from vehicles manufactured by the defendants. The claimed damages included added State costs due to: deprivation of fresh drinking water (from reduced snow pack), coastal erosion, ozone pollution, heightened wild fires, flooding, health impacts to residents, and environmental impacts to animals and fish. The case was dismissed by the Federal Court on the basis that the issue was a non-justiciable "political question."

Again, in the case of *Kivalina v ExxonMobil Corporation*,⁶ a small Alaskan community launched an action against a group of major petrochemical and energy generation companies under public nuisance. The plaintiffs relied upon a report of the U.S. Army Corps of Engineers which found that global warming had so affected the thickness, extent and duration of sea ice surrounding this coastal community as to cause serious erosion and

¹ [2006] NSWLEC 720

² VG 10 A 215.04 (FRG January 10, 2006)

³ [2005] AHRLR 151

⁴ Cap E12, Laws of the Federation of Nigeria (LFN) 2004

⁵ C 06-05755 MJI (ND Cal Filed on September 20, 2006)

⁶ 696 F.3d 849 (9th Cir. 2012)

property damage, thereby necessitating the relocation of the entire community. The U.S. District Court struck out the action as not justiciable, based on the “political questions” doctrine.

Furthermore, in the case of *Korinsky v. US EPA et al.*,¹ the plaintiff sued federal and state government entities, claiming that they failed to act to curb the culprit emissions. The plaintiff claimed that as a result of these failures, the agencies were responsible for the mental health effects that he suffered due to his fear of global warming. Although the court dismissed Korinsky’s complaint due to his inability to show adequate injury or redressability sufficient to establish standing, the Korinsky case is a prime example of the creative ways plaintiffs are trying to use litigation as a means of addressing climate change.

In the case of *Comer v. Murphy Oil USA and ors.*,² a group of Coastal Mississippi property owners alleged that the oil and coal industries released greenhouse gases that led to the development and increase in global warming, producing the conditions that formed Hurricane Katrina, which damaged their property. This was the second time these plaintiffs raised these claims against the same defendants in the District Court. In the first lawsuit, the District Court dismissed the plaintiffs’ claims because it found that the plaintiffs lacked standing and that their claims were non-justiciable because of the political questions. The trial court in the present suit also dismissed their claims not just it raised ‘non-justiciable because of the political questions’ but also because the plaintiffs did not have required standing. However, on appeal, the court ruled that these claims satisfied the threshold test for standing and that they were justiciable.

In Canada, Friends of the Earth, Canada, launched a landmark lawsuit against the Government of Canada for abandoning its international commitments under the Kyoto Protocol. In *Friends of the Earth v The minister of the Environment*,³ applications were brought seeking a declaration that the Canadian federal government’s climate change plan fails to comply with Canada’s Kyoto Protocol Implementation Act (KPIA). It requires the government to file a climate change plan with a view to meeting Canada’s obligations as a signatory to the Kyoto Protocol. The government filed a plan which, on its face, admitted that the government could not and would not comply with those obligations. The applicant sought a declaration that the government was violating the KPIA and a mandamus order forcing the government to comply. The federal court dismissed the Friends of the Earth applications on justiciability grounds. It ruled that the provisions of the KPIA, taken together, were so policy-laden, permissive and subject to parliamentary consultation and review that they did not evince a legislative intention to impose absolute, justiciable compliance obligations upon the government. On October 15, 2009, the Federal Court of Appeal dismissed the Friends of the Earth’s appeal, substantially adopting the reasons of the court below. The effect of these decisions is to remove any domestic requirement for Canada’s adherence to Kyoto.

Beside the above cases, some cases under the proactive pro-climate change were adjudicated under merits review appeals. This involves a court or tribunal re-exercising the power of the original governmental decision-maker. Courts in merits review appeals have considered the effects a proposed development might have on climate change and the effects climate change might have on a proposed development.⁴ In *Gippsland Coastal Board v South Gippsland Shire Council*,⁵ the Victorian Civil and Administrative Tribunal held that the likely increase in severity of storm events and sea level rise due to the effects of climate change created a reasonably foreseeable risk of inundation of the land and proposed dwellings, which was unacceptable. The Tribunal recognised that the relevant planning provisions did not contain specific consideration of sea level rises, coastal inundation and the effects of climate change unlike in other States of Australia.⁶ In this policy vacuum, the Tribunal applied the precautionary principle and refused to grant the permit for the development.⁷

There have also been judicial review proceedings under proactive pro-climate change cases. In some of such cases, the Friends of the Earth and Help the Aged have brought judicial review proceedings in relation to

¹Case no 05 Civ 859 (SDNY 2005)

²No. 1 11 CV 220-LG-RHW (S.D. Miss. March, 20, 2012)

³*Friends of the Earth v The Minister of the Environment* [2008] FC 1183

⁴B. J. Preston: “Climate Change Litigation” (Part 2), 5(2) *Carbon & Climate Law Review*, 244, (2011) at 252–256.

⁵[2008] VCAT 1545 (29 July 2008).

⁶*Supra* at 35

⁷*Supra* at 48

Government action on fuel poverty, with its failures on energy efficiency providing the link with climate change.¹

Reactive climate change litigation on the other hand, involves criminal proceeding brought by the crown (or State) against climate change activists involved in allegedly unlawful direct action.² Here, protestors engage in what the police are likely to regard as unlawful criminal activity such as aggravated trespass and criminal damage. These climate change activists typically invite arrest so that they can be charged to court in order to defend their action on climate change grounds. Whether they were set free or convicted their intention is to secure publicity for the climate change movement cause. Most of the cases so far have involved coal-fired power stations or airports. One of such spectacular protests took place in October 2007 at the Kings North coal-fired power station in Kent where activists scaled the chimney and painted 'Gordon' on it as a message to the then UK Prime Minister, Gordon Brown, about climate change. The activists were charged with causing criminal damage to the chimney. However, in September 2008, they were acquitted by a Jury at Maidstone crown court after raising a defence of lawful excuse under section 5 of the Criminal Damage Act of 1971. Their defence was that although they had caused damage to the chimney, this was needed in order to protect property all around the world which was at immediate risk of damage from climate change.³

A further incident occurred at the Drax coal-fired power station in North Yorkshire in June 2008, where climate change protestors hijacked a coal train en route to the power station, shoveling coal off the wagons and hoisting a banner saying 'leave it in the ground.' In their subsequent jury trial in July 2009, the 'Drax 22'⁴ attempted to raise a climate change based defence of necessity to the charge brought against them of obstruction of the railway. However, this defence and evidence of climate change were ruled out in a pre-trial hearing by the judge in the case. According to HHJ Spencer, "evidence concerning the burning of fossil fuels and global warming is inadmissible. To rule otherwise would allow these defendants to hijack the trial process just as surely as they hijacked the coal train."⁵

Like in all cases of litigation, some actions may succeed while others may fail, so are cases under climate change litigation. However, one thing is clear about climate change litigation; whether actions succeeded or failed the cases have both direct and indirect effects on governmental regulatory decision-making, corporate behaviour, and public understanding of the issue of climate change. Accordingly Burns and Osofsky argue that both successful cases and those with little hope of succeeding have together helped to change the regulatory landscape at multiple levels of government by putting both legal and moral pressure on a wide range of individuals and entities to act.⁶ Milner and Ruddock further gave some support. They opined that even unsuccessful cases can expose weaknesses in the law, highlight the need for law reform and also provided a vehicle for the development of the law, allowing subsequent cases to build on the legal arguments and scientific evidence presented.⁷ For instance, subsequent to the decision in *Gray v Minister for Planning*,⁸ the New South Wales government (in Australia) introduced the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (SEPP) to ensure that indirect emissions from extractive industries are considered in the decision-making process.

Again, in the cases of *Wildlife Preservation Society of Queensland v Minister for the Environment and Heritage*,⁹ and *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources*,¹⁰ the applicants were unable to succeed on claims bordering on climate change impact because of the narrow focus of the Environment Protection and Biodiversity Conservation Act, 1999. The provisions of this Act made it incredibly difficult for the applicants to prove that greenhouse gas (GHG) emissions from certain projects will cause significant impacts on specific matters of national environmental significance. The difficulties inherent in

¹ *R (Friends of the Earth and others) v. Secretary of State for Energy and Climate Change* [2009] EWCA Civ 810. [2010] PTSR 635

² C. Hilson, *op cit*, 4

³ *Ibid*, p. 10-11

⁴ *R. v. Bard* [2009] All ER (D)245

⁵ "Drax Trail Climate Change Injustice," *The Guardian*, available at <http://www.guardian.co.uk/commentisfree/2009/jul/03/drax-trail-climate-change-injustice> (last assessed on April 20, 2015)

⁶ W. C. Burns & H. M. Osofsky, *ibid*, 9

⁷ F. Millner and K. Ruddock: "Climate Litigation: Lessons Learned and Future Opportunities," (2011) 36(1) *Alternative Law Journal*, 27, 27

⁸ (2006) 152 LGERA 258

⁹ (2006) 232 ALR 510

¹⁰ (2007) 243 ALR 784

these provisions were raised during the review of the Act in 2009. As a consequence, the Final Report recommended that the Minister, when making decisions under the Act, should be required to consider the reasonably foreseeable impacts of decisions on the ability of a protected matter to adapt to current and emerging threats, including the threat of climate change.¹

6.0. Conclusion

The law relating to climate change litigation continues to be a developing area. The authors are of the view that litigating climate change for loss or damage is no longer a mirage. Various jurisdictions have followed different approaches. While the courts in the USA are leading the way in the use of common law nuisance for claims, the courts in the UK are tending towards judicial review and the courts in Australian have mainly entertained claims involving planning and the appropriate exercise of authority to curb effects of climate change. Again, litigants have instituted judicial review proceedings and merits review proceedings to challenge administrative decisions relating to approval of development proposals.

Be it as it may we urge litigants in other jurisdictions to borrow a leaf from the jurisdictions afore mentioned. This is predicated on the fact that since no State is a sealed-off 'island' with impenetrable boundaries, and given the interconnectedness of the environment and globalisation today, climate change litigation is a necessary action to ensure compliance with and reduction in the emission of greenhouse gases as we pursue sustainable development.

As we noted earlier, litigating loss and damage is not without obstacles. In spite of those obstacles, especially on the issues of standing to sue and establishing damage, we urge the judiciary to adopt the position of the Supreme Court of the USA in the case of *Massachusetts v EPA* where it held that Massachusetts had suffered an injury in fact as owner of the State's coastal land which is and will be affected by climate change-induced sea level rise and coastal storms and that the fact that other States suffered similar injuries did not disqualify Massachusetts. In arriving at this decision it applied the three-part test for standing enunciated in the case of *Lujan v Defenders of Wildlife*,² namely:

- (a) The plaintiff has suffered "an injury in fact" which is both concrete and particularised, and actual and imminent, as opposed to conjectural or hypothetical.
- (b) The injury is fairly traceable to the challenged action of the defendant.
- (c) There is a likelihood that the injury can be redressed by a favourable decision, as opposed to this being merely speculation.

While urging the judiciary to be liberal in climate change cases brought before it, we urge litigants to adopt group actions (or actions in representative capacity) in climate change actions for loss and/or damage. In doing this, they must adhere to the principles laid down by the Supreme Court of Nigeria in the case of *Oganioba v Oghene & ors*.³ In that case, the court laid down the following ground rules which must be proved by litigants in representative actions. They are:

- (a) There must be a common interest;
- (b) There must be a common grievance; and
- (c) The relief claimed must be beneficial to all.⁴

What these entail is that litigants suing in representative capacity must have common interest, common grievances and that the outcome of the suit must be beneficial to all concerned.

We believe that proper understanding of the political and legal nature of climate change as well as the judicial fora upon which climate change actions are brought will give a better insight into climate change litigation. Due to the urgent need to save our world, this paper advocates the use of litigation as a possible means of combating the earth killer, climate change.

¹ *Supra* at 237

² *Lujan v Defenders of Wildlife* 504 US 555, 112 S.Ct.2130, 119 L.Ed.2d 351 (1992)

³ (1961) SCNLR 115

⁴ The position had been followed in a number of later decisions of the Supreme Court and lower courts. See *Amos v. Shell BP P.D.C. Ltd* (1974) 4 ECSLR 48; *Shell Petroleum Development Company Nig. Ltd v. Chief Otoko and Others*(1990)6 NWLR(pt. 159-693; *Adediran and Anor v. Interland Transport Ltd*(1991) 9 NWLR (pt. 214) 155; *N.N.P.C. v. Sele* (2004) ALL FWLR (pt. 223) 1859 CA; *Gbemre v. Shell PDC Ltd and Ors* (2005) Suit No. FHC/B/CS/53/05