Climate change and nuisance law: I

Gordon Wignall, Six Pump Court Chambers

Can the law of nuisance be used as a restraint on the causes of climate change? This is first of a series of briefings which considers the difficulties which such claims may face.

The American courts were the first to have the effects of climate change tested by an attack based on the common law of nuisance. They responded initially by erecting new hurdles for claimants to jump, the most formidable of which has been the "Clean Air displacement rule". Will the judges of England and Wales be persuaded to act in the same way?

As one US judge put it: "the salient question is "whether [the legislature] has provided a sufficient legislative solution to the particular [issue] to warrant a conclusion that [the] legislation has occupied the field to the exclusion of … common law."

This question is one in which the effectiveness of both remedies for climate change, and of the law of nuisance at large, are closely bound up. It can be said that some judges have already started to dismantle the traditional robustness of nuisance by making legislative developments available as a shield. But in an area of the law which has proudly offered litigants their own means of vindicating their private rights, in the context of climate change, this would be an unwelcome and retrograde development.

In an early case in America two groups of claimants filed complaints in nuisance against five major electric power companies which were alleged to have destroyed trees and habitats (the claims having been filed in 2004 but decided in 2010). The claimants sought orders setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually. In another (2012) the inhabitants of a coastal village alleged that massive greenhouse gas emissions emitted by multiple energy producers had resulted in global warming, which, in turn, had severely eroded their land and threatened it with imminent destruction. In a third (2018), claimants in coastal flooding cases sought damages for emissions created outside the US.

Overwhelmed by the complexities of the expert evidence involved and the intricacies of both domestic and foreign policies, the judges in these (and other) cases decided that because the legislature has set up the Clean Air Act to be overseen by the regulatory body, the legislation had simply "displaced" the right to a common law remedy. This allowed claims in nuisance to be struck out. (A significant recent decision in the Supreme Court dated October 2019 now challenges this approach, as to which see further below.)

This development, which defers to relevant legislation, even where the legislature has not expressly provided that it should take priority over the common law, has parallels in England and Wales.

For many years courts have recognised that an Act of Parliament may expressly or even impliedly authorise the commission of a nuisance. Implied authority is a controversial application of the rule, recognised in the case of the development of the oil terminal in Pembrokeshire.

Then in a series of sewage flooding cases culminating in Marcic (2003), the courts developed a similar principle, holding that a claim in nuisance is but an impermissible attempt to avoid the consequences of having to make an application for judicial review to enforce the funding of a particular abatement scheme. Judges have more recently chipped away at this by deciding that a claim can be made where there has been an 'operational' error in relation to sewerage.

In a further set of cases, the courts have decided that where there is a statutory remedy the right to claim compensation must be made under the statutory scheme.

Private and public nuisance provide robust means of control in cases of pollution damage. Nuisance litigation is already having to come to terms indirectly with the effects of climate change, for instance in flooding cases: was a particular flood event 'extraordinary'; was it reasonably foreseeable; was the defendant under any duty to take steps against the risk of flooding?

There are reasons to hope that the judges in the Supreme Court will not stifle these claims on the basis that since the UK Parliament has enacted the Climate Change Act 2008 (and its subordinate legislation), then this alone means that such claims cannot be heard on their merits. As it is, nuisance claims in the context of climate change face other formidable obstacles (to be explored in future briefings).

Lord Carnwath JSC has written extra-judicially that "the courts will have an important role … in ensuring that [the commitments under the Paris Agreement] are given practical and enforceable effect".

It was also Lord Carnwath in the Court of Appeal who rejected the attempted reformulation of the law of nuisance by Coulson J. (as he then was) in *Biffa* (2003), the judge supposing that the statutory regimes of the environmental permitting and planning permission systems, rather than the law of private nuisance, were best suited to ensuring that local residents did not have to experience unreasonable odours.

Biffa was a triumph for the common law, so that there must be room to hope that the judges hearing these types of claims, when they do come before them, are not persuaded that they are best left for the 'experts' and for Parliament. Climate change, in the context of litigation, is in principle better pursued by private individuals who are not subject to the vagaries of Parliament's own behaviour and the non-interventionist review processes of administrative law.

As for developments in the US, on 10 June 2019, the Federal District Court for the District of Maryland rejected the displacement defence advanced by oil and gas companies who are defending the City of Baltimore's climate change action. On 22 October the Supreme Court rejected an application for a stay of the District Court's order pending an appeal.

See http://climatecasechart.com/case/mayor-city-council-of-baltimore-v-bp-plc/

Further such briefing documents on this and other issues will be found at the website www.wiglaw.co.uk