# 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 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 climate harms. 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.

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[1] J. L. Weston, *From Ritual to Romance* (Kindle e-book, Princeton University Press, 1932) Chapter 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.
[2] M. Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (Hart Publishing, 2020); M. Hanne & R. Weisberg (eds), *Introduction: Narrative and Metaphor in the Law* (Cambridge University Press, 2018).

It is very useful to commence this enquiry by thinking about the 'holy grail' kinds of cases. 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 (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 make some comments about the importance of climate litigation, explaining why I call this category of cases the 'holy grail' cases. Thirdly, I discuss private law theory and theories of narrative and metaphor in legal thinking, explaining how this helps me 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 a lot of excellent scholarship cited herein that does this. The purpose of this 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

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

approach these cases in relation to the dimension of climate chance response they would or could impact.[4] So I look at: mitigation, for which I discuss *Urgenda* (section 3); next I look at the complex interface between adaptation and loss and damage, discussing *Comer* v. *Murphy*, then make some comments about the new 'carbon majors' cases (section 4). Finally I conclude (section 5). The sections' titles are borrowed from TS 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.

[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 - 499.
[5] And specifically by Weston (n 1).
[6] J. Markale, *The Grail: The Celtic Origins of the Sacred Icon* (Kindle e-book, Inner Traditions Bear and Company, 1999), Chapter 2.

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]

Further details appear in some (but not all) of the stories. As the knight engages in the quest, he faces a number of 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

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

[8] J. Wood, 'The Search for the Holy Grail: Scholars, Critics and Occultists ' (2002) 22 *Proceedings of the Harvard Celtic Colloquium,* pp. 226-248. For instance it is suggested that much of Malory's account was influenced by contemporary politics – the War of the Roses in England in 1455 – 1485.

[9] Wood (n 8), at 226.

[10] Weston (n 1), Chapter II

[11] Wood (n 8), at 233 - 4

[12] Although many of these distractions may indeed be initiations, see Markale (n 6), Chapter 1.

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 grail stories, the holy grail is frequently a vessel of blood belonging to Joseph of Arimathea.[18] However this is certainly a re-interpretation 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.

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[13] Weston (n 1), Chapter 1.
[14] Markale (n 6), Chapter 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 Chapter 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, 2006), pp. 6-8. See also Jung (n 7), Chapter II. Also see Malory (n 16) above.
[19] Jung (n 7), Chapter VII
[20] Murphy (n 18), pp. 20 - 30; Jung & von Franz (n 7), Chapter VIII.
[21] N. Currer-Briggs, *Holy Grail and the Shroud of Christ* (Ara Publications, 1984).
[22] Weston (n 1), Chapter XIV

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 on 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, and the court of King Arthur as well.[24] Percival too encounters a young girl who tells him: '… 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 wasteland 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 to the wasteland, 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 are.

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[23] Weston (n 1), Chapter XII explains 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), Chapter 2 'The Romance of *Perlesvaus*'
[25] Ibid, Chapter 1.
[26] Ibid, Chapter 1 explains '… Gawain is skillful, courteous, diplomatic, courageous… '. However in Malory's version he can not see the Grail due to 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), Book XIII, Chapter VIII.
[30] See for instance the reimagining in Bradley (n 27). Here 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 do the work of maintaining what remains.

Having outlined the contentious and labyrinthine nature of these stories, it seems 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 does encourage us to reflect on the vagaries, arduousness and grand risks and rewards of such cases.[31] Despite their complexity, it is possible to distil a few core lessons that are helpful to understand 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 wasteland, 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 get 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 wasteland. 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 complex, contradictory, and their concepts of heroism and failure, bravery and hubris, neglect and

[31] I am grateful to Doug Kysar for this incisive description.
[32] G. Little, 'Developing environmental law scholarship: going beyond the legal space' 36(1) *Legal Studies*, pp. 48–74, at 68.

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 behaviours 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 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 co-ordinate 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 amongst 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

[33] IPCC, 2013: Summary for Policymakers. In: CC 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on CC Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA.

[34] This is implicit in Article 2 of the United Nations Framework Convention on Climate Change (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 greenhouse gases 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 (Paris Agreement).

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's) own scientific advisory body, the Intergovernmental Panel on Climate Change (IPCC), to discuss the impacts of more than 1.5°C of warming.[39] The 2018 Special Report of the IPCC confirmed that restricting warming to 1.5°C – compared to 2°C – would be associated with safer levels of warming and significantly reduced risks, but 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 contributions (NDCs) which specify the actions to be taken at national and subnational level 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 and difficult negotiations of the means of implementation of the Paris Agreement, and difficulties achieving a consensus-based adoption of the abovementioned report and, with it, commitment to a 1.5°C limit.[43] Most significant for the article, is the continuing shortfall in mitigation ambition

[36] Paris Agreement, Art 2(1)(a).
[37] Paris Agreement, Article 4.1.
[38] See fuller discussion below in Section 3.1.
[39] Decision 1/CP.21, para, 21.
[40] IPCC, 2018: 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 gas emission pathways, in the context of strengthening the global response to the threat of CC, sustainable development, and efforts to eradicate poverty. World Meteorological Organization, Geneva, Switzerland, 32 pp.
[41] J. Rogelj & others, 'Paris Agreement climate proposals need a boost to keep warming well below 2 °C' (2016) 534 *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 December 2018, available at https://www.carbonbrief.org/cop24-key-outcomes-agreed-at-the-un-climate-talks-in-katowice (accessed 2 February 2020).

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 litigation has more immediate potential to strong-arm regulators into action, responding to the 'institutional failure' which 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] For instance, in several jurisdictions administrative law challenges from both 'sides' have unarguably shaped domestic regulation relating to the production and consumption of energy.[48] Despite this, there is very little radical climate litigation. Most is 'business as usual',[49] raising

[44] The Talanoa dialogue was a co-operative process intended to take stock of collective efforts towards the joint goals of the agreement, and support the preparation of pledges, both under Article 4 of the Paris Agreement. F. Lesniewska & L. Siegele, 'The Talanoa Dialogue: A Crucible to Spur Ambitious Global Climate Action to Stay Within the 1.5OC Limit' (2018) 12(1) *Carbon & Climate Law Review,* pp. 41–49. Also see https://talanoadialogue.com/.

[45] FCCC/CP/2018/10/Add.1*: Decisions adopted at the Climate Change Conference in Katowice, Poland,* (2018), Para 14, and generally Section III. The adoption of the Talanoa Dialogue was somewhat lukewarm: the COP decision only 'Takes note of' (para 35) and 'Invites 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. 236–260, at 240 - 241.

[47] M. Wilensky, 'Climate Change in the Courts: An Assessment of Non-U.S. Climate Litigation' (2015) *Duke Environmental Law and Policy Forum,* pp. 131 - 179.

[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.

[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.

few novel points and upsetting few apple-carts. Arguably, this is indicative of climate litigation's integration 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 – for instance low-value claims in the domestic courts - remain fairly underutilized; although these are likely to increase as parties litigate localized climate damage, if adaptation attempts fail to keep pace with changes. The nature of 'inadvertent' climate litigation – for instance, where a litigated dispute affects climate policy but is not brought for that purpose - also remains underexplored. [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 to regulate 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 an 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 to actions for climate harms against large-scale emitters, [53] and its potential

[50] Fisher (n 46), at 242.
[51] Bouwer (n 4).
[52] Bouwer (n 4).
[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) 156 *University of Pennsylvania Law Review*, pp. 110 – 154; 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 *Environmental Law Reporter,* pp. 1 - 71 - a lengthy list of articles discussing this issue is found at Kysar's note 3; G. Kaminskaite-Salters, 'Climate Change Litigation in the UK: It's Feasibility and Prospects' in M. Faure

virtually ignored elsewhere.[54] The former are the kinds of cases first considered when scholars turned their attention to the topic of climate litigation,[55] and they form roughly the category of cases 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, 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 actions I discuss.[57] This descriptor appears sporadically throughout the academic literature, [58] where it consistently refers to mass private law litigation for climate harms. Significantly, it is also used by activists and practitioners, with very much the same meaning.[59]

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& M. Peeters (eds), *Climate Change Liability* (Edward Elgar Publishing Limited, 2011), pp. 65 – 89; J. Brunnee & others, 'Overview of Legal Issues Relevant to Climate Change' in R. Lord QC and others (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, 2011), pp. 23 - 49.

54 Bouwer (n 4), pp. 499 – 501.

55 Penalver (n 53); Grossman (n 53).

56 Brunnee (n 53), at 33.

57 Kysar (n 53), at 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 *Valparaiso University Law Review*, pp. 1053 – 1075 at 1060; Bouwer (n 4), at 484 - 485; J. Setzer & L. C. Vanhala, 'Climate change litigation: A review of research on courts and litigants in climate governance' (2019) 10 *Wiley Interdisciplinary Reviews: Climate Change* e580, at 3; J. Thornton & H. Covington, 'Climate change before the court' (2016) 9 *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) *The University of Tasmania Law Review*, pp 26 – 69, at 45.

59 Perhaps most significantly (although not exclusively) by James Thornton from ClientEarth in London, ref the author's private notes from UCL Environmental Law and Policy Away Day, 39 Essex Street Chambers, London, 16 February 2018 . The potential of 'Holy Grail' cases was also discussed at the 'Climate Change Law, Litigation and Governance' event at Warwick University on 18 February 2018, see S. Adelman & S. Hossain, 'Climate Change Law, Litigation and Governance - GNHRE' (April 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 Solicitors, 2 November 2012.

Prior to 2015, holy grail cases had only been brought in the United States (US), 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' 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

[60] L. Butti, 'The Tortuous Road to Liability: A Critical Survey on Climate Change Litigation in Europe and North America' (2011) 12(2) *Sustainable Dev. L. & Pol'y,* pp. 32–66 provides a good summary.
[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 - 757, at 714.

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 that asking the right questions, properly understanding what one is going after and why, are crucial to success in such complex endeavours. There are some secondary questions which are more complex to resolve and on which I do not seek a definitive conclusion, as these are more points for reflection; these questions are, 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. But 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 this article is to stimulate reflection on the *aims, impact and meaning* of climate litigation. Of course, one, rather obvious way of doing this, would be to investigate the outcomes and impacts of the cases using empirical methods. Osofsky and Peel have done socio-legal research, in particular interviews assessing 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

[62] J. Peel & H. M. Osofsky, *Climate Change Litigation* (Cambridge University Press, 2015). Also see S. McCormick & others, 'Strategies in and outcomes of climate change litigation in the United States' (2018) 8 *Nature Climate Change,* pp. 829–833.

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 that looks at narrative and framing within climate cases,[64] which can examine outcomes, but also contributes to 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

[63] Setzer (n 58), at 5 - 6.
[64] Setzer (n 58), at 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 48) who explores the narratives emerging legal scholarship with a focus on climate cases.
[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 LJ Online,* pp 317 - 333.
[66] G. Williams, 'The Aims of the Law of Tort' (1951) 4(1) *Current Legal Problems,* pp 137–176. 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 Publishing, 2009). Also see M. Lee, 'Tort, regulation and environmental liability' (2002) 22(1) *Legal Studies*, pp. 33–52; J. Lowry and R. Edmunds (eds.), *Environmental Protection and the common law* (Hart, 2000). 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 and J. Steele, 'Introduction: Insurance in the Law of Obligations' *Insurance and the Law of Obligations*, (OUP Oxford, 2013), pp. 3- 16.

a whole has effects that extend beyond those immediately involved.[67] This broader circle might 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 liability could be proven.[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 by the individual litigants within law's limits. Indeed, the true effects of litigation are hard to measure; and where this is attempted the 'expected' impacts are not overwhelmingly proven.[71] Also clear is that an instrumental effect of private law

[67] For a comprehensive discussion, see S. Hedley, 'Looking Outward or Looking Inward? Obligations Scholarship in the Early 21st Century' in A. Robertson & H. W. Tang (eds), *The Goals of Private Law* (Hart Publishing, 2009), pp. 193 - 297.
[68] E. R. D. Jong & others, '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 & others, '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 & others, 'Does Tort Law Deter Individuals? A Behavioral Science Study' (2012) 9(3) *Journal of Empirical Legal Studies,* pp. 567–603.
[70] B. Tamanaha, 'The Tension Between Legal Instrumentalism And The Rule of Law' (2005) 33 *Syracuse Journal of International Law and Commerce*, pp.131 - 154.
[71] Dewees (n 69) finds deterrence is weak in environmental law, at 108 – 112. 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 (n 69) finds no impact on behaviour.

cannot be guaranteed to operate in a straightforward way; in particular in relation to complex social problems or multiparty 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 claimants' and their representatives' understanding of their objective and purpose before litigation commences.

Fourthly: 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.

But 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 understandings 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

[72] Peel (n 62), at 124; Also generally Little (n 32).
[73] Peel (n 62), at 124.
[74] Nosek (n 64), at 753.
[75] D. T. Ritchie, 'The Centrality of Metaphor in Legal Analysis and Communication: An Introduction' (2007) 58(3) *Mercer Law Review,* pp 839 - 846, at 839.
[76] M. Hanne & R. Weisberg, 'Introduction: Narrative and Metaphor in the Law' in Hanne (n 2), pp. 1-12.
[77] Ibid.

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, develops 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 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 understand 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

[78] T. Hutchinson & N. Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review,* pp. 83–119, 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 instrumental ones; our job as scholars is not just polemical discussion, or commentary: see E. Fisher, B. Lange, E. Scotford & C. Carlarne, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21 *Journal of Environmental Law,* pp. 213–50 at 224 and 230 – 1.
[80] Nosek (n 64).
[81] Discussed in G. Olsen, 'On Narrating and Troping the Law: The Conjoined Use of Narrative and Metaphor in Legal Culture' in Hanne (n 2), pp. 19 – 36, at 19.
[82] L. Berger, 'The Lady, or the Tiger? A Field Guide to Metaphor & Narrative' (2010) 50 *Washburn Law Journal,* pp. 275 - 318, at 275.
[83] Ibid.
[84] Olsen (n 81); 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 - 281.
[85] Thornburg, ibid.
[86] For instance Del Mar (n 2); M. L. Johnson, 'Mind, Metaphor, Law' (2007) 58(3) *Mercer Law Review*, pp. 839 - 868; 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

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 if we refer to something as the 'holy grail'.

Simultaneously, metaphor can be disruptive or distortative. 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, 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

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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 are not necessary for the purposes of the article.

87 Del Mar (n 2), Chapter Six 'Metaphors', pp 278 - 239; also M. Del Mar, 'Metaphor in International Law: Language, Imagination and Normative Inquiry' (2017) 86 *Nordic Journal of International Law,* pp. 170–195.

88 Hanne & Weisberg (n 76), at 10.

89 L. L. Berger & K. M. Stanchi, 'Gender Justice: The Role of Stories and Images' in M. Hanne & R. Weisberg (n 2), pp. 157 – 192, at 158.

90 Ibid.

91 Del Mar (n 2), at 308.

92 Del Mar (n 2), at 281; Berger (n 89), at 174.

93 Berger (n 89), at 163.

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 cases, it cannot provide definitive answers as to what these cases do. The same might be said for metaphorical analysis. I appreciate as well 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? The answers in short are that I examined the grail legends, to make sense of why these cases are sometimes called 'holy grail' cases. I have 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 to 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

[94] ECLI:NL:RBDHA:2015:7196. *(Urgenda I)*

seemed tenuous. It was brought by non-governmental organization, Urgenda, and hundreds of citizens 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 Hague District Court that the Dutch government was liable for hazardous negligence on account of its inadequate climate policies, which at the time required a 17% reduction of GHG emissions by 2020, against a 1990 baseline, in accordance with European Union (EU) climate policy.[95] The 'tort' aspect of the case was brought under the Dutch Civil Code and is based on an '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 court gave an injunctive order against the government and thereby confirmed two standards: that global warming should be limited to 2°C and that the Dutch government should reduce its emissions by at least 25% by 2020. The emissions reductions limit was the minimum level requested by the claimants.

Unsurprisingly, this decision was appealed, and late in 2018 the Court of Appeal in the Hague upheld the decision, requiring the Dutch government to change domestic policy

[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) *RECEIL,* pp. 123–29, 124 - 126.
[96] *Urgenda Foundation v the Kingdom of the Netherlands* ECLI: NL: GHDHA: 2018: 2610, para. 4.3 (*Urgenda II).* Peeters, (n 95), at 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 v Urgenda Foundation* ECLI:NL:HR:2019:2007, 4.42 - 4.52. *(Urgenda III)*

to achieve a 25% emissions reduction by 2020, compared to 1990 levels.[99] The Court of Appeal's reasoning, however, was very different, as while it upheld the tort decision of the court below,[100] most of the Court's judgment focused on the question whether the fundamental rights that had been used in terms of the 'reflex effect' in the court of first instance, [101] could in fact be applied directly under Dutch national law.[102] The court found that Urgenda could invoke Articles 2 and 8 of the 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 baseline by 2020, with costs. This was subsequently appealed, 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]

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[99] *Urgenda II (*n 96).
[100] Ibid, at 76.
[101] *Urgenda III* (n 98), at 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 to *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), at 34 - 36.
[104] S. Roy, 'Urgenda II and its Discontents' (2019) 13(2) *Carbon & Climate Law Review,* pp. 130–41, at 134.
[105] *Urgenda II* ( n 96), at 8.65, 8.78.
[106] *Urgenda III* (n 98). This article was substantially completed prior to the Supreme Court decision on 20 December 2019. Accordingly I shall not discuss it in detail, but reference shall be made to it here and there.

*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-through 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 time 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 COP21 to the United Nations Framework

[107] Marjan Minnesma, 'Hague CC Verdict: "Not Just a Legal Process but a Process of Hope"' *The Guardian* (25 June 2015) <http://www.theguardian.com/global-development-professionals-network/2015/jun/25/hague-climate-change-verdict-marjan-minnesma> accessed 1 February 2020. Also see 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, and M. Holwerda, *Essential EU Climate Law* (Edward Elgar Publishing, 2015), Chapters 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, at 146.
[110] For instance, *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 a 'Urgenda' in Belgium (see http://www.klimaatzaak.eu/en) and France (see http://climatecasechart.com/non-us-case/commune-de-grande-synthe-v-france/), accessed 1 February 2020.
[111] For instance, *R (Plan B Earth and others) v SoS for BEIS* [2018] EWHC 1892 (Admin).

Convention on Climate Change.[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 and implications are uncertain. It may well be that the decision simply fitted into 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] most particularly 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 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. But 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.

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112 (n 34); Heinrich Bohl Feature 'Climate Justice – Can the courts solve the climate crisis?' (*Tipping Point Podcast 2/5,* 30 March 2017).
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 (n 58), at 4 - 'the Urgenda effect'.
115 Lin (n 108); Peeters (n 95); 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. 517–527.
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).
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).
119 This decision is not exportable to English tort law: Josephine van Zeben, 'Establishing a Governmental Duty of Care for CC Mitigation: Will Urgenda Turn the Tide?' (2015) 4(2) *Transnational Environmental Law,* pp. 339 - 357 – 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.

The critical analysis of *Urgenda* has in the main failed to distinguish the moral 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, where 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 their climate ambition, but the order was only provisional while the appeals 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 dispute in *Urgenda,* and the to-mid-century reduction targets, while stringent, are non-binding.[122]

So, how do we understand what this decision is and whom it serves? 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 would 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

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120 *Urgenda II* (n 96), at 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 - 175.
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, at 4.32 and 5.68.
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 – 138, at 109. Also see P. Cane, 'Using Tort Law to Enforce Environmental Regulations' (2001) 41(3) *Washburn Law Journal*, pp. 427 - 468, at 451.
124 Steele (n 123), at 130 - 133.

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 harms.[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 Cancun (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]

[125] K. Stanton & C. Willmore, 'Tort and Environmental Pluralism' in Lowry (n 66), pp 93 – 113, at 93 – 109.
[126] Lee (n 66).
[127] J. Murphy, 'Noxious Emissions and Common Law Liability' in Lowry (n 66), pp. 52 – 74, at 53.
[128] Ibid, at 53.
[129] UNFCCC Secretariat, 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', UN Doc. FCCC/CP/ 2010/7/Add.1, 15 Mar. 2011.
[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 previously.[132] As such, arguably by 2015 '…both the adequacy and the feasibility of the 2°C target [settled on 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, 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 likely impacts on the world's poor.[138]

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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. See Lin (n 108), Sections 3 and 6 for a detailed discussion of the relationship between the Dutch, EU and international temperature targets and emissions reductions goals. Discussed by the Court of Appeal in *Urgenda II* (n 96), at 57- 58, 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 Paris Agreement, Article 2.1.(a)
135 This is not the place for an indepth 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 CC 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 & others, *International Climate Change Law* (Oxford University Press, 2017), at 114 – 116. Strong authoritative alternative views confirmed that more stringent action was required: J. Hansen & others, 'Assessing "Dangerous Climate Change": Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature' (2013) 8 *PLoS ONE e81648*.
136 *Urgenda II* (n 96), at 3.5 and 4.4.
137 *Urgenda III* (n 98), para 4.3.
138 IPCC (n 40).

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 on even more difficult.[140] One would expect a major historical and present emitter such as the Netherlands to do more than the aggregate in terms of reductions, not less. This was acknowledged in the decision of the Court of Appeal, when they stated as follows:

> '... 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 giving 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.[144] So even if the 2°C goal could keep warming within tolerable limits, it is arguable that a reduction of 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

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139 Paris Agreement, Article 4.1.
140 The United Nations 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 UNEP Synthesis Report.* (2017). See Cox (n 109), at 155.
141 *Urgenda II* (n 96), at 47, also 72.
142 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, amongst other factors – see *Urgenda III* (n 98), at 2.19.
143 *Urgenda III* (n 98), from 2.14.
144 *Urgenda II* (n96), at 3.9 and 7.5.

would be kept under 2°C with these percentage reductions. Indeed, until about 2010, the Netherlands assumed a reduction target of 30% compared to 1990 levels,[145] which was reduced in line with the EU reduction target 'without climatological substantiation',[146] and the claimant asked for an 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, the court 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 is 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. Through the appeals process the Urgenda courts have emphasised that the Dutch separation of powers is not absolute, because a judge's democratic power and authority is derived from democratically enacted legislation.[148] This of course is magnified when the politics are quite so contentious, or when issues of fundamental rights are at stake.[149] While an indepth discussion of this issue probably exceeds the scope of this article,[150] suffice to say here that judicial restraint was

[145] Discussed *Urgenda III* (n 98), from 4.31.
[146] *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) and Stichting Urgenda* (n 122), 4.73.
[147] Para 4.96.
[148] *Urgenda III* (n98), 4.97 - 4.98. Also see van Zeben (n 119), at 352 – 356.
[149] *Urgenda II* (n 96), at 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) *RECEIL,* pp 94– 98, at 96; van Zeben (n 119), at 352; de Graaf (n 115), at 523; Bergkamp (n 117).

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, due to 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 quantitively, and surely once the court has sought to increase the emissions reduction target at all, the constitutional questions would not differ whatever the percentage reduction was. [152] But in making this compromise the court changed the character of the endeavour to some extent; while the Urgenda decision was rather radical from a lawyers 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 Hague district court 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 25% by 2020 emissions reduction was required further to achieve this, despite the questions outlined above, as to whether these standards were consistent with an aggregate trajectory towards safe

151 *Urgenda III* (n 98), para. 4.100.
152 As discussed above, but see for instance *Urgenda III* (n 98), at 4.86; the introductory comments of the Court of Appeal in *Urgenda II* (n 96); *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) and Stichting Urgenda* (n 122), from 5.70.
153 Lee (n 133), at 44.

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 so corrupted that the quest for the impossible becomes an end in itself. The holy grail of *Urgenda* was not going to restore the wasteland, 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.[154] We all know how litigation goes – outcomes are unpredictable, risks are high, and this first tort victory surely was an achievement. But 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,[155] in terms of the narrative this has created 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. But 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 a deeply 'conservative',[156] 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 HARMS

[155] Hutchinson (n 78), at 107.
[156] Lee (n 133) , at 44.

Forg[e]t the cry of gulls, and the deep sea swell

And the profit and loss… [157]

The relative conservatism of the *Urgenda* litigation can be contrasted with the radicalism of the first generation of holy grail cases.[158] These earlier cases sought damages against the 'polluter' class of defendants, and were brought with the sense that they could be the 'magic bullet'.[159] These cases have a very different character to *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 harms from those perceived to have caused them.[160] 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* [161] 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

[157] Eliot (n 28), Part IV.
[158] The evolution of climate litigation through generations is explained in Abate (n 3). 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 due to its interesting procedural history which provides more detail in its decisions.
[159] See discussion above in Section 2.2
[160] It is beyond the scope of this paper, 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, see 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.
[161] *Comer* v. *Murphy Oil USA*, 585 F.3d 855, 880 (5th Cir. 2009)

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 defendants. 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.[162] 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 in 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.[163] The original proceedings gradually suffered dismissal in a recusal fiasco,[164] 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 dismissal.[165] The plaintiffs lacked standing, as they were unable to establish a causal connection between the defendants' emissions and the harm.[166] The action

[162] All loss and damage cases will present quite distinct causation problems – see discussion in articles cited in (n 53). But in addition to the question of what caused the Hurricane, it would appear that decades long poor management of the 'MRGO' 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.

[163] The history is summarized in *Comer* (n 161) 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. Also see Weaver (n 119).

[164] Woods, ibid.

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

[166] This was not the only aspect of the standing enquiry in issue. The injury had to be 'fairly traceable' to the defendants, (n 161) at 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

raised political questions.[167] I shall refer to these loosely as 'justiciability' issues. These preliminary issues certainly were not unanticipated.[168] And of course, had any of the first-generation doctrinal cases been put to a substantive hearing, some knotty doctrinal problems would have been under discussion.[169]

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 targets for climate litigation.[170] Of course, a positive result could have set a powerful deterrent, and supported emissions abatement, given that the defendants were all large-scale emitters. But 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 harms. This seems like an entirely obvious statement, but this was entirely radical.

Compensation is a core function of private law.[171] 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.[172] 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. [173] These first generation cases have their legal and moral basis in the defendants' socially-conflicted

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liability', at 35.
[167] (n 161), at 24 – 29, distinguishing *Massachusetts* v. *EPA* 549 US 497 (2007). There was also a third, related point – that the plaintiff's action had been preempted by statute, at 30 – 32.
[168] Grossman (n 53), at 33-37.
[169] As discussed in the literature cited at (n 53).
[170] Markell (n 49), at 78.
[171] Williams (n 66), at 137 and 171 - 2.
[172] Cane (n 123), at 429.
[173] Ibid.

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.[174] 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 harms (or of taking preventative measures through adaptation) will fall to the claimant. This compensation/distribution function also operates between different potential defendants.[175] In this way liability or the prospect thereof either 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 instances 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

[174] Williams (n 66).
[175] Williams (n 66), at 170. Maybe this is obvious, but in complex multi-party actions the apportionment of liability amongst defendants and their insurers can be as contentious as primary liability. For instance the broad trends within mesothelioma actions in English tort law range from securing compensation for the claimants (e.g. *Fairchild* v*, Glenhaven Funeral Services Ltd*.) and struggles between defendants to reduce their portion of liability (e.g. *Barker* v. *Corus (UK) plc*.) to struggles between insurers to avoid bearing risk (*Durham* v. *BAI (Run Off) Ltd* [2012] 1 WLR 867).

meaningful day in court, and to bear their own loss, without recompense.[176] 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.[177] In each of the first-generation cases, the respective court's reluctance stemmed from the perceived inappropriateness of it making determinations both concerning redress for climate harms and future regulation of emissions.[178] 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 cut off a mechanism to hold them to account in terms of their historical (and ongoing) conduct and behaviour.[179]

*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

[176] M. Burkett, 'Climate Justice and the Elusive Climate Tort' (2011) 121 *Yale LJ Online,* pp 115 - 120.
[177] Wilensky (n 47).
[178] "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 161), citing *Connecticut* (n 158) at 2539. Also see Fisher (n 46), at 246 – 248.
[179] Michael Burger & Justin Gundlach 'The Status of Climate Change Litigation: A Global Review' (UN Environment Program and Sabin Center for Climate Change Law, 2017), <http://wedocs.unep.org/bitstream/handle/20.500.11822/20767/climate-change-litigation.pdf?sequence1/41&isAllowed1/4y> accessed 1 February 2020.

US of the Kyoto Protocol,[180] just at a time when the effects of climate change were becoming obvious, as evidenced by the substance of the litigation. But litigation should afford a clear site of pressure against this kind of institutional failure,[181] and these cases represented the refusal of yet another government body to take responsibility for this issue. Of course, it is small wonder the US federal courts did not want 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 harms was borne by with 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.[182] But from a narrative perspective, *Comer* (and decisions like it) could be read as reinforcing a sense of complacency about climate change.

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',[183] also determining the proportion of their 'contribution'.[184] The climate modelling is supported by philosophical interpretation of the implications of the models of relative

[180] Kyoto (Japan), 11 Dec. 1997, in force 16 Feb. 2005, available at: http://unfccc.int/kyoto_protocol/items/2830.php.
[181] Fisher (n 46), at 240.
[182] 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. 841–868.
[183] R. Heede, 'Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010' (2014) 122(1-2) *Climatic Change,* pp. 229–241.
[184] Ibid; B. Ekwurzel & others, 'The Rise in Global Atmospheric CO2, Surface Temperature, and Sea Level from Emissions Traced to Major Carbon Producers' (2017) 144(4) *Climatic Change,* pp. 579 - 590.

contribution, the relevant companies' knowledge of the risks of fossil fuel use, and active steps taken to hide and obfuscate that knowledge.[185] This research goes a long way towards connecting those defendants to climate harms, but is not enough, alone, to meet the legal criteria for causation of climate harms. 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.[186] It is not my project to predict the prospects of these actions,[187] 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,[188] 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.[189] A quite distinct set of proceedings, *Lliuya* v. *RWE,* 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 §1004 of the German Civil Code, an action based on interference with ownership.[190]

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185 P.C. Frumhoff & others, 'The Climate Responsibilities of Industrial Carbon Producers' (2015) 132(2) *Climatic Change*, pp. 157 - 171; H. Shue, 'Responsible for What? Carbon Producer CO2 Contributions and the Energy Transition' (2017) 144(4) *Climatic Change,* pp. 591 - 596.

186 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 – 298, at 273 -5. Although see R. A. James & others, 'Attribution: How is it Relevant for Loss and Damage Policy and Practice?' in R. Mechler & others (eds.), *Loss and Damage from Climate Change: Concepts, Methods and Policy Options* (SpringerOpen, 2019), pp. 113 - 154.

187 Although see Ganguly & others (n 182), at 850 - 855, in relation to carbon majors / corporates.

188 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* (forthcoming), (CUP, 2020).

189 L. Paddison 'Exxon, Shell and other carbon producers sued for sea level rises in California' *The Guardian* Wednesday 26 July 2017. Some complaints are available here: https://www.sheredling.com/press-room/.

190 W. Frank & others, 'The Case of Huarez: First Climate Lawsuit on Loss and Damage Against an Energy Company Before German Courts' in R. Mechler & others (eds.), Loss and Damage from Climate Change: Concepts, Methods and Policy Options, (SpringerOpen, 2019), pp. 475 - 482.

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 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 considered adaptation cases, as state bodies seek to claw back the costs of keeping their cities or states habitable. There are various sets of proceedings, [191] and most are brought on the basis that the defendants' production and promotion of fossil fuels constitutes a public nuisance. Some include additional heads of claim for trespass or in private nuisance.[192] 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. [193] 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* [194] and *City of New York* v. *BP*.[195] The dismissal hearings struck a depressingly familiar tone: the field was occupied by statute as a matter of precedent at a federal level,[196] and the broad scope of the proceedings warranted a political solution.[197] It remains to be seen what happens on appeal.

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[191] A fairly recent summary and overview of these cases is available at Michael Burger, 'Update: Upcoming Hearings on Motions to Dismiss CC Nuisance Cases in California and New York' (*Climate Law Blog*, 23 May 2018) <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/> accessed 1 February 2020.
[192] *City of New York* v. *BP p.l.c.* 325 F. Supp. 3d 466, For updates see <http://climatecasechart.com/case/city-new-york-v-bp-plc/> (accessed 1 February 2020).
[193] 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.
[194] *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/> (accessed 1 February 2020).
[195] *New York* (n 192). A further set of proceedings, County of San Mateo v Chevron, is at pleadings stage for a jurisdictional hearing, updates at <http://climatecasechart.com/case/county-san-mateo-v-chevron-corp/> (accessed 1 February 2020).
[196] Applying *Connecticut* v. *American Electric Power Company*. and *Native Villiage of Kivalina* v. *Exxonmobil Corp*. (n 158).
[197] Distinguished from *Mass* v. *AEP* (n 167) on the basis that AEP only sought to regulate six local coal fired electricity plants, not a broader section of the industry, including international activities. On which, a third point in both decisions related to the international nature of the defendants activities.

*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, proportional to RWE's contribution as determined by the carbon majors study, calculated at 0.47% of total costs, or US$21,000.[198] There are many reasons why a Peruvian action would be brought in the German courts,[199] and avoiding 'political question' arguments might well be one of them.[200] Despite a rocky ride through the lower courts, the claimant succeeded in the preliminary stages and the case will now proceed to the evidentiary stage.[201]

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 where 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 does not work.[202] They are brought in a setting where the discursive and scientific context is, perhaps, more receptive;[203] and their presentation reflects the learning from past quests.[204] 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.

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198 See K. Boom & others, *Climate Justice: the international momentum towards climate litigation* (2016), at 22.
199 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, 50.
200 Boom (n 198), at 22.
201 Frank (n 190). For updates see http://www.lse.ac.uk/GranthamInstitute/litigation/lliuya-v-rwe/ (accessed 1 February 2020).
202 Following the discussion in Abate (n 3).
203 Ganguly (n 182).
204 Also known to lawyers as precedence – for instance, the issuance in the state courts to avoid displacement (whether or not this is ultimately successful), the more narrowly framed causes of action, the careful use of science, etc.

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'. [205] Yet, with the possible exception of *Lluiya*, 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.[206] Moreover, the normative impact of a failed case can still be strong; it can still raise awareness of the problem, harm the defendants' reputation and might still be enough to change polluters' calculation of risk.[207] 'Signalling' from the bench that supports the claimant's purpose, can also yield a contribution in what would otherwise be a failed case. [208] All these reflections point to the question of narrative – the kind of story that is constructed around these cases both during and subsequent to 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, and that fossil fuel use is an inevitable 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

[205] Acknowledged by Judge William Alsup in *Oakland* (n 194).
[206] 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 *Oakland* (n 194), at 6.
[207] Ganguly (n 182), at 866. In *Oakland* (n 194), Judge Alsup goes so far as to suggest that a campaign of this nature could make the defendants' business 'unfeasible' – his concern is for the 'public benefits' of fossil fuels, at 14.
[208] Ibid.

benefits of fossil fuels,[209] or implicating the claimants in their use.[210] 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.[211]

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 wasteland. The relief requested is the compensation for harm but also funds for resilience or 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 *Lluyia,* which seems most likely to progress at the moment, even if the claimant was 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,[212] but it would not help with the costly work required to reduce risks from glacial melt. Of course,

[209] *Oakland* (n 194), per Judge Allsup, at 8.
[210] *New York* (n 192), per Judge Keenan, at 16.
[211] 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.
[212] Frank (n 190), at 482.

there would still be value in victory, both in terms of what the decision might establish for the future replicability of the action,[213] and the moral and political significance of the action, not least its recognition for the lay claimant.[214]

Yet, a win or loss could be more complicated than that. As in 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 sits uncomfortably with the still-controversial status and unsettled meaning of climate loss and damage in the global conversation.[215] If these cases become part of the 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 recognised as a priority in the climate change regime.[216] However, the conception and meaning of loss and damage,[217] possible routes to funding,[218] and the relationship

[213] Boom (n 198), at 23.
[214] Frank (n 190), at 480 - 1.
[215] 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.
[216] L. Siegele, 'Loss and Damage (Article 8)' in D. Klein & others (eds.), *The Paris Agreement on Climate Change, (OUP, 2017).*
[217] M. Mace & R. Verheyen, 'Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement' (2016) 25(2) *RECIEL,* pp. 197 - 214; V. Pekkarinen & others, '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.
[218] J. T. Roberts & others, 'How Will We Pay for Loss and Damage?' (2017) 20(2) *Ethics, Policy & Environment,* pp. 208 - 226; E. A. Page & C. Heyward, 'Compensating for Climate Change Loss and Damage' (2017) 65(2) *Political Studies,* pp. 356–372; 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)

between loss and damage and liability,[219] are contested and precarious. This overlaps with the climate justice debate, where is it argued that the socially vulnerable need to be prioritised when it comes to rectification,[220] with the priorities based on need, redistribution and rehabilitation rather than necessarily based on compensation for wrongful conduct.[221]

One also needs to ask serious questions about the purpose and effect of litigating for climate loss and damage in this way. Who is it intended to benefit? Will this have implications for loss and damage in the multilateral negotiations, and if so, who will be harmed? The slowness of the multiparty process, and express reluctance from negotiation participants from developed countries,[222] significant gaps between rhetoric and action in vital areas,[223] might mean that tort litigation ends up being the only route to redistribution.[224] It might come to this at some point, but to do this now could be to ride roughshod into fractious and delicate ongoing conversations, potentially causing diplomatic upset and jeopardising fragile yet important gains.[225] 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 jeopardise that process.

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*Transnational Environmental Law,* pp. 125–51 suggests a tax on major emitters, which may be better on distribution but unlikely on consensus.

[219] '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 (n 217) at 205-6, and ftn 72.

[220] H. Shue, 'Global Environment and International Equality (Chapter 9)' in *Climate Justice: Vulnerability and Protection*, (Oxford University Press, 2016), pp. 180 - 194.

[221] M. Burkett, 'Loss and Damage' (2014) 4(1-2) *Climate Law,* pp. 119–30; I. Wallimann-Helmer & others, 'The Ethical Challenges in the Context of Loss and Damage' in R. Mechler & others (eds.), Loss and Damage from Climate Change: Concepts, Methods and Policy Options, (SpringerOpen, 2019), pp. 39 - 62, at 47 - 52.

[222] See C. Okereke & P. Coventry, 'Climate justice and the international regime: before, during, and after Paris' (2016) 7 *Wiley Interdisciplinary Reviews: Climate Change,* pp. 834–51, from 844.

[223] Ibid.

[224] 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.

[225] 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.

Additionally, if the defendants' financial resources are finite, who will get there first? And last? In my view, the enormity of the quest involved in 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 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 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.

## 6. 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 engrained in the our consciousness, where they are usually associated with the trope of the wandering knight, the lone hero, of endeavours and victories.[226] The knights' quests have an all-or-nothing, high-risk, high-return quality to them; this is

[226] Weston (n 1) in fact argues that many of the later stories were simply hero romances, and had lost the meaning of the legend. See Chapter XII.

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.

Actually 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 four 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: (1) the nuance and complexity in notions of victory and defeat; (2) the importance of asking the right questions and ascertaining the character of one’s own quest, before proceeding and (3), that the significance of the costs of a failed quest. But 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.

In that context, I have considered a very small selection of holy grail cases, asking what their *aims, goals and character* is. 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.[227] This, of course, includes the consumption and production of fossil fuels, but also, knowledge of the implications of these activities, combined with concerted obfuscation.[228] 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 harms, and fails to provide relief for some of those suffering the impacts of climate harms (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. As highlighted earlier, the difficulty is that their complexity make these impacts difficult to predict, and it is difficult to know what questions to ask, without knowing which version of the story we are working in, and what the costs are of getting this wrong. The question then is whether it is safe to proceed without knowing that, or if the claimants are flogging a dead horse, and their considerable efforts would be best focused elsewhere.

[227] M. Grasso & K. Vladimirova, 'A Moral Analysis of Carbon Majors' Role in Climate Change' (2020) *Environmental Values* (forthcoming), conceptualise this as a non-homogenous duty of reparation.
[228] Ibid.