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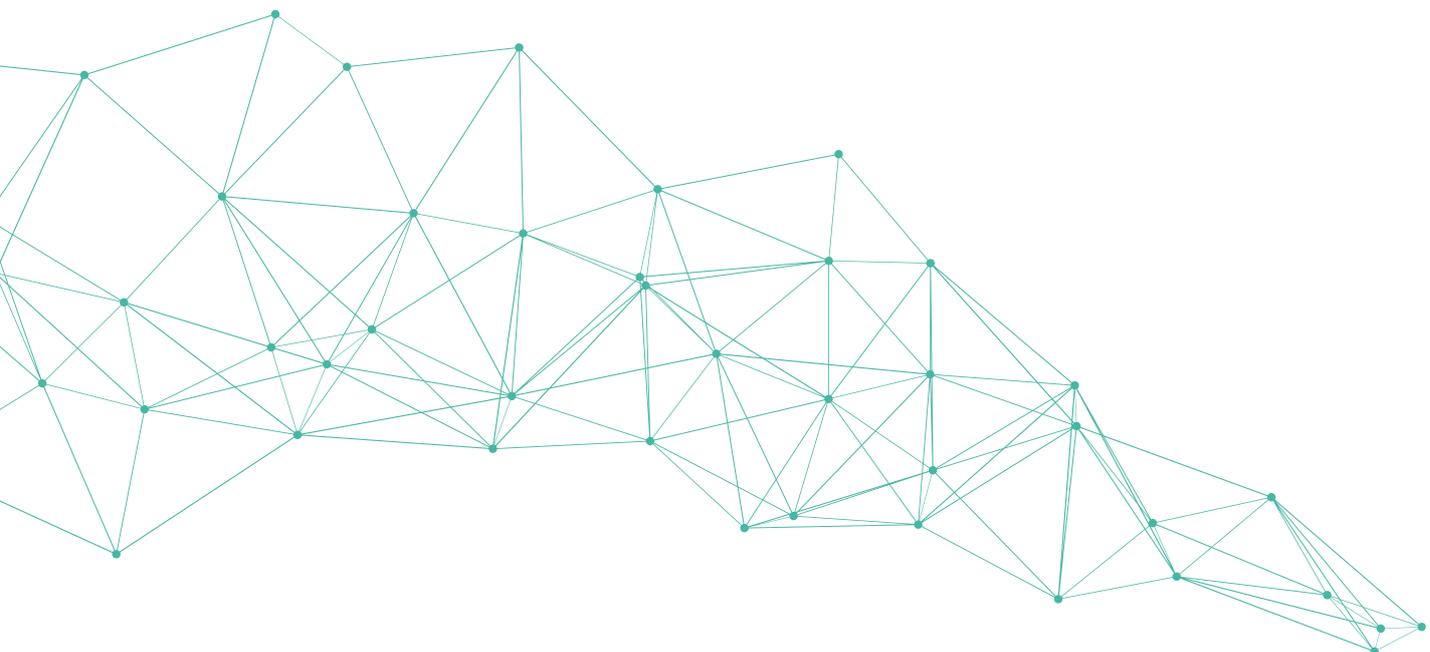
HORIZON
SCANNING
forward thinking

– Climate Change Risks –

the Future of Law as we know it?

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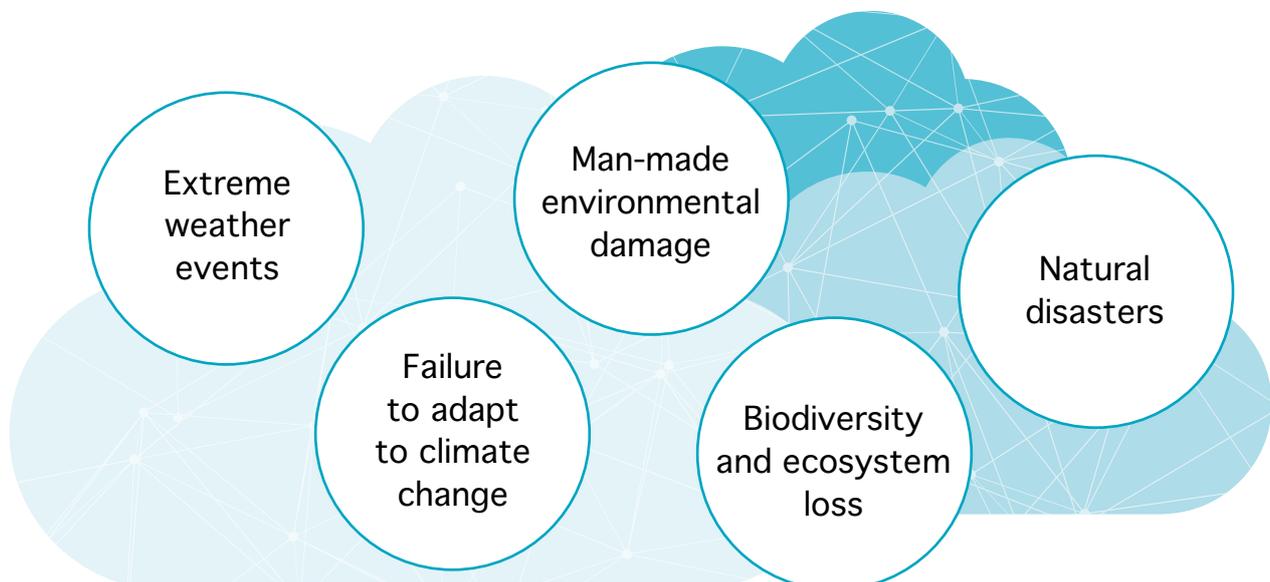
Introduction

Dr. Tara Chittenden, Foresight Manager, the Law Society

In 2020, the Law Society's Future Worlds 2050 project explored what emerging signals of change today might mean for the world by 2050. Our research included in-depth interviews with experts and key thinkers across a range of industries to understand the influence of factors such as AI and technology, data and ethics, global political dynamics and the increasing call to attend to the critical issues of our climate. This report brings a legal lens to the latter.

The top five global risks identified in the World Economic Forum's annual Global Risks Report for 2020 are all environmental or climate-related, encompassing: extreme weather events; failure to adapt to climate change; man-made environmental damage; biodiversity and ecosystem loss; and natural disasters. The acute and chronic physical impacts of climate change are a significant risk to business operations, infrastructure, supply chain, and beyond. Across market verticals, including financial and professional services, manufacturing, utilities, healthcare and more, risk professionals are worried about climate risk. The climate crisis is a risk multiplier across society and for the legal sector brings new and wicked problems around attribution, jurisdiction and accountability.

The UK government has already indicated that, as part of the coronavirus recovery strategy, it will focus on green fintech. There may also be legislative intervention, or industrial incentives for businesses and undoubtedly an increasing amount of environmental legislation in the coming decade. Short-term parliamentary objectives make it more difficult to implement long-term climate change regulation and legislation in a way that is stable enough to have a real impact. However, business may be more likely than government to address climate issues as greener models look to be more sustainable and more reliable in making returns for shareholders, and as more corporates are held to account for emissions and for greenwashing claims.

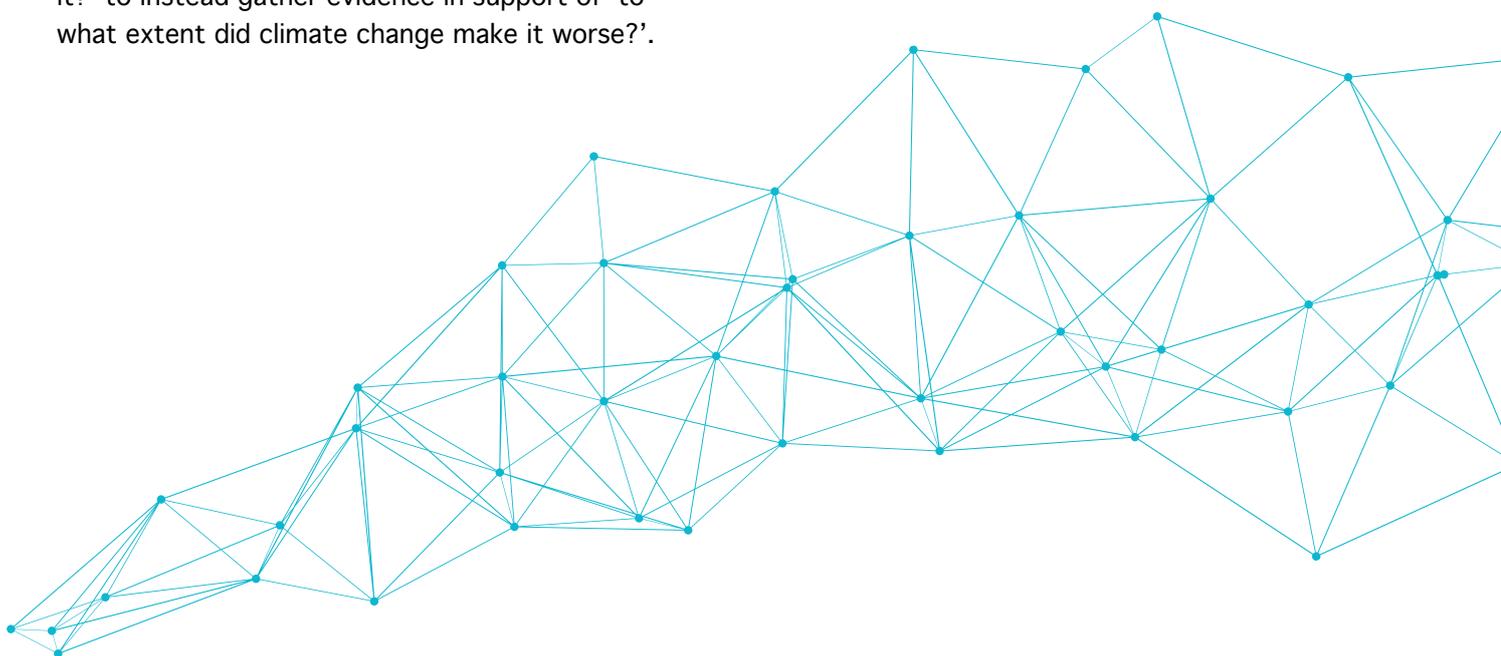


Change in societal-ecological systems often produce a cascade of unanticipated consequences and legal needs. As the legal profession begins to understand the full possible legal implications of climate change risks, including how to hold business and governments accountable to targets and commitments, in this report Nigel Brook and Zaneta Sedilekova from Clyde & Co. LLP share their understanding of the emerging physical, liability and transition risks and the growing role for lawyers in climate change litigation.

Cities, such as Kivalina in Alaska, have documented the damage that has been caused to their town, buildings, infrastructure and livelihoods by climate change. They decided to sue the biggest power companies in the US, who produce a third of US emissions, for the damages. We are likely to see a rise in such cases over the next decade, though as we learn in the following pages, attribution is a far from straightforward factor in the area of climate risk. The difficulty of assigning attribution and instances where there is no way to quantify harm have led to gaps in the regulatory system and limits to enforceability. It is estimated that the direct cost of any natural disaster is only around ten percent of the ultimate cost in terms of impact on infrastructure and jobs, which continue for years afterwards. For lawyers, the challenge comes in moving beyond a binary causal question of ‘did climate change cause all of it or none of it?’ to instead gather evidence in support of ‘to what extent did climate change make it worse?’.

There is a burgeoning role for AI and advanced data systems here as well. Risk managers and business leaders need to be equipped with an understanding of climate impacts under several climate change scenarios. Use of advanced spatial, socioeconomic, financial, and climate data can help businesses to understand their unique exposure and vulnerabilities to a range of climate change hazards. Predictive and probabilistic models, based on a company’s assets and the latest climate data, can assist in climate change adaptation planning. Increasingly lawyers will be called on to assist clients in these decisions and advise on exposure to risks. Climate risk analytics solutions are fuelling the next evolution of disaster risk reduction and climate change risk management. Familiarity with such technology, data and how liability is calculated will be critical skills for lawyers.

As such the insights from Brook and Sedilekova at Clyde & Co. LLP are a timely introduction to the areas of risk and evolving roles for and demands on the legal profession.



Climate Change Risks – the Future of Law as we know it?

Nigel Brook and Zaneta Sedilekova, Clyde & Co. LLP

There is no better point to start a discussion about climate change risks than September 2015, when the then Governor of the Bank of England, Mark Carney gave his seminal speech to the insurance market at Lloyd’s of London. In it, he called climate change ‘a tragedy of the horizon’ in the sense that its catastrophic impacts ‘will be felt beyond the traditional horizons of most actors’ (Carney 2015). Climate change will impose costs on future generations that the current one has little direct incentive to fix, on small island states that the current world’s powers have no legal obligation to help, and on girls and women, whose interests remain underrepresented in most governments and boardrooms around the world.

With this inequity in mind, Carney went on to define and categorise risks posed by climate change. Climate change risks in general are risks faced by businesses due to factors caused by a changing climate. They can be divided into categories according to these driving factors, as follows:

- a) physical risk, such as extreme weather events
- b) liability risk arising from legal claims brought against corporations and governments, and
- c) transition risk associated with the transition to a low-carbon economy.

The recognition of climate change as a business risk has had a transformational impact on the perceptions of governments, businesses and society more broadly. Discussions about climate change have moved from lecture theatres and classrooms to boardrooms and houses of parliament, alerting directors, shareholders and society to the fact that climate change law and practice extend beyond environmental law

and regulation to areas like asset management, financial services, insurance, tax and many more.

The five years between Carney’s speech and the onset of the Covid-19 pandemic have seen all these risks materialise, intensify and amplify, to the extent that the January 2021 World Economic Forum Global Risks Report now lists infectious disease and climate action failure among the top two risks by impact and top four by likelihood. In this contribution we analyse the current trends in climate change risks and take a broad look at how matters may unfold over the next 30 years as the world moves towards 2050. We discuss the role that lawyers will play in assisting their clients in addressing, managing and mitigating these climate change risks and how the demands of this role will reshape the legal industry as we know it today.

Climate change risks and their impacts on the legal profession

Physical risks

Physical climate change risks include impacts, potential economic costs and financial losses

resulting from the increasing severity and frequency of extreme climate change-related events, and longer-term progressive shifts in the climate.

Unlike liability and transition risks, physical risks have immediate and direct impact on individuals and their families, further translating into health risks and risks to livelihood. 2019 and 2020 were an epitome of these risks with Australian wildfires turning millions of hectares into ashes, destroying commercial buildings and private homes, taking with them the lives of people as well as millions of animals (Bruce-Lockhart and Romei 2020). On the other side of the Pacific, Californian wildfires have been getting more and more potent since 2010, with 4.7 million acres devastated in the 2020 wildfire period (June – September) alone (Insurance Information Institute 2020). Even after the initial devastation has passed, wildfires will continue to have immense impact on biodiversity of the burned ecosystem. More than 80% of all terrestrial species of animals, plants and insects live in forests. When the forests burn, the biodiversity of ecosystems on which all human life depends for a long-term survival burns with them (United Nations 2020).

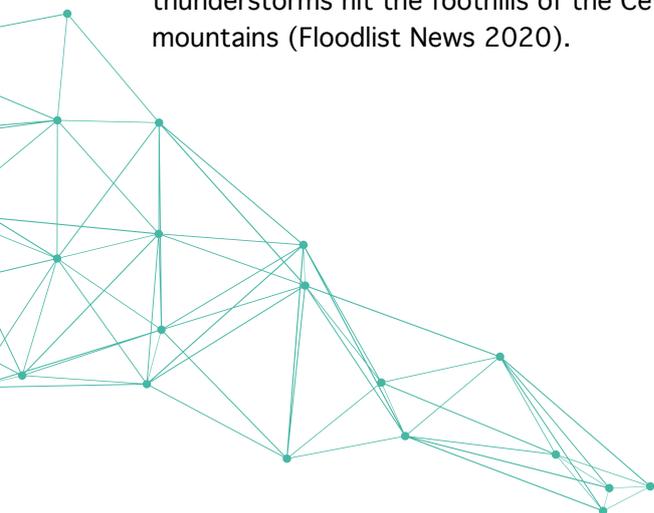
While California and Australia waited eagerly for rain to come to aid the firefighters, other parts of the world were drowning in its abundance. Only in September 2020, Hurricane Sally hit the Caribbean and the US, bringing historically unprecedented flooding to the southern US (BBC News 2020), while in Europe, Ireland evacuated homes in Galway after a flash flood and France was forced to evacuate hundreds of people as thunderstorms hit the foothills of the Cévennes mountains (Floodlist News 2020).

On the other side of the extremity spectrum, extreme heat waves are hitting Europe, Australia, India, Africa, South America and the Middle East, with 2019 being the hottest year in Europe's recorded history (McGrath 2020). If the world keeps on its current course for a three degree Celsius rise, scientists predict that by 2070 more than three billion people will live in regions with the average temperature beyond 29 degrees Celsius (84 degrees Fahrenheit), temperature considered near unliveable (UN Environment Programme 2019; Chi et al. 2020). Heavy rains, floods and heatwaves lead among other things to crop failure creating shortage in agricultural production already stressed by infertile soils and ever-increasing human population, which is expected to grow by one third between 2009 and 2050 (FAO – HLEF 2009).

Lawyers and physical risks

The escalating frequency and severity of extreme weather events can have far-reaching implications for lawyers and their clients across all sectors. While businesses can still get insured against losses caused by extreme weather events, insurance as a risk-transfer mechanism traditionally provides protection against unpredictable events. The more common-place extreme weather events become, the less likely they are to be considered unpredictable and thus insurable. This may leave the losses caused by physical risks to be borne by the individuals, businesses and countries themselves.

Lawyers and their insurer clients can play a crucial role in enabling innovative solutions to the risks posed by extreme weather events. In recent years parametric insurance has increasingly shown itself to be well suited for unpredictable weather risks (Swiss Re 2018). While indemnity insurance pays the insured *after* the adverse event once the amount payable has been assessed, parametric insurance can make a pre-determined payment within days – and potentially, even *in advance* of the adverse event taking place. This mechanism can be enabled by smart technology which links a parametric scale of a potential damaging event



(such as earthquake or draught) to the insurance payout, the monetary amount of which varies in accordance with the pre-defined index.

The Kenya Livestock Insurance Programme (KLIP), the first government-backed livestock insurance scheme in Kenya launched in 2016, is a great example of a parametric insurance product (World Bank 2018). KLIP uses satellite imagery to assess the state of grazing conditions by measuring deviation in the colour of ground vegetation on the basis of index called the Normalized Difference Vegetation Index. The index focuses on the presence or absence of green vegetation on the ground and when a certain shade of brown is reached, indicating drought conditions, insured farmers receive a lump sum payment to cover their crop losses as they occur. In South America, the Extreme El Niño Insurance Product (EENIP) has been developed to provide payments to Peruvian farmers in case of flooding, which can be predicted *months in advance* by measuring surface water temperatures (GlobalAgRisk 2013). In the next 30 years, lawyers will continue to play an important role in enabling such innovative technological solutions while working with their clients in drafting smart contracts that enable immediate and seamless physical risk transfer.

Liability risks

Liability risk is the risk of lawsuits being brought against government, corporations and directors, for example for their failure to act on climate change or transition risks, or misrepresentation/mismanagement of their purported action. 2019 and 2020 saw escalation in the use of climate litigation, an umbrella term that encompasses all lawsuits in which climate change plays a central or peripheral role, by individual activists and advocacy groups (Setzer and Byrnes 2020).

In the landmark Urgenda judgment (December 2019) the Dutch Supreme Court ordered the Dutch government to make deeper cuts to emissions by the end of 2020, by reference to the European Convention on Human Rights and the state's obligations under the Paris Agreement to keep global temperature increases within two

degrees Celsius of pre-industrial levels (Grantham Research Institute 2020). On 31 July 2020, the Irish Supreme Court unanimously quashed the Government's 2017 National Mitigation Plan on the basis that it was not specific enough in explaining the near-term measures to be adopted by Ireland to achieve its transition to a low carbon economy by 2050 (Grantham Research Institute 2020).

Litigation against the governments can be a powerful tool – following the Urgenda decision, the Dutch government announced new policies aimed at complying with the ruling, including reduction of the capacity of its remaining coal-fired power stations by 75% and implementation of a €3 billion package of measures to reduce Dutch emissions by 2020, while the ramifications of the Irish Climate Case are still to be seen (Buranyi 2020).

Corporates are not immune to climate litigation either. Some are being accused of greenwashing – the practice of misleading customers or the wider public about the environmental credentials of the company's products or the company itself. Since 2015, Volkswagen has been facing multiple class actions (Jolly 2019) in Germany (Hakim and Ewing 2015), Australia (Australian Associated Press 2019), US (Associated Press 2017) and most recently the UK (Laville 2019) in the notorious “dieselgate” scandal for its high-tech greenwash in relation to the true extent of its cars' emissions. In early 2020 Volkswagen said that the scandal had cost it €31.3 billion in fines and settlements with the cash outflows expected to continue until 2021. At the time of writing, 91,000 consumer claims are pending against the company in the UK (Harvey 2020).

With more and more corporations making public Net Zero commitments, including the likes of BP (Watts 2020), Nestlé (2019) and PwC (2020), greenwashing litigators have an open invitation to scrutinise corporates' actions against their commitments. In what seems to be a race to (net) zero, some companies go even further. Microsoft, for instance, committed to achieving carbon negativity (effectively reduction of the company's carbon footprint beyond neutral,

so that it has a net effect of removing carbon dioxide from the atmosphere rather than adding it) by 2030, *and* removing from the environment all the carbon Microsoft has emitted either directly or by electrical consumption since it was founded in 1975, by 2050 (Smith 2020).

Lawyers and liability risks

Managing and mitigating the risk of litigation has always been a traditional role of legal advisors. However, liability risks posed by climate change are of a different nature than traditional litigation risks. Climate change is a global issue unattached to a particular country or jurisdiction. This allows claimants to shop for a forum with law best suited for the liability they are seeking to establish. This trend can be seen in both the types of actions brought before courts in countries around the world, as well as claimants' choice of jurisdiction.

Attribution has always been an obstacle to finding a company liable for its contributions to climate change. The term 'attribution' itself may have several implications on legal arguments that lawyers put forward – on the one hand, it could refer to the theory by which the company's contribution is determined, or, on the other hand, to a causal link between the emissions and the loss complained of. Each comes with its own challenges. Attribution in terms of corporate's contribution to the impacts of climate change may either result in the corporate's responsibility for the loss being proportionate to the percentage of all its emissions to date, or liability for the marginal amount of loss caused by its own emissions alone. If attribution is understood as referring to the causal link between emissions and the specific, local loss complained of (e.g. wildfires), the claimants will deploy evidence from climate attribution scientists, who assess the probability that the loss could have arisen (at all, or the extent experienced) in a counterfactual world without those emissions. These difficult questions remain yet to be fully explored by courts.

Although recent advancements in attribution science have fuelled more lawsuits especially against oil majors in the US, the claimants in other jurisdictions have started looking for an alternative and more accessible basis for their claims against corporates. Since greenwashing claims are based on the company's current statements rather than its historic actions, they are inherently easier to prove by contemporary evidence. Increasing success of greenwashing claims has led to a shift in how claimants put their cases against corporations forward as the above-mentioned dieselgate scandal demonstrates. Inspiration can be also taken from the US cases, where causes of action are frequently based on consumer fraud, false advertising or product liability and substantial compensation is sought on that basis. However, the aim of lawsuits against corporates is often greater than seeking compensation. These cases serve as a means of changing the overall corporate's behaviour (in, for example, how it makes its internal decisions or how it votes as a shareholder of other companies) and raising public awareness of the corporate's impact. Claimants in these cases therefore choose their cause of actions strategically – seeking an argument that is easier to establish in law and prove in evidence and thus more likely to result in a successful outcome.

Choice of forum can be also instrumental to the success and impact of a liability action. The case of Luciano Lliuya v. RWE AG, brought before German courts back in 2015 by a Peruvian farmer supported by environmental NGO Germanwatch against RWE, Germany's largest electricity producer, is an excellent example of a strategic choice claimants in climate change litigation can make. Mr Lliuya alleged that RWE, having knowingly contributed to climate change by emitting substantial volumes of greenhouse gases, should be held responsible, at least to some extent, for the melting of mountain glaciers near his town of Huaraz in Peru. Since the harm complained of occurred in Peru, Peruvian courts would be a natural forum for this dispute. However, Mr Lliuya decided to bring the claim in the German courts because the defendant – the parent company of the operators responsible for the greenhouse gas emissions – is based in Germany.

From a practical perspective, German courts are efficiently run and administration of justice faces fewer obstacles than in Peru. In addition, German law afforded Mr Lliuya a possibility to base his claim on the law of nuisance, which allows the owner of a property that has been interfered with to require the disturber to remove the interference. Importantly, the interference did not have to be illegal at the time the damage occurred. Mr Lliuya's choice of forum is therefore not coincidental but rather strategic. It has been calculated to allow him an opportunity to plead his case under a legal framework most suitable for his particular circumstances. Moreover, support of Germanwatch complements this strategic picture quite well – on its own, Germanwatch would not be able to bring a climate case against Europe's largest utility provider as having suffered no harm, it would lack standing to do so. Supporting a claim of a representative claimant – a farmer who has suffered harm – has enabled the NGO to do so in a jurisdiction where public awareness of climate impacts of corporates keeps on rising. The wider impact of such a strategic case – on corporate behavior, public action, level of governmental security – should not be underestimated.

In the next 30 years, lawyers advising their clients on how to manage and mitigate liability risks will need to be aware of the variety of legal systems and grounds under which a single claim can be brought. Choice of forum is not unique to climate change litigation and has been commonly seen in international private litigation. What is unique about liability risk posed by climate change is the breadth of options in both types of forum and legal grounds that the claimants can choose from. In the next 30 years more than ever before will lawyers be expected to anticipate and understand these options.

Transition risks

Transition risks arise from the process of shifting to a low-carbon economy and the loss of assets that are inherently linked to carbon-intensive production. The concept of 'stranded assets' is used to cover all classes of assets threatened by

transition risks (Carbon Tracker 2017). These can be loosely defined as assets that at some time prior to the projected end of their economic life are no longer able to earn an economic return as a result of changes associated with the transition to a low-carbon economy.

Canadian tar sands and oil rigs in the North Sea are current or potential examples of stranded assets. However, one should be careful not to accept the current definition as exhaustive when it comes to the consequences of assets becoming stranded. The loss of economic value can easily turn into economic liability extending beyond the lifetime of the company itself. The manifestation of this far-reaching risk was well articulated in the judgment of the Canadian Supreme Court in the case of the Orphan Well Association, which has established that even after a company goes insolvent, its assets must be first and foremost used to fulfil its environmental obligations, including a clear-up of the environment impacted by its business activities, before paying what is left to the company's creditors (Supreme Court of Canada 2019). There is no doubt that the definition of stranded assets will keep on expanding over the next 30 years to encompass new classes of assets that are currently considered immune to the impacts of climate change.

Lawyers and transition risks

Lawyers are becoming more and more involved in assisting their clients with transition risks, more specifically how to avoid and manage them. Risks related to stranded assets are linked to poor investment decisions, which are very often ill-informed by the investee company's incomplete disclosures of climate risks. As a result, investors are becoming more activist, asking more questions and putting pressure on investee companies to divest from carbon-intensive assets that pose a risk of becoming stranded. In the years to come, lawyers will play a crucial role in advancing their shareholder clients' cases against unsustainable investment decisions and demanding enhanced disclosure of climate change risks.

An example of the litigation motivated by a desire to prevent investment into a stranded asset is *ClientEarth v. Enea*, the world's first climate risk case concerning a major power plant (Grantham Research Institute 2019; ClientEarth 2018). In this case, ClientEarth, an NGO and, strategically, a minority shareholder of Enea, the fourth largest energy group in Poland, filed a claim against the company for annulment of a resolution that had approved the construction of a new coal-fired power plant. This is the first climate change case on record, in which the claimant pursued its interest as a minority shareholder in order to avoid issues with legal standing that often prevent climate-conscious claimants from bringing actions against polluting companies. The claimant's position of a minority shareholder also enabled it to assert directors' fiduciary duties as a basis for its annulment action. In August 2019, the court ruled Enea's decision legally invalid giving an implied approval to the litigation strategy adopted by ClientEarth. The second approval the case received was more unexpected – the shares of Enea went up more than 4% only a day after the judgment was handed down suggesting that the market has also approved of the strategy and the eventual decision in the case (Carbon Tracker 2019). Enea subsequently ended its involvement in the project and wrote off its investment, and the power plant will not be built.

In the years leading up to the UK's 2050 Net Zero target (BEIS 2019), lawyers can expect to be called upon more and more often to devise innovative strategies to pursue their clients' claims against investee companies. Such strategies will have to address many obstacles both the legal systems and the science pose to the pursuit of investors' and shareholders' claims, including legal standing and gaps in attribution science. Strategic litigation in which a claimant becomes a shareholder of the company only for the purpose of acquiring legal standing to bring a claim against it, such as in the case of *ClientEarth v. Enea*, might become investors' preferred tool. As a result, lawyers will have to come up with new and innovative ways of identifying litigation strategies to achieve their clients' aims.

The second stream of legal work arising from transition risks is linked to climate-related

financial disclosures, which have a potential to make investment decisions more informed. Although investors have been demanding that their target companies disclose the risks that transition to Net Zero economy will pose to their assets for some time, thus far their calls have been supported only by various voluntary initiatives and frameworks. In 2015 the Financial Stability Board initiated the Taskforce on Climate-related Financial Disclosures (TCFD), to create a voluntary climate-related set of financial disclosures which provide investors, lenders and other stakeholders with a standard reporting framework. If widely adopted, the TCFD-compliant disclosures have a potential to redirect financial flows from carbon-intensive to low-carbon investments as transition risks will be laid down in black-and-white for every investor's attention when making their investments.

Since its launch, the TCFD has secured the official endorsement of various leading economies' governments and, over 1,440 signatories from the world's elite corporates, representing a market capitalization of over \$12.6 trillion as of September 2020. Its recommendations (TCFD 2017) on climate-related financial disclosures applicable to organisations across sectors and jurisdictions were published in 2017 yet no government made compliance with them mandatory at that time. Unsurprisingly, the TCFD Status Report from June 2019 reveals that only 25% of companies disclosed information under more than five out of the 11 recommended disclosure criteria and only 4% disclosed information aligned with at least 10. The 2020 Status Report published in October 2020 shows that for the fiscal year 2019 reporting, the average level of disclosures across the 11 criteria was 40% for energy companies and 30% for materials and buildings companies – a significant increase but still short of the desired endorsement.

With voluntary uptake of TCFD disclosures being slow, governments have begun to step in. On 15 September 2020, New Zealand/Aotearoa became the first country to announce its intention to make climate-related financial disclosures mandatory across the financial system from 2023 covering in total around

200 organisations (Shaw 2020). The UK government followed suit in November 2020 when it published a roadmap (HM Treasury 2020) to achieving mandatory climate change disclosure by 2025 under its ambitious Green Finance Strategy (premium listed companies will have to make disclosure from 2022) (HM Treasury and BEIS 2019). More and more governments can be expected to mandate climate change risk disclosures in the years to come. These developments will shape legal work in the next 30 years – lawyers will be asked not only to advise on the legal requirements of the mandated disclosure frameworks, but also on the consequences of falling short of meeting them. They will be also instrumental in holding non-compliant companies to account for their failures to disclose.

Towards 2050

If 2019 could be called the year the world woke up to the climate crisis (Peat 2019), the

next 30 years will go down in history as years of responding to this wake-up call. The legal profession will play a crucial role in this response. Lawyers will be asked to help their clients identify, avoid and manage physical, liability and transition risks linked to climate change. These requests will come with their own challenges, including the multiplicity of jurisdictions in which climate liability cases can be brought, as well as the need for novel technological solutions, such as parametric insurance products, and innovative litigation strategies. Opportunities stemming from these challenges have a potential to transform the legal profession as we know it today – proactive risk management advice, knowledge of numerous legal frameworks together with out-of-the-box thinking will be a sought-after quality every lawyer will need to develop and hone. For lawyers who respond to these challenges, the results will be both personally and professionally rewarding – these lawyers will be able to stand at the forefront of the fight against one of the greatest threats of the 21st century.

Nigel Brook and Zaneta Sedilekova

Clyde & Co. LLP

Nigel Brook heads Clyde & Co's reinsurance team and leads the firm's global Resilience and Climate Change Risk practice. He also sits on the firm's Innovation Board. Nigel regularly speaks about climate change risks and litigation at events organised by Clyde & Co as well as external institutions, including Chapter Zero, GARP and The Economist. Nigel is a co-author of two reports for the Insurance Development Forum, the most recent titled "**Technology and Innovation: Tools to help close the protection gap in microinsurance markets**".

Zaneta Sedilekova is in her second year of training currently in Data Lab, Clyde & Co's innovation hub, which uses data analysis supplemented with machine learning tools and legal insights to develop AI-driven legal products and services. Zaneta has founded and leads the Climate Change Group, a trainee-led firm-wide initiative that allows trainees to gain first-hand experience in business development while focusing on pro bono climate change-related projects. As part of her pro bono practice, Zaneta has also co-facilitated a rewilding theme as part of the Big Hack organised by The Chancery Lane Project in autumn 2020, and coordinated Clyde & Co's engagement with a rewilding project.

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The Law Society
113 Chancery Lane
London WC2A 1PL

Tel: 020 7242 1222
Fax: 020 7831 0344
DX: DX 56 London/Chancery Lane

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