11 Let's Talk about the Lawyers: Climate Change Litigation, Professional Ethics, and 'Good' and 'Bad' Case Outcomes

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There is a wonderful book by Nathaniel Frank called *Awakening*. It is the story of the fight for equal marriage in the US. Partly, the book tells the tale of the various litigation attempts to have marriage made available for same-sex couples. But mainly, it's a set of narratives focussing on the lawyers – about the lawyers who brought the cases, about the cases and tactics lawyers chose and why, about the claimants lawyers agreed on and those claimants they rejected, about politics between different lawyers, and about 'good' and 'bad' litigation outcomes. For the last couple of years, I have been thinking and working on lawyers and climate change: about the conditions under which we might, and sometimes should, hold lawyers responsible for the (perfectly legal) climate harms their clients bring about. In this contribution, I want to do something related but different, and possibly also provocative – to think, in the vein of Nathaniel Frank and *Awakening*, about the lawyers involved in climate change litigation.

Let us consider first large companies bringing claims to protect their property rights, usually against governments: KLM suing the Dutch government over reduced flights at Schipol; the Canadian cases on moratoria on hydrocarbon exploration in Alberta and Quebec, and similar. Let us also think about the lawyers who prosecute climate activists. What do or might these cases say about the rule of law?; the role of lawyers as servants and agents of the rule of law?; about how lawyers understand the rule of law concepts of legality, and other things that the rule of law may or may not include and wish to protect: property rights, social and other rights, environmental rights even?

As I have just argued forcefully in a report for the regulator, the Legal Services Board, on lawyers and the rule of law - written with Richard Moorhead and Kenta Tsuda - just because a client has a supposed right to bring a claim does not mean the claim should always be brought; other questions have to be asked and answered. Including the important question for law firms, about why they exercise their agency and *choose* to act for the clients they act for. Here, I can accept some nuance when it comes to client onboarding choices, but still find the argument that goes, 'We must help Shell sue Greenpeace for USD 2.1 million because it means we also get to advise them on renewables' a tough pill to swallow. What does it mean when lawyers in elite, global law firms choose to use their power and expertise to shore up the massive wealth and power of their carbon major clients through climate litigation, often to the disadvantage of those much less powerful? And what about when those elite, global law firms have their own glossy ESG and CSR brochures which profess their green

credentials? I am not saying anything directly in this contribution about barristers and the 'cab rank' rule, as that rule always seems to be (unhelpfully) offered up as the end of a conversation when it is simply the beginning of a debate.

Let us also think about claimant lawyers who bring cases that some, possibly many, think are 'bad' climate cases; and here, the Plan B cases are often raised with me as examples. I am thinking of cases being 'bad' perhaps because they are poorly thought out or poorly litigated, and/or because they are likely to set poor precedents or lead to poor outcomes, even if – as Kim Bouwer and Joana Setzer have argued – climate litigation can 'fail with benefits'. Litigation choices – some better than others - will be made by lawyers (and clients) about the forum, about claimants, about grounds of the claim, about funding, about the use of experts, about the timing of a claim, and so on. On bad legal outcomes (cases not helping to advance the law in ways some might desire), we might think about *Sharma* in Australia and *Smith v Fonterra* in New Zealand. More broadly, how legally useful are the English judicial review and Paris Agreement cases (where the English courts repeatedly seem unwilling to operationalise the Paris Agreement); or cases, in Ireland and France and elsewhere, on human rights and climate change (which are not often successful)? Joana Setzer mentioned to me speaking to a lawyer who raised the German car manufacturer cases as examples of unhelpful litigation; filings that were maybe not thought out carefully and that risked creating bad precedents.

What do or might these sorts of cases say: about the competence of the lawyers involved?; about lawyers being required to act in the best interests of clients (and what those best interests look like)?; about the administration of justice and proper use of court resources?; and about the professional, pervasive principles of lawyer independence and integrity? I, of course, accept that ex-post-facto dissection of choices about what is or is not 'good' or 'bad' climate litigation is not without its own challenges. And that 'success' may be thought to come in many forms. 'Strategic litigation' is naturally sometimes brought in the knowledge that a positive court result is highly unlikely and done for other reasons (which itself raises interesting questions about a client's 'best interests' and appropriate use of court time when political and social goals are also in the mix); and that lawyers – and legal advice, and legal expertise – are not always the key players in why litigation decisions or strategies are made. But still.

What, then about in-house lawyers? Those who work for government or public bodies; those who work for industry; and those who work for the third sector. In other work, I have written about the 'tournament of influence' in which in-house lawyers are engaged: managing their independence (a core professional obligation) through a series of networked interactions with their colleagues. That work shows that the tournament of influence can have an important (quantifiably measurable) effect on how in-house lawyers view their role, how they see their professional obligations, and also in terms of how in-housers negotiate their position relative to others within their organisation.

What does this mean for government lawyers (in England & Wales, but also elsewhere) who are also civil servants and have a complex of potentially divided loyalties? What should those government lawyers do when asked to opine on the legality of a proposed course of climate change action that might lead to litigation, especially when the Attorney General has produced guidance telling government lawyers that if they can see 'any respectable argument' as to the legality, then those arguments have to be advanced? This approach, compelling government lawyers to be 'solutions based', has obvious impacts on future climate litigation.

Think also of those ClientEarth in-house lawyers involved in the purported derivative claim against Shell where Trower J, as he was required to do under the Companies Act 2006, engaged in reflection on whether ClientEarth had brought the claim in 'good faith', coming to the view that Client Earth's 'motivation in bringing the claim is ulterior to the

purpose for which a claim could properly be continued.' Was this simply a difference of opinion, especially in a legally-novel climate change arena (where we know courts are often initially resistant to change), or a situation in which the claimants were not best using the court's time and expertise? There is something interesting in professional ethics terms, and worth further thought, about being a lawyer in an environmental NGO whose sole purpose is to advance positive environmental change.

Finally, let us think about how claimants are chosen and treated by lawyers in climate litigation. Let us think about the communities and the people involved: what they want; what they were promised; and how they feel when they are left behind when climate cases fail, like in *Kivalina*. There is a vast body of literature on cause lawyering, including more recent work on climate cause lawyering – and one of the things this vast body of literature raises as a real issue is when people and groups are instrumentalised for the cause. Here, I think Noah Crawford Walker's work on *RWE* and Saúl Luciano Lliuya is interesting and worth further reflection.

My simple point with this contribution is that, when telling the stories of climate litigation, we should think of the lawyers involved – on all sides, working in various public and private practice settings and for various clients – and about their professional obligations and their professional ethics. And that that sort of thinking is useful, both because lawyers are important and often-under looked at as institutional actors with significant agency in climate litigation, and for thinking about climate litigation itself.

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