CLIMATE CHANGE TORTS: *AMERICAN ELECTRIC POWER V CONNECTICUT*

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The decision of the U.S. Supreme Court in *American Electric Power v Connecticut*[1] is arguably the most important case for climate change torts in 2011. The Supreme Court's decision has now overruled the previous judgment of the Second Circuit delivered in *Connecticut v. American Electric Power*, 582 F.3d 309 (2nd Cir, 2009). There are two aspects to the Supreme Court's recent decision that are of particular importance to the status of climate change torts. Firstly, the court applied the doctrine of displacement to hold that the U.S. federal government has the appropriate mandate over the United States Environmental Protection Agency (EPA) and the related legislation, and hence the claimant's action under federal nuisance law was non-justiciable. Secondly, the Supreme Court abstained from ruling on the issue of the claimant's standing, due to the Court's division on the matter. Thus, higher judicial authority continues to fail to clarify standing regarding climate change torts.

In their statement of claim at trial, the claimants[2] in *Connecticut v American Electric Power* 406 F Supp 2d 265 (SDNY, 2005) (*Connecticut)* alleged violations of the federal common law of interstate nuisance and state tort laws based upon evidence that the defendant's greenhouse gas (GHG) emissions were substantially and unreasonably interfering with public rights. The defendants constituted five power companies who, due to the operation of their fossil-fuelled power plants, were collectively responsible for a significant proportion of total carbon dioxide emissions in the U.S. Although the claimant's case was unsuccessful at trial, the Second Circuit considered the claimant's appeal and reversed the trial decision.[3] The Second Circuit's decision recognised the claimant's standing and legitimate claim under U.S. federal law. The Second Circuit ruled that the federal law took precedence over the state tort law and, for this reason, neither the Second Circuit nor the Supreme Court (subsequently) considered the application of the state tort law in the case. Perhaps the most important determination of the Second Circuit was the rejection of the non-justiciable political question argument of the defendants. The U.S. political question doctrine functions to prevent federal courts from ruling on cases involving political questions that, under the U.S. Constitution, are the express responsibility of the legislative and executive branches of government.[4] Thus, the Second Circuit's

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[1] *American Electric Power v Connecticut,* (US Supreme Court, 20 June 2011).

[2] Constituted by an alliance of eight States, New York City, and three private land trusts.

[3] *Connecticut v. American Electric Power*, 582 F.3d 309 (2nd Cir, 2009)

[4] *United States Constitution* art 3.

rejection of this doctrine was heralded as a crucial development for the progressive recognition of climate change torts. Following this decision, the defendants appealed to the Supreme Court.

The Supreme Court's judgment will increase uncertainty over the legal status of the newly emerging climate change torts. Whilst the Supreme Court made several pronouncements on the legal status of climate change claims in terms of federal nuisance law, the Court did not consider more generally whether the political question doctrine bars climate change tort claims. The Supreme Court's abstention from considering the issue of standing in regard to climate change claims is a significant omission. The development of climate change tort law arguably requires special judicial consideration of standing due to the global nature of the causes and effects of anthropogenic climate change. The circumstances in which the law will recognise the causal connection between a defendant's GHG emissions and a claimant's injuries cannot be determined from the existing body of cases. The issue of standing proved to be a fatal defect in the arguments of the claimants in *Kivalina v ExxonMobil* 08-CV-1138 (ND Cal, filed 26 February 2008), whilst in *Massachusetts v EPA* 549 U.S. 1 (2007) (*Massachusetts*), the Supreme Court was willing to apply a peculiar test to hold that the claimants did in fact have standing.

The Supreme Court strongly refuted the proposition that federal judges should determine "unreasonable" carbon dioxide emissions and subsequent emissions reductions based on the non-justiciable political question doctrine. Inasmuch as this refutation was based on doctrinal concerns, it also reflected the pragmatic considerations of the Supreme Court. The Supreme Court held that the EPA, by virtue of its access to scientific, economic and technological resources, was in a better position than federal judges to deal with the issues of climate change. On an overall basis, the Supreme Court's decision makes the pursuit of climate change torts in the U.S. considerably less optimistic given that the option of federal law is now most likely unavailable to claimants. Due to this decision, the climate change tort jurisprudence developed in *Massachusetts* is unlikely to receive any further federal court consideration. The avenue of state tort law is still open to the *Connecticut* claimants, and thus the Supreme Court's decision can be regarded as an implicit notification of remand to the state courts. However, climate change litigation under state tort laws is likely to involve a protracted legal process for which Renner considers 'a simple judicial resolution is far less likely'.[5] It seems unlikely that state courts will be willing to consider climate change claims without a political mandate, based upon the outcome of previous cases. In any case, decisions involving U.S. state tort law are not as likely to carry the same weight – for the precedent assessment of U.S. and foreign judiciaries – as decisions determined in terms of U.S. federal law.

The Supreme Court's decision is perhaps best considered in the circumstances of the current U.S. political and financial context. The U.S. financial decline and uncertainty since 2009 has perhaps weighed heavily in the Supreme Court's consideration of the balance between 'environmental benefit[s] potentially achievable, [national] energy needs and the possibility of economic disruption...'.[6] The Supreme Court would have

[5] J. Robert Renner, *Recent Supreme Court Decision Will Not End Climate Change Tort Litigation* PropertyCasuality360 (30 June 2011) <http://www.propertycasualty360.com/2011/06/30/recent-supreme-court-decision-will-not-end-climate>.

[6] See *American Electric Power v Connecticut* (US Supreme Court, 20 June 2011).

foreseen that a decision in favour of the plaintiffs would set a precedent for claimants to pursue politically contentious climate change claims through the federal courts. Such an eventuality would, in terms of this reasoning, require the court to exceed its capacity as a fact-finding body. Given that Congress is presently faced with the problems of high public debt, high unemployment and the downgrading of the U.S. credit rating, it seems very unlikely that climate change mitigation will become a pressing federal political issue within the immediate term.

Whilst the U.S. may be regarded as a climate laggard in a political sense, climate change litigation has been pioneered in the U.S,[7] and as such, litigants in other nations in the common law family look to the U.S. for normative and legal developments to support their own climate change claims. Given the relatively small body of climate change cases that have as yet been heard in the Australian courts, a Supreme Court decision in favour of the *Connecticut* claimants would have been beneficial for future Australian claimants.

Climate change claimants are faced with significant uncertainties in regard to standing, evidence and redressability. These uncertainties have not been resolved by the courts and are thus likely to deter the further actioning of climate change claims. The outcome of such cases as *Connecticut* perhaps suggest that climate change claimants should – at least for now – abandon tort to instead investigate other possible legal avenues.

[7] See *City of Los Angeles v National Highway Traffic Safety Administration* 912 F 3d 478 (DC Cir, 1990); the first significant climate change case.