Liability for Climate Change
Cases, Challenges & Concepts in Civil and Common Law

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Liability for Climate Change

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Martin Spitzer
Factual Starting Point

- Global warming is taking place.
- Various natural forcing mechanisms.
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- Global warming is taking place.

- Various natural forcing mechanisms.

- Human behaviour does have an influence.

IPCC AR5: “It is extremely likely that more than half of the observed increase [...] from 1951 to 2010 was caused by the anthropogenic increase in GHG.”
International Framework

- 1992: UN Framework Convention on Climate Change: "induced by man-made greenhouse gas emissions"
- 1992: Rio Declaration on Environment and Development "precautionary principle"
International Framework

- 1992: UN Framework Convention on Climate Change: "induced by man-made greenhouse gas emissions"
- 1992: Rio Declaration on Environment and Development "precautionary principle"
- 1997: Kyoto Protocol emissions trading system
- 2016: Paris Agreement "ambitious national contributions" to achieve max +2°

- ILA Principles / Oslo Principles
CC Cases: Bread and Butter

- Austria: *Vienna International Airport* – 3rd Runway Case
  - Federal Administrative Court: Construction would improve infrastructure, create new jobs, and increase air safety. The significant increase in greenhouse gas emissions would have a severe impact on public health. Thus, the public interest in climate protection prebails over the public interest in realizing the project.
CC Cases: The American Way I

  - Clean Air Act: „The [EPA] shall prescribe standards applicable to the emission of any air pollutant from new motor vehicles, which cause, or contribute to, air pollution, which may reasonably be anticipated to endanger public health or welfare”
CC Cases: The American Way II

- *California v General Motors* (District Court for the Northern District of California)
  - Injusticiability because of political question
CC Cases: The American Way II

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  - No injunctive relief because of displacement

- *Kivalina v Exxon Mobil* (9th Circuit Court; no certiorari)
  - No damages because of displacement
CC Cases: The American Way II

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  - Injusticiability because of political question
  - No injunctive relief because of displacement
- *Kivalina v Exxon Mobil* (9th Circuit Court; no certiorari)
  - No damages because of displacement
- *Comer v Murphy Oil* (5th Circuit Court)

- “The federal common law of public nuisance died after a long illness on Sept. 21, 2012.”
CC Cases: The European Theatre I

- *Urgenda v The Netherlands* (District Court The Hague)
  - Due to the severity of the consequences of climate change and the great risk of hazardous climate change occurring – without mitigating measures – the court concludes that the State has a duty of care to take mitigation measures
CC Cases: The European Theatre I

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  - Due to the severity of the consequences of climate change and the great risk of hazardous climate change occurring – without mitigating measures – the court concludes that the State has a duty of care to take mitigation measures

- Klimaseniorinnen (Switzerland; Government; Administrative Court)
CC Cases: The European Theatre II

- *Lliuya v RWE* (Landgericht Essen)
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Bernhard Burtscher
Harm

- What have we seen so far?
  - Property (private - public)
Harm

- What have we seen so far?
  - Property (private - public)

- A minori ad maius
  - Life
  - Health
Harm

- What have we seen so far?
  - Property (private - public)

- A minori ad maius
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- Yet to come?
  - Consequential Damage
  - Pure Economic Loss
  - Ecosystem
Misconduct

- Failure to meet standard of behaviour
- Time frame
Misconduct

- Failure to meet standard of behaviour
- Time frame
- Likelihood and seriousness of damage
- Degree of danger
- Utility of conduct
- Learned Hand Formula
**Misconduct**

- Failure to meet standard of behaviour

- Time frame

- Likelihood and seriousness of damage
- Degree of danger
- Utility of conduct
- Learned Hand Formula

- Aggregate v Individual Level
Misconduct II

- Public authorization
  - Environmental impact assessment
  - Emission trading scheme

- Limits of authorization

- Policy question
Causation – Who?

- But-for test – conditio sine qua non formula
Causation – Who?

- But-for test – conditio sine qua non formula

- Alternative Causation
  - Joint and several liability
  - Minimal causation
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- But-for test – conditio sine qua non formula

- Alternative causation
  - Joint and several liability
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- DES cases
Causation – What?

- Global warming ≠ damage

- But-for test – conditio sine qua non formula: eg *Comer*
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- CO2: 9-26 % contribution to global warming
  - Alternative causation including hazard
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- Global warming ≠ damage

- But-for test – conditio sine qua non formula: eg *Comer*

- CO2: 9-26 % contribution to global warming
  - Alternative causation including hazard

- Lifetime 30-95 years
Conclusions

- CC policy is subject to judicial review.
- CC litigation in the US has died.
- CC litigation in Europe is in its infancy.
- CC has become a case for law, but probably not a case for tort law.