Directors' Responsibility towards Climate Change: Lessons from Recent Litigation

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Climate change concerns and the need for collective action occupied central attention at the meeting of G20 member states, resulting a fresh resolve to pursue low-carbon emissions, climate resilient and environmentally sustainable development pathways, ("**G20 New Delhi Leaders' Declaration**[1]"). At the same time, environmentalists, communities and NGOs have also been pursuing legal action against directors for either contributing to or failing to curb climate change, and this litigation has been increasing, in number of cases, scope of alleged climate-related failures, scope of businesses going much beyond the so-called Carbon Majors, type of litigants, and geographies.

This article discusses the various grounds on which lawsuits across the world have been pursued against corporations as well as directors, the various governing factors for determining a director as liable or not for climate change risks of the business activities of the company and the safeguards that the directors may install for escaping any potential liability.

Clearly, much of the present state of the environment and the fast depleting green cover are attributable to activities of the corporate sector, as it is the corporate sector, among the non-farming related activities, which should take the bulk of the blame. If companies take the blame for climate change, then the directors clearly take the blame for running such businesses. However, the issue is - is it a case of directors' personal liability for doing something that the directors were under a duty not to do, or averting something where such aversion could have been said to be a directorial duty, or is it a case of a business model where major stakeholders should take the burden? Results of litigation so far may not have been conclusive either in establishing directors' duties, or giving escape routes; however, it is clear that the trends in litigation have "turned the heat" on boardrooms[2].

Global trends in climate change litigation

The Global Climate Litigation Report: 2023 Status Review[3] by the UNEP reflects a continuous rise in the number of climate change cases filed over the years *(see figure 1)*. While the USA tops the chart in witnessing climate change litigation, countries such as Australia, the United Kingdom, Canada, Brazil, New

[1] https://www.g20.org/content/dam/gtwenty/gtwenty_new/document/G20-New-Delhi-Leaders-Declaration.pdf
[2] Also refer to Corporate climate change litigation: Increasing heat on boardrooms? here - https://vinodkothari.com/2022/09/climate-change-litigation-vis-a-vis-directors-liability/
[3] https://doi.org/10.59117/20.500.11822/43008

Zealand, Germany, France etc are in the other top 10 jurisdictions with the highest proportion of climate litigation.

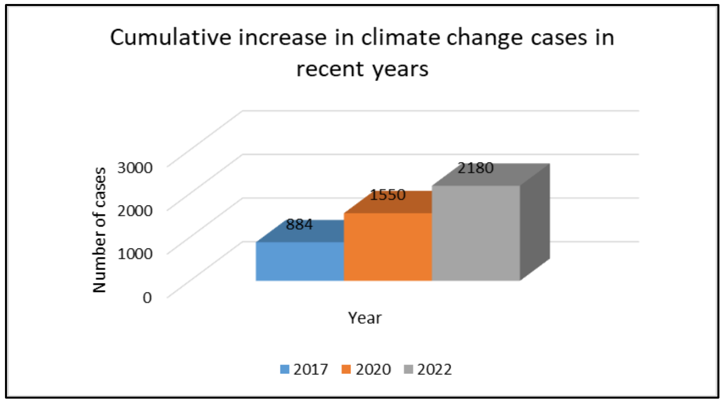

Figure 1: Increasing litigation on climate change
Source: Global Climate Litigation Report: 2023 Status Review

Another report, Global Trends in Climate Change Litigation: 2023 Snapshot[4] highlights an increasing number of cases being filed against the corporate actors. While brunt is borne by fossil fuel companies, there are other businesses also that face such litigation *(see figure 2)*, including financial institutions as ones providing the resources to the high emitters, thereby contributing to multiplying the emissions[5].

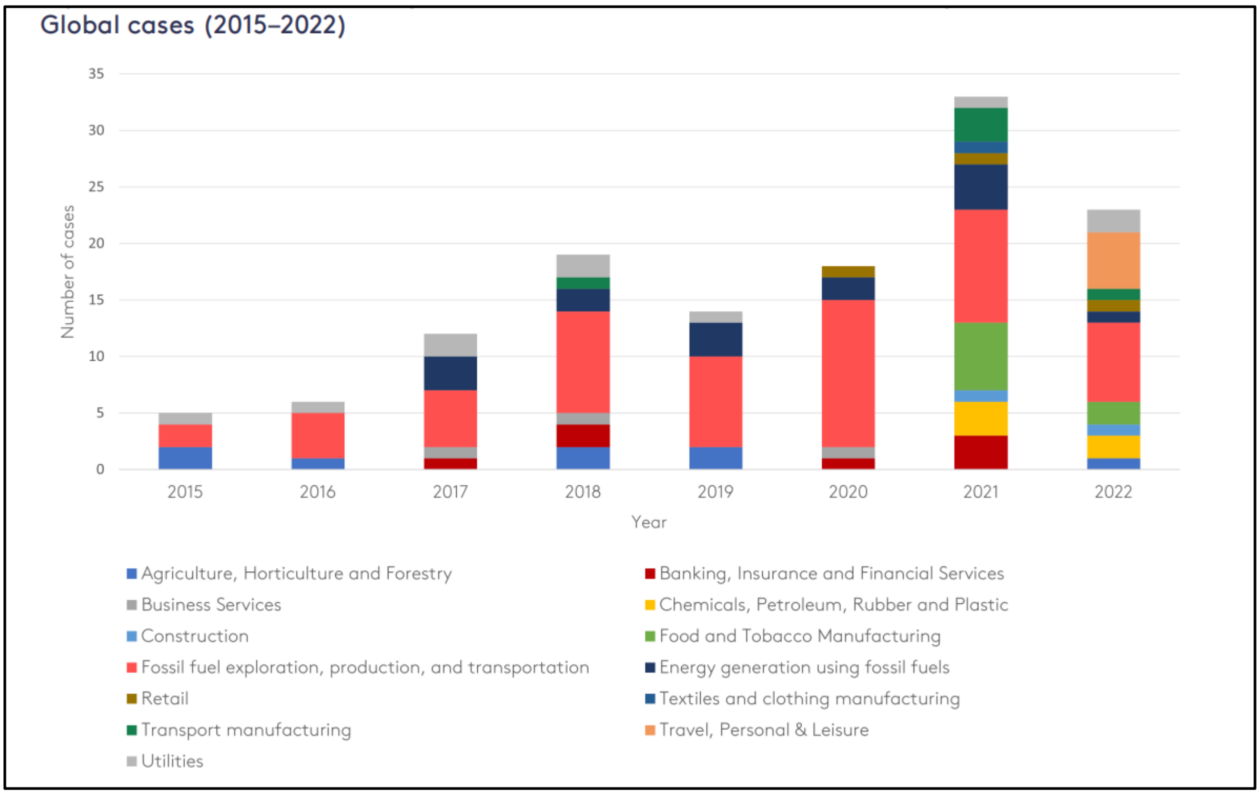

Figure 2: Distribution of climate change litigation across sectors
Source: Global Trends in Climate Change Litigation: 2023 Snapshot

[4] Global Trends in Climate Change Litigation: 2023 by Setzer J and Higham C
Snapshot. London: Grantham Research Institute on Climate Change and the Environment and
Centre for Climate Change Economics and Policy, London School of Economics and Political Science, See here - https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf

[5] Brulle and Downie, 2022

Categories of climate change litigation

There is no set categorisation of the climate change litigation, although various global reports have referred to their own classification on the subject. Further, it may happen that one suit is brought under two or more categories Presently, we categorize the climate change lawsuits under the following heads:

a. Statutory claims brought under environmental laws:

Relief can be sought against a violation of a company to comply with the statutory or regulatory requirements. Over the recent years, laws focussed on climate change setting out GHG emissions and reduction targets are evolving, such as the Climate Change Act 2022 of Australia[6], the Climate Change Act 2021 of Uganda[7], the Federal Climate Protection Act of Germany[8] etc.

In *re Friends of the Irish Environment v. The Government of Ireland & Ors*[9], the matter in question was the inconsistency of the National Mitigation Plan approved by the Irish Government with the Climate Action and Low Carbon Development Act 2015 of Ireland[10]. The Supreme Court, after considering the various aspects that the Plan is expected to cover in terms of the legal provisions, concluded that the Plan falls short of the specificity required by the statute and hence, the same be quashed.

However, most jurisdictions currently do not have climate change centric legislation in place. Having said that, evidence of resorting to environmental laws for holding one liable for climate action exists. For instance, in the US, climate change suits have been filed under the Clean Air Act, Clean Water Act, Endangered Species Act and Other Wildlife Protection Statutes etc[11]. That GHG emissions are a part of the meaning of "air pollutants" and thus covered by the provisions of Clean Air Act, was established by the US Supreme Court in the matter of *Massachusetts v. EPA* 549 U.S. 497 (2007)[12] in as early as 2007. In India, a number of statutes[13] deal with climate change through abatement of environmental pollution, regulation of emissions of air pollutants, efficient use of energy etc.

b. Human rights claims under constitutional law and conventions:

The constitution of various jurisdictions as well as various international conventions specify certain fundamental rights to a person, and some of these human rights have been the basis for the climate change litigation, and courts have, in several instances, recognised that climate negative action violates the rights available to the claimants under the constitution.

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6 https://www.legislation.gov.au/Details/C2022A00037

7 https://climate-laws.org/documents/national-climate-change-act-2021_0dc4?id=national-climate-change-act-2021_aeec

8 https://www.fao.org/faolex/results/details/en/c/LEX-FAOC192218/

9 https://www.courts.ie/view/judgments/681b8633-3f57-41b5-9362-8cbc8e7d9215/981c098a-462b-4a9a-9941-5d601903c9af/2020_IESC_49.pdf/pdf

10 https://revisedacts.lawreform.ie/eli/2015/act/46/revised/en/html

11 https://climatecasechart.com/us-climate-change-litigation/

12 https://climatecasechart.com/case/massachusetts-v-epa/

13 https://envis.haryana.gov.in/important-climate-change-laws-in-india/

A landmark ruling in this regard is in the matter of *Held v State*[14] wherein it was upheld that Montana's Constitution provides the “right to a clean and healthful environment”, climate is included in the “clean and healthful environment” and hence, allows the plaintiffs to obtain equitable relief before harm occurs. The claims of the plaintiffs were upheld, and the fossil-fuel based Acts that forbids consideration of impact of GHG emissions or climate change in the environmental reviews was held to be unconstitutional and permanently enjoined by the court.

The European Convention on the Protection of Human Rights and Fundamental Freedoms[15] (ECHR) requires the party states to protect the rights and freedoms established in the ECHR for their residents. Article 2 thereof provides the “right of life”, and Article 8 provides a “right to respect for private and family life”. In the matter of *Urgenda Foundation v. State of the Netherlands*[16], the Supreme Court upheld the decision of the Hague District Court[17] requiring the State to take action so as to ensure that the Dutch GHG emissions in the 2020 is atleast 25% lower than those in 1990, and do more to avert the imminent danger caused by climate change.

In *re Friends of the Irish Environment* (supra), the claimants had also alleged that the Plan is in violation of the “right of life” conferred under the Irish Constitution as well as the ECHR. While the claim of having a constitutional right could not survive for the procedural reasons and hence no conclusive decision has been made by the apex court on the same, the Supreme Court has offered its view on the question of having a “constitutional right to a healthy environment” drawing reference from the High Court’s decision in the matter of *Friends of the Irish Environment CLG v. Fingal County Council*[18]. In doing so, it also referred to the rights guaranteed by the constitution of other jurisdictions, and observed that no country other than India has incorporated environmental rights explicitly into the constitutional instruments. While the views offered by the Supreme Court prima facie suggest that there is no assertive right to a healthy environment guaranteed under the constitution, except if, and to the extent, it interferes with the right to life or the right to bodily integrity, it also acknowledged that *“in an appropriate case, it may well be that constitutional rights might play a role in environmental proceedings.”*

In India, the protection and improvement of the environment is included in the Directive Principles of the State Policy within the Constitution[19] itself, as well as a fundamental duty of all Indian citizens. The right to a clean and healthy environment has been recognized as the fundamental right under Article 21 of the Constitution of India in the matter of *Rural Litigation and Entitlement Kendra vs. State*, AIR 1988 SC 2187[20].

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[14] https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230814_docket-CDV-2020-307_order.pdf
[15] https://www.echr.coe.int/documents/d/echr/convention_ENG
[16] https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf
[17] https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2015/20150624_2015-HAZA-C0900456689_decision-1.pdf
[18] https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2017/20171121_2017-No.344-JR_judgment.pdf
[19] https://legislative.gov.in/constitution-of-india/
[20] https://indiankanoon.org/doc/1949293/

Claims for climate action as a part of human rights provided under the jurisdictional constitution or the ECHR have been witnessed in various other countries as well such as Switzerland, Belgium, Austria, France, Germany etc. As discussed in the case of *Friends of the Irish Environment* (supra), the right to a healthy environment is not vested upon through the constitutional instruments explicitly, however, this unwritten rule has been the basis of favourable decisions in some cases. In a move to explicitly recognise the right to a healthy environment, "the right to a clean, healthy and sustainable environment" has been recognised as 'a human right that is important for the enjoyment of human rights' by the UN Human Rights Council, as well as the UN General Assembly, in October 2021[21] and July 2022[22] respectively.

It is important to note that constitutional rights can be claimed only against the State or its instrumentality, and not against the private corporations.

c. Claims under law of tort:

An action against climate change may be resorted to based on the laws of tort. The grounds under which a tortious liability may be claimed against a contributor to the climate change problem, may be "public nuisance" and "negligence". In the context of climate change, a new ground, i.e., the breach of the duty to cease contributing to climate change is raised as a ground for initiating legal action against the defendants (see for instance, in *Smith v Fonterra*[23] discussed below). The claims under tort suffer from a fundamental requirement of "special damage rule", since climate change is a global problem, and the claimants have not been able to establish how the same has caused damages particular to the claimant as against the wider public community.

The principles have been elaborately discussed by the Federal Court of Australia in the matter of *Minister for the Environment v Sharma* [2022] FCAFC 35[24] in a 282-pager judgment, and the following elements are considered to be important in order to impose liability on the basis of a duty of care:

- **Reasonable foreseeability**: In order to impose a duty, the foreseeable connection of an act and any possible future damage is critical. Hence, in order to impose liability on the basis of a duty of care, it is necessary that the risk of damage caused by the act (or failure to act) is foreseeable.

- **Control over the harm**: The defendant, in the instant case, had control over any risk created by the approval of the extension of mine, and hence, a control over a tiny increase in the climate change risk, but the control over the harm is almost non-existent or extremely faint at the best. Hence, it is not only the "existence of control" but also the "extent of control" that is relevant for initiating an action against the defendant.

- **Vulnerability of claimants**: The rule of "special damage" prevails, and there is no way to establish the claimants are, in any way, more vulnerable than any other person who will be alive in future times at which the harm is posited.

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[21] https://digitallibrary.un.org/record/3945636?ln=en
[22] https://digitallibrary.un.org/record/3983329?ln=en
[23] https://climatecasechart.com/non-us-case/smith-v-fonterra-co-operative-group-limited/
[24] https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220315_VID-389-of-2021-2021-FCA-560-2021-FCA-774-2022-FCAFC-35-2022-FCAFC-65_decision.pdf

Thus, in order for a tort liability claim to survive, it is necessary that the alleged harm is reasonably foreseeable as well as there is a proximity between the respondent's actions and the harms caused to the claimants. While the foreseeability of climate change consequences are no more a matter of dispute, the latter is difficult to establish and hence, the duty of care under the tort laws.

In the context of corporations, the tortious claim for a duty of care may be coupled with the duty of care imposed on the directors under the applicable corporate laws (refer discussion below).

d. Duties of directors under corporate laws:

The directors have a fiduciary duty towards the corporation, the shareholders and other stakeholders. It is the directors who are generally recognised as "officers-in-default" and are responsible for any breach of law by the company. Hence, the directors are required to ensure that the operations of the company are conducted in accordance with the applicable provisions of law.

Apart from the compliance with specified provisions of applicable laws, the corporate law principles vest upon the directors, a general duty of reasonable care and due diligence. For instance, section 174 of the Companies Act 2006[25] (UK) requires the directors of a company to exercise reasonable care, skill and diligence. Similarly, section 157 of the Companies Act 1967[26] (Singapore) expects a director to use reasonable diligence in the discharge of the duties of his or her office. Section 180 of the Corporations Act, 2001[27] (Australia) requires a director to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise holding such a position.

In India, section 166 of the Companies Act, 2013 that lays down the duties of directors requires a director to *exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment*. It also requires the director to act in good faith to promote the objects of the company for the benefit of its members, and *"in the best interests of the company, its employees, the shareholders, the community and for the protection of the environment."*

While historically, the climate change litigation was being witnessed primarily against the government, lately, the corporations and their directors are increasingly being captivated for actions constituting the cause of climate change[28]. Below we discuss the cases being filed against corporations, including those against the directors.

Climate change litigation against corporations

As discussed above, a number of climate change cases are being filed against the corporations operating in almost all categories of business sectors. The cause of action is not limited to the direct consequences of high-emitting activities of companies, but extends to cover instances of failure to integrate climate

[25] https://www.legislation.gov.uk/ukpga/2006/46/section/174
[26] https://sso.agc.gov.sg/Act/CoA1967?ProvIds=pr157-
[27] https://www.legislation.gov.au/Details/C2019C00216/Html/Volume_1#_Toc13831444
[28] See the data for cases against government vis-a-vis corporations here - https://climatecasechart.com/non-us-climate-change-litigation/

considerations into decision-making, or indirectly amplifying climate risks through investments in or financing of climate-negative activities etc. Greenwashing or climate-washing is another important cause of action that is increasingly witnessing climate change suits.

While a regulatory action for breach of compliance with applicable environmental laws, including greenwashing claims stand against the corporations, directors are being presumed to have a general duty towards considering climate change risks of the business activities and take steps towards avoidance, reduction and ultimately, mitigation of the activities resulting into an adverse impact on the climate change. Below we discuss the same in light of some recent climate change litigation.

Duty of parent for activities of group

In *Milieudefensie et al. v. Royal Dutch Shell plc.*[29], the Hague District Court, Netherlands ordered the respondent to reduce its GHG emissions at a consolidated level, on the ground of "duty of care" pursuant to Book 6 Section 162 Dutch Civil Code. The Court interpreted the duty of care in reference to the UN Guiding Principles, which puts a responsibility on the companies to (i) identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships, and (ii) take 'appropriate action' on the basis of their findings and assessments.

The decision of the Hague District Court, currently appealed by the respondent, is significant not only because of its pioneering in requiring a private company to meet its reduction obligations in line with the Paris Agreement, and recognising a duty to mitigate emissions, but also since it enforces the duty of care on the policy-maker, as against the implementer.

> *"The court is of the opinion that* ***much may be expected of RDS****. RDS heads the Shell group, which consists of about 1,100 companies, and operates in 160 4.4.17. 4.4.18. countries all over the world. It* ***has a policy-setting position in the Shell group*** *(see 4.4 (1.)), which is a* ***major player on the worldwide market of fossil fuels and is responsible for significant CO2 emissions,*** *which exceed the emissions of many states and which contributes towards global warming and a dangerous climate change in the Netherlands and in the Wadden region (see 4.4 (2.)) with serious and irreversible consequences and risks for the human rights of Dutch residents and the inhabitants of the Wadden region (see 4.4 (3.) and (4.))."*

The UK Supreme Court in *Vedanta Resources PLC and another v. Lungowe and Others* [2019] UKSC 20[30], has indicated that a duty of care can exist between a parent company and those affected by the operations of the parent's subsidiaries, and the existence of such duty depends on the facts of each case, and mostly, on the **extent of intervention** of the parent in the activities of the subsidiary.

> *"…Vedanta may fairly be said to have asserted its own assumption of* ***responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries****, and in particular the operations at the Mine, and* ***not merely to have laid***

[29] https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf
[30] https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf

> ***down but also implemented*** *those standards* ***by training, monitoring and enforcement****, as sufficient on their own to show that it is well arguable that* ***a sufficient level of intervention by Vedanta in the conduct of operations at the Mine may be demonstrable*** *at trial, after full disclosure of the relevant internal documents of Vedanta and KCM, and of communications passing between them."*

The Court held that the duty of care ***"...depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary."***

Duty to cease contributing to climate change

For companies operating in energy-intensive sectors, the management of business induced climate risk is all the more important, since they are direct contributors to climate change concerns. Climate litigation has been noted against the breach of duty to cease contribution to climate change. The claims are generally brought under torts law or other environmental protection laws. While there are no positive results to date, mostly on account of procedural reasons, such claims pave the way for future climate change litigation in times to come.

For instance, in Germany, a number of cases have been witnessed against the automobile manufacturers seeking to compel them to strengthen their carbon emissions target and to cease production of fossil fuel-emitting cars by 2030, see *Kaiser, et al. v. Volkswagen AG*[31], *Deutsche Umwelthilfe (DUH) v. Bayerische Motoren Werke AG (BMW)*[32] and *Deutsche Umwelthilfe (DUH) v. Mercedes-Benz AG*[33]. None of these claims could succeed on account of procedural reasons including uncertainty of the manner and extent in which the automobile manufacturers' activities have an impact on the claimants. Appeals have been filed against the decision of lower courts and are currently pending for verdict.

In *Smith v Fonterra Co-Operative Group Ltd*[34] before the New Zealand High Court, a suit was filed on the grounds of public nuisance, negligence and a duty, cognisable at law, to cease contributing to damage to the climate system. While the New Zealand High Court striked off the first two grounds, the third has been accepted on the grounds that this may further evolve the common laws. The first two grounds had been striked off in view of the absence of a direct nexus between the defendant's activities and the counter party's claims, and observing that the same may result in the introduction of an "ad hoc" and "arbitrary regime", if a view to the contrary is taken. Cross-appeals have been filed, and the matter is currently pending before the Supreme Court[35] for decision of the admissibility of the cause of action.

[31] https://climatecasechart.com/non-us-case/kaiser-et-al-v-volkswagen-ag/
[32] http://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-bmw/
[33] https://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-mercedes-benz-ag/
[34] https://climatecasechart.com/non-us-case/smith-v-fonterra-co-operative-group-limited/
[35] https://www.courtsofnz.govt.nz/assets/cases/Case-synopses/NZSC/20220808-Case-Synposis-Smith-v-Fonterra.pdf

Greenwashing of climate actions

Greenwashing or climate-washing is one of the major climate issues faced by today's world. Greenwashing promotes false solutions to the climate crisis thereby distracting and ultimately delaying credible action in respect of the same. Considering the serious threats that greenwashing promises to the cause of a positive climate action, the UN Secretary General established a High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities that has submitted its recommendations on tackling greenwashing in its report titled Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions[36].

In the past few years, litigation has been witnessed around the greenwashing practices of corporations in their public disclosures and advertisements. Majority of these claims have been filed under the prevailing competition or unfair trade practice laws.

In *re Verbraucherzentrale Baden-Württemberg e.V. v. Commerz Real Fund Management S.à.r.l.*[37] (Germany), a suit was filed against the misleading advertising statement of an investment product having a positive effect on the personal carbon footprint. The Regional Court of Stuttgart held the respondent guilty of misleading advertisement under the Act against Unfair Competition.

In *KlimaAllianz v. FIFA*[38] (Switzerland) too, a claim filed against the use of absolute statements in commercial communications that represent the 2022 FIFA World Cup in Qatar as climate or carbon-neutral was upheld. The Swiss Fair Advertising Commission has recommended FIFA to refrain from making unsubstantiated claims in the future, and reiterated that strict standards apply when advertising carbon neutrality and that factual claims must be accurate and not misleading, which extends to environmental claims. Similar lawsuits have been filed against misleading advertisements such as *FossielVrij NL v. KLM*[39], *Lawyers for Climate Action and others v. Firstgas Group*[40], *Tesco Stores Ltd*[41] etc.

Responsibility of financial institutions - "turning off" the taps

A trend is noticeable in filing of climate change claims against financial institutions. While the business activities of a financial institution may not directly have a deteriorating impact on climate change, however, they are still major contributors to climate change concerns in regard to their investment activities and provision of funding to major GHG emitters.

In re ClientEarth v. Belgian National Bank[42], a suit was filed against the central bank on account of its failure to meet environmental, climate, and human rights requirements while making investments in fossil

[36] https://www.un.org/sites/un2.un.org/files/high-level_expert_group_n7b.pdf
[37] http://climatecasechart.com/non-us-case/verbraucherzentrale-baden-wurttemberg-ev-v-commerz-real-fund-management-sarl/
[38] http://climatecasechart.com/non-us-case/klimaallianz-v-fifa/
[39] http://climatecasechart.com/non-us-case/fossielvrij-nl-v-klm/
[40] https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210706_14297_decision.pdf
[41] https://www.asa.org.uk/rulings/tesco-stores-ltd-g21-1128264-tesco-stores-ltd.html
[42] https://climatecasechart.com/non-us-case/clientearth-v-belgian-national-bank/

fuel and other emission intensive companies. The suit was later withdrawn[43] by the claimant after the European Central Bank accepted its legal obligations to consider the climate in quantitative easing reforms.

In Korea, *re Kang et al. v. KSURE and KEXIM*[44], a suit was filed seeking injunction against the defendants from providing financial support to the development project for the Barossa fossil gas reserve. The application has been dismissed by a court in South Korea.

In *McVeigh v. Retail Employees Superannuation Trust*[45], a suit was filed against an Australian pension fund on account of failure to provide information related to climate change business risks and any plans to address those risks. The matter reached a settlement when the Australian pension fund agreed to incorporate climate change financial risks in its investments and implement a net-zero by 2050 carbon footprint goal. Pertinently, the defendant (Retail Employees Superannuation Trust) duly acknowledged the link of between climate change and financial markets and the impact of climate change on financial markets as climate change is *"a material, direct and current financial risk to the superannuation fund across many risk categories, including investment, market, reputational, strategic, governance and third-party risks."* Hence, a settlement reached between the plaintiff and the defendant.

Other instances of climate action suits against financing of emission generating activities include *Friends of the Earth v. UK Export Finance*[46] (dismissed by the UK Supreme Court), *Conectas Direitos Humanos v. BNDES and BNDESPAR*[47] (Brazil) etc.

Duty of care and due diligence on directors

As discussed above, across jurisdictions, directors pose a duty of exercising due and reasonable care in their conduct. This duty of care, as argued by the claimants, requires the directors of a company to adopt adequate measures for management of climate related risks.

In *ClientEarth v. Shell Board of Directors*[48], a claim was filed by ClientEarth in the capacity of a shareholder of Shell, alleging that the directors have breached the duty to promote the success of Shell and the duty to exercise reasonable care, skill and diligence in terms of section 172 and 174 of the Companies Act, 2006. While the case has been dismissed by the High Court of London, on the grounds of the litigant not having a *prima facie* case for the maintenance of the suit, a few important considerations may be noted. The Hon'ble Justice, drawing reference from *Regentcrest Plc v Cohen*[49] [2001] 2 BCLC 80 observed that the test for breach u/s 172 is a subjective one, and requires proof of conduct other than in good faith. Irrationality of a decision may be one of the grounds for assessing the presence of good faith, but does not constitute a ground of breach on its own. It is important to note that the present case was not based on the

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43 https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20221129_2138C_press-release.pdf

44 https://climatecasechart.com/non-us-case/kand-v-ksureandkexim/

45 http://climatecasechart.com/non-us-case/mcveigh-v-retail-employees-superannuation-trust/

46 https://climatecasechart.com/non-us-case/friends-of-the-earth-v-uk-export-finance/

47 http://climatecasechart.com/non-us-case/conectas-direitos-humanos-v-bndes-and-bndespar/

48 https://www.judiciary.uk/wp-content/uploads/2023/07/ClientEarth-v-Shell-judgment-240723.pdf

49

absence of a climate risk mitigation in Shell, but the allegation remains that the strategies are not adequate to meet the net-zero target by Shell, in alignment with the Paris Agreement.

The High Court also upheld the deeming commercial prudency of the board and observed,

> *"the law* ***respects the autonomy of the decision making of the Directors on commercial issues*** *and* ***their judgments as to how best to achieve results which are in the best interests of their members as a whole.***
>
> *XXX*
>
> *However,* ***the evidence does not engage with the issue of how the Directors are said to have gone so wrong in their balancing and weighing of the many factors which should go into their consideration of how to deal with climate risk,*** *amongst the many other risks to which Shell's business will inevitably be exposed,* ***that no reasonable director could properly have adopted the approach that they have****. This is a fundamental defect in ClientEarth's case because it* ***ignores the fact that the management of a business of the size and complexity of that of Shell will require the Directors to take into account a range of competing considerations, the proper balancing of which is a classic management decision with which the court is ill-equipped to interfere.****"*

Although an appeal was filed by ClientEarth against the High Court's decision, the UK Court of Appeal has declined to hear ClientEarth's case[50].

In Italy, a suit *Rete Legalità per il Clima (Legality for Climate Network) and others v. ENI*[51] has been filed alleging the inadequacy of the business plan adopted by a company as compared to its commitment to net zero emissions. The matter is currently proposed for mediation.

Are directors liable to consider climate change risks in decision-making?

While there is a noticeable surge in bringing climate change suits against corporations and directors directly, not much success has been achieved in rendering them liable, primarily due to the non- maintainability of the suits on procedural grounds. Although the attempts at initiating lawsuits in making a corporation and/ or its directors liable for managing climate risk may *prima facie* seem to be "not-so-successful", the success of these suits should not be based on the legal liabilities that could be enforced through courts, but the long way that has been covered in creating an awareness on the subject.

In the context of the 'duty of care and diligence' imposed upon the directors u/s 180 of the Corporations Act 2001, a legal opinion[52] was given on directors' duties and climate change in as early as 2016 ('Hutley Opinion'). The Hutley Opinion concludes that directors failing to consider climate change risks could be

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[50] https://www.clientearth.org/latest/press-office/press/court-fails-to-engage-with-key-climate-risk-arguments-in-shell-directors-case-dismissal/

[51] https://climatecasechart.com/non-us-case/rete-legalita-per-il-clima-legality-for-climate-network-and-others-v-eni/

[52] Climate Change and Directors' Duties, October 2016, Noel Hutley SC and Sebastian Hartford Davis see here - https://cpd.org.au/wp-content/uploads/2016/10/Legal-Opinion-on-Climate-Change-and-Directors-Duties.pdf

found liable for breaching their duty of care and diligence in the future. A 2021 update[53] to the earlier version of the Hutley Opinion further states that the standard of care to be exercised by the directors with respect to climate change has risen and continues to rise. The opinion also stresses on the need for having reasonable grounds to support the representations contained in the "net zero" commitments of the companies.

> *"38. It follows that* ***companies making net zero commitments require "reasonable grounds" to support the express and implied representations contained within a net zero commitment.*** *Moreover, reasonable grounds are required at the time of making a net zero commitment. That is,* ***companies wishing to commit to net zero must have a reasonable basis now for believing that they can achieve that commitment****.*
>
> *39. Consequently, it is* ***foreseeable that a company (and its directors) could be found to have engaged in misleading or deceptive conduct by not having had reasonable grounds to support the express and implied representations contained within its net zero commitment. Directors may also face personal liability as a result of "stepping stone liability"****, where,* ***by facilitating the making of the misleading representation, they will be found to have breached their own duties of care****."*

The Hutley Opinion sets out the broad principles on the basis of which the duty of care of a director may be understood. This requires comparison of the conduct of the director against an objective standard, that is, what a reasonable person would have done in similar circumstances. Further, such a duty is owed to the company, and therefore, extends to the shareholders, employees, and other stakeholders of the company, to the extent the same is in relation to an activity of the company.

Directors of a company are expected to identify and disclose the type of risks faced by the company, and in this context, the opinion sets out how climate change risk is a "foreseeable" risk making it all the more difficult to escape liability.

A paper[54] published by CCLI in October 2021 studies the fiduciary duties of directors in the United States and its relationship with climate change. The Delaware law imposes two primary fiduciary duties on directors and officers: a duty of loyalty and a duty of care. The duty of loyalty, in turn, contains a duty of oversight over the operations of the company. In the context of climate change, the duty of oversight may have an application in the following cases -

a. **Failure to implement climate risk controls** - This would constitute a failure to implement any adequate system of controls or information reporting to monitor climate risks at the board level, and a failure to institute company-wide climate-risk planning and mitigation strategies. Here, it is important to note that the trigger point for a potential breach of duty is not the "inadequacy" but the "absence" of having any formal mechanism in place.

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[53] https://cpd.org.au/wp-content/uploads/2021/04/Further-Supplementary-Opinion-2021-3.pdf

[54] Fiduciary Duties and Climate Change in the United States, Sarah Barker, Cynthia Williams and Alex Cooper, October 2021, published by Commonwealth Climate and Law Initiatives see here - https://ccli.ubc.ca/wp-content/uploads/2021/12/Fiduciary-duties-and-climate-change-in-the-United-States.pdf

b. **Failure to monitor mission-critical regulatory compliance -** This would include a failure to act by the board in response to a potential breach of compliance with either climate change specific regulatory requirements or with broader regulatory obligations where a climate-related default presents a material risk of breach or harm.

c. **Failure to monitor mission-critical business risks -** Directors may face a risk of potential liability, on account of failure to monitor red flags concerning major business risks that impact the core of the company's business.

The director's duties do not conclude on having proper systems for monitoring and tracking climate risk related red flags, it extends to the appropriate actions taken by directors to investigate the company's exposure to the risk and the adequacy of its internal controls in relation to the risk.

The duty of care requires the board to be adequately informed of and make a conscious decision in relation to the matter in question, and exercise independent judgment and critical evaluation. It has to be noted that the duty of care does not impose liability on account of incorrect commercial judgments *per se* but on the basis of the procedural efforts applied by a director in the information gathering and deliberation process for assessing climate risks. Having said that, a claim for breach of duty of care may arise on the grounds of a complete failure to consider climate related risks, or inadequate/ deficient efforts towards consideration of such risks.

A white paper[55] on director's liability and climate risk in Singapore of April 2021 applies the duties of directors in the context of climate risk. The study observes that *"where **climate-related risks have or are likely to have a material impact on corporate interest**, and **if directors deliberately or inadvertently fail to properly consider these risks** -- which would **include failing to give due weight to climate-related risks after considering them or failing to take actions to address the risks** -- they will **not meet the objective element of the bona fide aspect of the best interest duty**."*

Another legal opinion[56] published by CCLI in September 2021 studies the director's obligations to consider climate change related risks in the context of India. The opinion concludes that the directors of companies must have regard to climate change-related risks in the course of discharging their duties under section 166 of the Companies Act, 2013, taking reference from the Supreme Court judgment in the matter of *M.K. Ranjitsinh & Ors. v. Union of India & Ors.*[57], also known as the Great Indian Bustard case. Further, directors have a duty towards reviewing and adopting a proper risk management policy, which should also include the climate change related risks.

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[55] Directors' Liability and Climate Risk: White Paper on Singapore, Dr Ernest Lim Associate Professor Faculty of Law, National University of Singapore, April 2021 published by CCLI see here - https://ccli.ubc.ca/wp-content/uploads/2021/04/Directors-liability-and-climate-risk-White-paper-on-Singapore.pdf

[56] Directors' obligations to consider climate change-related risk in India, Shyam Divan, Sugandha Yadav & Ria Singh Sawhney, 7 September 2021, published by Commonwealth Climate and Law Initiatives see here - https://ccli.ubc.ca/wp-content/uploads/2021/09/CCLI_Legal_Opinion_India_Directors_Duties.pdf

[57] https://main.sci.gov.in/supremecourt/2019/20754/20754_2019_31_1502_27629_Judgement_19-Apr-2021.pdf

The opinion also anticipates climate litigation in India in the following forms, such as:

a. Failure of duty of directors under section 166 of the Companies Act, 2013
b. Class action suit by shareholders under section 245 of the Companies Act 2013
c. Failure to disclose material information in terms of Regulation 30 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015
d. Prosecutions under general environmental laws and public interest litigation

A June, 2021 report titled "Primer on Climate Change: Directors' Duties and Disclosure Obligations[58]" also provides a jurisdictional overview of directors duties in the context of climate change across 21 jurisdictions around the world.

Regulatory requirements fostering consideration of climate risk by companies

In recent times, regulators have been increasingly focussed on addressing climate change and sustainability requirements through regulatory enforcement. Various jurisdictions have mandated sustainability related disclosures, particularly for publicly traded companies. Through such a "disclosure-based regime", a responsibility is imposed on the board of directors of the companies to consider and report on the impact of their business practices on climate change.

For instance, in UK, the Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022[59] require disclosure of the following information in line with the TCFD recommendations[60]:

*(a) a description of the **company's governance arrangements** in relation to **assessing and managing climate-related risks and opportunities**;*
*(b) a description of how the company **identifies, assesses, and manages climate-related risks and opportunities**;*
*(c) a description of how **processes for identifying, assessing, and managing climate-related risks are integrated into the company's overall risk management process**;*
(d) a description of—
   *(i) the **principal climate-related risks and opportunities arising in connection with the company's operations**, and*
   *(ii) the **time periods by reference** to which those risks and opportunities are assessed;*
*(e) a description of the **actual and potential impacts of the principal climate-related risks and opportunities on the company's business model and strategy**;*
*(f) an analysis of the **resilience of the company's business model and strategy**, taking into consideration different climate-related scenarios;*

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[58] Primer on Climate Change: Directors' Duties and Disclosure Obligations, In support of the Principles for Effective Climate Governance June 2021 in collaboration with CCLI see here - https://www.tcfdhub.org/wp-content/uploads/2021/06/Primer_on_Climate_Change_Directors_Duties_and_Disclosure_Obligations_CGI_CCLI.pdf
[59] https://www.legislation.gov.uk/uksi/2022/31/regulation/4/made
[60] https://www.fsb-tcfd.org/recommendations/

(g) *a description of the* ***targets used by the company to manage climate-related risks and to realise climate-related opportunities and of performance against those targets****; and*

(h) *a description of the* **key performance indicators used to assess progress against targets** *used to manage climate-related risks and realise climate-related opportunities and of the calculations on which those key performance indicators are based."*

Stock exchanges such as the Singapore Exchange[61] (SGX) and the Hong Kong Exchanges and Clearing Limited[62] (HKEX) have also adopted sustainability disclosures in line with the TCFD recommendations.

In India, the Business Responsibility and Sustainability Reporting (BRSR) framework is currently applicable to top 1000 listed entities on the basis of market capitalization. The same contains disclosure of information on various ESG aspects, including disclosure on emissions and measures taken towards climate change. Recently, quantifiable parameters in the name of BRSR Core[63] has been notified, and the same is also being supplemented with the requirement of mandatory attestation of the disclosures in a phased manner. Further, in the context of listed entities, the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 explicitly requires the risk identification framework, a part of the overall risk management policy of the company to include a framework for identification of sustainability, particularly, ESG related risks.

The recently revised G20/OECD Principles of Corporate Governance[64], endorsed in September 2023 also recommends the board to ensure that material sustainability matters are considered in the review and assessment of risk management policies and procedures of a company.

Hence, it is evident that the law puts upon the directors a responsibility for identification and assessment of climate-related risks, and disclose them in their sustainability reports. The assessment of sustainability-related risks, including the climate change risks, is an important component of the overall risk management strategy of an organization.

Putting guardrails for climate change claims against directors

There is no denying the fact that directors have, in reality, a duty towards assessment of the impact of the conduct of the company on climate change, and take appropriate measures to mitigate and reduce the climate risks. As regards the enforceability of general duty of care and due diligence of a director, the only defence available with a director may be on the basis of "good faith", in which case, an actual loss does not render the director liable to make the same good. Addressing climate change at board level will require

[61] https://www.sgx.com/sustainable-finance/sustainability-reporting

[62] https://www.hkex.com.hk/-/media/hkex-market/listing/rules-and-guidance/listing-rules-contingency/main-board-listing-rules/appendices/appendix_27

[63] https://www.sebi.gov.in/legal/circulars/jul-2023/brsr-core-framework-for-assurance-and-esg-disclosures-for-value-chain_73854.html

[64] OECD (2023), G20/OECD Principles of Corporate Governance 2023, OECD Publishing, Paris, https://doi.org/10.1787/ed750b30-en

inclusion of the same in the overall corporate governance framework of the entity. There exists a relation between a director's standard of conduct and the potential exposure to climate change claims *(see figure 3)*.

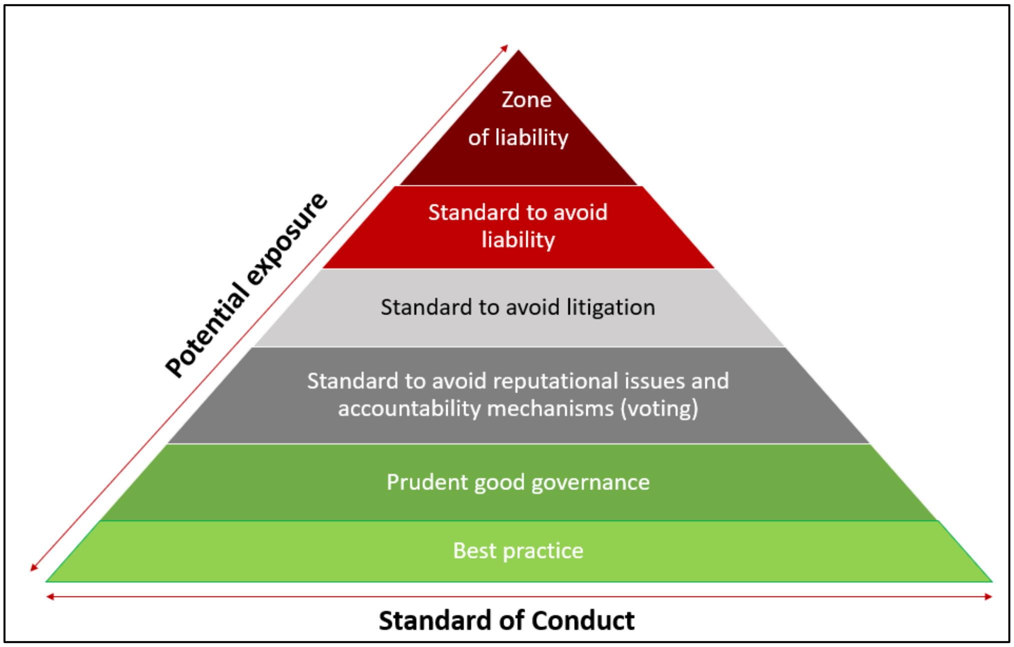

Figure 3: Relation between a director's standard of conduct and potential exposure to liability

Inference may be drawn from the legal opinions on directors' duties towards climate change risks of an entity as cited above.

1. The directors should take appropriate steps to **remain informed of the climate related risks** to their business, the potential of materialization of such risk, and impact thereto.
2. The company should have a **system in place to monitor the risks arising from climate change**, and directors should **consider these risks when making corporate decisions**.
3. The directors should engage in **balancing the foreseeable risk of harm to the company against the potential benefits that might accrue**, and act based upon a rational and informed assessment of the company's best interests.
4. The directors should engage the **services of independent experts wherever required**.
5. The directors should **develop a net zero strategy integrated with the operational strategy** of the company.
6. The strategy should **document the drivers of the company's ability to decarbonise, and the assumptions underpinning that strategy**. It should also explain the type of emissions that it proposes to reduce, and the relevant time frames.
7. Any **developments in the net zero strategy** of the company, such as alteration, non-fulfilment, impacted by supervening circumstances or untenable should be **promptly disclosed to avoid claims of misleading or deceptive information including greenwashing**.
8. **Proper and adequate disclosures** should be made with regard to the potential climate risks and the manner in which the company manages/ intends to manage such risks.

A 2019 paper on setting up effective climate governance on corporate boards[65] also puts forward some guiding principles and relevant questions to this effect. It recommends the following:

1. **Accountability -** The board should be made accountable for the company's long term resilience with respect to potential shifts in the business landscape that may result from climate change. This would require the board members to consider risks and opportunities associated with climate change while making decisions.
2. **Experience -** The board composition should include sufficiently diverse directors in knowledge, skills, experience and background to effectively debate and take decisions informed by an awareness and understanding of climate-related threats and opportunities.
3. **Board and committees structure -** The board should determine the most effective way to integrate climate considerations into its structure and committees, such that sufficient attention is given to climate considerations and allow for effective communication with the management.
4. **Assessment of risk and opportunities -** The materiality of the climate-related risks and opportunities in the short, medium and long term should be assessed by the management on an ongoing basis. The organization's actions and responses to climate should be proportionate to the assessed materiality.
5. **Integration of climate change consideration in organisation's strategy -** The climate change considerations should be included in the strategic investment planning and decision-making processes and is embedded into the management of risk and opportunities across the organization.
6. **Linking executive compensation with climate targets -** The board should ensure that executive incentives are aligned to promote the long-term prosperity of the company and may include climate-related targets and indicators, where appropriate.
7. **Transparency and disclosure -** The board should ensure that material climate-related risks, opportunities and strategic decisions are consistently and transparently disclosed to all stakeholders – particularly to investors, through annual reports and accounts etc.
8. **Engagement with external parties -** The board should engage in communication with peers, industry groups, policy-makers, investors and other stakeholders to encourage the sharing of methodologies and to stay informed about the latest climate-relevant risks, regulatory requirements etc.

Concluding remarks

It does not seem that directors can escape from their obligations of considering climate related risks and opportunities in their business decisions and conduct of the organization. While a number of climate cases currently could not be successful or otherwise in appeal or pending for final decision, there is a constant surge in the number of cases. Climate change action is constantly gaining momentum and over time, has aroused the consciousness of all sorts of stakeholders, including shareholders/ investors and is not restricted to only environmentalists or NGOs.

[65] How to Set Up Effective Climate Governance on Corporate Boards Guiding principles and questions, January 2019 by World Economic Forum in consultation with PwC. See here - https://www3.weforum.org/docs/WEF_Creating_effective_climate_governance_on_corporate_boards.pdf

Having said that, a global survey titled 2023 Global Directors' Liability Survey Report[66] suggests "climate change" as one that is being gradually considered by the large businesses as a significant risk, although small businesses may not still be taking cognisance of the same. However, the same does seem to be a matter of time; with the increasing awareness towards climate change and its consequences, no business seems to be shielded from the adverse consequences of not considering climate change. The directors need to take proper steps in the identification and assessment of climate related risks and opportunities, and take appropriate corrective action. It is only the director's awareness and consciousness towards the cause of climate action that may act as a safeguard against the imposition of personal liability, on account of failure of climate related actions.

[66] Directors and Officers Liability Survey 2023 by Directors and Officers Liability Survey 2023 see here - https://www.wtwco.com/en-se/insights/2023/03/directors-and-officers-liability-survey-2023