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Brick Court Chambers

14 April 2016

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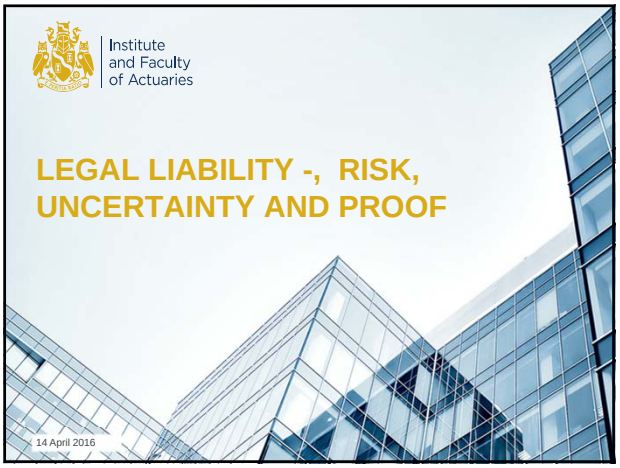
LEGAL LIABILITY -, RISK, UNCERTAINTY AND PROOF



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THE MYLES ALLEN RISK QUADRANT, A FEW YEARS AGO

	LIKELY DAMAGE SLIGHT	LIKELY DAMAGE SEVERE
REGULATORY SCHEME EFFECTIVE	LOW RISK OF LIABILITY	MEDIUM RISK OF LIABILITY
REGULATORY REGIME INEFFECTIVE	MEDIUM RISK OF LIABILITY	HIGH RISK OF LIABILITY

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WHAT LIABILITY

- Who is liable ?
- To whom ?
- For What ?

THE BASIC APPROACH

- Climate change has caused and will cause damage to people their property and their environment
- People cause climate change
- One set of people looking to another for recompense or to guard against future harm – accountability, responsibility, liability
- PLUS all kinds of corporate risk (operational, financial, regulatory, reputational, “stranded assets”) from climate change, even to those not accused of causing it

Claimants (1)

- Anyone affected by
  - Flooding
  - Sea level rise
  - Extreme weather events
  - Drought
  - A wide range of changes in temperature, precipitation and seasonality
  - No netting off of benefits ?

Defendants

- States/ Governments (Urgenda) and public bodies
- Companies
- Insurers
- Investors
- Lenders
- Directors and Officers
- Auditors

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Claimants (2)

- In actions against corporations
  - Regulators
  - Shareholders/investors
  - Consumer groups
  - Environmentalists/NGOs

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Types of claim

- Convergence of private and public law concepts
- Principles of tort and compensation for harm
- Misleading of shareholders, regulators or consumers over risk
- Failure to avoid corporate risk
- Secondary liability (USACE – Hurricane Katrina)

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THE KEY – CAUSATION AND ATTRIBUTION

- What are the causes of climate change ?
- What damage does climate change cause ?

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A STEEP LEARNING CURVE FOR THE LAW

- Common law notions of proof “on balance of probabilities” or “beyond reasonable doubt”
- Concerned with credibility of witnesses and whether
  - D was driving on the left or right and side of the road
  - Whether it was A or B who stabbed C
- Dislike of statistical evidence (similar fact evidence not statistical)
- Will allow some simple probability
  - Loss of a chance to win a beauty contest
  - Chance of developing arthritis

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HOW TO APPLY THIS TO CLIMATE CHANGE ?

- All about risk, statistical analysis, probability and confidence levels
- Some concepts easier (sea level rise)
- Others more difficult
  - Change on a local level (as opposed to mean global temperature)
  - “cause” of extreme weather events – if they double in frequency does it mean that on balance of probability they are caused by climate change
  - Novel approaches of causing “material increase in risk”

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OTHER PROBLEMS OF ATTRIBUTION

- If 10 actors collectively cause a 30cm sea level rise, can each say that their contribution was minimal ? (English case of the wheelbarrows), market share liability etc
- Can all or any say that it was only the last 2cms which breached the sea defences ?
- Temporal problems – lag between emissions, effect and reabsorption

CONCLUSION AND CHALLENGE

- Courts WILL accept statistical and epidemiological evidence
- But scientists and actuaries have got to make it accessible and comprehensible to legal minds.
- I do not foresee Bayes theorem, Chain Ladders or Bornhuetter-Ferguson coming to a courtroom near you anytime soon
- Insurers have a key roles as
  - Drivers of behaviour change
  - People who understand risk and statistics

THANK YOU

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