

'Exploring the potential of the law of delict in South Africa to address climate harms caused by private actors'



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Chapter 1: Introduction

1.1 Introduction

This dissertation explores the potential of the South African law of delict, which allows individuals to claim damages for harm caused by the wrongful and culpable conduct of another,¹ to evolve to address climate harms caused by private actors in the country. It does so in response to carbon-emitting companies being identified, through advancing climate science,² as primary contributors to climate change due to their sizable historic and cumulative greenhouse gas (GHG) emissions, meanwhile, marginalised and vulnerable communities with negligible emissions, particularly in the Global South (including South Africa), are disproportionately affected by climate change, suffering widespread climate harm that infringes on many interrelated and mutually reinforcing fundamental human rights.³ The research seeks to shed light on the role of these polluters in fuelling climate change, and explore whether South Africa's law of delict could evolve in line with the transformative aspirations of the Constitution of South Africa, 1996 (the Constitution) to potentially recognise the emitting actions of polluters as a delict where a causal link is established between their emissions and specific climate harm to enable affected individuals to claim delictual damages.

1.2 Climate Change, Climate Injustice, and the Rationale for the Study

Climate change, the defining global crisis of our time,⁴ is legally defined in South Africa as 'a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is, in addition to natural

¹ J Neethling & J Potgieter *Law of Delict* 8 ed (2020) 4.

² R Heede 'Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010' (2014) 122 *Climate Change* 229 at 229; P Griffin 'The Carbon Majors Database: CDP Carbon Majors Report 2017' (2017) at 5.

³ Intergovernmental Panel on Climate Change 'Climate Change 2023 Synthesis Report: Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change' (2023) at 42.

⁴ United Nations 'Climate Change' available at <https://www.un.org/en/global-issues/climate-change#:~:text=Climate%20Change%20is%20the%20defining,scope%20and%20unprecedented%20in%20scale>, accessed 3 October 2024.

climate variability, observed over comparable time period'.⁵ The Intergovernmental Panel on Climate Change (IPCC) has concluded that climate change is largely borne from human activity, which has unequivocally warmed the atmosphere, ocean and land.⁶ The influence of human activity on the climate system intensified dramatically from the 1800s and the expansion of the Industrial Revolution,⁷ with human activities largely rooted in a capitalist market economic model prioritizing maximized productivity, consumption, and corporate profits.⁸ The mechanics of such an economic model, built upon a reliance on fossil fuel use,⁹ has allowed excess GHG (carbon dioxide, nitrogen, methane) emissions to be released into the atmosphere thereby heating the planet, driving climate change and plunging us into the Anthropocene,¹⁰ the current geological epoch in which human activity has been the dominant (and disruptive) influence on Earth systems,¹¹ which are 'essential to the flourishing of human and non-human life'.¹²

However, the IPCC has confirmed that anthropogenic climate change is globally increasing the frequency and intensity of rapid onset events (extreme weather events) such as storms, heatwaves, wildfires, and floods, as well as slow onset events such as melting ice caps, sea-level rise, glacial melt, droughts, sea acidification, desertification, and biodiversity loss.¹³ These events result in significant loss and damage,¹⁴ such as infrastructure destruction, resource shortages, water scarcity, and food insecurity.¹⁵ Additionally, the events trigger rises in displacement and forced migration of affected people, life-threatening diseases, hunger, malnutrition, and extreme poverty that

⁵ Climate Change Act 22 of 2024 at s1.

⁶ IPCC op cit (n3) 44.

⁷ L Kotzé 'The Anthropocene, Earth system vulnerability and socio-ecological injustice in an age of human rights' (2019) 10 *Journal of Human Rights and the Environment* 31 at 73; L Kotzé 'Rethinking Global Environmental Law and Governance in the Anthropocene' (2014) 32 *Journal of Energy & Natural Resources Law* 121 at 128; C Gonzalez 'Climate Change, Race, and Migration' (2020) 109 *Journal of Law and Political Economy* 109 at 111; IPCC op cit (n3) 43-44.

⁸ Kotzé op cit (n7) 128-129.

⁹ Ibid.

¹⁰ Ibid; IPCC op cit (n3) 42-43.

¹¹ National Geographic 'The Anthropocene' available at <https://education.nationalgeographic.org/resource/anthropocene/>, accessed 22 October 2024.

¹² C Gonzalez 'Racial capitalism, climate justice, and climate displacement' (2021) 11 *Oñati Socio-Legal Series* 108 at 112.

¹³ IPCC op cit (n3) 46.

¹⁴ Ibid 51.

¹⁵ IPCC op cit (n3) 49-50.

prevent persons from living a dignified life and violate many other associated human rights.¹⁶ The adverse impacts of climate change on people and the environment are in this dissertation referred to as climate harms.

Those most vulnerable to, and severely impacted by, climate harms are predominantly indigenous, non-white, and socio-economically marginalised communities,¹⁷ who have historically contributed the least to climate change.¹⁸ These groups, including the rural and urban poor, racial and ethnic minorities, women, and indigenous peoples, who may have suffered historical injustices like colonialism, are already burdened by poverty, poor health, political disempowerment, and social exclusion.¹⁹ Often, they reside in high-risk geographic areas, such as low-lying coastal zones, small island states, and regions dependent on the environment for subsistence.²⁰ Further, for many indigenous communities, the land carries profound cultural and spiritual significance,²¹ and climate harm results in the loss of tangible and intangible heritage, including cherished cultural practices or resources.²² These losses pose a serious threat to the identity and sense of belonging of affected communities.²³ This heightened vulnerability to climate change makes it harder for these communities to respond to, and recover from, climate harms.²⁴

Conversely, significant developments in climate attribution science, notably beginning with Heede's 'Carbon Majors' Report,²⁵ point to private corporations as the primary drivers of climate change. The advancement of climate attribution science, defined as 'the branch of science which seeks to isolate the effect of human influence on the climate and related earth systems',²⁶ has allowed precise determination of

¹⁶ Ibid.

¹⁷ C Gonzalez 'Chapter 3: The Sacrifice Zones of Carbon Capitalism: Race, Expendability, and Loss and Damage' in M Doelle & S Secks (eds) *Research Handbook on Climate Change Law Loss and Damage* (2021) at 55.

¹⁸ IPCC op cit (n3) 58.

¹⁹ C Gonzalez 'Environmental Justice, Human Rights, and the Global South' (2015) 13 *Santa Clara Journal of International Law* 151 at 154-155.

²⁰ Gonzalez op cit (n17) 48.

²¹ IPCC op cit (n3) 51.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ R Heede 'Carbon Majors: Accounting for carbon and methane emissions 1854-2010 Methods & Results Report' (2014).

²⁶ M Burger, J Wentz & R Horton 'The law and science of climate change attribution' (2021) 45 *Columbia Journal of Environmental Law* 57 at 63.

which extreme weather events are caused by climate change (extreme event attribution)²⁷ and can link specific events to human activities or entities (source attribution).²⁸ This enables the calculation of individual companies' historical cumulative GHG contributions to global climate change, and precisely how much their emissions contributed to specific climate-induced extreme weather events.²⁹ Importantly, climate attribution science has uncovered that just 90 fossil fuel and cement companies are responsible for 63% of GHG emissions from 1854 to 2010,³⁰ and 100 companies are responsible for 70% of the total accumulative emissions in the past three decades.³¹ Therefore, these carbon-emitting corporations, referred to in this dissertation as polluters, are responsible for emitting two-thirds of global GHG emissions. While generating enormous profits and remaining largely insulated from climate harm, the true cost of their actions are disproportionately borne by vulnerable communities, who bear the brunt of severe climate harm, paying with their lives, livelihoods, homes, and food security.

This reality depicts the prevailing and pervasive issue of global climate injustice, defined as:

'The uneven and unjust distribution of climate change vulnerabilities and impacts within and among states with reference to the underlying or root causes of such maldistribution, including colonialism, patriarchy, and a lack of recognition and exclusion of people from participation in climate-related decision-making due to uneven concentrations of political and economic power'.³²

The concept of climate injustice allows climate change to be viewed, not only as scientific or technical issue, but as deeply connected to global human rights, ethics, politics, and economics.³³ The central contours of climate injustice include: distributive injustice, acknowledging that there is an uneven distribution in the responsibility for fuelling climate change, and an uneven distribution of harm and

²⁷ Center for Environmental Rights 'Polluter Pays for Climate Change Loss and Damage' (2024) at 11.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Heede op cit (n2) 229.

³¹ Griffin op cit (n2) 5.

³² M Murcott *Transformative Environmental Constitutionalism* (2022) at 23; M Murcott, M Tigre & N Zimmerman 'Transnational Insights for Climate Litigation at the European Court of Human Rights: A South-North Perspective in Pursuit of Climate Justice' (2023) 56 *VRÜ | WCL* 299 at 302.

³³ Ibid.

risk; procedural injustice, recognizing that global institutions, dominated by the Global North (GN), often overlook the perspectives and priorities of the Global South (GS) and calls for recognition of marginalised voices; corrective injustice (or restorative justice), referring to the lack of compensation or redress for those most affected by climate change; and social injustice, pointing to an economic system that worsens poverty and inequality while overstraining the planet's resources.³⁴

These contours prompt reflection on the root causes of climate change, such as colonialism, capitalism, and globalisation.³⁵ Our fossil fuel-driven, carbon-intensive, capitalist world economy, termed 'carbon capitalism',³⁶ was 'powered by the land, labour, and capital of colonised and enslaved peoples'.³⁷ GN states and corporations 'plundered nature and exploited vast swathes of the world's population through colonialism, genocide, slavery, race discrimination, the unpaid domestic labour of women, and the postcolonial domination and immiseration of the states and peoples' of the GS.³⁸ This historical exploitation of GS people and resources enabled GN states and corporations to amass wealth, industrialise, modernise, and develop thriving economies (all of which generated substantial GHG emissions in the process)³⁹ while former colonies are left destitute, politically unstable and exposed to exploitation.⁴⁰ Today, through neo-colonial practices, many GN states continue to extract resources from the GS via multinational corporations,⁴¹ particularly in fossil fuel industries like mining. These polluters, whose activities are responsible for significant GHG emissions, maximise their profit off structural poverty, benefiting from cheap labour and weak regulatory frameworks in impoverished regions,⁴² while often failing to compensate local communities or address the environmental harm they cause.⁴³ These entities leverage their mobility and capital to pressure GS states, in a weaker negotiating position and desperate for investment, to grant them advantageous and

³⁴ Gonzalez op cit (n12) 113.

³⁵ M Murcott 'A just COP26 outcome for South Africa?' (2022) 12 *Transnational Legal Theory* 352 at 354.

³⁶ Gonzalez op cit (n17) 43.

³⁷ Ibid 47.

³⁸ Ibid.

³⁹ Gonzalez op cit (n12) 112.

⁴⁰ Kotzé op cit (n7) 73; B Meyersfeld 'Corporations and positive duties to fulfil socio-economic rights: developing international human rights law' (2024) *Int. Journal of Human Rights* 1 at 7.

⁴¹ Meyersfeld op cit (n40) 7.

⁴² Ibid 9.

⁴³ Gonzalez op cit (n12) 112.

favourable terms and conditions,⁴⁴ enabling polluters to continue ‘the pattern of funnelling wealth from the GS to the GN’.⁴⁵ Arguably, wealth is maximised because others remain poor.⁴⁶ Thus, while GN countries and polluters have benefitted from colonial and neo-colonial exploitation of the GS,⁴⁷ southern states remain trapped in fossil fuel extraction and ‘vicious cycles of poverty and environmental degradation’.⁴⁸ Therefore, racialized and poor communities have endured the harms of carbon capitalism from slavery to the climate crisis,⁴⁹ and have been oppressed, exploited, marginalised, discriminated against, dispossessed, and ‘rendered climate-vulnerable’ through the actions of states, polluters, and global governance institutions.⁵⁰ As a result of intersecting systems of oppression, marginalisation and discrimination, the impacts of Earth’s socio-ecological crises are unevenly distributed, thereby perpetuating and compounding existing environmental, social and climate injustices.⁵¹

In response to climate injustice, a global climate litigation movement has emerged since the mid-2000s to hold governments and polluters accountable for ineffective climate action.⁵² Defined as ‘cases brought before judicial and quasi-judicial bodies that involve material issues of climate change science, policy or law’,⁵³ climate change litigation offers civil society a way to respond to inadequate actions from governments and the private sector.⁵⁴ Notably, youth, women’s groups, local communities, and indigenous peoples are increasingly leading these efforts.⁵⁵ Climate cases have surged from 884 in 2017,⁵⁶ to 2666 in mid-2024,⁵⁷ with many focusing on human rights violations by major polluters, or governmental failures to reduce GHG emissions.⁵⁸

⁴⁴ Meyersfeld op cit (n40) 9.

⁴⁵ Ibid 7.

⁴⁶ Ibid 9.

⁴⁷ Gonzalez op cit (n17) 44; Murcott op cit (n35) 355.

⁴⁸ Gonzalez op cit (n19) 154.

⁴⁹ Gonzalez op cit (n17) 58.

⁵⁰ Ibid.

⁵¹ M Murcott ‘Minding the Gap: the Constitutional Court’s Jurisprudence Concerning the Environmental Right’ (2023) 12 *Constitutional Court Review* 147 at 149

⁵² M Burger & M Tigre ‘Global Climate Litigation Report: 2023 Status Review’ (2023) at 6-7.

⁵³ J Setzer & C Higham ‘Global trends in climate change litigation: 2024 snapshot’ (2024) at 7.

⁵⁴ Burger *et al* op cit (n52) 7.

⁵⁵ Ibid IX.

⁵⁶ Ibid 12.

⁵⁷ Setzer *et al* op cit (n53) 10.

⁵⁸ Burger *et al* op cit (n52) 12.

While some cases treat climate change as a periphery issue, *strategic* climate litigation specifically exerts bottom-up pressure on governments (*public* strategic climate litigation) or corporations (*private* strategic climate litigation) to mitigate, adapt to, or compensate for climate harm,⁵⁹ and sets out to ‘win the individual case and to influence the public debate on climate action’.⁶⁰ Even where litigation is unsuccessful, it can influence public discourse and the decision-making of government and polluters.⁶¹ Polluters can suffer reputational damage, public scrutiny and increasing pressure to mitigate, adapt to, and or disclose climate change risks.⁶² With increasing developments in climate and attribution science, and with novel legal arguments being explored under international and domestic law, climate litigation continues to broaden in scope.⁶³ However, no strategic private climate case has yet successfully secured monetary compensation from a polluter for climate harm partially caused by their historical cumulative emissions.

Therefore, this research looks to the law of delict, which sets out circumstances in which a person is obliged to bear the damage he has caused another, by satisfying the necessary elements of delict (harm, conduct, fault, causation, wrongfulness).⁶⁴ This legal avenue would enable those most affected by climate harm, despite contributing the least to its causes, to pursue claims for damages against polluters responsible for substantial historical and ongoing GHG emissions. Additionally, it would amplify the plight and voice of the affected party, drawing attention to marginalised concerns and perspectives. In doing so, it would confront all contours of climate injustice (distributive, social, corrective, and procedural) by seeking accountability, equity, compensation, and redress for climate harm.

⁵⁹ G Ganguly, J Setzer & V Heyvaert ‘If at First You Don’t Succeed: Suing Corporations for Climate Change’ (2018) 38 *Oxf. J. Leg. Stud.* 841 at 843.

⁶⁰ Setzer *et al* op cit (n53) 9.

⁶¹ Burger *et al* op cit (n52) 7.

⁶² Ganguly *et al* op cit (n59) 867.

⁶³ Burger *et al* op cit (n52) 8.

⁶⁴ Neethling *et al* op cit (n1) 4.

1.3 Background/Significance: Climate Injustice in South Africa

South Africa is ‘a microcosm of socio-economic, climate and other human rights challenges faced around the world’ and ‘is a country in which the intersection of different struggles for justice are inextricably interlinked’.⁶⁵ It is ranked as one of the most unequal countries in the world,⁶⁶ and the observed and anticipated socio-economic and environmental damage of climate change⁶⁷ stand to further exacerbate South Africa’s triple challenges of poverty, unemployment, and inequality.⁶⁸ The preamble of the Climate Change Act (CCA) acknowledges that ‘climate variability in the Republic, including the increased frequency and intensity of extreme weather events, will affect, amongst other things, human health, access to food and water, biodiversity, habitats and ecosystems, the coast and coastal infrastructure and human settlements’ and ‘anticipated impacts arising as a result of climate change have the potential to undermine achieving the Republic’s developmental goals’.⁶⁹

The specific vulnerability of South Africa to climate harms stems from the country’s history of colonialism and apartheid, which entrenched racial segregation and systemic discrimination against communities of colour. Under these regimes, Black (including Indian and Coloured) communities were dispossessed of their land, homes and indigenous resources, faced disruption to their customary institutions and systems, suffered loss of language and identity,⁷⁰ and were oppressed and forcibly segregated into ecologically vulnerable areas with inadequate housing, infrastructure, and service provision.⁷¹ The enduring effects of these policies have left previously oppressed communities socio-economically disadvantaged, often living in poor conditions, such as informal settlements lacking proper housing, basic services, and adequate drainage systems, and susceptible to devastation from flooding, droughts,

⁶⁵ P Lado ‘Climate Change Litigation: A View from South Africa’ in E Aristova & J Lim (eds) ‘*Climate Litigation in Europe Unleashed: Catalysing Action against States and Corporations*’ (2024) 71-73 at 71.

⁶⁶ Presidential Climate Commission ‘The State of Climate Action in South Africa: Priorities for Action for the Government of National Unity’ (2024) at 3.

⁶⁷ IPCC op cit (n3) 26.

⁶⁸ Presidential Climate Commission op cit (n66) 3.

⁶⁹ CCA supra (n5) Preamble.

⁷⁰ Natural Justice ‘South Africa’ available at <https://naturaljustice.org/countries/south-africa>, accessed 7 December 2024.

⁷¹ Murcott op cit (n32) 13-14; P Steyn ‘The lingering environmental impact of repressive governance: The environmental legacy of the apartheid era for the new South Africa’ (2005) 2 *Globalisations* 391 at 395.

and other climate-related events.⁷² Climate harms, therefore, exacerbate systemic socio-economic inequalities inherited from apartheid, deepening risks for already vulnerable populations to climate harm.

This is already evident. South Africa's Updated Nationally Determined Contribution (NDC),⁷³ prepared in line with the United Nations Framework Convention on Climate Change⁷⁴ (UNFCCC) and the Paris Agreement,⁷⁵ outlines that since 1980, there have been 86 major weather-related disasters, affecting more than 22 million people and resulting in economic losses exceeding R113 billion.⁷⁶ It highlights the vulnerability of the country's settlements to climate variability, and notes that the socio-economic vulnerability of poor communities means that climate change erodes their livelihoods and further threatens their resilience.⁷⁷ This is illustrated by the April 2022 flooding in KwaZulu-Natal (KZN), where the province experienced record-breaking rain in four days,⁷⁸ which consequentially caused calamitous flooding, landslides and mudflows.⁷⁹ The floods claimed an estimated 443 lives and directly impacted 19,112 households by stymying economic activity, causing damage to properties, restricting mobility, and interrupting essential services.⁸⁰ The eThekweni Municipality suffered economic losses of over R540 million, and key public infrastructure is still not fully operational, such as wastewater treatment systems.⁸¹ The World Weather Attribution Group (WWA) concluded that anthropogenic climate change made these floods more severe and doubled the likelihood of such an extreme rainfall event.⁸² Another example, which anthropogenic climate change made three to

⁷² Ibid 13-14; P Johnston, T Egbebiyi, L Zvobo, S Omar, A Cartwright & B Hewitson 'Climate Change Impacts in South Africa: What Climate Change Means for a Country and its People' (2024) at 6.

⁷³ Department of Forestry, Fisheries, and the Environment 'South Africa's Nationally Determined Contribution Under the Paris Agreement: Updated in 2021' (2021).

⁷⁴ (adopted May 1992 and entered into force March 1994) 21 *ILM* 849.

⁷⁵ (adopted December 2015 and entered into force November 2016) 55 *ILM* 740.

⁷⁶ Department of Forestry, Fisheries, and the Environment op cit (n73) 6-7.

⁷⁷ CCA supra (n5) s1.

⁷⁸ Presidential Climate Commission op cit (n66) 26.

⁷⁹ S Grab & D Nash 'A new flood chronology for KwaZulu Natal (1836 - 2022): the April 2022 Durban floods in historical context' 2021 *S. Afr. Geogr. J.* 1 at 5.

⁸⁰ Presidential Climate Commission op cit (n66) 26.

⁸¹ Ibid.

⁸² World Weather Attribution 'Climate change-exacerbated rainfall causing devastating flooding in Eastern South Africa' 13 May 2022 available at <https://www.worldweatherattribution.org/climate-change-exacerbated-rainfall-causing-devastating-flooding-in-eastern-south-africa/>, accessed 16 March 2024.

six times more likely,⁸³ is the 1-in-400-year drought experienced in Western Cape (WC) from 2015 to 2018, which had the province preparing for 'Day Zero' (a day where water would potentially run out).⁸⁴ During the drought, residents lined up for water as restrictions were enforced, along with warnings that household water supply might be cut off.⁸⁵ Through some private responses, wealthy people could afford methods, like drilling boreholes, to enable water access, but many poorer communities could not afford these solutions, further worsening water and sanitation inequality.⁸⁶ The drought had a significant economic impact, resulting in losses of R27.6 billion, and 64,810 jobs were lost in WC.⁸⁷ With the frequency and intensity of these events projected to increase,⁸⁸ the most severe climate impacts will further disproportionately impact socio-economically vulnerable groups, particularly those residing in informal settlements, further deepening existing inequalities.⁸⁹ The KZN flooding and WC drought depicts how, when the constitutional right to an environment not harmful to health or well-being is implicated,⁹⁰ many other fundamental rights are implicated such as the rights to life, dignity, access to adequate housing, sufficient food and water, culture, education, and the rights of the child,⁹¹ perpetuating social, environmental and climate injustices.

Despite South Africa's vulnerability to climate change, the country is the 14th highest emitter of GHGs globally, and the highest emitting country in Africa.⁹² In exposing the source of these emissions, with the benefit of attribution science, the Centre for Environmental Rights (CER), in their 'Full Disclosure 5 Report' spotlighted the top 10 polluters in the country.⁹³ Eskom, South Africa's state-owned energy

⁸³ Johnston *et al* op cit (72) 4.

⁸⁴ Presidential Climate Commission op cit (n66) 26.

⁸⁵ IPCC 'Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change' (2022) 1212.

⁸⁶ *Ibid*.

⁸⁷ *Ibid*.

⁸⁸ Presidential Climate Commission op cit (n66) 26.

⁸⁹ *Ibid* 27.

⁹⁰ S24 of the Constitution.

⁹¹ S11, 10, 24(a), 26, 27(1)(b), 31, 29 & 28 of the Constitution.

⁹² Presidential Climate Commission op cit (n66) 4.

⁹³ Centre for Environmental Rights 'Full Disclosure 5: The Truth About South African Banks 'and Companies Ability to Identify and Address Climate Risks 'available at <https://fulldisclosure.cer.org.za/2019/emitters/introduction>, accessed on 18 March 2024.

provider, is the largest emitter, contributing to 39% of the nation's total GHG emissions – an amount that exceeds the annual emissions of over 164 countries, including Spain, Qatar, and Bangladesh.⁹⁴ Sasol is the next major polluter, with its 13.5% share exceeding the emissions of 'every car, truck, bus, train, and plane in South Africa combined'.⁹⁵ Other polluters include ArcelorMittal, Sappi, AngloAmerican, and Gold Fields.⁹⁶ The emissions of these polluters starkly contrast the negligible emissions of racialized climate-vulnerable communities who bear the greatest risk and impact of climate harm despite contributing least to the problem, highlighting climate injustice in the country.

In response to climate change, South Africa has set ambitious goals for climate action.⁹⁷ South Africa has acceded the UNFCCC and the Paris Agreement, developed an updated NDC outlining their efforts to reduce emissions and adapt to the impacts of climate change, and established a Presidential Climate Commission (PCC) to oversee and facilitate a 'just transition' (set out in their Just Transition Framework)⁹⁸ towards a low-carbon, climate-resilient, ecologically sustainable economy and society which contributes toward the creation of decent work for all, social inclusion and the eradication of poverty.⁹⁹ Pursuant to these obligations, South Africa enacted the CCA (not yet operational), to give effect to the constitutional environmental right to: an environment that is not harmful to health and well-being, and to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that secure ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development.¹⁰⁰

However, the PCC has reported that, although South Africa has strong commitments and public support for tackling climate change and facilitating a just transition, progress is not happening at the pace and scale required to tackle a crisis of such proportion, and that a significant gap remains between climate policies and

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ PCC op cit (n66) 2.

⁹⁸ PCC 'A Framework for a Just Transition in South Africa' (2022).

⁹⁹ CCA supra (n5) s1.

¹⁰⁰ S24 of the Constitution.

actual outcomes.¹⁰¹ The PCC describe South Africa as ‘policy-rich’ and ‘implementation-poor’ and argue that the gap between policies and outcomes is largely driven by ‘incoherent policies’ that continue to endorse the energy sector,¹⁰² responsible for 78% of the country’s GHG emissions.¹⁰³ This stems from a long reliance on coal in South Africa’s history, and the political alliances that exist between the extractive sectors and state actors, particularly the Department of Mineral Resources and Energy (DMRE).¹⁰⁴ These alliances reassure the energy industry under the guise of sustainable economic development, and there are other fossil fuel energy legislation in the pipeline, such as the Gas Amendment Bill¹⁰⁵ and Upstream Petroleum Resources Development Act.¹⁰⁶ However, the PCC states that the country’s relatively high levels of GHG emissions has not translated to significant socio-economic benefits, especially when considering South Africa’s persistent poverty, unemployment, and inequality.¹⁰⁷ Arguably, fossil fuel energy of this kind reinforces climate injustice in the country, as rural communities bear the burden of the fossil fuel life cycle from cradle (through eviction from ancestral lands; desecration of sacred sites; poisoning of air, land, and water; fires, explosions, and industrial accidents; loss of subsistence fishing and hunting rights; and exposure to significant health hazards) to grave (climate injustices).¹⁰⁸ Consequently, each phase of the fossil fuel lifecycle not only heightens the vulnerabilities of communities to climate change, but simultaneously worsens climate change through increased GHG emissions, thereby continuously compounding the climate injustices and harm experienced.

PCC also identifies that key energy industry players continue to resist climate policies and are slow to initiate any meaningful transition planning.¹⁰⁹ Instead, the PCC notes that that polluters in this industry, through lenient lobbying regulations,¹¹⁰ exert considerable influence over climate policy, while the voices of affected

¹⁰¹ PCC op cit (n66) 2.

¹⁰² Ibid 3 & 11; M Murcott ‘Emerging Climate Law and Governance Measures in South Africa: A Clash Between Policy and Practice?’ (2022) 12 *Iucnael* 76 at 83-86.

¹⁰³ ‘National GHG Inventory Report South Africa 2000 – 2022’ in GN4772 GG50707 of May 2024.

¹⁰⁴ PCC op cit (n66) 15.

¹⁰⁵ ‘Gas Amendment Bill’ in GN4257 GG50009 of April 2021.

¹⁰⁶ 23 of 2024.

¹⁰⁷ PCC op cit (n66) 49.

¹⁰⁸ Gonzalez op cit (n17) 47-48.

¹⁰⁹ PCC op cit (n66) 15.

¹¹⁰ Ibid.

communities and civil society are often marginalised.¹¹¹ This is reinforced by an investigation undertaken by local non-governmental organisations (NGOs) Just Share and amaBhungane in 2023 which revealed, through information requests, a pattern of behind-the-scenes negotiations between government officials and private corporations aimed at diluting climate actions and reshaping policies to favour the energy sector.¹¹² This corporate climate lobbying seeks to stall and weaken government responses to the climate crisis and hinder meaningful progress toward climate justice, ensuring that polluters' interests and industry profits are prioritised over public welfare and environmental justice.¹¹³ Thus, South Africa's legal climate regime is undermined by the influence of polluters and the government's continued reliance on fossil fuel extraction, reinforcing 'interlocking systems of oppression, extraction, and exploitation as a result of colonisation, apartheid, and neo-colonialism'.¹¹⁴

Thus, this dissertation explores the law of delict as a potential *private* legal avenue to address climate harms and injustice in South Africa. Whether delict can evolve to meet climate harm is rooted in the Constitution's transformative goal of being '*a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice*' towards a future that is founded upon the '*recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex*'.¹¹⁵ Importantly, the Constitution mandates the evolution of common law, including the law of delict, to align with its transformative object, purport, and values, as well as the rights enshrined in the Bill of Rights,¹¹⁶ to an egalitarian society founded on social justice.

Relatedly, Murcott explains that the transformative constitutional project and social justice cannot be realised without implementing environmentalism, because well-functioning socio-ecological systems (dependent on a stable climate) allows for conditions in which 'humans can flourish, vulnerabilities can be addressed, and social,

¹¹¹ Ibid.

¹¹² amaBhungane 'Lifting the veil on corporate climate lobbying' available at <https://amabhungane.org/lifting-the-veil-on-corporate-climate-lobbying/>, accessed 28 November 2024.

¹¹³ Ibid.

¹¹⁴ Murcott op cit (n35) 358.

¹¹⁵ Interim Constitution (Act 200 of 1993) at Preamble.

¹¹⁶ S8 & S39 of the Constitution.

environmental, and climate justice can occur'.¹¹⁷ In response, her theory of transformative environmental constitutionalism (TEC) calls for a radical shift in how matters concerning converging socio-ecological crises should be interpreted. TEC urges courts to embrace a justice-oriented framing of disputes and adopt a socio-ecological systems perspective, carefully considering how disputes reflect intersecting social, environmental, and climate injustices, to ensure that the adjudication process is responsive to the realities faced by particularly vulnerable groups and environments in the Anthropocene.¹¹⁸

Therefore, the research, adopting this framing, investigates the potential of the law of delict to evolve along transformative constitutional lines, incorporating environmentalism through TEC, to adequately address climate harm and its underlying systemic causes and impacts, including interlocking social, environmental, and climate injustices. The goal of this endeavour is to expand the legal toolkit for climate litigation in South Africa, potentially enabling the recovery of compensation for climate harm from polluters through delictual damages.

1.4 Research Question(s)

(a) *Can the law of delict be a potential legal mechanism to hold private sector actors to account for climate harms in South Africa?*

(b) Sub-questions:

- (i) How has the law of delict evolved under the transformative Constitution of the Republic of South Africa, 1996?
- (ii) To what extent is the global phenomenon of climate litigation being used to hold private polluters liable for climate harms? Have foreign jurisdictions applied delict in strategic private climate change litigation to seek compensation for climate harms resulting from a polluter's historical and cumulative GHG emissions? Relatedly, what lessons can be drawn from foreign climate litigation to inform the development of delictual law in South Africa?

¹¹⁷ Murcott op cit (n32) 35.

¹¹⁸ Ibid 137.

- (iii) Murcott's theory of TEC focuses on the interpretation of statutes in a way that links the transformative project with social justice and environmental protection, and this research aims to link this to the development of common law. While the theory has not yet been applied into the area of private law and the law of delict, how can this theory and way of thinking influence the development of delict?

1.5 Chapter Outline

Following this chapter, Chapter 2 outlines the theoretical framework of delict in South Africa, tracing its historical development and outlining how it must evolve under the Constitution. The chapter establishes a foundation for understanding how delict can evolve to address contemporary challenges, such as climate harm, in alignment with South Africa's transformative constitutional goals.

Chapter 3 provides a brief history of strategic private climate litigation and explores notable foreign cases (*Lliuya v. RWE AG*;¹¹⁹ *Smith v Fonterra*;¹²⁰ *Milieudefensie et al. v Royal Dutch Shell*;¹²¹ and *Re Greenpeace Southeast Asia*)¹²² to impart valuable lessons on how foreign courts are responding to climate harm and interpreting and evolving the law to address climate harms.

Chapter 4 pivots back to the South African context and assesses the potential for delictual elements to evolve to meet climate harm, informed by insights from foreign case law and using TEC as an analytical framework.

¹¹⁹ [2017] Higher Regional Court of Hamm Az5U15/17 (GER).

¹²⁰ [2021] NZSC 5 (NZ).

¹²¹ [2021] HA ZA 19-379 (NL).

¹²² CHR-NI-2016-0001 (PH).

Chapter 2: The Law of Delict in South Africa's Constitutional Dispensation

Introduction

This chapter provides a theoretical exploration of South African law of delict to understand delict and whether it can develop to address climate harm in South Africa. The chapter begins with a brief history of the law of delict. Thereafter, the transformative nature of the Constitution and its influence on the evolution of delictual law is explored, and the constitutional directive for common law development is outlined. The chapter concludes with an examination of a delictual enquiry, analysing each element of delict and how courts have applied the constitutional directive through case law.

2.1 The history and nature of delict

The law of delict has deep historical roots, tracing back to the Roman Twelve Tables of 449 BC, where it was formally codified.¹²³ The law of delict was brought to South Africa in the seventeenth century by the Dutch,¹²⁴ and today this uncodified Roman-Dutch law, influenced by English law,¹²⁵ forms the basis of South African common law.¹²⁶

In South Africa, the law of delict, a subset of the law of obligations, is defined as 'the act of one person which, in a wrongful and culpable way, causes harm to another'¹²⁷ and in order to impose an obligation on the wrongdoer to compensate the victim for harm they've endured, all the essential elements of a delict must be satisfied on a balance of probabilities:¹²⁸ harm (the plaintiff must have suffered a loss, whether physical, financial, or involving pain and suffering, resulting from the defendant's

¹²³ C Roederer 'Working the Common Law Pure: Developing the South African Law of Delict (Torts) in Light of the Spirit, Purport and Objects of the South African Constitution's Bill of Rights' (2009) *Ariz. J. Int'l & Comp. L.* 427 at 434.

¹²⁴ *Ibid.*

¹²⁵ R Ahemd 'The Influence of Reasonableness on the Element of Conduct in Delictual or Tort Liability - Comparative Conclusions' (2019) 22 *PERJ* 1 at 4.

¹²⁶ E Zitzke 'Transformative Legal History and the (Re)classification of the South African Law of Delict' (2023) 26 *PERJ* 2 at 7.

¹²⁷ Neethling *et al* op cit (n1) 4.

¹²⁸ M Loubser & R Midgley (Eds) P Jabavu, J Linscott, A Mukheibir, L Niesing, D Perumal, P Singh & B Wessels *The Law of Delict in South Africa* 3 ed (2018) at 27.

conduct);¹²⁹ conduct (an act or omission by the defendant that causes the harm);¹³⁰ fault (the defendant must be blameworthy, either intentionally or negligently);¹³¹ causation (there must be a direct link between the defendant's conduct and the harm suffered by the plaintiff);¹³² and wrongfulness (the conduct infringed upon a legally protected interest or an interest worthy of protection in a legally reprehensible way).¹³³ The elements are examined through a step-by-step analysis of a delictual enquiry in section 2.4 of this chapter.

Over the centuries, the law of delict has been known to have a dynamic and flexible nature that has allowed it to adapt and evolve in response to the ever-changing needs and values of societies all over the world.¹³⁴ Historically, the dominance of any one objective of delict, whether appeasement, justice, deterrence or compensation, reflected the socio-economic and philosophical trends of those times.¹³⁵ This flexibility allows delict to respond to the evolving moral and societal frameworks of different eras.

During the apartheid era, the common law was primarily premised on market-based relations, where everyone was presumed to be free and equal participants in the market.¹³⁶ However this model was designed to serve the archetype of white, male, able-bodied, property-owning individuals.¹³⁷ In this way, the common law effectively served those who were already privileged within the societal structure, and compounded the plight of those treated as inferior or sub-alterns and born into disadvantage.¹³⁸ It did not protect the rights of the people in South Africa from the concentrated power of white South African individuals and corporations.¹³⁹ The private law was 'blind to justice' and allowed 'the invisible hand of the market to

¹²⁹ Neethling *et al* op cit (n1) 209.

¹³⁰ Ibid 32.

¹³¹ Ibid 155.

¹³² Ibid 21.

¹³³ Ibid 33.

¹³⁴ Zitzke op cit (n126) 8.

¹³⁵ Loubser *et al* op cit (n128) 5.

¹³⁶ C Roederer 'The Transformation of South African Private Law after Twenty Years of Democracy' (2016) 14 *Northwestern JHR* 1 at 11.

¹³⁷ B Goldblatt & S Rai 'Recognising the Full Costs of Care? Compensation for Facilities in South Africa's Silicosis Class Action' (2018) 27 *Soc. Leg. Stud.* 671 at 686.

¹³⁸ Roederer op cit (n136) 11.

¹³⁹ Ibid.

dominate'.¹⁴⁰ This 'privatised apartheid' was not only reflective of but also reinforced the prevailing inequalities of the time.¹⁴¹ Private law continues to perpetuate the socio-economic inequalities, injustices, and unequal power dynamics stemming from apartheid,¹⁴² setting the stage for the socio-economic disparities and consequent climate injustices currently observed in South Africa, as outlined in Chapter 1.

After the adoption of the Constitution and the start of a new democratic era, while constitutional and administrative law underwent a complete overhaul, there were no sweeping changes to common law areas.¹⁴³ Instead, the Constitution introduced mechanisms for the incremental development of common law to align it with constitutional values.¹⁴⁴ All law, including the common law, in South Africa is now subject to the supremacy of the Constitution,¹⁴⁵ which aims to transform both law and society with its progressive Bill of Rights and value-laden framework.¹⁴⁶ The South African law of delict, with its dynamic and flexible character, has significantly evolved, and is subject to further development, as a result of the constitutionalisation of private law.¹⁴⁷

2.2 Delict under the Constitution

The Constitution aims to correct the injustices and power imbalances inherited by apartheid and promote social justice, and this is known as the 'transformative' aim of the Constitution.¹⁴⁸ The Constitution is an instrument committed to social transformation and reconstruction,¹⁴⁹ and gives itself a monumental goal of healing the wounds of the past and guiding South Africa towards a better future founded on equality.¹⁵⁰ The Constitution's aspirations of equality, redistribution and social

¹⁴⁰ Roederer op cit (n123) 455.

¹⁴¹ E Zitzke 'Constitutional Heedlessness and Over-excitement' (2015) 7 CCR 256 at 282.

¹⁴² Zitzke op cit (n126) 10.

¹⁴³ Roederer op cit (n123) 457.

¹⁴⁴ Ibid.

¹⁴⁵ S2 of the Constitution.

¹⁴⁶ Zitzke op cit (n126) 8.

¹⁴⁷ Zitzke op cit (n141) 259.

¹⁴⁸ P De Vos & W Freedman (Eds) Z Boggenpoel, L Draga, C Gevers, K Govender, P Lenaghan, S Weeks, C Namakula, N Ntlama, D Mailula, K Moyo, S Sibanda & L Stone *South African Constitutional Law in Context* 2 ed (2021) at 26.

¹⁴⁹ Ibid 27.

¹⁵⁰ P Langa 'Transformative Constitutionalism' (2006) 17 *Stell LR* 351 at 352.

security entails pursuing substantive equality and facilitating radical socio-economic transformation in the country.¹⁵¹ The Constitution's transformative goal permeates through our entire democratic dispensation, and must be effected and achieved through the transformation of both the public and private branches of law.¹⁵²

The law of delict traditionally serves to ensure interpersonal corrective justice through compensation, protect the legal interests of victims, promote social cohesion and a sense of legal order, provide a vehicle through which competing interests are mediated, deter harm, and manage the spreading of losses.¹⁵³ However, its broader significance extends beyond mere compensation,¹⁵⁴ and reflects public policy considerations and societal morals, norms and values regarding acceptable conduct (the *boni mores* of the community).¹⁵⁵ These societal views are dynamic and change over time, indicating that delict law must adapt to reflect contemporary social standards.¹⁵⁶ Importantly, the *boni mores* and legal convictions of South African society are now informed by constitutional aspirations,¹⁵⁷ and the common law must be rooted in the object, purport and values of the Constitution, including human dignity, the achievement of equality and the advancement of human rights and freedoms.¹⁵⁸ Therefore, in order for the common law to remain legitimate, a 'continuous constitutional audit' is required to ensure that the common law is ever-evolving to accommodate the community norms and values of South Africa's current democratic society.¹⁵⁹

Further, the law of delict, and the entire private law branch, plays a larger role in safeguarding our democracy.¹⁶⁰ Reforming private law is a vital part of strengthening our democracy,¹⁶¹ because it holds the dual potential to either 'exacerbate inequality, diminish dignity, limit freedom, and close off avenues for redress when people are

¹⁵¹ Ibid.

¹⁵² D Davis 'Where is the Map to Guide Common-Law Development?' (2014) 25 *Stell LR* 1 at 4.

¹⁵³ Loubser *et al* op cit (n128) 6.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Roederer op cit (n136) 28.

¹⁵⁹ Zitzke op cit (n141) 267.

¹⁶⁰ Roederer op cit (n136) 28.

¹⁶¹ Ibid.

harmed' or to promote and advance constitutional principles.¹⁶² If in harmony with the Constitution's transformative values, delict can directly confront persistent inequality and promote freedom, dignity, equality, and access to justice.¹⁶³ Such harmony would uphold the values of South Africa's constitutional democracy and stabilise democracy by integrating transformative principles into the everyday lives of those impacted by private law.¹⁶⁴

The integration of common law and human rights is essential for the transformative development of South African common law, keeping it legally and socially relevant.¹⁶⁵ Further, to be truly transformative, African customary knowledge must be incorporated. As expressed in *S v Makwanyane*:¹⁶⁶

'The secure and progressive development of our legal system demands that it draw the best from all the streams of justice in our country ... it means giving long overdue recognition to African law and legal thinking as a source of legal ideas, values, and practice... we can restore dignity to ideas and values that have long been suppressed or marginalized'.¹⁶⁷

The Africanist human rights perspective promotes mutual respect, communal values, interdependence of nature and people, and collective responsibility, and infusing traditional knowledge can serve as a necessary check on the common law to ensure its legitimacy in post-apartheid South Africa.¹⁶⁸

To achieve the transformative aspirations envisaged by the Constitution, the law of delict must be interpreted and developed through a constitutional lens.

2.3 The Constitution: the guidebook for common law interpretation and development

The Constitution has conferred significant powers and responsibilities upon South African courts to interpret and develop the common law to promote the spirit,

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Zitzke op cit (n141) 266.

¹⁶⁶ 1995 (2) SACR 1 (CC).

¹⁶⁷ Ibid para 364-365.

¹⁶⁸ Zitzke op cit (n141) 266.

purport, and objects of the Bill of Rights. The power and obligation to develop the common law in this manner is sourced in sections 8, 39 and 173 of the Constitution.¹⁶⁹

2.3.1 *Section 8 (Application of the Bill of Rights)*

Section 8(2) provides that: ‘a provision of the Bill of Rights binds a natural and juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right’.¹⁷⁰ Thereafter, section 8(3) provides that when applying a provision of the Bill of Rights to a natural or juristic person, a court, in order to give effect to a right in the Bill, must apply or if necessary develop the common law to the extent that legislation does not give effect to that right; and may develop rules of the common law to limit the right, provided the limitation is in accordance with the limitation clause in section 36(1).¹⁷¹

Section 8 is significant as it sets out the horizontal application of the Bill of Rights among private citizens and juristic entities.¹⁷² The Constitutional Court (CC) has affirmed that the purpose of this section is ‘to require private parties not to interfere with or diminish the enjoyment of a right’.¹⁷³ This horizontal application is essential in holding private power-holders accountable for the irresponsible exercise of power.¹⁷⁴ Embedding the Bill of Rights into the development of the common law in disputes between private parties reinforces substantive equality in South Africa, ensures that private actions align with the Constitution’s transformative framework, and creates avenues for courts to confront the racist, patriarchal and economically oppressive effects of, and uneven power relations from, colonialism, apartheid and neo-colonialism.¹⁷⁵ Thus, the law of delict can be instrumental in promoting equality and addressing societal power imbalances effectively.¹⁷⁶

2.3.2 *Section 39 (Interpretation of the Bill of Rights) and Section 173 (Interests of Justice)*

¹⁶⁹ Davis op cit (n152) 14.

¹⁷⁰ S8(2) of the Constitution.

¹⁷¹ S8(3) of the Constitution.

¹⁷² De Vos *et al* op cit (n147) 410.

¹⁷³ *Khumalo and Governing Body of the Juma Masjid Primary School v Essay NO* (CCT 29/10) [2011] ZACC 13 para 58.

¹⁷⁴ Zitzke op cit (n126); De Vos *et al* op cit (n148) 411.

¹⁷⁵ Zitzke op cit (n141) 268.

¹⁷⁶ *Ibid* 269.

Section 39(1) provides that when interpreting the Bill of Rights, a court must: 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law; and may consider foreign law'.¹⁷⁷ Thereafter, section 39(2) mandates that when developing the common law, every court must promote the spirit, purport, and objects of the Bill of Rights.¹⁷⁸

Therefore, the common law must uphold and promote the spirit, purport, and object of the Bill of Rights in a manner that supports both the transformative aims of the Constitution and vested rights, whether derived from common law, legislation, or the Bill of Rights.¹⁷⁹

Moreover, section 173 provides that the CC, the Supreme Court of Appeal (SCA) and the High Court (HC) each have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.¹⁸⁰

The case of *Carmichele v Minister of Safety and Security and Another (Carmichele)*¹⁸¹ was the first common-law development case to appear before the CC under the 1996 Constitution.¹⁸² Alix Carmichele was assaulted by Coetzee, who had a history of committing assault,¹⁸³ and at the time of the assault, was facing a charge of rape and was on bail awaiting trial.¹⁸⁴ Carmichele argued that the police and prosecutors had been negligent in allowing Coetzee's release, and she instituted action against the Ministers of Safety and Security, and of Justice and Constitutional Development, for alleged dereliction of duty by the police and the prosecutrix.¹⁸⁵ Initially, both the HC and the SCA dismissed her claims, and provided that duty of care had not been *prima facie* established.¹⁸⁶ On appeal, the CC recognised the need to adapt common law to better align with the Constitution's protections and expressed:

'It needs to be stressed that the obligation of Courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary. On the contrary it is

¹⁷⁷ 39(1) of the Constitution.

¹⁷⁸ S39(2) of the Constitution.

¹⁷⁹ Zitzke op cit (n141) 270.

¹⁸⁰ S173 of the Constitution.

¹⁸¹ 2001 (10) BCLR 995 (CC).

¹⁸² Zitzke op cit (n141) 260.

¹⁸³ Ibid.

¹⁸⁴ *Carmichele* supra (n181) para C.

¹⁸⁵ Ibid para D.

¹⁸⁶ Ibid.

implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objective, the Courts are under a general obligation to develop it appropriately'.¹⁸⁷

This led to the Court upholding the appeal.¹⁸⁸ The CC did not restrict itself to existing rules when determining whether the police owed a duty to Carmichele,¹⁸⁹ but developed the common law considering the rights to life, dignity, and freedom and security of the person,¹⁹⁰ and constitutional provisions indicating a positive duty to prevent harm.¹⁹¹ Further, they considered these duties particularly important in light of women's historically vulnerable position in South Africa,¹⁹² and adherence to international conventions,¹⁹³ specifically the Convention on the Elimination of All Forms of Discrimination Against Women.¹⁹⁴ This case mandated that 'where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation'¹⁹⁵ and align the common law the transformative constitutional aspirations.

However, Zitzke warns against 'constitutional over-excitement' and advocates instead for a practical balance – an amalgamation of common law and constitutional spirit, rather than an extreme shift that neglects or circumvents either the Constitution (constitutional heedlessness) or the common law (constitutional over-excitement).¹⁹⁶

2.4 Brief overview of a delictual enquiry

If someone has suffered a harm, the starting point is '*damage must lie where it falls*'¹⁹⁷ and each person must bear the damage he suffers.¹⁹⁸ However, where someone else has caused harm to another, a plaintiff may shift this burden to another party if they can provide a 'special' reason'¹⁹⁹ which is established by satisfying all the elements of

¹⁸⁷ Ibid para 39.

¹⁸⁸ Ibid para 84.

¹⁸⁹ Roederer op cit (n123) 497.

¹⁹⁰ S10, 11 & 12 of the Constitution; *Carmichele* supra (n181) para 44.

¹⁹¹ S7(2), 41(1)(b), S198(a) & S205(3) of the Constitution.

¹⁹² *Carmichele* supra (n181) para 62.

¹⁹³ Ibid para 73.

¹⁹⁴ (adopted December 1979 and entered into force September 1981) 1249 UNTS 13.

¹⁹⁵ *Carmichele* supra (n181) para 33.

¹⁹⁶ Zitzke op cit (n141) 287.

¹⁹⁷ Loubser *et al* op cit (n128) 7.

¹⁹⁸ Roederer op cit (n136) 27.

¹⁹⁹ Loubser *et al* op cit (n128) 7.

a delict – harm, conduct, causation (factual and legal), fault, wrongfulness²⁰⁰ – on a balance of probabilities.²⁰¹ The elements of delict are essentially devices that weigh the competing interests of plaintiffs, defendants, and society to resolve delictual problems,²⁰² and when the elements are sufficiently established, loss is reallocated to the responsible party.²⁰³

In a delictual matter, the inquiry begins with objectively establishing the first three factual elements: harm, conduct, and factual causation.²⁰⁴ Once these are determined, the focus shifts to: legal causation, fault, and wrongfulness.²⁰⁵ These latter elements are value laden decisions and reflect broader societal policy considerations on whether liability should be imposed.²⁰⁶ An examination of the essential theory of each element, supplemented by case law, will now be explored to provide an understanding of how elements are satisfied, interpreted and developed.

2.4.1 Harm

The delictual enquiry starts by identifying harm, as no legal claim can exist without some form of legally recognised harm, either realised or potential.²⁰⁷ Harm refers either to the infringement of the plaintiff's interests, or to the harmful consequences resulting from the defendant's action.²⁰⁸

The nature of harm dictates the nature of the legal action for seeking redress.²⁰⁹ In South African law, the primary forms of delictual action include: the *actio legis Aquilia*, which addresses patrimonial losses;²¹⁰ the *actio iniuriarum*, which deals with liability for injuries to personality;²¹¹ and the action for pain and suffering, which allows for

²⁰⁰ Ibid 25.

²⁰¹ Ibid 9.

²⁰² Ibid 27.

²⁰³ Ibid 7.

²⁰⁴ Ibid.

²⁰⁵ Ibid 28.

²⁰⁶ Ibid.

²⁰⁷ Ibid 27.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Neethling *et al* op cit (n1) 5.

²¹¹ Ibid.

compensation addressing impairment of bodily or physical-mental integrity,²¹² and the loss of a person's full enjoyment of life.²¹³

These actions protect many legal interests including property (physical property, personal integrity (bodily integrity), personality (dignity, privacy, identity), and psychological well-being (mental health, anxiety, distress).²¹⁴

2.4.2 *Conduct*

Conduct, the 'damage-causing event' giving rise to the delict, is defined as 'a voluntary human act [commission] or omission'.²¹⁵

A commission involves positive actions where the individual or entity actively engages in behaviour that causes harm.²¹⁶ An omission occurs when an individual or entity *fails to act* to prevent harm despite having a duty to do so.²¹⁷ In *Carmichele*, the failure of the police and prosecutor to oppose the bail of a dangerous criminal who later commits a violent crime represents an omission.²¹⁸ Notably, where someone already has control over a dangerous object (such as a fire) and fails to take reasonable steps to prevent harm to others, it is likely a case of negligent exercise of control as a commission.²¹⁹

The conduct element identifies possible defendants and what they are supposed to have done to infringe the plaintiff's interests.²²⁰

2.4.3 *Causation*

A *casual nexus* between conduct and damage is required to prove a delict.²²¹ In other words, the wrongful conduct must have caused the damage suffered by the plaintiff.²²² Causation turns on two separate enquiries: factual and legal causation.

²¹² Ibid 6.

²¹³ Loubser *et al* op cit (n128) 23-24.

²¹⁴ Ibid.

²¹⁵ Neethling *et al* op cit (n1) 27.

²¹⁶ Ibid

²¹⁷ Ibid

²¹⁸ Ibid 33.

²¹⁹ Ibid 32.

²²⁰ Loubser *et al* op cit (n128) 27.

²²¹ Neethling *et al* op cit (n1) 215.

²²² Ibid.

2.4.3.1 Factual causation

Factual causation is determined through an objective assessment known as the *conditio sine qua non* test, commonly referred to as the ‘*but for*’ test.²²³ This test considers whether, if the defendant's act were hypothetically removed, the damage would still have occurred. If the damage would not have happened without (*but for*) the defendant's action, then factual causation is established. Factual causation involves a particular kind of link or connection between at least two facts or sets of facts, concerning ‘the link existing when, stated succinctly, one fact arises out of another’.²²⁴

In *Lee v Minister for Correctional Services*²²⁵ (*Lee*), the CC highlighted the need for flexibility in applying the ‘*but for*’ test.²²⁶ The CC emphasised that the application of the *conditio sine qua non* approach, regarding both positive conduct and omissions, is flexible because strict application of this approach would result in an injustice in certain cases.²²⁷ This case involved Lee, a former prisoner who contracted tuberculosis (TB) in prison.²²⁸ He sued the Minister for Correctional Services, arguing that the prison authorities had failed to take adequate steps to protect him from TB.²²⁹ While the SCA initially found no causal link due to the uncertainty of the infection's source, the CC found that:

‘it would be enough to satisfy probable factual causation where the evidence establishes that the plaintiff had found himself in the kind of situation where the risk of contagion would have been reduced by proper systemic measures’.²³⁰

This illustrates that the ‘*but for*’ test should not be applied rigidly, and that causation can sometimes be inferred from an increased likelihood of harm due to negligent conduct.

The flexible approach was further formulated in *Minister of Finance v Gore*:²³¹

²²³ Ibid 218.

²²⁴ Ibid 195.

²²⁵ 2013 2 SA 144 (CC).

²²⁶ Ibid para 41.

²²⁷ Ibid.

²²⁸ Ibid para 2.

²²⁹ Ibid.

²³⁰ Ibid para 60.

²³¹ 2007 1 SA 111 (SCA) 125.

'Application of the 'but for' test is not based on mathematics, pure science, or philosophy. It is a matter of common sense, based on the practical way in which the ordinary person's mind works against the background of everyday-life experiences.'²³²

Moreover, it was set out in *Minister of Safety and Security v Van Duivenboden*²³³ (*Duivenboden*):

'A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than metaphysics'.²³⁴

Thus, 'it is sufficient for the purposes of factual causation if a defendant's conduct has *in any way* contributed to the damage sustained by the plaintiff' and 'it is unnecessary that his conduct should be the only cause, or the main cause, or a direct cause'.²³⁵

2.4.3.2 Legal causation

While factual causation deals with whether the defendant's conduct factually contributed to the harm, legal causation goes further by assessing whether it is *reasonable* to hold the defendant liable for the consequences of their actions. The question of legal causation arises when determining which harmful consequences caused by the wrongdoer's wrongful and culpable act he should be held liable for.²³⁶

Legal causation serves to limit the scope of a wrongdoer's responsibility by ensuring that they are only held liable for harm that is not deemed 'too remote'.²³⁷ This concept is often referred to as the 'remoteness of damage' and is essential in determining the extent of legal liability or the imputability of harm.²³⁸ It examines whether the defendant's conduct was closely related to the plaintiff's harm, or whether it was too remote or unrelated to be considered legally responsible.²³⁹ This prevents

²³² Ibid para 33.

²³³ 2002 (6) SA 431 (SCA).

²³⁴ Ibid para 19.

²³⁵ Neethling *et al* op cit (n1) 230.

²³⁶ Ibid 231.

²³⁷ Ibid 198.

²³⁸ Ibid.

²³⁹ Ibid.

the imposition of liability for a potentially indefinite chain of events that might trace back to the initial act.

There are various theories which aim to discern legal causation.²⁴⁰ These include the flexible approach (based on policy considerations, reasonableness, justice, and fairness); the adequate causation theory (a consequence is imputed to the wrongdoer if it is 'adequately' connected to their conduct, meaning that, based on human experience, the act typically tends to bring about that type of consequence in the normal course of events);²⁴¹ direct consequence criterion (an actor is liable for all direct consequences of their negligent conduct, not just those that are foreseeable, and the consequence does not need to occur immediately in time or space);²⁴² theory of fault (the wrongdoer is liable only for those consequences in respect of which he had fault);²⁴³ and the reasonable foreseeability test (whether a specific result was foreseeable, considering legal policy and the flexible approach to causation).²⁴⁴ The courts prefer a flexible approach, in terms of which there is no single criterion which can be applied to all situations, and the other approaches play a subsidiary role.²⁴⁵ The flexible approach, inquires as to whether there is a close enough relationship between the wrongdoer's conduct and its consequences for such consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness and justice.²⁴⁶ In *De Klerk v Minister of Police*, the CC endorsed the flexible approach, and stated that it is:

'... sensitive to public policy considerations and aims to keep liability within the bounds of reasonableness, fairness, and justice ... Any attempt to detract from the flexibility of the test for legal causation should accordingly be resisted'.²⁴⁷

Socio-economic realities may also impact on decisions about causation.²⁴⁸ Importantly, the other theories can inform the flexible approach, or can be used as pointers or criteria to determine when damage should be imputed to a person:

²⁴⁰ Ibid 233.

²⁴¹ Ibid 237.

²⁴² Ibid 238.

²⁴³ Ibid 240.

²⁴⁴ Ibid 248.

²⁴⁵ Ibid 214.

²⁴⁶ Ibid 233.

²⁴⁷ (CCT 95/18) [2019] ZACC 32 para 29.

²⁴⁸ Neethling *et al* op cit (n1) 201.

'damage is imputable when, depending on the circumstances, it is a direct consequence of the conduct, or reasonably foreseeable, or if it is in an adequate relationship to the conduct, or for a combination of such reasons, or simply for reasons of legal policy'.²⁴⁹ A court is thus not bound to a single theory but has the freedom in each case to apply the theory which serves reasonableness and justice best in the light of the circumstances, taking into account considerations of policy.

It is also important to acknowledge the so-called 'egg-shell skull cases' and these cases entail instances where the plaintiff experiences more severe harm, injury or loss due to pre-existing weaknesses or vulnerabilities – whether physical, psychological, or financial – than would have been the case if the plaintiff had not suffered from such a weakness.²⁵⁰ The wrongdoer is still responsible for all resulting damages, even those exacerbated by the plaintiff's vulnerabilities.²⁵¹ This idea is encapsulated in the principle '*you must take your victim as you find him*'.²⁵² The basic question is whether in light of all the circumstances of the case, the damage should be reasonably imputed to the defendant.²⁵³

2.4.4 *Fault*

Two main forms of fault are recognised, intention (*dolus*) and negligence (*culpa*).²⁵⁴ These terms refer to the 'legal blameworthiness or the reprehensible state of mind or conduct of someone who has acted wrongfully'.²⁵⁵ Fault is a subjective element of delict, as it largely pertains to an individual's disposition, mental state and or attitude.²⁵⁶

An accountable person is regarded as having intention when: 'his will is directed at a result which he causes while conscious of the wrongfulness of his conduct'.²⁵⁷ This entails two important elements: direction of the will, and consciousness (knowledge)

²⁴⁹ Ibid.

²⁵⁰ Ibid 253.

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ Ibid 254.

²⁵⁴ Ibid 155.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Ibid 159.

of wrongfulness.²⁵⁸ Regarding the direction of the will, there are three forms of intent: *dolus directus* or direct intent (occurs when a person consciously desires and aims to bring about a specific outcome through their actions); *dolus indirectus* or indirect intent (where a person directly intends one outcome but also has knowledge that another consequence will unavoidably or inevitably occur, thus they indirectly intend the second consequence); and *dolus eventualis* (where a person does not specifically desire a result but foresees its possibility and reconciles themselves to its occurrence, continuing with their actions that cause the outcome).²⁵⁹ Consciousness of wrongfulness entails that it is not enough for the wrongdoer to simply direct their will toward causing a specific outcome, they must also be aware of, or at least foresee, the possibility that their conduct is wrongful (contrary to the law or infringes upon another's rights).²⁶⁰

In the case of negligence, a person is blamed for 'an attitude or conduct of carelessness, thoughtlessness or imprudence because, by giving sufficient attention to his actions, he failed to adhere to the standard of care legally required of him'.²⁶¹ This is judged against the objective benchmark of the 'reasonable person' or '*bonus paterfamilias*'.²⁶² The test for negligence is set out in the case of *Kruger v Coetzee*²⁶³ (*Kruger*) which provides that the liability of negligence arises if a *reasonable person* in the position of the defendant:

'... would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and would take reasonable steps to guard against such occurrence; and the defendant failed to take such steps'.²⁶⁴

However, South African courts have deviated from the reasonable person test on occasion and instead adopted the English law approach of the 'duty of care' doctrine.²⁶⁵ This method involves first determining whether the defendant owed a

²⁵⁸ Ibid 160.

²⁵⁹ Ibid 160-161.

²⁶⁰ Ibid 162.

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ 1966 (2) SA 428 (A).

²⁶⁴ Ibid para 430E-H.

²⁶⁵ Neethling *et al* op cit (n1) 188.

duty of care to the plaintiff. If such a duty is established, the next step is to evaluate whether there was a breach of this duty. If this is proven, negligence is established.²⁶⁶

2.4.5 *Wrongfulness*

An act which 'causes harm to another in itself is insufficient to give rise to delictual liability' and for liability to follow, the act must be wrongful.²⁶⁷ This wrongfulness lies in the infringement of a legally protected interest (or an interest worthy of protection) in a legally reprehensible way.²⁶⁸

The decision on whether an interest deserves protection or if its infringement is legally unacceptable hinges on whether it would be *reasonable* to impose liability on a defendant for the resulting harm from their actions. Reasonableness in this context is assessed by the legal convictions of the community or *boni mores* criterion.²⁶⁹ This criterion is objective, and inquires whether, considering the legal convictions of the community and the circumstances of the case, 'the defendant infringed the interests of the plaintiff in an unreasonable manner'.²⁷⁰ Many factors are considered in this determination, such as: the nature and extent of the harm; whether the harm was subjectively foreseen or reasonably foreseeable; considerations of public interest and public policy; whether the costs of preventing the harm would have been proportional to the harm that the plaintiff could suffer; and the motive of the defendant, amongst others.²⁷¹

Importantly, the *boni mores* test must further consider the values and norms underpinning the Constitution and the Bill of Rights.²⁷² This means that the legal convictions of the community includes constitutional values of human dignity, equality, and freedom, ensuring they reflect the ethos of an open and democratic society.²⁷³ The courts must develop the *boni mores* in harmony with the Constitution's spirit and objectives,²⁷⁴ and over time, this will likely modify, enrich, and possibly

²⁶⁶ Ibid.

²⁶⁷ Ibid 33.

²⁶⁸ Ibid 35.

²⁶⁹ Ibid 40.

²⁷⁰ Ibid.

²⁷¹ Ibid 41.

²⁷² Ibid 42.

²⁷³ Ibid 43.

²⁷⁴ Ibid.

replace traditional norms related to wrongfulness.²⁷⁵ The *boni mores* is therefore 'juridical yardstick' which enables the court to continuously to adapt the law to the constitutional values and needs of the community.²⁷⁶

The wrongfulness of omissions hinges on whether the alleged wrongdoer had a legal obligation not to cause the harm to the victim or to act to prevent harm.²⁷⁷ Here, wrongfulness is assessed based on whether it was reasonable, according to societal norms and expectations (*boni mores*), for the defendant to have taken preventive action.²⁷⁸ The recognition of a legal duty or a duty of care is essentially the outcome of a value judgement and will only be regarded as wrongful when the legal convictions of the community require it to be unlawful.

The case of *Duivenboden*,²⁷⁹ involved the respondent suing the State for damages resulting from injuries sustained during a scuffle involving Brookes and his family.²⁸⁰ The primary basis of his claim was that the police were negligent in failing to take the legally available steps to deprive Brookes of his firearms before the tragedy occurred, and that their negligence was a cause of the respondent being shot.²⁸¹ This claim was based on the police's failure as an omission, rather than a direct action. The SCA court held:

'The convictions of the community must necessarily now be informed by the norms and values of our society as they have been embodied in our Constitution. The Constitution is the supreme law, and no norms or values that are inconsistent with it can have legal validity . . .'.²⁸²

Thus, the SCA reasoned that:

'Where there is a potential threat of the kind that is now in issue, the constitutionally protected rights to human dignity, to life, and to security of the person, are all placed in peril and the state, represented by its officials, has a constitutional duty to protect them'.²⁸³

²⁷⁵ Ibid 40.

²⁷⁶ Ibid 44.

²⁷⁷ Zitzke op cit (n126) 13.

²⁷⁸ Neethling *et al* op cit (n1) 60.

²⁷⁹ *Duivenboden* supra (n233).

²⁸⁰ Ibid para 1.

²⁸¹ Ibid para 2.

²⁸² Ibid para 17.

²⁸³ Ibid para 22.

Therefore, the SCA found that the negligent and wrongful conduct of the police was a cause of the respondent's injuries.²⁸⁴

Thus, the criterion of wrongfulness is a judicial determination that assesses the reasonableness of imposing liability on a wrongdoer, informed by public and legal policy considerations aligned with constitutional norms. This entails adjusting how these principles are applied to reflect constitutional values.

2.4.6 Damages

The law of delict primarily serves a compensatory role by awarding damages.²⁸⁵ Damage can be defined as 'the detrimental impact upon any patrimonial or personality interest deemed worthy of protection by the law'.²⁸⁶ Damages is therefore the monetary equivalent of this detrimental impact, and must be paid by the wrongdoer in order to compensate as fully as possible all past, and future patrimonial and, where applicable, non-patrimonial damage.²⁸⁷

Patrimonial loss refers to the loss or reduction in value of a positive asset in someone's patrimony.²⁸⁸ There are several categories of patrimonial loss: *damnum emergens* and *lucrum cessans* (losses incurred up to the trial date, including lost profits and loss of future earnings); damage to property and pure economic loss (immediate financial losses from property damage and broader economic losses); direct and consequential loss (direct losses result from the event, while consequential losses are secondary effects stemming from the initial damage); and general and special damages (general damages are presumed from the unlawful act and need only general pleading, whereas special damages, which lack such presumption, must be specifically pleaded and proven).²⁸⁹ The assessment and quantification of damages involves quantifying the monetary value of the damage by comparing the utility or value of the plaintiff's patrimony before and after the damage-causing event.²⁹⁰ This amount is thereafter adjusted by other specific principles to reflect the final

²⁸⁴ Ibid para 30.

²⁸⁵ Neethling *et al* op cit (n1) 221.

²⁸⁶ Ibid 222.

²⁸⁷ Ibid 221.

²⁸⁸ Ibid 229.

²⁸⁹ Ibid 231.

²⁹⁰ Ibid 246.

compensation amount.²⁹¹ For example, damages cannot be awarded for damage which is too remote, and damage for prospective damages are discounted or capitalised, and adjusted for contingencies. Moreover, there are also special rules regarding statutory limitations on the amount of recoverable damages.²⁹²

Non-patrimonial loss pertains to the detrimental impact of personality interests deemed worthy of protection by the law and which does not affect the patrimony.²⁹³ This refers to damages affecting rights of personality in regard to the following: physical-mental integrity, liberty, reputation, dignity, privacy, identity, and feelings.²⁹⁴ Importantly, injury to personality in respect of physical-mental integrity includes pain and suffering, shock (psychological injury/lesion), disfigurement, loss of the amenities of life, and shortened life expectancy.²⁹⁵ The quantum of damages recoverable must reflect the extent of the loss suffered, and this is said to equal the intensity, nature and duration of the physical or affective impairment of feelings. This formula also considers the medical and other evidence relating to bodily injuries to assess the full extent of the injury to personality.²⁹⁶ The extent of non-patrimonial loss is also determined considering: age (including life expectancy); sex; status; culture; lifestyle; and the degree of conscious awareness.²⁹⁷

Lastly, delict also addresses situations where damage is caused by many wrongdoers (joint wrongdoers).²⁹⁸ This is governed by the Apportionment of Damages Act²⁹⁹ which defines joint wrongdoers as 'persons who are jointly and severally liable in delict for the same damage'.³⁰⁰ This means that the plaintiff can claim the full amount of damages from any of them.³⁰¹ Joint wrongdoers are *in solidum* liable for the full damage and the plaintiff therefore has the right to sue whichever wrongdoer he chooses for the full amount of damages.³⁰² The court may apportion

²⁹¹ Ibid 247.

²⁹² Ibid.

²⁹³ Ibid 250.

²⁹⁴ Ibid.

²⁹⁵ Ibid 255.

²⁹⁶ Ibid 260.

²⁹⁷ Ibid 261.

²⁹⁸ Ibid 279.

²⁹⁹ 34 of 1956.

³⁰⁰ Ibid s2.

³⁰¹ Neethling *et al* op cit (n1) 279.

³⁰² Ibid 280.

damages among them based on their relative degrees of faults if all are present in the trial, adjusting their liabilities accordingly.³⁰³

Conclusion

This chapter provided a theoretical understanding of the law of delict, examining its elements and potential for evolution. This groundwork is also essential for understanding the legal arguments advanced in foreign case law discussed in the following chapter, which explore how other jurisdictions have addressed climate harm caused by private polluters through various legal avenues. By establishing this foundation, this chapter supports the subsequent examination of how these foreign approaches might inform and inspire potential development in South African delict law to address climate harm.

³⁰³ Ibid 281.

Chapter 3: Foreign Case Law

Introduction

In response to the global climate injustices discussed in Chapter 1, there have been intensifying efforts to address these injustices through litigation. This dissertation specifically examines strategic private climate litigation (SPCL) instituted against polluters seeking compensation for losses resulting from climate harm.³⁰⁴ Following an overview of SPCL, the chapter analyses groundbreaking cases: *Lliuya v RWE*³⁰⁵ (*Lliuya*); *Smith v Fonterra*³⁰⁶ (*Smith*); *Milieudéfensie v Shell*³⁰⁷ (*Milieudéfensie*); and *Re Greenpeace Southeast Asia*³⁰⁸ (*Re Greenpeace*) culminating in the Philippines Commission on Human Rights' 'National Inquiry on Climate Change'.³⁰⁹ These cases demonstrate how courts have interpreted and, in some instances, advanced the law to address climate harms caused by private polluters.

Notably, two cases were brought by indigenous individuals impacted by climate harm, highlighting the disproportionate burden faced by vulnerable communities. Another case explores whether major polluters owe a duty of care in relation to climate change. South African courts, empowered by section 39(1)(c) of the Constitution to consider foreign law,³¹⁰ can draw valuable insights from these cases to guide the development of the law of delict in responding to climate harm.

3.1. Overview of Strategic Private Climate Change Litigation

The first wave of SPCL arose in 2005 until 2015, primarily in the United States.³¹¹ These cases argued that energy companies' emitting activities significantly contributed to climate change, making them responsible for damages from the resulting climate

³⁰⁴ Ganguly *et al* op cit (n59) 843.

³⁰⁵ *Lliuya* supra (n119).

³⁰⁶ *Smith* supra (n120).

³⁰⁷ *Milieudéfensie* supra (n121).

³⁰⁸ *Re Greenpeace* supra (n122).

³⁰⁹ Commission on Human Rights of the Philippines 'National Inquiry on Climate Change Report' (2022).

³¹⁰ S39(1)(c) of the Constitution.

³¹¹ Ganguly *et al* op cit (n59) 843.

harm.³¹² However, these cases were unsuccessful, and failed to surmount issues of legal standing and causation.³¹³ As such, they will not be discussed in this dissertation.

The second wave of SPCL has been unfolding since 2015 against the backdrop of evolving global scientific, human rights, and environmental constitutionalism contexts.³¹⁴ This is strengthened by the adoption of international instruments like UNFCCC and particularly the Paris Agreement (adopted in 2015), as well as the 2022 United Nations General Assembly resolution recognising that a clean, healthy, and sustainable environment is a human right.³¹⁵ The resolution was passed on the basis that ‘environmental degradation, climate change, biodiversity loss, desertification and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to effectively enjoy all human rights’.³¹⁶ It calls ‘upon States, international organizations, business enterprises and other relevant stakeholders to adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all’.³¹⁷

The evolving scientific context refers to the significant advancements in climate science, exemplified by the work of the IPCC, whose reports affirm scientific consensus on the undeniable reality of climate change.³¹⁸ This is coupled with the developments in attribution science, beginning in 2014 with Heede’s ‘Carbon Major Report’,³¹⁹ which enable the accurate quantification of the proportional historical cumulative contributions of a polluter to climate change,³²⁰ and can link polluters to specific climate events and harm.³²¹

Regarding the evolving constitutional context, a burgeoning global phenomenon of ‘environmental constitutionalism’ has emerged.³²² Since the 1970s, a significant

³¹² Ibid 846.

³¹³ Ibid 849.

³¹⁴ Ibid.

³¹⁵ United Nations General Assembly ‘The human right to a clean, healthy and sustainable environment’ (2022) A/RES/76/300.

³¹⁶ Ibid.

³¹⁷ Ibid.

³¹⁸ IPCC op cit (n3) 42.

³¹⁹ Heede op cit (n25).

³²⁰ Ganguly *et al* op cit (n59) 849.

³²¹ Ibid 854.

³²² J May & E Daly *Global Environmental Constitutionalism* (2015) at 1.

number of countries have incorporated environmental rights into their constitutions,³²³ highlighting a recognition of a healthy and sustainable environment as essential for democratic societies under the rule of law.³²⁴ Environmental constitutionalism (located at the nexus of constitutional law, international law, human rights, and environmental law) affirms the environment as a subject warranting constitutional protection, and involves environmental protection in constitutional texts and vindication of environmental rights by courts worldwide to effectively protect a right to a healthy environment, and mutually reinforcing and interrelated human rights impacted by environmental degradation.³²⁵ As explained by Kotze:

‘Environmental constitutionalism recognizes the importance of environmental care and expresses this juridically at the highest possible level that law is able to offer, thus working to bring the environment under the protective umbrella of a constitution and enabling the application of all constitutionalism’s virtues to the environment... In doing so, environmental constitutionalism renders the issue of environmental care a matter of justice’.³²⁶

May and Daly observe that environmental constitutionalism may serve to promote global environmental health as a long-term value ‘that should be held to constrain those who would allow environmental degradation to gain a perceived short-term benefit’.³²⁷

Thus, this evolving context may encourage judges to rethink the interpretation of existing legal and evidentiary thresholds for claimants,³²⁸ and apply them in a way that achieves the fulfilment of various interconnected and mutually re-enforcing human rights, and domestic and international climate change commitments, in the Anthropocene.³²⁹ The cases discussed below form part of this global ‘second wave’ of global climate litigation.

³²³ L Kotzé *Global Environmental Constitutionalism in the Anthropocene* (2016) at 136.

³²⁴ Ganguly *et al* op cit (n59) 863.

³²⁵ May *et al* op cit (322) 1-3.

³²⁶ Kotze op cit (n323) 152.

³²⁷ May *et al* op cit (322) 48.

³²⁸ Ganguly *et al* op cit (n59) at 841.

³²⁹ Murcott op cit (n51) 148-150.

3.2. Delict and Tort

Before proceeding, it is necessary to briefly distinguish between tort and delict, as the cases discussed in this chapter primarily involve tort law. While both aim to hold wrongdoers accountable and enable plaintiffs to seek compensation, they differ in origin, structure, and application.³³⁰

Tort law, rooted in Anglo-American common law systems, follows a casuistic approach which categorises wrongs into distinct categories or ‘torts’ (such as negligence or defamation),³³¹ each governed by specific principles to protect certain legal interests,³³² and developed incrementally through judicial decisions under the writ system.³³³ Liability depends on aligning the facts of a case with an established tort and courts rely on precedent. While tort law does not explicitly refer to the delictual elements, these are implicitly required.³³⁴

Delict, derived from civil law systems, adopted in many European countries, takes a generalising approach, where liability is decided using general principles,³³⁵ and broad elements (i.e. causation and wrongfulness) which apply irrespective of which, or how, legal interests are impaired.³³⁶ Many European countries adopting this approach have civil codes (such as the Dutch or German Civil Code) which contain a few principles that courts can apply to differing factual situations.³³⁷ This approach offers flexibility to address new circumstances that may not fit into established categories.³³⁸

Notably, South African law embodies a hybrid system, blending the generalising approach of the Roman-Dutch with the English uncodified and precedent system into a unified framework.³³⁹ This duality enables South African delict law to remain flexible to new circumstances through recognising general causes of action and broad elements, while evolving specific forms of liability to address distinct legal issues and

³³⁰ Ahmed *op cit* (n125) 4.

³³¹ Neethling *et al op cit* (n1) 4.

³³² Loubser *et al op cit* (128) 19.

³³³ Ahmed *op cit* (n125) 4.

³³⁴ *Ibid.*

³³⁵ Loubser *et al op cit* (n128) 19.

³³⁶ Neethling *et al op cit* (n1) 4.

³³⁷ Loubser *et al op cit* (n128) 19.

³³⁸ *Ibid.*

³³⁹ Neethling *et al op cit* (n1) 5.

promote certainty, relevant examples being public and private nuisance.³⁴⁰ Private nuisance addresses unreasonable land use by one neighbor affecting their right to use and enjoy their property, while public nuisance involves actions or omissions in public spaces that offend, threaten, or inconvenience the broader public.³⁴¹

3.3. Foreign Case Law

3.3.1 *Lliuya v. RWE AG (Lliuya)*

3.3.1.1 *Background and Arguments*

In November 2015, Peruvian farmer Lliuya, supported by the NGO Germanwatch,³⁴² sued the German energy company Rheinisch-Westfälisches Elektrizitätswerk Aktiengesellschaft (RWE) in German civil court.³⁴³ Lliuya lives in Huaraz, Peru, beneath the glacial lake Palcacochar, which has grown 34 times in size since 1970 due to climate change.³⁴⁴ The expansion of the lake threatens to cause flooding and glacial avalanches, endangering Lliuya's home and the lives of 50,000 residents.³⁴⁵ Lliuya argues that RWE, a major GHG emitter, is partially responsible for this threat due to its significant historical cumulative contributions to climate change.³⁴⁶

Lliuya's complaint is grounded in section 1004 of the German Civil Code (GCC), commonly referred to as the neighbourhood section, which reads:

'(1) If the ownership is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction. (2) The claim is excluded if the owner is obliged to tolerate the interference'.³⁴⁷

³⁴⁰ D Collier & J Glazewski 'Climate change and possible legal liability' in A Cartwright, S Parnell, G Oelofse, S Ward (eds) *Climate Change at the City-scale: Impacts, Mitigation and Adaptation in Cape Town* 1 ed (2012) 147-179 at 152.

³⁴¹ Ibid.

³⁴² British Institute of International and Comparative Law 'Global Perspectives on Corporate Climate Legal Tactics: Germany National Report' (2024) at 16.

³⁴³ The Climate Case: *Saúl v RWE* 'Legal' available at <https://rwe.climatecase.org/en/legal#legaldocs>, accessed 22 June 2024.

³⁴⁴ M Tigre & M Wewerinke-Singh 'Beyond the North-South Divide: Litigation's Role in Resolving Climate Change Loss and Damage Claims' 2023 *RECIEL* 1 at 5.

³⁴⁵ Ibid.

³⁴⁶ Ibid.

³⁴⁷ GCC (promulgated in Federal Law Gazette January 2002, last amended August 2021) §1004.

Lliuya argues that RWE's emissions contribute to climate change, which accelerates glacier melting and threatens his property.³⁴⁸ He classifies RWE as a 'disturber' under the neighbourhood section and contends that he should not have to tolerate this interference. Lliuya requests that the court hold RWE liable for the costs of protective measures to prevent flooding from Lake Palcacochar, proportional to RWE's contribution to global emissions, estimated at 0.47% of industrial emissions between 1751 and 2010,³⁴⁹ amounting to \$21,000.³⁵⁰

3.3.1.2 *Judicial engagement*

In December 2016, the Regional Court of Essen dismissed the case,³⁵¹ finding the neighbourhood section inappropriate and insufficient causation between RWE's emissions and the threat to Lliuya's property.³⁵² However, in November 2017, the Higher Regional Court of Hamm (OLG Hamm) accepted the case for further proceedings.³⁵³ The OLG Hamm reasoned that climate change, with its transboundary effects, creates a 'global neighbourhood' where the neighbourhood section applies.³⁵⁴ Traditionally the 'neighbourhood section' applies to parties in close geographic proximity, and this reimagined interpretation 'stretches section 1004 across a planetary scale'.³⁵⁵ This interpretation of the neighbourhood section is novel, and the conception of this global neighbourhood urges the German courts to broaden their understanding of legal liability and neighbourly relations in the context of climate harm, embracing the realities of our interconnected world.³⁵⁶ Applying an anthropology lens, neighbourly relations become 'morally charged engagements between social actors who are able to affect one another'³⁵⁷ and conceptualises climate change through 'morally charged social relations spanning the planet'.³⁵⁸ Climate

³⁴⁸ The Climate Case: *Saúl v RWE* op cit (n343).

³⁴⁹ Tigre *et al* op cit (n344) 6.

³⁵⁰ Ibid.

³⁵¹ *Lliuya* supra (n119) para 1.

³⁵² British Institute of International and Comparative Law op cit (n340) 16.

³⁵³ *Lliuya* supra (n119) para 1.

³⁵⁴ The Climate Case: *Saúl v RWE* op cit (n343).

³⁵⁵ N Walker-Crawford 'Climate change in the courtroom: An anthropology of neighborly relations' (2023) 23 *Anthropological Theory* 76 at 88.

³⁵⁶ Ibid.

³⁵⁷ Ibid 81.

³⁵⁸ Ibid 92.

change is thus ‘graspable as specific relationships’ between those who cause harm and those who endure it,³⁵⁹ and reveals the unequal power dynamics inherent in social, political, and legal debates about climate change.³⁶⁰

Further, the OLG Hamm declared that although RWE’s emissions are not solely responsible for the flood risk to Huaraz, it is sufficient if they are *partially* responsible for the present risk.³⁶¹ Consequently, the court upheld the potential of *partial* causation,³⁶² and that whether RWE’s emissions partially contribute to the climate harm in Huaraz is a ‘scientific determination’.³⁶³ Thus, the OLG Hamm appointed experts to provide evidence establishing a causal link, specifically requiring evidence that: a flood or mudslide from the expanded water volume of Lake Palcacocha poses a serious risk to the plaintiff’s property; carbon dioxide emissions from the defendant’s power plants contribute to increased global GHG concentrations; these increased concentrations lead to higher global temperatures; and the defendant’s emissions are responsible for 0.47% of these effects, with further expert assessment needed to confirm the exact contribution.³⁶⁴ This case is the first to authoritatively test attribution science in court.³⁶⁵ If successful, advances in climate and attribution science may provide claimants with credible evidence to argue that, ‘*but for*’ the partial emissions of company X, they might not have suffered measurable harm, thus establishing partial causation.³⁶⁶ Another case equipping attribution science to justify this argument is *Asmania v. Holcim*,³⁶⁷ where Indonesian islanders are suing Holcim for its 0.42% contribution to global emissions since 1750, demanding that Holcim reduce emissions to meet Paris Agreement goals and contribute to the costs of adapting their island to climate change.³⁶⁸ However, this case is yet to receive

³⁵⁹ Ibid.

³⁶⁰ Ibid.

³⁶¹ Tigre *et al* op cit (n344) 7.

³⁶² Ibid.

³⁶³ Ibid.

³⁶⁴ *Lliuya* supra (n119) para 4.

³⁶⁵ The Climate Case: *Saúl v RWE* op cit (n343).

³⁶⁶ Ganguly *et al* op cit (n59) 856.

³⁶⁷ Climate Change Litigation Database ‘*Asmania et al. vs Holcim*’ available at <https://climatecasechart.com/non-us-case/four-islanders-of-pari-v-holcim/>, accessed 1 July 2024.

³⁶⁸ Ibid.

sufficient judicial engagement to warrant further discussion. These cases highlight the potentially pivotal role of attribution science for SPCL.³⁶⁹

In June and July of 2022, judges, experts, and lawyers visited Peru to assess the flood risk to Lliuya's house from a melting glacier.³⁷⁰ This site visit was rare for German courts and set a historical precedent.³⁷¹ The court-appointed experts are currently writing their reports to submit to the court.³⁷²

The litigation remains ongoing, but its use of attribution science and the 'stretching' of the neighbourhood section to apply to a 'global neighbourhood' are significant strides in SPCL.

3.3.2 *Smith v Fonterra (Smith)*

3.3.2.1 *Background and Arguments*

In 2019, Michael Smith, a Māori leader, brought tort claims against seven major New Zealand companies collectively responsible for one-third of the country's GHG emissions.³⁷³ Smith argues that the polluters have significantly contributed to the climate crisis, and therefore the defendants have 'damaged, and will continue to damage, his whenua (land) and moana (ocean), including places of customary, cultural, historical, nutritional and spiritual significance to him and his whānau (family)'.³⁷⁴ Therefore, Smith argues that 'the consequence, in fact and law, of the respondents' actions is that Smith, his whānau (family), his descendants and others will bear the cost of dealing with harms contributed to by the respondents' historical, current and future [GHG] emissions'.³⁷⁵ Smith contends that the polluters have failed to credibly commit to, or actively lobbied against, voluntary or regulatory measures that would see them contribute proportionately (or better) to the minimum required reductions.³⁷⁶ Thus, Smith argues that the polluters' activities amount to torts of public

³⁶⁹ Ibid.

³⁷⁰ The Climate Case: *Saúl v RWE* op cit (n343).

³⁷¹ Tigre *et al* op cit (n344) 7.

³⁷² The Climate Case: *Saúl v RWE* op cit (n343).

³⁷³ *Smith* supra (n120) para 3 & 52(a).

³⁷⁴ Ibid para 3.

³⁷⁵ Ibid para 58.

³⁷⁶ Ibid para 54.

nuisance and negligence, and proposes the court to develop a novel 'climate system damage tort'.³⁷⁷

In arguing the main cause of action of public nuisance, Smith argues that climate change and rising sea levels damage his customary family land through flooding and erosion, which results in the irrevocable loss of productive land, and culturally and spiritually significant sites (landing sites, burial caves, and cemeteries) and customary resources (traditional fisheries, including loss of specific species significant to him that are irreplaceable).³⁷⁸ Further, climate change impacts the health of Māori communities.³⁷⁹ Thus, Smith asserts the polluters' actions have, or will, interfere with the following public rights: health, safety, comfort, convenience, peace, and a safe and habitable climate system.³⁸⁰ He claims that this interference is substantial, material, and unreasonable, and that the respondents knew or should have known, at least since the 2007 IPCC Fourth Assessment Report,³⁸¹ that their activities were contributing to dangerous anthropogenic climate change and that they needed to immediately and significantly reduce their emissions.³⁸²

Relatedly, in arguing the second cause of action of negligence, Smith asserts that while polluters were aware, or should have been aware, of the necessity to reduce their GHG emissions, they continued emitting GHGs and distributing products resulting in emissions without significant reduction, and in some cases, have even increased their emissions.³⁸³ As such, he alleges that polluters owe him, and persons like him, 'a duty to take reasonable care not to operate their businesses in a way that will cause him loss by contributing to dangerous anthropogenic interference in the climate system',³⁸⁴ and this duty was breached.³⁸⁵

Smith further proposes the development of a novel climate system damage tort, and argues that polluters should owe a duty, cognisable at law, to cease materially

³⁷⁷ Ibid.

³⁷⁸ Ibid para 63.

³⁷⁹ Ibid.

³⁸⁰ Ibid para 64.

³⁸¹ IPCC 'Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change' (2007).

³⁸² *Smith* supra (n120) para 64.

³⁸³ Ibid para 68.

³⁸⁴ Ibid para 67.

³⁸⁵ Ibid para 68.

contributing to: damage to the climate system; dangerous anthropogenic interference with the climate system; and the adverse effects of climate change through their GHG emissions into the atmosphere (or through their production, exportation and or supply of coal or fuel products).³⁸⁶ Smith alleges that the defendants have breached, and will continue to breach, this duty by emitting GHGs for profit, knowing that those emissions will cause anthropogenic interference with the climate system, and that the adverse effects of climate harm are experienced by Smith and people like him.³⁸⁷

Further, Smith's claims incorporate tikanga Māori (Māori customary law, beliefs, and attitudes) to 'inform the legal basis of the pleaded causes of action and the development of the common law of New Zealand'.³⁸⁸ These principles are rooted in concepts like whakapapa (genealogy) and whanaungatanga (kinship), which connect people to the whenua (land and environment) and impose obligations of kaitiakitanga (to care for or nurture).³⁸⁹ According to tikanga, breaching these principles creates a hara (issue) which requires utu (compensation) to restore ea (balance), and this must consider tikanga conceptions of loss that are neither physical nor economic.³⁹⁰ The court is mandated to consider these principles in the development of New Zealand's common law.

Notably, despite bringing actions in tort, Smith does not seek monetary damages, but rather, for each cause of action,³⁹¹ requests a declaratory judgement that that the defendants had 'unlawfully either breached a duty owed to him or caused or contributed to be a public nuisance and have caused or will cause him loss through their activities'³⁹² and an injunction requiring the polluters to either: produce or cause a peaking of their emissions by 2025, achieve particularised reductions in their emissions by 2030 and 2040, and reach zero net emissions by 2050; or 'to immediately cease emitting net [GHG] emissions, or contributing to the net emission of [GHGs] through the sale of their products'.³⁹³ Smith defers to the Court to determine 'such

³⁸⁶ Ibid para 4.

³⁸⁷ Ibid para 71.

³⁸⁸ Ibid para 59.

³⁸⁹ Ibid para 60.

³⁹⁰ Ibid para 188.

³⁹¹ Ibid para 65.

³⁹² Ibid.

³⁹³ Ibid.

other relief as the Court determines appropriate to enable the mitigation of or adaptation to damage to climate systems contributed to by the respondents'.³⁹⁴ Smith contends that the 'orders sought in this proceeding will cause rapid sectoral change that will lead to other major New Zealand emitters taking similar steps to reduce their emissions in a manner that will materially mitigate the harm faced by Smith, his whānau and his descendants'.³⁹⁵

3.3.2.2 *Judicial engagement*

In March 2020, the High Court of New Zealand struck out Smith's public nuisance and negligence claims but allowed his novel proposed climate system damage tort to proceed, acknowledging that 'the law on appropriate occasion, evolves'.³⁹⁶ In October 2021, the Court of Appeal struck out all three causes of action.³⁹⁷

In August 2022, the Supreme Court (NZSC) reinstated all three of Smith's claims for trial.³⁹⁸ The NZSC acknowledged information about climate change as 'common ground or indisputable' and expressed that:

'Climate change threatens human well-being and planetary health. As the [IPCC] observes, the window of opportunity to ensure a livable and sustainable future for all is rapidly closing. The choices made, and actions implemented, in this decade will have impacts both now and for thousands of years'.³⁹⁹

The NZSC case involved a strike-out application to determine whether Smith's claims should be dismissed before trial, with arguments struck out only if they 'disclose no reasonably arguable cause of action'.⁴⁰⁰ The NZSC focused on assessing whether Smith's main claim in public nuisance constituted a 'reasonably arguable cause of action'.⁴⁰¹ The NZSC explained that where the main cause of action is affirmed, the

³⁹⁴ Ibid para 65.

³⁹⁵ Ibid para 58.

³⁹⁶ *Smith v Fonterra* [2020] NZHC 419 para 101.

³⁹⁷ *Smith v Fonterra* [2021] NZCA 552 para 16.

³⁹⁸ *Smith* supra (n120) para 193.

³⁹⁹ Ibid para 14

⁴⁰⁰ Ibid para 73.

⁴⁰¹ Ibid para 174.

remaining claims are unlikely to be struck out, unless they are without merit and likely to cause unnecessary costs or use excessive court resources.⁴⁰²

In assessing public nuisance, the court considered: whether actionable public rights are tenably pleaded; whether the claim is precluded by the fact that the defendants' emitting activities are lawful; where special damages is applicable; and whether there is sufficient causation between the pleaded harm and the respondents' activities.⁴⁰³ The NZSC clarified that a person is liable in public nuisance where they either: do an act not warranted by law; or omit to discharge a legal duty and further, where 'the effect of the action or omission is to endanger the life, health, property or comfort of the public or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects'.⁴⁰⁴ The Court accepted that the rights identified by Smith fell within the scope of a public nuisance,⁴⁰⁵ and that lawful activities can still be considered nuisances if they unreasonably interfere with public rights, emphasising that tort law can independently address such issues.⁴⁰⁶

Regarding 'special damage' (whether damage suffered by the plaintiff is different from that suffered by the broader public), the NZSC found that Smith's harms were different to those suffered by the general public.⁴⁰⁷ The NZSC adopted a *distributive* understanding of climate change, observing that 'while the effects of human-caused climate change are ubiquitous and grave for humanity, their precise impact is distributed and different'.⁴⁰⁸ The NZSC stated that Smith's unique pleaded injuries, such as harms to fisheries and cultural interests,⁴⁰⁹ 'go beyond a wholly common interference with public rights'.⁴¹⁰

On the issue of causation, the NZSC accepted that climate change, like other environmental harms, does not follow a straight-forward casual structure.⁴¹¹ The

⁴⁰² Ibid para 174.

⁴⁰³ Ibid para 143.

⁴⁰⁴ Ibid para 109.

⁴⁰⁵ Ibid para 144.

⁴⁰⁶ Ibid para 147.

⁴⁰⁷ Ibid para 152.

⁴⁰⁸ Ibid.

⁴⁰⁹ Ibid.

⁴¹⁰ Ibid.

⁴¹¹ Ibid para 157-164; S Bookman 'Smith v Fonterra and the Climatisation of Tort Law' 2024 *MLR* 2 at 5.

NZSC provided that problems of multiple causation do not obviate a defendant's 'responsibility for its contribution to a common interference with public rights',⁴¹² and that:

'How the law of torts should respond to cumulative causation in a public nuisance case involving newer technologies and new harms... is a question that should not be answered pre-emptively, without evidence and policy analysis exceeding that available on a strike out application'.⁴¹³

Confirming a 'reasonably arguable cause of action', all three claims were reinstated, and the case will proceed to trial.⁴¹⁴ The NZSC, in closing, stated:

'The principles governing public nuisance ought not to stand still in the face of massive environmental challenges attributable to human economic activity. The common law, where it is not clearly excluded, responds to challenge, and change in a considered way, through trials involving the testing of evidence... in this area, the common law must develop, if at all, in the fertile fields of trial, not on the barren rocks of a strike out application'.⁴¹⁵

The NZSC noted that the determination of Smith's claims must be resolved at trial based on additional evidence (including tikanga evidence), policy considerations, tikanga customary law, and international and domestic human rights obligations to inform the potential development of the common law.⁴¹⁶ Thus, while the NZSC was not required to 'prejudge' the issues, their engagement with these complex issues is encouraging and provides valuable reasoning that could inform and inspire SPCL in South Africa.

3.2.3 *Milieudefensie et al. v Royal Dutch Shell (Milieudefensie)*

3.2.3.1 *Background and Arguments*

In April 2019, the NGO Milieudefensie and co-plaintiffs brought a negligence claim against Royal Dutch Shell (Shell) arguing that Shell's contributions to climate change, through its significant GHG emissions, violates a duty of care grounded in the Dutch

⁴¹² Ibid para 164.

⁴¹³ Ibid para 166.

⁴¹⁴ Ibid para 176.

⁴¹⁵ Ibid para 172-173.

⁴¹⁶ Ibid para 169.

Civil Code (DCC) and other human rights in the European Convention on Human Rights (ECHR).⁴¹⁷ They argue that given the Paris Agreement's goals and the scientific evidence regarding the dangers of climate change, Shell has a duty of care to take action to reduce its GHG emissions.⁴¹⁸

This duty of care argument is founded on tort, set out in Article 6:162 of the DCC, which provides that:

'A person who commits a tortious act (unlawful act) against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof... a tortious act is a violation of someone else's rights and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour'.⁴¹⁹

The argument is also supported by Articles 2 and 8 of the ECHR, which ensure the rights to life (Article 2) and to a private and family life, home, and correspondence (Article 8).⁴²⁰

Therefore, the plaintiffs argue that Shell has violated this duty of care and seek a ruling from the court that Shell must reduce its CO₂ emissions by 45% by 2030 compared to 2010 levels and to zero by 2050, in line with the Paris Agreement.⁴²¹

3.2.3.2 *Judicial engagement*

In May 2021, the Hague District Court (HDC) found that Shell owed a duty of care to the claimants to reduce emissions from its operations by 45% by end of 2030 relative to 2019 emissions levels across all activities.⁴²² The HDC reasoned that Shell's reduction obligation ensues from the unwritten standard of care laid down in Article 6:162 of the DCC, and acting in conflict with what is generally accepted according to unwritten law is unlawful.⁴²³

⁴¹⁷ (adopted November 1950, entered into force September 1953) 213 *UNTS* 222.

⁴¹⁸ *Milieudéfensie* supra (n121) para 3.

⁴¹⁹ Article 6:162 of the Dutch Civil Code, website at <http://www.dutchcivillaw.com/legislation/dcctitle6633.htm>, accessed 3 July 2024.

⁴²⁰ ECHR supra (n417) Articles 2 & 8.

⁴²¹ *Milieudéfensie* supra (n121) para 3.

⁴²² *Ibid* para 5.3.

⁴²³ *Ibid* para 4.4.1.

However, in November 2024, the Hague Court of Appeal (HCA) overturned the decision in *Royal Dutch Shell v Milieudefensie*⁴²⁴ (*Shell*), ruling that, while ‘on the basis of objective factors, Shell has an obligation to counter dangerous climate change’,⁴²⁵ ‘Shell cannot be bound by a 45% reduction standard (or any other percentage) agreed by climate science because this percentage does not apply to every country and every business sector individually’.⁴²⁶

In the judgement, the HCA discussed the broader responsibilities that all polluters have in reducing their emissions. In considering the indirect horizontal effect of human rights, the HCA stated that:

‘It is an established fact that fossil fuel consumption is largely responsible for creating the climate problem and that addressing climate change is something that cannot wait. To combat the danger posed by climate change, everyone has a responsibility. To fulfil that responsibility, the focus does not lie exclusively on states. Especially companies whose products have contributed to the creation of the climate problem and have it in their power to contribute to combating it are obliged to do so vis-à-vis other inhabitants of the earth, even when (public law) rules do not necessarily compel them to do so. This follows from the instruments... including the OECD guidelines and the UNGP, to which Shell has subscribed. Those instruments place responsibility for protection against dangerous climate change also on (large) companies and call on them to take appropriate measures themselves to counter dangerous climate change’.⁴²⁷

Therefore, after considering that the rights protected by Articles 2 and 8 of the ECHR ‘impact on private law relationships by giving substance to open standards, such as the social standard of care’ and drawing on international guidelines obligating business enterprises to respect human rights, such the UN Guiding Principles on Business and Human Rights (UNGP) and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises on Responsible Business Conduct (OECD Guidelines), the HCA concluded that:

‘Companies like Shell, which contribute significantly to the climate problem and have it within their power to contribute to combating it, have an obligation to limit CO2

⁴²⁴ *Royal Dutch Shell v Milieudefensie* [2024] (The Hague Court of Appeal) 200.302.332/01.

⁴²⁵ *Ibid* para 1.

⁴²⁶ *Ibid* para 7.111.

⁴²⁷ *Ibid* para 7.26.

emissions in order to counter dangerous climate change, even if this obligation is not explicitly laid down in (public law) regulations of the countries in which the company operates. Companies like Shell thus have their own responsibility in achieving the targets of the Paris Agreement'.⁴²⁸

Thus, while this judgement removes mandatory and specific emission reduction obligations for Shell, it establishes a broader duty for all polluters to reduce emissions to meet Paris Agreement goals and protect human rights, albeit with the specific measures left to the polluter's discretion.

The applicants are likely to appeal this further, so the issues remain alive.

3.2.4 *Re Greenpeace Southeast Asia and Others*⁴²⁹ (*Re Greenpeace*) and *National Inquiry on Climate Change*

Following the devastation caused by Super Typhoon Haiyan in 2013, Greenpeace Southeast Asia, with other civil society groups and Filipino citizens, filed a petition to the Philippines Commission on Human Rights (PCHR) to investigate the human rights implications of climate change,⁴³⁰ and the role of 47 major fossil fuel producing companies, the Carbon Majors (including Sasol, Total, Shell, BP, Chevron, and ExxonMobil), in driving the climate crisis, obstructing climate action, and contributing to resulting climate harms, and whether this breached their responsibilities to respect the rights of the Filipino people.⁴³¹

Over seven years, the PCHR conducted a thorough inquiry through fact-finding missions, community dialogues, expert reports, and hearings in Manila, London, and New York. This resulted in the largest collection of expert and eyewitness testimonies, documentary evidence, and legal analysis regarding the climate responsibilities of Carbon Majors.⁴³²

⁴²⁸ *Shell* supra (n424) para 7.27.

⁴²⁹ *Re Greenpeace* supra (n122).

⁴³⁰ *Burger et al* op cit (n52) 52.

⁴³¹ Center for International Environmental Law 'Philippines Commission on Human Rights Releases Systematic and Searing Indictment of the Carbon Majors; a Stark Warning to the Financial Sector; and a Vital New Tool for Courts and Human Rights Bodies' available at <https://www.ciel.org/news/philippines-commission-on-human-rights-releases-systematic-and-searing-indictment-of-the-carbon-majors-a-stark-warning-to-the-financial-sector-and-a-vital-new-tool-for-courts-and-human-rights-bodies/>, accessed 24 October 2024.

⁴³² *Ibid*.

This culminated in the PCHR's 'National Inquiry on Climate Change Report'⁴³³ (PCHR Report) released in May 2022, which found that, through their operations and products, the polluters contributed to the global climate crisis at a scale that is significant and quantifiable.⁴³⁴ Moreover, the report exposed that these large companies had 'early awareness, notice, or knowledge of their products' adverse impacts on the environment and climate system by 1965.⁴³⁵ It finds that the major polluters engaged in 'wilful obstruction and obfuscation to prevent meaningful climate action'⁴³⁶ motivated 'not by ignorance, but by greed'.⁴³⁷ The PCHR's findings vindicate millions of people who endured climate harm and rights violations by polluters fuelling the climate crisis.⁴³⁸

The PCHR further concluded, in light of international standards, principles and guidelines outlining the human rights responsibilities of business enterprises (such as the UNGP and OECD Guidelines),⁴³⁹ that business enterprises must respect human rights,⁴⁴⁰ irrespective of whether domestic laws exist or are fully enforced domestically.⁴⁴¹ This corporate duty includes the responsibility to avoid causing or contributing to adverse human rights impacts through harm to the environment or climate change.⁴⁴² The PCHR thus concluded that the Carbon Majors should have a corporate responsibility to undertake human rights due diligence and provide remediation.⁴⁴³ Simply put, the polluters have responsibilities to protect human rights as we face the climate emergency.⁴⁴⁴

⁴³³ PCHR op cit (n309).

⁴³⁴ Ibid 89.

⁴³⁵ Ibid 90.

⁴³⁶ Ibid 94.

⁴³⁷ Ibid 110.

⁴³⁸ Center for International Environmental Law op cit (n431).

⁴³⁹ PCHR op cit (n309) 80.

⁴⁴⁰ Ibid 79.

⁴⁴¹ Ibid.

⁴⁴² Ibid 84.

⁴⁴³ Ibid 99.

⁴⁴⁴ Greenpeace 'The Climate Change & Human Rights Inquiry Archive' available at <https://www.greenpeace.org/philippines/the-climate-change-human-rights-inquiry-archive/>, accessed 24 October 2024.

Conclusion

The cases discussed in this chapter reflect the growing recognition of polluters as primary contributors to climate change and aims to compel them to reduce their emissions or compensate for climate harms caused, in part, by their emissions. It highlights how, globally, litigants are creatively expanding upon traditional legal frameworks to effectively confront the challenges posed by climate change.⁴⁴⁵

Notable lessons emerge from these cases that could be used to satisfy or develop South African delictual elements to address climate harm. The use of attribution science to establish partial causation in the *Lliuya* could be used to argue factual causation in South Africa, as it provides evidence of an objective causal link. Further, *Milieudefensie* and the PCHR Report argue the existence of a duty of care for polluters or a general ‘responsibility in achieving the targets of the Paris Agreement’, even in the absence of specific public law regulations, and in consideration of international conventions concerning climate change and human rights. This can inform the development of a duty of care, required to satisfy the fault element, particularly for negligent acts or omissions. Finally, the integration of customary law principles into the common law in *Smith* highlights the potential for African customary law to inform the development of South African common law, contributing to a more transformative approach to developing the law of delict.

The cases lend inspiration for the next chapter, which takes the legal doctrine of delict outlined in Chapter 2 and lessons learned from foreign cases, and pivots back to the South African context to assess the potential for evolving delict law to address climate harm in South Africa.

⁴⁴⁵ J Peel & R Markey-Towler ‘Recipe for Success?: Lessons for Strategic Climate Litigation from the Sharma, Neubauer, and Shell Cases’ (2021) 22 *German Law Journal* 1484 at 1487.

Chapter 4: Delict's Potential to Develop to Meet Climate Harm in South Africa

Introduction

This chapter evaluates whether the law of delict can be interpreted and developed to address climate harm, informed by Murcott's theory of TEC.

The chapter first explains the theory of TEC and its core pillars. Thereafter, each element of delict is analysed to determine its capacity to evolve to address specific aspects of climate harm, using TEC as an analytical framework, and incorporating insights from legal doctrine discussed in Chapter 2 and the foreign law explored in Chapter 3.

4.1 Informing the Delictual Analysis: Transformative Environmental Constitutionalism

The Constitution mandates the development of the common law to promote the spirit, purport, and objects of the Bill of Rights,⁴⁴⁶ and courts must develop the common law in alignment with transformative constitutional aspirations.⁴⁴⁷

Relatedly, TEC could guide the interpretation and development of the common law. In recognition that a healthy environment is a pre-condition for human flourishing and the achievement of social justice,⁴⁴⁸ TEC entails a novel approach to the adjudication of disputes concerning converging socio-ecological crises which negatively impact on Earth systems functioning, with grave justice and human rights implications, and seeks to address the interlocking struggles for social, environmental and climate justice in a time of planetary crisis.⁴⁴⁹

TEC has two important pillars. First, TEC calls upon the courts to frame litigation about converging socio-ecological crises in a justice-orientated manner, adopting a socio-ecological systems perspective that allows an appreciation of intersecting social, environmental, and climate injustices.⁴⁵⁰ This framing allows interlocking patterns of

⁴⁴⁶ S39(2) of the Constitution.

⁴⁴⁷ *Carmichele* supra (n181) para 33.

⁴⁴⁸ Murcott op cit (n32) 136.

⁴⁴⁹ Murcott op cit (n51) 166.

⁴⁵⁰ Murcott op cit (n32) 136.

marginalisation, discrimination, and oppression to be explicitly linked to the need to protect the environment. Further, it ensures that the plight of those most vulnerable to environmental degradation are less likely to be overlooked or demeaned.⁴⁵¹ TEC advocates for courts to address the justice implications of cases by evaluating the evidence presented or by taking judicial notice of facts that highlight these injustices to ensure that the adjudication process is responsive to the realities faced by vulnerable groups and environments in the Anthropocene.⁴⁵² Second, TEC promotes a substantive, human rights-based adjudication of environmental law disputes as required by section 39(2) of the Constitution.⁴⁵³ This pillar encourages courts to do three things: meaningfully invoke relevant justice-oriented provisions in environmental legislation giving effect to the environmental right to shape the development and interpretation of law; develop the normative content of the environmental right; and recognise the mutually reinforcing and interrelated nature of the environmental right and other substantive rights (including the rights to life, dignity, socio-economic entitlements, and culture).⁴⁵⁴

TEC has been invoked as an analytical frame mainly in judicial review cases concerning human rights issues related to climate change or environmental governance. It has not yet been invoked as an analytical frame in a delictual enquiry. However, it is possible for TEC to influence the domain of private law given the horizontal application of the environmental right, which imposes a duty on polluters to protect the environment and not to violate the right to an environment not harmful to health or wellbeing. This was affirmed in *ArcelorMittal South Africa v Vaal Environmental Justice Alliance*⁴⁵⁵ (VEJA), where the SCA impliedly applied section 24 of the Constitution, and thus the National Environmental Management Act⁴⁵⁶ (NEMA) principles, horizontally.⁴⁵⁷ The court recognised that ArcelorMittal, and other corporations, bear duties under the environmental right, thus justifying the

⁴⁵¹ Ibid.

⁴⁵² Ibid 137.

⁴⁵³ Ibid 142.

⁴⁵⁴ Ibid 142-143.

⁴⁵⁵ 2014 69 SA (SCA) 184.

⁴⁵⁶ 107 of 1998.

⁴⁵⁷ Murcott op cit (n32) 190.

horizontal application of NEMA principles to corporations.⁴⁵⁸ The court explained that while NEMA principles apply principally to the state:

‘... [NEMA principles] must, in principle, apply to corporate decisions and activities that impact on the environment and thus implicate the public interest, particularly when their activities require regulatory approval’.⁴⁵⁹

Thus, polluters are horizontally bound by environmental right, and legislation aimed to protect that right.

Given that climate change, a pressing environmental issue, threatens the Constitution’s transformative aspirations and pursuit of social justice, TEC offers a valuable framework for ensuring that the interpretation and development of delict is responsive to the profound social, environmental, and climate injustices resulting from climate harm, as well as addressing the root causes and systemic factors that exacerbate these issues. Having briefly described TEC, the next issue that this chapter explores is how these pillars of TEC could influence the delictual enquiry.

4.2 Delictual enquiry

4.2.1 Harm

Climate harm can be argued under two current bases of action under delict: the *actio legis Aquilia*, for patrimonial losses;⁴⁶⁰ and the action for pain and suffering compensating non-patrimonial damages,⁴⁶¹ protecting intangible personal injury, encompassing actual pain, psychiatric injury, loss of amenities of life and loss of life expectancy.⁴⁶² Notably, only harm in respect of a person’s legally recognised patrimonial and non-patrimonial interests qualifies for damages, protecting the plaintiff’s legal interests of: property, bodily integrity, personality (dignity and identity), and psyche (including distress and anxiety).⁴⁶³

⁴⁵⁸ Ibid.

⁴⁵⁹ *VEJA* supra (n455) para 66.

⁴⁶⁰ Neethling *et al* op cit (n1) 9.

⁴⁶¹ Ibid.

⁴⁶² Loubser *et al* op cit (n128) 31.

⁴⁶³ Ibid 23-24.

However, TEC's justice-oriented framing could reshape how harm is understood regarding climate harm. By applying this framing, it is acknowledged that racialised and vulnerable communities in South Africa bear the most severe climate harm, despite contributing least to the climate crisis. This distributive climate injustice stems from historical and ongoing racialized carbon capitalism,⁴⁶⁴ a system that, within the South African context, has long exploited and oppressed marginalised communities.⁴⁶⁵ This system's foundations lie in colonial and apartheid-era practices, where resources and land were forcibly taken from Black communities to fuel the growth of GN states and companies,⁴⁶⁶ releasing significant GHG emissions and entrenching a legacy of economic and environmental inequality. Today, these dynamics persist through neoliberal economic policies that prioritise profit-driven development, often at the expense of ecological and social well-being.⁴⁶⁷ TEC's framing reveals the power dynamics that shape society and drive social, environmental, and climate injustices behind the resulting climate harm.

Further, TEC's second pillar requires reflection on how the environmental right is mutually reinforcing of other substantive fundamental constitutional rights. Climate harm particularly illustrates how the right to an environment not harmful to health or wellbeing is mutually reinforcing and interrelated with the rights to life, dignity, equality, culture, sufficient food and water, housing, education, and the rights of the child. While patrimonial losses and the action for pain, suffering, and loss of amenities protect many of these interrelated constitutional rights, they fall short in addressing harm implicating customary rights or right to culture. As expressed in *Smith*, climate harm has 'damaged and will continue to damage [*Smith's*] whenua (land) and moana (ocean), including places of customary, cultural, historical, nutritional and spiritual significance to him and his whānau (family)⁴⁶⁸ and their indigenous communities (who have negligibly contributed to climate change in comparison to the 7 polluter defendants) are set to experience loss of cultural and spiritually significant sites and

⁴⁶⁴ Gonzalez op cit (n12) 108.

⁴⁶⁵ T Nair van Ryneveld & M Islar 'Coloniality as a Barrier to Climate Action: Hierarchies of Power in a Coal-Based Economy' (2023) 55 *Antipode* 958 at 961.

⁴⁶⁶ Gonzalez op cit (n12) 112.

⁴⁶⁷ Nair *et al* op cit (465) 962.

⁴⁶⁸ *Smith* supra (n120) para 3.

damage to customary resources.⁴⁶⁹ This oversight does not adequately consider, nor compensate, the communal spiritual or cultural significance of these losses suffered by affected communities, which cannot be fully expressed in economic terms nor categorised under non-patrimonial claims related to physical suffering. The link between the mutually reinforcing nature of the environmental right and the right to culture was seen in *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy*⁴⁷⁰ (*Sustaining the Wild Coast II*). In setting aside an exploration right that would have enabled Shell to conduct seismic surveys off South Africa's coastline in its search for oil and gas reserves, the HC recognised that the potential impacts on the climate system would impact on the livelihoods, community wellbeing, cultural practices and spiritual beliefs.⁴⁷¹

This limitation in the traditional legal formulation of harm arises partly from the dominance of Euro-Western legal paradigms, which evolved around capitalist and modernist values that prioritise the protection of individual rights (largely individual ownership of property),⁴⁷² and view humans as separate from, and dominate over, nature.⁴⁷³ TEC's socio-ecological perspective deviates from liberal legal tradition or dualistic thinking,⁴⁷⁴ and aligns with indigenous knowledge systems, such as the Southern African conceptions of *ubuntu*, *ukama*, and *botho*.⁴⁷⁵ *Ubuntu* advances the idea that humans are inseparable from each other and nature.⁴⁷⁶ *Ukama*, means 'relatedness' and 'relatedness to the entire cosmos' and sees human life as embedded in, and related to, ecological life.⁴⁷⁷ Read together, *ubuntu* and *ukama* refer to an 'inseparable oneness' and interdependence of all people, nature and animals within past, present and future generations.⁴⁷⁸ *Ubuntu's* core 'hinges on consolidating the

⁴⁶⁹ Ibid para 63.

⁴⁷⁰ (3491/2021) [2022] ZAECMKHC 55.

⁴⁷¹ Ibid paras 112-125.

⁴⁷² S Kanga 'Cultural values as a source of law: emerging trends of ubuntu jurisprudence in South Africa' (2018) 18 *AHRLJ* 625 at 626.

⁴⁷³ D Chibvongodze 'Ubuntu is not only about the human! An analysis of the Role of African Philosophy and Ethics in Environmental Management' (2016) 63 *J Hum Ecol* 157 at 161.

⁴⁷⁴ Ibid.

⁴⁷⁵ Murcott op cit (n32) 8.

⁴⁷⁶ Ibid 9.

⁴⁷⁷ L Le Grange 'Ubuntu/Botho as Ecophilosophy and Ecosophy' (2015) 49 *J Hum Ecol* 301 at 306.

⁴⁷⁸ Ibid.

human, natural and spiritual tripartite'.⁴⁷⁹ Indigenous knowledge systems appreciate 'environmental conservation as part of Africans' collective identity and morality' and 'encourages a collective sense of responsibility for conservation'.⁴⁸⁰ For these communities, land and nature hold vital cultural and spiritual meaning, integral to identity, sense of dignity and wellbeing. The extension of mutual interdependence with, and respect for, nature was viewed by Europeans as:

'...illogical since in their understanding the nature and animals lacked compassion and agency to reciprocate back... and the human compassion and understanding towards the environment and animals inculcated in indigenous knowledge systems was subsumed and trivialized'.⁴⁸¹

This rationalisation allowed the 'colonialists-cum-capitalists' to disrupt the dependence of Africans on natural resources, exploit nature, and separate indigenous peoples from nature and animals to secure resources and cheap labour necessary to satisfy increased productivity, capital accumulation and industrial expansion.⁴⁸² This destroyed and devalued the moral, religious and spiritual connection Africans had with nature and animals.⁴⁸³

Expanding this element to further consider cultural harms gives due recognition to African legal thinking and aligns with NEMA's principle that mandates 'decisions... take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge'.⁴⁸⁴ TEC could thus encourage the development of the law of delict in terms of section 39(2) of the Constitution to advance a more inclusive understanding of harm that respects the beliefs of those most impacted by climate harm. Further, employing a socio-ecological systems perspective, enriched by indigenous knowledge systems, is essential to ensure that the common law evolves and 'departs from the problematic Western dualistic thinking that views humans as separate from the environment' and has led to the industrial development model that

⁴⁷⁹ Chibvongodze op cit (n473) 157.

⁴⁸⁰ Ibid 159.

⁴⁸¹ Ibid 164.

⁴⁸² Ibid.

⁴⁸³ Ibid 165.

⁴⁸⁴ NEMA supra (n456) s2(4)(g).

is largely responsible for the Anthropocene, and perpetuated climate, environmental, and social injustices that disproportionately impact vulnerable communities.⁴⁸⁵

4.2.2 Conduct

An important question not yet explored in the South African law of delict is whether polluters' significant historical and cumulative GHG emissions could potentially constitute delictual conduct (an act or omission causing harm).

In *Lliuya*,⁴⁸⁶ the historical and cumulative emissions of RWE were presented as actionable conduct. Similarly, in *Smith*⁴⁸⁷ and *Milieudefensie*,⁴⁸⁸ both the cumulative historical emissions and failure to reduce emissions were argued as actionable conduct, considering authoritative climate science (IPCC reports) and international agreements (the Paris Agreement). Thus, a commission arguably involves deliberate emissions, such as from fossil fuel extraction and combustion, that continue despite knowledge of their harmful consequences, while omissions involve failures to reduce emissions or mitigate harm, even as the risks of climate change become clearer.

In arguing that this behaviour could potentially constitute 'conduct', TEC's justice-orientated framing of this behaviour allows reflection that the cumulative emissions of polluters starkly contrast with the negligible emissions of vulnerable communities. The trend of high emissions originates from mass industrialisation that began over two centuries ago, a process driven by the exploitation of labour and resources from racialized communities worldwide, primarily benefiting and enriching GN states and corporations.⁴⁸⁹ Today, emissions-intensive activities persist, supported by neoliberal economic policies that prioritise profit over ecological and social welfare.⁴⁹⁰ Further, such conduct not only drives climate harm through GHG emissions, but first pollutes the air, water, and land of nearby communities.⁴⁹¹ These environmental and climate

⁴⁸⁵ A Terblancé-Greeff 'Ubuntu and Environmental Ethics: The West Can Learn from Africa When Faced with Climate Change' in M Chemhuru (ed) *African Environmental Ethics* (2019) 93-107 at 105.

⁴⁸⁶ *Lliuya* supra (n119).

⁴⁸⁷ *Smith* supra (n120).

⁴⁸⁸ *Milieudefensie* supra (n121).

⁴⁸⁹ Gonzalez op cit (n12) 115.

⁴⁹⁰ Kotzé op cit (n7) 73.

⁴⁹¹ CER 'Full Disclosure: The Truth about Mpumalanga Coal Mines Failure to Comply with their Water Use Licences' (2019); L Khomo 'South Africa: Gold mine pollution is poisoning Soweto's water and

injustices compound existing socio-economic inequalities and violate the right of marginalised groups to an environment not harmful to their health and wellbeing, impacting mutually reinforcing rights. This reality is illustrated in *Trustees for the Time Being of Groundwork Trust v The Minister of Environmental Affairs*⁴⁹² (#DeadlyAir), where emissions causing air pollution are ‘responsible for premature deaths, decreased lung function, deterioration of lungs and heart, and the development of diseases such as asthma, emphysema, bronchitis, tuberculosis and cancer’ in the area.⁴⁹³ Similarly, in *VEJA*,⁴⁹⁴ the SCA-mandated disclosure of ArcelorMittal's Environmental Master Plan revealed significant pollution at their Vanderbijlpark plant, including heavy metal contamination in the groundwater and soil, which posed severe risks to the environment, human health and drinking water.⁴⁹⁵

Importantly, in relying on TEC’s second pillar requiring a substantive rights-based reasoning of environmental law principles, courts can invoke specific NEMA environmental principles, notably, that the ‘responsibility for the environmental health and safety consequences of a policy, programme, project, product, process, service or activity exists throughout its life cycle’ (life cycle principle).⁴⁹⁶ This can be complemented by the polluter pays principle, which provides that:

‘The costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimizing further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment’.⁴⁹⁷

Applying these principles substantially implies that the responsibility for addressing pollution, environmental degradation, and their adverse impacts should rest with

soil – study finds food gardens are at risk’ (2024) available at <https://theconversation.com/south-africa-gold-mine-pollution-is-poisoning-sowetos-water-and-soil-study-finds-food-gardens-are-at-risk-229775>, accessed 10 December 2024; CER ‘Vaal communities demand accountability from polluter ArcelorMittal at its shareholder meetings’ (2020) available at <https://cer.org.za/news/vaal-communities-demand-accountability-from-polluter-arcelormittal-at-its-shareholder-meeting>, accessed 10 December 2024.

⁴⁹² (39724/2019) [2022] ZAGPPHC 208.

⁴⁹³ Ibid para 70.

⁴⁹⁴ *VEJA* supra (n455).

⁴⁹⁵ GroundUp ‘Steel giant’s environmental records exposed’ (2015) available at https://groundup.org.za/article/steel-giants-environmental-records-exposed_3076/#fnref:8, accessed 10 December 2024.

⁴⁹⁶ NEMA supra (n456) s2(4)(e).

⁴⁹⁷ Ibid s2(4)(p).

those responsible. This responsibility extends across the entire life cycle of the activity or product, arguably including its long-term cumulative consequences. This can potentially include climate harm ensuing from emissions of ‘any project, product, process, service, or activity’, satisfying the element of conduct.

4.2.3 Causation

4.2.3.1 Factual causation

Factual causation is determined using the ‘*but for*’ test which, on the authority of *Lee*,⁴⁹⁸ is applied flexibly, and it is sufficient if a defendant’s conduct has in *any way* contributed to the damage sustained by the plaintiff, and that it is unnecessary that his conduct should be the only, main or direct cause.⁴⁹⁹ This flexibility is particularly advantageous in addressing climate harm, which stems from cumulative emissions originating from multiple sources, and it accommodates the possibility of attributing liability through partial causation. TEC would support the application of the test in ways that address interconnected social, environmental and climate injustice for the most vulnerable in society in a time of planetary crisis.

The concept of partial causation is endorsed in *Lliuya*, where the OLG Hamm acknowledged RWE's potential as a co-contributor to climate harm in Huaraz.⁵⁰⁰ In *Smith*, the court acknowledged that climate change does not follow a straight-forward causal structure, and that ‘problems of multiple causation do not obviate a defendant’s responsibility for its contribution to a common interference with public rights’.⁵⁰¹ This causal link is substantiated by climate attribution science, which can determine the extent of a polluter's contribution to global climate change or specific climate-induced extreme weather events. In *Lliuya*, the OLG Hamm recognised scientific models as credible legal evidence, purporting that assessing whether RWEs emissions partially contribute to harm in Huarez is a scientific determination.⁵⁰²

⁴⁹⁸ *Lee* supra (n225) para 41.

⁴⁹⁹ Neethling *et al* op cit (n1) 230.

⁵⁰⁰ Tigre *et al* op cit (n344) 7.

⁵⁰¹ *Smith* supra (n120) para 164.

⁵⁰² Tigre *et al* op cit (n344) 7.

Similarly, to establish partial causation for climate harm in South Africa, attribution science experts could develop credible climate models that clearly demonstrate the causal link. Through TEC's justice-orientated framing, courts accepting attribution science can recognise the substantial contribution of polluters to climate change compared to vulnerable communities.

Notably, the costs and resources of obtaining attribution science is expensive and challenging, and not easily accessible or within the means of the affected vulnerable communities. Philanthropists and governments will need to fund litigation to facilitate this kind of intervention.

4.2.3.2 *Legal causation*

Legal causation requires demonstrating that the harm is not *too remote* from the wrongdoer's conduct and whether it is *reasonable* to impose liability. This is determined using a flexible approach, guided by reasonableness, fairness, and justice, considering factors like foreseeability, legal policy, and the country's socio-economic realities.⁵⁰³

When considering whether it is *reasonable* to hold a polluter accountable, the flexible test's call to consider fairness, justice and the socio-economic realities of the country can be viewed within TEC's justice-orientated frame. This framing brings to the fore the injustice of shifting the costs of climate harm onto vulnerable communities, while major polluters benefit economically from their emissions that are causally linked, through attribution science, to the harm.⁵⁰⁴ These vulnerable groups have been systematically '*rendered vulnerable*' by colonial and neo-colonial practices and systems that entrenched inequality and exploitation, shaping the socio-economic realities of the country, and climate harm compounds these intersecting environmental, climate, and social injustices.⁵⁰⁵

In employing TEC's second pillar, in conjunction with the flexible approach's call to consider legal policy, many environmental principles can be invoked to potentially satisfy legal causation. First, the CCA incorporates a polluter pays principle, which

⁵⁰³ Collier *et al* op cit (n340) 158.

⁵⁰⁴ Gonzalez op cit (n17) 58.

⁵⁰⁵ Ibid.

states that ‘the costs of responding to the adverse impacts of climate change and of mitigation... must be paid for by those responsible for causing the adverse impacts’.⁵⁰⁶ Further, this can be reinforced by NEMA’s polluter pays principle.⁵⁰⁷ These principles applied in the context of addressing climate harm can work towards fulfilling NEMA’s environmental justice principle, which states that ‘environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons’.⁵⁰⁸ Further, specific domestic and international instruments, such as the Paris Agreement and South Africa’s updated NDC, and the Just Transition Framework (JTF), impress the need to reduce emissions to avoid further climate chaos, which further strengthens the link between emissions and climate change. This framing makes polluters’ emissions relevant to climate harm, potentially countering arguments that such harm is too remote.

Further, the conception of a ‘global neighbourhood’ in *Lliuya* could be factored into the development of legal causation, aligned with section 39(1) of the Constitution which empowers courts to consider foreign law.⁵⁰⁹ This conception frames neighbourly relations as ‘morally charged engagements between social actors who are able to affect one another’.⁵¹⁰ This concept resonates with African knowledge systems, particularly *ubuntu*, which loosely translates to ‘*I am because we are; and since we are, therefore I am*’⁵¹¹ and reflects the idea that our ‘humanness’ is derived from our relatedness with others and nature past, present, and future.⁵¹² It teaches that to become ‘fully human’, we must enter deeply into community with others.⁵¹³ This collective personhood embodies an ethos of collective unity, respect, compassion, human dignity, tolerance, sharing, empathy, and love,⁵¹⁴ and imbues an ethical responsibility individuals have to their community and environment. It embodies moral obligations towards community members (or global neighbours), and ‘how we

⁵⁰⁶ CCA supra (n5) s(3)(j).

⁵⁰⁷ NEMA supra (n456) s2(4)(p).

⁵⁰⁸ Ibid S2(4)(c).

⁵⁰⁹ The Climate Case: Saúl v RWE op cit (n343).

⁵¹⁰ Walker-Crawford op cit (n355) 81.

⁵¹¹ D Bilchitz, T Metz & O Oyowe *Jurisprudence in an African Context* 1st ed (2017) at 23.

⁵¹² Le Grange op cit (n477) 306.

⁵¹³ Ibid 304.

⁵¹⁴ Chibvongodze op cit (n473) 157.

ought to relate to the other' and what our moral obligation is towards the other (both human and non-human).⁵¹⁵ One therefore cannot become more fully human or realise one's true self by exploiting, deceiving, or acting in unjust ways towards others.⁵¹⁶ This interconnected view establishes the legal closeness of causation in climate harm cases by recognising that the actions of polluters are morally linked to the harm they cause to vulnerable communities inter- and intra-generationally. The concept of *ubuntu*, along with the 'global neighbourhood' conceptions, provides a framework for understanding that climate harm is not too remote from the conduct of polluters, as their impact is part of a shared and interconnected world where each 'morally charged' action reverberates across generations and communities. It is valuable given Dube's call for *ubuntu* to take its rightful place as a fundamental constitutional principle of environmental governance.⁵¹⁷ Environmental governance thus extends to holding polluters accountable.

Lastly, the egg-shell skull rule holds that a defendant must 'take their victim as they find them',⁵¹⁸ and they are liable for all the consequences of that harm, even if the plaintiff had a pre-existing condition or vulnerability (whether physical, psychological, or financial) that made the harm more severe than it would have been. Through TEC's justice-oriented framing, courts can recognise that the vulnerability of these communities is not incidental but results from colonial and neo-colonial systems of racialized carbon capitalism. These underlying dynamics have created a reality where emissions disproportionately impact poor and vulnerable communities, who bear the earliest and most severe losses in the climate crisis. This approach would reinforce the *egg-shell skull* rule by ensuring that the heightened susceptibility of these communities, shaped by historical and systemic injustice, is properly accounted for in assessing liability and further establishes the causal links between a polluter's emitting activities and climate harm.

4.2.4 *Fault*

⁵¹⁵ Le Grange op cit (n477) 304.

⁵¹⁶ Ibid 304.

⁵¹⁷ F Dube 'Ubuntu: An Underutilised Foundational Constitutional Principle of South African Environmental Law' (2023) 10 *Journal of Law, Society and Development* 1.

⁵¹⁸ Neethling *et al* op cit (n1) 253.

4.2.4.1 *Intention*

In the context of climate harm culpability, intent can include: *dolus indirectus*, where a person intends one outcome but knowingly allows a secondary consequence; or *dolus eventualis*, where a person foresees a possible result, accepts it, and continues the action. Such intentional culpability is reinforced by the findings from the PCHR's 2022 National Inquiry on Climate Change which revealed that 47 Carbon Majors had early awareness, notice, or knowledge of their product's adverse impacts on the environment and climate system by 1965,⁵¹⁹ yet continued business-as-usual and engaged in 'wilful obstruction and obfuscation to prevent meaningful climate action' motivated 'by greed'.⁵²⁰

However, this argument would be challenging, as it requires a detailed investigation into what a specific polluter knew, when they knew it, and how they continued to contribute to anthropogenic climate change while pursuing their business-as-usual model, despite being aware of the harm that climate change would inflict on vulnerable groups. Therefore, negligence becomes the primary focus for establishing liability.

4.2.4.2 *Negligence*

(a) Reasonable person test

Building on the reasonable person test established in *Kruger*,⁵²¹ a plaintiff must demonstrate that: climate harms were reasonably foreseeable to the polluter; a reasonable person in the polluter's position would have acted to prevent such harm; and the polluter failed to take these preventive steps. Importantly, foreseeability does not require precise prediction of harm's extent but rather general awareness of its type.

In establishing reasonable foreseeability, and in first applying TEC's justice-oriented framing, it is evident that industrial production and the combustion of fossil

⁵¹⁹ PCHR op cit (n309) 90.

⁵²⁰ Ibid 94.

⁵²¹ *Kruger* supra (n263) para 430E-H.

fuels release emissions which directly fuel the climate crisis, disproportionately affects vulnerable communities globally, infringing fundamental human rights that are mutually reinforcing, and exacerbating existing social-economic and environmental inequalities. This reality is well-documented in widely accepted and publicly accessible reports, such as by the IPCC.⁵²² Evidence suggests that major polluters such as Shell and Exxon have known about the climate risks of their business activities for decades.⁵²³ The PCHR's Report reinforces this, finding that many Carbon Majors had early awareness, notice, or knowledge of their product's adverse impacts on the environment and climate system by 1965.⁵²⁴ Moreover, since 1992, the UNFCCC has called upon states to take climate action given the knowledge of climate risks. The Paris Agreement's goal of limiting global warming to 2 to 1.5°C based on climate science as of 2015, further emphasises the urgency of reducing global emissions. This international framework reinforces the foreseeability of climate harm and the responsibility to mitigate it.

In considering environmental principles in line with TEC's second pillar, the CCA includes a precautionary and risk-averse principle, which promotes 'the need for a risk-averse and cautious approach to be adopted, which takes into account the limits of current knowledge about causes and effects of climate change and the consequences of decisions and actions in relation thereto'.⁵²⁵ This is reinforced by the NEMA principle which instructs that 'the social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment'.⁵²⁶

Additionally, a plaintiff must demonstrate that a reasonable person in the defendant's position would have taken measures to prevent the harm, and that the defendant neglected to do so. This involves making a normative value judgment informed by various competing factors. This normative judgment can be informed by

⁵²² IPCC op cit (n3) 42.

⁵²³ B Franta 'Shell and Exxon's secret 1980s climate change warnings' (2018) available at <https://www.theguardian.com/environment/climate-consensus-97-per-cent/2018/sep/19/shell-and-exxons-secret-1980s-climate-change-warnings>, accessed 9 December 2024.

⁵²⁴ PCHR op cit (n309) 90.

⁵²⁵ CCA supra (n5) s3(g).

⁵²⁶ NEMA supra (n456) s2(4)(i).

the environmental right and NEMA's principles, particularly the environmental justice principle is relevant, as polluters' decisions are expected not to distribute harmful impacts in a manner that unfairly discriminates, especially against vulnerable or disadvantaged groups.⁵²⁷ In this justice-oriented framework, a reasonable person in the polluter's position should be aware of the exacerbation of environmental, social, and climate injustices resulting from emissions in South Africa, and has a duty, given the horizontal application of the environmental right as affirmed in *VEJA*, to prevent harm. Given the foreseeability of climate harm as established by climate science and international treaties, and in pursuit with ensuring compliance with the country's domestic goals of a just transition and the NDC under the Paris Agreement, a reasonable person would be guided to take preventive measures to mitigate these harms.

(b) Duty of care

Negligence is established when the wrongdoer failed to act despite having a duty of care to do so. In determining this duty, substantive human-rights legal reasoning encouraged by TEC's second pillar can potentially be applied drawing on section 28 of NEMA, which establishes a duty of care to give effect to the environmental right. This duty provides that:

'Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment'.⁵²⁸

This duty extends to significant pollution and degradation that: predates the Act; emerges, or is likely to arise, at a different time than the activity causing it; or results from actions that alter pre-existing contamination.⁵²⁹ This can account for the time lag between emissions (which causes pollution and the resulting environmental

⁵²⁷ Ibid s2(4)(c).

⁵²⁸ Ibid s28(1).

⁵²⁹ Ibid s28(1A).

degradation) and the ensuing climate harm. Section 28 specifies obligations within this duty of care that could apply in cases of climate harm, such as require a polluter to: investigate, assess, and evaluate environmental impacts; cease, modify, or control any harmful activity; contain or prevent the spread of pollutants; eliminate sources of pollution; and remedy any resulting harm.⁵³⁰ In the context of pollution from emissions, these measures emphasise proactive and preventive action, obliging polluters to address and mitigate emissions that contribute to environmental degradation and climate harm. This strengthens the interpretation of section 28 forming the basis for recognising a duty of care related to climate harms under the law of delict. Such duty should extend to both past and ongoing emissions.

Further, aligning with TEC's socio-ecological perspective, African legal philosophy could meaningfully inform a duty of care for environmental protection. African culture views land as a sacred source of life and is guided by the belief that 'we do not inherit the earth from our ancestors; we borrow it from our children'.⁵³¹ African culture emphasises a profound responsibility to safeguard the environment and maintain ecological harmony. Such cultural beliefs support a 'duty of care' and reinforces the obligation of polluters to respect and protect both current and future generations' rights to a safe environment not harmful to health or well-being. This can be seen in *Sustaining the Wild Coast II*:

'The applicant communities contend that they bear duties and obligations relating to the sea and other common resources like our land and forests; it is incumbent on them to protect natural resources, including the ocean, for present and future generations; the ocean is the sacred site where their ancestors live and so they have a duty to ensure that their ancestors are not unnecessarily disturbed and that they are content. If there is a potential for disturbance, they contend, they must be given the opportunity to follow their customary practices for dealing with the anticipated disturbance'.⁵³²

⁵³⁰ Ibid s28(3).

⁵³¹ N Mahao 'Can African juridical principles redeem and legitimise contemporary human rights jurisprudence?' (2016) 3 *COMP* 456 at 472.

⁵³² *Sustaining Wild Coast II* supra (n470) para 115.

In *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy*⁵³³ (*Sustaining the Wild Coast I*), the HC acknowledged that: ‘As indigenous peoples, they feel responsible for conserving the planet for themselves and humanity’.⁵³⁴

Foreign case law could further be relied upon to strengthen this duty of care. The HCA in *Shell* remarked on how:

‘Companies whose products have contributed to the creation of the climate problem and have it in their power to contribute to combating it are obliged to do so vis-à-vis other inhabitants of the earth, even when (public law) rules do not necessarily compel them to do so. [International human rights instruments] place responsibility for protection against dangerous climate change also on (large) companies and call on them to take appropriate measures themselves to counter dangerous climate change’.⁵³⁵

The HCA reasoned therefore that polluters ‘have an obligation to limit CO₂ emissions in order to counter dangerous climate change’ and ‘thus have their own responsibility in achieving the targets of the Paris Agreement’.⁵³⁶ Thus, while this judgement set aside the HDC’s decision imposing mandatory and specific reduction obligations for Shell based on an unwritten duty of care, it affirmed that polluters have their own general responsibility and obligation to limit emissions to protect human rights (both within domestic frameworks and in compliance with human rights conventions) and to achieve Paris Agreement goals. Notably, on the basis of section 39(1) of the Constitution, courts can consider such foreign case law and must consider international law in interpreting the Bill of Rights and developing the common law.⁵³⁷ While the HCA judgement is likely to be appealed and the unwritten duty of care may be reinstated, the reasoning of both the HDC and HCA is pivotal in motivating that polluters have an unwritten responsibility to reduce emissions and could inform a duty of care in South Africa.

Therefore, aligned with TEC’s second pillar and socio-ecological perspective, substantive legal reasoning can be applied to interpret section 28 of NEMA, African indigenous knowledge systems, international human rights and climate

⁵³³ (3491/2021) [2021] ZAECGHC 118.

⁵³⁴ *Ibid* para 15.

⁵³⁵ *Shell* supra (n424) para 7.26.

⁵³⁶ *Ibid* para 7.27.

⁵³⁷ S39(1) of the Constitution.

commitments, and foreign case law. Together, these sources strengthen the argument for imposing a duty of care on polluters.

4.2.5 *Wrongfulness*

4.2.5.1 *Legal convictions of the community or boni mores criterion*

Whether it is *reasonable* to impose liability on a defendant hinges on the *boni mores* of the community, as informed by the transformative spirit, objects and purport of the Constitution and the Bill of Rights, and further considering broader public interest, public policy, and ethical and moral considerations.

TEC's justice-oriented framing reveals that distributive climate injustice deepens existing socio-economic injustices inherited from apartheid and colonialism and perpetuated through neo-colonialism. The CCA's acknowledgement that climate harm 'will affect, amongst other things, human health, access to food and water, biodiversity, habitats and ecosystems, the coast and coastal infrastructure and human settlements'⁵³⁸ recognises that the environmental right, and mutually reinforcing rights are implicated and threatened by climate change. These threats exacerbate inequality and jeopardise South Africa's pursuit of social justice. The CCA's Preamble acknowledges 'anticipated impacts arising because of climate change have the potential to undermine achieving the Republic's developmental goals'.⁵³⁹ Such an outcome could be viewed as contrary to the *boni mores* of the community and the Constitution's rights, values, and vision, thus justifying development of the notion of wrongfulness in South African law.

Further, emerging norms in environmental legislation could prompt development of wrongfulness. One relevant norm is the notion of a 'just transition', embedded in the heart of South Africa's climate change response regime. The PCC, in the JTF, define 'just transition' to include:

'... aiming to achieve a quality life for all South Africans, in the context of increasing the ability to adapt to the adverse impacts of climate, fostering climate resilience, and

⁵³⁸ CCA supra (n5) Preamble.

⁵³⁹ Ibid.

reaching net-zero greenhouse gas emissions by 2050, in line with best available science; and placing people at the centre of decision making, especially those most impacted, the poor, women, people with disabilities, and the youth – empowering and equipping them for new opportunities of the future’.⁵⁴⁰

The JTF explains that:

‘The [just transition] framework... supports South Africa’s broader efforts to redesign the economy to the benefit of most citizens to enable deep, just, and transformational shifts (i.e. addressing the triple challenges), in the context of delivering an effective response to climate change (i.e. improving resilience, making substantial cuts to greenhouse gas emissions, and protecting and promoting the health of communities)’.⁵⁴¹

This transition is applicable for all social partners in South Africa, across all sectors, and all social partners are expected to ‘design their own policies and programmes in line with their specific conditions, responsibilities, and realms of influence, based on the vision, principles, and interventions articulated in [the] framework’.⁵⁴² In other words, it applies to polluters. The Climate Justice Alliance explain that a just transition ‘itself must be just and equitable; redressing past harms and creating new relationships of power for the future through reparations. If the process of transition is not just, the outcome will never be’.⁵⁴³ They argue that a just transition is necessary to ‘build new systems that are good for all people, and not just a few’ and ‘must actively work against and transform current and historic social inequities based on race, class, gender, immigrant status and other forms of oppression’.⁵⁴⁴ Therefore, the just transition aims to: foster climate resilience and empowerment of historically disadvantaged and vulnerable communities; promote equity; and achieve sustainability while transitioning to a low-carbon economy. The JTF explicitly mandates that all sectors and stakeholders must align their policies and actions with its objectives. When polluters act in ways that undermine these objectives, either by failing to contribute to resilience-building efforts or exacerbating environmental harm, they contradict the principles of the JTF and the broader legal and ethical

⁵⁴⁰ PCC op cit (n98) 7.

⁵⁴¹ Ibid 5.

⁵⁴² Ibid 6.

⁵⁴³ Climate Justice Alliance ‘Just Transition: A Framework for Change’ website at <https://climatejusticealliance.org/just-transition/>, accessed 15 November 2024.

⁵⁴⁴ Ibid.

commitments it represents. Such actions counteract emerging legal and public policy, which arguably represent the growing legal convictions of the community.

The rise in climate litigation in South Africa also demonstrates an increasing public call for mitigation, adaptation, accountability, and action to address climate injustices,⁵⁴⁵ and thus a shift in *boni mores*. Since 2017, climate litigation has been increasingly instituted against government and polluters to protect the climate system, safeguard the environmental right and interrelated human rights, and defend society's most vulnerable against 'destructive neo-colonial and capitalist development agendas in the Global South'.⁵⁴⁶ This increase in litigation signals a shift in societal values, as public disapproval grows toward actions and policies that perpetuate climate harm, environmental degradation and socio-economic inequality, with climate cases emerging across various contexts, including challenges to: environmental impact authorisations,⁵⁴⁷ urban planning decisions,⁵⁴⁸ water use licencing,⁵⁴⁹ exploration rights for oil and gas,⁵⁵⁰ and authorisations for coal fired power.⁵⁵¹ South African courts in these cases have 'shown a willingness to read in a responsibility [or duty] on the executive branch to consider climate change in varying contexts' and have employed contextual and rights-based interpretations of the law aligned with South Africa's transformative constitutional project.⁵⁵² Courts have thus been receptive, responsive, and instrumental in addressing climate change risks and enforcing the environmental right, further promoting a shift in the *boni mores*.

The rise in climate litigation, coupled with the JTF, CCA, and other legal and policy developments, represent a growing *boni mores* in South African society which entails that climate change must be mitigated, GHG emissions reduced, and vulnerable

⁵⁴⁵ M Murcott & C Vinti 'The Judge-Made 'Duty' to Consider Climate Change in South Africa' (2024) 16 *Journal of Human Rights Practice* 125 at 125-126.

⁵⁴⁶ Ibid 131.

⁵⁴⁷ *Earthlife Africa Johannesburg v Minister of Environmental Affairs* (65662/16) [2017] ZAGPPHC 58; *Trustees for the Time Being of GroundWork v. Minister of Environmental Affairs*(39724/2019) [2022] ZAGPPHC 208).

⁵⁴⁸ *Philippi Horticultural Area Food & Farming Campaign v MEC for Local Government, Environmental Affairs and Development Planning: Western Cape* 2020 (3) SA 486 (WCC).

⁵⁴⁹ *Trustees for the Time Being of GroundWork v Acting Director of Water and Sanitation* (WT06/11/2015) [2020] ZAWT 1 (21 July 2020).

⁵⁵⁰ *Sustaining Wild Coast II* supra (n472)

⁵⁵¹ *Africa Climate Alliance et. al. v Minister of Mineral Resources & Energy* (56907/2021) [2024] ZAGPPHC (4 Decemeber 2024).

⁵⁵² Murcott *et al* op cit (n545) 141.

populations empowered to adapt to climate impacts. Conduct on the part of polluters that runs counter to these endeavours, whether through actions or omissions, could therefore be deemed wrongful pursuant to the development of the law of delict in line with TEC.

4.2.5.2 Omissions

The wrongfulness of omissions hinges on whether the alleged wrongdoer had a legal duty not to cause the harm or to act to prevent harm.⁵⁵³ The arguments made above (under negligence) can be applied to argue the wrongfulness of an omission on the part of the polluters causing intersecting social, environmental, and climate injustice.

4.2.6 Damages

Damages are a monetary equivalent of damage awarded to a person with 'the object of eliminating as fully as possible his past as well as future damage' in respect of both current and prospective patrimonial and non-patrimonial loss.⁵⁵⁴ Damages can only be recovered by means of one or more of the recognised actions: the *actio legis Aquiliae*, the *actio iniuriarum* or the action for pain and suffering.⁵⁵⁵

Patrimonial losses claimed through *actio legis Aquiliae* in the context of climate harm compensate tangible economic losses, such as the immediate destruction of property, future income losses (including current or future earning capacity), and broader economic impacts.⁵⁵⁶ These losses are assessed by comparing the plaintiff's patrimony (net wealth) before and after the climate-induced event.⁵⁵⁷ Given the cumulative and global nature of climate change, a single polluter may be held liable based on partial causation, with liability apportioned according to the polluter's specific contribution to global emissions and the resulting climate harm. This approach is exemplified in the *Lliuya*, where RWE is argued to be liable for 0.47% of the costs required to mitigate further climate harm. This percentage, reflecting RWE's contribution to historical cumulative global emissions as calculated using attribution science, forms the basis

⁵⁵³ Neethling *et al* op cit (n1) 255.

⁵⁵⁴ Loubser *et al* op cit (n128) 486.

⁵⁵⁵ Ibid.

⁵⁵⁶ Ibid.

⁵⁵⁷ Neethling *et al* op cit (n1) 266.

for quantifying the patrimonial damages. Similarly, this method could be applied to quantify the patrimonial damages attributable to a polluter in South Africa.

Non-patrimonial damages can be awarded based on the action for pain and suffering, allowing compensation, albeit *imperfect*, for physical injuries,⁵⁵⁸ pain and suffering, shock (psychological injury), disfigurement, shortened life expectancy and loss of amenities of life.⁵⁵⁹ The term 'imperfect' is used because full restitution is impossible, however the law attempts to achieve a compensatory objective.⁵⁶⁰ Therefore, polluters could potentially be held liable not only for damages proportional to their contribution to global climate change but also for damages arising from non-patrimonial loss.

TEC's justice-oriented framing recognises that poor and impacted communities primarily suffer non-patrimonial losses. Vulnerable groups, who have fewer material possessions, suffer largely from the loss of informal structures, fertile soil, access to potable water, and culturally, spiritually, or customarily significant sites and resources⁵⁶¹ (such as indigenous biological resources with medicinal or spiritual significance,⁵⁶² or animals that define a community and their way of life, such as a fishing community).⁵⁶³ These losses, which are deeply intertwined with communities' identity, dignity, physical-mental integrity, and social well-being, are not adequately accounted for, nor compensated under the law of delict. When the law prioritises patrimonial damages and disregards this form of non-patrimonial harm, it further marginalises those without property and renders them invisible in the eyes of the law of delict. Thus, there is a need to develop the law of delict, in line with sections 39(2) and 39(3) of the Bill of Rights which 'does not deny the existence of any other rights or freedoms that are recognised or conferred by... customary law, to the extent they are consistent with the Bill'.⁵⁶⁴ Section 30 guarantees persons the right to participate

⁵⁵⁸ Ibid 256.

⁵⁵⁹ Ibid.

⁵⁶⁰ Ibid.

⁵⁶¹ IPCC op cit (n3) 51.

⁵⁶² V Shiva 'Bioprospecting as Sophisticated Biopiracy' (2007) 32 *Signs: Journal of Women in Culture and Society* 2007 307 at 307-308.

⁵⁶³ Chibvongodze op cit (n473) 159-160.

⁵⁶⁴ S39(3) of the Constitution.

in the cultural life of their choice,⁵⁶⁵ while section 31 recognises the right of persons to enjoy their culture and practise their religion.⁵⁶⁶ These sections ensure that individuals and communities can preserve and practice their cultural traditions and access the resources necessary for their cultural identity and social well-being. Such preservation is interrelated with the protection of the environment as required by section 24 of the Constitution. In *Sustaining the Wild Coast I*, the HC accepted that:

‘The customary practices and spiritual relationship that the applicant communities have with the sea may be foreign to some and therefore difficult to comprehend. How can ancestors reside in the sea and how can they be disturbed, may be asked. It is not the duty of this court to seek answers to those questions. We must accept that those practices and beliefs exist... In terms of the Constitution, those practices and beliefs must be respected and where conduct offends those practices and beliefs and impacts negatively on the environment, the court has a duty to step in and protect those who are offended and the environment’.⁵⁶⁷

And that:

‘... the anticipated financial loss to Shell and Impact Africa cannot justify the infringement of the applicants’ constitutional rights. The breach of those constitutional rights threaten the livelihoods and well-being of the applicant communities as well as their cultural practices and spiritual beliefs. Where constitutional rights are at issue, the balance of convenience favors protection of those rights’.⁵⁶⁸

Acknowledging the mutually reinforcing rights to an environment not harmful to health or well-being and the right to culture, the scope of compensable harm should be broadened.

Further, while punitive damages are not recognised in South Africa, there may potentially be an argument for incorporating punitive, exemplary or aggravated damages, as practiced in England or America, in cases of climate harm.⁵⁶⁹ These damages are awarded alongside compensatory damages and are intended to punish defendants for egregious conduct and serve as a deterrent, beyond merely

⁵⁶⁵ S30 of the Constitution.

⁵⁶⁶ S31 of the Constitution.

⁵⁶⁷ *Sustaining the Wild Coast I* supra (n533) para 32.

⁵⁶⁸ Ibid para 68.

⁵⁶⁹ Loubser *et al* op cit (n128) 489.

compensating the plaintiff for their losses.⁵⁷⁰ Aggravated damages compensate victims for mental distress caused by wrongful acts, and punitive or exemplary damages are awarded for particularly outrageous conduct.⁵⁷¹ Introducing such additional damages could address compounded harm suffered by vulnerable communities disproportionately affected by environmental, climate, and social injustices, often rooted in colonial and neo-colonial exploitative practices; especially where it can be argued and evidenced that a polluter had early awareness or knowledge of their emitting activities contribution to both local pollution (heightening the vulnerability of local communities to climate harm) and climate change at large.

Thus, developing the damages element in terms of section 39(2) of the Constitution and in alignment with TEC would ensure that all harms, particularly those rooted in historical and ongoing social, environmental and climate injustices, are acknowledged and remedied.

Conclusion

This dissertation set out to explore the potential of the law of delict to respond to climate harms, understood as the adverse impacts of climate change on people and the environment. It recognised the law of delict as an important private branch of law to potentially hold polluters accountable in a time of planetary crisis, marked by climate change. It proceeded to describe the law of delict in Chapter 2 and revealed that delict is flexible and evolving. Chapter 3 explored how delict (or equivalent laws depending on the jurisdiction) have been utilised in Germany, New Zealand, and Netherlands to hold polluters accountable for climate harms, with varying degrees of success. The evolving body of case law was viewed as inspirational for South Africa, given that our courts can consider developments in foreign law. Lastly, in Chapter 4, the potential of the law of delict to evolve to address climate harms caused by polluters was explored, including with reference to lessons from foreign law and TEC.

In conclusion, there is great potential for the law of delict in South Africa to be utilised to hold polluters accountable for climate harms, but creative and bold

⁵⁷⁰ Ibid.

⁵⁷¹ Ibid.

lawyering will be required. Such creativity could usefully draw on emerging radical legal theories such as TEC.

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