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THE *SHELL* CLIMATE LITIGATION BEFORE THE COURT OF APPEAL

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Hans De Wulf

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Abstract

On November 12, 2024, the Court of Appeal of The Hague (in the Netherlands) delivered its opinion in the Shell climate litigation. Paraphrasing the Court, the case revolved around the question whether Shell had the obligation to reduce its CO2 emissions by 45% by 2030 relative to 2019 levels. An NGO (Milieudefensie) had sought a court order to this effect on the basis that Shell acted unlawfully if it failed to reduce its emissions by 45%. In its judgment the Court of Appeal ruled that, on the basis of objective factors, Shell had an obligation to counter dangerous climate change. However, this finding did not imply that a civil court could establish that Shell should reduce its CO2 emissions by 45%, or any other percentage. In other words, the Court ruled that companies like Shell have a duty to mitigate dangerous climate change, but that the court cannot determine the extent of such a duty, meaning that the court cannot be used to enforce such a duty against a company.

This case note analyses the reasoning of the court. The court deduces the existence of a behavioral duty (to contribute to combatting global warming) on the part of Shell from the standard of care from Dutch tort law. I criticise this part of the judgement, because no precautionary duties can be derived from the standard of care from tort law. The standard of care in negligence is a measuring instrument that can be used to determine *ex post* whether certain behaviour conformed to the standard of due care. Tort law, however, does not contain a duty to behave with due care that would be *ex ante* (before damage has occurred or been proven) enforceable through injunctions. I also criticise the way in which Dutch courts, as opposed the more reasoned opinions of German courts in the litigation against the major German car firms, brushed aside the "political question" doctrine in the Shell litigation.

The author welcomes your comments at hans.dewulf@ugent.be.

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COMPANIES HAVE A DUTY TO MITIGATE DANGEROUS CLIMATE CHANGE BUT COURTS CANNOT DETERMINE THE EXTENT OF THAT DUTY

A case note to Court of appeal The Hague, 12 November 2024: the climate litigation against Shell

Hans De Wulf, Ghent University, Financial Law Institute

On November 12, 2024, the Court of Appeal of The Hague (in the Netherlands) delivered its opinion in the Shell climate litigation.[1] The Court of Appeal summarized its own ruling as follows:

This case revolves around the question whether Shell has the obligation to reduce its CO2 emissions by 45% by 2030 relative to 2019 levels. Milieudefensie et al. have sought a court order to this effect on the basis that Shell acts unlawfully if it fails to reduce its emissions by 45%. In this judgment it is determined on the basis of objective factors that Shell has an obligation to counter dangerous climate change. However, this does not mean that the civil court is able to establish that Shell should reduce its CO2 emissions by 45%, or any other percentage.[2]

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[1] Gerechtshof Den Haag, 12 November 2024, available at https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:GHDHA:2024:2099 (official Dutch text). The unofficial English translation is available at https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:GHDHA:2024:2100. Literal quotations in the present case note are taken from this unofficial translation, but our analysis is based on the official Dutch text of the ruling. in this case note, I will use "ruling" to refer to the opinion of the court of appeal, whereas I will use "judgement" to refer to the opinion issued by the court of first instance. Some of the case notes that have appeared in law reviews on the appeals decision are: M. Dieperink and A. Hendrix, "Wat is dan wel de emissiereductienorm voor individuele bedrijven?", *Nederlands Juristenblad (NJB)* 2025, 90 (This article focuses on the question whether it would have been possible, in view of regulatory developments in the EU and the Netherlands, to determine the specific emissions reduction rate required of Shell and concludes that this would become possible in the months after the Shell appeals decision had been issued); Th. Ahsmann and M. van Velzen-de Boer, "Milieudefensie/Shell: bedrijven kunnen nog niet opgelucht ademhalen", *Bedrijfsjuridische berichten (Bb)* 2025/3; A.G. Castermans and J.A. Lukkes, "Drie arresten over gebod, causaliteit, en klimaatschade" *AV&S* 2025/7.
The appeals ruling decided on the appeal by Shell against the first instance court decision in this case, which was Rechtbank (district court) Den Haag, 26 May 2021, ECLI:NL:RBDHA:2021:5337 (5339 for the English translation). Some of the more important case notes and comments on the first instance decision as published in law reviews include: B. M. Katan, "Ieder het hare. Enkele opmerkingen bij het klimaatvonnis tegen Shell", *Ondernemingsrecht* 2021, 663-669; J. van Calker and J.P.M. Steenkamp, "Het Shell-vonnis en bange bestuurders", *Ondernemingsrecht* 2022/31; A.F. Verdam, "Bepaling van milieubeleid van ondernemingen", *WPNR* 2022, 131; S.M. Bartman, "Een concernrechtelijke beschouwing naar aanleiding van het Shell-klimaatvonnis", *Ondernemingsrecht* 2022/73, p. 514 and the debate between the authors of these last two publications in *Ondernemingsrecht* 2022/91, p. 647-648. The judgement also provoked lots of debate in Belgium, one of the more thorough analyses by Belgian authors is J. Bouckaert and S. François, "Actieve rol voor de rechter bij het bepalen van het (ondernemings)beleid ?" *TBH* 2021, 3-60.
[2] Paragraph 1 of the judgement available as ECLI:NL:GHDHA:2024:2100.

Essentially, the Court of appeal ruled that Shell is subject to a climate change mitigation duty, entailing a duty to reduce CO2 emissions, even though at the time of the ruling government regulation contained no such precise emissions reduction duty for Shell. Such a duty follows from the duty of Shell to behave in accordance with what the court calls "the social standard of care", that is, the duty of care that follows from tort law. But the court of appeal also ruled that it cannot determine the extent of such an emissions reduction duty -the percentage by which Shell would need to reduce its emissions, and the timing of such reductions- which in practice means that Dutch courts cannot be used to enforce such a duty against Shell (or other private companies). The ruling has been appealed by the initial plaintiffs to the *Hoge Raad*[3], the highest court in the Netherlands. A decision at that level is expected in (late) 2026.

With its November 12, 2024 ruling, the court of appeal reformed the judgement by the court of first instance of The Hague in which the court had ruled that Royal Dutch Shell plc[4] had a specific, enforceable duty to reduce its CO2 emissions by 45% by 2030 compared to 2019 levels; that this was an obligation of result for its scope 1 and 2 emissions and a best efforts obligation for its scope 3 emissions[5]; and that such an obligation could be deduced from an unwritten duty of care owed by Shell under article 6:162 (Dutch) Civil Code, the basic statutory provision on tortious liability under Dutch law.[6]

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[3] Sometimes called, in English, the Dutch "Supreme Court" but I find that potentially misleading insofar as "Supreme Court" is usually used to refer to a constitutional court as the final arbiter of the interpretation of the Constitution and often allowed to engage in judicial review of legislation. The Netherlands have a written constitution, but do not have a constitutional court in this sense (and judicial review is not allowed in the Netherlands).

[4] This was the top holding company of the Shell group of companies since a reorganization of the Shell group in 2005. Royal Dutch Shell Plc was a public company limited by shares set up and registered under the laws of England and Wales, but with its head office in The Hague. In 2022, the company moved its head office to London and dropped the "Royal Dutch" from its name, to become simply "Shell plc". This implied that its tax residence also moved to the UK. Around the same time Shell also ended its dual listing in Amsterdam and London for an exclusive London listing. This move was regarded at the time as a blow for the Netherlands as a favored jurisdiction for companies. The move was opposed by the Dutch government, probably because it was not good for the prestige of the Netherlands but also because of potential loss of tax revenue. Shell declared that the move of the head office was not mainly driven by the court cases in the Netherlands against it, but that those cases had contributed to its determination to leave the Netherlands. See e.g. "Shell plans to shift to Britain, and dropping 'Royal Dutch'", *NY Times* 15 November 2021.

[5] These concepts are defined in the Greenhouse Gas Protocol, available at https://ghgprotocol.org/ and are also explained in paragraph 3.5 of the court of appeal ruling.

[6] Article 6:162 Civil Code contains three paragraphs. The first says that a person who commits an unlawful act ("onrechtmatige daad", "tort" in common law English, though of course there is a difference between the common law concept of torts and the continental European concept of extra-contractual fault or "unlawful act") that can be attributed to that person, is liable to compensate the victim for the resulting damage. The second paragraph essentially states that an unlawful act can consist of a violation of a right or of a statutory duty or of acting (or failing to act) contrary to what is deemed fitting/required by unwritten law for social interactions (all this provided there are no

This case comment will first summarize the legal reasoning of the first instance court, without much analysis, and only then describe and critically analyse the reasoning of the Court of appeal. By first summarizing the first instance decision, it will be easier to understand the themes discussed in the appeals decision, and to understand the ambit of what the court of appeal decided.

I. THE FIRST INSTANCE DECISION

1. Standing of general interest NGOs in collective litigation

The first instance judgement was issued at the request of a series of NGO plaintiffs who were recognized to have standing based on article 3:305a BW (Dutch Civil Code). This oft-invoked provision creates standing for collective general interest litigation[7], including such litigation brought by non-profit organisations that have included the pursuit of a collective interest (say, protection of the environment) into their articles of association and have a proven track record of actually pursuing such a collective interest.[8]

The court denied standing[9] to some NGOs who claimed to represent the interests of current and future generations of the whole human population on planet Earth, essentially because the court thought "all the people of the world" was a class that did not show enough commonality in the sense of collective, non-conflicting interests, in view of the fact that not every country or region is similarly affected by climate change. The court also denied standing to several individual natural persons who had joined the claim, mainly because their interests were already represented by the plaintiff NGOs. The *de facto* lead plaintiff was a non-profit association called "Milieudefensie"[10] that was recognized as having standing to defend the interests of all the inhabitants of the Netherlands and of the Wadden islands (a group of small islands off the Dutch and German coast).

After having described some facts about climate change and the regulatory reaction to it in Europe and after having dealt with the issue of standing, the court ruled that the claims made by plaintiffs were governed by Dutch law, as a result of a choice of law made by plaintiffs

exculpatory grounds that justify the seemingly unlawful behaviour). The third paragraph states some principles of attribution.

[7] For a brilliant analysis of the different kinds of collective and general interest litigation, see (alas in Dutch) M. Kruithof, "Privaatrechtelijke facetten van algemeenbelangacties bij de justitiële rechter", *TPR* 2022, 21-130. For an overview of Dutch law on collective litigation, see R. Schutgens and J. Sillen, "Algemeenbelangacties bij de burgerlijke rechter", *TPR* 2022, 209-281.

[8] Paragraph 4.3 of the judgement.

[9] All issues concerning standing are discussed in paragraph 4.2 of the judgement.

[10] See milieudefensie.nl/campagnes for some of the major campaigns of this NGO. One type of campaign is suing big firms. After the Shell decisions discussed here had been issued, Milieudefensie announced it would continue suing ING, a big bank, for funding projects that contribute to climate change, and in June 2025 its website mentioned that it had launched a new court case against Shell, this time to stop Shell from exploring new gas or oil fields.

under article 7 of the Rome II Regulation. Article 7 deals with non-contractual obligations that result from environmental damage and allows the person claiming damages to invoke the laws of the country where the act or fact causing damage occurred. The court ruled that this provision was indeed applicable to the claims, as climate change damage is clearly -in the view of the court- environmental damage in the sense of article 7 Rome II. Article 7 is about claims for damages, but the court was apparently not bothered by the fact that plaintiffs did not claim damages, even though they based their claim on tort law.

2. Transforming the standard of care from tort law into a duty to behave carefully

Plaintiffs did indeed base their substantive claim on the core statutory tort law provision in Dutch law, article 6:162 Civil Code. In spite of this, plaintiffs did not pursue damages, but injunctive relief, namely an order against Shell to reduce its emissions at a pace set by the court. Had plaintiffs pursued damages, this would have provoked debates before the court about the existence and extent of damage and causation, and it seems obvious plaintiffs wanted to avoid debates about these issues, in view of the evidentiary difficulties these would have raised. In any case, at no point in time did plaintiffs pursue damages, they were interested in bringing about societal change and in particular combatting climate change by forcing companies to reduce their greenhouse gas emissions.[11]

a. The duty of care from the tort of negligence as a duty to reduce greenhouse gas emissions

According to plaintiffs, Shell had violated a duty to behave with due care by not planning to reduce its CO2 emissions at the rate that according to plaintiffs is required by tort law, which determines the content of what can be considered acting with due care. The content of that duty to act with due care could be derived, according to plaintiffs, from essentially three sources: the "Kelderluik"-criteria ("cellar hatch criteria"), as developed in a leading Dutch court decision allegedly creating a duty to take precautionary measures against risks[12], which we'll discuss *infra* at section I.2.b; the human right to life and respect for private life as enshrined in articles 2 and 8 European Convention on Human Rights; and various soft law instruments such as the UN Guiding Principles on Business and Human Rights[13].

[11] Milieudefensie, the lead plaintiff, often engages in strategic litigation, about this see H. De Wulf, "Strategic litigation against companies by NGOs representing stakeholder interests" in K.E. Sörensen en H. Birkmose (eds.), *Stakeholders in European Company* Law, Kluwer, 2025, to be published around December 2025.
[12] Hoge Raad 5 November 1965, ECLI:NL:HR:1965:AB7079, *NJ* 1966/136, annotated by Scholten.
[13] Available at www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

The first instance court would largely copy this approach of plaintiffs in deriving a duty for Shell to reduce its emissions. According to the court, the Shell top holding company (which at the time was still called Royal Dutch Shell (RDS) and still had its head offices in the Netherlands)[14] was under a duty to develop a corporate group policy that would ensure that the Shell group would reduce its CO2 emissions with 45% by 2030 compared to 2019 levels. This "reduction duty" followed (according to the court) from the "unwritten standard of care" in article 6:162 Civil Code, which article implied that Shell should act with the care that is due in societal interactions.

b. How the court operationalized the duty of care

The specific meaning of this due care standard had to be determined taking into account "all circumstances of the case".[15] In order to flesh out the due care standard[16], the court invoked 11 such "circumstances" including the existing CO2 emissions of Shell, the ability of the Shell holding to influence the behaviour of its subsidiaries, the UN Guiding Principles, the right to life as enshrined in articles 2 and 8 of the ECHR, "what is required to prevent dangerous climate change", "the twofold challenge" to combat dangerous global warming while also meeting the demand for energy of a growing world population, the ETS system, the effectiveness and proportionality of a reduction order, the burdens put on Shell by such an order, etc. Clearly, the court saw the relevant circumstances as a categorically mixed bag of facts concerning climate change and emissions, soft law provisions, a human (fundamental) right, EU policies, and policy considerations of what is reasonable/realistic, effective and proportionate.

*The "*Kelderluik *-criteria": a precautionary principle implicit in the standard of care?*

The court did not explicitly refer to the "Kelderluik"-case criteria to flesh out the meaning of the concept of negligence or, which is the same thing in this judgement, to discover a duty for Shell to behave with due care and thus reduce its emissions. Plaintiffs had suggested using

[14] See *supra*, footnote 4.

[15] See paragraph 4.4.1 of the judgement: "RDS' reduction obligation ensues from the unwritten standard of care laid down in Book 6 Section 162 Dutch Civil Code, which means that acting in conflict with what is generally accepted according to unwritten law is unlawful. From this standard of care ensues that when determining the Shell group's corporate policy, RDS must observe the due care exercised in society. The interpretation of the unwritten standard of care calls for an assessment of all circumstances of the case in question."

[16] "Norm" is the Dutch word that the court uses for what I call "standard". "Due care standard" is a better translation of the Dutch than "duty of care", which immediately creates the misleading impression that there is a legal behavioral duty to behave carefully, which may even be enforceable "in kind", that is as such, through an injunction to behave carefully. Such a duty does not exist.

those criteria to determine the existence and extent of an emissions reduction duty for Shell[17]. But since the reasoning of the court undeniably implied that every company in the Netherlands (not just Shell) was under a duty to mitigate certain risks[18], namely the risk of climate change, there can be little doubt that it had the "Kelderluik" doctrine in mind[19] when it found a duty of Shell to behave carefully, i.e. reduce its emissions. When Dutch scholars and attorneys refer to these "cellar hatch" criteria ("Kelderluik-criteria") they refer to a seminal decision of the Dutch Hoge Raad.[20] The case was about an accident involving a pedestrian who fell down a cellar hole in the pavement in front of a pub while the hatches to the cellar hole had been opened by an employee of the brewing company delivering beer to the pub's cellar at that moment. In order to justify its conclusion that the pub operator had acted negligently by not warning pedestrians about the danger they could fall down the cellar hole (or taking other precautionary measures, like putting a barrier around the hole), the Hoge Raad ruled that there may be circumstances where people have a duty to take precautionary measures to limit the risks created by their activities if they do not want to be judged to have acted negligently. This judgement simply applied least cost avoider-thinking to determining the standard of negligence. Had the pub operator acted negligently? Yes, because it would have been easy for him to take precautionary measures that would have greatly reduced the risk of accidents. The case revolved around whether leaving the cellar hatch open without any accompanying measures was negligent, in other words, around *how to measure* negligence, how to determine whether behaviour was negligent. But because the Hoge Raad used the word "duty" ("plicht") to frame the issue, it created a risk of misunderstanding: people could develop the idea- as did plaintiffs -that the Hoge Raad had developed a stand-alone behavioral duty, enforceable as such through a demand for injunctive relief, to mitigate the risks created by certain activities -like the risk of climate change to which emissions by Shell seemed to contribute. As we will explain in our discussion of the appeals decision, such a stand-alone duty is probably not contained in Dutch tort law today and was certainly not established by the Hoge Raad in its "Kelderluik" ruling. We'll argue, normatively, that a well-designed legal system should never introduce such an independent, enforceable general risk mitigation duty.

The right to life as protected by the ECHR

The court also refers to the right to life as enshrined in the ECHR (arts 2 and 8) in order to determine the standard of behaviour for Shell. The court explicitly states (in one brief sentence)[21] that plaintiffs cannot directly invoke this human right against Shell (since Shell is

[17] Plaintiffs arguments as summarized in paragraph 3.2 of the judgement.
[18] See in this sense, convincingly, B. M. Katan, "Ieder het hare. Enkele opmerkingen bij het klimaatvonnis tegen Shell", *Ondernemingsrecht* 2021, 663-669.
[19] See Katan, previous footnote, and J. van Calker and J.P.M. Steenkamp, "Het Shell-vonnis en bange bestuurders", *Ondernemingsrecht* 2022/31, text accompanying their footnote 57.
[20] See *supra* footnote 12.
[21] In paragraph 4.4.9 of the judgement.

a private person, whereas human rights can primarily be invoked by private persons against the state). But, the court reasoned, because of the fundamental importance of human rights and the values they embody for society as a whole, such rights can play a role in the relationship between plaintiffs and Shell. "Therefore, the court will factor in the human rights and the values they embody in its interpretation of the unwritten standard of care."[22]. Indeed, in earlier cases, Dutch courts had already used human rights to interpret or "color" the standard of care from tort law.[23] In addition, the Hoge Raad had of course already ruled, in its famous *Urgenda* decision[24], that the right to life as protected by the European Convention on Human Rights entailed a right to protection, by the state, against climate change. This was several years before the European Court of Human rights would rule in its *Klimaseniorinnen* decision, that the ECHR did indeed imply such a right to protection against climate change.[25] Both *Urgenda* and *Klimaseniorinnen* were about a right that citizens could invoke against the state, not against other private persons like corporations, but still the the Hague court referred to *Urgenda* to justify its rejection of Shell's argument that citizens could not invoke a right to protection against climate change as such.[26]

Soft law

As far as the relevance of the UN Guiding Principles is concerned, the court recognised that these are soft law, but again ruled that in spite of this they could be used to give meaning to the standard of care under Dutch tort law. Moreover, "due to the universally accepted content of the UNGP, it is irrelevant whether or not RDS has committed itself to the UNGP, although RDS states on its website to support the UNGP", thus the court[27]. Rather apodictically, the court concludes that "It can be deduced from the UNGP and other soft law instruments that it is universally accepted that companies must respect human rights."[28] It adds[29]: "This responsibility of companies is not optional. It applies everywhere, regardless of the local legal context,

[22] Paragraph 4.4.9 of the judgement.
[23] See esp. Hoge Raad 9 January 1987, ECLI:NL:HR:1987:AG5500 (this was a case between two natural persons, one of whom alleged that her right to privacy had been violated by another who allegedly spied on her). For scholarly analysis of how Dutch courts use and may use human rights to interpret private law rules applicable between private persons, see Asser/Hartkamp vol. 3-I 2019/288 (full title: A.S. Hartkamp, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, Vermogensrecht algemeen. Deel I Europees recht en Nederlands vermogensrecht*, 4th edition, Deventer: Wolters Kluwer 2019). See also S.J. van Calker and J.P.M. Steenkamp, "Het Shell-vonnis en bange bestuurders", *Ondernemingsrecht* 2022/31, text accompanying their footnote 24.

[24] Hoge Raad 20 December 2019, 'Urgenda', ECLI:NL:HR:2019:2006.
[25] ECtHR, 9 April 2024, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, case 53600/20.
[26] Paragraph 4.4.10 of the judgement.
[27] Paragraph 4.4.11 of the judgement
[28] Paragraph 4.4.14.
[29] Paragraph 4.4.15.

and is not passive:*"Respecting human rights is not a passive responsibility: it requires action on the part of businesses."*[30]

3. Shell has a specific 45% reduction duty whose violation is imminent

After having analysed the 11 "circumstances" that had to be used, according to the court, to give meaning and substance to the duty of care incumbent on Shell, the court comes to the conclusion that there was a scientific and societal consensus that in order to keep global warming below 1.5 degrees by 2050 – a goal that is at the heart of the Paris Climate Agreement that is binding on the Netherlands but not on Shell- a CO2 emissions reduction of 45% by 2030 needed to be obtained.

The court recognized that the Shell group had already developed and implemented climate change policies, but ruled it was certain that these policies as implemented would not be sufficient to have the group reduce its emissions of scopes 1 through 3 with 45% by 2030. Because of the "imminent threat of a violation" by Shell of the emissions reduction duty that the court had just established was incumbent on it, the court felt justified to issue an order (injunction) to Shell to perform the said emissions reduction, thus preventing a future but imminent violation by Shell of the duty found by the court.[31]

To summarize, the gist of the court's decision was that tort law contains a duty (for everybody) to behave carefully and that such a duty can be enforced by private plaintiffs including NGOs that have standing to launch collective interest litigation, through injunctions when it is shown that the defendant is on the verge of violating this duty to behave with due care.(Note that discussions about damage and causation need not enter the debate). In the specific circumstances of the case, this duty of Shell to behave carefully meant that the top holding company of the Shell group ("RDS") had to use its influence over that corporate group (i.e. its direct and indirect subsidiaries) to reduce the group's carbon dioxide emissions (including scope 3) with 45% by 2030, because there was a scientific and societal consensus that this level of reduction was required to keep global warming below 1.5 degrees Celsius, which in turn was required to prevent climate change from becoming dangerous.

4. The "political issue"- argument: too easily brushed aside by the Shell courts

By issuing its court order, the court had clearly invented emissions reduction regulation that it applied to only one company, the defendant in the case brought before it (Shell). I believe only the state -parliament or executive branch bodies such as regulatory agencies that have been granted rule-making powers by parliament- has the legitimacy to produce emissions reduction regulation. Shell had argued as much with its defense that determining the rate at

[30] Paragraph 4.4.15. The quote in italics is a quote from the Interpretative Guide (2012) to the Guiding Principles (*The Corporate responsibility to respect human rights: an interpretative guide*, available at www.ohchr.org/en/publications/special-issue-publications/corporate-responsibility-respect-human-rights-interpretive) question 18, p. 23.
[31] For all this, see section 4.5 of the judgement.

which it had to reduce its emissions was a political question. The court rejected this "political question"- argument in one brief paragraph (4.1.3, in what the court itself labels the "introduction" to its assessment of the parties' arguments). The court essentially says it will be deciding a legal question, since it will look into the question whether Shell is under a legal duty, and will rule that it is. The court of appeal would use the same argument to give equally short thrift to the "political question"-defense of Shell[32], although the court of appeal would briefly return to the issue in paragraph 7.53, where it pointed out that the measures taken by the state to reduce CO2 emissions were not exhaustive and concludes: "Thus, obligations arising from existing regulations do not preclude a duty of care based on the social standard of care on the part of individual companies to reduce their CO2 emissions."

I believe the "political question" issue deserved a more careful treatment than that given to it by the Dutch courts in the Shell litigation. Of course, the courts were right that the questions put before them were legal questions and that therefore they were competent to rule on them. But a more careful analysis could have conceivably caused the courts to see that by transforming the standard of care from tort law into a behavioral and enforceable duty, they were producing regulation. Producing regulation to combat climate change requires a weighing of interests that cannot be guided by legal criteria and can therefore only be done by politicians or the civil servants who produce regulation under the control of politicians. Courts are very badly placed to engage in this activity. As was well explained by Jonathan Sumption in a critical comment on the *Klimaseniorinnen* judgement of the European Court of Human Rights[33]:

> Climate change is a classic polycentric issue. There is an urgent need for measures to address it. But governments cannot sensibly consider it in isolation from other relevant factors. They have to take into account the impact on whole populations who have built their lives on past assumptions about the availability of energy. People need to heat their homes, go to work, run businesses and so on. Many live on very tight budgets. There is a trade-off between these competing policy imperatives. Difficult compromises may be required. Yet the Strasbourg Court considered nothing but climate change. That is how courts work. They address the particular issue put before them by the complainant. They do not look at the collateral issues raised by most demands for the enactment of positive rights. Responsible states cannot make major decisions affecting people's lives on such a blinkered basis."

I would add that not only are courts badly placed to weigh competing interests in order to come up with specific behavioral rules (in this case: emissions reductions rules for a specific company), in a democracy they also lack the legitimacy to do so.[34] The weighing of interests

[32] See the brief sentences devoted to the issue in paragraph 6.8 of the court of appeal ruling.
[33] J. Sumption, *The challenges of democracy and the rule of law*, London, Profile books, 2025, p. 147.
[34] There is very large literature on the topic of to what extent judges should be allowed to interfere in policy matters, something which courts sometimes do when they engage in judicial review or pronounce on human rights matters. From the literature in Europe that is intended for a general audience and that has therefore been more impactful, see two books that plead in favour of a more limited role of courts: from a British former Supreme Court judge, J. Sumption, *Trials of the state : law and the decline of politics* , London: Profile Books, 2019 and from the Belgian sociologist M. Elchardus,

that is required to develop an acceptable national climate policy cannot be performed based on criteria derived from science (climate science or any other science), ethics, or cost-benefit analysis. There is simply no rational system of thought that can guide policymakers in this weighing of interests. Because rational criteria cannot guide the development of such policies, such decisions are political to the bone, at their core. Politicians have to decide who will lose and who will win as a result of their decisions (e.g. energy firms and people who want access to cheap energy mainly lose, people who prefer reductions in global warming to cheaper energy will mainly win).[35] Because such essentially political decisions cannot be taken on a rational basis, they are only legitimate if they are democratically decided, namely after every adult citizen has had an albeit indirect possibility of influencing the decision, namely by electing politicians who sit in a parliament that will hold government - which actually develops policies and enforces the resulting regulation- to account. It would undermine democracy and the balance of powers if a political system allowed courts to take this type of decision. Developing policy and producing regulation implementing those policy choices is also something for which adversarial court procedures are singularly unsuitable. In such procedures each party does the opposite of trying to come up with a balanced weighing of interests: each party will only invoke (and present to the court) facts and arguments that serve its single-minded purpose, namely mitigating climate change whatever the costs to other legitimate societal goals in the case of plaintiffs whose organizational purpose is to combat climate change, and going about its business as it deems best in the case of a firm like Shell, an oil major.

II. THE REASONING OF THE COURT OF APPEAL

The court of appeal ruling would confirm that Shell is under a legal duty, derived from the duty of care under tort law, to reduce its emissions, but would find that Shell had not violated such a duty (nor was such a violation imminent) as far as its scope 1 and 2 emissions were concerned, whereas for scope 3 emissions the court found it could not establish what a prudent level of emissions for Shell would have been, so that it could not order Shell to pursue a specific emissions reduction rate. In addition, the court found that an injunction ordering Shell to reduce its scope 3 emissions would have been ineffective in reducing global emissions

Reset,Antwerp: Ertsberg, 2021 (esp. chapters 18 and 19); while a former president of the Hoge Raad and a judge in the Amsterdam court of appeal wrote on the case for the defense (court interventions are mostly OK): G. Corstens and R. Kuiper, *De rechter grijpt de macht*, Amsterdam: Promotheus, 2021. An original, worthwhile contribution is B. Ewing and D. Kysar, "Prods and pleas: limited government in an era of unlimited harm", *Yale Law Journal,* Vol. 122, 2011, 350. One of the authors' arguments is that the different branches of the state can sometimes usefully trespass on each other's territory in order to prod the other branch into action and make it accept its responsibility to deal with an issue.

[35] See about what is the core and nature of political decision-making, Ch. Mouffe, *On the political*, London:Routledge, 2005.

(because Shell could have complied with such an order by selling certain activities to a third party), so that was an extra reason for not issuing such an order.

The court of appeal began its analysis with a description of the relevant facts, meaning scientific findings about climate change and the policy reactions to it at a global and EU level and in the Netherlands. This was followed by an overview of the Shell group and its climate goals, including the potential climate impact of the fossil fuel investments that Shell had planned for the foreseeable future. One of the major conclusions from this overview of the facts was that there is indeed a scientific consensus that in order to avoid the more dangerous consequences of climate change, the world would need to reduce CO2 emissions by 45% by 2030 compared to 2010 levels, and with 100% by 2050.[36] However, this is the level of emissions reductions that should be reached at a global level, and the court explains that such percentages do not necessarily apply to regions like the EU, countries like the Netherlands, economic sectors like the petrochecmial industry, let alone individual firms like Shell. The court of appeal further pointed out that climate policy in the Netherlands is developed by the government within he framework of the Dutch Climate Act, which, implementing the European Climate Act that in turn translates the Paris agreement into a binding set of rules for EU member states, provides for a 55% reduction in CO2 emissions by 2030 and net zero electricity production by 2050. As part of its climate policy, the Dutch State had entered into a non-binding "Expression of Principles" with the Shell group, which states (again, this is not legally binding) that Shell will strive towards a reduction with 3.9 megatonnes of the emissions caused by activities of Shell under its operational control in the Netherlands.[37]

After having confirmed that the plaintiff NGOs did indeed have standing under Dutch civil procedure rules on collective litigation and taking into account that during the appeal proceedings Shell had given up its objections against the application of Dutch substantive law to the claims brought by plaintiffs, the court of appeal's analysis proceeds in essentially four steps:

1. Shell is subject to an emissions reduction duty

First, the court asks whether Shell is subject to an emissions reduction duty.[38] It answers this question in the affirmative and here its reasoning is quite similar to the argumentation used by the court of first instance, deducing such a duty from the standard of care used in tort law. Still, the reasoning of the appeals court is better constructed than at first instance. The court finds that protection against climate change is a human right and that states have a duty to

[36] See esp. paragraphs 3.9 and 3.11 of the ruling, referring to reports by the IPCC and the IEA (international Energy Agency).
[37] See paragraph 3.20 of the appeals ruling.
[38] The reasoning of the court of appeal is summarized in paragraphs 7.55 through 7.57 of the appeals ruling.

protect their citizens against the negative consequences of climate change. In private, "horizontal" relationships between private persons, these human rights and state obligations can also have an effect, namely through "open norms or standards" such as the standard of care from tort law (which is systematically called "the social standard of care" in the English translation of the judgement provided by the court itself). The concrete meaning of this standard can be filled out by relying on soft law instruments such as the UN Guiding Principles. In the EU, climate policy regulations are also addressed, says the court, to companies. The court mentions that Shell is subject to the EU-ETS trading system[39] which will make it progressively more expensive for Shell to emit greenhouse gases. Under both the CSRD and the CSDDD[40] Shell needs to adopt (and if the Omnibus proposal[41] of the EU commission to dilute the CSDDD would not be adopted) implement climate transition plans. But, the court of appeal stresses, this EU regulation does not impose absolute emissions reductions obligations to individual firms or industry sectors. However, the court continues, emissions reductions regulation is not exhaustive: in order to comply with the social standard of care, it may not be sufficient for a firm to comply with specific (statutory) regulation. The court writes: "In addition to complying with these measures (binding EU regulation-hdw), companies have a social duty of care to reduce their emissions"[42]. Since the court has explained that EU regulation does not impose an emissions reduction obligation on companies directly, it is not very clear from the ruling on what basis the court of appeal finds such a duty to behave carefully and therefore reduce emissions for Shell, even though Shell is a large emitter and not just any firm when it comes to CO2 pollution and contributions to global warming. It seems the main source for such an emissions reduction obligation must be the human right to

[39] See https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets_en.

[40] CSDDD: Directive (EU) No. 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation 2023/2859 ('CSDDD'), *OJ* 5 July 2024, https://eur-lex.europa.eu/eli/dir/2024/1760/oj/eng; CSRD: Directive (EU) No. 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting ('CSRD'), OJ 16 December 2022, https://eur-lex.europa.eu/eli/dir/2022/2464/oj/eng.

[41] Proposal for a Regulation of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements, COM/2025/81 final, OJ 26 February 2025, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52025PC0081. The Council on 21 June 2025 seemed to endorse most of the Commission's proposals, which could lead to the adoption of "Omnibus" at the end of 2025: Mandate for negotiations with the European Parliament, Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements, 2025/0045(COD), 21 June 2025, https://www.consilium.europa.eu/en/press/press-releases/2025/06/23/simplification-council-agrees-position-on-sustainability-reporting-and-due-diligence-requirements-to-boost-eu-competitiveness/.

[42] Para. 7.57. appeals ruling.

protection against climate change which, as explained, may be used to flesh out the concrete meaning of the general duty of social care to which companies are subject.

In any case, the court of appeal makes explicitly clear that it does not feel that the so-called "Kelderluik-criteria" could be used to construe the duty of care (social standard of care) for Shell. Plaintiffs had suggested these criteria could be used for that purpose, and as we saw the court of for instance, even though it never explicitly referred to them, seemed to have used them to construct a duty of care. The court of appeal correctly explains: "The Kelderluik factors are used in case law to assess whether, assuming a dangerous situation, the social standard of care requires certain safety measures to be taken. The Kelderluik factors are focused on the creation of dangerous situations. *The dangerous climate change occurring worldwide is not entirely equivalent to hazardous situations to which the Kelderluik factors tend to be applied.*"[43] (emphasis added by me). The reasoning of the court of appeal would have been even stronger if it had explicitly made clear that the Kelderluik criteria are indicia that may be used to judge *post factum* (ex post) whether the behaviour of a defendant who is linked to damage that has really occurred, had been negligent or not. They are standards by which to judge past behaviour, emphatically *not* ex ante duties to behave in a certain way, that is, duties to take precautionary measures in order to try and avoid certain damage from occurring. If I'm wrong in my characterisation of the Kelderluik criteria and they *should* be regarded as behavioral duties that are enforceable *ex ante* through a demand for injunctive relief, ordering the defendant to behave carefully, then I would have to accuse the Dutch legal system of having a very bad design fault, confusing the enforcement of subjective rights through injunctive relief with the protection of mere interests through damage claims based on tort law. I will explain this point *infra*, in section III.1.

2. Shell has not violated its duties for scope 1 &2 emissions, and the court cannot establish the extent of its scope 3 duties

Having established that Shell is under an emissions reduction duty that follows from the duty of care under tort law, the second prong of the court's analysis tries to establish whether Shell has acted in violation of such a duty as far as its scope 1 and 2 emissions are concerned.[44] Scope 1 emissions are direct emissions caused by the activities of a firm through assets under its operational control. Scope 2 emissions are indirect emissions, namely essentially those related to the production of energy that the firm buys to support its activities from outside energy providers. Scope 3 are the indirect emissions that are not scope 2 emissions, meaning mainly emissions caused through the use of products or services sold by the firm. Scope 3 emissions

[43] Paragraph 7.3 of the court of appeal ruling.
[44] Paragraphs 7.63 through 7.66 of the ruling.

are essentially emissions caused by clients of the firm, and for most firms constitute by far the largest portion of a firm total emissions. For Shell they constitute about 95% of emissions.[45]

The court of appeal concluded that Shell had not violated its duty of care concerning scopes 1 and 2, nor was such a violation imminent. It appeared from Shell's climate policy documents and their implementation, as well as from its disclosed business plans, that Shell would reduce its scope 1 and 2 emissions to a larger extent and more rapidly than demanded by plaintiffs in their application for injunctive relief. Plaintiffs had argued that Shell had in recent years repeatedly changed its climate policies, emissions targets and plans on investment in the oil and gas sector, and that therefore Shell's announcements about planned emissions reductions could not be trusted. The court rejected these claims as speculative. Therefore, the court could not grant an injunction relating to Shell's scope 1 or 2: there was no impending violation of a legal obligation ("rechtsplicht" in Dutch) by Shell[46].

The court of appeal devotes more space (several pages)[47] to arguing that it is not able to judge whether Shell has violated its duty of care in relation to scope 3 emissions, because the court cannot establish from objective factors such as existing climate change regulation, soft law instruments or consensus in the scientific community what exactly the appropriate emissions reduction rate for the Shell group of companies would be. The court reiterates the point that there is a scientific consensus about the need to achieve a *global* emissions reduction rate of 45% by 2030 relative to 2010 levels, but, the court finds, it is impossible to deduce desirable reduction rates for an individual economic sector like the oil and gas industry, let alone an individual firm that is part of that industry, from these global norms, which apply to all countries and all sectors of activity. The court stresses that it could very well be that certain countries, sectors or individual firms should be forced to reduce their emissions with a much higher or lower percentage than 45% in order to achieve the global emissions reduction goal.

3. It would be ineffective to subject Shell to scope 3 duties

Finally, the court of appeal also rules that it would have been *ineffective* to issue an order to Shell concerning its scope 3 emissions, which constitute about 95% of the emissions attributable to Shell.[48] The court takes care to confirm, rejecting arguments from Shell about its limited influence on the demand for oil products from consumers, that Shell in principle also has a duty to reduce its scope 3 emissions. But on the sell side, the court finds that Shell could comply with an order to reduce its scope 3 emissions by leaving the value chain, i.e. selling its distribution and trading business to an entity completely independent from Shell. That would have no effect on the level of global emissions at all, even though Shell would have

[45] For a brief explanation about the meaning of scopes 1, 2 and 3, see paragraph 3.5 of the ruling (p. 2).
[46] See this conclusion in para 7.66 of he appeals ruling.
[47] Paragraphs 7.67 through 7.96 of the appeals ruling.
[48] See paragraph 7.67 ff.

greatly reduced the emissions that could be attributed to it. Therefore, ordering Shell to reduce its scope 3 emissions would be ineffective. This even means, according to the court of appeal, that plaintiffs had no civil procedure interest to demand a reduction of scope 3 emissions from Shell. As the court of appeal states[49]:" It follows from Article 3:303 DCC[50] that there must be a sufficient interest in a legal action. Whether there is a sufficient interest can be assessed by comparing the situation with and without granting the claim. If there is no relevant difference between the two situations, in the sense that allowing the claim does not actually bring the claimant any benefit, the required interest in the claim is lacking." Since Shell could meet its scope 3-obligations by selling its trading business to a third party, plaintiffs have no interest in demanding such a reduction in scope 3 emissions. It is somewhat surprising that the court of appeal only comes to this conclusion at the very end of its ruling: if the court can easily establish that plaintiffs have no interest in scope 3 emissions, shouldn't the related claims have been thrown out as inadmissible at the start of proceedings ? The court may have been reluctant to do so because that would have robbed it of the possibility to affirm that *in principle*, Shell is subject to a legal duty to reduce also its scope 3 emissions.

III. TWO CRITICAL REMARKS CONCERNING THE REASONING OF THE COURT OF APPEAL

1. Tort law contains no duty to behave carefully and injunctions to behave with due care can therefore not be based on tort law

Plaintiffs in the Shell litigation were NGOs pursuing an injunction against a company. Under Dutch law, courts can only issue an injunction when the addressee of such an injunction has violated a legal duty or such a violation is imminent.

a. There is no ex ante enforceable duty to behave with due care

In the Shell litigation, both the court of first instance and the court appeal derived the existence of such a legal duty from tort law. As we saw, article 6:162 of the Dutch Civil Code provides that a person who commits an unlawful act and thus causes damage, is liable to compensate that damage and in its second paragraph explains that an unlawful act can consist in acting contrary to what is deemed fitting for social interactions by unwritten law. Belgian lawyers call this standard (what is unfit behavior according to unwritten standards of prudence) "the general standard of care", and the The Hague court of appeal calls it "the social standard of care" in its own unofficial English translation of its ruling. This is a standard for judging behavior, namely judging whether the behaviour of a defendant was negligent (in the tort law sense of the word) or not. It is a yardstick, a measuring tool, to (after the facts) measure

[49] Paragraph 7.102
[50] The Dutch Code of Civil Procedure.

behaviour, in order to determine whether the defendant committed a "fault" (as it is called in tort law systems influenced by the French *code civil*). This general standard of due care is emphatically *not* a duty to behave in a certain way, namely with due care, certainly not a duty that would be enforceable through an injunction to behave in accordance with the standard of care. This is no doubt true of every tort law system in western Europe and also in the US, but probably everywhere in the world or at least the west. That it is also true under Dutch law (though perhaps only until Dutch courts began to misconstrue tort law) is apparent from the structure of article 6:162 BW. Only the first paragraph of that article formulates a legal obligation, essentially: if you cause damage through an "extra-contractual" unlawful act, you have to pay compensation to the victim if the latter demands this. The second paragraph merely explains the meaning of the concept "unlawful act" used in the first paragraph: an unlawful act as the word is used in the first paragraph can consist not only in the violation of a right or a statutory provision, but also in behaving in a way that is not fitting according to unwritten standards that prevail in society, the so-called "social standards of care". Nowhere does article 6:162 state or imply that every person is under a duty to behave carefully at all times. The article only makes clear that one condition for non-contractual liability is careless, in the sense of negligent, behaviour: a victim can claim damages if it proves fault (in this case behavior contravening the social standard of careful behaviour) *and* damage *and* a causal link between the fault (unlawful act) and that damage. When a court rules that a duty to behave in a certain way can be deduced from this norm of due care it turns a standard to measure past behavior, into something complete different, a duty to behave carefully that would be enforceable through demands for injunctive relief pertaining to the future. Such a duty to behave carefully does not exist in any legal system that I know of.

b. Injunctions are only allowed in order to enforce subjective rights or existing regulation

Even excellent tort law scholars have been known to write such things like "certainly in climate change matters, it is better to prevent climate damage than to cure it". But such things are surely written during a fit of absentmindedness because while "better to prevent than to cure" is a prescription of great wisdom, it is patent nonsense if it is uttered in an attempt to describe a feature of tort law or its underlying philosophy. Tort law does not contain a duty to avoid creating certain risks, nor a precautionary principle that would outlaw behaviour that is not unlikely to bring about damage. Road traffic accidents (cars, bicycles, …) kill about 1.2 million people every year, that is between 3000 and 4000 people every day.[51] Clearly, driving cars poses a threat to life and limb, and could be considered to be a direct attack on the right to life of potential victims of car accidents. But surely there is no duty to avoid

[51] See https://www.who.int/data/gho/data/themes/topics/topic-details/GHO/road-traffic-mortality. Recently, there has been a slow annual decrease of this figure: 2016 saw 1.35 million road traffic deaths, 2023 1.19 million.

creating this risk for fellow humans by not driving a car on roads that are already busy. But isn't there a duty to drive your car with due care, going beyond specific regulatory rules such as speed limits, which are by no means exhaustive in determining the duties of car drivers? Certainly. But such a duty is not enforceable through injunctions directed against drivers who have been known to drive carelessly but have never caused damage through their careless behaviour. In other words, nobody would presumably argue that a court in, say, Germany, where there are no speed limits on large parts of the highway system, would have the power to issue an injunction ordering all or some car drivers to not drive above a certain speed during rush hour or in case of rain (on stretches of highway where government regulations impose no speeds limits), at the request of an NGO representing parents whose children have been victims of car accidents, because according to the court such behaviour (driving above a certain speed in rainy or rush hour conditions) would be a violation of the social/societal standards of care for car driving, or because there would be a societal or scientific consensus that driving above the speed limit deemed acceptable by the court in rainy conditions creates unacceptable risks or is, in other words, negligent or showing a lack of due care. Nor would the argument that car traffic clearly is a permanent attack on the right to life[52] win the day.

That is because in a well -designed legal system, a private person can only demand an injunction against another private person if the claimant can invoke a subjective right[53] or has been recognized to have standing to enforce bright line behavioral rules from already existing government regulation (such as a statute saying " if you are an oil company, you shall not emit more than X megatonnes of gas Y"). An injunction is an order telling the addressee to behave in a certain way (possibly to cease and desist from certain behaviour). One private person can only demand that another behave in a certain way if the plaintiff has a subjective right against the defendant.[54] The definition of a subjective right is that it is an entitlement, recognized by the legal system ("objective law" in continental European parlance) to demand a certain behavior of another person. If you own a subjective right and it is violated or a violation is imminent, you can go to court to ask for redress or preventive protection through an injunction. You don't have to show that you suffered damage: the violation of your right is problematic enough in itself, and everybody has to respect your right. Courts do not have to, and indeed may not weigh other people's interests against your subjective right: once the legal system has recognized that you own a subjective right, you can demand respect for it[55].

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[52] In addition to the 1.2 million deaths per year, the WHO estimates that at the very least 20 million people are seriously injured through car accidents annually.

[53] In continental European legal parlance, as probably influenced by von Savigny, who seems to be the inventor of the concept of subjective right that is now explained to first year law students in their first week at law school; in common law countries, lawyers seem to simply talk about "rights" when they refer to what continentals call "subjective rights".

[54] See also M. Kruithof, "Privaatrechtelijke facetten van algemeenbelangacties bij de justitiële rechter", *TPR* 2022,120.

[55] This is part of what Dworkin meant when he wrote that rights are trumps (R. Dworkin, *Taking rights seriously*, 1977). Calabresi and Melamed explained that some entitlements are protected by what they

If, by contrast, a mere interest of yours is violated, you can only ask for redress if you can show that the violation of your interest that is not protected by a subjective right, has resulted in damage as defined by whatever tort law system you are subject to (where for instance the German tort law system uses a concept of damage that is far more limited than the French one). You cannot demand through a court order that anyone behave with due care in order not to create a risk of violation of your mere interest.

Therefore, when the court of appeal in the Shell litigation ruled that in principle the NGO plaintiffs could ask for an injunction against Shell because there was a duty for Shell to reduce its emissions, which duty could be derived from the social standard of care from tort law, the court of appeal was making a quite fundamental mistake. It transformed the standard of care from tort law into a behavioral rule enforceable against Shell, thus in effect awarding plaintiffs a subjective right. Courts should enforce existing subjective rights at the request of their owners, and may "find" or "recognize" subjective rights implicit in legal texts[56]; but courts are, however, not entitled to *create* such subjective rights. Therefore, the The Hague court of appeal was wrong in recognizing in principle the existence of a legal duty for Shell to reduce its emissions even though the court then concluded that it could not enforce such a duty because it could not determine the extent/implications concerning emissions levels of it. Of course, Shell, like other firms, should expect to be subjected, sooner or later, to Dutch legislation or environmental permit rules forcing it to reduce its emissions, and arguably the Dutch state could be deemed to be in violation of its public law duties for not yet having determined the emissions reduction scheme that Shell or the oil and gas sector or firms generally in the Netherlands would be subject to. But even when the state/government does not fulfill its duty to produce emissions reduction litigation, courts cannot lawfully step into the breach and invent a subjective right by misconstruing Dutch tort law.

2. Human rights cannot limit the freedom of companies more than they can limit the freedom of the state to design regulation

called a "property rule"; they were thinking of subjective rights. Mere interests are, by contrast, entitlements that are protected by a Calabresian "liability rule", see G. Calabresi and D. Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral " *Harvard Law Review*, Vol.85, 1972, p. 1089.

[56] For instance, to the surprise of many controlling shareholders, in 1992 the Belgian supreme court recognized a subjective right of shareholders to a mandatory takeover bid in most cases of change of control in a listed company that came about otherwise than through a public takeover bid. The court did not invent such a subjective right, but only recognized it. It could clearly be deduced from statute, which said that in certain circumstances, control acquirers had to launch a mandatory bid. Until the supreme court ruling, it had only been doubted (unconvincingly) that that statutory provision created an actionable subjective right.

Of course, a predictable objection to my conclusions in the previous paragraph would be that plaintiffs in the Shell case *did* have a subjective right that could be the basis for their demand for injunctive relief: the Dutch Hoge Raad in the *Urgenda* case and the ECtHR in the *Klimaseniorinnen* case recognized a human right to protection against dangerous climate change as an application of the right to life (arts. 2 and 8 ECHR). Let's assume for argument's sake that this right to protection against climate change is a subjective right. Then it is a subjective right against the state, not a right that can be exercised against other citizens (e.g. those huddled masses who contribute to climate change by taking lots of short haul flights within Europe for touristic reasons, or by often eating vast steaks from methane-producing cows on steroids) or firms that are massive GHG emitters like Shell. Nothing further than a right to protection by the state was recognized in *Urgenda* or *Klimaseniorinnen.* As at least the court of appeal recognized, human rights can only have indirect horizontal effect ("mittelbare Drittwirkung" in the standard German expression) through private law norms, such as, for instance, tort law. And as I do not tire of saying, the general standard of (social) care from tort law does not imply a subjective right (except a subjective right to damages once fault, damage and causation have been proven) nor can a precautionary principle be derived from it. But perhaps more importantly, if the state enjoys considerable discretion in deciding how to fashion regulation in order to meet its human rights obligation to protect its citizens against the consequences of dangerous forms of climate change, then at the very least the same amount of discretion must necessarily be enjoyed by a private firm that is *not* directly subject to a duty to protect citizens against climate change. This point was well grasped and explained by German courts in their decisions in climate litigation against the three big car manufacturers, where NGOs or natural persons fronting for NGOs sued BMW, Mercedes and Volkswagen in order to obtain an injunction ordering these companies to stop producing combustion engines by 2030. These claims were all rejected both in first instance and at appellate level[57], and at the time of writing the case against BMW is pending before Germany's highest court in these matters, the BGH (*Bundesgerichtshof*).[58] Some of these German decisions contain a more extensive and frankly better analysis of indirect horizontal effects of human rights than the The Hague decisions. In essence, the German courts argued correctly that if courts cannot impose on the state specific measures to combat climate change, for instance by focusing on the car industry, surely they cannot order companies directly to adopt specific climate change measures such as stopping to build combustion engines or reducing emissions at a certain rate.

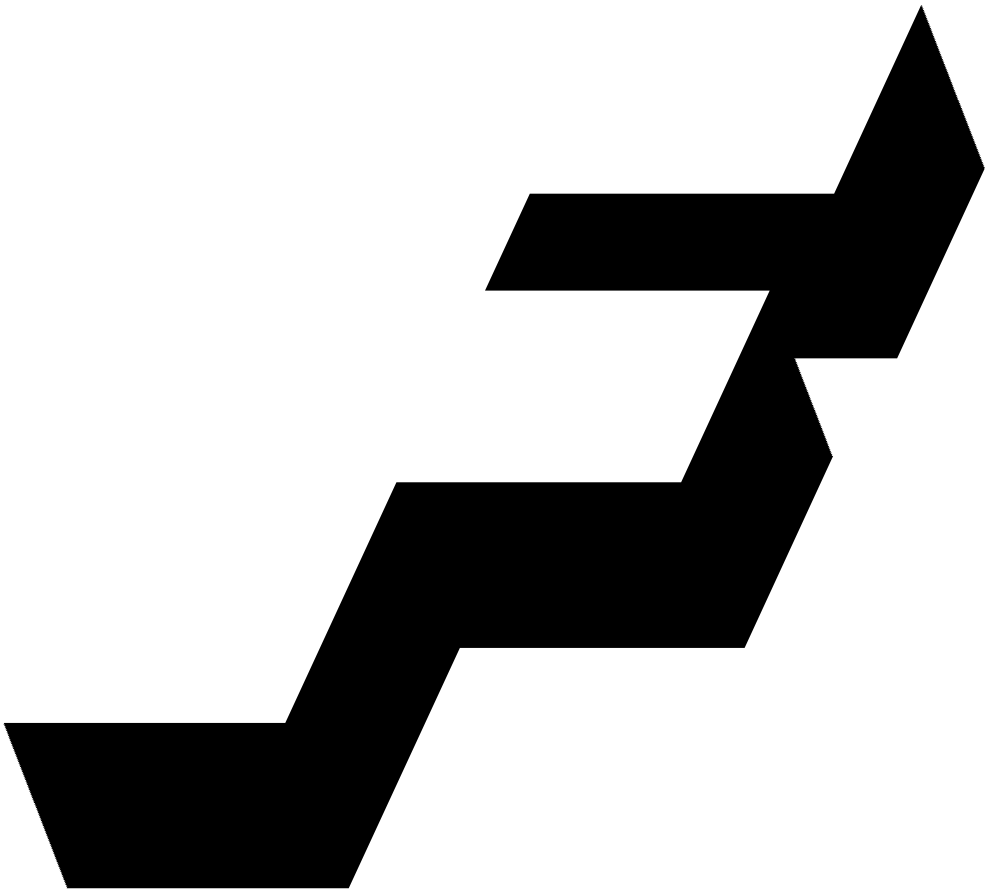
[57] See LG Braunschweig, 14 February 2023 (case 6 O 2931/21), *KlimR* 2023, 88 confirmed in in OLG Braunschweig, 24 June 2024 (case 2 U 8/23) (Volkswagen); OLG München, 12 October 2023, *Die Aktiengesellschaft* 2024, 252 (BMW); OLG Stuttgart 8 November 2023, *Die Aktiengesellschaft* 2024, 256 (Mercedes Benz).

[58] For a bold but convincing analysis of how the BGH should approach the questions put before it, see M. Habersack, " 'Klimaschützende Unterlassungsklagen' gegen Pkw-Hersteller vor dem BGH", *ZIP* 2024, 1513.

Conclusion

The reform by the court of appeal of the first instance court decision in the climate litigation against Shell is to be welcomed. The court of appeal correctly found that as a civil court it was not in a position to determine an exact emissions reduction rate that would be binding on an individual company like Shell. It therefore could not issue an injunction ordering Shell to reduce its emissions in accordance with a timeline and percentage set by the court. However, the court did rule that Shell, as a large firm and big emitter of greenhouse gases, is in principle subject to a (legally binding) duty to reduce emissions, which the court deduces from the "social standard of care" implied in art. 6: 162 of the Dutch civil Code, that is the core statutory provision on tort law in the Netherlands. This latter opinion of the court should be criticized. The standard of care from tort law can be used to judge behavior and determine whether it meets the standard of due care. But tort law contains no duty to behave carefully that could be enforced through injunctions. Injunctive relief sought by a private person amounts to demanding that a court orders a person to behave in a certain way in future. One private person (e.g. an NGO representing the collective interest of a large group of citizens who share common interests) can only demand, through the courts, a specific form of behavior (e.g. a reduction of the amount of CO2 emitted through the activities and the products of a firm) of another private person (e.g. a corporate group like Shell which causes huge amounts of greenhouse gas emissions and therefore no doubt contributes to global warming) if the claimant can base its claim on a subjective right -the definition of which is the right to demand a specific behaviour of other persons- or if the plaintiff has received standing from the law to enforce black letter regulation mandating such specific behaviour. If a plaintiff cannot invoke a violation of its subjective right or existing black letter regulation, it can still claim damages from a defendant who (negligently) caused that damage. But courts do not have the power to create new regulation of behavior based on the general duty of care, or the social standard of care as the the Hague courts call it. The precautionary principle or the slogan "it's better to prevent than to cure" cannot lead to another conclusion. That principle and that slogan are not law or legal principles. On the contrary, there is no tort law or legal system anywhere in the western world that is based on precautionary principles or thinking. Any such system would allow judges to create ex ante regulation for the use of cars on public roads, since car traffic kills more than a million people annually worldwide, thereby posing a clear threat to the right to life that every human enjoys. No legal system grants courts such rule-making powers, not even in relation to individual defendants. The climate emergency does not justify giving such powers to courts to regulate corporate behaviour. What courts *can* do is force governments who do not enact and enforce emissions reduction rules for individual firms even though they have to according to their own international obligations, to enact and enforce such rules. But courts may not create those regulatory rules instead of the government. Not even when consensus within political society in a country would be that the government is not doing enough to force companies to contribute to battling the climate

change emergency which is indeed, alas, a fact (governments are not doing enough) that is hard to deny for any western country.



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