When gist is mist: mismatches in small-scale climate change litigation

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This article casts a fresh perspective on the relationship between tort law and environmental protection, in the context of climate change. It takes energy efficiency failings in domestic buildings as a case study, questioning whether the common law will support energy efficiency/climate change mitigation strategy. Using the conjoined notions of ‘protected interests’ and ‘correlativity’ as an explanatory framework, and focusing on damage, duty and remedies in negligence, it argues that common law remedies can contribute little to the enforcement of climate change mitigation measures. This is because, far from being small technical issues, any changes to negligence to pursue this particular policy objective would demand deep structural changes to the law of tort. Asserting that prospective claims such as these are instances of small-scale climate change litigation, it explores the implications of negligence’s shortcomings as tools to contribute to the mitigation of climate change.

Introduction

The drive to achieve energy efficiency in buildings predates concerns about anthropogenic climate change, and consequential legal and policy initiatives to reduce carbon emissions at global, regional and national levels. Carbon mitigation efforts have overtaken concerns about air pollution, occupant health and energy security in incentivising householder or house-builders to ‘green’ homes; reducing carbon emissions from the built environment is key in meeting UK carbon reduction commitments. However, difficulties in achieving energy targets in buildings have plagued green developers since the 1970s, and questions of how to prevent and remedy this ‘performance gap’ continue to afflict the building industry. Of course, if there is a gap between projected and actual energy performance in buildings, the potential for energy efficiency improvements to contribute to climate change mitigation is curtailed. Policy focuses on incentivising householders towards energy efficiency improvements, but those householders have no regulatory recourse in relation to shortcomings in the quality and effectiveness of those works. This is why it is necessary to look at the prospective operation of the common law.

This article locates itself within existing scholarship concerning the potential and shortcomings of tort in the environmental, and specifically climate change, context. It explores liability, primarily in negligence, in respect of domestic buildings that are meant to be energy efficient, but are not (‘poor energy performance’). It seeks to illustrate some of the limitations of negligence in relation to climate change harms, and cautions that the common law might not be useful to enforce climate change mitigation strategies. The focus here varies slightly from that taken in the existing scholarship, in at least two ways.

First, rather than exploring liability for loss or damage caused by climate change, potential liability in respect of shortcomings in climate change mitigation strategies is examined. Existing climate change litigation scholarship mainly reflects scepticism about tort-based climate litigation, with most commentators considering the possibilities of (usually) mass tort claims for massive climate change harms. However, climate change is a multi-dimensional and multi-scalar problem, with the potential to appear as a factor in local, domestic litigation as well. There is good cause to question whether tort has the potential to support or undermine climate change mitigation in this context.

Secondly, it is argued that understanding liability for negligence as underpinned both by private protected interests and the correlative relationship between the parties can illustrate why the invisibility of climate change harms is inevitable in private litigation. Using this explanatory frame-

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* Versions of this article were presented at the UCL Law Faculty PhD Work-in-Progress Forum in March 2014, at the UCL New Work in Obligations Workshop in April 2014, and at the UCL-KCL Postgraduate Environmental Law Symposium in May 2014. I am grateful to all participants for their interesting and helpful comments on my work. I also thank for their comments on the written draft; Carrie Bradshaw, James Lee and Eloise Scottford. Particular thanks are owed to Maria Lee for her patience and invaluable support in preparing this article. Any errors are mine.

1 Department of Energy and Climate Change The Carbon Plan (December 2011); Committee on Climate Change ‘Meeting carbon budgets – 2014 Progress Report to Parliament’ (2014).


5 This geographic term is contested, but in Osofsky’s work describes socially constructed hierarchies in which climate change regulation and litigation take place. See H M Osofsky ‘Scales of law: rethinking climate change governance’ (PhD Thesis, University of Oregon, 2013) particularly ch 2. This is distinct from a ‘multi-level’ conception, which is indeed relevant in a climate change context, because of the conceptualisation of scales as fluid, changeable and simultaneously engaged see eg 35; also J Peel, L Godden and R J Keenan ‘Climate change law in an era of multi-level governance’ (2012) 1(2) Transnational Environmental Law 245–280 at 272.
work, it is suggested that the shortcomings of negligence are owed to its deep structural underpinnings rather than any incidental doctrinal characteristics.

The next section of this article explains the relevance of negligence, by reference to the shortcomings of contractual protection and regulatory controls. Negligence claims are then examined, focusing on the nature of the loss brought about by poor energy performance, outlining the difficulty of identifying actionable damage. This explains the article’s title: if damage is the ‘gist’ of negligence, what use is negligence as a remedy in relation to harms that are diffuse or intangible? This flows into a discussion of well worn difficulties in establishing a duty of care, and in respect of the mismatch between the remedies available and the reasons for undertaking the measures, namely the mitigation of climate change.

After exploring these doctrinal challenges, the application of one explanatory model of the constitutive elements of tort to these outcomes is discussed, suggesting that the interplay between protected interests and tort parties’ mutual relationship underlies liability in negligence. This is important because it clarifies the deeply structural underpinning of previous decisions.

Next, the implications of an absence of liability for energy efficiency failings are briefly explored. As explained above, current energy efficiency policy is largely driven by climate change mitigation concerns. By extension, when shortcomings or failings occur in these policy areas, the implications must be faced up to in a climate change context. Climate harms can be ignored even when litigation is precisely about climate change mitigation strategies. Exploring the implications of tort’s operation means that any failure to provide a compensatory solution to the claimant must be confronted, not as a victim of climate change harms, but as an individual seeking to implement climate change mitigation strategy. This also calls into question the extent to which liability outcomes provide regulatory support for climate change mitigation policies. This refers to the deterrence function of private law, and the potential to shape priorities or defendant behaviour.

As such, the article is of significance for a number of reasons. First, it identifies that, in addition to a ‘performance gap’, householders who have invested in ineffective energy efficiency improvements, and wish to rectify this or recover their investment, suffer an enforcement gap. This means that when these mitigation/energy efficiency strategies fail, claimants have no legal recourse. The assumption seems to be that individuals will take action — including litigation — to correct deficiencies in performance, but this will not work. Secondly, it provides a focused exploration of very specific elements of the common law – duty, damage and remedies in negligence — to illustrate that this enforcement gap is not incidental, but speaks of the inherent incompatibility between the structural design of the law of tort and what climate change demands from us. Thirdly, it emphasises that we can expect these mismatches to persist in other areas, and cautions against making assumptions about the utility of the common law in small-scale climate cases and also raises questions about the impact of apparent impunity in this (and other relevant) context(s), on climate change mitigation goals. Finally, the article aims to emphasise that, as the potential for parties to enforce these provisions through private law is constrained or absent, the regulatory framework supporting these measures requires rethinking.

These small-scale climate change cases may not seem of overwhelming relevance when juxtaposed with the prospect of global catastrophe. But as in life, so also in litigation: this climate liability ‘daily grind’ type of prospective tort claim is important for both representative and cumulative reasons. First, this analysis of tort’s limits informs our understanding of how negligence operates in the specific context of poor building energy performance, illustrating the mismatch between the substantive nature of the climate change problems, and tort’s doctrinal elements. The mismatches found in this study can be seen as illustrative (or representative) of the unsuitability of tort, or even private law, to account for climate harms and support climate strategy. The problems arising here are likely to arise in circumstances where the emissions volume is more significant.

Second, and cumulatively, although each individual’s carbon emissions may be relatively negligible, the combined impact of individual small-scale emissions is not. In the present study, poor energy performance in a discrete building unit is relatively insignificant, but underperformance across the entire building stock is not.

The limits of the obvious

The purpose of this section is to explain why we might be interested in tort claims in relation to poor energy performance in buildings by explaining the limits of other methods of enforcement. First, the unique characteristics of the problem are briefly explained, and the potential parties

7 I have taken some liberties; air containing pollution or with high carbon density is not actually mist.
8 P Cane The Anatomy of Tort Law (Hart Publishing 1997).
9 Mitigation in this context refers to steps taken to arrest the process of climate change; this is not what mitigation means to a tort lawyer. See S Goldberg, R Lord ‘Adjudicating climate change across scales’ in W C G Burns, H M Ostafsky (eds) Adjudicating Climate Change (1st edn Cambridge University Press 2011) 1645.
11 As outlined in J Brunnée, S Goldberg, R Lord and L Rajamani ‘Overview of legal issues relevant to climate change in Lord Climate Change Liability (n 9).
12 Any of these issues could be, and has been, a work in itself. See Goldberg and others (n 9); Lin ‘Climate change and the courts’ (2012) 32(1) Legal Studies 35–57; May ‘Civil litigation as a tool for regulating climate change: an introduction’ (2012) 46(2) Valparaiso University Law Review 357.
13 Committee on Climate Change ‘Building a low carbon economy – the UK’s contribution to tackling climate change’ (2008) ch 6; Committee on Climate Change (n 1) ch 3.
to any dispute identified. Next, the role of regulation and the limitations of contractual remedies are outlined, specifying the parameters of the tort enquiry before it is commenced.

Errors in design or construction are significantly implicated in the building energy efficiency ‘performance gap’, when compliance with energy performance standards – either as specified by legislation or agreed – are not achieved. This occurs either in new developments, which are required to be built to a minimum standard of energy efficiency or by means of energy ‘retrofit’ renovation works, the sole purpose of which is to transform the building’s energy status. Energy performance is certified with varying degrees of accuracy, and a lay occupier would not be able objectively to assess how his building was using energy before or after the works were completed. Technical complications or other failings producing incorrect results in assessment may also delay the detection of energy performance problems. Or indeed, in larger developments individual units might perform very differently, and yet energy performance rating and certification might be generalised from a model unit or building information computer modelling. However, absent other problems that may arise from the energy efficiency measures, the fabric and structure of the building will remain unaffected. Energy performance failings do not necessarily mean that a building would be inadequate in any other respect.

In this article, ‘claimants’ means the owners of or tenants in a building with poorer energy performance than specified or agreed. Because of the difficulties in detecting energy performance problems, and the persistent nature of the problem, many potential claimants would be secondary titleholders and have no contractual relationship with a design/construction team. ‘Defendants’ refers to the design/construction team (which includes architects, engineers, builders and all varieties of sub-contractors) as well as any party responsible for assessment and certification of a building’s energy status, including ‘energy assessors’. Thus, a defendant’s liability could arise either in connection with the construction of the building, retrofit work on an existing building or in relation to the assessment and certification of a building’s energy status.

Regulation is the obvious starting point for climate change mitigation measures, and regulation has a strong role to play in ensuring good energy performance in domestic buildings. However, it suffers from major limitations in terms of ensuring the implementation and enforcement of effective energy efficiency measures. It is increasingly clear that the rate of energy efficiency improvements is inadequate; however, little or no attention has been paid to ensuring the substantive quality and impact of those improvements. The assumption seems to be that individuals will take action – including litigation – to correct deficiencies in performance. Given, however, that tort will make a limited contribution, this article suggests that the regulatory framework supporting these measures requires rethinking.

Building control regulations prescribe minimum energy performance standards. Most new and renovated buildings are required to have a specific minimum level of energy performance. Compliance with energy performance standards to the extent that this is ‘technically, functionally and economically feasible’, is required. Voluntary technical guidance recommends best practice in both the achievement and testing of energy performance.

Building energy performance is subject to two ‘layers’ of regulatory controls. First, various means exist to ensure (domestic) buildings’ compliance with specified energy performance standards. Along with other building standards (relating for example to fire safety, ventilation and structure) these are subject to regulatory compliance and approval either by the local authority or by designated ‘approved inspectors’, private parties nominated by contractors to fulfil this function. If buildings contravene the regulations, the local authority can issue a compliance notice backed up with a statutory penalty. Subsequent
enforcement action if required can extend to the destruction or alteration of the building.33

The second layer of regulatory control is energy performance certification. At key stages34 dwellings are subject to a standardised assessment procedure,35 subsequently certified by accredited ‘energy assessors’36 with a mandatory Energy Performance Certificate (EPC). Penalty charge notices may be issued in the event that an EPC is not produced and displayed.37 However, while there is a requirement that energy assessments be carried out with ‘care and skill’, there is no specific regulatory penalty for issuing an incorrect or inaccurate EPC.38

The empirical literature suggests these regulatory controls are not effective at ensuring the quality and thus effectiveness of energy performance in domestic buildings. Poor controls are not effective at ensuring the quality and thus effectiveness certification. At key stages34 dwellings are subsequently certified by accredited ‘energy assessors’36 with a series of warranties or ‘duty-of-care deeds’.43 There is an emerging trend of restricted warranties44 for energy performance, even where outcomes are specified. Where such warranties exist in relation to retrofit/renovation work, they are generally confined to guarantee the structural integrity of the works, not any performance outcome.45 In addition, it is common for smaller building works to be conducted without any formal or written contract.46 These factors circumscribe the potential for recovery under a contract.

Any contractual protection would only apply to primary titleholders, not to subsequent owners or residents of the building, so even robust contractual warranties would not protect successors-in-title. Moreover, energy performance problems are difficult to detect yet present from the outset—particularly if the building has been wrongly certified—and without correction, endure for the life of the building.17 The nature of these problems means that the six-year contractual limitation period could have expired by the time the resident claimant is aware of them.48

Even a successful claimant may be limited to recovery in damages for financial or amenity losses,49 or indeed no damages had the defendant made substantial performance,50 which is likely in a large construction project. There is very restricted scope for an order of specific performance, which raises roughly the same issues—namely, the common law’s failure to account for climate harms—that are detailed below in relation to tort.

This article does not purport to conduct a doctrinal analysis exploring the basis or prospects of all potential areas of private law liability in relation to poor energy performance. Space does not permit this, and in any event, an important part of the argument is that even (unlikely) success for the claimant would have only partial impact in environmental terms. Also within the context of a negligence claim, the enquiry here is limited to the conjoined issues of duty and damage, and remedies therefor. These issues have been selected because they illustrate very clearly both the doctrinal mismatches and deeper structural challenges of using tort in small-scale climate change litigation.51

Actionable damage in negligence

Secondary titleholders, lessees, parties not in privity of contract with the design/construction team or where any claim in contract had expired, or claimants pursuing an engaged in long-term energy performance monitoring; personal notes from public lecture by Tim Forman of Cardiff University ‘Solid wall and hard-to-treat cavity wall insulation in existing UK dwellings: drivers and hindrances of consistent quality in installation and delivery’ UCL Energy Institute (6 November 2013).

45 See Forman (n 44).

46 Bailey (n 41) 48–54.

47 Davies and Oreszcyzyn (n 20).

48 Limitation Act 1980 s 5.

49 Particularly where the claimant did not intend to seek rectification of the works, as in Ruxley Electronics and Construction Ltd v Forjagh [1995] UKHL 8.

50 Bolton v Mohedoes [1972] 2 All ER 1322.

51 An exploration of other aspects of private law liability—including a discussion of the limits and potential of contractual remedies, and challenges facing negligence’s elements of foreseeability, fault and causation—must form the basis of future work.
Duty of care

With loss so characterised, the claimant’s routes to liability lie either in establishing a duty of care as against the constructor/design team or by means of framing a claim in relation to the negligent provision of services, for example by an ‘energy assessor’.60 The ‘gist’ of a negligence action is actionable damage and of course the difficulty presented by a claim for financial loss is that no damage to person or property exists.

For the last quarter of a century, English common law has settled into the appearance of a blanket exclusion of liability for pure economic loss occasioned as a consequence of latent defects in buildings.61 This is not the place for a detailed analysis of the law on pure economic loss; however, a brief rehearsal of the key issues in the context of defective buildings might be helpful in what follows. In Murphy v Brentwood DC62 the House of Lords reversed previous authority to deny a duty of care in respect of defective building pure economic loss. Key to the decision was the absence of a ‘special relationship of proximity’63 between the parties and obvious judicial discomfort in creating a ‘transmissible warranty of quality’,64 even where the claimant was the original titleholder. Following Henderson v Merrett,65 claimants in the lower courts sought to establish a duty of care in comparable situations on the basis of an assumption of responsibility in relation to the provision of services.66

However, subsequent attempts to fashion a duty of care based on a ‘special relationship’ as contemplated in Murphy v Brentwood DC have been markedly unsuccessful.67 In the more recent case of Robinson v Jones (Contractors) Ltd,68 even a contractual relationship was insufficient to create a ‘special relationship’ founding a duty of care not to cause pure economic loss in a comparable situation. This severely constrained the potential even for those parties with privity of contract to owe any but the most rudimentary duties in tort.69 It now seems unlikely that a claimant

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59 Osofsky (n 10); Peel (n 5) 249, 272.
61 Sub-contractors: D & F Estates Ltd v Church Commissioners for England [1989] AC 177; builders: Department of the Environment v Thomas Bates and Son Ltd [1990] 3 WLR 457; local authority: Murphy v Brentwood DC (n 53). In Murphy v Brentwood DC, Lord Keith thought an architect could be liable in tort, as well as contractually, for defects causing pure economic loss (n 53) 466. The distinction has been eroded more recently; see eg Bellefield Computer Services Ltd v E Turner and Sons Ltd Uhligate UK Ltd v E Turner and Sons Ltd [2000] BLR 97; Payne & Ors v John Secset Ltd [2001] EWHC 457 (TCC) and suggestions in Robinson v Jones (Contractors) Ltd [2011] EWCA Civ 9 that such distinctions should be made, make little sense. See S Steel ‘Building contracts: a concurrent claim in tort?’ (2011) 27 Professional Negligence 726.
62 Inter alia because the Lords would not find a local authority’s liability to extend beyond that of a builder, See Murphy v Brentwood DC (n 53) 483 (Lord Oliver), 469 (Lord Keith).
63 Ibid 496 (Lord Oliver).
64 Ibid 481 (Lord Bridge), 469 (Lord Keith).
65 Note 58.
67 Bellefield (n 61) 19 (May LJ).
68 Note 61.
69 As explained above, this article will not devote itself to a full doctrinal analysis; however, Robinson v Jones (Contractors) Ltd (n 61) does present some difficulties. Chiefly, because the court seeks to resolve the perceived tension between two ‘streams of authority’ (at 54) by severely restricting the possibility of concurrent liability in contract and tort, which does not do justice to the complexity of the text in Henderson v Merrett Syndicates Limited (n 60) 87–88. It is unclear whether any basis
would be able to found a duty of care in negligence either in relation to the defective building or on account of the poor provision of design or construction services by a defendant in the design/construction team.

These decisions are typically defended on ‘policy’ grounds, and yet the exact policy considerations remain elusive."70 Concerns about the indeterminacy of liability, the sanctity of contract and a preference for universally available first party insurance to indemnify a claimant in such cases motivate against the finding of a duty.71 However, there are very real considerations about professional (or occupational) accountability that demand a duty be found, particularly where the claimant/householder is in a relatively financially weak position.72 Whether the compelling policy factors are interpreted in favour of claimants or against them, it is arguable that the framing of the duty of care in negligence, usually considered a policy-based ‘control device’ to limit the proliferation of claims, is in fact inherent in the very design of negligence.

The specific policy factor at play in these ‘cases’ is climate change mitigation. If the importance of this objective did influence a court to make an exception and find that a defendant did have a duty in relation to defects causing energy performance problems, it is unlikely that this would impact on climate change mitigation, for reasons discussed below.

A claimant might have better luck in relation to an incorrect energy certification. The claimant’s success in Smith v Bush73 is in marked contrast to the Murphy v Brentwood DC line of cases. The defendant surveyor owed the claimant a duty of care by virtue of his deemed assumption of responsibility in endorsing her purchase of the building, and her reliance on it.74 However, in light of the multiple factors involved in the decision to purchase a house, proving such reliance might prove challenging. So as things stand, the well-meaning claimant is likely to go uncompensated, and a culture of impunity will continue in relation to the accuracy and outcomes of these works.75

But of course, the financial loss suffered is not the only kind of harm at stake. In as much as the extra carbon emitted by a building with poor energy performance cannot constitute ‘actionable damage’ in negligence — indeed, even if it could — it is unclear to whom the defendant would owe a duty of care in relation to it. In the case at hand, the diffuse and (hopefully) intangible nature of air pollution, the transboundary, fluid and invisible76 nature of the medium and carbon dense air with all its catastrophic but slow-to-appear implications, represent the fine end of the harm suffered.77 These challenges are exemplified by the broad and ‘long tail’ problems of climate change: its nature — including the diffuseness of ‘damage’ and sometimes indeterminable claimant/defendant roles78 — frustrates every element of tort doctrine.79

Remedies

The discussion above has centred on the difficulties establishing a duty of care in negligence, based largely on the kinds of damage caused by the defendant’s conduct. Turning now to elaborate briefly on how even success (however unlikely) is circumscribed by remedies, it should be emphasised that there is no mechanism in negligence for a coercive order.80 Even if there were,81 as explained above, the most likely prospect of liability lies against a defendant who is not in a position to rectify the works (namely an assessor).

The position the claimant would be in, absent the defendant’s conduct,82 is residence in an energy efficient property. The claimant’s loss is commensurable with the difference between the minimum energy performance standards prescribed in the Building Regulations 2010 and the energy performance of the claimant’s own property, although there are different ways in which this could be quantified. When the claimant’s property is damaged, the ‘broad rule’ is that the claimant’s loss is the reduction in its value.83 It is not clear what impact energy efficiency measures, or their failure, have on property or rental values.84 Alternatively, the claimant’s loss could represent the cost of repair,85 which means reasonable repair; not meticulous

73 Smith v Bush [1990] UKHL 1, 1.
74 Murphy v Brentwood DC (n 53) 32 (Lord Jauncey).
75 Hunter and Salzman (n 56) 1775.
77 Ibid.
78 The fact that their roles in any event may only be an exacerbating factor: see M Allen ‘The scientific basis for climate change liability’ in Lord Justice Alton’s paper ‘Climate Change Liability’ (n 9).
79 Kysar (n 56) 10 or generally Brunme (n 11).
81 It is notable that an analysis of the potential for mandatory injunctions in negligence does not conceive of their scope expanding to the kinds of cases discussed here; see J Murphy Rethinking injunctions in tort law (2007) 27(3) Oxford Journal of Legal Studies 509.
83 See Daikin (n 43) 863. In Murphy v Brentwood DC (n 53), the claimant’s damages were calculated on the basis of the reduction in the market value of the property.
84 There appears to be a positive association with energy efficiency measures and sale or rental values, but only at the top end of the market. See F. Fuerst, P McAlister, A Nanda and P Wyatt ‘s energy efficiency priced in the housing market? Some evidence from the United Kingdom’ Working Papers in Real Estate & Planning 01/13 (University of Reading March 2013) 35; F Fuerst, J van de Watering and Peter Wyatt ‘s intrinsic energy efficiency reflected in the pricing of office leases” (2013) 41(3) Building Research & Information 373–383.
85 D & F Estates (n 61).
restoration. However, often the defects in a building that cause poor energy performance may be such that only meticulous restoration can make good the loss. Even if the claimant is awarded damages for repair, it is her choice whether to engage in renovations with an uncertain outcome.

Energy retrofits are incentivised by a reduction in energy usage and hence more affordable energy bills, so as a third alternative the claimant could seek compensation for the difference.

Certainly, the most likely outcome is that the building would stay as it is.

Small-scale climate litigation and deep structures in tort law

At the beginning of this article it was stated that the transformation of the UK’s building stock is key to climate change mitigation strategy. In many cases this requires householders or landlords to initiate (and fund) changes to their own properties, or to bear some additional costs of new developments. However, despite long-standing industry-wide concerns about differences between intended and actual energy efficiency in buildings, as well as an apparent lack of integrity in the certification process, no regulatory enforcement mechanism exists to ensure the quality and effectiveness of these works. Either it was intended that householders should bear the risk of these works failing or it is implicitly assumed that the common law (most likely, tort) would come to the rescue. As is clear from the discussion above, tort does not come to the rescue.

The remainder of this article will draw on theoretical explanations of the structure and functions of the law of torts, to emphasise both the inevitability of this position and its broader implications in terms of climate change mitigation. As explained above, this has relevance on at least two levels. First, this concludes the interrogation of an enforcement gap in the case study area, emphasising that claimants will be expected to bear the costs of energy performance failings, and that this stands to undermine climate change mitigation policy. Secondly, the small number of mismatches explored here can be seen as representative of problems that could arise in other areas where climate change issues interface with private law.

Most critiques of tort’s efficacy as a tool for environmental protection highlight the mismatch between these harms and tort’s doctrinal requirements. This by necessity includes the growing arena of litigation prompted by climate change or relating to measures taken to address it. There is more to this than the tendency to diffuseness of environmental harm: this is symptomatic of the fundamental and embedded nature of protected interests within a correlative relationship in tort.

An understanding of tort based on its deep structural components provides a predictive tool for possibilities in future decisions. More importantly for current purposes, this also goes to expose the impossibility of understanding changes to this area as small technical adjustments.

In essence, actionable damage in negligence is founded in the underlying interests protected by tort. Hierarchies of kinds of damage flow from bodily injury up to levels of property damage. So in the case of property interests, real property, chattels followed by intangible damage to property (including consumer protection for defects in buildings) are progressively less protected.

Neither is it controversial to assert that tort is characterised by correlativity in the relationship between the parties to an action in tort. Its character is a relationship of mutual personal responsibility, which determines how the parties should or should not behave in their dealings with others. Where the interest is afforded relatively weak protection, the quality and intensity of the correlative bond is probably determinative of whether the private law as an instrument of environmental protection. D Howarth ‘Muddying the waters: tort law and the environment from an English perspective’ (2001) 41(3) Washburn Law Journal 469 counters most of these concerns.

This can include litigation that is ‘climate blind’, where neither judge nor parties consider or argue climate change as relevant to the proceedings. Most existing analyses require the climate change aspects to be explicit. C Hilson ‘Climate change litigation in the UK: an explanatory approach (or, bringing the grievance back in)’ in F Frasch, M Ochsenra (eds) Climate Change: Lo Riposto del Diritto (Naples, Editoriale Scientifica).

Cane (n 8) 95: ‘The idea of protected interests, when combined with the concept of correlativity, can be used to throw light on the role of interests and of individuals and society in setting limits on tort liability. That there are two barriers, rather than one, has been implicit from the start. See C G D Stone Should Trees Have Standing? Law, Morality, and the Environment (Oxford University Press 2010), who seeks both legally protected rights and a right to assert them against those who infringe them, for natural objects.

This goes both to defective product poor economic loss generally but, specifically it anticipates any suggestion that the current context justifies a different outcome in relation to energy efficiency defects. This is discussed further below.

Stapleton (n 6) 216. Also Cane (n 8) 67 puts the underlying interests in the person, property and contractual interests, non-contractual expectations, trade values and wealth, in hierarchies of importance.

Stapleton (eds) The Law of Obligations: Essays in Celebration of John Fleming (Clarendon Press 1998). As explained above, the focus in this article is on the idea of duty and damage (and remedies for that damage) and that the other elements of negligence would not be discussed. This perhaps entails that only the bones of the relationship of correlativity are made out – the fleshier elements of fault, foreseeability etc will have to wait for another time.
protection of the interest is such as to found a duty of care at all.\textsuperscript{99} From this perspective, the formation of ‘pockets’ of liability in non-recovery territory can be understood not as exceptions formed on express or implicit policy considerations, but rather reflective of both the parties’ relative relationship, as well as the specific interests underlying the substance of their connection.\textsuperscript{105}

No liability was afforded in the buildings cases as much because of the nature of the damage incurred/underlying protected interests, as in relation to the parties’ mutual understanding in relation to those interests.\textsuperscript{101} This defined the duty of care. The difference in the Smith v Bush decision vis-à-vis the Murphy v Brentwood DC case can be explained by the relationship between the claimant and defendant in Smith v Bush.\textsuperscript{102} Lord Keith’s acknowledgement that there was no duty not to cause defective building pure economic loss where this relationship was a little looser, but that there would be such a duty when the relationship between the parties warranted it was an intuitive expression of these constitutive elements of tort.\textsuperscript{106} Similarly, a reluctance to create transmissible warranties of quality may reflect a discomfort with protecting interests not encompassed within a relationship of mutuality. What is important is that the two elements are mutually dependent. This would reflect the underlying structure of a claim in tort.

Inspiring suggestions have been made that, for the law of torts to play a role properly in a climate context, some liberties would need to be taken with elements of tort doctrine.\textsuperscript{104} However, tort doctrine admits flexibility when liberties would need to be taken with elements of tort performance in buildings damages more than the claimant’s nature of tort, and the very interests it protects, represents a fundamental change to the entire structure of tort.\textsuperscript{106} From the opposite perspective, if it were considered what would be required in order to obtain a proper remedy for urgent environmental harms, using tort, it becomes clear why tort is unsuited to this task. This examination exposes the mismatch between the characteristic problems of climate change and tort’s potential.

A consequence of the prioritisation of protected interests in tort is that litigation in an environmental context can be successful, but benefit the claimant financially, rather than improving or preventing harm to the environment.\textsuperscript{107} In the climate context, work drawing on notions of protected interests informing our conceptions of harm illustrates other ‘disfavoured’ interests lying beyond what tort conceives as actionable damage.\textsuperscript{108} Ideally, this would draw attention to kinds of harm considered either incidental or unimportant unless the full consequences are taken into account.\textsuperscript{109} This tendency is clearly illustrated in relation to poor energy performance in buildings; even if a duty of care did exist in this context, and claimants were permitted to recover damages for poor energy performance, this is not to say that the cause of the problem would be corrected (or correctable). Unless corrected (which, as explained above, would be unlikely) the environmental harm caused by the excessive carbon emissions would continue.

As highlighted earlier in this article, poor energy performance in buildings damages more than the claimant’s economic interests. Even if climate change policy concerns were to justify exceptions, there is little guarantee that this would support the social and environmental policy reasons why the exception was made. The loss flowing from this state of affairs is conceptualised as belonging solely to the claimant; the implications for the environment or in relation to climate change are not taken into consideration. Where these are not underpinned by or co-extensive with a claimant’s protected interests, they have no place in tort. Short of deterring future harms, it is not clear how permitting a duty of care to exist in such circumstances, and allowing recovery, would benefit the environment directly.\textsuperscript{107} Carbon emissions/pollution from the property would be invested in remediation, the recipient would be over-

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\textsuperscript{99} This satisfies objections to basing tort liability on interests. See eg R Stevens Torts and Rights (OUP 2009) 289; P Benson ‘The basis for excluding liability for economic loss in tort law’ in D G Owen (ed) Philosophical Foundations of Tort Law (OUP 1995) provides an illuminating explanation for seeming discrepancies in this area, which centres on the nature of the claimant’s rights underlying the affected interest. Stapleton (n 72) takes issue with Benson’s account. See also P Benson ‘The problem with pure economic loss’ (2009) 60(4) South Carolina Law Review 823.

\textsuperscript{100} Stapleton (n 6) 228, 230 acknowledges that the relationship between the parties can not only found liability but also (in defective buildings cases) be determinative of when shoddy workmanship can be conceptualised as loss. This arguably could extend to subsequent owners as well. Ibid 237.

\textsuperscript{101} S R Perry ‘Protected interests and undertakings in the law of negligence’ (1992) 42 University of Toronto Law Journal 247.

\textsuperscript{102} Specifically the undertaking and reliance (and the unlawful disclaimer).

\textsuperscript{103} Murphy v Brentwood DC (n 53) 78 (Bridge LJ): ‘[Pure economic loss] is not recoverable in tort in the absence of a special relationship of proximity imposing on the tortfeasor a duty of care to safeguard the plain-
tiff from economic loss. There is no such special relationship between the manufacturer of a chattel and a remote owner or hirer’; and ibid 82 (Bridge LJ): ‘[D]amage to a house itself which is attributable to a defect in the structure of the house, ... represents purely economic loss which is only recoverable in contract or in tort by reason of some special relationship of proximity which imposes on the tortfeasor a duty of care to protect against economic loss’.

\textsuperscript{104} Kyser (n 56).

\textsuperscript{105} J M Anderson ‘Comment on Doug Kyser’s “What climate change can do about tort law.”’ (2012) 42 Environmental Law Reporter 10745; also see Bell (n 90) 385.

\textsuperscript{106} Anderson (n 105) asserts that Kyser does not seem to appreciate the (un)constitutional demands this would place on the courts.

\textsuperscript{107} Nuisance injunctions are the obvious exception to this.

\textsuperscript{108} Kyser (n 56) 65.

\textsuperscript{109} Similar observations could be made about civil litigation arising from nuclear contamination – that economic recovery (whether available or not) for the claimants in no way reflected the true extent of the damage; see J Lowry, R Edmunds ‘Sigma damages amendity and the margins of economic loss: quantifying perceptions and fears’ in J Lowry, R Edmunds (eds) Environmental Protection and the Common Law (2000) 12 Journal of Environmental Law 317–332 also discusses judicial difficulty in reconci-
ing nuclear contamination within the range of protected interests.

\textsuperscript{100} ibid.
may only affect future generations.113 As discussed above, disingenuously claiming from climate change.114 Despite the contribution made by poor energy performance to eventual climate change damage, these would manifest elsewhere in time and space. The resulting damage is not the claimant’s.

Short of deterring future harms, it is not clear how permitting a duty of care to exist in such circumstances, and allowing recovery, would benefit the environment directly.115

Deterring future harms

Most of this article has been dedicated to a discussion of the constraints of private law116 in providing recourse for poor energy efficiency works in domestic buildings. The impact of these constraints extends beyond discrete disputes and can impact on the sector as a whole. It is widely accepted that the prospect of liability will influence defendant conduct.117 This will be explored briefly in this final part of the article.

One strand of criticism of the Murphy v Brentwood DC decision focused on the effect of legal impunity for ‘shoddy workmanship’ on the construction industry.118 Concerns were expressed that this would disincentivise industry-wide improvements in the quality of building work. It is not asserted here that the imposition of a duty of care for energy efficiency defects would instantly rejuvenate the quality of energy efficiency installations industry-wide. If it operates positively, the effect can be subtle, informing our values and understanding of what we hold important as a society (perhaps, our interests).

One of the factors that seems to undermine proper reporting and accuracy in certification of energy efficiency status is a trivialisation of the energy efficiency works.120 It stands to reason that if performance failings can be delivered without penalty, there is no incentive on industry to ensure either that buildings perform correctly or that they are certified correctly. This could contribute to an industry perception that energy efficiency is unimportant, which undermines energy efficiency regulation and climate change mitigation. If the common law reflected the importance of these issues, this could contribute to growing social awareness of the importance of energy use and climate change mitigation.

It should also be taken into account that, whether or not the claimant has some recourse under the common law, this would not necessarily lead to broader improvements or otherwise support compliance.121 Private law’s deterrent effect can also operate in perverse ways; for instance, tentative suggestions that (undetermined) concerns about the risk of liability (or concerns about expensive revision work) can deter post-occupancy assessment and contribute to concealment of problems.122 This suggests that if there was in fact some basis for liability, this would not necessarily lead to an improvement in the quality of works, either industry-wide or in relation to specific projects.

However, there should be some mechanism for claimants (including secondary title holders) to benefit from reliable and accurate assessment, with an accessible mechanism for revisions, in cases of failings. This seems imperative both for the benefit of claimants but also because of the implications of energy performance shortcomings for broader climate change mitigation goals. Simply assuming that the common law, and particularly the law of torts, will provide an adequate solution does not offer the nuanced regulation that is required.

Conclusion

The motivation for domestic decarbonisation varies. Even before climate change was broadly acknowledged as a problem (let alone mitigation measures conceived of), concerns about energy efficiency in buildings were driven, in different scales, by energy security and broader environmental concerns, cost and resource saving incentives, ‘green’ values and an interest in personal and environmental health. The practical complexity of energy performance.

111 Cane (n 8) 218.
112 Elsewhere Cane argues that unless the environmental harm caused could cause further harm to other protected interests, that it might be better not to remEDIATE it, and leave it as it is. In his view, the money could be better spent serving social purposes and natural resources. Damages generally are a bad idea. P Cane ‘Are environmental harms special?’ (2001) 13(1) Journal of Environmental Law 3.
113 ibid para 3.1.
114 See D A Grossman ‘Warming up to a not-so-radical idea: tort-based climate change litigation’ (2005) 28(1) Columbia Journal of Environmental Law 3–5 and generally, who commented in the early days of climate change litigation conceptualisation that tort is not well suited to the problems of climate change specifically for these reasons.
115 This is an important issue: tort undoubtedly serves a regulatory function and allowing recovery, would benefit the environment.
116 Distinctions are not always made in the literature. So, as explained above, the interest here relates mainly to tort, although most of these arguments can also be applied to other areas of private law.
117 Some scholars refute that instrumental discussions have a place in tort scholarship, notably Weirnib (n 96) 18 and generally. This seems inevitable, however, other directly from a prospective defendant’s own assessment of risk or indirectly through his insurer; See G Williams ‘The role of tort in energy regulation’ (2011) 101(4) Annals of the Association of American Geographers 775–782.
118 It might seem here that I am conflating tort law with private law. Distinctions are not always made in the literature. So, as explained above, the interest here relates mainly to tort, although most of these arguments can also be applied to other areas of private law.
120 Garmston (n 39).
121 It would appear that what is needed are conversations about use of buildings and experience of failings, and strategies for training and information sharing, see Zero Carbon hub (n 39).
122 See Note 118.
123 See discussion in R Baldwin, M Cave and M Lodge Understanding Regulation: Theory, Strategy, and Practice (2nd edn OUP 2011) 241.
measures creates potential for errors. The variety and importance of the driving incentives means that a diversity of interests can be adversely affected by failings.

Focusing on tort liability, this article has explored the possibility of existing remedies for poor energy performance in buildings. After outlining the ineffectiveness of contractual and regulatory enforcement mechanism, it established that the common law of negligence is unlikely to found a duty of care in relation to loss suffered for flaws in design or construction. Three aspects of the problem have been considered.

The first considered what the foundational components of tort reveal about remedies in negligence and what these really can achieve; the absence of a duty of care in negligence in relation to the kind of damage poor building energy performance represents has been considered. It has been suggested that this reflects tort’s tendency to protect specific interests within a correlative relationship. Climate change harms do not fit within this framework for various reasons. In assigning a role for tort, attention must be paid to the interests protected and where these lie within a relationship of mutuality. Unsatisfactory outcomes demand changes. However, whether anticipating judicial outcomes or designing new legislation, a failure properly to understand the interests underlying the existing law can result in a naïve conception of the extent to which legal changes could really accommodate excluded interests.

Secondly, even if a claimant could recover her financial losses, this would not adequately address the harm actually caused by a building with poor energy performance. Continued excessive carbon emissions (particularly in the hopefully relatively negligible quantities emitted by a discrete domestic building) make a minor contribution to a potentially disastrous situation, but in themselves do not represent damage recognised in negligence. Even if a claimant were to recover the economic loss, it is important to acknowledge that such a victory would be partial as the real harm would continue unabated.

Thirdly, what these factors can tell us about liability in a climate change context has been considered. Whilst hopeful for the prospects of litigation arising from climate related damage, serious questions exist as to whether environmental interests can realistically and legitimately be encompassed within a tort claim. Conceptualising building energy performance as instructive or representative of climate change liability issues across scales suggests that similar issues will arise when the extent of emissions is more significant. A degree of circumspection about tort’s potential properly to support climate change mitigation policy is necessary.

However, building energy efficiency is significant in its own right. It has been emphasised that attention must be paid to the instrumental effect of liability and non-liability in this context. The problem demands recourse for claimants, rectification of the works, and learning and development in the industry. These joint objectives require clear thought and nuanced regulation. Making assumptions about the capacity of the common law is not sufficient to achieve any, certainly not all, of these.

Finally, the importance of this seemingly minor issue becomes apparent when it is asked whether the sum of many small things is perhaps not more important than one big thing. Much as climate change is a cumulative problem, an accumulation of failures to account for minor climate harms combined results in impunity for emitters. The complexities and injustice of judicial denial in relation to large-scale climate disasters should not blind us to the potential consequences of a failure of the mechanisms of private law to address climate problems on all scales.