

Applying Attribution: Impacts of Climate Attribution Science on Tort Litigation

Executive Summary¹

Climate attribution science is the study and estimation of causal responsibility for the drivers and impacts of climate change. Attribution studies have seen accelerating improvements in their accuracy, speed of production, and breadth. With an increase in climate litigation – particularly U.S. state law tort claims – coinciding with these improvements in attribution studies, important questions are arising as to how the tort system might grapple with adapting individual duties of care in response to better scientific information about individual contributions to, and the worsening effects of, climate change.

Tort law’s long history of setting baseline norms of acceptable behavior has made it particularly adept at addressing the collective action problem of climate change. Through the centuries, tort law has developed ample doctrinal resources for addressing complex collective harms, including various means of apportioning liability among multiple defendants. Although judicial determination of individual climate obligations could infringe upon the purview of the political branches due to the vast scope and scale of climate change, other mass tort litigation provides a framework for appropriate judicial engagement with individuals’ climate rights and responsibilities. Moreover, judicial discretion over tort obligations is not unfettered. Judges may restrain themselves by identifying areas for legislative determination, and any judicially-articulated climate obligations could be overruled by new legislation.

Source attribution studies will be fundamental to tort suits seeking to hold polluters accountable for the present and anticipated costs of their contributions to climate change. If ‘carbon majors’ suits – state law tort claims against the largest fossil fuel companies – reach hearings on the merits, courts’ determinations of whether the named defendants control the relevant instrumentalities causing climate change will rely heavily upon studies attributing past and present greenhouse gas emissions to those defendants. Existing source attribution studies have already identified just a few dozen companies as the predominant contributors to climate change, making disaggregating responsibility for the collective problem significantly more feasible. If defendants are found liable for their contributions to climate change, normative questions will arise concerning the scope of emissions for which companies, particularly in the extractive energy industry, should be held accountable.

Improved impact and event attribution studies, in conjunction with the increasing probability and magnitude of harm from climate change, are shifting legal risk calculations and may lead to the imposition of new legal duties upon individuals – including greater consideration of both the impacts that decisionmakers will have on the climate and the impact the climate will have upon their decisions. Though judges have traditionally been reluctant to hold individual defendants liable for natural catastrophes and climate impacts have historically

fallen into this category, the calculus surrounding culpability for climate change may change as its catastrophic impacts, like hurricanes and wildfires, become more routine and expected. And as our understanding of climate risks improves, the way engineers, planners, financial professionals, attorneys, and corporate executives consider climate change and its effects in their decision-making is likely to shift, particularly in the context of real or perceived tort liability.

¹This is a summary of *Applying Attribution: Impacts of Climate Attribution Science on Tort Litigation* authored by Douglas A. Kysar and Isabella Soparkar.