

Will the Jackson Review deliver access to justice in environmental cases?

by James Thornton

I would like to explore why environmental cases in the public interest are a distinctive kind of case, why the English costs rule is a barrier to these cases that must be removed, why the Jackson Review does not do this, and how an American style rule on one way cost shifting could grant the access to justice that the UK is obliged to provide under the Aarhus Convention.

Over the last half century, a distinctly new kind of litigation has emerged globally: cases brought in the interest of the public. From time immemorial civil cases were about private interests. But a modern conception of human rights and environmental interests has led to cases that seek to prevent or redress public harms. In the civil rights era in the United States, cases that asserted the rights of black citizens to be treated equally were a central pillar on which change was built. Similarly, in the United States, environmental protection has depended on cases to force government and industry to fulfil legal duties to regulate or reduce pollution.

These public interest cases assert interests that are broad rather than individuated. The successful plaintiff enjoys no benefit greater than other citizens. In effect, such a plaintiff has brought the case not on her own behalf but on behalf of the public, to protect an interest that is going unprotected by government actors. In such cases there is always a governmental entity that could have protected the interest but failed to do so. When a private citizen or a non-governmental organisation picks up the cudgel and goes to battle, they do so as a private attorney general.

This private attorney general concept is distinctly modern. It is an advance in jurisprudence we should be proud of. It is a marker of mature civil society, and key feature of modern participatory democracy. It allows

citizens to play a role in the balance of power. When government cannot or will not act to protect public interests, citizens can themselves do so where they can act as private attorneys general.

The costs barrier

For private attorneys general to protect the public interest, the system must give them useful access to justice. Four conditions ensure such access: *locus standi* must be easy to establish, costs must not be prohibitive, the scope of review must be broad, and remedies must be adequate.

In the England and Wales legal system, standing is liberally granted. This is not the case in all mature democracies. In Germany, for example, standing is very restrictive. But while the courtroom door is open in the UK, the remaining three conditions are problematic: costs, scope of review and remedies. These three barriers mean that the courts in the UK are not providing the democratic opportunity that they currently provide in the United States and most other EU member states.

I will focus primarily on the problem of costs here. The English rule of 'costs follow the event' grew up centuries ago. It makes no provision for the modern class of public interest cases.

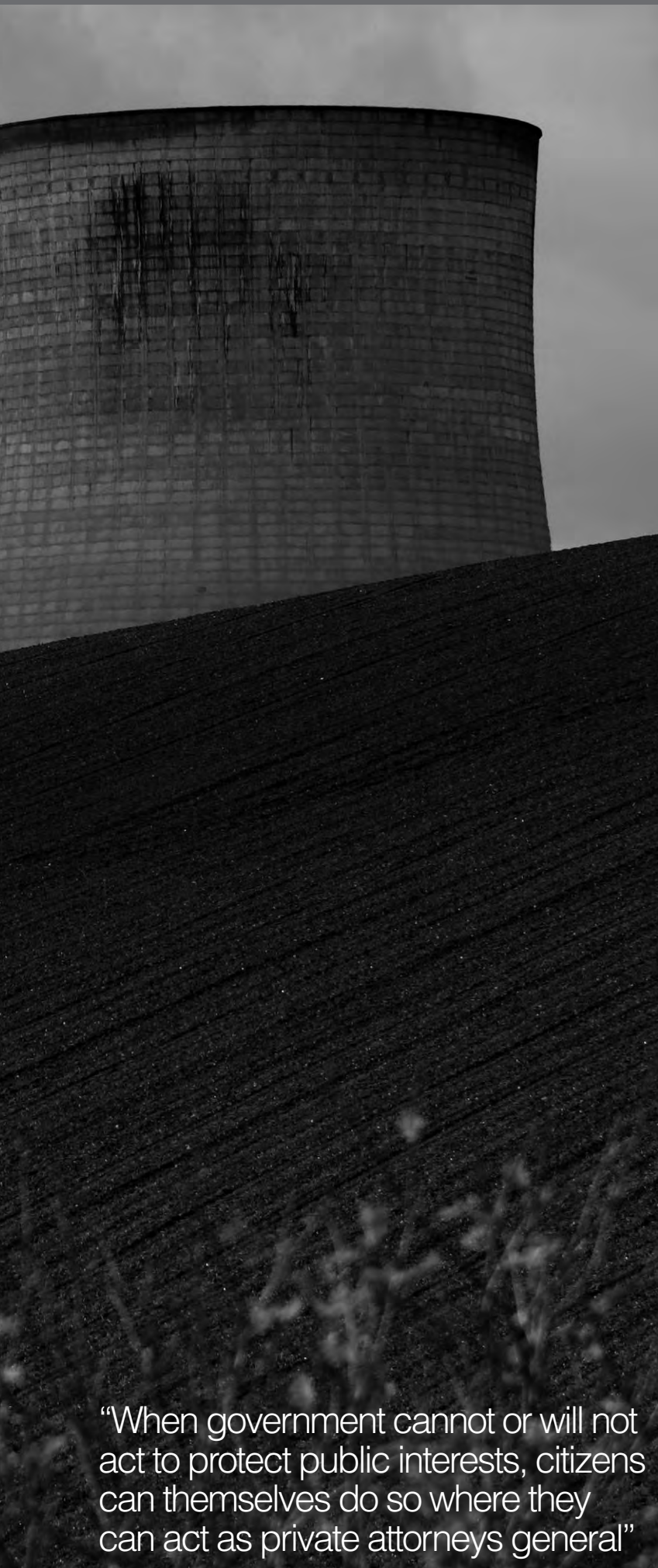
The normal use of the English rule in environmental cases gives results in which losing plaintiffs can be liable for tens of thousands of pounds, and there is no barrier to being liable for a million pounds or more. In a recent case, the respondents in an environmental public interest case have claimed £88,100 for a three day

hearing against a woman who would have to sell her house to pay.

The costs in that case have not yet been determined at the time of writing, but the Supreme Court has already said that it



Pictures: Jess Hurd / reportdigital.co.uk



“When government cannot or will not act to protect public interests, citizens can themselves do so where they can act as private attorneys general”

is ‘difficult to imagine circumstances in which it would be appropriate ... to allow less than £25,000 if the Respondents’ costs would otherwise reasonably exceed that sum’.

English courts casually impose such costs every day. In doing so they are entirely out of line with the rest of the EU and with the United States. Such punitive costs act as an effective barrier to justice. Indeed, they were intended to do so. Over the centuries, common law judges worked to keep private litigants from suing unless they were either so sure of victory they were willing to risk paying the other side’s costs, or so wealthy it did not matter. The result is well captured in the old line, “Her Majesty’s courts are open to all members of the public – just like the Ritz.”

This old rule is entirely unsuited to the modern concept of public interest cases. Individuals or NGOs bringing such cases never have a financial interest in the outcome, and cannot afford the loss. This is evident regarding private citizens, but applies even to environmental organizations. The rule freezes them from bringing cases asserting the interests of the public.

The Jackson Review

Lord Justice Jackson announced in January the results of his study of civil costs in England and Wales. The report’s conclusions have been widely praised. I demur. When looking at environmental cases, it appears that the views announced in the report, if adopted, will not improve the costs problem, and may even make it worse.

The final report differs from the Preliminary Report, issued in May 2009. There, it was recognised that environmental cases required special cost rules. And it appeared to favour one way cost shifting. In true one way cost shifting, a plaintiff who loses bears his own costs only, but a plaintiff who wins can recover costs from the other side.

The final report pulls back from the idea of true one way cost shifting and instead recommends ‘qualified’ one way cost shifting in all civil cases.

Under ‘qualified’ one way cost shifting, the basic presumption is that the losing plaintiff still pays, as he would under the normal English rule, but his liability for costs may be qualified. The problem arises in the qualification. For the report takes the view that ‘the financial resources available to the parties may justify there being two way costs shifting in particular cases’. This effectively means that private individuals and NGOs would be in the same position as they are now.

It is true that the report contains rhetoric suggesting that only the wealthy should pay. But when we consider how the system would work in practice, it seems to come down to this: losing plaintiffs would be shielded from costs only if they are poor enough to obtain legal aid. That amounts to the poorest third or so of the population of the UK and never applies to NGOs.

So under the proposed costs rule, only the poorest third of the population would have access to justice. Everyone else would pay based on a reasonableness test. And we have copious evidence about what English judges think is reasonable, e.g. a minimum of £25,000 for a three day hearing in the Lords.

The Aarhus Convention

The unfairness of the UK costs system is no longer entirely a domestic affair. The UK is bound by the Aarhus Convention, which requires that in environmental cases costs shall not be prohibitive. A point in favour of the Jackson Review is its implicit admission that the UK cost rules are not in compliance with Aarhus. The unfortunate thing is that the Review’s proposal would not put the UK in compliance. The ‘qualified’ one way cost shifting leaves most citizens, and almost certainly all NGOs, liable to high costs that are not knowable in advance. Indeed the one protection against such costs in environmental cases – protective costs orders – could be eliminated. While protective costs orders are themselves not enough to comply with Aarhus, ►

► they did provide some costs insulation. If qualified one way costs shifting gets rid of them without moving to true one way cost shifting, plaintiffs who bring environmental cases in the public interest may well wind up worse under the proposed reforms than under the current rule.

Genuine one way cost shifting

The problem with the Jackson Review's view of costs, when it comes to environmental cases, is the qualification on the shifting of costs. I'd like to outline how genuine one way cost shifting works in environmental cases by looking at the system in the United States.

The private attorneys general concept began in the United States with some of the landmark modern environmental legislation, the Clean Air Act and the Clean Water Act in the early 1970s. In each, members of the public are given the statutory right to step into the shoes of a government prosecutor and bring civil actions in federal courts against polluters. The successful citizen plaintiff is allowed to recover costs including legal fees against the defendant.

This one way cost shifting was an invention of the idealistic moment in history when the environmental movement was new, public interest cases were first being conceived, and even Richard Nixon was happy to sign the landmark bills into law. One way cost shifting in environmental cases is a variant on the standard American rule. The American rule on costs in civil cases generally is that each side bears their own costs. This provides far greater access to justice than the English rule. But the one way cost shifting provided greater access yet, in that it gave private citizens and NGOs an incentive to bring cases.

The incentive is justified under the theory that to recover costs, the citizen must show that that defendant has violated environmental law. Because this is a public harm, redress of the harm is a public good. The one way cost shifting rule has been included by one count in around 150 American environmental laws, making it the general rule in environmental cases. It applies in cases both against the Government and against legal individuals. Because one way cost shifting has proved such a useful invention of civil society, it has survived conservative governments to become a fixture of the law.

A Case Study in One Way Cost Shifting

Genuine one way cost shifting is effective in delivering good environmental outcomes. It may be useful to illustrate this with an example.

In 1984, I joined an American environmental law non-profit group called The Natural Resources Defense Council (NRDC). My goal was to set up a program to enforce the Clean Water Act nationally. The Ronald Reagan administration had been in power for three years, and had worked systematically to dismantle federal enforcement of environmental laws. From a normal annual caseload of around 350 enforcement actions under the Clean Water Act for the country, the number dropped by 1984 to zero.

With a team consisting primarily of a chemist a secretary and myself, we researched violations of water discharge permits, and used the private attorney general provision of the Act to bring civil enforcement actions in federal court. Within six months we had 60 cases pending, and the program went on to more than double that number of cases. We won all the cases. We got injunctions that ordered the polluting companies to comply with the law, and penalties that we used to set up charities that worked for clean water in the polluted areas. We also got costs and fees in all the cases. This was vital, for the NRDC is a charity. We had a loan from a trustee to fund the first cases. From the fees we were able to repay the loan and fund the subsequent cases.

The result was not only enhanced compliance in the companies we took to court. The message went wider. A national industry newsletter with a high subscription fee was set up that just tracked our cases. Companies paid attention.



“When it comes to environmental cases, the Jackson Review is a missed opportunity to provide the access to justice the UK is bound to provide”





One of the major cases was against Bethlehem Steel, for violations at its Sparrows Point plant on the Chesapeake Bay. At that time the Sparrows Point plant was the world's largest steel plant, and the damage of its pollution was considerable. After three years of litigation, when we signed the settlement agreement, a senior vice president of Bethlehem Steel said to me, 'You know, son, we didn't know you were out there. We thought when we had a deal with the Government we were safe.'

It is in the nature of governments to make deals like that. Only citizen vigilance can make sure that environmental laws are enforced. And only when the courts give access, give effective remedies and use true one way cost shifting can citizens turn vigilance into successful redress.

After we won dozens of cases, Bill Ruckelshaus, the Director of the Environmental Protection Agency (EPA) called me down to Washington D.C. for a noon meeting. The EPA is the entity charged with enforcing environmental law at federal level. When I arrived I was told it was to be a lunch meeting, and I expected a sandwich with the Director. Instead I was shown into a large conference room, with the EPA's enforcement lawyers waiting for me. At the head of the vast room was Bill Ruckelshaus. As I sat down to my sandwich, he said, 'Mr. Thornton, I'd like you to give us a seminar on how you develop and win your enforcement cases. We want to know. We seem to have forgotten how to do it, but you have kept the torch burning.'

What followed at that lunch was a positive dialogue. What happened later was that the EPA got back into the enforcement business. A few years later we were able to end our own citizen enforcement project, because the Government had taken the job back up.

It was because we embarrassed the Government that it started to fulfil its duty again. A small group of people had done what large government teams were not doing. This spirited competition to make the laws work is just the kind of experiment in democracy that access to justice allows. When citizens have access to justice, they can play a vital

role in making the system work. They can protect the interests of the environment, when others cannot or will not.

This story shows the power of genuine one way cost shifting in environmental cases. It was only because we could get costs and fees that we could take such effective action.

I should make clear that one way cost shifting in the US system applies to cases against the Government as well. When a plaintiff convinces the court that the Government has acted illegally or has failed to fulfil a mandatory duty, it will grant an injunction ordering the Government to comply, and award costs including fees to the plaintiff. Long experience shows that governments – even ones apparently favourable to the environment – often fail to perform their duties. Cases by citizens are frequently what forces governments to fulfil their duty. And in the cases of governments that actively oppose environmental benefit, such as the Bush administration, it is only the power of citizen litigation that can prevent the dismantling of work that took decades to build.

Sadly, the 'qualified' cost shifting proposed in the Jackson Review is so diluted that it will not improve access to justice in the UK. If the Jackson reforms were adopted in the way that seems most likely, the UK would still fail to comply with the Aarhus Convention, because the costs of using the courts would still be prohibitively expensive.

It is worth noting that in the UK, it is not only costs that keeps citizens from bringing cases like those against Bethlehem Steel. In the UK, there are several other barriers. First, judicial review does not permit cases against private persons including corporations, so citizens cannot effectively enforce. Second, looking more widely at environmental cases, judicial review is overly narrow in scope. It does not allow the court to determine whether a decision maker (say the finder of fact in a planning matter) has made an erroneous decision, but only whether he has followed proper procedures. Third, injunctive relief is rarely available against the Government. This is due to the fiction that the sovereign can do no wrong. Life proves otherwise, and without the power of the court to order governments to fulfil its duties, citizens are often deprived of effective remedies.

Each of these barriers is important, as they each prevent the courts from delivering justice to citizens in environmental cases. We at ClientEarth have therefore brought a case against the UK before the Aarhus Compliance Committee in Geneva. The Committee has the power to review whether the legal systems of signatory countries meet the requirements of access to justice guaranteed by the Convention. We are presently awaiting the finding of the Committee. Returning to the issue of costs, because the UK is so out of line with other countries, we hope for a positive outcome.

When it comes to environmental cases, the Jackson Review is a missed opportunity to provide the access to justice the UK is bound to provide. The Aarhus Compliance Committee has the power to direct the UK to take the right steps.

There is no solution to the costs problem so good as genuine one way cost shifting. Only this way of dealing with costs gives genuine access to citizens, who, when they raise environmental interests against government and industry, are necessarily in the position of David against Goliath. Genuine one way cost shifting puts them in the position to gain David's outcome.

● James Thornton is a member of the bars of New York, California and the Supreme Court of the United States and a solicitor of England and Wales. He founded the Citizens' Enforcement Project at the Natural Resources Defense Council in New York where he brought and won some 80 federal lawsuits against corporations to enforce the Clean Water Act. He is CEO of Client Earth, an organization of activist lawyers committed to securing a healthy planet www.clientearth.org