## Appeal of Milieudefensie v Shell, shifted duty of care and future litigation

## ***By Piotr Pukowski***

**The author of this blog provides a short overview of the Judgment of Shell v Milieudefensie case in the Court of Appeal of the Hague. The Court found that scope 3 emissions cannot be attributed to companies such as Shell due to a lack of any ‘law’ that would force or incentivise companies to lower their scope 3 emissions. This shows a shift of climate change burden, from companies to states.**

**Introduction**

On the 12th of November 2024, the Court of Appeal in the Hague overturned the first instance of the District Court in the Hague judgment between Shell and Milieudefensie. The result was met with a wave of disappointment and criticism, however, was the negativity deserved, or is there still hope for climate change litigation?

Three years ago, a court in the Hague heard the case between a pro-environmental NGO and an oil and gas company, where Milieudefensie argued that Shell’s failure to reduce its [scope 1, 2 and 3] emissions violate human rights.

These three scopes can be considered as industry standards set by the Greenhouse Gas Protocol. Scope 1 emissions refer to the direct emissions produced and controlled fully by the organisation such as emissions created during the extraction of fossil fuels. Scope 2 emissions are indirect emissions coming from the third parties that supplied the organisation with energy or other goods related to emissions. While scope 3 emissions refer to emissions that are indirectly connected to the organisation, for example the final combustion of fossil fuels.[[1]](#footnote-1) In the previous instance the court sided with the claimant and obligated Shell to reduce its scope 1, 2 and 3 emissions.

Nevertheless, on the 12th of November 2024, the Court of Appeal of the Hague took a different stance, overturning the previous judgment.

**EU Legislation**

Before continuing it is pivotal to highlight the relevant EU climate change legislation. While it is not relevant for the findings of this blog, the Court of Appeal in the Hague used these Regulations and Directives extensively in their judgment.

In 2019 the European Green Deal (EGD) was introduced as a bundle of regulations and directives aimed at fulfilling the Paris Agreement obligations and supporting Member States in achieving their Nationally Determined Contributions (NDCs).[[2]](#footnote-2) The original goal of the EGD was a net 55% or greater reduction in emissions below 1990 levels by 2030, and the achievement of total carbon neutrality by 2050.[[3]](#footnote-3)

This changed with new regulations such as the Emissions Trading System (ETS), the upcoming ETS II, Land Use, Land Use Change, and Forestry Regulation (LULUCF), as well as Efforts Sharing Regulation (ESR). What created a new goal of 45% emissions reduction below 2019 levels by 2030 for the EU Member States.

**Dutch Legislation**

According to Dutch law, whether a private or public party has a duty of care is assessed within the civil law framework.

When a duty of care is present, is being formed in jurisprudence. The provision of the ‘onrechtmatige daad’ (in literal terms of translation ‘unlawful act’) forms the basis for holding a private party or the State accountable due to ‘endangerment’, which may entail an act or an omission. This provision (article 6:162 Civil Code) includes a residual category called ‘social care’.

Within this category, many kinds of duties of care for both the government and private parties can be found.[[4]](#footnote-4) Within the case *Milieudefensie vs. Shell*, the District Court based her ruling that Shell had breached its duty of care regarding the protection of the environment, on this provision.

The Court of Appeals’ judgment differs from this first judgment in outcome but shows similarities regarding the verdict that Shell has a duty of care in this instance. This will be demonstrated in the next paragraph.

**Judgment**

Human rights form the centrepiece of this case, as they bridge the duty of care and climate change.

In this regard, the Court of Appeal took the same position as the first instance and affirmed that protection against climate change is a human right. Governments and legislators are compelled to protect such rights from violation, and corporations such as Shell are also subject to the same duty.

Therefore, Shell, as a major contributor to climate change, is obligated to reduce its CO2 emissions. The court further stated that a lack of regulation in the country in which the company operates does not amount to a precedent of inaction.

Thus, the Court of Appeal concluded that companies have a duty of care to reduce their CO2 emissions to certain levels, in this case the one proposed by the EGD.[[5]](#footnote-5)

The Court of Appeal rejected the claimant’s argument and suggested that a violation of the duty of care is necessary.

The court ruled no such violation had occurred, since even if Shell’s scope 1 and 2 emissions were above the EGD target of 45% emission reduction of 2019 levels by 2030, the reduction that Shell attained so far showcased Shell’s ability to achieve the target.

Thus, the risk of a breach of duty of care committed by Shell is too low, in turn Court of Appeal in the Hague denied the claim that Shell had violated scope 1 and 2 emissions targets.[[6]](#footnote-6)

Lastly, the Court of Appeal had difficulty concentrating on the arguments addressing scope 3 emissions. The lack of European Regulations, Directives or global targets meant that there are no general rules pertaining to the required reduction of scope 3 emissions. is because there is no European regulation, or directive nor any global target that would showcase average required emissions reduction relating to scope 3 emissions.

The Court of Appeal held that it did not have the competence to create and impose such global emissions reduction target, particularly if it only bound Shell, which is a singular entity. Since a global emissions reduction target, which targets only one organisation would be ‘useless’ according to the Court of Appeal in the Hague. It followed therefore that the Court of Appeal denied the scope 3 emissions claim by Milieudefensie.[[7]](#footnote-7)

**Conclusion**

This ruling may be disappointing for many, as it enables Shell to continue its current policy, and closes the door to any current and future claims with similar grounds.

However, there are two distinct principles that the Court of Appeal established in its ruling.

Firstly, organisations such as Shell have a duty of care to guarantee human rights, including protection against climate change. This obligates companies to reduce their emissions based on the NDCs or any other international targets such as the EGD.

Secondly, in their argumentation of scope 3 emissions the Court of Appeal in the Hague shifted the burden of the duty of care, from companies such as Shell to governments. What closes the path of litigation against companies like Shell on grounds of a breach fo duty of care. While it opens the litigation path against states using the same duty of care, which is violated by states’ inaction to create emissions reductions targets.

Naturally, some may argue that companies, being the biggest emitters of CO2, should hold the burden to address climate change and reduce their emissions.

Fundamentally, I agree with the court that governments have the power to enact those emissions reduction targets (NDCs) and hold compliance tools against emitting entities. Ultimately, this ruling allows future litigation against states that violate their duty of care by not reaching or creating emission reduction targets.

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