Common Law Tool Review

Regulatory Tools

TABLES Project 2012: Mini reviews	
Guidance	*Using your experience and expertise, consider the following tasks in relation to the tool. It may not be possible to complete all tasks for each tool due to a lack of available information, the task not applying to the tool, etc.* **Please note where this is the case by writing in the reason in the space provided**. *Please use a maximum of 6 pages of A4 (excluding diagrams and appendices).* **Your responses are required in the white spaces**.

Task 1: Basic information

Name of the tool	Common Law
Type of tool (list all that apply) *Learning and skills (pedagogic); participatory; regulatory; collaborative; mapping; valuation; modelling; decision; futures; financial; ecosystem services*	Financial/economic, valuation, decision, ecosystem services

Group members	1. Mark Everard
	2.
	3.
	4.
	5.

| **Please provide a brief synopsis of the tool** *This may include: background context, development (and ownership if appropriate), current use and applications etc. Please also note any desired outcomes of the tool so that you can make reference back to these in Task 7: SWOT analysis* | The Common Law is consistently omitted from consideration by (most) academics, virtually all regulators and government departments, (most) NGOs and indeed many in society. Yet the Common Law dates back to Roman times as Justinian Law, evolving by case law protective of rights. It has been hugely influential in the shaping of environmental and ethical agenda throughout millennia, reacting quickly to changing knowledge as well as environmental and social consequences. It drives in turn developments in environmental and social valuation methods better to account for damages as a basis for fines, injunctions and judgements of allocation of resources such as water flows and quality. Often, it is the consensus built up as case law that drives new Statute Law (the second formal strand of law that is more generally considered by the stakeholders noted above). So the power of Common Law to test and create precedents contributing to the evolution of public response, including around ecosystem services and the elements of the ecosystem approach, is hugely underappreciated and underused. Both the exercise and extension of case law has been, and remains, a potent tool to debate and institute rights, and the ecosystem services framework reflects the breadth of ways in which management affects the rights of a wide range of beneficiaries or victims of ecosystem change. |

Task 2: Use of the tool

Position / Use *If you can, please indicate which **stage(s)***	**Stage**	**Currently used**	**Could be used**
	Ideas	No	Yes, testing ideas against case law

of the decision / policy making process your tool is / could be used in *(these stages were identified in the specification document)*	Survey	No	No
	Assess	Rarely, and rarely on ES basis	Yes, testing ideas against existing or potential new case law on rights of ecosystem service beneficiaries
	Policy / decision	Rarely, and rarely on ES basis	Yes, testing ideas against existing or potential new case law on rights of ecosystem service beneficiaries
	Implement	Rarely, and rarely on ES basis	Yes, testing ideas against existing or potential new case law on rights of ecosystem service beneficiaries
	Evaluate	Rarely, and rarely on ES basis	Yes, testing ideas against existing or potential new case law on rights of ecosystem service beneficiaries

Task 3: Existing literature about the tool

Are you aware of any KEY policy and / or academic literature evaluating your tool? *(e.g. reports, journal articles, books)*	There are a few, including: • Everard, M. and Capper. • Everard, M. and Appleby, T. (2008). Safeguarding the pubic value of ecosystems. Environmental Law and Management. • Everard, M. (2011). Common Ground: The Sharing of Land and Landscapes for Sustainability. Zed Books, London.

Task 4: Your experience of working on the tool

Have you done any research/consultancy work on this tool in terms of its development, testing and/or evaluation? *If so, please provide an outline.*	As noted in the literature above, yes I have worked on this a fair bit. More to follow! But the key thing here is that the Common Law is a vast and diverse body of precedent-based case law that cross-cuts all our ecosystem service interests – the rights of all reflected by the multiple benefits that flow from ecosystems – but are as consistently overlooked!
Guidance	For Tasks 5-7, please also try to consider the **future** development and application of this tool in the TABLES project in your answers.

Task 5: Incorporating the ecosystem approach (EA) and ecosystem services (ES)
Please refer to the summary text about ES for concept clarification at the end of this template (appendix)

Using examples (from practice, research or consultancy), explain	As Common Law has evolved, it has done so on the basis of current knowledge and concerns about rights. Generally, this on the basis of 'property' of one form or another. But as Everard and Appleby (2008) and Everard (2011) describe, there are 'public rights'

how EA and/or ES are currently incorporated in/by the tool *If neither approach is currently incorporated, please move to the next question*	some of which have been tested (Lyme Bay and the disproportionate costs and benefits of destructive scallop dredging) and modern and emerging understandings of ecosystem services are systematising this. However, a great deal more test cases need to be taked to realise this potential.
How <u>could</u> the ecosystem approach and/or ecosystem services be (further) incorporated within the existing tool?	As noted above, much case law has focused on a private understanding of 'property', but there is scope to extend this to more public definitions based on emerging understandings of the ways that different stakeholders groups are affected by ecosystem change (i.e. the beneficiaries of victims of ecosystem services).

Task 6: Situating the tool within priority questions/criteria arising from the scoping interviews

Explain how the tool can be situated within the priority questions/criteria that arose in the scoping interviews *Complete as many boxes as required*	**Priority question/criteria**	**Does your tool address/implement this question/criteria? Or does it have the potential if it was better integrated with an EA/ES approach?** *Please explain how.*
	Language and communication	
	1. Contribution to aiding the development of shared vocabulary within which principles of EA and ES can be shared with multiple stakeholders across built and/or natural environment	Framing services as (Common Law) rights opens up a different form of societal negotiation that reflects a more connected view of how the socio-ecological system works, and hence greater cross-sectoral understanding.
	2. Capacity of the tool to develop shared understandings of the many identities and values of places from the perspectives of multiple visitors, residents and businesses	Framing services as rights also opens up a more inclusive approach to understanding the interests of different constituencies of society (ecosystem service beneficiaries) and their interdependencies.
	3. Capacity of the tool to improve or enable engagement across different publics so avoiding the usual suspect problem	As noted in (2) above, framing services as rights opens up a more inclusive approach to understanding the interests of different constituencies of society (ecosystem service beneficiaries) and their interdependencies.
	Learning from experience/pedagogy	
	4. Capacity of the tool to help reveal and value	As noted in (2) above, framing services as rights opens

	'hidden' assets that are not recognised by communities or publics that use them	up a more inclusive approach to understanding the interests of different constituencies of society, and the 'hidden assets' that they use or value.
	5. Extent to which tool is building on other tools or EA/ES progress	The common Law can be used, as established case law or in test cases, internalise the implications of all ecosystem services and elements of the ecosystem approach, including a means for embedding other tools.
	6. Extent to which tool is locally derived or grounded or can be adjusted to closely reflect 'local' context. Is the tool suitable for an open source approach?	Case law evolves by local context, though precedents then have generic applicability across the jurisdiction, so this is consistent.
	7. Extent to which the tool is open to interpretation and application in a variety of forms (that reflect 'cultural' differences)	Common Law evolves by judgements on different cultural perspectives.
Developing and selecting tools		
	8. Is the tool dependent on a specific funding source? How onerous is the application procedure? What are the chances of success?	Taking test cases is onerous, and public cases have often been driven by NGOs. Test cases are risky, and need expert (and therefore expensive) proponents
	9. Does skills development (essential or optional?) and support exist for the tool or is there a body to ensure the optimal and correct use of it?	Legal expertise is valuable here, but so too is understanding of basic legal rights by non-legal staff. This could constitute a value training module.
	10. Extent to which current statutory hooks can be exploited by the tool or will benefit the quality or application of the tool (e.g. NNPF's duty to cooperate, SUDS, ecol. networks)	What is 'fair'? What does 'equitable' mean in practice? How are (Principle 4) economic context, (Principle 11) relevant knowledge and (Principle 12) relevant sectors of society determined, if not by the rights the support or compromise?
Informing resultant policies effectively		
	11. Extent to which the tool informs or improves policies/decisions. What does the tool cover? (full range of positive and negative economic, social and environment impacts / tradeoffs?)	Common Law can inform (rights established by case law) or test (new case law) the equity and robustness of policies/decisions.
	12. How does the tool link	It does not at present, but could form a test of likely

	into the planning system (applications and processes). At what cost / extra burden?	outcomes (screened across the ecosystem services framework as an exposition of plural rights).
Delivering management objectives		
	13. Suitability or capacity of the tool to assist with managing visitor needs and pressures within protected areas / the considered area? How?	Can help resolve conflict only if it comes to conflict and the need for damages or injunctions, though the precedents in case law can inform guidance to avert conflicts arising.
Local ownership/new governance		
	14. To what extent can the tool assist in developing statutory plans (local and management plans) and improve ownership and use by publics?	Case law can help elucidate potential rights conflicts that the plans should avoid of mitigate.
	15. To what extent does/could the tool contribute to a new form of community governance in management of the environment?	The body of case law can form a basis for negotiation and established practice about how rights are recognised or resolved.
Improved tools: understanding flows, interconnections and spatial issues		
	16. Capacity to improve spatial understandings of the flows and interactions of various ecosystem services between sectors and at different scales	As case law evolves to address infringement or other forms of interactions vectored by ecosystem services, this can address a range of scale issues.
	17. Capacity of the tool to reconcile assessments of options and benefits across different scales (and sectors)	As noted in (16), case law can inform or be extended to reconcile potential conflicts between rights-holders.
	18. Extent to which the tools is capable or can be manipulated to work across sectoral and administrative boundaries	Also as noted in (16), case law can inform or be extended to reconcile potential conflicts between rights-holders, including across sectoral and administrative boundaries. As for (16) and (17), this need not be through confrontational lawsuits, but can be through consideration of precedents and remedies agreed I the large body of case law.
	19. Extent to which the tool can handle data shortages and gaps (or is effectiveness considerably compromised?)	Legal judgements are ideally informed by good evidence, but judgements occur nonetheless in its absence.
	20. To what extent has/could the tool put landscape/nature conservation and	There are good examples of case law relating to conflicts between species and landscape impacts versus development in its various forms.

	designated species/sites on the radar (positively or resulting in resentment?)	

Please add any further comments here:

Task 7: A SWOT analysis of the tool

Referring back to the relevant policy and academic literature (listed in Task 3), plus your own expertise (listed in Task 4) and the way in which the tool is situated within the priority questions/criteria (listed in Task 6), please complete a summary SWOT analysis ensuring that each point is well justified *Where possible, this analysis should reflect the tool's past and current application, as well as its effectiveness in policy and decision making processes*	**Strengths** *(of the tool in delivering intended outcomes)* • Based on rights (i.e. akin to ecosystem service benefits) • Integrates plural values • Evolves rapidly relative to Statute Law • Mechanisms are established for resolution of new disputes • Centuries of case law precedents upon which to draw **Weaknesses** *(factors that detract from the tool's ability to deliver intended outcomes)* • Taking new cases are expensive and time-consuming • Legal expertise does not come cheap either • The vast bulk of precedents are, obviously, historic! **Opportunities** *(consider opportunities for application of the ecosystem approach and services)* • Testing of rights based on new understandings (particularly framing ecosystem services are rights… which they are!) **Threats** *(factors which negatively affect the tool and its outcomes)* • The vested interests that fight cases generally have more resources than those that initiate them on the basis of defending rights *Classify these by their "seriousness" and "probability of occurrence" in the table below, and pay particular attention to the threats associated with potential use of ecosystem approach/ecosystem services.*

Threat	Seriousness (high, medium, low)	Probability of occurrence (high, medium, low)
The economically-powerful can win through investment in 'high power' legal representation	High	High

Please add further comments here:

Guidance	*Please now use the remainder of the document (box below) to make any general comments, observations or analyses of the tool*
Further comments	