Is it fair to hold companies responsible for past emissions, even if they didn't know at the time the emissions were harmful? Shouldn't it be a defense that they didn't appreciate the risk at the time?Not if tort law is any guide.

Tort law imposes liability for ongoing harm even though a company did not realize the risk posed by its conduct. The general test under tort law is negligence. This requires that the defendant failed to take reasonable steps to reduce a foreseeable risk of harm. This is often called a "fault-based" standard, but the fault is measured by an objective standard: whether a reasonable person could foresee the harm. This was definitely true by 1990 if not earlier. After all, there was enough concern by then to prompt international negotiations, leading the U.S. as well as other countries to enter a treaty to address the subject.

Indeed, U.S. law goes well beyond this foreseeability standard where toxic waste is involved. Under the Superfund law (CERCLA) and the common law of some states, those who generate or dispose of waste are liable for cleanup regardless of how long ago they disposed of the waste or how careful they were at the time. In fact, the law doesn't necessarily even require proof that it was a particular defendant's waste that leaked. By that standard, responsibility for carbon emissions should go back to the start of the Industrial Age.

My purpose here isn't to prejudge how current litigation against oil companies should come out. There are a lot of legal issues that would have to be sorted out before coming to an opinion. Instead, I'm interested how tort law reflects societal views of fairness. Tort law suggests that it would be fair to hold companies responsible for harm caused by their past emissions, at least from the time that the risk of climate change was clear and at least for emissions they could reasonably have avoided. (If you're interested, you can find more about this here.) There is actually a growing body of evidence that fossil fuel producers and other major firms were well aware of the risks of climate change by then, but decided to do nothing. Not only was the risk foreseeable, it was actually foreseen.

Even putting aside political problems, there are complex issues involved in implementing this idea, whether that would be done through tort law or some other mechanism: how to allocate responsibility, how far back in time to go, whether the harm should be based on all the company's emissions or only some, what evidence of causation is required, and how to measure damages.

Tort law may or may not be a good mechanism for compensation; some kind of

administrative mechanism might well be better. And of course it’s important to ensure that any efforts at compensation avoid interfering with the effort to reduce future emissions. But tort law at least suggests that some form of compensation is consistent with our society’s general view of responsibility for past conduct.