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CURRENTS OF CHANGE IN CLIMATE LITIGATION IN AUSTRALIA

ELIZABETH SPENCER* & CHRIS MCGRATH**

ABSTRACT

Only a fraction of cases in Australia ever appear in authorized law reports. Hundreds of significant court decisions are overlooked, amid growing concern in several common law jurisdictions that the courts at the highest level may be becoming increasingly aligned with the governments of the day. In tort law, the currents of change can take years and many decisions at various levels before taking hold as established law. In *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment*, a single judge of the Federal Court of Australia, Justice Mordecai Bromberg, held that the Federal Minister for the Environment, in determining whether to approve the extension of a coal mine, owed a duty of care to avoid causing harm to Australian children from carbon emissions. The Court did not grant the injunction sought by the children, and the Minister subsequently approved the extension. On appeal, the Full Court overturned the Federal Court's decision. The focus of this Article is on the importance of Justice Bromberg's decision, as the first case in Australia to recognize that a government official can owe a duty of care to avoid the risk of harm from the effects of climate change. It is a remarkable decision for this and other reasons, as this Article explains.

INTRODUCTION

Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment (“*Sharma*”) involved the Vickery Coal mine in New South Wales (“NSW”).¹ This mine produces coal, which is used principally for power generation and in industry.² Vickery wanted to

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¹ [2021] FCA 560, ¶ 6 (Austl.).

² Lisa Cox, *Whitehaven Coal's Vickery Mine Given Green Light by Environment Minister*,

expand the mine and sought approval from the Minister for the Environment as the applicable legislation, the Environment Protection and Biodiversity Conservation Act 1999 (the “Act”), required it to do.³

A group of eight children led by Anjali Sharma (with the assistance of eighty-six-year-old litigation guardian Sister Brigid Arthur) brought before the Court a real controversy that they would suffer harm if the mining and burning of coal is allowed to continue.⁴ The children claimed that government is responsible to future generations, and they asked the court to determine that a duty of care was owed to them by the Minister in making decisions about the extension of the coal mine.⁵

Justice Bromberg held that the Minister did owe duty of care to future generations but did not issue a *quia timet* injunction to restrain the Minister from approving the extension.⁶ The Judge said that it was not possible to know what decision the Minister would make, and therefore sufficient basis did not exist for a finding that the Minister’s decision would cause imminent and substantial damage.⁷ But, in making the decision, the Minister would be on notice of the important findings of the Court with regard to the very significant risks of harm if she were to approve the extension.⁸ The Minister did subsequently approve the extension.⁹ She also appealed to the Full Federal Court, which overturned the decision of the single judge.¹⁰

Notwithstanding the result on appeal, *Sharma* remains a remarkable and important decision for many reasons, and so it is worthy of a

GUARDIAN (Sept. 15, 2021, 10:05 PM), <https://www.theguardian.com/australia-news/2021/sep/16/whitehaven-coals-vickery-mine-extension-given-green-light-by-environment-minister> [<https://perma.cc/US4H-7KBF>].

³ See *Sharma* [2021] FCA ¶ 8. The extension of the scope of the approved mine was considered a “controlled action” under Sections 67 and 67A of the Act. *Id.* ¶ 7; see also *Environment Protection and Biodiversity Conservation Act 1999* (Cth) §§ 67, 67a (Austl.) [hereinafter *The Act*].

⁴ *Sharma* [2021] FCA ¶¶ 1–2, 4. This was a representative action in the Federal Court seeking a *quia timet* injunction to restrain the Minister from breaching her alleged common law duty to exercise her powers under the Act with reasonable care as to avoid causing mental and physical injury, economic harm, and property damage. *Id.* ¶¶ 11, 16. See *Sharma v Minister for the Environment, ENV'T L. AUSTL.*, <http://envlaw.com.au/sharma/> [<https://perma.cc/B5NY-66GA>], for a case study of the litigation.

⁵ *Sharma* [2021] FCA ¶ 9.

⁶ *Id.* ¶ 3.

⁷ *Id.* ¶ 508.

⁸ *Id.* ¶ 503.

⁹ Cox, *supra* note 2.

¹⁰ *Minister for the Env't v Sharma [No 2]* [2022] FCAFC 65 (Austl.) [hereinafter *Sharma [No 2]*].

close analysis. Brought by children, it heralds a “new wave” of litigation that opens the door to holding governments accountable to future generations not only with respect to the harms of climate change, but other areas of global concern; and it underscores the importance of intergenerational justice.¹¹

Framed according to the realities of post-pandemic relationships among government and the scientific community, as well as the balancing of diverse interests of generations of global persons, both individuals and entities, Justice Bromberg’s analysis carries important implications about the liability of government ministers and officials to the public for the decisions they make in the course of their duties, including obligations to children and future generations.¹²

In the evolution of the law of negligence, exists a case of negligence of a statutory authority regarding its responsibilities in the face of a risk of grave imminent harm rather than harm that has been inflicted. *Sharma* applies to this future risk the synthesis of principles of negligence with respect to duty of care owed by statutory authorities, causation, and remedies.

The decision offers insights about separation of powers and the role of the courts, not only for future climate litigation, but also for other areas of law such as migration, health, biosecurity, technology, and other global issues.¹³ This decision considers the evolving role of the courts in the context of changing social and economic conditions, and lays out the factual and legal basis for claims in negligence at common law against governments and companies that breach their duty of care to avoid harm due to climate change.¹⁴ The decision is an important statement by a court that political controversy cannot provide a principled basis for a court declining access to justice¹⁵ any more than it can provide a basis for a legislative or policy-making function.¹⁶

The innovative strategy of the litigants in applying for a *quia timet* injunction prior to the Minister’s decision allowed applicants to call evidence and run a merits case, shifting the negligence analysis to a

¹¹ Bridget Brennan & Kirstie Wellauer, *Rising Sea Levels Push Torres Strait Islanders Paul and Pabai to Take Legal Action Against the Australian Government*, ABC NEWS (Oct. 26, 2021, 7:32 PM), <https://www.abc.net.au/news/2021-10-27/australian-government-sued-for-failing-to-take-climate-action/100569558> [<https://perma.cc/BEB7-CSK7>].

¹² See generally *Sharma* [2021] FCA 560.

¹³ *Id.*

¹⁴ *Id.* ¶ 482.

¹⁵ *Id.* ¶¶ 483–84.

¹⁶ *Id.* ¶ 476.

prospective approach requiring remedies alternative to damages.¹⁷ Further, the approach meant findings of fact were not subject to appeal.¹⁸

It is a case that requires careful consideration of fundamental principles of law and justice and carries significant implications for future litigation.

I. THE ROLE OF THE COURTS: CHANGING CONTEXTS AND THE EVOLUTION OF THE LAW OF NEGLIGENCE

As debate rages about the causes of and contributors to global warming, as well as social and economic aspects of the use of coal and the complexities of reducing dependence on fossil fuels, *Sharma* comes at a time of increasing concern about climate globally, and at a time when Australia has come to play an important role on the global stage.¹⁹ A new attitudinal “climate” globally, notable in the *Urgenda Foundation v State of the Netherlands* decision and in legislated changes to directors’ duties, indicate that a tipping point may have been reached, opening a new sense of urgency about climate change and the possibility of effective collective response.²⁰ The global impact and varied landscape of responses to COVID-19 have contributed to increased awareness, while underlying issues of intergenerational justice common to the pandemic and climate action synergistically forge new global and local imperatives.

Governments are under pressure to act more quickly and decisively to reduce the extraction and combustion of coal, but progress remains slow, and many grow impatient and become motivated to seek alternatives.²¹ In the contentious arena of climate, as in migration, biosecurity,

¹⁷ *Sharma v Minister for the Environment*, *supra* note 4.

¹⁸ *See id.*

¹⁹ *See Climate change—reducing Australia’s emissions*, PARLIAMENT OF AUSTRALIA, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook45p/EmissionsReduction [<https://perma.cc/UGS9-JFRS>] (last visited Oct. 17, 2022).

²⁰ *See* HR 20 December 2019, AB 2020, 24 m.nt. GA van der Veen, Ch.W. Backes (Staat der Nederlanden/Stichting Urgenda) (Neth.); Kirstie Richards, Alec Kibblewhite & Clive Cachia, *A Novel Duty of Care? Recent Developments in Australian and International Climate Change Law*, K&L GATES (June 2, 2021), <https://www.klgates.com/A-Novel-Duty-of-Care-Recent-Developments-in-Australian-and-International-Climate-Change-Law-6-2-2021> [<https://perma.cc/Z4KB-TFUQ>].

²¹ *See* Frances Mao, *Climate Change: Why Australia Refuses to Give Up Coal*, BBC NEWS (Oct. 22, 2021), <https://www.bbc.com/news/world-australia-57925798> [<https://perma.cc/F4M2-UTWQ>].

and other matters, the alternatives have included resorting to the courts.²² Increasingly, climate change litigation has been employed to advance climate policy goals and encourage social change.²³ Tort law is partly designed to deter unreasonably risky conduct.²⁴ As norms of human relations change, with them the law as to duties has also evolved.²⁵ This has occurred significantly in other areas, and we are seeing that the filing of climate-based tort cases has already demonstrated a deterrent effect—litigation risk increasingly shapes deliberations over corporate climate policies.²⁶

Independent of the executive and legislative branches of government, the role of the judiciary is to apply the law and administer justice, and specifically in judicial review of administrative decisions, the role of the courts is to ensure legality.²⁷ In doing so, courts may forge new principles of law as in decisions such as *Marbury v. Madison* and *Mabo v Queensland [No 2]*.²⁸

As the number of cases concerning climate change litigation increases alongside the growing popular concern for the environment, we may expect to see more courts pronouncing a healthy environment as a fundamental right.²⁹ UK courts have taken rights derived from human

²² For similar trends internationally, see, for example, David Hunter & James Salzman, *Negligence in the Air: The Duty of Care in Climate Change Litigation*, 155 UNIV. PA. L. REV. 1741, 1744 (2007); Heather Colby, Ana Stella Ebbesmeyer, Lisa Marie Heim & Marthe Kielland Røssaak, *Judging Climate Change: The Role of the Judiciary in the Fight Against Climate Change*, 7 OSLO L. REV. 168, 172–73, 176–77 (2020).

²³ Colby et al., *supra* note 22, at 169; Olivier van Geel, *Urgenda and Beyond: The Past, Present and Future of Climate Change Public Interest Litigation*, 3 MAASTRICHT UNIV. J. SUSTAINABILITY STUD. 56, 57 (2017).

²⁴ Hunter & Salzman, *supra* note 22, at 1775.

²⁵ *Id.* at 1768 (citing RESTATEMENT (SECOND) OF TORTS § 4 (AM. L. INST. 1965); Prosser and Keeton define duty as “an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.” *Id.* at 1745 n.24 (citing W. PAIGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 365 (5th ed. 1984)).

²⁶ Hunter & Salzman, *supra* note 22, at 1775.

²⁷ *Sharma* [2021] FCA ¶¶ 420–28.

²⁸ See generally 5 U.S. 137 (1803) (establishing the principle of judicial review); (1992) CLR 1 (Austl.) (overturning the doctrine of *terra nullis*).

²⁹ Anam Gill, *Farmer Sues Pakistan’s Government to Demand Action on Climate Change*, THOMSON REUTERS (Nov. 13, 2015, 9:33 AM), <https://www.reuters.com/article/pakistan-climatechange-lawsuit/farmer-sues-pakistans-government-to-demand-action-on-climate-change-idUSL8N1383YJ20151113> [<https://perma.cc/5PED-UBLA>]. A strong example of this is the case *Ashgar Leghari v. Pakistan*, in which a farmer sued the Pakistani government for its failure to carry out the National Climate Change Policy that had been adopted three years earlier, as well as the Framework for Implementation of Climate Change Policy. (2015) W.P. No. 25501/2015 (Pak.). The Lahore High Court found that the delay in implementing the Framework offended the “fundamental rights of the citizens,” and that these need to be safeguarded. *Id.* at 5.

rights conventions as a rationale for potential development of the law.³⁰ Lady Mary Arden writes, “In this way, Convention rights may be said to *energize* the common law.”³¹ The direction courts are taking in the European context is towards more active judicial involvement in climate cases; the rising number of climate cases in countries around the world indicates a growing consensus that a healthy environment is a constitutional matter, and therefore a prerequisite for democracy.³²

It is important to remember that courts can only rule on real cases and controversies brought before them.³³ With respect to climate action, the number of these is growing.³⁴ Worldwide, more than one thousand cases have been filed regarding responsibility for the risks of climate change.³⁵ As part of the “next generation” of climate litigation,³⁶ *Sharma* follows in the footsteps of ambitious climate litigation internationally, particularly the *Urgenda* case in the Netherlands, in which a district court in the Netherlands found that the Dutch government violated a duty of care towards the people and ordered more ambitious emission reduction targets.³⁷

The long-established function of the courts is to construe statute, consider precedent, apply legal principle, and encompass policy considerations consistent with these standards. The judgment in *Sharma* upholds all these elements of the judicial function.³⁸ While litigation under the common law system is often perceived as backward-looking, law has always had a forward-looking dimension as well, as *Sharma* demonstrates.³⁹

³⁰ MARY ARDEN, HUMAN RIGHTS AND EUROPEAN LAW: BUILDING NEW LEGAL ORDERS 222 (1st ed. 2015).

³¹ *Id.* at 234.

³² Colby et al., *supra* note 22, at 184.

³³ *Sharma v Minister for the Environment*, *supra* note 4.

³⁴ Hunter & Salzman, *supra* note 22, at 1743.

³⁵ Mark Clarke & Tallat Hussain, *Climate Change Litigation: A New Class of Action*, WHITE & CASE (Nov. 13, 2018), <https://www.whitecase.com/insight-our-thinking/climate-change-litigation-new-class-action> [<https://perma.cc/F2QA-9NH3>]. For more on climate change litigation, see, for example, Laura Burgers, *Should Judges Make Climate Change Law?*, 9 TRANSNAT'L ENV'T L. 55, 56–57 (2020); Richards et al., *supra* note 20; Colby et al., *supra* note 22, at 172–80; van Geel, *supra* note 23, at 57.

³⁶ Jacqueline Peel, Hari Osofsky & Anita Foerster, *Shaping the 'Next Generation' of Climate Change Litigation in Australia*, 41 MELBOURNE UNIV. L. REV. 793, 795–96 (2017).

³⁷ Rb.'s-Gravenhage 24 juni 2015, AB 2015, 336 m.nt. Ch.W. Backes ¶¶ 3.1, 5.1 (Stichting Urgenda/Staat der Nederlanden) (Neth.); Hof's-Gravenhage 9 oktober 2018, AB 2018, 417 m.nt. GA van der Veen, Ch.W. Backes (Staat der Nederlanden/Stichting Urgenda) (Neth.); HR 20 December 2019, AB 2020, 24 m.nt. GA van der Veen, Ch.W. Backes (Staat der Nederlanden/Stichting Urgenda) (Neth.).

³⁸ See *Sharma* [2021] FCA 560 ¶¶ 247–57.

³⁹ See *id.*

A. *Intergenerational Justice*

One of the striking aspects of *Sharma* is the role played by children as litigants. For years, environmental law around climate change has struggled to gain traction. Cap and trade schemes, for example, are important, but somehow seemed to fail to convey compelling meaning. The children in *Sharma* provide that meaning. As climate change litigants, they open up new domains for social change, challenging the authority of their governments to make decisions about their future. Though they “traditionally belong in the private sphere of the family,” children taking an assertive and proactive role in the public sphere is “powerfully symbolic.”⁴⁰ Though they might be seen to abandon child’s play to engage in the law, they bring their youthful perspectives to this adult occupation, opening new avenues of access to justice.⁴¹

The children argued that, in deciding whether to approve the mine extension under the Environment Protection and Biodiversity Conservation Act 1999, the Minister responsible for administering the Act owes a duty to protect young people from the devastating impacts of climate change.⁴² Among the stated objects of the Act are the protection of the environment and the ecologically sustainable use of natural resources.⁴³ “Ecologically sustainable use” is defined as “ensuring that the benefit of the use to the present generation does not diminish the potential to meet the needs and aspirations of future generations,”⁴⁴ adopting “intergenerational equity” as a principle of ecologically sustainable development.⁴⁵

Apprehending that the Minister would fail to discharge the duty by exercising her discretion under Sections 130(1) and 133 of the Act to approve the extension, the applicants sought declaratory and injunctive relief to preclude the Minister from such approval and therefore failing to discharge the alleged duty of care.⁴⁶ They asked the Court to grant an injunction before a decision was made.⁴⁷ In this way, the conduct of the *Sharma* litigation transcends the usual constraints for challenging administrative decisions. It does this by bringing an action before a decision

⁴⁰ Nicole Rogers, *Climate Change Litigation and the Awfulness of Lawfulness*, 38 ALT. L. J. 20, 23 (2013).

⁴¹ *Id.* at 22–24.

⁴² *Sharma* [2021] FCA ¶ 2.

⁴³ *The Act* § 3.

⁴⁴ *Id.* at § 528.

⁴⁵ *Id.* at § 3A.

⁴⁶ *Sharma* [2021] FCA ¶¶ 8–10.

⁴⁷ *Id.* ¶ 16.

was made.⁴⁸ The relief the applicants sought depended upon the Court being satisfied that the approval of the extension by the Minister involved a risk of future injury to each of the children.⁴⁹ To warrant an injunction, two matters needed to be satisfied: (1) “a reasonable apprehension of a breach of the duty of care must be established”; and (2) “the principles for the grant of a *quia timet* injunction must be satisfied.”⁵⁰

B. Reasonable Apprehension of a Breach of the Duty of Care

The children submitted that the Minister’s position in the Commonwealth Executive implies special responsibilities owed to Australian children.⁵¹ They claimed a vulnerability to a known, foreseeable risk of serious harm,⁵² over which the Minister has control.⁵³ The applicants asked the Court to recognize a novel duty of care and sought the aid of the Court to impose a responsibility to protect them from a serious threat of irreversible future harm.⁵⁴

In *Sharma*, Justice Bromberg explained that the question of whether a novel duty of care exists is to be ascertained by reference to a multifactorial approach informed by a “salient features” analysis derived from President Allsop’s decision in the NSW Court of Appeal case of *Caltex Refineries (Qld) Pty Limited v Stavar*.⁵⁵ Justice Bromberg quotes from *Stavar*:

⁴⁸ *Id.* ¶ 8.

⁴⁹ *Id.* ¶ 497.

⁵⁰ *Id.* ¶ 496.

⁵¹ *Id.* ¶ 14.

⁵² *Sharma* [2021] FCA ¶ 11. Harms that would likely be suffered by them “as a consequence of their . . . exposure to climatic hazards induced by increasing global surface temperatures driven by the further emission of CO₂ into the Earth’s atmosphere” include “longer and more intense bushfires, storm surges, coastal flooding, inland flooding, cyclones and other extreme weather events.” *Id.*

⁵³ *Id.* ¶ 12.

⁵⁴ *Id.* ¶ 14.

⁵⁵ *Caltex Refineries Pty Ltd v Stavar* [2009] NSWCA 258, ¶ 102 (Austl.). Whether a novel duty of care exists is to be ascertained by reference to a multifactorial assessment in which considerations (salient features) relevant to the appropriateness of imputing a legal duty upon the putative tortfeasor are assessed and weighed. *Id.* “A salient features approach was adopted by President Allsop (with whom Justice Simpson agreed) as applicable to determining whether a novel duty of care exists.” *Sharma* [2021] FCA ¶ 97. “At [103] his Honour set out a list of seventeen salient features.” *Id.* ¶ 211. *See also Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54, ¶¶ 145–47 (cited in *Hunter Area Health Serv v Presland* [2005] NSWCA 33, ¶¶ 7–10); *Stuart v Kirkland-Veenstra* [2009] HCA ¶¶ 112–13.

If . . . the posited duty is a novel one, the proper approach is to undertake a close analysis of the facts bearing on the relationship between the plaintiff and the putative tortfeasor by references to the “salient features” or factors affecting the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury.⁵⁶

It is “[t]he totality of the relationship between the parties . . . [which] is the proper basis upon which a duty of care may be recognised.”⁵⁷ Whether a requisite relationship which gives rise to a duty of care is established must be assessed by reference to all the relevant salient features.⁵⁸ In summary, the approach to determining a duty of care is multifactorial.⁵⁹ The seventeen factors listed by President Allsop in *Stavar* provide a valuable checklist as to the kinds of matters that may be relevant in a multifactorial analysis.⁶⁰

⁵⁶ *Caltex Refineries Pty Ltd* [2009] NSWCA ¶ 102.

⁵⁷ *Graham Barclay Oysters* [2002] HCA ¶¶ 145–47.

⁵⁸ *Sharma* [2021] FCA ¶ 96.

⁵⁹ *Stavar* [2009] NSWCA ¶¶ 102–04.

⁶⁰ *See id.* ¶ 40. The seventeen factors include:

1. The foreseeability of harm;
2. The nature of the harm alleged;
3. The degree and nature of control able to be exercised by the defendant to avoid harm;
4. The degree of vulnerability of the plaintiff to harm from the defendant’s conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself;
5. The degree of reliance by the plaintiff upon the defendant;
6. Any assumption of responsibility by the defendant;
7. The proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant;
8. The existence or otherwise of a category of relationship between the defendant and the plaintiff or a person closely connected with the plaintiff;
9. The nature of the activity undertaken by the plaintiff;
10. The nature or the degree of the hazard or danger liable to be caused by the defendant’s conduct or the activity or substance controlled by the defendant;
11. Knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff;
12. Any potential indeterminacy of liability;
13. The nature and consequences of any action that can be taken to avoid the harm to the plaintiff;
14. The extent of imposition on the autonomy of freedom of individuals, including the right to pursue one’s own interests;

This list of factors is not considered exhaustive; not all considerations will be relevant in each case, and the relevant considerations will be of various weights.⁶¹ Where the respondent is a repository of statutory power or discretion is a special class of case, that raises its own problems.⁶² However, the correct approach remains multifactorial,⁶³ and requires a close examination of the terms, scope, and purpose of the relevant statutory regime.⁶⁴ In such cases, certain factors in *Stavar* assume special relevance. Coherence with the statutory scheme and policy considerations are of critical importance.⁶⁵ So, too, may be control, reliance, vulnerability, and the assumption of responsibility.⁶⁶

In support of a duty of care being found to exist, the children emphasized a number of the salient features, including; reasonable foreseeability and nature of the harm; degree and nature of control available to the Minister to avoid the harm; vulnerability of the children and the relationship between the Minister and the children.⁶⁷ The Minister's submission focused on reasonable foreseeability, control, proximity, reliance and responsibility, incoherence and inconsistency with the Act, and public law principles and indeterminacy.⁶⁸ The Minister did not dispute that climate change presents serious threats to the environment, the

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15. The existence of conflicting duties arising from other principles of law or statute;
 16. Consistency with the terms, scope and purpose of any statute relevant to the existence of a duty; and
 17. The desirability of, and in some circumstances, the need for conformance and coherence in the structure and fabric of the common law.

Id.

⁶¹ *Id.* ¶ 104.

⁶² *Sullivan v Moody* [2001] HCA 59, ¶ 50; *McKenna v Hunter & New England Local Health Dist* [2013] NSWCA 476, ¶¶ 19–22.

⁶³ *Presland* [2005] NSWCA, ¶¶ 11–12; *Caltex Refineries Pty Ltd* [2009] NSWCA ¶¶ 131–32 (Austl.). See also David Logano, *16 June 2021: A Novel Duty of Care—Implications for State Wardship and the Department's Duty*, ANGELA SDRINIS LEGAL (June 16, 2021), <https://www.angelasdrinislegal.com.au/16-june-2021-a-novel-duty-of-care-implications-for-state-wardship-and-the-departments-duty.html> [<https://perma.cc/6NUS-5FES>].

⁶⁴ *Graham Barclay Oysters* [2002] HCA ¶ 78; *Stuart* [2009] HCA ¶ 113; *Moody* [2001] HCA ¶¶ 55–62.

⁶⁵ See, e.g., *Stuart* [2009] HCA; *Presland* [2005] NSWCA; *Crimmins v Stevedoring Indus Fin Comm* [1999] HCA 59, ¶ 93; *Graham Barclay Oysters* [2002] HCA ¶ 146.

⁶⁶ See, e.g., *Stuart* [2009] HCA ¶ 133; *Graham Barclay Oysters* [2002] HCA ¶¶ 81, 149, 151; *Presland* [2005] NSWCA.

⁶⁷ *Sharma* [2021] FCA ¶ 145.

⁶⁸ *Id.* ¶ 146.

Australian community, and the world at large, but denied that there existed a duty of care, that the project would cause the harm alleged, and that injury to the children was reasonably foreseeable.⁶⁹ She submitted that the relevant salient features were overwhelmingly against recognition of a novel duty of care, but, in any case, there would be no reasonable apprehension of breach.⁷⁰

In deciding that the Minister did owe a duty of care, His Honor noted that duty of care is assessed *prospectively* because the “ultimate issue” is whether the alleged tortfeasor should have had the interests of the claimant in contemplation *before* it pursued or failed to pursue a course of conduct.⁷¹ His discussion assessed both “positive” salient features (i.e., that mitigate in favor of recognition of the posited duty, such as reasonable foreseeability of harm; control, responsibility and knowledge; and vulnerability, reliance, and recognized relationships), as well as “negative” salient features (i.e., toward the rejection of the posited duty, such as coherence of the posited duty with the statutory scheme and administrative law; indeterminacy; and “other control mechanisms”).⁷²

C. Reasonable Foreseeability of the Harm

With respect to reasonable foreseeability of the harm, His Honor outlined that what must be established is that a reasonable person in the Minister’s position would foresee that a risk of injury to the children would flow from the extension’s contribution to increased CO₂ and increased surface temperature brought about by the combustion of the coal, which the Minister’s approval would facilitate.⁷³

The Court found that the children were exposed to a real risk of either death or personal injury from heat waves, bushfires, and other catastrophic events such as cyclones and flooding.⁷⁴ The Court held that the risk of harm to the children was not remote, was reasonably foreseeable, and was therefore a real risk.⁷⁵ The Court did not accept that the

⁶⁹ *Id.* ¶ 15.

⁷⁰ *Id.*

⁷¹ *Id.* ¶ 115.

⁷² *Id.* ¶ 94 (“[T]he posited duty of care’ meaning a duty on the Minister to take reasonable care in the exercise of her statutory powers not to cause the [c]hildren harm arising from the extraction of coal from the extension project and the consequent emissions of CO₂ into the Earth’s atmosphere.”).

⁷³ *Sharma* [2021] FCA ¶ 94.

⁷⁴ *Id.* ¶¶ 225, 235–36.

⁷⁵ *Id.* ¶ 271.

applicants demonstrated “indirect” and “flow-on” impacts.⁷⁶ Invoking the nature of harm as a salient feature, while the foreseeability of harm from the defendant’s harm might be small, should the risk of harm crystallize, the harm would be catastrophic.⁷⁷

D. Control, Responsibility, and Knowledge

The Court held that the salient features of control, responsibility, and knowledge strongly supported the existence of relations between the Minister and the children sufficient for the common law to impose a duty of care,⁷⁸ and that, “[t]he greater level of control over, responsibility for and knowledge of the risk of harm, the closer will be the relations.”⁷⁹ As it was her exercise of power upon which the creation of the risk depended, the Minister had direct control over the foreseeable risk.⁸⁰ And though there was no physical or temporal nearness between the Minister and the children, the Court held that the strength of the affirmative salient features demonstrated a relational nearness.⁸¹ Each of the features of control, responsibility and knowledge, bore upon the relations between the Minister and the children.⁸² The Court continued, “The entirety of the risk of harm flowing from that exercise of power is therefore in the Minister’s control.”⁸³

It is difficult to characterize in a single phrase the devastation that the plausible evidence presented in this proceeding forecasts for the children. The physical environment will be harsher, far more extreme, and devastatingly brutal. As for the human experience—quality of life, opportunities to partake in nature’s treasures, the capacity to grow and prosper—all will be greatly diminished. Lives will be cut short. Trauma will be far more common and good health harder to hold and maintain. None of this will be the fault of nature itself. It will largely be inflicted by the inaction of this generation of adults, in what might fairly be described as the greatest intergenerational injustice ever inflicted by one generation of humans upon the next.⁸⁴

⁷⁶ *Id.* ¶ 204.

⁷⁷ *Id.* ¶ 257.

⁷⁸ *Sharma* [2021] FCA ¶ 288.

⁷⁹ *Id.* ¶ 258.

⁸⁰ *Id.* ¶ 288.

⁸¹ *Id.* ¶ 315.

⁸² *See id.* ¶ 271.

⁸³ *Id.*

⁸⁴ *Sharma* [2021] FCA ¶ 293.

Who, then, in law is my neighbor? The answer seems to be: persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

The Court held that the Minister had “substantial and direct control over the source of harm”⁸⁵ and that the Minister’s approval would be a necessary cause of the hypothesized harm were the approval to be granted and were the harm of climate change to materialize.⁸⁶ His Honor rejected the Minister’s argument that, unless the defendant had an exclusive capacity to avoid the risk of harm, the defendant lacked control; if control in that sense were required in order for a duty of care to be recognized, a duty would rarely, if ever, be recognized.⁸⁷ Further, His Honor rejected the implication in the Minister’s submissions that a causal nexus is necessary between conduct and injury.⁸⁸

The Court found that the Minister had all of the knowledge about the risk of harm to the children,⁸⁹ that she was responsible in the interests of Australians to ensure a healthy environment for the benefit of future generations,⁹⁰ and was required to consider recognized principles of environmental law, such as ecologically sustainable development and the precautionary principle when making decisions under the Act.⁹¹

II. VULNERABILITY, RELIANCE, AND RECOGNIZED RELATIONSHIPS

The Court found that the evidence demonstrated that the children “are extremely vulnerable to a real risk of harm from a range of severe harms caused by climate change, or more specifically, increased global average surface temperature brought about by increased greenhouse gases in the Earth’s atmosphere.”⁹² The vulnerability of the children was “partly a function of the magnitude of the potential risk of harm,” but “also a function of their powerlessness to avoid that harm.”⁹³ The children’s innocence was also relevant, as they bore no responsibility for the

⁸⁵ *Id.* ¶ 288.

⁸⁶ *Id.* ¶ 299.

⁸⁷ *Id.* ¶¶ 279–80.

⁸⁸ *Id.* ¶ 282.

⁸⁹ *Id.* ¶ 286.

⁹⁰ *Sharma* [2021] FCA ¶ 274.

⁹¹ *Id.* ¶¶ 254–56, 339, 399.

⁹² *Id.* ¶ 289.

⁹³ *Id.* ¶ 296.

harm.⁹⁴ It was the Minister who had control.⁹⁵ It was the Minister who relevantly had a responsibility.⁹⁶ So, there existed a form of dependency encapsulated by “reliance” as a salient feature.⁹⁷

Dependence or reliance upon the Minister reinforced a special vulnerability of the children as minors.⁹⁸ While the Court held it was not necessary to make a determination regarding the principle of *parens patriae*, it noted that, “[i]t is sufficient to observe that common law jurisdictions have historically identified and our courts continue to identify that there is a relationship between the government and the children of the nation, founded upon the capacity of the government to protect and upon the special vulnerability of children.”⁹⁹ This special vulnerability bolsters “vulnerability” and “reliance” as affirmative indicators of a duty of care.¹⁰⁰

III. COHERENCE OF THE POSITED DUTY WITH THE STATUTORY SCHEME AND ADMINISTRATIVE LAW

With respect to “coherence,” the Minister argued against the imposition of a duty of care on the basis that it was inconsistent with the Act or public law more generally.¹⁰¹ The Court explained that “it has been generally accepted that, unless the statute manifests a contrary intention, a public authority which enters upon an exercise of statutory power may place itself in a relationship to members of the public which imports a common law duty of care.”¹⁰² Therefore, a public authority may be subject to a common law duty of care when it exercises or performs a statutory power or duty. The Court noted that the capacity to validly exercise such a power or duty was not necessarily in tension with a coextensive duty of care which may cut across its exercise.¹⁰³

Regarding the coherence of the imposition of the posited duty of care with the Act and the Minister’s approval function, the Court said:

⁹⁴ *Id.* ¶ 312.

⁹⁵ *Id.* ¶ 299.

⁹⁶ *Sharma* [2021] FCA ¶ 299.

⁹⁷ *Id.*

⁹⁸ *Id.* ¶ 301.

⁹⁹ *Id.* ¶ 311.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* ¶¶ 333, 338–430.

¹⁰² *Sharma* [2021] FCA ¶ 361 (quoting *Council of the Shire of Sutherland v Heyman* [1985] 157 CLR ¶¶ 424, 458–59 (Austl.)).

¹⁰³ *Id.* ¶ 373.

The Minister’s contention that the recognition of the posited duty would in practical terms impose a distortion upon the Minister’s discretion, was premised on harm to the Children not being a mandatory consideration required to be taken into account in an approval decision under s 130 and s 136. I disagree. Human safety is a relevant mandatory consideration in relation to a controlled action which may endanger human safety. . . . [T]he lives and safety of the Children are not optional considerations but have to be taken into account by the Minister when determining whether to approve or not approve the controlled action.¹⁰⁴

Rather than distorting the discretion, the recognition of common law duty could result in making a governmental functionary or entity “more vigilant in its role.”¹⁰⁵

With respect to the incoherence argument, that the imposition of the posited duty would be incoherent with administrative law principles and so recognition of a duty of care would be inconsistent with the role of the courts in supervising the legality of statutory decision-making, His Honor pointed out “that the law of tort may bear directly upon the conduct of public administration.”¹⁰⁶ Though the distinctions between the subject matters of private and public law are necessarily different, the role of the courts in judicial review of administrative decisions is to ensure legality.¹⁰⁷ Distinguishing cases in which inconsistency was found, the Court stated that protection of human safety would “almost always cut across the exercise or performance of a statutory power including a broad discretionary power.”¹⁰⁸ His Honor concluded that there was an implied legislative intention to treat human safety as a mandatory consideration.¹⁰⁹

Regarding the putative “skewing” of administrative discretion, Justice Bromberg rejected the argument that imposing a duty of care

¹⁰⁴ *Id.* ¶ 404.

¹⁰⁵ *Id.* ¶ 393 (quoting *Crimmins v Stevedoring Indus. Fin. Comm.* (1999) 200 CLR 1, ¶ 132 (Austl.)).

¹⁰⁶ *Id.* ¶¶ 419–20.

¹⁰⁷ *Id.* ¶¶ 420, 423.

¹⁰⁸ *Sharma* [2021] FCA ¶ 398.

¹⁰⁹ *Id.* ¶ 404; Ellen Rock, *Superimposing Private Duties on the Exercise of Public Power: Sharma v Minister for the Environment*, AUSTL. PUB. L. (Aug. 11, 2021), <https://auspublaw.org/2021/08/superimposing-private-duties-on-the-exercise-of-public-powers-sharma-v-minister-for-the-environment/> [<https://perma.cc/HDY2-REW2>].

would inevitably require the Minister to disapprove the proposal.¹¹⁰ Rather, a standard of reasonableness allowed for the Minister to weigh other factors alongside those protected by the duty,¹¹¹ consistent with the purpose of the statute.¹¹² The reference to “weighing”¹¹³ raised the issue of separation of powers; in public law, “it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power.”¹¹⁴ Justice Bromberg conceded that incoherence would arise where the content of the duty is “directed to the making of a valid decision.”¹¹⁵ But here, the substance of the duty recognized by Justice Bromberg was not validity, but the requirement that the Minister “take reasonable care to avoid causing the Children personal injury” in making her decision, and thus there would be no inconsistency between public and private law.¹¹⁶

The Court determined that to award the injunction would impose a restraint on statutory discretion, which Justice Bromberg had taken steps to avoid in framing the duty of care.¹¹⁷ Rather than grant the injunction, the Court remitted to the Minister the decision, with the benefit of the additional knowledge gained as a result of the proceedings.¹¹⁸

A. *Indeterminacy*

The Minister invoked the “flood-gates argument,” i.e., that recognition of a duty of care would impose tortious liability on all or a multitude of persons involved in generating emissions of greenhouse gases globally.¹¹⁹ The Minister’s submissions misconceive what the inquiry about indeterminacy is really about. Indeterminacy in this context is really about a defendant’s inability to sufficiently ascertain the nature and extent of its prospective liability—the larger the class of potential claimants and the more extensive the nature of their potential claims, the more difficult it may be to assess prospective liability.¹²⁰ Justice Bromberg considered that the necessary analysis was to look at the totality of the relations

¹¹⁰ *Sharma* [2021] FCA ¶ 413.

¹¹¹ *Id.* ¶¶ 412–13.

¹¹² Rock, *supra* note 109, at 33.

¹¹³ *Sharma* [2021] FCA ¶ 407.

¹¹⁴ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, ¶ 41 (Mason J.).

¹¹⁵ *Sharma* [2021] FCA ¶ 424.

¹¹⁶ Rock, *supra* note 109, at 33 (quoting *Sharma* [2021] FCA ¶ 492).

¹¹⁷ *Sharma* [2021] FCA ¶ 502.

¹¹⁸ *Id.* ¶¶ 513–20.

¹¹⁹ *Id.* ¶ 437.

¹²⁰ *Id.* ¶ 438.

between the Minister and the children unique to them, and he rejected the duty be declined for policy reasons.¹²¹ Justice Bromberg rejected the Minister's arguments that the size of the class or uncertainty about when future claims would arise equate to indeterminacy,¹²² and he noted that there are many mechanisms such as the Civil Liability Acts and the principle of proportionality that will limit damages and make many different contributors responsible ultimately.¹²³

B. *Other Control Mechanisms*

His Honor conceded that the Minister is better placed to deal with the complex task of addressing climate change than the common law.¹²⁴ However, he notes that the imposition of liability for breach of a duty of care arising from conduct causing personal injury is at the heart of the common law's place in the legal system and is not an inappropriate intervention.¹²⁵ His Honor acknowledged the dimensions of the contested political issues around climate change and prioritization of interests, but noted that duty of care is recognized in relation to statutory approval processes,¹²⁶ and warned that political controversy cannot provide a principled basis for a court declining access to justice.¹²⁷

It was not suggested that statutory decision-making of the kind in question was a core legislative or policy-making function,¹²⁸ but rather, the Minister's submission relied on the policy/operational dichotomy.¹²⁹ This, His Honor noted, "has largely been discredited."¹³⁰

C. *The Court's Finding Regarding Duty of Care*

His Honor concluded that "coherence," "control," "vulnerability," and "reliance" all assumed special relevance in an assessment of whether a novel duty of care should be recognized, and all were significantly affirmative of a duty being recognized.¹³¹ On the facts, His Honor regarded

¹²¹ *Id.* ¶¶ 488–89.

¹²² *Id.* ¶ 436.

¹²³ *Sharma* [2021] FCA ¶ 472.

¹²⁴ *Id.* ¶ 479.

¹²⁵ *Id.* ¶ 482.

¹²⁶ *Id.* ¶ 476.

¹²⁷ *Id.* ¶¶ 483–84.

¹²⁸ *Id.* ¶ 476.

¹²⁹ *Sharma* [2021] FCA ¶ 387.

¹³⁰ *Id.* ¶¶ 387, 475.

¹³¹ *Id.* ¶ 490.

“coherence” as agnostic.¹³² “Indeterminacy” and the policy considerations dealt with under the heading “Other Control Mechanisms” were also largely agnostic, but, if they tended in any direction, it would be against a duty being recognized.¹³³ “Reasonable foreseeability’ strongly favo[red] the recognition of duty of care.”¹³⁴ In totality, His Honor held “the relations between the Minister and the children answer the criterion for intervention by the law of negligence.”¹³⁵ “[A] reasonable Minister for the Environment ought to have the Children in contemplation when facilitating the emission of 100 Mt of CO₂ into the Earth’s atmosphere,” and she does owe “a duty to take reasonable care to avoid causing personal injury to the Children when deciding, under [Section] 130 and [Section] 133 of the EPBC Act, to approve or not approve the Extension Project.”¹³⁶

Finding a duty of care, however, does not define the scope of that duty or mean there was a breach of that duty; this was acknowledged by the Court.¹³⁷ Finding a duty of care is owed is only the first step in the negligence analysis, because liability from negligence arises due to a breach of a duty of care, not simply because a duty of care existed.¹³⁸ Ultimately, this is why it was impossible for the Court to grant the relief sought.¹³⁹ The Court’s recognition of the posited duty of care would not, in itself, require that the extension project be disapproved.¹⁴⁰

IV. THE COURT’S FINDING REGARDING *QUIA TIMET*

Tim Baxter wrote in 2017 that *Urgenda*-style litigation has promise in Australia where the remedy sought is not damages, but an injunction to prevent future harm.¹⁴¹ Baxter’s analysis drew heavily on the decision of Justice Bromberg in *Plaintiff S99/2016 v Minister for Immigration and Border Protection* (“*Plaintiff S99*”).¹⁴² In that case, the applicant, a refugee, had been detained trying to enter Australia by boat and taken,

¹³² *Id.* ¶ 490.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Sharma* [2021] FCA ¶ 490.

¹³⁶ *Id.* ¶ 491–92.

¹³⁷ *Id.* ¶ 510.

¹³⁸ *See id.* ¶ 503.

¹³⁹ *Id.* ¶ 503–12.

¹⁴⁰ *Id.* ¶ 411.

¹⁴¹ Tim Baxter, *Urgenda-Style Climate Litigation Has Promise in Australia*, 32 AUSTRL. ENV'T REV. 70, 76 (2017).

¹⁴² *Id.* at 72; *Plaintiff S99/2016 v Minister for Immigr and Border Prot* [2016] FCA ¶ 483.

under Australia's offshore processing regime, to Nauru.¹⁴³ While in detention, she was raped and fell pregnant.¹⁴⁴ On her request, the Australian authorities agreed to procure an abortion, and she was taken to Papua New Guinea for the procedure.¹⁴⁵ She applied for a restraint due to both legal and medical risks in Papua New Guinea.¹⁴⁶ Justice Bromberg held a novel duty of care existed and granted an injunction *quia timet* to restrain an apprehended commission of the tort of negligence, requiring Australia to obtain a safe and lawful abortion for her elsewhere.¹⁴⁷

In *Sharma*, having determined that a reasonable apprehension of a breach of the duty of care had been established, the Court turned its attention to the requirements for the grant of a *quia timet* injunction.¹⁴⁸ In *Plaintiff S99*, Justice Bromberg stated that a plaintiff, practically speaking, might have the opportunity to receive an injunction in negligence in the "rare circumstances" that the plaintiff perceives the risk; the plaintiff is not prepared to take the risk; the risk is, in theory, avoidable or reducible; but, the risk is not in the power of the plaintiff to avoid or reduce; the risk is in the power of the defendant to avoid or reduce; and the plaintiff has enough time to go to court before the risk eventuates.¹⁴⁹

In 2018, a *quia timet* injunction was granted in *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection*.¹⁵⁰ Justice Bromberg wrote that a *quia timet* injunction is available on a final basis in cases involving the apprehended or threatened breach of a duty of care to prevent or restrain an apprehended or threatened wrong which would result in substantial damage if committed.¹⁵¹ The Court set out the relevant principles for the grant of a *quia timet* injunction against the Commonwealth, meaning that such an injunction may be granted to prevent a threatened infringement of the rights of the applicant where the applicant can show that what the respondent is threatening and intending to do will cause imminent and substantial damage to the applicant.¹⁵²

¹⁴³ *Plaintiff S99/2016* [2016] FCA ¶ 3.

¹⁴⁴ *Id.* ¶ 5.

¹⁴⁵ *See id.* ¶ 111.

¹⁴⁶ *See id.* ¶ 405.

¹⁴⁷ *Id.* ¶ 495.

¹⁴⁸ *Sharma* [2021] FCA 560 ¶¶ 197–99.

¹⁴⁹ *Plaintiff S99/2016* [2016] FCA ¶ 471.

¹⁵⁰ *FRX17 as litig representative for FRM17 v Minister for Immigr and Border Prot* [2018] FCA 63, ¶¶ 5–6 (Austl.).

¹⁵¹ *Plaintiff S99/2016* [2016] FCA ¶ 467.

¹⁵² *Sharma* [2021] FCA ¶¶ 497–98.

As outlined in *Plaintiff S99*, *quia timet* injunctions are not to be granted unless the imminence of the act to be prohibited is sufficiently clearly established to justify the court's intervention.¹⁵³ In deciding whether to grant a *quia timet* injunction, a court will have regard to the degree of probability of the apprehended injury, the degree of seriousness of the injury, and the requirements of justice between the parties.¹⁵⁴ "In the circumstances, including that the harm in question is not imminent," the Court considered it undesirable to preempt the Minister's decision and declined to grant an injunction to prevent the Minister from approving the extension.¹⁵⁵

The Court was not satisfied that there was a reasonable apprehension that the Minister would breach her duty of care, given that:

the Minister had a variety of options available that would assist in avoiding a breach of her duty (such as a conditional approval); the Minister now had a 'mountain' of new information which she could consider in relation to the decision; and in any event, the decision would still be subject to administrative review.¹⁵⁶

Justice Bromberg was not satisfied that a breach of duty of care would occur.¹⁵⁷ He noted that the relevant inquiry to be made includes not only an assessment of reasonable foreseeability, but also taking into account the Minister's competing or conflicting responsibilities.¹⁵⁸ This is done through determining whether the only reasonably available response to the reasonable foreseeability of personal injury to the children is that the Minister not approve the extension.¹⁵⁹

No submissions were made by the children about the Minister's capacity to make a reasonable response, including by imposing conditions

¹⁵³ *Plaintiff S99/2016* [2016] FCA ¶ 479 (quoting *Apotex Pty Ltd v Les Laboratoires Servier [No 2]* [2012] FCA 748; (2012) 293 ALR 272, ¶ 46 (Austl.)).

¹⁵⁴ *Apotex Pty Ltd v Les Laboratoires Servier [No 2]* (2012) 293 ALR 272, ¶ 46 (Austl.) (Bennett J.) (citing *Hurst v Queensland [No 2]* [2006] FCAFC 151 ¶ 21 (Austl.)).

¹⁵⁵ *Plaintiff S99/2016* [2016] FCA ¶¶ 507–08.

¹⁵⁶ Kate Swain, *Government Decision-Making Climate Change and Australian Children*, MCCULLOUGH ROBERTSON (June 22, 2021), <https://www.mccullough.com.au/2021/06/22/government-decision-making-climate-change-and-australian-children/> [https://perma.cc/W65M-TT52].

¹⁵⁷ *Sharma* [2021] FCA ¶ 510.

¹⁵⁸ *Id.* ¶ 499.

¹⁵⁹ *Id.*

on an approval under Sections 134(1) and (2) of the Act.¹⁶⁰ Nor did they comment about the extent to which the Minister's competing or conflicting responsibilities would influence the reasonable response to the foreseeable harm.¹⁶¹

His Honor concluded that the applicants did establish that the Minister has a duty to take reasonable care to avoid causing personal injury to the children when deciding, under Sections 130 and 133 of the Act, to approve or not approve the extension project.¹⁶² Further, His Honor decided that an injunction restraining the Minister from exercising her power under Sections 130 and 133 of the Act in a manner that would permit the extraction of coal from the extension project should not be granted.¹⁶³

To find a duty of care is not to define the scope of that duty or to find a breach.¹⁶⁴ It is why, ultimately, it was impossible for the Court to grant the relief sought. His Honor remitted the decision regarding the extension to the Minister's discretion subject to her consideration of the established duty of care and exercise of the appropriate procedural measures.¹⁶⁵ The Minister was put on notice that she "must take into account, as a mandatory relevant consideration, the avoidance of personal injury to people" in determining whether to approve the mine under the Act.¹⁶⁶

V. A NOVEL PREEMPTIVE MANEUVER

Even though Justice Bromberg did not grant the injunction, the value of seeking it and declarations (rather than waiting for judicial review) allowed the applicants to call evidence and run a merits case rather than waiting for the Minister to make biased factual findings.¹⁶⁷ Given the opportunity to make a decision and findings of fact, the Minister would likely have used the same formula as previous Federal Environment Ministers have since the *Wildlife Whitsunday* case in 2006¹⁶⁸

¹⁶⁰ *Id.* ¶ 500.

¹⁶¹ *Id.*

¹⁶² *Id.* ¶ 513.

¹⁶³ *Sharma* [2021] FCA ¶ 513.

¹⁶⁴ *Id.* ¶¶ 38–39.

¹⁶⁵ *Id.* ¶¶ 508, 510.

¹⁶⁶ *Id.* ¶ 503.

¹⁶⁷ *Id.* ¶¶ 512–13.

¹⁶⁸ *Wildlife Pres Soc'y of Queensl Proserpine/Whitsunday Branch Inc v Minister for the Env't & Heritage & Ors* [2006] FCA 736, ¶ 16 (Austl.).

and the *Anvil Hill* case in 2007¹⁶⁹ that the climate change impacts of approving a mine are too “uncertain” and “speculative” and, therefore, can be discounted.¹⁷⁰

The nature of approvals pre-*Sharma* is a patchwork from which it is hard to discern the record or the reasoning with any clarity or consistency. They have often been characterized by willingness to accept rationales such as exaggerated claims of positive economic impacts and job creation; misrepresentation of the principles of supply and demand; misapplication of the precautionary principle; a false dichotomy between jobs in the environment; and the “drug dealers’ defense,” meaning if we don’t supply it, somebody else will.¹⁷¹

This formula, and the limitations of judicial review, have allowed the Minister to continue to approve large coal mines for over a decade while, on paper at least, not disputing climate change is real.¹⁷² The Minister has used this formula many times since these earlier cases, for instance, as a basis for approving the massive Adani Mine without finding its impact on climate change.¹⁷³ This formula allows the Minister to avoid outright climate denial while, simultaneously, avoiding recognition of the impacts of approving large coal mines and gas projects.¹⁷⁴

The applicants in *Sharma* avoided waiting for the Minister (or a delegate) to make these factual findings and instead brought the Minister before a court in which they could tender evidence of climate experts

¹⁶⁹ *Anvil Hill Project Watch Ass’n Inc v Minister for the Env’t & Water Res* [2007] FCA 1480, ¶¶ 10–14 (Austl.); *Anvil Hill Project Watch Ass’n Inc v Minister for the Env’t and Water Res* [2008] FCAFC 3, ¶¶ 5–6 (Austl.).

¹⁷⁰ See *Wildlife Pres Soc’y of Queensl Proserpine/Whitsunday Branch Inc* [2006] FCA ¶¶ 15–16; *Anvil Hill Project Watch Ass’n Inc*. [2007] FCA ¶ 10.

¹⁷¹ See *Wildlife Pres Soc’y of Queensl Proserpine/Whitsunday Branch Inc* [2006] FCA ¶ 16.

¹⁷² See Lisa Cox, *Third New Coal Project Approved by Australian Environment Minister Sussan Ley in Just One Month*, *GUARDIAN* (Oct. 4, 2021, 9:28 PM), <https://www.theguardian.com/australia-news/2021/oct/05/new-coalmine-mangoola-nsw-muswellbrook-approved-australia-environment-minister-sussan-ley> [<https://perma.cc/JLU4-8R9Y>].

¹⁷³ *Austl Conservation Found Inc v Minister for the Env’t* [2016] FCA ¶¶ 31, 35, 39, 41–42 (Austl.); *Austl Conservation Found Inc v Minister for the Env’t and Energy* [2017] FCAFC ¶ 22 (Austl.).

¹⁷⁴ It is a formula straight from the “climate delayers” handbook (accepting climate change is real but finding any possible excuse to avoid taking immediate action now). See William Lamb, Giulio Mattioli, Sebastian Levi, J. Timmons Roberts, Stuard Capstick, Felix Creutzig, Jan C. Minx, Finn Müller-Hansen, Trevor Culhane & Julia K. Steinberger, *Discourses of Climate Delay*, 3 *GLOB. SUSTAINABILITY* 1, 4–5 (2020), <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/7B11B722E3E3454BB6212378E32985A7/S2059479820000137a.pdf/discourses-of-climate-delay.pdf> [<https://perma.cc/QQZ3-VEE9>].

and have the court make findings of fact based on the merits of this evidence and their claim to substantive rights (not merely procedural rights as in judicial review).¹⁷⁵

Because the Federal Court's subject matter jurisdiction depends on there being a "matter" within the meaning of Section 76 of the Constitution,¹⁷⁶ it lacks jurisdiction to give opinions that are advisory or hypothetical.¹⁷⁷ There must be a real right, duty, or liability to be established by the Court's adjudication.¹⁷⁸ The applicants in *Sharma* were able to preempt the Minister's decision by seeking a *quia timet* injunction, which may be granted where an applicant establishes that what the respondent is threatening and intending to do will cause imminent and substantial damage to the applicant.¹⁷⁹

In this case, the applicants sought the injunction to restrain the Minister approving the coal mine extension project on the basis that there is a reasonable apprehension that the Minister would approve it, which she ultimately did, and there is a reasonable apprehension of a breach of the duty of care to them.¹⁸⁰ Justice Bromberg declined to grant a *quia timet* injunction because it was not clear that the Minister would breach the duty of care once made aware of its existence by a decision of the Court.¹⁸¹

The failure to obtain an injunction does not mean that the applicants failed overall, particularly in the context that this approach was a vehicle to run the case on the merits and have the Court rule on the existence of a duty of care based on evidence from climate scientists.¹⁸² Faced with the alternative of waiting and seeking judicial review after the Minister (or a delegate) had approved the mine, which the reasons for the approval would all be stacked against finding liability, the applicants' legal preemption of the decision was truly inspired and novel.

¹⁷⁵ *Sharma v Minister for the Environment*, *supra* note 4.

¹⁷⁶ Such jurisdiction is conferred pursuant to federal laws, including Section 19(1) of the Federal Court of Australia Act 1976, made under Sections 71 and 77 of the Constitution. *Australian Constitution* ss 71, 77. The High Court of *in re Judiciary and Navigation Acts* (1921) 29 CLR 257 (Austl.), explained that "there can be no matter within the meaning of [Section 76] unless there is some immediate right, duty or liability to be established by the determination of the Court." *Id.* at 265.

¹⁷⁷ *In re Judiciary and Navigation Acts* (1921) 29 CLR at 259.

¹⁷⁸ *Id.*

¹⁷⁹ *Sharma* [2021] FCA 560 ¶ 407.

¹⁸⁰ *Id.* ¶ 492.

¹⁸¹ *Id.* ¶¶ 499–512.

¹⁸² *See id.* ¶ 517.

VI. DECISION OVERTURNED ON APPEAL

On March 15, 2022, the Full Federal Court allowed the Minister's appeal.¹⁸³ In their decision, three judges of the Full Federal Court dismissed the Minister's challenge to Justice Bromberg's factual findings about climate change.¹⁸⁴ They commended His Honor on the "detailed and careful" judgment.¹⁸⁵ However, they held, for different reasons, that a duty of care should not be imposed on the Minister.¹⁸⁶ Chief Justice Allsop rejected that an implied duty of care existed under the Act, (1) because the posited duty invokes core policy questions unsuitable in their nature and character for judicial determination and is inconsistent and incoherent with the Act; and (2) because of "considerations of indeterminacy, lack of special vulnerability and of control."¹⁸⁷ Nevertheless, Chief Justice Allsop recognized the difficulty of the decision and praised Justice Bromberg, observing that, "[t]he primary judge [Justice Bromberg] considered and dealt with the arguments of the respondents and the Minister in a careful, thorough and clear body of reasons."¹⁸⁸

The decision of Justice Bromberg remains an important decision. The Full Federal Court rejected the Minister's challenge to Justice Bromberg's factual findings of the dire consequences of climate change on children, and not all of the judges on appeal reasoned that response to climate change must be left to Parliament rather than the courts.¹⁸⁹ Finally, there are two key words for liability that stand out in Chief Justice Allsop's decision in *Sharma*: "tiny" and "material." Chief Justice Allsop repeatedly used the former to find no liability.¹⁹⁰ Future tort cases may still succeed if they establish the contribution to harm is material.

Sharma has been criticized by some for its activism.¹⁹¹ Evolution in legal thinking and the principles of law, however, happens over time. Lord Atkin's neighbor principle did not emerge out of whole cloth, but was the culmination of a line of judicial decisions across years and across

¹⁸³ *Sharma [No 2]* [2022] FCAFC ¶ 1.

¹⁸⁴ *Id.* ¶ 11.

¹⁸⁵ *Id.* ¶ 35.

¹⁸⁶ *Id.* ¶¶ 11–12.

¹⁸⁷ *Id.* ¶ 7.

¹⁸⁸ *Id.*

¹⁸⁹ *Sharma [No 2]* [2022] FCAFC ¶¶ 17, 332–33.

¹⁹⁰ *Id.* ¶¶ 344–46.

¹⁹¹ See Janet Albrechtsen, *Hey Presto a New Legal Duty Pushes Judicial Boundaries*, AUSTL. (June 2, 2021), <https://www.theaustralian.com.au/commentary/hey-presto-a-new-legal-duty-pushes-judicial-boundaries/news-story/a209ba3b903cec3317ed1c7a1a524cef> [<https://perma.cc/R8WL-58HW>].

jurisdictions.¹⁹² The law is slow to change, but it does not stand still. The law of negligence continues to be tested and to evolve, perhaps most markedly in the current era in the area of climate litigation.

Justice Bromberg's decision acknowledges current generations' responsibilities not just to children but also to future generations.¹⁹³ It expands the potential for an Australian government official to owe, in their decision-making capacity, a duty of care to young people to prevent harms associated with climate change.¹⁹⁴ Liability of government is an important example of transition in attitude. As governmental authorities' approval of environmental degradation comes under increasing regard as complicit, the expansion of corporate social responsibility dovetails with governmental responsibility. That responsibility means refraining from contributing, as the Court put it, "to a danger and, in each case, a danger to the safety of the people or property that the Council or Authority had been charged with protecting."¹⁹⁵ This decision highlights society's collective responsibility, including government, to children and future generations as a real and tangible obligation, one to which we are truly held accountable.

The Federal Court's ruling will reverberate for years to come. Though the case involved a duty of care under statute, Justice Bromberg's reasoning lays out the factual and legal basis for others to base claims in negligence at common law against governments and companies that breach their duty of care to avoid harm due to climate change.¹⁹⁶ Other ramifications may be that decision-makers will be more willing to require more comprehensive, verifiable, and accurate information, impose conditions on planning approvals, and question local government policies, guidelines, and decisions under state and local laws. Having lost before the Full Federal Court, the children announced they would not be seeking special leave to appeal to the High Court.¹⁹⁷ The case, therefore, has come to an end, but its legacy will continue for years to come.

¹⁹² See, e.g., James C. Plunkett, *The Historical Foundations of the Duty of Care*, 41 MONASH U. L. REV. 716, 716–44 (2015).

¹⁹³ It is worth noting that the remit of the Hungarian Commissioner for Future Generations includes powers to review and propose legislation and to initiate judicial review of decisions. Ciprian N. Radavoi & Lez Rayman-Bacchus, *The Need for Durable Institutions for Future Generations: Mobilising the Citizenry*, 132 FUTURES 102,820, 102,822 (2021).

¹⁹⁴ Sharma [2021] FCA ¶¶ 91–95.

¹⁹⁵ Sharma [No 2] [2022] FCAFC ¶ 377.

¹⁹⁶ See, e.g., Brennan & Wellauer, *supra* note 11.

¹⁹⁷ Madeleine Achenza, *'Reprehensible': Group Being Court Case Issues Election Warning*, NEWS.COM.AU (Apr. 12, 2022, 2:48 PM), <https://www.news.com.au/technology/environment/climate-change/students-behind-environmental-duty-of-care-case-slam-costly-court-appeal/news-story/2dd5bbae570ad6cf641d2446feb4fcb7> [<https://perma.cc/L59R-84AV>].