

TORT LAW AND CLIMATE CHANGE

WENDY BONYTHON*

Tort law presents doctrinal barriers to plaintiffs seeking remedies for climate change harms in common law jurisdictions. However, litigants are likely to persist in pursuing tortious causes of action in the absence of persuasive policy and regulatory alternatives. Ongoing litigation in Smith v Fonterra Co-operative Group Ltd in New Zealand and Sharma v Minister for Environment in Australia highlights tensions between torts doctrine and climate change litigation in both countries. Regardless of its ultimate outcome, that litigation provides a valuable opportunity to integrate theoretical questions about the legitimacy of judicial lawmaking, and intersectional critical legal perspectives, into the teaching of torts.

I INTRODUCTION

Anthropogenic climate change is predicted to have a significant long-term impact on the habitability of the planet.¹ Burdens attributable to climate change will be disproportionately borne by marginalised groups — including women,² migrants,³ children,⁴ older people,⁵ indigenous peoples,⁶ and residents of the

* Faculty of Law, Bond University, Queensland, Australia.

¹ Intergovernmental Panel on Climate Change, 'Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty' in Christopher B Field et al (eds), *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects* (Cambridge University Press, 2014) 1.

² Lorena Aguilar, Margaux Granat and Cate Owren (eds), *Roots for the Future: The Landscape and Way Forward on Gender and Climate Change* (International Union for Conservation of Nature and Global Gender Climate Alliance, 2015); Eric Neumayer and Thomas Plümper, 'The Gendered Nature of Natural Disasters: The Impact of Catastrophic Events on the Gender Gap in Life Expectancy, 1981–2002' (2007) 97(3) *Annals of the Association of American Geographers* 551; Peter Newell, 'Race, Class and the Global Politics of Environmental Inequality' (2005) 5(3) *Global Environmental Politics* 70; United Nations Environment Programme, 'Gender, Climate & Security: Sustaining Inclusive Peace on the Frontlines of Climate Change' (United Nations Environment Programme, 2020); Susan Buckingham and Virginie L Masson (eds), *Understanding Climate Change through Gender Relations* (Routledge, 2017); World Meteorological Organization, *Gendered Impacts of Weather and Climate: Evidence from Asia, Pacific and Africa* (Report, 2019).

³ Maria Waldinger, 'The Effects of Climate Change on Internal and International Migration: Implications for Developing Countries' (Working Paper No 192, May 2015).

⁴ UNICEF, *An Environment Fit for Children* (Report, 2019).

⁵ HelpAge International, *Climate Change in an Aging World* (Position Paper, 2015).

⁶ James Ford, 'Indigenous Health and Climate Change' (2012) 102(7) *American Journal of Public Health* 1260.

global south⁷ — at the national and global levels.⁸ Many affected individuals will fall within more than one of those categories throughout their life course: intersectional disadvantage is a well-recognised consequence of climate change.⁹

Responsibility for anthropogenic causes of climate change remains vigorously contested within media, governments, and business. This reflects a broad spectrum of social, economic and political ideologies.¹⁰ In the absence of consensus in global and national political responses, litigation — including private law claims brought against governments and corporations for climate change — has increased and will continue to increase,¹¹ as citizens and states seek remedies for climate change harms and foster effective political responses.¹²

⁷ World Bank, 'CLIMATE CHANGE AFFECTS THE POOREST IN DEVELOPING COUNTRIES', *THE WORLD BANK* (Feature Story, 3 March 2014) <<http://www.worldbank.org/en/news/feature/2014/03/03/climate-change-affects-poorest-developing-countries>>.

⁸ Irene Dankelman and Kavita Naidu, 'Introduction: Gender, Development, and the Climate Crisis' (2020) 28(3) *Gender and Development* 447; Anna Kaijser and Annica Kronsell, 'Climate Change through the Lens of Intersectionality' (2014) 23(3) *Environmental Politics* 417; Kirsten Vinyeta, Kyle Powys Whyte and Kathy Lynn, 'Climate Change through an Intersectional Lens: Gendered Vulnerability and Resilience in Indigenous Communities in the United States' *United States Department of Agriculture* (Report, 2015).

⁹ Barry Levy and Jonathan Patz, 'Climate Change, Human Rights, and Social Justice' (2016) 81(3) *Annals of Global Health* 310.

¹⁰ Mike Hulme, *Why We Disagree About Climate Change: Understanding Controversy, Inaction and Opportunity* (Cambridge University Press, 2009); Ross Garnaut, *The Garnaut Climate Change Review: Final Report* (Cambridge University Press, 2008); Maria Taylor, *Global Warming and Climate Change: What Australia Knew and Buried ... Then Framed a New Reality for the Public* (ANU Press, 2014); Riley E Dunlap and Robert J Brulle (eds), *Climate Change and Society: Sociological Perspectives* (Oxford University Press, 2015).

¹¹ United Nations Environment Programme and Sabin Center for Climate Change Law, *The Status of Climate Change Litigation: A Global Review* (Report, 2017) <<https://wedocs.unep.org/handle/20.500.11822/20767>>; Joana Setzer and Rebecca Byrnes, *Global Trends in Climate Change Litigation: 2019 Snapshot* (Report, 2019); Katerina Mitkidis and Theodora Valkanou, 'Climate Change Litigation: Trends, Policy Implications and the Way Forward' (2020) 9(1) *Transnational Environmental Law* 11.

¹² According to the Climate Change Litigation Database, there have been 1350 climate change cases brought in the US, 28 of which were common law claims, mainly brought by the state against corporate entities. See Sabin Center for Climate Change Law, 'Climate Change Litigation Databases' (Databases, 2021) <<http://climatecasechart.com/climate-change-litigation/>>. Excluding the US, 395 claims have been brought against governments with an additional 45 brought against corporations, 115 in Australia and 18 in New Zealand. Most claims have relied on human rights, planning law, regulatory non-compliance, advertising misconduct and a range of other public law-based claims, with only a small number brought under common law or private causes of action. Among overviews, see: Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015); Michael Faure and Marjan Peeters (eds), *Climate Change Liability* (Edward Elgar, 2011); Jutte Brunnée et al, 'Overview of Legal Issues Relevant to Climate Change' in Richard Lord et al (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, 2012) 23; Christina Voigt, 'Climate Change and Damages' in Cinnamon P Carlarne, Kevin R Gray and Richard Tarasofsky (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press, 2016) 464.

The primary role of tort law in climate change remains unclear. Few claims brought in tort have been successful,¹³ substantiating academic commentary that seemingly insurmountable doctrinal barriers will defeat potential plaintiffs.¹⁴

Others predict a more indirect role for tort law in climate change litigation, identifying its potential as a regulatory tool — ‘regulation through litigation’¹⁵ — or as part of a broader body of ‘strategic’ litigation. Proponents of strategic climate change litigation¹⁶ valorise indirect outcomes, with success measured both directly, such as remedies awarded, and indirectly, such as through publicity of the relevant issues, and policy development.¹⁷

Lytton, critiquing tort-based climate change litigation as a strategy for influencing regulatory policy, has identified advantages of ‘regulation through litigation’,¹⁸ including ‘fram[ing] issues in new ways, giv[ing] them greater prominence on the agendas of regulatory institutions, uncover[ing] policy-relevant information, and mobiliz[ing] reform advocates.’ Among disadvantages, litigation is ‘complex, protracted, costly, unpredictable, and inconsistent.’¹⁹

Peel and Osofsky, writing about the achievements of climate change litigation more broadly, including through environmental and administrative law pathways, observe that litigated cases ‘have raised awareness of climate change as a key environmental issue in the public, business, professional and government sectors’, resulting in both direct and indirect regulatory action.²⁰

¹³ R Henry Weaver and Douglas A Kysar, ‘Courting Disaster: Climate Change and the Adjudication of Catastrophe’ (2017) 93(1) *Notre Dame Law Review* 295, 329 (‘Courting Disaster’).

¹⁴ Douglas A Kysar, ‘What Climate Change Can Do About Tort Law’ (2011) 41(1) *Environmental Law* 1 (‘What Climate Change Can Do About Tort Law’); Carlo Vittorio Giabardo, ‘Climate Change Litigation and Tort Law: Regulation Through Litigation?’ [2019] *Diritto and Processo* 361.

¹⁵ W Kip Viscusi (ed), *Regulation through Litigation* (Brookings Institution Press, 2002).

¹⁶ Jacqueline Peel, Hari Osofsky and Anita Foerster, ‘Shaping the ‘Next Generation’ of Climate Change Litigation in Australia’ (2017) 41(2) *Melbourne University Law Review* 793 (‘Shaping the ‘Next Generation’ of Climate Change Litigation in Australia’); Jacqueline Peel and Hari Osofsky, ‘Climate Change Litigation’ (2020) 16 *Annual Review of Law and Social Science* 21; Jacqueline Peel and Hari Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015).

¹⁷ Kim Bouwer, ‘The Unsexy Future of Climate Change Litigation’ (2018) 30(3) *Journal of Environmental Law* 483; Brian Preston, ‘The Influence of Climate Change Litigation on Governments and the Private Sector’ (2011) 2(4) *Climate Law* 485; Hari Osofsky, ‘The Continuing Importance of Climate Change Litigation’ (2010) 1(1) *Climate Law* 3, 4; Douglas A Kysar, ‘The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism’ (2018) 9(1) *European Journal of Risk Regulation* 48. See also Kysar, ‘What Climate Change Can Do About Tort Law’ (n 14); Giabardo (n 14).

¹⁸ Timothy Lytton, ‘Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits’ (2008) 86(7) *Texas Law Review* 1837.

¹⁹ *Ibid.*

²⁰ Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015).

The Dutch Supreme Court's decision in *The State of the Netherlands v Urgenda* ('*Urgenda*')²¹ has renewed interest in the use of tort law to address climate change, including as a pre-emptive measure to restrict further anthropogenic climate change-caused harms through pursuit of injunctions and declarations, as well as for strategic purposes.²² Part II of the article discusses the history and potential use of tort law in climate change litigation and reviews and critiques two recent Australasian decisions. The New Zealand High Court in *Smith v Fonterra Co-operative Group Ltd* ('*Smith*')²³ struck out nuisance and negligence claims brought by a traditional owner against corporate emitters of greenhouse gases, but not a claim based on a previously unrecognised tort. The Federal Court of Australia in *Sharma v Minister for Environment* ('*Sharma*')²⁴ found that a Federal Minister owes a duty of care to Australian children when exercising statutory functions under the *Environmental Protection and Biodiversity Conservation Act* ('*EPBC Act*') to approve expansion of a coal mine.²⁵ Part III considers what the scope and content of any inchoate tort directed towards climate change-caused harm might be, reflecting on extra-curial musings that influenced the court in *Smith*, and an alternative proposal for a 'tort to the environment' in response.²⁶

Part IV shifts focus away from litigating climate change in tort law, to using climate change tort litigation as a tool to integrate critical theories — including intersectionality — into teaching of tort law. Teaching students about the limits of tort law as a mechanism for achieving climate change justice provides an opportunity to strengthen student understandings of critical legal studies and intersectionality, and gain a deeper understanding of how the common law has evolved and how it might be reformed. Part V concludes.

II TORT LAW AND CLIMATE CHANGE

'What can tort law do for climate change?'²⁷

Prior to 2011, Dutch government policy sought to, by 2020, reduce greenhouse gas emissions to 30 per cent below 1990 levels. In 2011, those reduction goals were

²¹ *Urgenda Foundation v The Netherlands* [2015] HAZA c/09/00456689 (Supreme Court of the Netherlands) ('*Urgenda*').

²² Peel, Osofsky and Foerster, Shaping the 'Next Generation' of Climate Change Litigation in Australia (n 16); Tim Baxter, 'Urgenda-Style Climate Litigation Has Promise in Australia' (2017) 32(3) *Australian Environment Review* 70.

²³ [2020] 2 NZLR 394 ('*Smith*').

²⁴ (2021) 391 ALR 1 ('*Sharma*').

²⁵ Environment Protection and Biodiversity Conservation Act 1999 (Cth).

²⁶ Maria Hook et al, 'Tort to the Environment: A Stretch Too Far or a Simple Step Forward?' (2021) 33(1) *Journal of Environmental Law* 195.

²⁷ Kysar, What Climate Change Can Do About Tort Law (n 14).

lowered to a 20 per cent reduction. In *Urgenda*,²⁸ the Dutch Supreme Court upheld a District Court's findings that the government was required to reduce emissions by at least 25 per cent under the *European Convention on Human Rights* ('ECHR') Articles 2 and 8.²⁹ *Urgenda* is viewed as a watershed moment in global climate change litigation.³⁰ In the aftermath of *Urgenda*, perceptions of a local softening of judicial attitudes,³¹ discernible from Australian judges' extra-curial engagement with climate change,³² and successful high profile claims in other jurisdictions,³³ likely account for the increased attention tort law is receiving as a potential vehicle for climate change claims in many jurisdictions, including Australia.³⁴ Climate change tort litigation need not entail pursuit of compensatory damages for harms already sustained: future claims may be more like those in *Urgenda*, where the plaintiffs sought declarations and injunctions to limit further emission of greenhouse gases, and restrict or prevent future harms.

Caution is required when predicting the outcomes of *Urgenda*-style claims translocated to other jurisdictions. Although the *Urgenda* claim was initially brought as a tort claim under the Dutch civil code, the Supreme Court judgment ultimately relied on the ECHR.³⁵ Achieving an *Urgenda*-like result from an *Urgenda*-like claim in countries without an overarching Bill of Rights or other

²⁸ *Urgenda* (n 21).

²⁹ *Ibid*; *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('ECHR').

³⁰ Laura Burgers, 'Should Judges Make Climate Change Law?' (2020) 9(1) *Transnational Environmental Law* 55.

³¹ Allens Linklaters, *Climate Change Litigation in Australia: Key Trends and Predictions* (Report, 2020) <<https://www.allens.com.au/insights-news/insights/2020/11/climate-change-litigation-in-australia/>>.

³² Chief Justice Helen Winkelmann, Justice Susan Glazebrook and Justice Ellen France, 'Climate Change and the Law' (Asia Pacific Judicial Colloquium, Singapore, 28–30 May 2018) <<https://www.courtsofncz.govt.nz/assets/speechpapers/ccw.pdf>> ('Climate Change and the Law'); Geoffrey Palmer, 'Can Judges Make a Difference: The Scope for Judicial Decisions on Climate Change in New Zealand Domestic Law' (2018) 49(2) *Victoria University of Wellington Law Review* 191; Preston (n 17).

³³ *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7; *Wildlife of the Central Highlands Inc v VicForests* [2020] VSC 10. See also Samantha Daly and Lara Douvartzidis, 'The Emergence of Climate Change Law in New South Wales and Beyond' (2019) 38(1) *Australian Resources and Energy Law Journal* 53; Matteo Fermeglia, 'Climate Science Before the Courts: Turning the Tide in Climate Change Litigation' in Laura Westra, Klaus Bosselmann and Matteo Fermeglia (eds), *Ecological Integrity in Science and Law* (Springer, 2020) 23.

³⁴ See Peel, Osofsky and Foerster, *Shaping the 'Next Generation' of Climate Change Litigation in Australia* (n 16); Baxter (n 22); Allens Linklaters (n 31).

³⁵ *Urgenda* (n 21); Burgers (n 30).

ECHR-comparable human rights protections,³⁶ or common law countries with substantially different tort-law regimes,³⁷ may prove challenging.³⁸

The various³⁹ common law tort systems have been unsupportive of plaintiffs seeking remedies for past climate change harms, or for avoiding or mitigating future ones.⁴⁰ Douglas Kysar, writing about the uneasy relationship between tort law and climate change, noted that:

[T]ort law seems fundamentally ill-equipped to address the causes and impacts of climate change: diffuse and disparate in origin, lagged and latticed in effect, anthropogenic greenhouse gas emissions represent the paradigmatic anti-tort, a collective action problem so pervasive and so complicated as to render at once both all of us and none of us responsible. Thus, courts will have ample reason — not to mention doctrinal weaponry — to prevent climate change tort suits from reaching a jury.⁴¹

Kysar's 'doctrinal weaponry' includes the test for duty/proximate cause, breach, causation, and harm as stages at which plaintiffs might encounter challenges in US torts law.⁴² Plaintiffs in other jurisdictions — both non-US common law and civil law — encounter comparable doctrinal barriers.⁴³ In non-US common law jurisdictions, plaintiffs may struggle to establish duty of care, breach, and causation.⁴⁴ The significance of those barriers is not diminished by the fact that in

³⁶ *Urgenda* provides a poor precedent approach for Australian litigants in Australia, due largely to the absence of a comparable — and justiciable — human rights statute. New Zealand does have a Bill of Rights. The plaintiff in *Smith* is reported to have also commenced separate proceedings under that Bill. See Emmeline Rushbrook and Hannah Bain, 'Climate Change Litigation — Expect the Unexpected', Russell McVeagh (Article, 10 March 2020) <<https://www.russellmcveagh.com/insights/march-2020/climate-change-litigation-expect-the-unexpected>>.

³⁷ See Peel, Osofsky and Foerster, Shaping the 'Next Generation' of Climate Change Litigation in Australia (n 16) 805.

³⁸ Petra Minnerop, 'Integrating the 'Duty of Care' under the European Convention on Human Rights and the Science and Law of Climate Change: the Decision of The Hague Court of Appeal in the *Urgenda* Case' (2019) 37(2) *Journal of Energy and Natural Resources Law* 149; Robert F Blomquist, 'Comparative Climate Change Torts' (2012) 46(4) *Valparaiso University Law Review* 1053.

³⁹ The US is a common law negligence jurisdiction; however, there are significant differences in the doctrinal development of negligence law in the US distinguishing it from other (non-US) common law jurisdictions, such as the United Kingdom, Australia, Canada, and New Zealand. Those countries, while developing independently, nonetheless remain more similar to each other overall than they do to the common law of negligence in the US. Both are distinguished from civil law countries based on Roman legal tradition, such as France, Germany, Austria, Japan, and Brazil.

⁴⁰ Weaver and Kysar, *Courting Disaster* (n 13).

⁴¹ Kysar, *What Climate Change Can Do About Tort Law* (n 14) 3–4.

⁴² *Ibid* 12.

⁴³ Giabardo (n 14).

⁴⁴ Peel, Osofsky and Foerster, Shaping the 'Next Generation' of Climate Change Litigation in Australia (n 16). See also Nicola Durrant, 'Tortious Liability for Greenhouse Gas Emissions? Climate Change, Causation and Public Policy Considerations' (2007) 7(2) *QUT Law and Justice Journal* 403; Peter Cashman and Ross Abbs, 'Liability in Tort for Damage Arising from Human-Induced Climate Change' in Rosemary Lyster (ed), *In the Wilds of Climate Law* (Australian Academic Press, 2010) 235; Ross Abbs, Peter Cashman and Tim Stephens, 'Australia' in Richard Lord et al (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, 2012) 67, 85.

those jurisdictions judges may directly determine the outcome of claims, rather than determining whether those claims should be presented to a jury Kysar observes.

Kysar's observations about doctrinal limitations of tort law regarding climate change formed part of his response to the question: 'What can tort law do about climate change?'⁴⁵ The conclusion he reached was 'Not much'.⁴⁶ He instead recast the question to consider: 'What can climate change do for tort law?'⁴⁷ In answering that question, Kysar identified many areas ripe for reconsideration within torts, ultimately 'forc[ing] a re-evaluation of the existing system for compensating and deterring harm'⁴⁸ and shifting 'the bar for exoticism in tort',⁴⁹ making claims that have been previously described as frustrating 'judges because of their scale, scientific complexity, and widespread policy implications'⁵⁰ potentially soluble. Even 'claims involving toxic and environmental harm, tobacco and handgun marketing, or slavery and Holocaust reparations ... seem less daunting when juxtaposed against "the mother of all collective action problems"'⁵¹ that is climate change and the climate emergency.

Ultimately, many of the benefits Kysar foresaw for tort law were not direct 'wins' for plaintiffs, but rather consequences of some of the 'indirect' strategic objectives. In the process of highlighting limitations of the tort-law system in responding to climate change, the system's limitations regarding other challenging types of claims may also be revealed.

Part III of this article now examines the judgements in *Smith* and *Sharma*, two tort-based climate change claims brought in the aftermath of *Urgenda*, to determine whether Australasian tort law 'can do anything about' climate change for those plaintiffs, and whether those cases 'can do anything about' Australasian tort law.

⁴⁵ Kysar, What Climate Change Can Do About Tort Law (n 14) 1.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid 4.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

III CLIMATE CHANGE CLAIMS IN AUSTRALASIA: SMITH AND SHARMA

‘What can climate change do for tort law?’⁵²

A Smith

*Smith*⁵³ was an application to strike out claims brought by Michael Smith against seven New Zealand corporations in industries that directly emit or facilitate the emission of greenhouse gases.⁵⁴ Smith claimed customary interests in coastal and littoral land and resources threatened with inundation resulting from global warming. He identified loss of land, decreased productivity, loss of culturally and spiritually significant sites, including ceremonial and burial grounds, and loss of fishing and landing sites of traditional and cultural significance as consequences of inundation. The claim also identified ocean warming and acidification as causes of change in the coastal and freshwater fisheries he customarily uses, and adverse health impacts to which he, and Maori communities generally, are vulnerable.⁵⁵

Smith claimed that the defendants ‘unlawfully caused or contributed to a public nuisance’⁵⁶ — an interference with the right of the public to ‘health, safety, comfort, convenience, and peace’⁵⁷ — through their emission or facilitation of emission of greenhouse gases.⁵⁸ Additionally, or alternatively, he claimed that the defendants breached their duty of care to not ‘operate their business in a way that will cause him loss by contributing to dangerous anthropogenic interference in the climate system’,⁵⁹ and that they knew or should reasonably have known of New Zealand’s requirement to reduce their greenhouse gas emissions since 2007.⁶⁰ As a final option, Smith also claimed:

[T]he defendants owe him a duty, cognisable at law, to cease contributing to damage to the climate system, dangerous anthropogenic interference with the climate system and adverse effects of climate change through their emission of greenhouse gases.⁶¹

Smith sought declarations and an injunction requiring the defendants to achieve net zero greenhouse gas emissions by 2030 through linear reductions in net

⁵² Ibid.

⁵³ *Smith* (n 23) 397 [2].

⁵⁴ Ibid. The defendants were dairy corporations Fonterra Co-operative Group (Fonterra) and Dairy Holdings (DHL), energy providers Genesis Energy and Z Energy, steel group New Zealand Steel, oil and petroleum refinery New Zealand Refining, and coal miner BT Mining.

⁵⁵ Ibid 397 [5], 399 [10].

⁵⁶ Ibid 399–400 [12].

⁵⁷ Ibid 399 [11].

⁵⁸ Ibid 399 [11].

⁵⁹ Ibid 400 [13].

⁶⁰ Ibid.

⁶¹ Ibid 400 [15] (emphasis omitted).

emissions until the 2030 deadline, and relief deemed appropriate to mitigate or adapt ‘to damage to climate systems said to be contributed to by the defendants.’⁶² He did not specifically seek damages or costs.⁶³

Conceding their status as greenhouse gas emitters, and acknowledging the relationship between greenhouse gas emission and global warming, the defendants argued that global efforts are required to address global warming, with their emissions being too small to contribute to the harm alleged; their emissions were lawful, and the issues were non-justiciable, either because they were complex policy issues better addressed by the parliament, or because existing legislation excluded justiciability.⁶⁴ Each sought to have Smith’s claim struck out for failure to disclose a reasonably arguable cause of action.⁶⁵

To strike out an application for failure to disclose a reasonably arguable cause of action, the Court must be satisfied that the cause of action is ‘untenable’, and ‘certain that it cannot succeed’.⁶⁶ The strike-out power is to be exercised ‘sparingly and only in clear cases’⁶⁷; its strike-out ‘jurisdiction is not excluded by the need to decide difficult questions of law, requiring extensive argument’,⁶⁸ and ‘[c]ourts should be slow to strike out a claim in any developing area of the law, particularly where a duty of care is alleged in a new situation’.⁶⁹

1 The Public Nuisance Claim

Public nuisance ‘materially affects the reasonable comfort and convenience of life of a class of Her Majesty’s subjects’,⁷⁰ and is committed by doing an act not warranted by law or failing to discharge a legal duty.⁷¹

While standing is normally restricted to the Attorney-General, there are exceptions under which private citizens can also achieve standing to sue in public nuisance if they can demonstrate that they have suffered special damage — damage that is more significant than that experienced by the general community, usually because it is more extensive, or more serious, even if it is of the same

⁶² Ibid 400 [16].

⁶³ Ibid.

⁶⁴ Ibid 400–1 [18].

⁶⁵ Ibid 397 [4].

⁶⁶ High Court Rules 2016 (NZ) r 15.1.

⁶⁷ *A-G v Prince* [1998] 1 NZLR 262, 267 (Court of Appeal) (*‘Prince’*), quoted in *Smith* (n 23) 402 [23].

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ *Smith* (n 23) 410 [56], quoting *A-G v PYA Quarries Ltd* [1957] 2 QB 169, 184 (Romer J) (Court of Appeal). The Australian equivalent statement is found in *Wallace v Powell* [2000] NSWSC 406 31 [32]. It additionally notes that ‘those liable ... would be the persons who created it, and also persons who unreasonably failed to end it’.

⁷¹ *R v Rimmington* [2006] 1 AC 459, 467–8 [5]–[7] (Lord Bingham) (House of Lords) (*‘R v Rimmington’*), quoted in *Smith* (n 23) 410 [58].

type.⁷² Smith claimed that he had experienced special damage that warranted the courts recognising his standing,⁷³ or, alternatively, that the special damage rule lacked principle, and was ‘archaic, unnecessary and out of step with the liberal approach to standing adopted in other contexts by the Courts’.⁷⁴

Special damage must be direct, rather than consequential, and substantial.⁷⁵ The New Zealand Court of Appeal further noted that the right of action available by special damage is an exception to the general rule, and as such, ‘the right of action cannot depend upon the quantum of damage’.⁷⁶ Specifically, the plaintiff cannot be granted standing under the special damage rule just because the value of his claim for compensation is greater than the hypothetical value of the claims of his neighbours.

Wylie J found that Smith’s claimed damage was ‘neither particular nor direct’, nor different to that faced by many other New Zealanders, and that he did not meet the ‘special damage’ exception.⁷⁷ Further, Wylie J concluded he was unable to overturn the special damage rule, and struck out the public nuisance claim.⁷⁸ That apparently misunderstood the decision he was required to make under the Rules, which required him to consider whether Smith’s public nuisance claim was arguable, not whether it would be successful. Wylie J was not required to ultimately determine the merits of any argument that the special damage rule, laid down by a superior court, should be overturned. Instead, he was required to decide whether that argument was essential to the plaintiff’s claim, and was so certain to be unsuccessful, that the Court should not be required to consider it. Smith did not have to prove that the special rule should be replaced. Instead, he only had to show that there was an arguable cause of action in negligence, which may have included an argument to overturn the special damage rule. As written, the judgment appears to pre-empt that argument, instead conflating Wylie J’s acknowledged inability to overturn the doctrine with an implicit determination that a superior court, if presented with the argument, would not be persuaded by the argument. Importantly, adopting this approach means any claim challenging existing precedent should be struck out, regardless of its prospects of success, *because* it challenges existing law.

This approach further misunderstands the range of possible effects of a successful argument against the special damage rule. The rule creates an exception to the general principle, permitting private citizens to bring claims for public nuisance, which are otherwise restricted to the Attorney-General, in the

⁷² *R v Rimington* (n 71) 486 [44] (Lord Rodger), quoted in *Smith* (n 23) 410 [59].

⁷³ *Smith* (n 23) 410–11 [60].

⁷⁴ *Ibid* 412 [64].

⁷⁵ *R v Rimington* (n 71) 486 [44] (Lord Rodger), quoted in *Smith* (n 23) 411 [61].

⁷⁶ *Mayor of Kaiapoi v Beswick* [1869] 1 NZCA 192, 208, quoted in *Smith* (n 23) 411 [61].

⁷⁷ *Smith* (n 23) 411–12 [62]–[63].

⁷⁸ *Ibid* 412 [64].

event they can demonstrate a heightened harm or damage. If the validity of the exception is rejected, what remains is the general principle the exception seeks to modify — specifically, that claims in public nuisance can only be brought by the Attorney-General. In order for the plaintiff to succeed, a more sophisticated argument than mere revocation of the special damage rule would need to be presented. For Smith's desired outcomes, there is no requirement to overturn or discard the rule, rather it should be reformed to expand standing for claims in public nuisance.

Perhaps more critically for the purposes of striking out the application, the defendants' compliance with legislative and regulatory requirements meant Smith's claim that the interference with the public rights identified was unlawful *per se*, if accepted, would have entailed the tort 'pulling itself up by its own bootstraps':⁷⁹ the defendant's activity would constitute a public nuisance because it is unlawful, and it would be unlawful because it was a public nuisance. This is doctrinally illogical. The unlawfulness of the relevant acts in public nuisance is external to the tort of public nuisance. It can arise from failure to perform statutory, regulatory, or other common law obligations to the required standard, but it does not arise from within the tort of public nuisance itself.

2 *The Negligence Claim*

All parties acknowledged the novelty of the contended duty of care: a duty owed by the defendants to the plaintiff 'to take reasonable care not to operate [their] business in a way that [would] cause him loss by contributing to dangerous anthropogenic interference with the climate system'.⁸⁰ As such, the limitations on striking out claims 'in any developing area of the law, particularly where a duty of care is alleged in a new situation',⁸¹ suggests this claim should have proven difficult to strike out. Instead, Wylie J also struck out Smith's negligence claim.

Establishing a novel duty of care in negligence in New Zealand requires the court to consider

- a) whether the claimed loss was a reasonably foreseeable consequence of the alleged wrongdoer's acts or omissions;
- b) the degree of proximity or relationship between the alleged wrongdoer and the person said to have suffered loss; and

⁷⁹ Ibid 413 [71].

⁸⁰ Ibid 414 [75].

⁸¹ Ibid 402 [23], citing *Prince* (n 67).

- c) whether there are factors external to the relationship which would make it not fair just and reasonable to impose the claimed duty. Policy factors can support or negative finding a duty.⁸²

Wylie J also cited *Wagon Mound [No 2]*:⁸³

Damage is foreseeable only where there is a real risk of damage, that is one which would occur to the mind of a reasonable person in the position of the defendant and one which he would not brush aside as far-fetched.⁸⁴

He also noted that ‘the law can regard damage as ‘such an unlikely result of the defendant’s act or omission that it would not be fair to impose liability even if the act or omission was actually a cause or even the sole cause’.⁸⁵

In finding the harm alleged was not a reasonably foreseeable consequence of the defendants’ acts or omissions,⁸⁶ Wylie J noted a major conceptual defect in Smith’s statement of claim. Although causally connecting emissions to climate change harms at a global level, it fails to draw a causal link between the harms particular to the plaintiff, and the emissions particular to the defendant.

Elsewhere, Wylie J highlighted Smith’s failure to satisfy the ‘but for’ test of causation.⁸⁷ Even if the defendants were to stop emitting greenhouse gases, the anticipated harms would still occur as a consequence of the actions of other emitters. Wylie J also observed scientific limitations in establishing the proportion of damage pleaded as resulting from the defendants’ contribution.⁸⁸

In critiquing the judgment those difficulties are difficulties in proving causation, not foreseeability: the margins between foreseeability and causation have been problematically blurred. Further, the likelihood of the defendants contributing to climate change in the event they continue to emit is high, even if their net contribution is itself low, and therefore may not be so unlikely as to make it ‘unfair’ to impose liability. Based on the high threshold for striking out applications focussed on novel duty questions, the difficulties should not have influenced the foreseeability finding in *strikeout* but instead should have been considered at trial.

⁸² Smith (n 23) 414 [76], citing *North Shore City Council v A-G* [2012] 3 NZLR 341 403–4 [158]–[160] (*‘North Shore City Council’*).

⁸³ *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd* [1967] 1 AC 617 (Privy Council) (*‘Wagon Mound [No 2]’*).

⁸⁴ *Ibid* 643.

⁸⁵ *North Shore City Council* (n 81), quoted in Smith (n 23) 414–5 [80].

⁸⁶ Smith (n 23) 415 [82].

⁸⁷ *Ibid* 415 [84].

⁸⁸ Noted in Winkelmann, Glazebrook and France, ‘Climate Change and the Law’ (n 32) and Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, ‘If At First You Don’t Succeed: Suing Corporations for Climate Change’ (2018) 38(4) *Oxford Journal of Legal Studies* 841. However, both note that technology is developing rapidly.

Wylie J found there was neither physical nor relational proximity between the plaintiff and defendants, and that there was nothing sufficiently special about Smith, or a class of people including him, to suggest that the defendants should have had him specifically in mind when considering the consequences of their actions.⁸⁹

Policy considerations contraindicating recognition of the duty identified included: indeterminacy of plaintiff — that is, the inability of potential defendants to identify who might be affected by their actions — and its rarer counterpart indeterminacy of defendant, reflecting the duality of emitter/defendant and climate change victim/plaintiff, which potentially captures everyone on the planet.⁹⁰ Wylie J also noted that, rather than the defendants, the government is best positioned to protect citizens from the effects of climate change through coordinated regulation, legislation, and policy initiatives, and the potential for the common law to undermine the coherence of legislation and policy in the event it imposed obligations on actors that are inconsistent with, or in excess of, previously agreed and mandated tasks and functions.⁹¹

3 *The Inchoate Duty*

Smith ‘made no attempt in pleading his third cause of action to refer to recognised legal obligations, nor to incrementally identify a new obligation by analogy to an existing principle.’⁹² Regardless, the Court acknowledged the law’s capacity to create ‘new principles and causes of action’, through ‘the methodological consideration of the law that has applied in the past and the use of analogy’,⁹³ notwithstanding the absence of both to justify preservation of the inchoate tort claim in either the judgment or the claim itself, based on the court’s summary of it.

Wylie J acknowledged that the public policy considerations identified in the decision to strike out the negligence claim were also likely to apply to the inchoate tort claim,⁹⁴ but nonetheless he was ‘reluctant to conclude that the recognition of a new tortious duty which makes corporates responsible to the public for their emissions, is untenable.’⁹⁵

Referring to Winkelmann, Glazebrook and France JJ’s extra-curial predictions,⁹⁶ he speculated that the inchoate tort might ‘result in the further

⁸⁹ *Smith* (n 23) 417 [92].

⁹⁰ *Ibid* 418–20 [98].

⁹¹ *Ibid*.

⁹² *Ibid* 420–1 [102].

⁹³ *Ibid* 420 [101].

⁹⁴ *Ibid* 420–1 [102].

⁹⁵ *Ibid* 421 [103].

⁹⁶ Winkelmann, Glazebrook and France, *Climate Change and the Law* (n 32).

evolution of the law of tort', by either modifying the special damage rule, or advancements in climate change science leading to 'an increased ability to model the possible effects of emissions.'⁹⁷ He reasoned that those issues could only properly be explored at trial, and justified his decision not to strike out the cause of action, which would foreclose 'on the possibility of the law of tort recognising a new duty which might assist Mr Smith'.⁹⁸

The Court's decision to not strike out the inchoate tort claim seems inconsistent with the reasoning behind the decisions to strike out the negligence and nuisance claims. An argument about the ongoing relevance of the special damage rule in public nuisance is, necessarily, better contextualised within a public nuisance claim, rather than loosely deferred to a trial on a novel tort whose elements may not relate to public nuisance, denying its context at best, and relevance at worst. Similarly, argument about ways of overcoming limitations of science and technology in proving causation are better situated in claims to which they are directly relevant that have proceeded to trial. *Fairchild v Glenhaven Funeral Services Ltd*⁹⁹ and the other cases grappling with scientific uncertainty mentioned in discussion of the struck-out negligence claim were pleaded as negligence cases, not as 'inchoate' torts. Nor does the vague formulation provided of 'a duty which makes corporates responsible to the public for their emissions' necessarily appear to reflect the gist of influential proposals for reform,¹⁰⁰ and nor does it support any determination of the tenability or otherwise of the cause of action.

B Sharma

In *Sharma*,¹⁰¹ the child Applicants¹⁰² claimed that the Commonwealth Minister for the Environment owes them personally, and as representatives of children generally, a duty to exercise statutory decision-making powers¹⁰³ to exercise 'reasonable care so as not to cause them harm'¹⁰⁴ in any decision to approve expansion of a coal mine. They sought declaratory and injunctive relief to prevent the Minister from approving the extension based on her inability to approve the expansion without breaching the contended duty of care.¹⁰⁵

⁹⁷ *Smith* (n 23) 421 [103].

⁹⁸ *Ibid.*

⁹⁹ *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32.

¹⁰⁰ Winkelmann, Glazebrook and France, *Climate Change and the Law* (n 32).

¹⁰¹ *Sharma* (n 24).

¹⁰² *Ibid* 4 [4].

¹⁰³ Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 130, 135.

¹⁰⁴ *Sharma* (n 24) 5 [9].

¹⁰⁵ *Ibid* 5 [10].

Vickery Coal — the second defendant in the application — is a wholly owned subsidiary of Whitehaven Coal, which had approval under New South Wales law to develop the mine.¹⁰⁶ Subsequent to obtaining that approval, the developers proposed to significantly expand the mine.¹⁰⁷ That expansion requires Ministerial approval under the *EPBC Act*.¹⁰⁸

The applicants claimed increased risk of personal injury — mental and physical, including death — property damage, and pure economic loss¹⁰⁹ resulting from increased climatic hazards¹¹⁰ as a consequence of increased CO2 emission. They restricted the duty owed by the Minister to ‘children’ in expectation that the most severe of the anticipated harm is likely to occur ‘towards the end of this century’, when ‘unlike today’s adults, today’s children will be alive and will be the class of person most susceptible to the harms in question’.¹¹¹ Referencing the salient features approach — the criteria against which novel duty of care claims are evaluated in Australia¹¹² — the applicants specifically argued that the risk of harm was foreseeable; that the children were vulnerable; that the Minister knew of the risk, and was in a position to control it; and, that the children occupy a special position vis-a-vis the Minister.¹¹³

The Minister argued that other salient features, including coherence and indeterminacy, pointed overwhelmingly against the duty’s recognition.¹¹⁴ Even if the duty is recognised, there was no basis for apprehending that the Minister would breach it, and consequently no basis for granting the injunction sought by the applicants.¹¹⁵

The ‘salient features approach’ consists of seventeen considerations. These considerations are all derived from prior decisions of superior courts, evaluation of which can determine whether a novel duty of care should be recognised. Not all factors must be considered in every case and some factors will be more relevant in certain cases. Each factor need not be accorded any particular, or even equal, weighting; and the list is not exhaustive.¹¹⁶

The salient features approach has been applied by superior courts, including the New South Wales Court of Appeal and the Federal Court of Australia, in the aftermath of the High Court of Australia’s formal rejection of proximity as the

¹⁰⁶ Ibid 4–5 [6].

¹⁰⁷ Ibid 6 [19].

¹⁰⁸ Ibid 5 [7].

¹⁰⁹ Ibid 5 [11].

¹¹⁰ Ibid.

¹¹¹ Ibid 5 [12].

¹¹² Ibid 27 [96], citing *Plaintiff S99/2016 v Minister for Immigration and Border Protection* (2016) 243 FCR 17, 69–72 [202]–[209] (Bromberg J), *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649, 676 [102] (Allsop P) (‘*Caltex*’).

¹¹³ Ibid 5 [12].

¹¹⁴ Ibid 6 [15].

¹¹⁵ Ibid.

¹¹⁶ *Sharma* (n 24) 28 [99], quoting *Hoffmann v Boland* [2013] NSWCA 158 [31] (Basten JA).

determining criteria for establishing a duty of care.¹¹⁷ Those applications of the approach overlook a critical aspect of its formulation and use. Although ‘foreseeability of harm’ was the first entry in the salient features ‘checklist’, the judgment subsequently acknowledges that foreseeability of harm is not the same as the other salient features: its demonstration is a pre-condition to undertaking a salient features analysis, rather than a component of it.¹¹⁸ None of the cases cited by Bromberg J in *Sharma* appear to recognise this distinction. However, it may be important, as failure to treat foreseeability as a pre-conditional control factor, instead treating it in the same way as the other salient features, could potentially distort the evaluative process outlined by the formulation of the salient features approach, placing undue weight on a ‘feature’ which in fact is a pre-determined condition.

As *Sharma* was ‘a special class of case, [raising] its own problems’ based on the respondent [defendant] Minister’s status as ‘a repository of statutory power or discretion’,¹¹⁹ ‘certain factors’ — ‘[c]oherence with statutory scheme and policy considerations ... control, reliance, vulnerability, and the assumption of responsibility’ — may be of ‘critical importance’.¹²⁰ Bromberg J accordingly applied selected salient features (control, vulnerability, reliance, and reasonable foreseeability) in finding support for existence of the posited duty.¹²¹

1 Foreseeability of Harm

To determine whether the risk of harm was foreseeable,¹²² the Court had to consider specifically the extent to which emissions from the Extension Project will ‘materially contribute to the Children’s risk of being injured by one of more of the hazards induced by climate change.’¹²³ The Minister’s argument that foreseeability ‘was causally negated by the complex interaction of factors that will evolve over the coming decades’¹²⁴ was rejected as it was ‘founded upon a causal analysis’, and “‘reasonable foreseeability’ is not a test of causation’.¹²⁵

Nevertheless, Bromberg J found that, because the claim sought an injunction to prevent anticipated harms, he was required to consider ‘the prospect of the Minister’s conduct causing harm to the children’.¹²⁶ However, as the Minister’s

¹¹⁷ *Sullivan v Moody* (2001) 207 CLR 562 (‘Sullivan v Moody’).

¹¹⁸ *Caltex* (n 112) [106] (Allsop P).

¹¹⁹ *Sullivan v Moody* (n 117) 579–80 [50]; *Hunter and New England Area Health District v McKenna* (2014) 253 CLR 270, 278–9 [17]–[18].

¹²⁰ *Sharma* (n 24) 31 [109].

¹²¹ *Ibid* 113 [490].

¹²² *Ibid* 22–3 [77].

¹²³ *Ibid* 22 [76].

¹²⁴ *Ibid* 50 [194].

¹²⁵ *Ibid*.

¹²⁶ *Ibid* 23 [78].

decision was not the sole direct source of risk associated with the claimed future harms, instead being a necessary but insufficient link in a chain of events leading to the harm, it was necessary to establish whether the Minister's proposed conduct would *materially contribute to a risk* of harm to the children.¹²⁷

Of the various climatic events included in the plaintiffs' claim, only heatwaves and bushfires caused by climate change were identified as 'injury-inducing events which ... expose[d] each of the Children to a real risk of harm from extreme weather events brought about by climate change.'¹²⁸

Bromberg J initially formulated the 'proper inquiry' as whether 'the injury to the children is a foreseeable consequence of the Minister's approval of the extension project.'¹²⁹ That was subsequently qualified by recasting it as whether

a reasonable person in the Minister's position would foresee that a risk of injury to the Children would flow from the contribution to increased atmospheric CO₂ and consequent increased global average surface temperature brought about by the combustion of the coal which the Minister's approval would facilitate.¹³⁰

Although both duty and breach rely on reasonable foreseeability tests, the content of those tests differs:

[T]he foreseeability inquiry at the duty, breach and remoteness stages raises different issues which progressively decline from the general to the particular. The proximity upon which a Donoghue type duty rests depends upon proof that the defendant and plaintiff are so placed in relation to each other that it is reasonably foreseeable as a possibility that careless conduct of any kind on the part of the former may result in damage of some kind to the person or property of the latter. The breach question requires proof that it was reasonably foreseeable as a possibility that the kind of carelessness charged against the defendant might cause damage of some kind to the plaintiff's person or property. Of course, it must additionally be proved that a means of obviating that possibility was available and would have been adopted by a reasonable defendant. The remoteness test is only passed if the plaintiff proves that the kind of damage suffered by him was foreseeable as a possible outcome of the kind of carelessness charged against the defendant.¹³¹

The plaintiff's claim identified a class consisting of 5 million people. Bromberg J determined that relevant test of foreseeability was whether 'each member of that class is exposed to a real risk of harm from the Minister's conduct'.¹³²

¹²⁷ Ibid 22–3 [76].

¹²⁸ Ibid 53 [204].

¹²⁹ Ibid 64 [247].

¹³⁰ Ibid 64 [247].

¹³¹ Minister Administering the Environmental Planning and Assessment Act 1979 v San Sebastian Pty Ltd [1983] 2 NSWLR 268, 295–6 (Glass JA) (emphasis in original) (citations omitted).

¹³² Sharma (n 24) 49 [190].

Having applied the narrower test, Bromberg J then drew on Lord Atkin's canonical statement of the neighbour principle in *Donoghue v Stevenson*¹³³ to conclude that

this is a case where the foreseeability of the probability of harm from the defendant's conduct may be small, but where the foreseeable harm, should the risk of harm crystallise, is catastrophic. The consequent harm is so immense that it powerfully supports the conclusion that the Children should be regarded as persons who are 'so closely and directly affected' that the Minister 'ought reasonably to have them in contemplation as being so affected when ... directing [her] mind to the acts ... which are called into question'.¹³⁴

In doing so, Bromberg J relied on the likelihood of the harm occurring, and the magnitude of its consequences — considerations more commonly associated with foreseeability at the breach stage of enquiry — to establish foreseeability at the duty stage. This approach differs substantially from precedent. Foreseeability at the duty stage is a more general enquiry than foreseeability at the breach stage. Foreseeability at the breach stage involves calculation of likelihood of the harm occurring and magnitude of the consequences of a particular harm. Breach, unlike duty, relies on facts which include the actual harm the plaintiff is pleading. In the absence of actual realised harm — as in *Sharma* — no finding of breach can be made, as those facts have not yet materialised. That neither likelihood of harm, nor severity of consequences, expressly appear on the 'salient features' list is consistent with the dependency of their assessment on identification of the relevant harm to a greater level of specificity than does foreseeability at the duty stage.

2 Control, Responsibility and Knowledge

In observing that '[t]he greater the level of control over, responsibility for and knowledge of the risk of harm, the closer will be the relations',¹³⁵ Bromberg J concluded that '[t]he Minister has direct control over the foreseeable risk because it is her exercise of power upon which the creation of that risk depends', and that the relationship between her power, and the risk to the Children, is direct.¹³⁶

Bromberg J also considered the 'situation' occupied by the Minister with respect to the statutory powers and duties to be informative,¹³⁷ noting that by virtue of the functions conveyed to her by the *EPBC Act*, 'she has responsibility over those aspects of the environment which the Commonwealth Parliament has

¹³³ [1932] AC 562 ('*Donoghue v Stevenson*').

¹³⁴ *Ibid* 66 [257], quoting *Donoghue v Stevenson* (n 133) 580 (Lord Atkin).

¹³⁵ *Ibid* 66 [258].

¹³⁶ *Ibid* 68 [271].

¹³⁷ *Ibid* 68 [272].

chosen to regulate'.¹³⁸ This includes the 'protection of the environment' and, ultimately, 'the interests of Australians including Australian children', reflected by the Acts objectives, jurisdictional operation, and express statement of the principle of inter-generational equity.¹³⁹ His Honour found that, supplementing the control exercised over the risk by the Minister, she also has knowledge of the risk of harm, not least because of the Minister's access to the extensive body of evidence presented during argument.

3 Vulnerability, Reliance, and Recognised Relationship

Focusing on the question of whether the Children were vulnerable in the limited context of the harm flowing from the Minister's exercise of her decision-making powers, Bromberg J considered the powerlessness of the Children to avoid that harm, specifically 'the steps the person can reasonably be expected to take to avoid the harm inflicted by a defendant', ultimately finding that no such steps were apparent.¹⁴⁰

His Honour rejected the Minister's argument that the Children's vulnerability was not unique to them, but was common to children and adults globally: 'vulnerability to harm is not denied by the fact that there are others equally vulnerable or even others more vulnerable.'¹⁴¹ 'Reliance' was satisfied by the Minister's responsibility to Australians generally under the *EPBC Act*.

Whether the Children, as minors, occupied a position of 'special vulnerability' with respect to the Minister rested on debate about the scope and content of the *parens patriae* jurisdiction, and discussion of some immigration cases involving best interests of minors in the context of cancellation of parental visas,¹⁴² and parental deportation.¹⁴³ Ultimately the *parens patriae* argument remained unresolved.¹⁴⁴ However, Bromberg J observed that common law jurisdictions '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.'¹⁴⁵

¹³⁸ Ibid 68 [273].

¹³⁹ See *ibid*.

¹⁴⁰ Ibid 73 [296].

¹⁴¹ Ibid 73 [297].

¹⁴² *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

¹⁴³ *Vaitaiki v Minister for Immigration and Ethnic Affairs* (1998) 150 ALR 608 (Federal Court of Australia — Full Court).

¹⁴⁴ *Sharma* (n 24) 76 [311].

¹⁴⁵ *Ibid*.

4 Coherence of the Posited Duty with the Statutory Scheme and Administrative Law

Coherence is a private law policy consideration which assists the courts in developing the common law as it interacts with statute and with other common law principles.¹⁴⁶ In the context of statutory interaction, coherence prevents the common law from developing (or being applied) in circumstances where it would ‘undermine, contradict, or substantially interfere with the purpose, policy and operation of the statutory law already in place.’¹⁴⁷

The Minister contended that the proposed duty of care is incoherent with the *EPBC Act*, and public law principles generally. That statutory incoherence arose because if the duty was found to exist, the discretion she was vested with in exercising her functions under the *EPBC Act* would be ‘foreclosed’ or pre-empted, and she would be compelled to reach a particular decision, specifically refusing the expansion application.¹⁴⁸ Alternatively, recognition of the proposed duty would “skew” or “distort” the Minister’s statutory decision-making discretion, because consideration of the need to avoid harm to the Children would become a ‘mandatory and paramount consideration’.¹⁴⁹

Bromberg J determined that

coherence between the imposition of liability for negligence and a statutory power or discretion requires a consistency assessment which has regard to both statutory purpose and statutory function and which will ordinarily give priority to consistency between the purpose of the statute and the concern or object of the duty of care.¹⁵⁰

In applying that test to the Minister’s functions under the *EPBC Act*, Bromberg J found that the posited duty was consistent with the purpose of the statutory scheme, in that both were ‘concerned with the avoidance of various categories of harm to the Children’, and ‘a relevant consideration that the Minister must take into account in exercising her power of approval under ss 130 and s 133 of the *EPBC Act*’.¹⁵¹ Preservation of human life and the avoidance of personal injury would be relevant in any decision presenting a risk of danger to human safety:

An expectation that a statutory power will not be used without care being taken to avoid killing or injuring persons will almost always cut across the exercise or performance of a statutory power including a broad discretionary power. ... It would therefore be surprising for incoherence to arise between a common law duty to take reasonable care for the lives and safety of persons and a statutory scheme which

¹⁴⁶ Ibid 78 [321].

¹⁴⁷ Ibid 78 [322].

¹⁴⁸ Ibid 79–80 [329].

¹⁴⁹ Ibid 80 [329].

¹⁵⁰ Ibid 95 [396].

¹⁵¹ Ibid 95 [397].

contemplates that the powers it confers would not be used to unreasonably endanger the lives and safety of persons.¹⁵²

His Honour found that the avoidance of death and personal injury by the taking of reasonable care may legitimately be regarded as ‘the obvious intent of any legislative scheme which confers functions or powers capable of creating a danger to human safety, unless a contrary intention is shown.’¹⁵³

As such, Bromberg J found that human safety — including the safety of the Children — was a mandatory, rather than permissive, consideration for the Minister under the Act,¹⁵⁴ requiring her to ‘give at least elevated weight to the need to take reasonable care to avoid that risk of harm.’¹⁵⁵ The posited duty was found to be ‘in harmony with the statutory scheme’ and as such unlikely to result in the Minister adopting ‘a defensive frame of mind’ in order to avoid liability which the Commonwealth of Australia, as the defendant, has the ‘capacity to immunise itself from liability for damages’ but had not done so.¹⁵⁶

In considering the outcomes-based impairment identified by the Minister, Bromberg J noted that liability in negligence ‘is imposed by breach of duty of care not simply by the recognition that a duty of care exists’, so mere recognition of the duty would not foreclose the Minister’s decision.¹⁵⁷ His Honour’s conclusion with respect to the property and economic harms foreshadowed by the applicants was different. His Honour found that consideration of them was permissive, rather than mandatory, and as such incoherence was established, ruling out the existence of a duty of care ‘extending to property and pure economic loss’.¹⁵⁸

The determinative value of this finding is potentially important. It suggests that, of the salient features considered by Bromberg J, incoherence would be fatal to recognition of a purported duty. Whether that implies that Bromberg J was applying each of the relevant factors sequentially as a series of gates, all of which must be cleared in order for the duty to be recognised, or whether his Honour simply accorded much greater evaluative weight to coherence than other salient features — and if so, why? — is not clear from the judgment. The court also rejected the Minister’s claim that recognising the posited duty of care was inconsistent with administrative law principles.¹⁵⁹

¹⁵² Ibid 95 [398].

¹⁵³ Ibid 95–6 [399].

¹⁵⁴ Ibid 97 [406].

¹⁵⁵ Ibid 97 [407].

¹⁵⁶ Ibid 97 [408].

¹⁵⁷ Ibid 97–8 [410].

¹⁵⁸ Ibid 99 [416].

¹⁵⁹ Ibid 101 [427].

5 Indeterminacy

The Court rejected the Minister's claims that 'the 'magnitude of potential liability and the class of persons to whom the duty would be owed',¹⁶⁰ that restriction of the class to children only was arbitrary; and that recognition of the duty would 'bring about a potential liability of 'astonishing extent and breadth', of 'a vast scope even if confined to children as the potential claimants',¹⁶¹

Indeterminacy is not, according to Bromberg J, determined by the number of claims — or at least not the number of claims alone — but rather the inability of the defendant to identify the 'nature and extent' of the claims.¹⁶² Bromberg J noted that indeterminacy is 'less relevant and not commonly considered in relation to physical harm to person or property'.¹⁶³ In this instance, the Court had already rejected the possibility of property and economic harms falling within the scope of the posited duty on the basis of incoherence. Therefore, the only type of claims likely to arise from recognition of the posited duty were claims for personal injury, which, as noted earlier, seldom enliven consideration of indeterminacy.¹⁶⁴

With respect to the arbitrariness of recognising Children as the plaintiff group, Bromberg J restated that the risk of injury must be real 'rather than a mere possibility',¹⁶⁵ and that the applicants 'rely on the intensity of exposure to harm and thus the significance of risk of harm as a defining characteristic which distinguishes children from adults',¹⁶⁶ which they linked to the risk of significant global warming that will be experienced in their later years, rather than the latter years of extant adults. Bromberg J did, however, acknowledge that there are some rational limitations on the distinction used by the applicants to define the class.¹⁶⁷

Ultimately, Bromberg J rejected the Minister's claims regarding indeterminacy on three bases. First, the posited duty only related to personal injury, which typically does not attract indeterminacy considerations.¹⁶⁸ Second, the Minister is in a position to inform herself about the nature of claims, and the potential class of claimants, rendering any liability determinate.¹⁶⁹ Third, in the event of liability arising, it is unlikely that the Minister would be found to be solely liable, noting the contributions to the harm made by others.¹⁷⁰

¹⁶⁰ Ibid 101 [428].

¹⁶¹ Ibid 103 [435].

¹⁶² Ibid 104 [438].

¹⁶³ Ibid 102 [430].

¹⁶⁴ Ibid 105 [447]–[448].

¹⁶⁵ Ibid 107 [457].

¹⁶⁶ Ibid 107 [458].

¹⁶⁷ Ibid 107 [458]–[459].

¹⁶⁸ Ibid 109 [469].

¹⁶⁹ Ibid 109 [470].

¹⁷⁰ Ibid 109–10 [471]–[472].

6 Other Control Mechanisms

The Minister contended that ‘her statutory task was steeped in policy considerations appropriately dealt with by her without intervention by the common law’,¹⁷¹ and that

how to manage the competing demands of society, the economy and the environment over the short, medium and long term, is a multifaceted political challenge ... within the context of evolving national and international strategies.¹⁷²

Further, imposition of a common law duty of care rendering tortious all activities that involve generating (or allowing someone else to generate) material quantities of greenhouse gases is ‘a blunt and inappropriate response’.¹⁷³

Bromberg J found that this misconceived the effect of finding that a duty of care was owed. Contrary to the Minister’s claim, that effect was not to address ‘the problem of climate change and thus interfere with the statutory task given to the Minister’ or to ‘render tortious all or a multitude of activities that involve the generation of greenhouse gasses.’¹⁷⁴ Instead ‘[a]ll that it can and will do’ is impose an obligation on the Minister, when deciding whether or not to approve the Extension Project, to take reasonable care to avoid personal injury to the Children.¹⁷⁵

Bromberg J also noted that courts ‘are regularly required to deal with legal issues raised in the milieu of political controversy. A political controversy can never provide a principled basis for a Court declining access to justice.’¹⁷⁶ Bromberg J quoted with approval the view of Gaudron, McHugh and Gummow JJ that

it is no answer to a claim in tort against the Commonwealth under s 75(iii) of the Constitution that its wrongful acts or omissions were the product of a ‘policy decision’ taken by the Executive Government; still less that the action is ‘non-justiciable’ because a verdict against the Commonwealth will be adverse to that ‘policy decision’.¹⁷⁷

In dismissing ‘policy reasons’ as a basis for not recognising the posited duty of care, Bromberg J also observed that it does not follow from recognition of a duty of care based on the relationship between the Minister and the Children that the Minister ‘owes a duty of care to others or that anyone else involved in contributing to greenhouse gas emissions owes the same duty’, noting that the relationship

¹⁷¹ Ibid 111 [478].

¹⁷² Ibid 111 [478].

¹⁷³ Ibid.

¹⁷⁴ Ibid 111 [479].

¹⁷⁵ Ibid 111 [481].

¹⁷⁶ Ibid 112 [484].

¹⁷⁷ Ibid 112 [485], quoting *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 560 [106].

existing between the Children and the Minister was unique to them based on the provisions of the *EPBC Act*.¹⁷⁸

Despite finding the Minister did owe the posited duty of care not to cause the Children personal injury when exercising her statutory decision-making functions to approve the mine extension under the Act,¹⁷⁹ Bromberg J did not grant the injunction sought by the Applicants, finding that they could not demonstrate that a breach of that duty by the Minister was reasonably apprehended.¹⁸⁰ He did not issue the declaration sought by the Applicants, citing uncertainty about the utility and terms of the requested declaration.¹⁸¹

C *Smith in Australia?*

Based on the judgment in *Sharma*, how might a *Smith*-type claim against corporate, rather than state, defendants fare in Australia?

Like New Zealand, the civil procedure rules in Australia permit courts to strike out applications that do not disclose a cause of action.¹⁸² The power is likewise to be used sparingly, particularly in cases where the law is uncertain or developing. Summarising the Australian position, Kirby J stated:

If there is any reasonable prospect that the appellant might be able to make good a cause of action, it is not proper for a court, in effect, to terminate the appellant's action before trial. Where the law is uncertain, and especially where it is in a state of development, it is inappropriate to put a plaintiff out of court if there is a real issue to be tried. The proper approach in such cases is one of restraint. Only in a clear case will answers be given, and orders made, that have the effect of denying a party its ordinary civil right to a trial. This is especially so where, as in many actions for negligence, the factual details may help to throw light on the existence of a legal cause of action — specifically a duty of care owed by the defendant to the plaintiff.¹⁸³

Procedurally, therefore, the law is likely to operate in much the same way, based on similar considerations.

¹⁷⁸ *Ibid* 112 [488].

¹⁷⁹ *Ibid* 117 [513].

¹⁸⁰ *Ibid* 117 [510].

¹⁸¹ *Ibid* 118 [518].

¹⁸² *Federal Court Rules 2011* (Cth) r 16.21; *Court Procedures Rules 2006* (ACT) r 425; *Uniform Civil Procedure Rules 2005* (NSW) r 14.28; *Supreme Court Rules 1987* (NT) r 23.02; *Uniform Civil Procedure Rules 1999* (Qld) r 171; *Uniform Civil Rules 2020* (SA) r 70.3; *Supreme Court Rules 2000* (Tas) r 258; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 23.02; *Rules of the Supreme Court 1971* (WA) ord 20.19.

¹⁸³ *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, 565–6 [138] (citations omitted).

Doctrinally, public nuisance is very similar:¹⁸⁴ like New Zealand, Australia retains the ‘special damage’ rule, so a plaintiff would potentially struggle to achieve standing.

The negligence claim, however, would be dealt with quite differently. In lieu of proximity, plaintiffs in Australia would, as in *Sharma*, have to address the various salient features. However, the weight and relevance of each of those features may differ from those used in *Sharma*, reflecting the Federal Court’s categorisation of *Sharma* as presenting particular difficulties.¹⁸⁵

In the light of the reasoning in *Sharma*, plaintiffs in a *Smith*-type fact scenario would likely argue that the harm was not only foreseeable, but actually *known to the defendant*. Whether they could show that the specific harm to that specific plaintiff was foreseeable and known may prove challenging, but not necessarily fatal, in the overall evaluation of salient features.¹⁸⁶ Plaintiffs would also likely argue that defendants, by virtue of their role as emitters, have the *ability to exercise the control* required to avoid the harm, simply by refraining from the emitting conduct.¹⁸⁷ Plaintiffs would also likely contend that they were *vulnerable* to the harm,¹⁸⁸ lacking the capacity to take steps to protect themselves, potentially due to lack of transparency about the emission practices.

Proximity, as a salient feature, refers to physical, temporal, or relational nearness between the parties.¹⁸⁹ It is not essential under the salient features approach, and its availability will depend on the specific factual circumstances of the case. In an identical situation to *Smith*, it is unlikely to be satisfied. A salient feature which might work to the plaintiff’s advantage is ‘the nature or degree of hazard or danger liable to be caused by the defendant’s conduct or the nature or substance controlled by the defendant’.¹⁹⁰ Similarly, the degree of control the defendant is able to exercise over the risk is likely to act in a potential plaintiff’s favour. As noted throughout *Sharma*, the Minister’s decision to approve the extension, while not sufficient to result in the harm, was nonetheless necessary. In the event the Minister approved the mine but the developers subsequently decided to abandon the project, the harm would not occur: control of the risk of harm, therefore, is distributed between the Minister and others involved in bringing the mine expansion into existence. Control, therefore, need not be exclusively exercised by the defendant. In a *Smith*-type claim, the decision to carry out greenhouse gas-emitting activities on a corporate scale — absent any

¹⁸⁴ *Smith* (n 23).

¹⁸⁵ *Sharma* (n 24) 31 [109].

¹⁸⁶ *Caltex* (n 112) 676 [103] (Allsop P).

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

regulatory or other legitimate prohibition on doing so — is likely to lay within the control of the defendant.

Salient features likely to operate against recognition are those identified in the Minister's response in *Sharma*: indeterminacy of plaintiff,¹⁹¹ and incoherence with other areas of law,¹⁹² including creation of conflicting duties and obligations. The Court's response to the issue of indeterminacy of plaintiff in *Sharma* was not entirely persuasive. Although the Court restricted the applicant's representation to Australian children, and in places relied on the applicant's minority to invoke considerations including 'special vulnerability' in the context of the relationship between the Minister and the applicants, those points do not necessarily appear to be determinative. Indeed, the Court in *Sharma* acknowledged the potential for other classes of plaintiffs who could be owed comparable duties, but did not dwell on the number or types of classes it had in contemplation, leaving the indeterminacy of plaintiff feature somewhat unresolved.¹⁹³

Incoherence with other areas of law might play out quite differently in the context of a *Smith*-type fact scenario. If defendants are carrying out a regulated activity in an approved or compliant way, a ruling preventing them from doing that which in the circumstances is otherwise lawful is likely to fall foul of the incoherence feature, echoing the position in *Smith* in the public nuisance claim. As noted in *Sharma*:

It is not necessary for the common law to adhere to the existing statutory law as though they are glued together as a seamless whole. What is required by coherence-based reasoning is that the two laws cohere, one sitting compatibly alongside the other without 'incongruity' or 'contrariety'.¹⁹⁴

If the plaintiff in the Australian iteration of *Smith* were indigenous, the framework for consultation and consideration of their interests in formulation of policy and legislation, potentially inconsistent with recognition of a novel duty, may be quite different. The Court in *Sharma* was not required to consider an 'indigenous tort' of the type envisaged in *Smith*, or speculate on how indigenous claims might be addressed under Australian law. Without obligations under a counterpart to the *Treaty of Waitangi* or even a bill of rights, the principles for indigenous engagement, and consideration of human rights, in developing policy and legislation are far more threadbare under Australian law. Failure to consider indigenous issues in formulating policy may or may not influence any judicial consideration of the adequacy of any policies or laws that might be cut across if a novel duty of the type proposed were recognised.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ *Sharma* (n 24) 107 [459].

¹⁹⁴ Ibid 78 [322], quoting *Miller v Miller* (2011) 242 CLR 446, 473 [74] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

Assuming the plaintiffs prevailed on duty, they would face the same challenge in establishing causation that has stymied other plaintiffs thus far: proving that the contribution by a defendant to global greenhouse gas emissions necessarily has any effect — causal or contributory — on specific harms experienced locally by the plaintiffs.

Are these matters sufficient to warrant striking out a plaintiff's claim in nuisance or negligence under Australian law? The issues raised around coherence and determinacy may well ultimately determine the outcome of litigation in negligence. However, as noted above, an arguable case is not necessarily one that is certain to win. And, absent any precedent, it is difficult to predict whether a claim based on an inchoate tort as pleaded in *Smith* would survive a strike-out application in Australia.

The outcome of *Smith* was preservation of the plaintiff's claim for breach of an inchoate tort, accompanied by the demise of claims in negligence and nuisance. What is the scope and content of that inchoate tort likely to be? How will it overcome some of the doctrinal barriers arising under tort law elsewhere?

In their influential article, cited extensively in *Smith*, Winkelmann et al referred to four categories used to classify climate change litigation:¹⁹⁵ litigation seeking to hold government accountable for policy and legislative responses to climate change; litigation as regulation; litigation to protect the individual or group's interests in the environment, including compensation for harms to those interests; and litigation to enforce good corporate governance.¹⁹⁶ They added a fifth category to this list of overlapping and non-exhaustive entries: litigation by indigenous peoples.¹⁹⁷

D An 'Indigenous' Tort?

In *Smith*, their Honours specifically noted New Zealand law's recognition of the unique relationship indigenous people have with land.¹⁹⁸ In particular, they identified interests and duties arising from that relationship that would not typically be recognised in private litigation. Their Honours stopped short of providing detail about how private law could be reformed to recognise indigenous

¹⁹⁵ Winkelmann, Glazebrook and France, *Climate Change and the Law* (n 32).

¹⁹⁶ *Ibid.* The categorisation was developed by the London School of Economics' Grantham Research Institute.

¹⁹⁷ Winkelmann, Glazebrook and France, *Climate Change and the Law* (n 32) 40.

¹⁹⁸ *Ibid.* 74.

interests, beyond their predictions for reform or challenges to private law generally. Instead, they focussed on public law litigation by indigenous groups.¹⁹⁹

A claim by indigenous people seeking recognition for a novel type of harm, outside the traditional personal injury, damage to property or pure economic loss, might be recognised. Nothing in the legislative reforms in Australia prevent it: the provisions of the various civil liability statutes provide non-exhaustive definitions of harm,²⁰⁰ permitting expansion of the categories, and the High Court in *Sullivan v Moody* expressly identified the ‘type of harm’ as a type of case requiring consideration of novel duties of care.²⁰¹ Claims relying on recognition of novel harms would fall within that category.

It then becomes axiomatic that plaintiff traditional owners must fall within a class of people who should have been within the consideration of the defendant if the court determines that causing harm to traditional cultural interests was a foreseeable consequence of the defendant’s actions. Is that necessarily the basis on which the test would be formulated? Absent a statutory or policy requirement to consider indigenous interests — which may well apply to government officials or regulated corporate entities — it seems likely that foreseeability and causal potency could undermine any such claim.

Would a defendant livestock farmer, for example, foresee that (relatively minor) levels of emission, in combination with the greenhouse gas emissions of a very large number of other far more significant emitters from nearly every country, would cumulatively cause harm to the interests of an indigenous group who may or may not be physically or circumstantially proximate to them? All the uncertainty of foreseeing plaintiffs, individually or as part of a restricted group, combined with uncertainties about ‘material contribution’ and ‘causal potency’ would come to the fore. Policy considerations of the type alluded to by the High Court in *Sullivan v Moody*²⁰² and *March v E & MH Stramare Pty Ltd*,²⁰³ reflected in the post-Ipp Report ‘scope of liability’ statutory reforms,²⁰⁴ could certainly counter

¹⁹⁹ Ibid 77. The litigation included the United National Human Rights Committee application brought by eight Torres Strait Islanders against Australia for breaching its obligations under the *International Covenant on Civil and Political Rights*, and a Waitangi Tribunal application alleging breach of its obligations to ‘actively protect’ Maori custodial or guardianship relationships with the environment by the New Zealand government.

²⁰⁰ See, eg, *Civil Law (Wrongs) Act 2002* (ACT) s 40; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 3; *Civil Liability Act 2002* (NSW) s 5; *Civil Liability Act 2003* (Qld) sch 2 Dictionary; *Civil Liability Act 1936* (SA) s 3; *Civil Liability Act 2002* (Tas) s 9; *Wrongs Act 1958* (Vic) s 43; *Civil Liability Act 2002* (WA) s 3.

²⁰¹ *Sullivan v Moody* (n 117) 579–80 [50].

²⁰² Ibid.

²⁰³ (1991) 171 CLR 506.

²⁰⁴ See, eg, *Civil Law (Wrongs) Act 2002* (ACT) s 45; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 3; *Civil Liability Act 2002* (NSW) s 5D; *Civil Liability Act 2003* (Qld) s 11; *Civil Liability Act 1936* (SA) s 34; *Civil Liability Act 2002* (Tas) s 13; *Wrongs Act 1958* (Vic) s 51; *Civil Liability Act 2002* (WA) s 5C.

any argument to hold accountable — or disproportionately burden, depending on your perspective — a local defendant whose restraint may not make any material difference to the harms anticipated by the plaintiff, but whose continued viability has significant social and economic benefits to their local community.

A limitation of *Smith*'s nuisance claim was that the harms relied on to satisfy the special damage rule were not specific to the plaintiff: recognition of the plaintiff's claim could potentially trigger the plaintiff indeterminacy problem. Could the reforms to the special damage rule posited by Wylie J via an inchoate tort result in recognition of harm to indigenous interests as a form of special damage? Such an outcome would potentially enable recognition of the harms complained of in *Smith*. However, other doctrinal barriers, including those of reasonableness and causation, are likely to remain. Similarly, it is difficult to see how the tests for duty in either Australia or New Zealand could be adjusted to accommodate identification of indigenous custodians as a specific class of plaintiff distinct from the world at large on the basis of harm and foreseeability.

Indeterminacy of plaintiff and defendant, in the absence of statutory control mechanisms such as those identified in *Sharma*, seem likely to remain insurmountable obstacles under common law, with the courts reluctant to open a floodgate of litigation in which potentially everybody can sue everybody else, being both harmed by and contributing to greenhouse gas emission.

Even if some doctrinal barriers confronting plaintiffs in climate change litigation can be overcome, other barriers to proving causation dependent on scientific evidence — particularly causal potency — still remain. In addition to the changes or requirements noted above, any architect of an inchoate tort will need to consider how the law should accommodate and respond to the challenge of contribution which may or may not be causally potent on a global scale, but whose causal potency locally may or may not be able to be scientifically proven, even if it is foreseeable.

It seems inevitable that climate change claims will reshape, or at least provide additional definition to, tort law within Australasia. *Smith* was a procedural determination apparently under appeal,²⁰⁵ and substantive argument on the claim itself has not been heard. It seems unlikely to be abandoned, regardless of the outcome of the appeal, given the significant level of public interest in the case. *Sharma* is also likely to be appealed by the government. Regardless of the outcome of that decision, unless the applicants seeking approval of the mine extension ultimately abandon their plans, there is potential for litigation around the yet-to-be made approval decision to continue for the foreseeable future. In each case, the plaintiffs appear to have considerable financial and legal support for their claims, and the defendants are similarly not

²⁰⁵ Hook (n 26). However, as at date of submission, the appeal has not been listed for hearing.

poor. It is unlikely either side will be forced to abandon their claims due to limited resources.

At a minimum, the litigation may provide further clarification of the existence of the purported ‘inchoate’ tort of harm to the environment, mooted in *Smith*, and what the parameters of any such claim might be.

Responding to the decision in *Smith*, Hook et al speculated that New Zealand courts might recognise a tort to the environment as a mechanism allowing corporations who cause damage to the environment to be sued.²⁰⁶ Questioning the Court’s decision to strike out the plaintiffs’ claims in both negligence and nuisance, and citing the high threshold required for strike-out proceedings, the authors queried the validity of one of the Court’s reasons for striking out the claim — the difficulty in attributing causation to individual large-scale emitters — citing the scientific evidence of RWE’s contribution global emissions since industrialisation, accepted for procedural purposes by the German court in *Lliuya v RWE AG*.²⁰⁷

Hook et al consider that courts might be willing to consider harm to the environment ‘in and of itself’ as the wrong the defendant has committed/is committing, if those courts view such recognition as consistent with evolution in the underlying goals of tort law. Accordingly, it would be ‘immaterial whether another person has suffered any loss or harm as a result.’²⁰⁸ However, this model would not so much represent evolution in the development of tort law as it would an entirely new species of wrong that is entirely foreign to the common law tradition.

Citing an article by Lee,²⁰⁹ Hook et al refer to ‘many examples of courts taking account of public interests in the imposition of tortious liability.’²¹⁰ Problematically, however, in each of Lee’s examples a private party has suffered harm of some sort. Public interest considerations may have been taken into account in the court’s disposition of private claims of harm, but none of the cases were brought on the basis of harm purely to a public interest per se. It is difficult to see who might bring a claim on behalf of the environment. If the claim is brought by the state, for example, the tort looks far more like a public law action, underpinned by a breach of statute, or failure to comply with regulatory requirements. It is unlikely that the solution to the problem of indeterminacy of plaintiffs is to create a tort with no identifiable plaintiff at all.

²⁰⁶ Ibid.

²⁰⁷ Oberlandesgericht Hamm [Higher Regional Court of Hamm], 2 I 285/15, 30 November 2017. See also Myanna Dellinger, ‘See You in Court: Around the World in Eight Climate Change Lawsuits’ (2017) 42(2) *William & Mary Environmental Law and Policy Review* 525.

²⁰⁸ Hook (n 26) 205.

²⁰⁹ Maria Lee, ‘The Public Interest and Private Nuisance: Collectives and Communities in Tort’ (2015) 74(2) *Cambridge Law Journal* 329.

²¹⁰ Ibid.

Even if, as the authors propose, there is ‘widespread legal recognition’ of a ‘duty to protect’ the environment,²¹¹ that duty may be derived either directly or by implication from legislation, or non-tort common law. If the former, the appropriate cause of action may be breach of statutory duty, assuming the wording of the relevant statute permits; if the latter, it seems more appropriately addressed through public law than torts.

The authors suggest, in response to concerns in *Smith* that tortious liability ‘would potentially compromise Parliament’s response’,²¹² that tort law could instead support the legislative framework, noting that ‘[o]ne of the strengths of the law of torts is its ability to provide justice ... based on a range of factors that could not be properly balanced by way of *ex ante* regulation.’²¹³ This reasoning is not inconsistent with the Court’s findings on coherence in *Sharma*. Problematically, however, Hook et al suggest that courts could be ‘[g]uided by international commentary such as the Principles on Climate Change Obligations of Enterprises’ in order to determine whether a particular defendant acted ‘unreasonably’.²¹⁴ This fails to note, first, that the ‘international commentary’ referred to is itself a form of *ex ante* regulation — albeit not one not agreed to by a domestic legislature, but *ex ante* regulation nonetheless — and, further, that in doing so, defendants are essentially being bound by two conflicting sets of obligations: the statutory obligations passed by the parliament, which are potentially less stringent as a consequence of the political compromise necessary to pass such laws; and an international non-binding set of obligations for the purposes of avoiding tortious liability. Such an outcome is precisely the situation Wylie J and other jurists are keen to avoid, noting among other issues its potential for conflict with such fundamental principles as the doctrine of parliamentary sovereignty and the rule of law.

In the event the tort is found to exist, it is likely to open up a new seam of tort litigation, which could potentially transform the civil liability environment for corporate defendants. Across the ditch in Australia, the decision in *Sharma* may require the High Court to once again grapple with the vexed issue of novel duties of care and how they relate to public and statutory authorities as a forerunner to similar claims based on *Smith*-type facts brought against corporate defendants. The multifactorial ‘salient features’ framework articulated in *Caltex* is already complicated: climate change litigation certainly seems to have the potential to make it even more so.

Both *Smith* and *Sharma* demonstrate the potential for power imbalances between parties to exist within the context of climate change relationships: in

²¹¹ Hook (n 26) 206.

²¹² *Smith* (n 23) 419 [98].

²¹³ Hook (n 26) 209 (emphasis added).

²¹⁴ *Ibid*.

both cases, the defendants — multinational corporate New Zealand, and the Australian Federal government — occupy positions of significant power and resources. The plaintiffs, meanwhile, are representative of groups traditionally disempowered by law: traditional owners in *Smith*, and children in *Sharma*. Curiously, neither case examines the position of plaintiffs who experience disempowerment at the hands of the legal system on multiple fronts: would *Smith* have had a different outcome if the claim had been brought on behalf of future generations of traditional owners, for example? Or would the plaintiff's position in *Sharma* have been strengthened if one or more of the Children specifically identified as indigenous? In their respective judgements, the courts do not consider the impact of intersectionality on plaintiff claims, nor does the secondary literature necessarily engage with it, instead focussing on, for example, children's claims or indigenous claims. These are valid considerations in light of the documented intersectional effects of climate change²¹⁵ and, as the next section of the article argues, provide a valid lens through which to teach about climate change litigation in torts law for the purpose of considering its utility in the achievement of climate change justice.

IV WHAT CAN CLIMATE CHANGE LITIGATION DO FOR TEACHING TORT LAW?

Considering Kysar's earlier work on what climate change and tort law can do for one another through a legal education perspective, a related question emerges: what can climate change tort litigation do for *teaching* tort law? Examining some of the emerging climate change claims — such as *Smith* and *Sharma* — in the teaching of tort law provides an opportunity to educate students about some of the limitations of existing doctrine, and to explore why the status quo may be inadequate for the delivery of climate change justice.

The plaintiff and applicants in *Smith* and *Sharma*, respectively, are not parties with proprietary or possessory interests in the land on which the impugned conduct is occurring. As representative actions, both cases are brought not on the basis of harms that will necessarily affect the plaintiffs and their interests personally, but rather the interests of a class of people they claim to represent, challenging traditional notions of 'private' in private law. In *Smith*, the plaintiff is acting as a representative of traditional owners, while in *Sharma* the plaintiffs are minors. In each case the defendants — the Commonwealth of Australia, and various large corporations — have access to significantly greater resources to support them in the litigation. Climate change tort litigation of this type,

²¹⁵ Ibid. See also Neumayer and Plümper (n 2); Newell (n 2); Waldinger (n 3); World Bank (n 7); Ford (n 6); Dankelman and Naidu (n 8); Kaijser and Kronsell (n 8); Vinyeta, Whyte and Lynn (n 8).

therefore, provides a valuable teaching opportunity to concurrently explore a range of critical legal perspectives, including Marxist theories of property and privatisation, legitimacy of judicial law-making, and intersectional critical feminist, racial, and disability perspectives; to critique the adequacy of existing law to respond to marginalisation and power imbalances within the status quo; and to formulate effective proposals for reform.

The appropriate scope and extent of legal-theory teaching within legal education has been a topic of longstanding debate, reflecting different conceptualisations of the discipline. From a vocational conceptualisation, theory is thought to have limited value. Its teaching is, consequently, viewed as a detraction from the curriculum's ability to provide a sufficient grounding in the posited 'black-letter' law and practical legal skills that students will ultimately be required to apply. Alternative views note that law is no longer purely or even largely a vocational qualification, instead calling for teaching in a wide array of skills, including critical thinking.²¹⁶ In Australia, a significant number of law graduates do not work in private practice, but instead work in policy, government, and an array of other roles.²¹⁷ The diversity of graduate destinations into a range of other fields of employment therefore necessitates graduates receiving an education that has a broader focus than doctrinally-focused material contained in the prescribed learning outcomes.²¹⁸

Coleman, in defence of teaching theory in the US context, noted:

Considerations of efficiency and justice are not just windows through which we can assess or reform existing law, they are important standards of law. Indeed, the view that such standards are not law is itself a theoretical claim about the nature of law. The truth of that claim cannot be presupposed by the law school curriculum.²¹⁹

Rice recently argued that legal education demands critical perspectives, lamenting the absence of legal theory from the prescribed content of Australian law degrees.²²⁰ Summarising views that the 'debate' was largely redundant as the

²¹⁶ Michael Coper, 'Educating Lawyers for What? Reshaping the Idea of Law School' (2010) 29(1) *Penn State International Law Review* 14; Nickolas James, 'Australian Legal Education and the Instability of Critique' (2005) 14(2) *Legal Education Digest* 54; David Barker, *A History of Australian Legal Education* (Federation Press, 2017) 3; Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Report, 1987); Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, February 2000).

²¹⁷ Simon Rice, 'Why Prescriptive Legal Education Demands Critical Perspectives' in Kevin Lindgren, Francois Kunc and Michael Coper (eds), *The Future of Australian Legal Education: A Collection* (Lawbook, 2018) 217.

²¹⁸ *Ibid.*

²¹⁹ Jules L Coleman, 'Legal Theory and Practice' (1995) 83 *Georgetown Law Journal* 2579.

²²⁰ Rice (n 225) 217.

two perspectives are ‘profoundly consistent’,²²¹ Rice called for greater integration of teaching of critical theories into the prescribed legal curriculum, stating:

Critical perspectives on legal doctrine and process can explain how law may be seen and appreciated differently, and may operate differentials, exposing and opening to challenge the many conceptions of justice in law, and the implicit values and biases in legal procedures. Critical perspectives help lawyers see the oppressive dimensions of law and the legal system — as well as its occasional liberating capacity — with greater clarity and insight. Marxism, feminism, critical race theory, critical disability theory, critical legal studies, are all ways of understanding how power operates in and through law; critical perspectives on law tell us how our clients see and experience law ... And critical perspectives are understood best, or maybe only, in the social contexts of laws operation. This requires an appreciation of the many ways that law is experienced by those for whom law is chronically unjust, and provides material with which to examine embedded conceptions of justice in law.²²²

In providing examples of how critical perspectives could be embedded throughout subjects within the curriculum, Rice identified critical disability perspectives as a candidate for deepening student-understanding of torts, highlighting the ‘many assumptions, against interest, that legal rules make about ability, capacity, autonomy and dependence’.²²³

Perhaps underemphasised by Rice are opportunities within the curriculum to explore intersectionality: the ‘interaction between gender, race, and other categories of difference in individual lives ... and the outcomes of these interactions in terms of power’.²²⁴

As noted above, climate change, in addition to being ‘the mother of all collective action issues’,²²⁵ provides a vivid illustration of intersectional disadvantage arising from unjust and inequitable distribution of harms. Climate change disproportionately affects those who are already disadvantaged and marginalised, including indigenous peoples, displaced peoples, young people, the unemployed, women, and others who lack social and political power.²²⁶ That those who are affected by climate change may fall within more than one of the identified vulnerable groups is also well-established. The intersectional effects of climate change, where the combined effects of belonging to more than one identified vulnerable group are amplified to a greater extent than the sum of the

²²¹ Ibid 218, citing Michael Coper, ‘Legal Knowledge, the Responsibility of Lawyers, and the Task of Law Schools’ [2006] *ALTA Law Research Series* 2.

²²² Ibid 225.

²²³ Ibid 215–6.

²²⁴ Kathy Davis, ‘Intersectionality as Buzzword: A Sociology of Science Perspective on What Makes a Feminist Theory Successful’ (2008) 9(1) *Feminist Theory* 67, 68.

²²⁵ Kysar, What Climate Change Can Do About Tort Law (n 14).

²²⁶ See, eg, Neumayer and Plümper (n 2); Newell (n 2); Waldinger (n 3); World Bank (n 7); Ford (n 6); Dankelman and Naidu (n 8); Kaijser and Kronsell (n 8); Vinyeta, Whyte and Lynn (n 8).

disadvantage attributable to membership of each group individually, is also well established.²²⁷

Intersectionality can encompass a broad range of attributes. Originally, intersectional approaches considered race and gender.²²⁸ However, it may be extended to include other attributes, such as sexuality, class, religion, age, able-bodiedness, and nationality, as appropriate.²²⁹ A key principle of intersectionality is its examination of how those intersecting sources of injustice or disadvantage play out against the backdrop of power, including institutionalised power wielded by courts, parliaments and the executive, as well as the private sector.²³⁰ Importantly, it can be used to frame discussions about the legitimacy of activities such as judicial law-making, and whether that is an acceptable use of the courts power, including in circumstances where political power in achieving a legislated alternative seems to have failed.

There is therefore scope to examine the justice of outcomes arising from strict application of existing tort-law doctrine on those groups through an intersectional lens. More broadly, however, we can use critical perspectives in the context of climate change to examine the foundational concepts underpinning tort law, starting with the interests it deems worthy of protection, the harms it recognises as warranting compensation, and the mechanisms it legitimises as appropriate for achieving recompense for harms to those interests.

An identified criticism of intersectionality as a general theory of identity is that it recognises a 'hypothetical' alternative person who does not share the intersecting identities of the subject (such as male, cis, hetero, white, wealthy, able-bodied, etc).²³¹ This criticism, directed against intersectionality in general, is precisely what makes it a useful theory for critiquing law, an institution which has been extensively criticised by academics precisely because it privileges those characteristics. Whereas other disciplines need to create an alternate who does not have the relevant disadvantaging characteristics in order to apply intersectional theory, in legal analysis the existing paradigm already embodies them.²³²

Outside of elective subjects based on discrimination law or gender, legal theory, or criminal law units that specifically examine intersectional offending,

²²⁷ Dankelman and Naidu (n 8).

²²⁸ Kimberlé Crenshaw, 'Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] (1) *Chicago Legal Forum* 139.

²²⁹ Davis (n 229) 75.

²³⁰ *Ibid.*

²³¹ Ben Smith, 'Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective' (2016) 16 *Equal Rights Review* 73, 73.

²³² The legal system's embodiment of those characteristics is the basis of much critical legal analysis, a body of scholarship too extensive to be detailed here.

intersectionality may receive limited express attention.²³³ Teaching of critical perspectives will often occur in isolation, both of the critical approach concerned, and the legal issue it is applied to. In tort law, for example, critical feminist theories are commonly used to shed light on doctrinal principles such as the objective ‘reasonable man’ standard, the impact on women of wrongful birth claims, or quantification of future economic loss arising from personal injury. Critical race theories, particularly as they apply to property rights of traditional owners, may be discussed in the context of teaching *Wik*²³⁴ and *Mabo [No 2]*²³⁵ in property law or public law units, but may not be acknowledged in the teaching of property-related torts. This isolation is understandable: the volume of doctrinal and substantive law contained within the curriculum leaves limited space to add in anything more. Yet there remains an expectation that within that curriculum, academics teach about new and emerging issues within the subdiscipline. Climate change litigation meets that criterion within tort law. Teaching tort law with an emphasis on intersectional justice presents an opportunity to address several requirements — pedagogical and social — simultaneously.

How then should we teach climate change tort litigation through an intersectional lens?

Matsuda developed an approach that is both simple and effective for identifying intersectional issues.²³⁶ Through what she called ‘asking the other question’, Matsuda sought to identify intersectional inequities by reformulating her initial question to focus on an alternative attribute:

When I see something that looks racist, I ask, ‘Where is the patriarchy in this?’ When I see something that looks sexist, I ask, ‘Where is the heterosexism in this?’ When I see something that looks homophobic, I ask, ‘Where are the class interests in this?’²³⁷

Applying Matsuda’s approach to tort claims for climate change harms might, therefore, look something like ‘tort law appears to disadvantage indigenous climate change plaintiffs: how does it respond to women plaintiffs?’; or ‘tort law appears to disadvantage children: how does it disadvantage refugees?’. This approach identifies different and overlapping ways in which tort law might disadvantage plaintiffs bearing the brunt of inequitable distribution of those harms, identifying opportunities for law reform to address those injustices, and providing students with insight into the effectiveness of legal institutions in achieving climate change justice, including via tort law, and why those institutions may or may not be adequate.

²³³ An exception may be some criminal law or sentencing units, which consider intersectionality, for example, in the context of offending by indigenous minors, or drug and alcohol offences.

²³⁴ *Wik Peoples v Queensland* (1996) 187 CLR 1, 173 (Gummow J).

²³⁵ *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

²³⁶ Mari Matsuda, ‘Beside My Sister, Facing the Enemy: Legal Theory out of Coalition’ (1991) 43(6) *Stanford Law Review* 1183.

²³⁷ *Ibid* 1189.

V CONCLUSION

What, then, can tort law do for climate change litigation in Australasia, and what can climate change do for tort law?²³⁸ An answer may be that plaintiffs seeking justice for climate change caused harms via torts law will continue to encounter multiple insurmountable doctrinal barriers. Even if an inchoate tort is adopted, it is difficult to see how it could be designed in a way that would be capable of overcoming every one of the doctrinal challenges thrown up by tort law, unless it becomes something fundamentally different in character from a tort. With enough persistence and repeated exposure to climate change claims, enough of those barriers may crumble or stretch to accommodate a successful claim. Such is the course of incrementalism. Ironically, tort law itself may benefit from repeated exposure to climate change claims, particularly if those claims require the court to better articulate or reform areas of doctrine that have become stagnant.

Climate change offers us an opportunity to do more with the history of tort law than just legitimise change driven by social development. It offers an opportunity to critically re-examine existing or even old, possibly extinct, doctrine to determine whether, within those artefacts, there remains useful material that can assist with the challenge that climate change litigation poses to tort law.

Part IV proposed that climate change tort litigation can and possibly should be used to introduce students to intersectionality as a critical perspective for the evaluation of the capacity of legal institutions to deliver justice. To engage in that critical examination, students need to be introduced to the theories that support it. What climate change litigation does for tort-law teaching, therefore, is provide an opportunity to do just that. Climate change is a ‘super wicked problem’.²³⁹ Teaching students about climate change litigation — including about cases that ultimately may not survive the appellate process — provides opportunities to explore relationships between law and justice, and exposes students to the intersectional effects of different sources of disadvantage and injustice in a common law context, rather than within the more commonly encountered realms of human rights and discrimination law. In addition to providing an opportunity to examine issues of justice through an intersectional lens, climate change litigation offers an opportunity to examine the power relationships between different institutions, and between institutions and citizens, in more detail, to evaluate the legitimacy or otherwise of the law as practiced within courts for themselves.

²³⁸ Kysar, *What Climate Change Can Do About Tort Law* (n 14) 1.

²³⁹ Richard J Lazarus, ‘Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future’ (2009) 94(5) *Cornell Law Review* 1153, 1159.