Breakthrough climate litigation positions courts to combat the health impacts of climate change

In a critical year for climate action, two cases provide new pathways for climate litigation based on intergenerational impacts

In November 2021, global leaders are gathering in Glasgow at the 26th United Nations Climate Change Conference of the Parties (COP26) to mark the fifth anniversary of the Paris Agreement on Climate Change. Climate change poses current and future threats to human health, and COP26 will be the "last best chance" to avert dangerous climate change as the world accelerates towards a critical tipping point of a 1.5°C temperature rise above pre-industrial levels.[1-3] Countries need to rapidly increase their efforts, but there is little evidence of concrete policy action that meets the scale of this challenge. Australia is one of two countries in the world that have not set a firm target for net zero emissions.[4]

New strategies are needed urgently to cut through the political thicket and accelerate systemic change. To this end, climate litigation is becoming increasingly effective in linking threats to human health to the impacts of dangerous climate change, forcing both governments and businesses to take action and protect future generations. Nowhere is the growing sophistication of climate litigation more evident than in the May 2021 decisions of *Sharma v Minister for the Environment*[5] in Australia and *Milieudefensie et al v Royal Dutch Shell*[6] in the Netherlands, in which courts have found climate-related duties of care.

Sharma concerned an application to the Federal Court of Australia by eight teenage children through their litigation guardian, Sister Marie Brigid Arthur. They sought an injunction to prevent the federal Minister for the Environment from approving a proposal by Whitehaven Coal under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) to extend the Vickery coalmine in northern New South Wales.[5] The children's application was pre-emptive, as it was taken before the Minister's decision on the mine extension. They sought both a declaration that the Minister has a duty to avoid causing them harm in making her decision on the project, and an injunction to prevent the Minister from making a decision in breach of that alleged duty.[5] The application also provided an opportunity for the children to place extensive evidence of climate experts before the court on the impacts of dangerous climate change, including on human health.[7]

In a landmark decision, Justice Bromberg accepted that approval of the project would give rise to a risk of "catastrophic" future injury to the children from "climatic hazards", such as bushfires and heatwaves, induced by increases in the Earth's average surface temperature.[5] The court was particularly distressed to hear evidence that one million Australian children (the eight child litigants and children who ordinarily reside in Australia) "are expected to suffer at least one heat-stress episode serious enough to require acute care in a hospital" in the last 20 years of their lives, and that "[m]any thousands will suffer premature death from heat stress or from bushfire smoke", describing these potential impacts as "the greatest inter-generational injustice ever inflicted by one generation of humans upon the next".[5]

Ultimately, it was "reasonably foreseeable" for a person in the position of the Minister that the approval of the mine extension would expose the children to these risks of personal injury.[5] The 100 megatonnes of carbon dioxide (CO_2) attributable to the project could be characterised as small, but it was not so insignificant as to deny a real risk of harm to Australian children.[5] These essential findings of fact, which are unlikely to be overturned on appeal, represent a significant breakthrough for the children. The Minister had successfully argued in previous cases under the EPBC Act that the impacts of approving a mine on climate change are too "uncertain and conjectural" and could therefore be discounted.[8]

In a world first, Justice Bromberg then found that the Minister has a novel duty to take reasonable care to avoid causing personal injury to Australian children when exercising her powers of approval under the EPBC Act.[5] A duty of care is an essential element of a negligence claim. The duty of care here was based on the "salient features" of the relationship between the Minister and the children, including the Minister's knowledge of the risks of harm arising from future CO_2 emissions from the proposed project, and her

Katherine Owens

Sydney Law School, University of Sydney, Sydney, NSW.

kate.owens@sydney.edu.au

doi: 10.5694/mja2.51288

control of both the source of the risk of harm and the safety of people who are put at risk by the project approval. A further factor supporting a duty was the "extreme" vulnerability of the children who were at risk of a range of severe harms caused by climate change and could not take steps to avoid it.[5]

Finding a duty of care in this context was contentious, as the health, wellbeing and survival of human beings are not protected aspects of the environment under the approval regime of the EPBC Act.[5] Justice Bromberg formulated the duty by reference to the broader statutory scheme of the EPBC Act, including the Act's object to protect the environment (defined to include people and communities), and the principle of intergenerational equity, under which the present generation is to ensure that the "health, diversity and productivity" of the environment is maintained or enhanced for future generations.[5]

The finding of a duty of care will have significant consequences as it will operate as an additional private law duty alongside the Minister's existing statutory approval obligations under the EPBC Act. It will apply to the Minister's future decisions under the Act, including in relation to the Vickery coal mine extension. It will also provide a prototype for litigants mounting challenges to other government decisions, including under state environmental and planning legislation.

Ultimately, the court did not grant an injunction at this stage because, in the absence of a decision on the proposal by the Minister, the court was not satisfied that the Minister would breach her duty of care. The Minister could, for example, decline to approve the proposal, or approve the proposal subject to stringent conditions.[5] However, the door was left open for a possible injunction once the Minister's decision has been made. Following its decision, the court also issued a declaration that the Minister has "a duty to take reasonable care … to avoid causing personal injury or death to persons who were under 18 years of age and ordinarily resident in Australia … arising from emissions of carbon dioxide into the Earth's atmosphere", and declined to limit that declaration to the litigants.[9] The Minister lodged a formal appeal to the Full Federal Court on 16 July 2021 before approving the Vickery coalmine extension on 15 September 2021. This approval decision is, in turn, likely to lead to further court action.

Sharma is one of a growing number of decisions in which courts acknowledge the health impacts of climate change and recognise duties to individuals on the part of both governments and corporations. In the Netherlands, a class action was brought by Milieudefensie (Friends of the Earth Netherlands) and other co-plaintiffs against Royal Dutch Shell (RDS).[6] The Hague District Court held, in another world first, that RDS has an obligation arising from the unwritten standard of care under the Dutch Civil Code to contribute to preventing dangerous climate change through the corporate policy it determines for the Shell group.[6]

The Shell group is responsible for CO_2 emissions that exceed the emissions of many states.[6] RDS, as the top holding company of the Shell group, has an important policy-setting function and must observe particular standards of care concerning Shell's emissions and climate change policies. The court interpreted these standards of care by reference to factors such as the accepted science on dangerous climate change (including current and projected climate change-related health problems in Dutch residents), human rights (specifically the right to life and the right to respect for private and family life) as well as "soft law" standards such those in the United Nations Guiding Principles on Business and Human Rights (https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf).[6]

RDS had an existing commitment of net zero emissions by 2050, but this policy undertaking was assessed to be "intangible, undefined and non-binding".[6] RDS was therefore ordered to cut its global carbon emissions by 45% by 2030 compared with 2019 levels.[6] This was the first time a court has held a corporate emitter responsible for reducing its emissions in accordance with the temperature goals of the Paris Agreement. RDS confirmed that it will appeal the court's decision on 20 July 2021.

Both the *Sharma* and *Shell* decisions are landmark rulings that will have far-reaching consequences for climate litigation and the future trajectory of the oil, gas and coal sectors. Critics of the decisions may argue that the courts are not the appropriate forum for these so-called political issues. However, in the absence of appropriately ambitious policy and legislation, the courts are hearing, and accepting, extensive expert evidence on the likely health impacts of dangerous climate change, and have taken the opportunity in these cases to fill the void left by governments in applying the law. Further litigation based on the two cases is virtually certain, with litigants seeking to expand these duties in relation to both governments and businesses in comparable contexts. In a make or break year for climate action, the cases have provided new pathways for climate litigation based on intergenerational impacts, and have positioned the courts to play a key role in combatting the worst effects of climate change on health.

Competing interests: No relevant disclosures.

Provenance: Commissioned; externally peer reviewed. ■

© 2021 AMPCo Pty Ltd

1 BBC News. John Kerry: 'Glasgow the last best chance the world has to avoid climate crisis'. 28 Jan 2021. https://www.bbc.com/news/av/world-us-canada-55835266 (viewed June 2021).

2 World Meteorological Organisation. WMO Global Annual to Decadal Climate Update. Target years: 2021 and 2021-2025. https://hadleyserver.metoffice.gov.uk/wmolc/WMO_GADCU_2020.pdf (viewed June 2021).

3 Beggs PJ, Zhang Y, McGushin A, et al. The 2021 report of the *MJA–Lancet* Countdown on health and climate change: Australia increasingly out on a limb. *Med J Aust* 2021; 215: doi: 10.5694/mja2.51302 .

4 Visual Capitalist. Race to net zero: carbon neutral goals by country. 8 June 2021. https://www.visualcapitalist.com/race-to-net-zero-carbon-neutral-goals-by-country/ (viewed Sept 2021).

5 *Sharma v Minister for the Environment* [2021] FCA 560.

6 *Vereniging Milieudefensie et al v Royal Dutch Shell plc*. Hague District Court, 26 May 2021.

7 Environmental Law Australia. *Sharma v Minister for the Environment*. http://envlaw.com.au/sharma/ (viewed June 2021).

8 *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2008] FCAFC 3.

9 *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment (No 2)* [2021] FCA 774. ■