

## COURTS ACTING ON CLIMATE CHANGE TO FILL LEADERSHIP VOID LEFT BY GOVERNMENT INACTION

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IN what is a critical year for climate action, two court cases provide new pathways for climate litigation based on the impacts it will have on our children, according to the authors of a Perspective published today by the *Medical Journal of Australia*.

Dr Katherine Owens, Senior Lecturer in the Sydney Law School at the University of Sydney, wrote that "nowhere is the growing sophistication of climate litigation more evident than in the May 2021 decisions of *Sharma v Minister for the Environment* in Australia and *Milieudefensie et al v Royal Dutch Shell* 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.

"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," wrote Dr Owens.

"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.

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. 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.

"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," wrote Dr Owens.

In the Dutch case, a class action was brought by Milieudefensie (Friends of the Earth Netherlands) and other co-plaintiffs against Royal Dutch Shell (RDS). 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.

"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," wrote Dr Owens.

"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."

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