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Climate Change Litigation: Vulnerable Children and a Duty of Care

Abstract

This article considers climate change jurisprudence in the context of other eschatological narratives developing the theme of ecological catastrophe. It focusses in particular on concepts of fault, harm and responsibility, referents in case narratives, as expounding a sense of outrage at the excesses of modern capitalism, and the converse use of the child as the party innocent of all agency in the upcoming apocalypse. The article analyses the narrative developed by the applicants in an Australian case, *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560 (*Sharma 1*), in which the “previously unimaginable power” to cause potentially “cataclysmal harm” to “Vulnerable Children” created a duty to those children. The applicants were successful at first instance, but an appeal (*Minister for the Environment v Sharma* [2022] FCAFC 35 (*Sharma 2*)) reversed this decision.

Taking an interdisciplinary approach and drawing upon approaches of philosophy, psychology and theology as well as law, this article considers the idea of “fault” in the tort of negligence and the techniques used to support the moral connotations of fault in the case narrative. In particular, it reflects on the contribution of the Judeo-Christian tradition to this fault narrative. It focusses in particular on the theology of hope in Christian eschatology,

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responses to anticipation of catastrophic climate change narratives, and the concept of fault in those narratives. It considers the psychological dimensions of “hope” and “despair” as illuminated in theological approaches to apocalyptic views, and the reification of doctrines of despair in proving damages in the law of negligence.

Keywords: climate change, fault, legal philosophy.

Introduction

The concept of blame, or fault, is ubiquitous in legal frameworks. Law expresses dimensions of fault-based determinacy that have become contestable in other cultural narratives. As a secular parallel to eschatological conceptions of judgment, law is now one of the theatres in which there can be a reckoning for environmental apocalypse. This article traces the use of concepts of fault and blame as referents in legal discourse to expound a sense of outrage at the excesses of modern capitalism, and the converse use of the child as the party innocent of all agency in the environmental disaster. The article analyses the narrative developed by the applicants in an Australian case, *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* (2021) (*Sharma 1*), in which the “previously unimaginable power” to cause potentially “cataclysmal harm” to “Vulnerable Children” created a duty to those Children and considers the corrective view, on appeal in *Minister for the Environment v Sharma* (2022) (*Sharma 2*) that no duty was owed.

Taking an interdisciplinary approach and drawing upon approaches of philosophy, psychology and theology as well as law, this article will consider the idea of “fault” in the tort of negligence and the techniques used to support the moral connotations of fault in the case narrative. In particular it will reflect on the contribution of Christian eschatological thinking to the analysis of climate change narratives, drawing on Moltmann’s “theology of hope” (Moltmann, 1967) to interrogate the use of blame as a response to apocalyptic climate change. It will consider the psychological dimensions of “hope” and “despair” as illuminated in theological approaches to apocalyptic views, and the reification of doctrines of despair in proving damages in the law of negligence.

The article will first address the use of imagery in climate change narrative; particularly the powerful sense that, in the excesses of modern capitalism, the current generation is consuming the future – devouring its children. The use of the child, unmarked by the stain of fault, as a “victim” in litigation, is a deliberate strategy to address law’s rationality in rules

of “standing”. Thus, the article accounts for the ascription of blame through the application of the tort of negligence to climate litigation. The article then considers the narrative approaches in the pleadings and judgment in *Sharma 1*, folding imagery into the formulaic legal terms to breathe life into a novel cause of action. The tendentious narrative, departing from conventional readings of the tort of negligence, evokes a sense of the erstwhile powerless child successfully rallying against dominant forces vested with power, influence and resources. The article goes on, however, to analyse a troubling aspect of the case, in that it not only elicits, but encourages despair. To found an action in negligence damage must have become actual. The forms of damage supporting the negligence framework in *Sharma 1* are, in part, the losses arising from counsels of despair. Conversely, Christian eschatology, framed as a “theology of hope” is “forward looking and forward moving, and therefore also revolutionizing and transforming the present” (Moltmann, 1996, p. 25). In its consideration of the decision on appeal in *Sharma 2*, the article draws particularly upon the court’s discussion of the proportionality of fault, both underlining the sense of powerlessness of the applicants against climate change, and interrogating portrayals of emotion and rationality in argument.

Devouring the Future: One Classical Analogy at a Time

Goya’s nightmarish depiction, purportedly of Saturn devouring his son (Goya, 1821–1823), evokes in emblematic black oil the dystopian landscape of anthropogenic climate change. Saturn (Kronos/Cronus) the Titan, eyes bulging, has already consumed the head and arm of the corpse. Sometimes considered an allegory of the state turning on its people, it is also a warning that in trying to prevent destruction we bring it upon ourselves. In the Theogeny “each child issued from the holy womb [...] was seized by mighty Kronos, and gulped down” (Hesiod, 1973, as cited in Morgan, 1990, p. 39).

Whether we ascribe Goya’s vision to that fear of his own mortality in *tempus edax rerum*, adopt the Theogeny, despite the textual inconsistencies, or view Goya’s vision as a manifestation of the universal parental fear that we will destroy our children (Hesiod, 1973, as cited in Morgan, 1990, p. 40), the mimetic force of the Titan’s appetite is an appropriate starting point for the consideration of narrative in discussion of anthropogenic climate change. It demonstrates the power of image as a “rhetorical framework that can be adapted to depict a contemporary event”, and “summoned up

as ventriloquist dolls which are made to speak about a contemporary event based on the epistemological potential” (Vives-Ferrándiz Sánchez, 2019, p. 24). In the Titan we see not only madness, power and greed, but also guilt and shame. Over all, we see the pathology of the most appalling of betrayals, that of the father/protector against the vulnerable child. In the context of climate change the image becomes a more implacable accusation – the Titan not only destroys but also devours the child: the child not only has no future but has been destroyed to sate the appetite of the present.

The Cronus hypothesis is an established metaphor for the behaviour of the earth as a system, using the myth to portray the stability-entropy spectrum in a population (González-Vaquerizo, 2019). The Cronus hypothesis presents “speciation and extinction [as] analogous to the demographic processes of birth and death that underpin the local or regional growth rate of a biological population” (Bradshaw & Brook, 2009, p. 203). Extinction is inevitable.

The use of Greek mythology in this way was preceded by the Gaia (Lovelock, 1983, 2010; Lovelock & Margulis, 1974) and the Medea (Ward, 2009a, 2009b) hypotheses, marking the use of highly evocative Classical referents to illustrate, and potentially embellish, scientific study. Other origin stories contain their own visions of the relations between people and their ecosystems. The use of metaphor to explain ecosystem dynamics renders in human terms the complex processes of system self-regulation (Gaia) and self-destruction (Medea), whereas Cronus bridges these processes because speciation and extinction events balance each other out. The Anthropocene extinction event may, according to this hypothesis, end in the decline and potential extinction of our own species.

If Saturn’s cannibalistic appetites represent scientific theory, the reception of the lessons of anthropogenic climate change is a matter of some concern. Eschatological narratives focussed on fault and judgement do not necessarily translate into action, but rather may counsel despair. The narrative of inevitable destruction may be accepted, but not the insights of climate science (de Wit & Haines, 2021). For some groups “reluctance to accept climate science is due to the idea that humans can control and influence the weather/sky is extremely novel as in ancient mythology, Indigenous belief systems and organized religions, the sky has always been the domain of the Gods, separated from the Earth” (de Wit & Haines, 2021). Catastrophic climate change is not therefore inconsistent with anthropogenic fault, as it may be a form of “moral feedback” (de Wit & Haines, 2021), but this hybridisation of science and myth does not provide solutions in the form

of new ways to act, unless we equate with action the paralysis of despair. The form of Christian eschatology represented in Moltmann counsels hope, “not only for human beings but also for the cosmos” (Moltmann, 1996, p. 25). This is not inconsistent with resistance, advocacy and public demonstration, but the “Christian rebellion of conscience [...] is not a retreat into an individual chimney-corner” (Moltmann, 1996, p. 25). In this sense Christian eschatology speaks less of “last things” and more of hope for the future.

Eschatological Narratives in Law

Sharma 1 was a case argued in the tort of negligence, brought on behalf of several Children (the report on the case capitalised “Children” throughout as a reference to the applicants), challenging the Australian Federal Government approval under the *Environmental Planning and Assessment Act 1979* (NSW) of an extension to the Whitehaven coal mine. It was argued on the basis of the foreseeability and likelihood of the contribution of coal-burning to the concentration of carbon dioxide in the atmosphere and consequent climate change. At first instance Justice Bromberg in the Federal Court of Australia recognised that a duty of care was owed in the tort of negligence to prevent harm arising from climate change. In late September of 2021 the Minister for the Environment lodged a submission to appeal the decision; a not-unexpected development given criticisms of the judgment on the basis, inter alia, that it was inconsistent with the principle of separation of powers, which requires that the legislative, judicial and executive arms of government be kept, as far as possible, apart so that one cannot interfere inappropriately in the others. This successful appeal is reported in *Sharma 2*.

The case at first instance was argued in the tort of negligence, which requires that the applicant prove, on the balance of probabilities, that a duty of care was owed by the defendant to the applicant to take reasonable care to avoid legally recognised damage, that the duty was breached by the defendant in that they fell below the standard of a reasonable person in the circumstances, and that damage was caused by the breach. *Sharma 1* and *Sharma 2* focussed entirely on the first question – the existence of a duty to take reasonable care to prevent recognised harm. The remaining questions were not considered, and it remains to be seen whether an applicant could effectively demonstrate that the purported breach caused harm (particularly since the anticipation of future harm does not amount to damage in the law

of negligence in Australia). However, the finding that a duty of care was owed by the Minister to a class of “Children” for the types of loss described effectively opened to litigation a new class of case. An appeal to the Full Court from the decision of the primary judge, however, held unanimously that no such duty was owed. Each of the three judgments on appeal used quite different reasoning but shared a concern that the role of the Minister in making the decision was not sufficiently related to legally significant harm.

In common law jurisdictions using the adversarial technique the role of the applicant (or their representative) in a case in negligence is to frame the issues sufficiently clearly, then to provide sufficient evidence to establish their case, so the parties – the applicant and defendant – are the active participants in the proceedings. The role of the judge is to control the conduct of the proceedings, but to otherwise remain neutral and impartial in the preparation and conduct of the proceedings. In this way, according to traditional views of the law, the adversarial method is the “*process* for the fair resolution of disputes” (Crystal, 1997, p. 674). An arbiter cannot, as in an inquisitorial system, pause the proceedings to satisfy themselves that all relevant information has been provided, to question a witness or to advise a party that they have mischaracterised the issue. The judge relies on compliance with the obligations owed by the legal representatives to their client and to the court to frame a case appropriately, to advise their clients competently and to bring before the court any relevant law. This means that the narrative framing of the case in the hands of the applicant is critical to success in the case.

In terms of semiotics, the framing in *Sharma 1* links eschatological narratives and legal narratives, particularly the fault-based framing of the law of negligence and the anticipation of future catastrophic loss suffered by the applicants personally. In this way the case explicitly links government decision-making with catastrophic climate change. Other relevant narratives arise from the selection of applicants. Eight Children (in Australia a child is a person of under 18 years of age) Anjali Sharma, Isolde Raj-Seppings, Ambrose Hayes, Tomas Arbizu, Bella Burgemeister, Laura Kirwan, Ava Princi and Luca Saunders were applicants in the proceedings, but as they lacked legal competence the case was brought by their litigation representative Sister Marie Brigid Arthur, a Sister of the Brigidine Order of Victoria. This aligns with a view of children as “sacralised innocent and vulnerable beings or as moral heroes” (Dillen, 2012), whilst the adult, presumably fully formed and responsible upon reaching legal competence, bears the moral consequences of anthropogenic

climate change. Thus, the children are both vulnerable and innocent – “[t]hey bear no responsibility for the unparalleled predicament which they now face. That innocence is also deserving of recognition and weight” (*Sharma 1*, 2021, para [312]). The legal system stands in for “end times” judgment and, through stare decisis and the doctrine of precedent, a successfully argued case results in the societal and political interiorisation of the judgment.

The vulnerability of the Children in the case is legally significant because of the current articulation of the approach required to establish that a duty of care exists in a novel case. This approach was articulated by Allsop P in *Caltex Refineries (Qld) Pty Ltd v Stavara* (2009, para. [102]) and has since been followed in many cases: for instance, see *Makawe Pty Limited v Randwick City Council* (2009); *Hoffmann v Boland* (2013); *Ku-ring-gai Council v Chan* (2017); *Fuller-Wilson v State of New South Wales* (2018); *Hopkins v AECOM Australia Pty Ltd (No 3)* (2014) and *Carey v Freehills* (2013). The approach addresses “salient features” of the relationship between the applicant and the defendant, although it does not specify which features, or the relative weight of those features. *Stavara* lists the foreseeability and nature of harm, the degree and nature of control exercised by the defendant, the vulnerability of the applicant to harm caused by the defendant’s conduct, reliance on the defendant or assumption of responsibility by the defendant, the proximity of the applicant and defendant, the existence of a category of relationship, the nature of the activity undertaken by the defendant and associated hazards and knowledge of potential harm. Matters which might speak against the creation of a new duty would be the potential indeterminacy of liability, the nature and consequences of any action that can be taken to avoid the harm to the applicant, the impact on freedom or autonomy, the existence of conflicting duties and whether a duty would be consistent with statute, consistency with the terms, scope and purpose of any statute relevant to the existence of a duty (in this case the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)); and whether a duty would affect the coherence of the common law. The considerations which may impact on the existence of a duty are not closed.

Thus, the applicant in formulating a narrative to support a case for the existence of a duty is invited to argue that certain factors are of elevated importance. The vulnerability of the applicants in *Sharma 1* assumed particular relevance. The child-innocent is especially vulnerable to the catastrophic consequences of the actions of the adult – the paternal Government as the Titan Cronus is enabling the continued destruction; or from another perspective, the current generation of adults is wilfully

persevering in a lifestyle of consumption that requires unsustainable energy use. The child-applicants also emphasised the degree of control exercised by the defendant, the reasonable foreseeability and nature of harm, and a recognised category of relationship between the defendant and the applicant (*Sharma 1*, 2021, para. [145]).

At first instance his Honour accepted the narrative of the applicants that they were “extremely vulnerable to a real risk of harm from a range of severe harms caused by climate change, or more specifically, increased global average surface temperature brought about by increased greenhouse gases in the Earth’s atmosphere” (*Sharma 1*, 2021, para. [289]). He cited evidence adduced by the Children that “a ‘business-as-usual trajectory will result in a fundamentally altered world, with the lives of today’s children profoundly affected by climate change” (*Sharma 1*, 2021, para. [289]). His Honour said:

It is difficult to characterise in a single phrase the devastation that the plausible evidence presented in this proceeding forecasts for the Children. As Australian adults know their country, Australia will be lost and the World as we know it gone as well. The physical environment will be harsher, far more extreme and devastatingly brutal when angry. As for the human experience – quality of life, opportunities to partake in nature’s treasures, the capacity to grow and prosper – all will be greatly diminished. Lives will be cut short. Trauma will be far more common and good health harder to hold and maintain. (*Sharma 1*, 2021, para. [293])

In assessing that “the World as we know it [will be] gone as well” the imminence of apocalypse is accepted. The threat to the nation is “existential” (*Sharma 1*, 2021, para. [313]). Moreover, this apocalypse is attributable not to nature, nor even to time, but to the actions of the present (adult) generation: it will “largely be inflicted by the inaction of this generation of adults” (*Sharma 1*, 2021, para. [293]). The Titan, in his madness, consumes the future – his own children.

His Honour draws upon the doctrine of *parens patriae* for narrative and legal support of the proposition that the Minister/Crown bears a “direct responsibility” “with respect to persons who, being in need of care, are unable to take care of themselves” (*Sharma 1*, 2021, para. [303]). This evokes the Titan as state power, brutally slaying its people. The Court declined to explicitly determine that the *parens patriae* doctrine imposed legal obligations in this context, merely noting that “common law jurisdictions have historically identified [...] 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” (*Sharma 1*, 2021, para. [311]), thus supporting the argument that there is a duty of care owed by the Minister. In this way the primary judge in *Sharma* relied heavily on a fault-based articulation of duty in the tort of negligence, both enlarging on the parental/adult responsibility of the Minister and rhetorically accepting the coextensive wrongdoing of the present “generation” of adults.

Fault and Responsibility

End-time narratives in many cultures pointedly involve judgment. There is a more than metaphorical aspect of judgment in litigation ascribing blame for the end of the world as we know it (*Sharma 1*, 2021, para. [293]). The choice of the tort of negligence to ascribe culpability creates a narrative of individual fault. His Honour found a nexus between the “especial vulnerability” of the Children and the conduct of the Minister. “None of this will be the fault of nature itself. It will largely be inflicted by the inaction of this generation of adults, in what might fairly be described as the greatest inter-generational injustice ever inflicted by one generation of humans upon the next” (*Sharma 1*, 2021, para. [303]). Contrasted with the “innocence” of the applicant Children (*Sharma 1*, 2021, para. [312]), the Minister’s conduct is to be viewed not merely through the lens of liability, but of justice – we are considering not merely legal, but moral fault.

Negligence is said to be a “fault-based” tort. It is actionable because it is wrongful. The measure of “wrongdoing” or fault is the degree to which the defendant has deviated from the standard of the “reasonable person”. The law distinguishes between torts which are actionable per se – without wrongdoing – and those that are actionable because the defendant has fallen below an objective standard of care. Despite the extensive range of wrongdoing enveloped by the tort of negligence, taking in momentary oversights as well as egregious failures, the language of tort law is a language of culpability. The Titan is not accidentally killing his children, he is deliberately devouring them to avert fate, a wrong for which he is, through Zeus, punished.

However, whereas time and the accession of the child to adulthood (and to responsibility) is inevitable, “fault is relentlessly moral and personal” (Calnan, 2007, p. 701). The use of a fault narrative to hasten the adoption of alternative resource profiles is not inevitable. The common law of nuisance, historically adapted to deal with pollutants, does not rely on fault to mediate between reasonable uses of land. The use of the negligence as the vehicle for action against climate change could have evocative potential – the normative

origins of the law of negligence are readily apparent in earlier cases. In Lord Atkin's epochal statement of the parameters of a duty of care in negligence (*Donoghue v Stevenson*, 1932), His Lordship both referenced and distinguished the moral from the legal:

acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. [...] The rule that you must love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. (*Donoghue v Stevenson*, 1932, p. 580)

The lawyer's question, "Who is my neighbour" is an allusion to the Christian Gospel of St Luke (10:25) and the preface to the parable of the Good Samaritan. The law does not require the same love for a neighbour that Christianity requires. Nevertheless,

[in] many cases, a judgment of fault carries strong moral overtones. Thus, a faulty actor is not merely a nonconformist, but more of a social deviant. This instinct is heavily influenced by fault's usage. While fault identifies deviance of any sort, it openly condemns deviance in human transactions and relationships. (Calnan, 2007, p. 701)

In *Sharma 1* the modern narratives of vulnerability, coupled with innocence, and the explicit mention of inter-generational injustice underlines the overtly moral considerations inherent in the question of liability in negligence. The role of the litigation representative in the proceedings, Sister Marie Brigid Arthur, a Sister of the Brigidine Order of Victoria, also has symbolic force – aligning the interests of the children with a faith-based order of nuns committed to education and to agitation for human rights. Sister Marie Brigid Arthur has acted as litigation guardian in other legal campaigns, such as actions to remove children from adult prisons (*Certain Children v Minister for Families and Children*, 2016; *Certain Children v Minister for Families and Children (No 2)*, 2017; *Certain Children v Minister for Families and Children (Ruling No 1)*, 2017), is co-founder of the Brigidine Asylum Seeker Project and has been a key figure in other human rights campaigns (Bessant & Watts, 2019). The corrective justice embodied by the law of torts, which "does not typically pursue wrongful conduct in the abstract" (Weinrib, 1983), presumes a particular tortfeasor and a particular victim. The language of duty and breach is redolent of fault and responsibility.

Conversely, in *Sharma 1* the wrongdoing is spread across entire generations: the Children "say today's adults have gained both previously unimaginable power to harm tomorrow's adults, and the ability to control that harm.

The applicants seek the aid of the Court to impose a correlative responsibility to protect them from what they say is a serious threat of irreversible future harm” (*Sharma 1*, 2021, para. [14]). But the duty of the generalised “adult” coalesces into a single person, the Minister, and a single decision. The Minister becomes the biblical scapegoat for generations of people benefiting from coal extraction, including the Children themselves. As Carmichael notes, the issue is “not the standard one for a lawgiver of an individual’s wrongdoing and its appropriate punishment. It is the decidedly complex matter of wrongdoing in general, not just an individual’s but an entire group’s” (Carmichael, 2000, p. 172).

“[N]aming, blaming, and claiming” converts a disaster from an event for which we are all responsible to one for which an individual or an authority can be blamed. The disaster becomes an abnormality caused by a failure rather than an event that the community can take responsibility for. (Eburn, 2008, p. 12)

In *Sharma 1* the brutal realities of the future world were depicted as “harsher, far more extreme and devastatingly brutal when angry” and the Children’s “quality of life, opportunities to partake in nature’s treasures, the capacity to grow and prosper – all will be greatly diminished” (*Sharma 1*, 2021, para. [293]). The judgment adumbrates trauma, ill-health and lives truncated, but not from the actions of nature, but “by the inaction of this generation of adults” (*Sharma 1*, 2021, para. [293]). “This generation” of adults, through inaction, and the “impugned conduct of the Minister” were the sources of the Children’s vulnerability. Whilst the contribution of the Minister to the devastation to come was acknowledged to be minute, the consequences were so grave as to ascribe duty.

In the case of climate change litigation utilising claims in negligence, the goal appears to be the ascription of blame rather than the aversion of the climate apocalypse, and moreover the person in whom the blame is reposed takes the role of the sin-eater, effectively but problematically absolving all others from blame and the obligation to take action. Members of the Court in the judgment on appeal in *Sharma 2* addressed the disproportionality between the contribution to the Children’s harm and the projected duty by returning to the “core concern” (*Sharma 2*, 2022, para. [213]) of the law of negligence, particularly given the “unorthodox” (*Sharma 2*, 2022, para. [213]) nature of the proceeding which “involves the imposition of a duty of care in the context (on the uncontested evidence) of a potential global catastrophe for the world and all humanity that has been incrementally generated, and contributed to, by generations past and present throughout

the world” (*Sharma 2*, 2022, para. [213]). Reorienting the narrative around the rational approach of conventional legal reasoning (focussing on “the constitutional system of government in a federation, the broader legal system, the statutory context, and the contours of the law of negligence”) (*Sharma 2*, 2022, para. [213]), the Court held that no duty was owed. Chief Justice Allsop noted that “[n]otwithstanding the primary judge’s statement [...] that the posited duty of care will not and cannot address climate change, that is exactly what it does do” (*Sharma 2*, 2022, para. [219]). The Minister would, according to the original judgment, be obliged to take steps to address a matter wholly outside legislative power or practical capacity. The capacity of the Minister to control the harm was “non-existent” – the relationship was “indirect and mediated by the intervening conduct of countless others around the world” (*Sharma 2*, 2022, para. [336]).

Creating New Eschatological Narratives

As the discipline of law joins the set of narrative contributions to the climate change debate, the use of eschatological referents in legal argument signals a challenge to law’s orthodox rationality. Whilst the use of scientific evidence in tracing climate change and its impacts occurs in legal cases, there is also an ascription of moral blame for the psychological harm caused by the expectation of catastrophic consequences of climate change. Legal argument thus joins some other eschatological narratives in anticipating end times and pre-empting judgment. A similar shift can be seen in the medical profession; a Canadian doctor was recently reported to be the first person to diagnose a patient with “climate change” after treating a woman in her 70s with breathing issues due to a heatwave (Limb, 2021).

Represented in the mythological Cronus, the apocalyptic narrative anticipated unredeemed fault, rather than the future orientation of Christian eschatology. In preparing an argument suitable for litigation, however, the parties have to reframe it in legal terms, and where parties are pursuing novel claims this requires a carefully narrated link to authority. In common law, this means that the case has to be shown to be legally analogous to an already accepted cause of action. Thus, Wheelahan J in *Sharma 2* noted that “the common law generally develops by increments, where the legal question whether a duty of care is to be recognised is answered by using the common law technique which looks to precedent, which reasons analogically, and by reference to principles and policy underlying earlier decisions” (*Sharma 2*, 2022, para. [783]). By choosing to bring an action in the tort

of negligence, the applicants faced a serious legal impediment in that the tort of negligence is not complete until harm occurs. Damage is the gravamen of the action and “negligence in the air will not do” (*Haynes v Harwood*, 1935, p. 152). Neither the risk of harm nor the anticipation of harm is sufficient to complete the cause of action. Thus, the applicants would have to prove that specified and compensable damage has been caused by the defendant’s wrongful action.

Without more, a risk of developing a compensable personal injury cannot sustain a cause of action in negligence for damages for personal injury. It is only when and if the risk eventuates that compensable damage is suffered and, therefore, it is only then that the cause of action in negligence accrues. (*Alcan Gove v Zabic*, 2015, para. [38])

Sharma 1 was litigated solely on the basis of duty of care, so the applicants were not required to argue and to provide evidence that harm was suffered. However, a legal argument that a duty of care exists requires that the duty be defined by reference to harm – thus, the applicant has to show that the defendant owed a duty of care not to cause compensable harm. A novel duty requires that it be linked to a form of harm – for instance, the defendant has a duty to the applicant to take reasonable steps to prevent physical injury, property damage, or economic loss. In this case, the Children were asserting that the approval of additional type of harm, as yet unknown to law, in the form of mental harm caused by solastalgia. The harm is the *anticipation* of harm to come – a grief for an alternative life.

His Honour summarised the effect of the applicant’s argument to be that the type of harm that the Minister should foresee would be “mental or physical injury, including ill health or death, as well as damage to property and economic loss” (*Sharma 1*, 2021, para. [92]). His Honour found that the applicants were not able to demonstrate a risk of harm of every type “either directly or as members of a clearly identifiable sub-class” (*Sharma 1*, 2021, para. [204]) but did find that they were exposed to a real risk of death or personal injury from heatwaves induced by climate change (*Sharma 1*, 2021, para. [225]), bushfires (*Sharma 1*, 2021, para. [235]) and other climatic events such as inland and coastal flooding and cyclones (*Sharma 1*, 2021, para. [236]). The evidence was insufficient to demonstrate reasonable foreseeability of risk of harm to mental health caused by increased conflict, declines in agricultural productivity and rural incomes, and mental harm as a result of climate change-induced drought would apply only to some applicants, not all as a class.

In Particulars the applicants also cited the foreseeability of damage in the form of “mental harm caused by solastalgia, and the experience and anticipation of” (*Sharma 1*, 2021, para. [201]) the other climate change effects. Although His Honour was not convinced of the argument that the Minister owed a duty of care to the Children as a class to avoid recognised psychiatric illness of the type suggested by the term solastalgia, it is characteristic of the development of common law that strategic litigation is focussed well beyond the immediate case (Fischer-Lescano, 2021). The use of tort law to address environmental issues forces the law to address the “lie of apolitical law on its own” (Fischer-Lescano, 2021, p. 303). The purpose of introducing novel forms of harm is precisely to explode the idea that law is fixed and determinate, and create a tow-line by which future arguments may be moved into position. Presumably it is a call to the law not only to acknowledge the fiction that law is neutral and impartial, but to actually take sides in favour of “liberal human rights” (Fischer-Lescano, 2021, p. 309). The ambitions of the *Sharma 1* action, although unsuccessful, were recognised by Beach J in the Appeal:

the primary judge planted the seed of a cause of action in finding the posited duty, but envisaging that the seed may not fulfil its Aristotelian potential of a fully formed tort for many decades, if at all. This was a bold step to take given that trial judges normally only assess, admire or indeed chop down completed forms. (*Sharma 2*, 2022, para. [753])

In postulating a duty of care to prevent mental harm caused by solastalgia the activist narrative, if effected, would open broad-ranging potential legal redress against anything from the removal of a tree to urbanisation. The laments of hill shepherds displaced by land enclosure and country lasses moving to the city for employment would finally find their consolation in an implicit caveat to the benefits of modernity.

Fortitude and Doctrines of Despair

Solastalgia is a relatively recent area of study, concerned with “the distress caused by the transformation and degradation of one’s home environment” (Galway et al., 2019, p. 1). Louv argues that “if climate change occurs at the rate that some scientists believe it will, and if human beings continue to crowd into de-natured cities, then solastalgia will contribute to a quickening spiral of mental illness” (Louv, 2012). Solastalgia is not the only conceptualisation of mental harm caused by climate change;

ecological grief and eco-anxiety are also cited (Galway et al., 2019, p. 2) along with topophilia and eritalgia. The term “solastalgia” has been used in appeals against planning decisions (*Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited*, 2013; *Gloucester Resources Limited v Minister for Planning*, 2019; *Nerringillah Community Association Inc v Laundry Number Pty Ltd*, 2018) which concentrate on the “psychoterratic (earth-related) relationships” (*Gloucester Resources Limited v Minister for Planning*, 2019, para. [315]) people have with their immediate environment but otherwise has not found purchase in the common law until *Sharma 1*.

Where litigation is brought by young people the use of these narratives signals the troubling loss of hope for the future, even in the event that their arguments are successful. “[T]he choice for the activist seems to be how – with what politics, ethics, belief – one is to live in the time of the end, a choice that calls for a certain amount of utopian imagination alongside the rather depressing visions generated by the scenarios of climate breakdown” (Skrimshire, 2019, p. 7). Ray (2020) itemises instances of climate anxiety, even “climate suicide”, resulting from the elevated emotions generated in the constant reminders of apocalyptic climate change. The “climate generation” (Ray, 2020) risks a suit of “psychoterratica” (Albrecht et al., 2007). Knowledge contributing to such overwhelming despair that children suffer diagnosable mental illness even in the anticipation of future harm, results in reification, an interruption to normal, healthy psychosocial development. There has been no judicial consideration of the causal nexus between an impugned government decision and an applicant’s solastalgia, so the issue is purely theoretical, but in determining causation the applicant’s own responses to a breakdown in psychoterratic relationships must be considered. In *Sharma* the postulated damage to the Children would occur towards the end of this (the 21st) century – hence the nomination of children as plaintiffs, since “only today’s children would live to experience that harm” (*Sharma 1*, 2021, para. [12]). Absenting actual damage, however, a legal action in negligence is incomplete, as noted on appeal:

the duty is sought to be imposed before damage is suffered and before causal connection to damage (as distinct from risk) even exists. Such disconnection is both temporal and geographic. This is most unusual for the law of torts. The respondents might say that to wait for the damage is to wait for the catastrophe. Yet that response would only highlight what might be seen as the nature of the present political imperative or duty to act as opposed to the imposition of a duty at common law which cannot crystallise into a cause of action until well into the future, possibly

not within the lifetime of the putative tortfeasor. To disaggregate the duty from causation and damage is to remove duty from the essential nature or very essence of the cause of action: damage, of which it is a necessary part; and to found it not on damage, but on contribution to risk amongst contributions of countless other unidentified actors across the world and across time. (*Sharma 2*, 2022, para. [231])

A pre-emptive action to address the effects of climate change “decades before one knows whether there will be a cause of action” (*Sharma 2*, 2022, para. [298]) yields difficulties for the plaintiff, who must prove the elements of the action; and not only in establishing the existence of actual damage. The plaintiff also must establish that the impugned actions caused the damage. The implacable rationality of legal categories sits uneasily with the sense of “anticipatory grief” (Spark, 2016, p. 27) and the existential despair experienced by children (as well, naturally, as adults).

The interaction between the defendant’s actions and the applicant’s reaction parallels a phenomenon in traditional tort law, particularly in litigation involving negligent infliction of mental harm. There is an acknowledged psychological barrier to recovery in a situation in which recovery would result in a reduction in a damages award. In claims for psychological harm, such as the anticipation of the catastrophic effects of climate change, the psychological effects of continuing litigation in which the litigant remains pointedly vulnerable and continually grief-stricken by environmental harm could include a complex and involuntary malingering. The “pre-traumatic stress disorder” suggested by solastalgia complicates the existing psychological literature surrounding damages for mental harm (Young & Drogin, 2014). The risk of protracted proceedings in negligence, depending on their success on continuing and compensable harm to the applicant, not only creates issues of proof in mental health cases but also can create the conditions for real psychological harm to the applicant. The reality of tort litigation does not encourage the applicant’s recovery because compensation is based on the damage caused by the breach (Eburn, 2008).

Conclusion

The legal narrative as an eschatological narrative, therefore, both presumes despair and strategically positions itself to overcome the catastrophe. As an eschatological narrative it evokes both the Death and Resurrection characteristic of Christian eschatological views. The frame of judgment on the chosen sources of environmental devastation suggests that once wrongdoers are punished or removed the environment will be renewed.

In the Theogeny Zeus survives by the strategy of his mother Gaia and lives to overthrow his father (Morgan, 1990), and long after the defeat of the Titan Cronus he was made King of the home of the blessed dead. Zeus' ascension signals the thesis of ecological self-regulation. If we can stretch the legal analogy a little more, it might also signal the subjugation of current environmental trends to the new generation of eco-activists. If we consider the matter from an eschatological viewpoint, our hope is not linked to this world. Nevertheless, despite the use of narratives of despair, climate change litigation is fundamentally an act of hope. Conversely, Zeus' brother Prometheus, the "forethinker" and giver of fire and the sciences to mortals, is punished by Zeus, bound to a mountain for eternity as an eagle devours his liver. Jordaens' *Prometheus Bound* (1640) depicts in oil the agony and rage of constant restraint and suffering. Is suffering the inevitable price of human advancement, or an act of vengeful hubris?

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Spory sądowe dotyczące zmian klimatycznych: bezbronne dzieci i obowiązki opieki

W artykule rozważane jest orzecznictwo odnoszące się do zmian klimatu w kontekście narracji eschatologicznych możliwej katastrofy ekologicznej. Skoncentrowano się w szczególności na koncepcjach winy, krzywdy i odpowiedzialności, które w analizowanych narracjach są przywoływane jako powód do oburzenia na wybryki współczesnego kapitalizmu, przy jednoczesnym wykorzystaniu obrazu dziecka jako niewinnego uczestnika nadchodzącej apokalipsy. Przeanalizowano też narrację skarżących w australijskiej sprawie sądowej *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560 (*Sharma 1*), wedle której „niewyobrażalna wcześniej moc” (*previously unimaginable power*) powodowania potencjalnego „kataklizmu krzywd” (*cataclysmal harm*) wobec „bezbronnych dzieci” (*Vulnerable Children*) miała stworzyć obowiązek opieki nad nimi. Skarżący wygrali sprawę w pierwszej instancji, ale w apelacji (*Minister for the Environment v Sharma* [2022] FCAFC 35 (*Sharma 2*)) uchylono tę decyzję.

Autorka przyjmuje podejście interdyscyplinarne, czerpie z filozofii, psychologii i teologii, a także prawa; w artykule skupia się na obecności tradycji judeochrześcijańskiej i analizuje ideę „winy” i czynu zaniedbania oraz techniki stosowane do wspierania moralnych konotacji winy w narracji sądowej. W szczególności koncentruje się na obecnej w chrześcijańskiej eschatologii teologii nadziei, reakcjach na antycypację narracji o katastrofalnych zmianach klimatu oraz na koncepcji winy.

Rozważa psychologiczne wymiary „nadziei” i „rozpaczy” jako kategorii wywyższonych w teologicznych podejściach do apokalipsy oraz reifikację doktryn rozpaczy w udowadnianiu szkód w prawie zaniedbania.

Słowa kluczowe: zmiana klimatu, wina, filozofia prawa.

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