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ARTICLE

Recipe for Success?: Lessons for Strategic Climate Litigation from the *Sharma*, *Neubauer*, and *Shell* Cases

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Abstract
The urgency of the global climate problem has prompted an increasing turn to the courts to accelerate action. While still a relatively new phenomenon, "strategic" climate cases have been on the rise since 2015. Litigants in these cases aim to produce ambitious and systemic outcomes. However, with both time and resources limited, how might we best discern which cases have the greatest prospects of achieving cut through in the policy and public debate, and accelerating climate action? This Article contributes to developing literature evaluating the "recipe for success" in strategic climate claims. It provides a comparative analysis of three recent, high-profile wins in climate cases from Australia—*Sharma*—, Germany—*Neubauer*—, and the Netherlands—*Shell*—, examining their commonalities to give insight into the ingredients for successful strategic climate litigation. Our analysis shows how the three cases combine careful, strategic planning, with legal imagination and innovation to generate outcomes that heighten their capacity for broader impact. Evaluating the success of these types of prominent climate cases provides important guidance for future case design.

Keywords: Climate change litigation; impact; strategic litigation; courts

A. Introduction

With the urgency of the climate problem growing and the prospect of limiting global temperature rise to 1.5 degrees Celsius slipping away,[1] there is an increasing turn to the courts to accelerate action. "Strategic" climate cases aiming to bring about such change have been on the rise, especially since 2015, and now span multiple jurisdictions and lawsuits against both governments and corporations.[2] Litigants in these cases aim to produce ambitious and systemic outcomes, such as advancing climate policy, raising public awareness, and transforming government or corporate behavior.[3] While, as put by District Judge Staton in *Juliana v. United States*, "[n]o case can singlehandedly prevent the catastrophic effects of climate change predicted by the government and scientists,"[4] there is nonetheless growing interest among those bringing, funding, and analyzing strategic climate litigation in which cases have the greatest prospects of achieving cut through in the policy and public debate, and accelerating climate action.[5]

[1]Climate Change 2021: The Physical Science Basis, Intergovernmental Panel on Climate Change, 17 (2021).
[2]Joana Setzer & Catherine Higham, Global Trends in Climate Change Litigation: 2021 Snapshot 13 (2021).
[3]*Id*. at 12.
[4]947 F.3d 1159, 1175 (9th Cir. 2020).
[5]Jacqueline Peel & Hari M. Osofsky, *Climate Change Litigation*, 16 Annu. Rev. L. Soc. Sci. 21, 31 (2020).

Strategic climate litigation is itself a relatively recent phenomenon, and scholarship on its potential regulatory contribution is still in its infancy.[6] Early empirical analysis of climate litigation, focusing on the jurisprudence in the United States—which remains the most prolific jurisdiction for climate change lawsuits[7]—saw little evidence of systemic change. For instance, as Dave Markell and J.B. Ruhl—in their seminal 2012 study—concluded, "[t]he story of climate change in the courts has not been one of forging a new jurisprudence, but rather one of operating under business as usual."[8] Subsequent analysis of climate litigation in the United States and Australia—the country with the second highest number of climate cases[9]—has elucidated different pathways to impact, with climate litigation often producing its most significant impacts through indirect effects on government, corporate and public behaviors.[10] More recent literature has begun to consider the types of cases or legal arguments that achieve high salience in the media and public debate, and generate the most potential for impact beyond the specific circumstances of an individual case.[11] This Article seeks to contribute to this developing literature on the "recipe for success" in strategic climate claims.

To this end, we provide a comparative analysis of three recent, high-profile "wins" in strategic climate cases, examining their commonalities to give insight into the ingredients of a potential "recipe" for successful strategic climate litigation. In the high-profile *Sharma by her litigation representative Sister Marie Brigid Arthur v. Minister for the Environment* ("*Sharma*") case,[12] a group of Australian children successfully argued, at first instance, that the Federal Environment Minister owes a novel duty of care in the tort of negligence when exercising her approvals power for a coal mine project. We compare *Sharma* with two prominent decisions in Europe: *Neubauer v. Germany* ("*Neubauer*"),[13] concerning four constitutional human rights complaints filed against the German Federal government, and *Milieudefensie et. al v. Royal Dutch Shell PLC* ("*Shell*"),[14] arguing that Royal Dutch Shell (RDS) has a responsibility pursuant to the Dutch Civil Code, informed by human rights and soft law, to prevent dangerous climate change.

To facilitate comparison, we identify six common dimensions that characterize *Sharma*, *Neubauer*, and *Shell* and which, we argue, contribute to their propensity to generate systemic impact. These dimensions are: (1) Carefully selecting plaintiffs to communicate a strategic message; (2) engaging an experienced legal team with a track record of bringing other strategic climate legal interventions; (3) targeting defendants which are widely seen to be lagging in their climate action; (4) tying legal arguments closely to the latest climate science; (5) adopting innovative legal arguments, including those emphasizing duties of protection;[15] and (6) seeking remedies that extend beyond the situation of individual litigants and contribute to intended policy and regulatory impacts. Our analysis shows how these cases combine careful strategic planning, with legal imagination and innovation, to generate outcomes that meaningfully contribute to addressing the

[6]Setzer & Higham, *supra* note 2, at 13; Peel & Osofsky, *supra* note 5, at 32.

[7]*Climate Change Litigation Databases*, Sabin Center for Climate Change Law, http://climatecasechart.com/climate-change-litigation/about/ (last visited Aug. 30, 2021).

[8]David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?*, 64 Fla. L. Rev. 15, 85 (2012).

[9]Setzer & Higham, *supra* note 2, at 10.

[10]Jacqueline Peel & Hari M. Osofsky, Climate Change Litigation: Regulatory Pathways to Cleaner Energy 37–48 (2015).

[11]*See* Kim Bouwer & Joana Setzer, *Climate Litigation as Climate Activism: What Works?* Brit. Acad. 10–13 (2020), https://www.thebritishacademy.ac.uk/documents/2701/Climate-Litigation-as-Climate-Activism-What-Works_lnBlsWN.pdf.

[12][2021] FCA 560 (27 May 2021) (Austl.).

[13]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 2656/18, Mar. 24, 2021, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html.

[14]Rb. den Haag, 26 mei 2021, Prg. 2021 mnt HA ZA 19-379 (*Milieudefensie/Royal Dutch Shell PLC*), https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339 (Neth.).

[15]Jacqueline Peel, Hari Osofsky & Anita Foerster, *Shaping the 'Next Generation' of Climate Litigation in Australia*, 41 Melb. Univ. L. Rev. 793, 798 (2017).

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global climate problem. Whether these positive impacts will be sustained over the longer-term is harder to predict at this stage, and raises questions about what is meant by success in this context. However, these shared ingredients arguably heighten the capacity for strategic impact and provide guidance on the "recipe for success" for future climate litigation claims.

The remainder of the Article proceeds as follows: Section B elaborates the concept of strategic climate litigation, distinguishing this subset of climate cases from the broader body of climate jurisprudence; Section C turns to *Sharma*, *Neubauer* and *Shell*, analyzing six common elements of these cases; Section D discusses how these elements might provide indicators of "success" in the selection and pursuit of climate cases seeking strategic impact; Section E concludes.

B. Strategic Climate Litigation

Numerous studies have sought to map the growth in climate litigation, especially over the past ten years.[16] As of May 2021, there were over 1,800 ongoing or concluded cases around the world.[17] These cases represent a diverse range of claims, reflecting the lack of a singular body of "climate law."[18] Instead, climate cases have been brought under a collection of laws regulating public and private actors, as well as different aspects of the causes and consequences of climate change.[19] These include claims brought in tort, public trust, consumer law, corporations law, administrative law, constitutional law, and human rights law.[20]

However, not all climate change cases are "strategic." Strategic litigation—sometimes referred to as impact litigation—is consciously designed to produce ambitious and systemic impacts extending beyond an individual case.[21] Strategic climate cases are a small but growing subset of climate cases, as litigation becomes a tool more widely used to achieve regulatory ends.[22] These regulatory ends may be sought via direct and/or indirect pathways.[23] Direct impacts arise as a result of substantive legal or policy changes following an intervention, for instance, where the judgment clarifies or extends the operation of relevant laws to cover climate aspects.[24] Indirect impacts occur when the litigation raises public awareness of an issue or climate injustice, puts pressure on governments to change policy, or influences business culture in ways shaping subsequent behavioral change, which in turn contributes to climate change goals.[25]

While there is growing acceptance in the climate litigation literature and practice of the value of a strategic approach to bringing claims, as well as of efforts to learn from other areas with a history of impact litigation, such as human rights litigation,[26] guidance on how climate cases might best be selected and constructed to contribute to positive regulatory outcomes through direct and indirect impact pathways remains limited. This Article responds to this knowledge gap. It focuses on three recent climate cases, *Sharma*, *Neubauer,* and *Shell*, selected due to their strategic characteristics. These cases are "strategic" in two senses. First, all show evidence of careful planning of the

[16]*See* Setzer & Higham, *supra* note 2; Global Climate Litigation Report: 2020 Status Report, U.N. Env't Program, (2020); Climate Change Litigation in the Asia Pacific (Jolene Lin & Douglas A. Kysar eds., 2020).

[17]Setzer & Higham, *supra* note 2, at 5.

[18]Jacqueline Peel, *Climate Change Law: The Emergence of a New Legal Discipline,* 32(3) Melb. U. L. Rev. 922, 923 (2008).

[19]Brian J. Preston, *Legal Imagination and Climate Litigation*, Aust. Env't Rev. 1, 2 (2020).

[20]*See* Brian J. Preston, *Mapping Climate Change Litigation*, 92 Austl. L.J. 774 (2018).

[21]Ben Batros & Tessa Khan, *Thinking Strategically About Climate Litigation*, OpenGlobalRights (June 28, 2020), https://www.openglobalrights.org/thinking-strategically-about-climate-litigation/.

[22]Setzer & Higham, *supra* note 2, at 13; Jacqueline Peel & Hari M. Osofsky, *Litigation as a Climate Regulatory Tool, in* International Judicial Practice on the Environment 311, 311 (Christina Voigt ed., 2019).

[23]Peel & Osofsky, *supra* note 10, at 37–48.

[24]For example, *Bushfire Survivors for Climate Action Incorporated v. Environment Protection Authority* [2021] NSWLEC 92 (Austl.).

[25]For example, Torres Strait Islanders claim against the Australian Government: Our Islands, Our Home, https://ourislandsourhome.com.au/ (last visited Aug. 31, 2021).

[26]*See* Batros & Khan *supra* note 21.

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litigation to seek ends beyond the outcome in the individual case. This reflects a recognition that obtaining a judgment is not an end of itself. Rather, strategic litigation is understood to be part of a larger process for change, where the particular case is just one element of a broader plan oriented towards the ultimate aim of attaining lasting change.[27] Second, these climate cases demonstrate significant innovation and creativity. This legal imagination is "needed to see, and to see beyond, the traditional taxonomies of law and litigation" and achieve positive outcomes.[28]

We consider these cases in greater depth in the following Section, highlighting their planning and creative dimensions, to explore the elements that have contributed to their success and potential for broader impact.

C. Ingredients for Strategic Success in Climate Cases

Just as many other areas of climate action have progressed markedly in 2021,[29] the year has also seen several notable "successes" in strategic climate cases, including decisions in *Sharma*, *Neubauer,* and *Shell* handed down respectively by courts in Australia, Germany, and the Netherlands. These cases have achieved considerable salience in the global media,[30] a visibility that often portends the capacity for achieving broader social and policy change.[31] They have also been subject to extensive discussion in the literature and academic commentary despite their recency.[32] In this Section we do not rehearse the description and analysis of these cases that has been admirably covered in other articles. Instead, we identify six common dimensions characterizing *Sharma*, *Neubauer,* and *Shell*—despite their very different legal contexts—which point to the ingredients that make up a successful recipe for climate litigation with strategic impact. These are:

1. Carefully selecting plaintiffs to communicate a strategic message with the case.
2. Engaging an experienced legal team with a track record of bringing other strategic climate legal interventions.
3. Targeting defendants who are widely seen to be lagging in their climate action.
4. Tying legal arguments closely to the latest climate science.
5. Making innovative legal arguments, including those emphasizing duties of protection.
6. Seeking remedies that extend beyond the situation of individual litigants and contribute to intended policy and regulatory impacts.

I. Selecting Plaintiffs with a Compelling Story

In *Sharma, Neubauer*, and *Shell,* there is evidence of the plaintiffs being chosen, or coming together in coalitions, with a view to furthering the broader strategic narrative pursued in the litigation. In particular, the selection or combination of plaintiffs aided telling a compelling story about the interests of people from across current and future generations in accelerating climate action.

[27] *Id.* at 5.

[28] Preston, *supra* note 20, at 2.

[29] *See* Richard Black, Kate Cullen, Byron Fay, Thomas Hale, John Lang, Saba Mahmood, & Steve Smith, *Taking Stock: A Global Assessment of Net Zero Targets*, THE ENERGY & CLIMATE INTEL. UNIT, 9–10 (2021) https://ca1-eci.edcdn.com/reports/ECIU-Oxford_Taking_Stock.pdf?v=1616461369, (noting the increase in zero net targets).

[30] *See* Ortrun Sadik, *For my right to the future*, GREENPEACE (JAN. 15 2021) https://www.greenpeace.de/themen/klimakrise/klimaschutz/fuer-mein-recht-auf-zukunft; *Sharma v Minister for Environment*, EQUITY GENERATION LAWYERS, https://equitygenerationlawyers.com/cases/sharma-v-minister-for-environment/; *Press kit Climate Case against Shell,* MILIEUDEFENSIE, https://en.milieudefensie.nl/news/press-kit-climate-case-against-shell (detailing communications campaigns of the litigants).

[31] For example, John Thompson, *The New Visibility*, 22(6) THEORY, CULTURE & SOC'Y 31 (2005).

[32] For example, Jacqueline Peel & Rebekkah Markey-Towler, *A Duty to Care*, 00 J. ENVT'L L. 1 (2021); Benoit Mayer, *Milieudefensie v Shell: Do oil corporations hold a duty to mitigate climate change?*, EJIL:TALK! (June 3, 2021), https://www.ejiltalk.org/milieudefensie-v-shell-do-oil-corporations-hold-a-duty-to-mitigate-climate-change/; Jaap Spier, *A Ground-Breaking Judgment in Germany*, SABIN CENTER CLIMATE LAW BLOG (May 10, 2021) http://blogs.law.columbia.edu/climatechange/2021/05/10/guest-commentary-a-ground-breaking-judgment-in-germany/

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In *Neubauer*, the German Constitutional Court brought together claims filed in four proceedings. The first complaint involved high-profile individuals, including former politician Josef Göppel, actor Hannes Jaenicke, and energy expert Professor Volker Quaschning, as well as environmental associations—German Solar Energy Promotion Association and Friends of the Earth Germany.[33] While the German court held that only natural persons were entitled to bring claims under the Basic Law,[34] in other jurisdictions, standing may not represent as significant a barrier for non-natural persons, as in *Shell*. *Shell* was filed as a public interest class action by multiple non-governmental organizations (NGOs), including Milieudefensie—also representing 17,379 individual claimants.[35] Specific provisions in the Dutch Civil Code allow an NGO to institute legal proceedings for the protection of the "similar interests" of a class of plaintiffs where the interest aligns with the organizations' objectives.[36] Almost all the NGOs involved[37] had objectives aligned with the "similar interests"—the interests of current and future generations of Dutch residents and inhabitants of the Wadden Sea area.[38] The breadth of plaintiffs involved in both cases showcased the wide-ranging concern, across different sectors of German and Dutch society, for more ambitious climate action.

Given the truly global nature of the climate problem, a growing feature of strategic climate cases is to include plaintiffs from beyond the particular jurisdiction where the case is filed, including from Global South jurisdictions—countries often most vulnerable to climate impacts.[39] Indeed, some of the plaintiffs in *Neubauer* were from Bangladesh and Nepal.[40] Interestingly, the court did not preclude their claims from the outset,[41] agreeing it was conceivable that fundamental rights in the Basic Law also obliged Germany to protect people in other countries. However, the court ultimately put this issue to one side[42] and focused on duties of protection owed to German peoples.

Youth plaintiffs are also emerging as a key group leading strategic climate cases, with *Neubauer* and *Sharma* being notable examples of this trend. The growth of youth-led litigation acknowledges that current children and future generations will bear the disproportionate burden of climate change.[43] Media surrounding these cases attests to the compelling stories of climate harms and inter-generational injustice that young people bring to the courtroom.[44] In particular, Luisa Neubauer and Linus Steinmetz, prominent activists in Fridays for Future, were amongst the youth

[33]*Groundbreaking climate ruling by the Federal Constitutional Court*, FRIENDS OF THE EARTH GERMANY (Apr. 29, 2021), https://www.bund.net/service/presse/pressemitteilungen/detail/news/bahnbrechendes-klima-urteil-des-bundesverfassungsgerichts/.

[34]*Neubauer*, BVERFG, 1 BvR 2656/18 at 136.

[35]*Shell*, C/09/571932/HA ZA 19-379 at 2.1.8.

[36]Otto Spijkers, *Public interest Litigation Before Domestic Courts in the Netherlands on the Basis of International Law: Article 3:305a Dutch Civil Code*, EJIL:TALK! (Mar. 6, 2020) https://www.ejiltalk.org/public-interest-litigation-before-domestic-courts-in-the-netherlands-on-the-basis-of-international-law-article-3305a-dutch-civil-code/ (explaining Article 305(a) of Book 3 of the Dutch Civil Code which allows anyone to establish a foundation mandated to protect a public interest and then to institute legal proceedings).

[37]*Id.* at 4.2.5 (all of the NGOs involved except ActionAid whose mandate focused on developing countries).

[38]*Id. at* 4.2.3–4.2.4 (distinguishing that the court was not considering, more broadly, the interests of current and future generations globally).

[39]Jacqueline Peel & Jolene Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113(4) AM. SOC'Y INT'L L. 679, 682 (2019).

[40]*Verfassungbeschwerde gegen das Bundes-Klimaschutzgesetz,* DUETSCHE UMWELTHILFE https://www.duh.de/vbklima2020/ detailing the claims of Yi Yi Pure and others). Also one of the NGO claimants in *Shell*, Action Aid, had a mandate focused on developing countries.

[41]*Neubauer,* BVerfG, 1 BvR 2656/18 at 90 and 174.

[42]*Id.* at 173–181.

[43]*Sharma*, [2021] FCA 560, at 293 (Bromberg J recognized the same issue).

[44]For example https://www.ourchildrenstrust.org/written-media-coverage (listing many articles exemplifying the intense media focus on *Juliana*).

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participating in *Neubauer*.[45] The *Sharma* case focused on a group of eight Australian children, representing their own interests and the interests of children ordinarily living in Australia.[46]

While many past climate claims have involved "David versus Goliath" struggles between poorly resourced environmental groups and powerful defendants,[47] what differentiates strategic climate lawsuits like these is the evident effort to curate a plaintiff group or coalition speaking to the widespread societal interest in accelerating climate action, as well as ensuring justice for the most vulnerable—such as peoples in developing countries, youth or future generations.[48] Creation of a narrative to drive public support is a well-appreciated component of environmental campaigns,[49] and its cultivation as part of recent climate litigation points to growing understanding among those bringing these cases of how creating compelling stories may also increase the likelihood of achieving broader impacts beyond the courtroom.[50]

II. Engaging an Experienced Legal Team

The *Sharma*, *Neubauer,* and *Shell* lawsuits were backed by experts in climate law with a track record of bringing multiple legal interventions designed to have systemic impact. Such expertise and experience provide a strong foundation for realizing broader outcomes from the litigation, extending beyond the individual circumstances of particular cases.

In *Neubauer*, for example, legal advocate Roda Verheyen has been part of other strategic climate cases, such as the high-profile case of a Peruvian homeowner, Lluiya, suing RWE for compensation for climate harms.[51] Lawyers also included Remo Klinger, who has filed further complaints against the States of Bavaria, North Rhine-Westphalia, and Brandenburg,[52] and Felix Ekardt, founder of the Research Unit Sustainability and Climate Policy and Professor at Rostock University.[53]

Similarly, the *Sharma* children were represented by a team of experienced climate lawyers at the forefront of innovative "next generation" cases in Australia.[54] The law firm supporting the case, Equity Generation Lawyers, and its principal solicitor, David Barnden, were the brains behind Mr. Mark McVeigh's groundbreaking claim against his superannuation—pension—fund, arguing that the fund breached its obligations under the Corporations Act 2001 (Cth) and Superannuation Industry (Supervision) Act 1993 (Cth) by failing to manage climate change risks.[55] The firm is likewise representing Ms. Katta O'Donnell in her novel claim against the Australian Government for its (mis)management of climate change risks to sovereign bonds.[56]

[45]*See* Luisa Neuber (@LuisaNeuber), Twitter (Oct. 14, 2021 5:00 PM) https://twitter.com/Luisamneubauer; Linus Steinmetz (@Linus_steinmetz), Twitter (Oct. 14, 2021 5:00 PM) https://twitter.com/linus_steinmetz;.

[46]*Sharma*, [2021] FCA 560 at 91-92.

[47]*See* Chris McGrath, *Flying Foxes, Dams and Whales: Using Federal Environmental Laws in the Public Interest*, 25 Envt'l Plan. L. J. 324, 341–342 (2008) (discussing the *Flying Fox* Case).

[48]*See* also in the Indigenous climate justice movement: *Protect Country, Stock Origin Fracking the NT*, Seed Mob, https://nt.seedmob.org.au/; Our Islands, Our Home, https://ourislandsourhome.com.au/.

[49]Amrekha Sharma, *Storytelling in the Work of 'Justice'*, Greenpeace (Dec. 12, 2019), https://storytelling.greenpeace.org/story/1699/storytelling-and-the-work-of-justice-what-do-they-have-to-do-with-each-other/.

[50]*See supra* note 30 (showing communications and campaigns in *Neubauer, Sharma,* and *Shell*).

[51]*Luciana Lluiya/RWE AG*, Rechtsanwälte Günther, https://www.rae-guenther.de/klimaschutz.

[52]Guelen & Klinger, https://www.geulenklinger.com/blog/portraet-remo-klinger/.

[53]Felix Ekardt, *Climate Revolution with Weaknesses*, Verfassungsblog (May 8, 2021) https://verfassungsblog.de/climate-revolution-with-weaknesses/.

[54]Peel, Osofsky & Foerster, *supra* note 15, at 816.

[55]*Mark McVeigh v Retail Employees Superannuation Pty Ltd*, Equity Generation Lawyers, https://equitygenerationlawyers.com/cases/mcveigh-v-rest/.

[56]*O'Donnell v Commonwealth and Ors*, Equity Generation Lawyers, https://equitygenerationlawyers.com/cases/odonnell-v-commonwealth/.

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The children's barrister, Noel Hutley SC, is an eminent Australian advocate well-known for his leading legal opinions on directors' duties and climate change.[57]

The *Shell* case also follows this trend, involving experienced and strategically focused legal advocate Roger Cox, representing the plaintiffs. Roger Cox authored the influential book, *Revolution Justified*, calling for the judiciary to oblige national governments to act on climate change.[58] In an effort to actuate this theory, Cox instituted proceedings on behalf of the NGO Urgenda and Dutch citizens against the Dutch Government. Through successful decisions in 2015, 2018, and 2019, Dutch courts agreed that the Dutch Government was obliged to reduce the country's greenhouse gas ("GHG") emissions, decisions seen as watershed moments in strategic climate litigation.[59]

III. Targeting Laggards

As any good storyteller knows, the other half of a compelling narrative, besides a sympathetic protagonist, is a convincing villain. In the context of climate change though, with many contributors to a complex problem, responsibility is generally seen as shared.[60] Nonetheless, in line with the principle of common but differentiated responsibility, the international climate regime recognizes that "developed country Parties should take the lead in combating climate change and the adverse effects thereof."[61] This general directive is increasingly supplemented by NGOs and international organizations' reports detailing the progress of different developed countries in taking action.[62] There is also emerging literature on parties' "fair share" of global GHG emissions, providing guidance on the adequacy of "Nationally Determined Contributions" ("NDCs") submitted under the Paris Agreement.[63] In the corporate sphere, there is likewise a growing number of studies tracking the climate change contribution of emissions from the largest corporate polluters, dubbed "carbon majors."[64] These principles and studies provide a basis for identifying governments and corporate actors with greatest responsibility for climate harms, prime targets for litigation.

This targeting of "laggards" in climate litigation is evident in *Sharma*, *Neubauer,* and *Shell*, and contributes to strategic framing of their claims as ones seeking "climate justice."[65] The child plaintiffs in *Sharma*, for instance, brought their claims against the Australian Federal Government, and also targeted a coal mining company.[66] In the case, Vickery Coal Pty Ltd had sought to expand and extend its existing development consent for a proposed coal mine, requiring approval by Australia's Federal Environment Minister under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) ("EPBC Act").[67] The proposed extension would result in an increase of one-hundred million tons (Mt) of CO_2 in scope three emissions over the course of the mine's

[57]Noel Hutley & Sebastian Hartford Davis, *Climate Change and Directors' Duties: Further Supplementary Memorandum of Opinion*, Centre for Policy Development (April 23, 2021) https://cpd.org.au/wp-content/uploads/2021/04/Further-Supplementary-Opinion-2021-3.pdf.

[58]Roger Cox, Revolution Justified, (2012) https://www.revolutionjustified.org/roger-cox-author-of-revolution-justified.

[59]HR 20 December 2019, NJ 2019, 19/00135 (*Urgenda/Netherlands*) (Neth.). *Shell* sought to extend the line of reasoning in *Urgenda/Netherlands* from a government to a company.

[60]Daniel Cole, *The Problem of Shared Irresponsibility in International Climate Law, in* Distribution of Responsibilities in International Law 290, 291 (André Nollkaemper & Dov Jacobs, eds., 2015).

[61]United Nations Framework Convention on Climate Change, art. 3(1), May 9, 1992, 1771 U.N.T.S. 107.

[62]Climate Action Tracker, https://climateactiontracker.org/; Climate Change Performance Index, https://ccpi.org/; United Nations Environment Programme, Emissions Gap Report 2020 (2020).

[63]*See* Lavanya Rajamani et. al., *National 'fair shares' in reducing greenhouse gas emissions within the principled framework of international environmental law*, 21(8) Clim. Pol'y 983 (2021).

[64]*Carbon Majors,* Climate Accountability Institute, https://climateaccountability.org/carbonmajors.html.

[65]*See* International Bar Association, *Achieving Justice and Human Rights in an Era of Climate Disruption* 2-3 (2014) https://www.ibanet.org/MediaHandler?id=0f8cee12-ee56-4452-bf43-cfcab196cc04 (discussing the many definitions of climate justice).

[66]*Sharma*, [2021] FCA 560, at 5–6.

[67]*Id.* at 6–8.

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approximately thirty-year lifespan. While this emissions profile is comparatively small,[68] it should be situated against the broader Australian policy context and the national government's lackluster record of climate action.[69] Australia has an inadequate NDC to reduce GHG emissions by twenty-six to twenty-eight percent below 2005 levels by 2030,[70] continued to push the country's reliance on coal,[71] and is a large per capita emitter.[72] To compel better climate action in Australia, the children sought to challenge the Minister's decision-making authority, arguing she has a duty of care to avoid causing harm to Australian children when approving (or approving with conditions) the coal mine.[73]

Likewise, the *Neubauer* plaintiffs brought their claims against the German Federal Government, specifically challenging provisions of the Climate Change Act.[74] Germany remains the largest carbon emitter in the European Union and the fourth largest CO_2 emitter in history.[75] Per capita emissions are almost twice as high as the global average.[76] Moreover, at the time the complaints were filed, Germany's NDC to reduce GHG emissions by fifty-five percent by 2030 had been assessed as "highly insufficient" to limit global temperature rise.[77] Against this backdrop, the plaintiffs argued that the government's emissions trajectory set out in the Climate Change Act was inadequate to stay within the remaining carbon budget consistent with a 1.5 degrees Celsius temperature limit.[78]

While *Neubauer* and *Sharma* mainly sought greater climate action at the national government level, the plaintiffs in *Shell* concentrated on holding a multinational corporation, RDS, responsible for its contribution to dangerous climate change. As the Dutch court recognized, the Shell group is a "major player on the worldwide market of fossil fuels."[79] Considering scope one, two, and three emissions collectively, the group's total CO_2 emissions exceed many countries, including the Netherlands.[80] Indeed, RDS is one of only twenty companies responsible for twenty-five percent of all fossil fuel and cement emissions worldwide since 1965.[81] Historically, claimants seeking to hold private actors to account for their contribution have found it extremely difficult to overcome procedural and substantive thresholds to their claims.[82] The plaintiffs in *Shell* nevertheless argued RDS' "hazardous and disastrous" corporate policy for the Shell group was "in no way is consistent with the global climate target to prevent dangerous climate change."[83]

As well as contributing to the framing of claims as part of a broader climate justice narrative, targeting defendants whose actions are most lagging compared with their contribution to the climate problem adds to the cases' potential for broader, systemic impact.[84]

[68] *Id. Cf Carmichael Coal ("Adani") Mine Cases in Queensland Courts*, Env't L. Ausrtl. (last visited Oct. 14, 2021) http://envlaw.com.au/carmichael-coal-mine-case/ (discussing Adani Carmichael mine's expected 4.7 billion tons, 0.5 percent of the remaining carbon budget for one mine).

[69] *Australia*, Climate Change Performance Index (CCPI), https://ccpi.org/country/aus/ (last visited Aug. 23, 2021).

[70] Australian Government, Australia's Nationally Determined Contribution (2020), https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Australia%20First/Australia%20NDC%20recommunication%20FINAL.PDF.

[71] International Energy Agency, Coal 2020: Analysis and Forecast to 2025 1, 43 (2020) https://iea.blob.core.windows.net/assets/00abf3d2-4599-4353-977c-8f80e9085420/Coal_2020.pdf.

[72] *Per capita consumption-based CO_2 emissions, 2018*, Our World In Data, https://ourworldindata.org/grapher/consumption-co2-per-capita?country=~AUS (last visited Oct. 14 2021).

[73] *Sharma*, [2021] FCA 560, at 9.

[74] *Neubauer*, BVerfG, 1 BvR 2656/18 90 at 1.

[75] *Carbon dioxide emissions in Germany 1970-2020*, Statista, Jul. 22, 2021, https://www.statista.com/statistics/449701/co2-emissions-germany/.

[76] *Neubauer*, BVerfG, 1 BvR 2656/18 at 29.

[77] *Germany*, Climate Action Tracker, https://climateactiontracker.org/countries/germany/.

[78] *Neubauer*, BVerfG, 1 BvR 2656/18 at 1, 38.

[79] *Shell*, C/09/571932/HA ZA 19-379 at 4.4.5.

[80] *Id.*

[81] *Carbon Majors*, *supra* note 64.

[82] Geetanjali Ganguly, Joana Setzer & Veerle Heyvaert, *If at First You Don't Succeed: Suing Corporations for Climate Change*, 38(4) Oxford J. Legal Stud. 841, 844 (2018).

[83] *Shell*, C/09/571932/HA ZA 19-379 at 3.2

[84] *Infra* Pt D.

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IV. Tying Legal Arguments Closely to Climate Science

A notable feature of recent, high-profile climate litigation is the extent to which legal arguments are developed by plaintiffs in conjunction with the latest climate science, particularly the reports of the Intergovernmental Panel on Climate Change ("IPCC").[85] This strategy has helped elevate climate science—especially IPCC science—to the level of unchallenged "fact," while at the same time paving the way for transnational spread of accepted factual understandings of the climate problem through climate jurisprudence.[86] *Sharma*, *Neubauer,* and *Shell* exemplify this trend of relying strongly on the latest scientific evidence to substantiate successful arguments.

In *Neubauer,* the court accepted it as incontrovertible that the rapid rise in global temperatures is due to "anthropogenic emissions."[87] Relying on the IPCC's authoritative evidence, the court recognized that without additional measures, average global temperatures will likely rise by more than three degrees Celsius by 2100.[88] While a three degree Celsius world would have "drastic" consequences, the court accepted even lower temperature increases will have "serious negative consequences for individuals and societies."[89] Noting that human health is particularly vulnerable to climate change—a point emphasized in the IPCC's Working Group II reports[90]—the court cited evidence that "the number of heat waves could potentially rise by as much as five events per year in northern Germany and thirty events per year in southern Germany."[91] Other cited impacts, based on scientific evidence, included from droughts, heavy rainfall, floods, hurricanes, forest fires, and human displacement.[92]

A similarly dark climate future was laid out by the Australian court in *Sharma*. Like the German Constitutional Court, Bromberg J relied heavily on expert evidence from the IPCC and leading Australian climate scientist, Professor Will Steffen, which was presented by the plaintiffs and went unchallenged by the Australian government. This evidence focused on the likelihood and risks of two, three, or four degree Celsius future world scenarios for Australian children.[93] Forecasts of the future in these scenarios are dire,[94] with the likelihood of physical harm or death for the children being particularly important in finding a duty of care.[95] Bromberg J was especially affected by the statistic that "one million Australian Children are expected to suffer at least one heat-stress episode serious enough to require acute care in a hospital."[96]

Like *Neubauer* and *Sharma*, the Dutch court in *Shell* also referred to the authoritative scientific findings of the IPCC and others—including the Royal Netherlands Meteorological Institute—presented by the applicants, to articulate the impacts of climate change especially on Dutch residents and inhabitants of the Wadden region. Using this evidence, the court recognized that heat waves, drought, floods, ecosystem damage, threats to food production, and damage to health—via heat stress, increasing diseases, deteriorating air quality, and increasing UV exposure—are all expected to intensify in the future as temperatures increase.[97] Alarmingly, temperatures in the Netherlands

[85]The IPCC is the United Nations body for assessing science relating to climate change: https://www.ipcc.ch/.

[86]Geetanjali Ganguly, *Judicial Transnationalization*, *in* Research Handbook on Transnational Environmental Law 301 (Veerle Heyvaert & Leslie-Anne Duvic-Paoli eds., 2020).

[87]*Neubauer*, BVerfG, 1 BvR 2656/18 at 18.

[88]*Id.* at 19.

[89]*Id.* at 22.

[90]*Working Group II Impacts, Adaptation and Vulnerability,* Intergovernmental Panel on Climate Change, https://www.ipcc.ch/working-group/wg2/.

[91]*Neubauer*, BVerfG, 1 BvR 2656/18 at 24.

[92]*Id.* at 22–28.

[93]*Sharma*, [2021] FCA 560 at 30–31, 55–69, 90.

[94]*Id.* at 290.

[95]*Id.* at 247–57.

[96]*Id.* at 291.

[97]*Shell*, C/09/571932/HA ZA 19-379 at 2.3.7 and 2.3.9.

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had already risen "about twice as fast as the global average, with serious and irreversible consequences and risks for ... human rights."[98]

The scientific assessments of the IPCC and other leading climate science bodies point to the inevitable conclusion that urgent action is needed to limit the impact of these climate futures.[99] Guided by the presentation of such science, the courts in *Neubauer*, *Sharma,* and *Shell* all recognized the responsibility of various respondents to take action to prevent the materialization of harmful climate futures by reducing CO_2 emissions. In *Neubauer*, Germany's Climate Change Act had committed the German government to reducing emissions by fifty-five percent by 2030—compared to 1990 levels—GHG neutrality by 2050, and outlined steps to achieve these goals until 2030.[100] A "carbon budget" approach[101]—the level of GHG emissions that can be emitted while keeping to the goals of the Paris Agreement—was used by the court to assess whether provisions of the Climate Change Act violated the duties of protection owed under the Basic Law.

In Australia, previous attempts to compel the Federal Government to consider the climate change implications of coal projects under the EPBC Act have proved notoriously difficult.[102] However, the novel claims of the plaintiffs in negligence allowed the court to make important findings of fact on the science of climate change. On the basis of this scientific evidence, Bromberg J in *Sharma* accepted that the one-hundred Mt of CO_2 from the proposed coal mine extension could contribute to global average surface temperature rise and increase the risk of Australian children being exposed to harm, particularly if the "tipping point" four degree Celsius future world trajectory is engaged.[103] Despite the fact that the contribution of this one mine to average warming would be de minimis when considered in isolation, Bromberg J focused on the accumulation of CO_2 in the atmosphere, in light of the overall carbon budget, and the potential for even fractional increases to trigger "tipping cascades."[104] In the court's opinion, a reasonable person in the Minister's position would foresee the risk of harm from these emissions to Australian children inherent in approving the proposed coal mine.[105]

The urgency of responding to climate harms as substantiated by consensus scientific evidence was also recognized by the court in *Shell.* The Dutch court established that the need to tackle climate change requires "immediate attention" and that the remaining carbon budget to keep global temperature rise to 1.5 to two degrees Celsius is limited.[106] The sooner GHG emissions reductions started, the more time there would be available before the carbon budget ran out.[107] Echoing the court's finding in *Sharma* that even one "small" coal mine could contribute to temperature increase and cause harm, the Dutch court found that "every emission of CO_2 and other greenhouse gasses, anywhere in the world and caused in whatever manner," including those of RDS, contributes to the environmental damage and imminent environment damage in the Netherlands and Wadden region.[108]

[98] *Id.* at 4.4.6.

[99] Intergovernmental Panel on Climate Change, *Summary for Policymakers*, *in* Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change 17 (2021) https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf.

[100] *Neubauer*, BVerfG, 1 BvR 2656/18 at 3–4.

[101] *Id.* at 36.

[102] Victoria McGinness & Murray Raff, *Coal and Climate Change: A Study of Contemporary Climate Litigation in Australia*, 37 Envt'l & Plan. L.J. 87, 93 (2020).

[103] *Sharma*, [2021] FCA 560 at 74–90, 249.

[104] *Id.* at 74–90.

[105] *Id.* at 253.

[106] *Shell*, C/09/571932/HA ZA 19-379 at 4.4.28.

[107] *Id.*

[108] *Id.* at 4.4.37 and 4.4.52.

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V. Innovative Legal Arguments

Another important "ingredient" of climate litigation has been litigants' willingness to pursue novel legal arguments, testing the bounds of the law. This is particularly apparent in strategic climate litigation aimed to achieve broader ends, with many such cases framed as "test" cases. The *Massachusetts v. EPA* decision of the U.S. Supreme Court was an early example, successfully putting the novel argument that the Clean Air Act extended to regulation of greenhouse air pollutants.[109] More recent strategic climate claims in the "next generation" climate litigation mold have often sought systemic impact with legal arguments directed to the accountability of government or corporate actors for the climate harms their actions create.[110]

This strategy of pursuing "next generation" climate litigation claims focused on "duties of protection" is evident in the three case studies here, although using different jurisdiction-specific laws. The court in *Neubauer*, for instance, held that the Climate Change Act was unconstitutional insofar as it deferred major emissions reductions to 2030, therefore impacting the freedoms of future generations.[111] Germany's legislature must ensure a proportional spread of the emissions reduction burden over time as "one generation must not be allowed to consume large portions of the CO_2 budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom."[112]

A similarly novel duty of protection was advanced and upheld in the *Sharma* case. This duty—existing in common law negligence rather than pursuant to constitutional human rights law[113]—was owed to future generations, with Bromberg J asserting that climate change "might fairly be described as the greatest inter-generational injustice ever inflicted by one generation of humans upon the next."[114] Bromberg J weighed various "salient features"[115] to conclude that a new duty of care exists under Australian law for the Minister to avoid causing personal injury or death to Australian children—under eighteen years old and ordinarily living in Australia at the time the proceeding commenced—arising from emissions of carbon dioxide into the Earth's atmosphere in approving the proposed coal mine extension under the EPBC Act.[116] While there have been many previous challenges to coal projects under the EPBC Act,[117] *Sharma* represents a wholly novel trajectory—imputing a common law duty of care in the exercise of statutory decision-making power.[118] The novelty of this finding, as well as its potential to be extended to other decision-making, has contributed to the case's perceived impact.[119]

Litigants in *Shell* were similarly innovative in the arguments made to hold RDS accountable. Building on the *Urgenda* reasoning,[120] the court found that RDS has an obligation pursuant to the unwritten standard of care under the Dutch Civil Code to contribute to preventing dangerous climate change through the corporate policy it sets for the Shell group.[121] In interpreting this standard, the court referred to, *inter-alia*, human rights—specifically the right to life and the right to

[109]549 U.S. 497 (2007).

[110]Peel, Osofsky & Foerster, *supra* note 15, at 803; Peel & Osofsky, *supra* note 5, at 30.

[111]BVerfG, 1 BvR 2656/18 at 142.

[112]*Id.* at 192.

[113]Constitutional provisions preserving inter-generational equity like those in *Neubauer* do not exist at the Federal level in Australia given the absence of a national Bill of Rights.

[114]*Sharma*, [2021] FCA 560 at 293.

[115]*Sharma* [2021] FCA 560 at 96–115 (including reasonable foreseeability of harm, coherence, control, vulnerability and reliance).

[116]*Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment (No II)* [2021] FCA 774 at 58 (Aust'l).

[117]McGinness & Raff, *supra* note 102, at 101–02.

[118]Peel & Osofsky, *supra* note 5, at 97 (noting that the closest case in terms of similarity to *Sharma* is the Australian case *Gray v. Macquarie Generation*).

[119]Peel & Markey-Towler, *supra* note 32.

[120]*See Urgenda, supra* note 59.

[121]*Shell*, C/09/571932/HA ZA 19-379 at 3.2.

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respect for private and family life—and soft law, including the UN Guiding Principles on Business and Human Rights.[122] Notwithstanding the global nature of the climate problem, the court found that RDS has an individual responsibility to reduce its emissions across the Shell group.[123]

The ramifications of these novel legal arguments accepted in the *Sharma*, *Neubauer,* and *Shell* decisions are likely to extend beyond the bounds of the individual cases given their ties to broader calls for greater accountability for climate harms from governments and corporate majors.[124]

VI. Seeking Remedies that Contribute to Intended Impacts

One of the signature features of strategic litigation outside the sphere of climate change has been the pursuit of remedies that extend beyond the circumstances of an individual case to pursue more broadly framed social and policy change. The *Sharma*, *Neubauer*, and *Shell* cases all provide examples of claims seeking remedies of this kind.

In *Neubauer*, the litigants sought remedies that would shape legislative action to reduce emissions within defined timeframes. In its orders, the court required the legislature to set out clear provisions for reducing emissions from 2031 onward by the end of 2022. While there was some discretion in setting emissions reduction targets which accord with the remaining carbon budget consistent with a 1.5 to two degree Celsius trajectory, this was not unlimited.[125] Indeed, the targets as set out meant that future generations—post-2030—would shoulder a greater emissions reduction burden, potentially violating their constitutional freedoms. These targets could "only be reconciled with the potentially affected fundamental freedoms if precautionary measures are taken in order to manage the reduction burdens anticipated after 2030 in ways that respect fundamental rights."[126]

Although enhanced climate action at the Federal Government level was also an end shared by the plaintiffs in *Sharma*, the remedies sought to achieve this were more indirectly targeted—seeking to prevent the Australian government approving a proposed coal mine extension project. Australia, unlike Germany, does not have federal climate legislation setting out emission reduction targets.[127] Moreover, the Federal EPBC Act under which some coal projects require approval—including the proposed mine at issue—does not explicitly allow litigants to challenge any decision of the Minister on climate grounds.[128] Therefore, the children in *Sharma* sought two remedies: A declaration that the Minister owed a new duty of care; and an injunction to prevent the Minister from apprehended breach of this duty.[129] While the court accepted the existence of a new duty, Bromberg J declined to issue an injunction, finding that any allegations of breach were more appropriately dealt with after the Minister exercises her approval power.

More akin to *Neubauer*, *Shell* involved a direct challenge to the emissions reduction targets of a corporate entity. In order to stay within reach of the goal of the Paris Agreement to limit global warming to 1.5 degrees Celsius, the court held that RDS was obliged to reduce the CO_2 emissions of the Shell group's activities by forty-five percent at the end of 2030 relative to 2019 through its corporate policy.[130] Significantly, the court included emissions across the Shell group's entire

[122] *Id.* at 4.4.2.

[123] *Id.* at 4.4.49–4.4.52.

[124] *Infra* Pt D.

[125] *Neubauer*, BVERFG, 1 BvR 2656/18 at 214–35.

[126] *Id.* at 245.

[127] *Cf* at the sub-national level in Australia where several states and territories have passed climate legislation, for example, Victoria's Climate Change Act 2017.

[128] *Sharma* [2021] FCA 560 at 154 describing that considerations under the EPBC Act are limited to a narrow range of "matters of national environmental significance" not including climate change.

[129] *Id.* at 1.

[130] *Shell*, C/09/571932/HA ZA 19-379 at 4.4.55.

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energy portfolio and the aggregate volume of all emissions—Scope one through to three.[131] Scope three emissions are indirect emissions resulting from the activities of the organization such as when the coal is combusted by third parties.[132] These emissions form the majority of emissions from fossil fuel companies[133] but few have set targets to reduce these. The court importantly concentrated on the need for companies to "genuinely take responsibility for Scope three emissions,"[134] a ruling which has been interpreted as putting fossil fuel majors more generally on notice to attend to these emissions in their corporate climate strategies.[135]

D. A "Recipe for Success"?

For those engaging in climate litigation an increasingly important question is not just "will this case be successful in court" but also "will this case have a broader systemic effect, beyond this case and beyond the courtroom in contributing to the acceleration of action on climate change?" In this Section, we summarize how the strategic elements or "ingredients" outlined above inform a "recipe for success" by tracing impacts emerging from the *Sharma*, *Neubauer*, and *Shell* cases. We acknowledge that these cases are recent and, in some instances, subject to appeal so their full impact might not be known for some time or sustained over the longer-term. Moreover, while the six ingredients identified above can be influenced by those bringing the cases, there are other structural or contextual factors that will contribute to their ultimate success, for example, receptivity of courts to legal arguments led by plaintiffs, public support for enhanced climate action, and the appetite of governments and others to change behavior.

This leads to the more general question: What does "success" mean in this context? Clearly it is more than achieving a favorable court ruling, as litigants are seeking systemic changes beyond the individual circumstances of the case. Rather, strategic litigation is just one tool used by litigants and organizations as part of a larger process of stimulating change towards an ultimate goal, such as a healthy and safe climate future. This approach invites litigants to articulate carefully what they seek to achieve through a particular case and identify how the litigation will contribute to their ultimate goal.[136] Monitoring and evaluation of case outcomes is an important, iterative process that can help inform strategic climate litigants and their funders in case selection decisions.[137] As other authors have identified, it is also an area that warrants future exploration and research in terms of how to measure and evaluate the success and impact of strategic climate litigation.[138]

Noting that we are still at an early point in assessing the impact of *Sharma*, *Neubauer*, and *Shell*, one indicator of a successful climate case is the extent to which a case has 'direct impacts' in terms of binding the respondent(s) to court orders in individual cases and creating new legal precedents to explore in subsequent cases. As a result of *Sharma* for example—and subject to the decision standing on appeal—the Australian Environment Minister will have to exercise her approvals power for the Vickery coal project, and other similar projects requiring federal approval, considering the new common law duty of care to future generations and the scientific evidence and arguments in this case. While the duty was somewhat limited—to "take reasonable care . . . to

[131] *Id.* at 4.1.4.

[132] *Corporate Value chain (Scope 3) Standard*, Greenhouse Gas Protocol, https://ghgprotocol.org/standards/scope-3-standard.

[133] *Shell*, C/09/571932/HA ZA 19-379 at 2.5.5 ("85 [percent] of the Shell group emissions were Scope 3 emissions").

[134] *Id.* at 4.4.19.

[135] Diederik Baazil, Hugo Miller & Laura Hurst, *Shell loses climate case that may set precedent for big oil*, Austl. Fin. Rev. (May 27, 2021) https://www.afr.com/companies/energy/shell-loses-climate-case-that-may-set-precedent-for-big-oil-20210527-p57vhe.

[136] Batros & Khan, *supra* note 21.

[137] *See* monitoring, evaluation and learning programmes of ClientEarth's strategic litigation programme, which one of the authors is involved in, *Grant Portfolio*, Children's Investment Fund Foundation, https://ciff.org/grant-portfolio/.

[138] Joana Setzer & Lisa C. Vanhala, *Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance*, 10 WIREs Climate Change 1, 12–13 (2019).

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avoid causing personal injury or death" to Australian children[139]—it is difficult to see how the Minister could exercise her approval power and not expose the children to some harm. If the Minister approved the project, a claim in negligence for breach of the duty would seemingly be likely.[140] As legal precedent, the innovative arguments of the plaintiffs in *Sharma* open up a whole new line of accountability reasoning for litigants to argue in cases involving climate impacts, and create greater potential to hold the Australian government to account.[141]

The potential direct implications from *Shell* for RDS and other companies are also profound. If the decision is upheld in any appeal, commentary has suggested that RDS will have to slash its emissions by 740 million tons of CO_2 a year—greater than the emissions of Germany—by the end of the decade.[142] This would have significant implications for the future operation and management of the business requiring, for example, keeping liquefied natural gas production flat and cutting oil product sales by thirty percent from 2020 levels.[143] Although the Dutch court did not set specific steps for RDS to follow in reducing its emissions, litigants may nevertheless seek to enforce the decision through the courts if the company does not keep on track.[144] Moreover, the decision represents the first time a company has been held directly responsible for its contribution to climate change.[145] This could spark a series of similar lawsuits, which aim to force other companies to speed up their decarbonization plans.[146]

Strategic climate cases are also calculated to improve climate policy, especially those of governments who should be doing more to respond to climate change. This is perhaps most apparent in the case of *Neubauer* with the German Government required to amend provisions of the Climate Change Act by the end of 2022. Shortly after the ruling, Germany proposed amendments that included increasing the 2030 target from fifty-five percent to sixty-five percent, reducing emissions by at least eighty-eight percent by 2040 and reaching net GHG neutrality by 2045.[147] Germany's climate policies will also be influenced by recent changes to the EU's targets and forthcoming updates to all relevant climate and energy legislation.[148] Whether this ratcheting of ambition will be sufficient remains to be seen, but does indicate a willingness of the courts to step in at the request of plaintiffs like those in *Neubauer* and fill an "accountability gap."[149]

Apart from important "direct" contributions, well planned and imaginative strategic climate cases like *Neubauer*, *Sharma,* and *Shell* play an essential indirect role in raising public awareness and driving behavioral change. Immediately following the decision in *Neubauer*, politicians from

[139]*Sharma (No II)*, [2021] FCA 774 at 58.

[140]Miklos Bolza, *Climate Change Class Actions Likely as Court Finds Duty of Care Owed to Children,* LAWYERLY, (May 28, 2021), https://www.lawyerly.com.au/climate-change-class-actions-likely-as-court-finds-duty-of-care-owed-to-children/.

[141]McGinness & Raff, *supra* note 102, at 93 (discussing how the majority of cases in Australia challenging coal mines previously have involved administrative law challenges and had little success in compelling the Federal Government to consider the climate implications of coal projects).

[142]Diederik Baazil & Laura Millan Lombrana, *What a Dutch Court Ruling Means for Shell and Big Oil*, BLOOMBERG, (June 4, 2021), https://www.bloomberg.com/news/articles/2021-06-04/what-a-dutch-court-ruling-means-for-shell-and-big-oil-quicktake.

[143]*Id.*

[144]*Id.*

[145]Isabelle Gerretsen, *Shell Ordered To Slash Emissions 45% by 2030 in Historic Court Ruling*, CLIMATE HOME NEWS, (May 26, 2021), https://www.climatechangenews.com/2021/05/26/shell-ordered-slash-emissions-45-2030-historic-court-ruling/; *ESG: Dutch Court's Landmark Decision on Climate Change, Human Rights and Corporate Duties,* CLIFFORD CHANCE, May 2021, https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/05/esg-dutch-courts-landmark-decision-on-climate-change-human-rights-and-corporate-duties.pdf.

[146]Jacqueline Peel, Ben Neville, & Rebekkah Markey-Towler, *Four Seismic Climate Wins Show Big Oil, Gas and Coal Are Running Out Of Places To Hide*, THE CONVERSATION (May 31, 2021) https://theconversation.com/four-seismic-climate-wins-show-big-oil-gas-and-coal-are-running-out-of-places-to-hide-161741.

[147]Kerstine Appunn & Julian Wettengel, *Germany's Climate Action Law,* CLEAN ENERGY WIRE (July 12, 2021), https://www.cleanenergywire.org/factsheets/germanys-climate-action-law-begins-take-shape.

[148]*European Climate Law*, EUROPEAN COMMISSION, https://ec.europa.eu/clima/policies/eu-climate-action/law_en.

[149]Polly Botsford, *The Rising Tide of Climate Litigation,* INT'L BAR ASSOC. (July 12, 2021), https://www.ibanet.org/The-rising-tide-of-climate-litigation.

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across party lines came out in support of the ruling.[150] Public support for strong climate action has also been bolstered by recent devastating flooding in the country.[151] However, such positive behavioral changes are not a given. By way of contrast, following the Australian ruling, Vickery Coal was quick to hail the judge's decision to reject an injunction as a "win."[152] The Australian Federal Government similarly dismissed the decision and has appealed the decision.[153] While public support for climate action is growing in Australia and sub-national actors have been taking decisive action,[154] the *Sharma* case at present seems unlikely to compel the Federal Government to end its reliance on fossil fuels and commit to ambitious emissions' reduction targets.

Company directors and investors are also likely to be paying close attention to the decision of the court in *Shell* as it provides an opportunity for them to reflect on their obligations to maintain a forward-looking approach on managing climate-related risks in their companies and portfolios.[155]

E. Conclusion

As examples of successful strategic climate litigation, the *Sharma*, *Neubauer,* and *Shell* cases invite an examination of their common features which provide indicators of the "recipe" for achieving similarly broad impacts in future cases. We have highlighted six common features of *Sharma*, *Neubauer,* and *Shell* which we argue point to some of the key ingredients that go into the mix when developing strategic climate claims.

While even enthusiastic proponents of climate litigation, such as the present authors, recognize that climate change cases alone will not solve the climate crisis, they do have the potential to generate impacts that reverberate far beyond an individual case. Youth activist, Greta Thunberg has perceptively noted that the *Sharma*, *Neubauer,* and *Shell* cases all share the potential for "snowball" effects[156] by exposing "layer upon layer of incomplete targets and insufficient action."[157]

By examining the shared features of these cases, we can begin to discern a recipe for success so that scarce resources for climate litigation can be targeted to maximize cases' impact and contribution to addressing the urgent global challenge of climate change.

[150]*Germany sets Tougher CO2 Emission Reduction Targets After Top Court Ruling*, Reuters (May 5, 2021) https://www.reuters.com/business/environment/germany-raise-2030-co2-emissions-reduction-target-65-spiegel-2021-05-05/.

[151]Sören Amelang, Edgar Meza, Benjamin Wehrmann, and Julian Wettengel, *Deadly Floods Sharpen Focus On Climate Change In German Election Campaign*, Clean Energy Wire (Jul. 17, 2021) https://www.cleanenergywire.org/news/deadly-floods-sharpen-focus-climate-change-german-election-campaign.

[152]Matthew Burgess, *Coal Scores a Win as Wider Climate Reckoning Rocks Fossil*, Bloomberg (May 27, 2021), https://www.bloomberg.com/news/articles/2021-05-27/coal-giant-defeats-nun-and-teenagers-in-mine-expansion-battle.

[153]Minister for the Env't, Federal Court of Appeal (July 9, 2021), https://minister.awe.gov.au/ley/media-releases/federal-court-appeal.

[154]R.M. Colvin & Frank Jotzo, *Australian voters' attitudes to climate action and their social-political determinants*, 16(3) PLoS ONE 1, 2 (2021).

[155]Cynthia A. Williams, *What the Shell Judgment Means for US Directors,* Harvard Law School Forum on Corporate Governance, (July 22, 2021) https://corpgov.law.harvard.edu/2021/07/22/what-the-shell-judgment-means-for-us-directors/.

[156]Greta Thunberg (@GretaThunberg), Twitter (May 28, 2021); https://twitter.com/GretaThunberg/status/1397988609035280386; Greta Thunberg (@GretaThunberg), Twitter (May 27, 2021), https://twitter.com/GretaThunberg/status/1397565989479456775.

[157]Greta Thunberg (@GretaThunberg), Twitter (Apr. 30, 2021), https://twitter.com/GretaThunberg/status/1387815038984015877.

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