Sharma ex rel Sister Brigid Arthur v Australia (Minister for the Environment)*: A Unique "Anns-wer" to Public Authority Non-Liability for Climate Change Harms in Canada?*

Brandon D. Stewart*

Abstract: *In* Sharma ex rel Sister Brigid Arthur v Australia (Minister for the Environment), *[2021] FCA 560, the Federal Court of Australia imposed a duty on the Minister for the Environment to take reasonable care, when exercising her statutory powers to approve (or not approve) a mine extension project, to avoid causing personal injury or death to Australian children arising from greenhouse gas emissions. This is the first time a common law jurisdiction had imposed a climate change–related duty of care on a public authority under negligence law. Before the decision was overturned, Australian legal scholars and the environmental community were hopeful that the decision would create pathways to recovery for climate change victims elsewhere. This article provides the first in-depth examination of* Sharma *and its application in Canada. It focuses on proximity at step one of the* Anns/Cooper *duty test and draws from Professor Bruce Feldthusen's scholarship on unique public duties and the Canadian duty case law. The author argues a* Sharma*-type duty to avoid or protect against climate change–related physical harms would likely not be recognized under Canadian negligence law because it lacks sufficient private party proximity. The Federal Court of Australia had actually created a unique public duty of care based on a questionable assessment of double foreseeability. It is unique because it is based on a relationship that would not be sufficiently proximate to impose a duty of care on a private party defendant in the same situation. The author further argues Canadian courts would not recognize a* Sharma*-type unique public duty because it would be distinguishable from the existing and rare unique public duty precedents in Canada. It also does not align with the Supreme Court of Canada's recent emphasis on proximity and its shift towards a corrective justice or rights-based approach to the duty of care analysis since* Cooper*. So long as this approach prevails over instrumentalist goals and social policy, common law negligence will not be the tool for regulating Canadian public authorities and their climate change–related discretionary decisions.*

Résumé: *Dans* Sharma ex rel Sœur Brigid Arthur c Australie (ministre de l'Environnement), *[2021] FCA 560, la Cour fédérale de l'Australie a imposé une obligation au ministre de l'Environnement d'agir avec une diligence raisonnable dans l'exercice de ses pouvoirs statutaires d'autoriser (ou de ne pas autoriser) un projet d'expansion minière, afin d'éviter des préjudices à la personne ou à la vie des enfants australiens dus aux émissions de gaz à effet de serre. Ceci est la première fois où une juridiction de Common Law a imposé une obligation de diligence liée aux changements climatiques à une autorité publique en négligence. Avant le renversement du jugement, des académiques australiens ainsi que la communauté environnementale espéraient que la décision créerait des moyens de recours pour des victimes du changement climatique ailleurs. Cet article fournit la première analyse détaillée de* Sharma *et son applicabilité au Canada. Il se concentre sur l'analyse de proximité à la première étape du test* Anns/Cooper *et se base sur les idées du Professeur Bruce Feldthusen au sujet des obligations uniques des autorités publiques ainsi que la jurisprudence canadienne. L'auteur soutient qu'une obligation du type* Sharma *d'éviter ou de protéger contre les préjudices physiques engendrés par les changements climatiques ne serait probablement pas reconnue par la loi canadienne de négligence, parce qu'elle n'a pas suffisamment de proximité entre parties privées. La Cour fédérale de l'Australie a ainsi créé une obligation unique aux autorités publiques, basée sur une évaluation douteuse de double-prévisibilité. Cette obligation est unique car elle se base sur une relation qui ne serait pas suffisamment proche pour imposer une obligation de diligence à une partie privée dans la même situation. De plus, l'auteur soutient que les tribunaux canadiens ne reconnaîtront pas une obligation unique des autorités publiques du type* Sharma *parce que celle-ci se distingue des précédents canadiens actuels et rares. Elle ne correspond non plus à l'accent récemment mise par la Cour suprême du Canada sur la proximité, ainsi que le virage de cette cour depuis* Cooper *vers une approche axée sur la justice corrective et les droits humains dans leur analyse de l'obligation de diligence. Tant que cette approche emporte sur des buts instrumentalistes et politiques sociales, la loi de négligence en Common Law ne serait pas utile à la régulation des autorités publiques canadiennes et leurs décisions discrétionnaires sur le changement climatique.*

Titre en français : **Sharma ex rel Sœur Brigid Arthur c Australie (ministre de l'Environnement)** ***: Une réponse unique à la non-responsabilité des autorités publiques pour les dommages issus du changement climatique au Canada?***

* Brandon D. Stewart is an Assistant Professor at the University of Ottawa's Faculty of Law. He holds a JD (Silver Medal) from the University of Ottawa and an LLM and JSD from Yale Law School. My thanks to Bruce Feldthusen, Phillip Saunders, and the anonymous peer reviewers for their helpful insights and comments on earlier drafts. Thanks also to the MJSDL editors for their superlative editing work. All errors are my own.

1. A COMMON LAW CANARY IN A COAL MINE

What can tort law do about government inaction on climate change? The answer has been "not much."[1] Citizens and environmental groups have struggled to use tort law to hold governments accountable for unambitious climate change policies, missing adaptive measures, and the regulatory approval of high-carbon projects.[2]

A 2021 decision by the Federal Court of Australia, however, revived the debate over whether tort law, and specifically negligence law, is an effective tool for achieving climate justice. In *Sharma ex rel Sister Brigid Arthur v Australia (Minister for the Environment)*,[3] Bromberg J imposed a common law duty on the Minister for Environment ("Minister") to take reasonable care when exercising her statutory powers to approve (or not approve) a mine extension, to avoid causing personal injury or death to Australian children ("the Children") arising from greenhouse gas ("GHG") emissions.[4]

This was the first time a common law jurisdiction had imposed a climate change–related duty of care on a public authority under negligence law. Before the decision was overturned, Australian legal scholars Jacqueline Peel and Rebekka Markey-Towler suggested that *Sharma* was a potential "watershed moment" that would have "profound ramifications for the ongoing

---

1 See Douglas A Kysar, "What Climate Change Can Do About Tort Law" (2011) 41:1 Envtl L 1 (asking the same question from the perspective of the United States).

2 Climate change–related tort actions against government entities are fairly rare, at least compared to the number of claims historically made against the fossil fuel industry. For a historical Canadian example, see "Burgess v Ontario Minister of Natural Resources and Forestry" (16–1325 CP), online: *Climate Change Litigation Database* <climatecasechart.com/climate-change-litigation/non-us-case/burgess-v-ontario-minister-of-natural-resources-and-forestry> (the lead plaintiff discontinued a class action brought against Ontario for negligently failing to adapt to climate change and prevent flood damage to class members' properties).

3 *Sharma ex rel Sister Brigid Arthur v Australia (Minister for the Environment)*, [2021] FCA 560 [*Sharma*]. The FCA recently upheld the Minister's appeal and rejected the duty: see *Australia (Minister for Environment) v Sharma*, [2022] FCAFC 35 [*Sharma Appeal*]. Please see the Addendum for further discussion.

4 See *Sharma ex rel Sister Brigid Arthur v Australia (Minister for the Environment)*, [2021] FCA 774 at para 1 [*Sharma II*] (Bromberg J's exact declaration).

development of climate litigation … globally."[5] For common law jurisdictions specifically, they contended that the decision may open paths for vulnerable claimants to succeed with creative arguments in negligence.[6] Environmental groups and global law firms similarly described *Sharma* as a "stunning" and "landmark decision" that significantly altered the climate change liability landscape.[7]

This article provides the first in-depth examination of *Sharma* and its potential application to another common law jurisdiction, Canada. My analysis is primarily doctrinal. I consider both the duty to avoid and to protect against climate change–related physical harms. The first type of duty is covered by *Sharma*: a public authority engages in misfeasance when it approves a GHG-emitting project or activity. A duty to protect arises through nonfeasance, when a public authority fails to enact more ambitious (or any) GHG emissions reduction target legislation.

I first argue that a *Sharma*-type duty would likely not be recognized under Canadian negligence law because it lacks sufficient private party proximity. Proximity is the core legal principle that determines whether one party owes a common law duty of care to another.[8] It refers to a meaningful level of closeness between the plaintiff and the defendant. In *Sharma*, Bromberg J points to several factors (vulnerability, indirect risk creation and discretionary regulatory control, and general reliance) that are said to support "relational nearness" between the Minister and the Children.[9] However, these factors amount to general principles, not proximity. *Sharma* is, by implication, distinguishable from the most analogous private duty precedents: dual control-and-protect duty cases, where the defendant's misfeasance has a clear and direct effect on the plaintiff, and an affirmative duty based on specific reliance. At best, Bromberg J created a unique public duty of care based on a questionable assessment of double foreseeability: foreseeable (climate change–related, physical) harm to a foreseeable class of plaintiff (the Children). It is unique because it is based on a relationship that would not be sufficiently proximate to impose a duty of care on a similarly situated private party defendant. The Supreme Court of Canada has explicitly stated since *Cooper* that something more than double foreseeability is required to establish proximity and impose a *prima facie* duty of care on a public authority.[10]

---

5 Jacqueline Peel & Rebekkah Markey-Towler, "A Duty to Care: The Case of Sharma v Minister for the Environment [2021] FCA 560" (2021) 33 J Envtl L 727 at 727–28.

6 *Ibid* at 735.

7 See e.g. Graham Readfearn, "'One More Mine Does Make a Difference': Australian Children Argue for the Climate – and the Law Agrees", *The Guardian* (9 July 2021), online: <theguardian.com/environment/2021/jul/10/one-more-mine-does-make-a-difference-australian-children-argue-for-the-climate-and-the-law-agrees>; Hamish Cardwell, "Global Court Rulings on Preventing Climate Harm Excite New Zealand Lawyers Group", *RNZ* (29 May 2021), online: <rnz.co.nz/news/national/443617/global-court-rulings-on-preventing-climate-harm-excite-new-zealand-lawyers-group>; Elisa de Wit & Kai Luck, "Landmark Climate Change Decision: Sharma Decision has Significant Implications for Developments and Activities with Climate Change Impacts" (June 2021), online: *Norton Rose Fulbright* <nortonrosefulbright.com/en/knowledge/publications/a2f31ca9/landmark-climate-change-decision>.

8 See Bruce Feldthusen, "Please Anns: No More Proximity Soup" (2019) 93 SCLR 141 at para 1 (QL) [Feldthusen, "Please Anns"].

9 *Sharma*, *supra* note 3 at para 315.

10 See *Cooper v Hobart*, 2001 SCC 79 at para 34 [*Cooper*]; *Deloitte & Touche v Livent Inc (Receiver of)*, 2017 SCC 63 at paras 22–23, 34 [*Livent*]; *1688782 Ontario Inc v Maple Leaf Foods Inc*, 2020 SCC 35 at para

I further contend that a Canadian court would likely refuse to recognize a unique *Sharma*-type public duty due to its distinction from the existing and rare unique public duty precedents. The first group of precedents mostly involves dual control-and-protect unique police duties.[11] One is based on a power-and-dependency special relationship between a municipality and tenants, absent control.[12] *Sharma*-type duty claims are distinguishable from these because they involve discretionary, policy-based decisions made by public authorities that facilitate one or more emitters to cause indirect physical harm to all citizens—or at least a large class of particularly vulnerable citizens. Failures to pass stricter target legislation or to reject a GHG-emitting project proposal do not invoke the Bad Samaritan principle because protecting citizens from climate change–related harms is not an easy rescue.[13] These decisions also do not involve a level of reprehensible conduct[14] or inexcusable forgetfulness[15] that compels a finding of proximity based on fairness or justice. Nor does their impact meet the low bar for causal directness in *Odhavji*.[16] Finally, the possible risk of harm to *Sharma*-type plaintiffs does not meet the high level of double foreseeability present in some of the unique public duty cases: particularly foreseeable harm to a fairly small and well-defined class of plaintiff.[17] Any attempt to restrict a *Sharma*-type duty to a more foreseeable class of particularly vulnerable plaintiffs would be arbitrary and likely not provide a strong basis for proximity.

The second group of unique public duties was created by the Supreme Court of Canada and relates to discretionary inspections.[18] Bruce Feldthusen argues these duties are rooted in the Good Public Samaritan principle, which holds that "once a public defendant begins to exercise a discretionary power [to confer a gratuitous public benefit], it then comes under a duty to exercise the power with reasonable care."[19] They are justified by the principle of general reliance—that citizens generally expect or rely on public authorities to conduct their operations without negligence. *Sharma*-type duty claims do not align with the Supreme Court's emphasis on proximity and shift towards a corrective justice or rights-based approach to duty since *Cooper*. Most unique public duties based on general reliance were created over a decade ago, when the Supreme Court was more open to considering policy concerns and instrumentalist goals. The Supreme Court has not relied on general reliance since. A future Canadian court will likely follow the Supreme Court's lead when faced with *Sharma*-type duty

62 [*Maple Leaf Foods*].

11 See e.g. *Haggerty v Rogers*, 2011 ONSC 5312 [*Haggerty*]; *Doe v Metropolitan Toronto (Municipality) Commissioners of Police*, 1998 CarswellOnt 3144, 160 DLR (4th) 697 (ONSC) [*Doe*]; *Odhavji Estate v Woodhouse*, 2003 SCC 69 [*Odhavji*].

12 See *Williams v Toronto (City)*, 2016 ONSC 42 [*Williams I*], aff'd 2016 ONCA 666 [*Williams II*].

13 See *Haggerty*, *supra* note 11; *Doe*, *supra* note 11; *Williams I* and *Williams II*, *supra* note 12.

14 See *Haggerty*, *supra* note 11; *Doe*, *supra* note 11.

15 See *Williams I* and *Williams II*, *supra* note 12.

16 See *Odhavji*, *supra* note 11 at para 56.

17 See *Williams I*, *supra* note 12 at paras 32, 51–53, 67–68; *Williams II*, *supra* note 12 at para 8; *Doe*, *supra* note 11 at para 171.

18 See e.g. *Just v British Columbia*, [1989] 2 SCR 1228, 1989 CarswellBC 234 [*Just*].

19 Bruce Feldthusen, "Ten Reasons to Reject Unique Public Duties of Care in Negligence" (2018) 84 SCLR 25 at para 3 [Feldthusen, "Ten Reasons"]. See also Feldthusen, "Please Anns", *supra* note 8 at para 76 (identifying Lord Wilberforce's judgment in *Anns* as the primary source of the Good Public Samaritan principle).

claims. I support this prediction by examining the existing public authority case law related to discretionary environmental policy and legislative decisions. My analysis demonstrates courts require specific reliance or other indicia of private party proximity before they will recognize a duty of care. There are no meaningful differences between the discretionary decisions at issue in these cases and those in *Sharma*-type duty claims that could avoid this requirement.

Much of my analysis is grounded in relevant scholarship by Professor Bruce Feldthusen because he provides the most comprehensive descriptive account of unique public duties in Canada to date.[20] While some tort scholars disagree with Feldthusen's normative objections to unique public duties,[21] they do not reject his descriptive account. In fact, some cite to it.[22] I add to his account by identifying several important and sometimes well-known lower court decisions that also create unique public duties.

My arguments focus exclusively on proximity at step one of the *Anns/Cooper* test, given this step's critical importance to establishing novel duties in Canada. Canadian courts also follow a doctrine called common law policy immunity.[23] A plaintiff who succeeds in establishing a *prima facie* duty of care may nevertheless have their action dismissed because

---

20 See especially Bruce Feldthusen, "Unique Public Duties of Care: Judicial Activism in the Supreme Court of Canada" (2016) 53:4 Alta L Rev 955 (QL) [Feldthusen, "Unique"]. See also Jonathan de Vries, "Before Kamloops: The Canadian Law of Public Authority Liability That Might Have Been" (2019) 93 SCLR 117 (QL) (providing an interesting historical account of how Canadian courts experimented with a Diceyan approach to public authority liability using *Hedley Bryne*); Erika Chamberlain, "Affirmative Duties of Care: A Distinctly Canadian Contribution to the Law of Torts" (2018) 84 SCLR 101 (QL) [Chamberlain, "Affirmative"] (tracing the history of affirmative duties in Canada with some reference to Feldthusen's scholarship).

21 See section 4 for further discussion.

22 See e.g. Allistair Price, "Negligence Liability for Police Omissions: A Golden Mean" (2018) 84 SCLR 131 at para 29, n 10 (QL); Margaret Isabel Hall & Aliya Chouinard, "Systemic Wrongdoing, Public Authority Liability, and the Explanatory Function of Tort Doctrine: Two Case Studies" (2018) 84 SCLR 71 at para 19, nn 16, 39 (QL).

23 Governments enjoy a number of immunities that insulate them from negligence liability. One is a statutory immunity. Another is sovereign immunity, the idea that a government and its agents are only liable in tort to the extent that they consent to be held liable. This is not a tort doctrine, but a jurisdictional question based on the separation of powers: see Bruce Feldthusen, "Public Authority Immunity from Negligence Liability: Uncertain, Unnecessary, and Unjustified" (2014) 92:2 Can Bar Rev 211 at 212, 226–27 [Feldthusen, "Unjustified"]. Sovereign immunity did not apply in *Sharma*: see *Sharma*, *supra* note 3 at para 408. It would not pose a problem in Canada because the federal government and common law provinces have surrendered their historical sovereign immunity through Crown liability legislation. At one time, the Canadian Environmental Law Association feared that section 11 of the recently enacted *Crown Liability and Proceedings Act, 2019*, SO 2019, C 7, Sched 17 (CPA), immunized Ontario from any regulatory negligence claims: see Richard Lindgren, "Submissions of the Canadian Environmental Law Association to the Standing Committee on Finance and Economic Affairs Regarding Schedule 17 of Bill 100" (18 March 2019), online (pdf): *Canadian Environmental Law Association* <cela.ca/wp-content/uploads/2019/07/1263-CELA-Brief-Schedule-17-of-Bill-100-Crown_Liability.pdf>. The Ontario Court of Appeal held that section 11 simply codifies the policy/operational distinction under common law policy immunity: see *Francis v Ontario*, 2021 ONCA 197 at paras 115–29 [*Francis*]. *Francis* did not address the fact that Ontario intended to do more with section 11 than codify the common law.

the impugned conduct was an exercise of a "policy"[24] (and now "true" or "core" policy)[25] decision by the government.[26] Such decisions are immune from negligence liability to maintain the separation of government powers.[27] It is entirely possible that the reasons I offer for why *Sharma* would likely not be adopted in Canada could prove unnecessary, because common law policy immunity would be applied to dismiss a *Sharma*-type duty claim. However, a Canadian court might also find the decision operational in nature, as outcomes under this immunity are notoriously unpredictable.[28] That is the very reason why the House of Lords rejected this approach to immunity in *Stovin v Wise*, with specific reference to the uncertainty in Canadian law.[29] In *Sharma*, Bromberg J similarly viewed common law policy immunity with dubious eyes,[30] and Australian courts have not consistently or universally adopted it.[31] The scope of Canadian common law policy immunity may also be narrowing. The Supreme Court in *Deloitte & Touche v Livent Inc* recently shifted the focus in negligence law strongly towards step-one proximity and away from step-two policy considerations, where common law policy immunity often arises.[32] More recently, in *Nelson (City of) v Marchi*, the Supreme Court apparently narrowed what constitutes a core policy decision, moving away from its earlier emphasis on high level decision-makers in *Imperial Tobacco* and *Just*.[33] While this factor still matters, the Supreme Court has clarified that the "mere presence of budgetary, financial,

---

24 *Just*, *supra* note 18 at 3.

25 *R v Imperial Tobacco*, 2011 SCC 42 at para 85 [*Imperial Tobacco*]; *Nelson (City) v Marchi*, 2021 SCC 41 [*Marchi*].

26 Common law policy immunity was created by the Supreme Court of Canada in *Just*. The term "policy decision" was first used to distinguish from operational decisions that may attract negligence liability. McLachlin CJ in *Imperial Tobacco*, later referred to "true" or "core" policy decisions in an attempt to address shortcomings with the policy/operational distinction. The Supreme Court revisited common law policy immunity for a second time in *Marchi*. Core policy decisions are said to be "decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith": see *Imperial Tobacco*, *supra* note 25 at para 90. Usually, they are deliberative decisions made by higher-level decision makers who balance competing objectives and policy goals, including high-level (and not day-to-day) budgetary considerations:see *Marchi*, *supra* note 25 at paras 62–64.

27 See *Marchi*, *supra* note 25 at paras 3, 67.

28 For a detailed discussion and critiques of common law policy immunity: see Feldthusen, "Unjustified", *supra* note 23; Lewis N Klar, "R v Imperial Tobacco Ltd: More Restrictions on Public Authority Tort Liability" (2012) 50:1 Alta L Rev 157 [Klar, "More Restrictions"]; Paul Daly, "The Policy/Operational Distinction: A View from Administrative Law" (2015) 69 SCLR 17; Hon David W Stratas, "The Liability of Public Authorities: New Horizons" (2015) 69 SCLR 1.

29 See *Imperial Tobacco*, *supra* note 25 at para 79, citing Lord Hoffmann in *Stovin v Wise*, [1996] RTR 354 (UKHL), AC 923.

30 See *Sharma*, *supra* note 3 at paras 387, 474–89 (noting that "the 'policy/operational' dichotomy…has largely been discredited").

31 See *Imperial Tobacco*, *supra* note 25 at para 80.

32 See *Livent*, *supra* note 10 at paras 41–45. See also, Feldthusen, "Unjustified", *supra* note 23 at 213.

33 For a helpful review of the Supreme Court's core policy jurisprudence, see *Marchi*, *supra* note 25 at paras 37–56. See also *Imperial Tobacco*, *supra* note 25 at para 95 (McLachlin CJ appears to conclude that the federal government's representations to tobacco companies that low tar cigarettes were less harmful were matters of "true" or "core" policy simply because "the government's alleged course of action was adopted at the highest level in the Canadian government, and involved social and economic considerations").

or resource implications" and the government's use of the word "policy," including as a "label," are not determinative.[34] For these reasons, I will leave a detailed discussion about government immunities for a separate article and focus here on proximity.

The remainder of this article proceeds as follows: section 2 describes the principle of proximity and its importance to the duty of care analysis, both generally and for public authorities, as a backdrop to the *Sharma* decision; sections 3 and 4 address my main claims; section 5 concludes and outlines areas for future research.

2. PUBLIC AUTHORITIES AND THE IMPORTANCE OF PROXIMITY

Proximity is the core concept that determines whether a defendant owes a duty of care to a plaintiff under Canadian negligence law. Either the defendant is in a sufficiently "close and direct" relationship with the plaintiff such that it is "just and fair" to impose a duty of care,[35] or she is not, and no duty is owed.

Proximity refers to a meaningful level of closeness between the parties. The neighbour principle from the House of Lords' seminal 1932 decision in *Donoghue v Stevenson*[36] provided the first definition of proximity. Lord Atkin explained that the defendant must take reasonable care to avoid acts or omissions they could "reasonably foresee would be likely to injure [their] neighbour"—that is, "persons who are so closely and directly affected by [their] act that [they] ought reasonably to have them in contemplation as being so affected when [they are] directing [their] mind to the acts or omissions which are called into question."[37] This is sometimes referred to as double foreseeability: foreseeable harm to a foreseeable plaintiff.[38]

Donoghue represents a corrective justice or rights-based approach to duty. Corrective justice theorists are noninstrumentalist and believe the sole aim of negligence law is to correct rights violations.[39] They consider proximity (and duty) solely from the perspective of the defendant's "unreasonable interference with the plaintiff's recognized personal or property rights."[40] Double foreseeability is consistent with this view: Lord Atkin's concept "connect[s] the defendant as the creator of an unreasonable risk and the plaintiff as a person whose endangerment [makes] the risk unreasonable."[41] Policy considerations are irrelevant.

Corrective justice theorists strive for coherence. They argue duties of care are part of a coherent normative system that requires "[them] to be thematically unified through the same underlying principle."[42] Prior to *Donoghue*, courts created a number of specific and restrictive

---

34 *Marchi*, *supra* note 25 at paras 58–59.

35 *Cooper*, *supra* note 10 at paras 32, 34.

36 [1932] AC 562, [1932] All ER Rep 1 (UKHL) [*Donoghue*].

37 *Ibid* at 580.

38 See Feldthusen, "Please Anns", *supra* note 8 at para 3.

39 *Ibid* at n 33; Ernest J Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012) at 49–50 [Weinrib, "Corrective"].

40 Feldthusen, "Please Anns", *supra* note 8 at para 91.

41 Weinrib, *supra* note 39 at 45.

42 *Ibid* at 39.

duty categories due to policy concerns.[43] Lord Atkin attempted to unify the concept of duty around "some general conception" grounded in the relationship between the parties (i.e., double foreseeability).[44] Feldthusen suggests Lord Atkin largely succeeded in this goal insofar as double foreseeability was and remains the test to establish sufficient proximity in paradigmatic negligence actions—where the direct act of the defendant damages the personal or property rights of the plaintiff.[45]

After *Donoghue*, both the House of Lords and the Supreme Court of Canada were confronted by nonparadigmatic duty claims involving nonfeasance, pure economic loss, and public authority defendants.[46] They had to decide whether Lord Atkin's concept of double foreseeability would suffice to resolve them. The House of Lords made its initial decision in 1977 in *Anns v Merton London Borough Council*.[47] *Anns* involved a novel trifecta: (1) alleged nonfeasance (2) by a public authority (3) causing pure economic loss. Lord Wilberforce, writing for the majority, articulated a two-step test for deciding all novel duty claims, adopting double foreseeability as the test for proximity at step one.[48] Whether any policy reasons ought to negate or limit the scope of the duty owed was considered at step two.[49]

Anns marks a slight reversion to a pre-*Donoghue* policy approach to duty. In *Anns*, Lord Wilberforce expanded the concept of foreseeability of harm to include a right to protection against pure economic loss—a right that corrective justice theorists generally do not recognize.[50] By adding policy concerns at step two, Lord Wilberforce also allowed future courts to again justify or create duties based on instrumentalist objectives and distributive policy.[51]

---

43 See Feldthusen, "Please Anns", *supra* note 8 at n 2, citing The Hon Justice Russell Brown, "Forward" in Margaret Hall, ed, *The Canadian Law of Obligations: Private Law for the 21st Century and Beyond* (Toronto: LexisNexis Canada, 2018) vii at x.

44 *Donoghue*, *supra* note 36 at 580. See also Weinrib, *supra* note 39 at 38–39. For a detailed discussion on *Donoghue* from a corrective justice perspective and the "disintegration of duty" in *Anns* and subsequent cases, see Weinrib, *supra* note 39 at 38–80.

45 See Feldthusen, "Please Anns", *supra* note 8 at paras 2–3, n 2.

46 *Ibid* at paras 4–5.

47 [1978] AC 728, [1977] 2 All ER 492 [*Anns*].

48 *Ibid* at 751–52. See also Feldthusen, "Please Anns", *supra* note 8 at para 10 (Lord Wilberforce offered no actual justification for expanding the reach of double foreseeability beyond the paradigm duty cases).

49 See *Anns*, *supra* note 47 at 752. The plaintiff has the onus of establishing the step-one requirements, while the defendant is responsible for establishing one or more residual policies at step two: *Childs v Desormeaux*, 2006 SCC 18 at para 13 [*Childs*].

50 See generally Ernest J Weinrib, "The Disintegration of Duty" (2006) 31 Adv Q 212 at 226 [Weinrib, "Disintegration"]; Donal Nolan, "Rights, Damage and Loss" (2016) 37:2 Oxf J Leg Stud 255 at 262–68.

51 See De Vries, *supra* note 20 at n 2 (referring to the policy approach as a policy-driven exercise where duties are created because "a policy choice or preference external to private law favours it"). See also Nicholas McBride, "Michael v Chief Constable of South Wales Police" (2015) University of Cambridge Faculty of Law Working Paper No 21/2015 at 6, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2565068> (describing this approach as a public defendant owing the plaintiff a duty of care unless reasons of public policy ought to negate it).

The Supreme Court of Canada adopted *Anns* in 1984[52] and, unlike the United Kingdom,[53] has remained loyal to its two-step framework. Examples of the Supreme Court engaging in social policy engineering can be found in the 1990s.[54] Proximity did not play a particularly critical role in Canadian negligence law[55] until the Supreme Court's 2001 decision in *Cooper v Hobart*. There, the court abandoned Lord Wilberforce's view that double foreseeability alone establishes proximity in nonparadigmatic cases. McLachlin CJ and Major J explicitly stated that "something more" was required,[56] though they did little to explain what that "more" was. They simply stated that proximity factors are diverse and depend on the "closeness" of the relationship between the parties, based on the "expectations, representations, reliance, and the property or other interests involved."[57] They provide some examples of recognized relationships of proximity.[58] Their analysis of proximity on the facts is unhelpful. They focus primarily on the statute applicable to the public authority defendant, and statutory language will rarely support a finding of proximity.[59]

Cooper signaled a shift back to a more corrective justice or rights-based approach to duty. The Supreme Court emphasized the "relational" nature of proximity at step one over the extrinsic policy considerations at step two, and noted that such policy considerations would "seldom arise," since liability "will be determined primarily by reference to established and analogous categories of recovery."[60] Weinrib has therefore described the now *Anns/Cooper* test as possibly creating "a path back to a more coherent approach to the duty issue."[61]

Since *Cooper*, the Supreme Court has continued to distance itself [62] from the *Anns* policy approach by prioritizing proximity within the *Anns/Cooper* test, particularly in its most recent duty jurisprudence.[63] In their 2017 decision in *Livent*, Gascon and Brown JJ confirmed that

---

52 See *Kamloops v Nielsen*, [1984] 2 SCR 2, 10 DLR (4th) 641 [*Kamloops*]. Sometimes, courts would refer to the *Anns/Kamloops* test.

53 See *Caparo Industries v Dickman*, [1990] 1 All ER 568 at 573–74, 581–82, 585–87, 604.

54 See e.g. *Winnipeg Condominum Corp No 36 v Bird Construction Co*, [1995] 1 SCR 85, 121 DLR (4th) (addressing a distributive policy involving manufacturers and consumers). See also Russell Brown & Shannon Brochu, "Once More Unto the Breach: James v British Columbia and Problems with the Duty of Care in Canadian Tort Law" (2008) 45:4 Alta L Rev 1071 at 1079 (referring to cases such as *Norsk*, where proximity was "a functional device that describes categories of cases where policy concerns have previously led courts to impose liability").

55 See e.g. *Just*, *supra* note 18 at para 12, where the majority briefly considers proximity. See also Sopinka J's objections to the majority's reasons at paras 37–54.

56 *Ibid* at para 29.

57 *Ibid* at paras 34–35.

58 *Ibid* at para 36.

59 *Ibid* at paras 43–51.

60 *Ibid* at para 39.

61 Weinrib, "Corrective", *supra* note 39 at 66.

62 See e.g. *Childs*, *supra* note 49 (where step two was skipped entirely); *Hill v HamiltonWentworth Regional Police Services Board*, 2007 SCC 41 at 34–38 [*Hill*] (where the Supreme Court considers several policy issues at step-one proximity).

63 See Lewis Klar, "Duty of Care for Negligent Misrepresentation – And Beyond?" (2018) 48 Adv Q 235 at 246–49 [Klar, "Beyond"].

Cooper refined *Anns* by "distinguishing more clearly between foreseeability and proximity" and recognizing that "something more [than] mere foreseeability of injury" was required to recognize a novel duty of care.[64] They further recommended assessing proximity before foreseeability of harm in negligent misrepresentation and performance of service duty cases.[65] Three years later, in *Maple Leaf Foods*, a 5-4 majority of the Court extended *Livent*'s step-one approach to all negligence cases.[66] The four dissenting judges objected, preferring to keep the step-one analysis flexible for different factual scenarios.[67] Time will tell which approach will prevail.[68]

Livent also emphasized step-one proximity over step-two residual policy concerns. Gascon and Brown JJ stated *Cooper* placed "greater emphasis on a more demanding first stage of the two-stage analysis."[69] *Cooper* may not have actually done this or done this well.[70] If anything, the majority in *Cooper* muddied the waters by referring to relationship-based policy considerations at step one and stating certain policy arguments could be raised at either step one or step two.[71] In *Livent*, Gascon and Brown JJ nevertheless explained that a proper and "[r]obust application" of *Anns/Cooper* at step one should "almost always obviate concerns for indeterminate liability" at step two.[72] The dissent in *Maple Leaf Foods* referred to this observation, while the majority rejected the proposed duty of care for want of proximity and did not even discuss residual policy.[73]

Unlike *Cooper*, corrective justice animated the proximity discussions in *Livent* and *Maple Leaf Foods*. In *Livent*, Gascon and Brown JJ used corrective justice concepts like rights, wrongs, and duties to explain the factors determinative to proximity (i.e., the plaintiff's reliance and the defendant's undertaking) in negligent misrepresentation and performance of service duty cases.[74] A similar discussion is found in *Maple Leaf Foods*.[75] This, combined with my observations above, signals a return to a restrictive corrective justice or rights-based approach to duty not seen since before *Anns*.[76] I return to this approach in subsection 4.2.

Public authority duty cases are always novel because of the unique statutory regime at

---

64 *Livent*, *supra* note 10 at paras 22, 23, 34.

65 *Ibid* at para 24.

66 See *Maple Leaf Foods*, *supra* note 10 at para 62.

67 *Ibid* at para 119.

68 See generally Lewis Klar, "Maple Leaf Foods: A Step Beyond Livent" (2021) 51 Adv Q 441 (further discussing the significance of *Maple Leaf Foods*) [Klar, "Maple Leaf"].

69 *Livent*, *supra* note 10 at para 22, citing *Cooper*, *supra* note 10 at para 30.

70 For a critique on this analysis see Feldthusen, "Please Anns", *supra* note 8 at paras 14–19.

71 See *Cooper*, *supra* note 10 at paras 27, 30. The term "relational proximity" is a preferable label for any relationship-based policy considerations at step one to avoid confusion with residual policy considerations at step two.

72 *Livent*, *supra* note 10 at para 42.

73 See *Maple Leaf Foods*, *supra* note 10 at paras 84–95, 121.

74 See *Livent*, *supra* note 10 at paras 30–31.

75 See *Maple Leaf Foods*, *supra* note 10 at paras 34–35.

76 See Klar, "Beyond", *supra* note 63.

play[77] and require a full *Anns/Cooper* analysis. Proximity remains the lynchpin. A *prima facie* duty of care will arise (1) "explicitly or by implication from the relevant statutory scheme" or (2) from the interactions between the public authority and the plaintiff which are not negated by statute.[78] Tort scholars have criticized this approach to proximity for fostering unpredictability.[79] Finding proximity by inferring legislative intent also violates the Supreme Court's rule in *R v Saskatchewan Wheat Pool* that there is no tort of statutory breach.[80] This second concern, however, is largely moot, since statutory language will almost never create a private duty of care. Proximity hinges upon the interactions between the parties.

Australia never adopted *Anns*, and the High Court of Australia has rejected proximity as a determinative factor in the duty analysis.[81] A salient features test is instead used. It requires the balancing of the factual characteristics or salient features relevant to the appropriateness of imposing a duty of care on the defendant. *Caltex Refineries (Qld) Pty Ltd v Stavar* provides a nonexhaustive list of 17 salient features for consideration.[82] Some are more relevant to public authorities, although a definitive list does not exist.[83] The statutory regime and policy considerations always appear to matter.[84]

Whether the salient features test and the *Anns/Cooper* test will consistently reach different

---

77 See Feldthusen, "Please Anns", *supra* note 8 at para 68.

78 *Imperial Tobacco*, *supra* note 25 at para 43; *Taylor v Canada (AG)*, 2012 ONCA 479 at paras 80, 88 [*Taylor*].

79 See Lewis Klar, "The Proximity Hurdle in Negligence Actions Against Public Authorities" (2018) 84 SCLR 3 at paras 42–44 (QL) [Klar, "Proximity Hurdle"]; Joost Blom, "Do We Really Need the Anns Test for Duty of Care in Negligence?" (2016) 53:4 Alta L Rev 895 at 907.

80 [1983] 1 SCR 205 at 222–27, 1983 CarswellNat 92. See Klar, "Proximity Hurdle", *supra* note 79 at paras 3–10, 40. See also Feldthusen, "Please Anns", *supra* note 8 at paras 68–69 (Feldthusen suggests it would be preferable to answer these three questions prior to or outside of the *Anns/Cooper* test: (1) whether the statute expressly creates a statutory cause of action; (2) whether the statute expressly precludes or limits the proposed duty; and (3) whether the proposed duty would conflict with the public authority's statutory mandate).

81 Proximity was initially embraced by the Australian High Court in the 1980s to address the indiscriminate nature of reasonable foreseeability as the main criterion for establishing a novel duty of care: see Joanna Kyriakakis et al, *Contemporary Australian Tort Law* (Port Melbourne: Cambridge University Press, 2020) at 52–54.

82 See *Sharma*, *supra* note 3 at paras 97–99, citing *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009), 259 ALR 616 at 102–03, 75 NSWLR 649 [*Caltex*].

83 See *Sharma*, *supra* note 3 at para 105, citing *Hunter Area Health Service v Presland*, (2005) 63 NWSLR 22 at 11, NSWCA 33 (emphasizing the purpose to be served by the exercise of power, the public authority's control over the relevant risk, the plaintiff's vulnerability, and coherence). See also *Graham Barclay Oysters Pty Ltd v Ryan* (2002), 211 CLR 540 at 84, 194 ALR 337; *Crimmins v Stevedoring Industry Finance Committee* (1999), 200 CLR 1 at 93, 167 ALR 1 (noting that, at common law, courts must consider: foreseeability of harm, whether the public authority controlled the situation that brought about the harm, the vulnerability of the plaintiff, whether the duty of care would impose liability with respect to the defendant's core policy or quasi-legislative function, and whether there are any policy reasons which deny a duty of care). For more detailed discussion, see Pam Stewart & Anita Stuhmcke, *Australian Principles of Tort Law*, 4th ed (Sydney: Federation Press, 2017) at chapter 18.

84 See *Sharma*, *supra* note 3 at para 105; Stewart & Stuhmcke, *supra* note 83 at 18.2.1–2.2.

duty conclusions on the same facts is beyond the scope of this article.[85] It bears noting that the considerations under both tests are quite similar. Andrew Robertson, based on his review of the High Court of Australia's jurisprudence, argues proximity remains critically important to the duty of care analysis and what Australia really has is a "sufficiently close relationship test."[86] His account is persuasive. Proximity looms large in the *Caltex* list. The temporal, physical, and relational dimensions of proximity are listed as their own salient features, and many of the remaining factors (reliance, risk creation and control, vulnerability) would be familiar to Canadian judges as part of their step-one proximity analysis.

What Robertson does not address, however, are the potential impacts of the salient features test's flexible structure (or lack thereof) on the duty of care analysis. By listing proximity as a single salient feature among many, judges are invited to engage in a balancing exercise that embraces a less robust view of the salient features relevant to relational proximity—they are, in effect, transformed into general principles that bear little resemblance to the features of private party proximity. All that is left is double foreseeability. This is what happened in *Sharma*.[87]

3. *SHARMA* AND PRIVATE PARTY PROXIMITY—PLEASE *ANNS*, I WANT SOME MORE!

Sharma arose over concerns about the Australian Minister's potential approval of a coal mine extension in New South Wales. The extension was expected to increase the mine's total coal extraction and produce 100 million tonnes of CO_2 over the course of its 26-year life.[88] The Children commenced proceedings in the Federal Court of Australia to block the extension. The Minister agreed not to render a decision until the case was decided.[89]

The Children argued that the Minister owed them and all Australian children a common law duty to exercise her statutory powers to approve (or not approve) the mine extension with reasonable care, so as not to cause them harm.[90] They requested a *quia timet* injunction to prevent the Minister from approving the mine extension in breach of this duty.[91] Bromberg J declared that the Minister, in exercising her statutory powers, owed Australian children a duty

---

85 See Blom, *supra* note 79 at 907 (although the author did not directly answer this question).

86 Andrew Robertson, "Proximity: Divergence and Unity" in Andrew Robertson & Michael Tilbury, eds, *Divergences in Private Law* (Oxford, UK: Hart Publishing, 2016) 9 at 9.

87 *Sharma* is also uncharacteristic of Australian negligence law, where, unlike Canada, the Australian High Court has refused to recognize more conventional affirmative duties: see e.g. Chamberlain, "Affirmative", *supra* note 20 at paras 24–25 (contrasting the duty case law in Canada and Australia for commercial alcohol providers). Perhaps Bromberg J is less conservative than his colleagues, or felt compelled to respond to the failings of Australian administrative law to address concerns over high-carbon projects.

88 See *Sharma*, *supra* note 3 at paras 7, 24–25.

89 *Ibid* at para 17.

90 *Ibid* at paras 148, 416. The Children included property damage and economic loss in their definition of harm. Bromberg J restricted the duty to avoid physical harm and death due to issues of coherence with the statutory regime.

91 *Quia timet* in Latin means "because he fears." The Children requested this type of permanent injunction to restrain the Minister's *apprehended* breach of the duty of care: *ibid* at paras 492–99. Bromberg J ultimately refused to issue an injunction on the basis that the children's request was premature; it was not probable that the Minister would breach the duty of care by approving the mine extension: *ibid* at para 510.

to take reasonable care to avoid causing personal injury or death "arising from emissions of carbon dioxide into the Earth's atmosphere."[92]

The subsections below examine Bromberg J's reasons with reference to the Canadian private duty jurisprudence. I conclude that Bromberg J actually created a unique public duty to avoid climate change–related physical harms based on double foreseeability alone. It is unique because it is based on a relationship that would not be sufficiently proximate to impose a duty of care on a private party defendant in the same situation under Canadian negligence law.[93] Subsection 3.1 argues Bromberg J's assessment of double foreseeability is questionable, because it turns upon the mere possibility of future harm to the Children. Subsection 3.2 demonstrates the public statute relevant to the Minister's approval does not support a finding of proximity, because it contains no explicit private duty–creating language. Subsection 3.3 argues the remaining positive salient features Bromberg J relies on (vulnerability, indirect risk creation and discretionary regulatory control, and general reliance) amount to general principles, not proximity.

3.1. Focusing on Double Foreseeability

Bromberg J's application of the salient features test begins with and largely focuses on double foreseeability. Over half of his discussion is devoted to the Children's unchallenged expert evidence and the issue of foreseeable (future, climate change–related, and physical) harm to a foreseeable class of plaintiffs (Australian children). He concludes that a reasonable person in the Minister's position would foresee that the approval of the mine extension would expose the Children to a "tiny" but "real" risk of serious personal injury or death from heatwaves or bushfires.[94] This conclusion flows from two findings: (1) it is both "obvious and foreseeable" that the approval will allow the mine to make a "tiny" contribution to global atmospheric CO_2 (in the form of 100 million tonnes of scope three CO_2 emissions);[95] and (2) unlike a layperson, the Minister must be aware of the unchallenged expert evidence indicating that the mine extension will cause a "fractional increase" in the global average surface temperature, possibly triggering a "tipping cascade" towards a four-degree future world.[96] Even without reaching the tipping point, the risk and magnitude of future harm to the children from bushfires and heatwaves will increase exponentially at every increment above two degrees Celsius.[97]

While there is no bright line test for how foreseeable "some harm" to the class of plaintiff must be to support a finding of proximity,[98] Bromberg J's reasons require a degree of ministerial prognostication unseen in common law negligence. Whether a reasonable Minister would (or ought to) be aware of every aspect of the Children's expert evidence is questionable. We are left

92 *Sharma II*, *supra* note 4 at para 1 (Bromberg J specifically refers to persons who are under the age of 18 and ordinarily resident in Australia at the time of the proceeding's start).

93 See Feldthusen, "Please Anns", *supra* note 8 at para 75. I suspect this conclusion is consistent with Australian negligence law as well: see the addendum for support for this view.

94 *Sharma*, *supra* note 3 at para 253.

95 *Ibid* at paras 7, 248, 253.

96 *Ibid* at paras 88, 248–49.

97 *Ibid* at para 75.

98 See Klar, "Beyond", *supra* note 63 at 243 (asking: "what makes an injury reasonably foreseeable has never been adequately explained. Is it a question of statistical likelihood or creative imagination?").

to wonder if Bromberg J would have concluded differently if the Minister adduced her own expert evidence to challenge the tipping cascade theory.[99]

While rare, foreseeability can preclude the finding of a duty of care in Canada.[100] For example, in *Rankin (Rankin's Garage & Sales) v JJ*,[101] the Supreme Court refused to impose a duty on a commercial garage owner to protect minors who might steal one of his cars and suffer injuries in a subsequent accident. The duty argument failed due to a lack of foreseeability. While a reasonable garage owner would have foreseen the risk of car theft, there was no evidence that he would also have foreseen the risk of physical injury from the dangerous operation of a vehicle by a minor thief. It did not matter that youth lived within walking distance of the garage or that underage drivers are more likely than licensed drivers to drive recklessly. As Karakatsanis J stated, "the fact that something is *possible* does not mean that it is reasonably foreseeable."[102]

Karakatsanis J's language would present a problem for Bromberg J's foreseeability analysis. While he refers to "real risks" the Children may face,[103] they are more accurately characterized as possible, or at least contingent on various possibilities. Canadian courts may, however, address Bromberg J's characterization of the risk through factual and legal causation, as opposed to following *Rankin* and denying the existence of a duty of care.

Rankin creates another potential conceptual hurdle because Karakatsanis J did not view vehicles as inherently dangerous:

> Vehicles are ubiquitous in our society. They are not like loaded guns that are inherently dangerous and therefore must be stored carefully in order to protect the public. Commercial garages, unlike an individual who leaves a car unlocked with the keys accessible, have care and control of many vehicles and necessarily have to turn their mind to the security of those vehicles, especially after hours, to prevent theft of the vehicles. Having many vehicles, however, does not necessarily create a risk of personal injury. While cars can be dangerous in the hands of someone who does not know how to drive, this risk would only realistically exist in certain circumstances.[104]

While Karakatsanis J raises this point when discussing "more" proximity, an argument could be made that GHG emissions are also not inherently dangerous. It may not be reasonably foreseeable that the "tiny" amount of emissions from the mine extension pose more than a possible risk of future physical harm to the Children. I return to this idea in subsection 3.3.[105]

---

99 Climate change litigation increasingly involves lengthy discussions on climate science. Yet, some of Bromberg J's discussion of the expert evidence is arguably unnecessary. He alludes to this in his reasons and his justification is not particularly persuasive: see *Sharma*, *supra* note 3 at para 184. It is unclear why the peculiar nature of the children's case (that a breach has yet to occur) requires accommodation, if the foreseeability analysis focuses on "some" (not the actual) harm.

100 See e.g. *Childs*, *supra* note 49 at paras 27–30.

101 2018 SCC 19 [*Rankin*].

102 *Ibid* at para 46 [emphasis in original]. See also *Childs*, *supra* note 49 at para 29.

103 *Sharma*, *supra* note 3 at paras 225, 235, 251–53.

104 *Rankin*, *supra* note 101 at para 60.

105 Bromberg J later finds that the Minister's knowledge of the risk of harm to the Children is a stand-alone positive salient feature: see *Sharma*, *supra* note 3 at paras 285–87. How is this any different from saying that the risk of harm to the Children is reasonably foreseeable? This is an unnecessary rehash of double

3.2. Just a Public Statute

Bromberg J next engages in what I described in section 2 as the controversial exercise of finding proximity between the parties by implication from the legislation that guides the Minister's approval, the *Environment Protection and Biodiversity Conservation Act 1999 (EPBCA)*.[106] He determines the *EPBCA*'s scope, functions, and objectives give the Minister "responsibility over the environment and the interests of Australians as part of the environment, with an emphasis on ensuring a healthy environment for the benefit of future generations."[107] The *EPBCA*, he concludes, thus places the Minister in the "situation" of having a "significant and special measure" of control over the risk of harm, which "facilitates the existence of a duty of care."[108]

The inclusion of the concept of intergenerational equity under the *EPBCA*'s objectives supports Bromberg J's conclusions that: (1) the Minister's responsibility over the environment includes the protection of future generations such as the Children; and (2) the Minister should consider people's safety when exercising her statutory power to approve or reject a particular project.[109] What does not flow from these conclusions, however, is any intention by the Australian legislature to create a *private* duty of care on the Minister that exposes her to damage claims when she exercises this statutory power. The *EPBCA* is a public statute with a public purpose. It contains no explicit duty language. Nor is there any reference to a right to compensation. Breach of a statutory duty does not give rise to negligence liability. As in most public authority negligence cases, all that can be safely said is the *EPBCA* does not negate a duty of care.

3.3. General Principles, Not Proximity

Bromberg J devotes a single paragraph of his reasons to the specific salient feature of proximity. He correctly observes that there is no temporal or physical proximity between the Minister and the Children.[110] He nevertheless concludes that proximity is a positive salient feature because several other positive salient features "demonstrate a *relational nearness*" between the Minister and the Children.[111] It is not, and they do not.

Bromberg J first finds that: (1) the innocent Children are particularly vulnerable to the risk of severe climate change–related physical harms;[112] and (2) the Minister, by approving the mine extension, will create and "substantial[ly], if not exclusive[ly], control" this risk.[113]

---

foreseeability. Any doubt over this point disappears when Bromberg J references *Donoghue*'s neighbour principle: *ibid* at para 287.

106 (Cth), 1999/91 [*EPBCA*].

107 *Sharma*, *supra* note 3 at para 274.

108 *Ibid* at para 284.

109 *Ibid* at para 274.

110 *Ibid* at para 315.

111 *Ibid* at para 315 (Bromberg J does not specify whether he is referring to every positive salient feature other than foreseeability, or only some of them) [emphasis added].

112 *Ibid* at paras 289–97, 312.

113 *Ibid* at para 284. See *ibid* at paras 271–88 for further discussion on the Minister's role and the risk of harm.

A review of the private duty precedents recognized in Canada (including one seminal UK precedent) suggests this type of indirect risk creation and discretionary regulatory control does not create sufficient private party proximity. Still, the dual control-and-protect duty cases are most relevant to *Sharma*. There are several formal and situational[114] "special relationships of control"[115] that impose affirmative duties on a more powerful private or public defendant[116] both to control a vulnerable party and to protect third parties from being injured by that vulnerable party.[117] A prison warden, for example, must protect vulnerable prisoners and also control them to prevent them from escaping and injuring foreseeable third parties.[118] Similarly, a commercial alcohol provider owes a duty to protect its patrons and a duty to control them so they do not injure third-party motorists.[119]

Feldthusen suggests these are not true affirmative duty cases. The defendants' careless control is better characterized as misfeasance than nonfeasance and explained by the create the peril principle: a defendant who, by her fault, creates a situation of peril, owes a duty to a person so imperiled.[120] Proximity is simply based on double foreseeability.[121] Hall adds that foreseeability must be "extra or high."[122] She uses the seminal House of Lords' decision in *Home Office v Dorset Yacht* to illustrate this point.[123] A group of borstal boys caused damage to the plaintiff's yacht after escaping from their prison officers during an overnight training session on an island. It was predictable that the boys would escape and escape by boat, given

---

114 Formal control is assigned or obtained through statutory law (warden-prison) or the common law (parent-child). Situational control arises based on the relationship between the parties and other relevant factors: see Margaret I Hall, "Duty to Protect, Duty to Control and the Duty to Warn" (2003) 82:3 Can Bar Rev 645 at 647. Commercial host-patron is an example of situational control: see e.g. *Jordan House Ltd v Menow*, [1974] SCR 239, 38 DLR (3d) 105 [*Jordan House*].

115 Sometimes other labels are used, such as a "paternalistic relationship of supervision" or a "power/dependency" special relationship.

116 Vicarious liability may or may not apply if a public authority is involved.

117 See generally Hall, *supra* note 114. See also Bruce Feldthusen, "Bungled Police Emergency Calls and the Problems with Unique Duties of Care" (2017) 68 UNBLJ 169 (QL) [Feldthusen, "Bungled"].

118 See Feldthusen, "Bungled", *supra* note 117 at paras 10, 16, n 26 (noting that the create the peril principle might apply to a case like *Dorset Yacht Co Ltd v Home Office*, [1970] 2 All ER 294 [*Dorset Yacht*]). See also Hall, *supra* note 114 at 649–52 (referring to *Dorset Yacht* and prison wardens' dual duties to control a prisoner and warn foreseeable victims regarding the escaped prisoner).

119 See *Stewart v Pettie*, [1995] 1 SCR 131 at 126–28, 121 DLR (4th) 222 [*Stewart*].

120 See Feldthusen, "Bungled", *supra* note 117 at para 16; Feldthusen, "Please Anns", *supra* note 8 at para 58. The create the peril principle is traced to Lord Denning's remarks in *Videan v British Transport Commission*, [1963] 2 QB 650. Lord Denning was cited with approval by the Supreme Court in *Horsley v MacLaren*, [1972] SCR 441 (SCC) at 444, 1971 CarswellOnt 171 [*Horsley*]. A boat captain attempted to rescue an invited passenger who had fallen overboard. Another invited guest dove into the water to help and subsequently died. According to Feldthusen, a duty arose between the boat captain and the invited guest based on a "special relationship" rooted in the guest's vulnerability and the captain's control of the risk, despite the fact the guest fell overboard through no fault of the captain. No duty, however, arose between the captain and the second rescuer because the captain was not negligent in his attempt to rescue the first guest and thus did not create the peril: see Feldthusen, "Please Anns", *supra* note 8 at para 58.

121 See Feldthusen, "Please Anns", *supra* note 8 at para 58.

122 Hall, *supra* note 114 at 646.

123 See *Dorset Yacht*, *supra* note 118.

their physical location. The yacht owners were therefore part of a foreseeable class of victim that faced a particular risk of damage. Hall suggests that had the boys made it to shore and then traveled inland to cause damage to a farm, the farmer would not have been a foreseeable plaintiff, but a general member of the public to whom no duty was owed.[124]

The Supreme Court rarely mentions the create the peril principle in the dual control-and-protect (and other) duty cases, even when it applies.[125] Sometimes the Court will refer to the defendant's misfeasance having a "close and direct effect" on the plaintiff,[126] or there being a "direct causal link" between the defendant's misfeasance and the plaintiff's physical injuries.[127] Most recently in *Childs*, the Supreme Court used this language: "where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls."[128] The facts of *Stewart v Pettie* help illustrate when the create the peril principle applies regardless of the risk-creation language the court chooses to use.[129] The commercial host defendant created a peril (drunk driving) for the third-party plaintiff (a guest) when it actively and directly overserved another guest (misfeasance) to a state of ascertainable intoxication, knowing that the guest might drive himself and the third-party plaintiff home. The intoxicated guest was allowed to leave the premises (lack of control) and then injured the third-party plaintiff (who was now a passenger in his car) in an accident on the highway a short time later.[130]

Describing the Minister's misfeasance in terms of risk creation is difficult because there is

---

124 See *Hall*, *supra* note 114 at 649–50. See also *Stewart*, *supra* note 119 at para 28 (the Supreme Court notes that a commercial host owes a duty "to third parties who might reasonably be expected to come into contact with the patron, and to whom the patron may pose some risk").

125 *Horsley* is the main exception. When these cases involve public or private defendants engaged in a commercial enterprise or public function, the Supreme Court's proximity analysis may also examine the relevant statutory regime and any public expectations or reasonable reliance that arise from it: see *Childs*, *supra* note 49 at paras 37, 40, referring to *Dunn v Dominion Atlantic Railway Co*, 60 SCR 310, [1920] 2 WWR 705, *Stewart*, *Jordan House*, and *Doe*. But see my later discussion regarding *Doe* in subsection 4.1. Yet these considerations are not necessary to establish sufficient private party proximity. *Jordan House* is illustrative. The intoxicated plaintiff was injured while traveling home on a highway after being overserved alcohol and then ejected by the hotel owner defendant: see *Jordan House*, *supra* note 114 at 241–43. Laskin J, for the majority, determined that the hotel owner had a duty to protect the intoxicated guest, in part, because they "fed" the guest alcohol "in violation of applicable liquor license and liquor control legislation": *ibid* at 248. Reference to this legislation is suprising since Laskin J noted earlier that the *Liquor License Act* had "no direct application to the facts" and the breach of either act was not "enough to attach civil liability to the hotel": *ibid* at 245–46.

126 *Hill*, *supra* note 62 at para 29.

127 *Odhavji*, *supra* note 11 at para 56.

128 *Childs*, *supra* note 49 at paras 37–38.

129 The Supreme Court again does not mention the create the peril principle. Major J simply relies on Laskin J's reasons in *Jordan House* to extend a commercial host's duty to protect to foreseeable third-party motorists: see *Stewart*, *supra* note 119 at paras 26–29. Those reasons refer to an "invitor-invitee" relationship between commercial hosts and their guests. However, an invitation and risk attraction are not necessary to establish proximity when the defendant has created a peril. When they are present, it is simply easier to establish a foreseeable class of plaintiff.

130 See *Stewart*, *supra* note 119 at paras 2–8, 10. Major J ultimately concludes that the commercial host did not breach the standard of care and was not a but-for cause of the plaintiff's injuries: *ibid* at paras 34–70.

not a clear and direct causal link between the project approval and the possible future harm to the Children. Bromberg J concludes that there is no physical or temporal proximity between the Minister and the Children.[131] In fact, to assert that the Minister's approval of the mine extension will imperil them is tenuous. She will not give the mine owners or operators matches to start a bushfire; she will not even provide the coal needed to create the GHG emissions. The Minister's position is closest to that of the social hosts in *Childs*. There, the Supreme Court refused to impose a duty on social hosts of a "BYOB" party to protect third-party motorists from physical harm caused by an intoxicated guest. The social hosts did not create the peril of drunk driving by merely inviting guests to a house party where alcohol was served. The intoxicated guest did not "park his autonomy at the door" when he decided to attend the party and overdrink, and he was responsible for the accident that injured the third-party plaintiff.[132] Similarly, the Minister's approval will merely facilitate an offsite "Bring Your Own Coal (BYOC)" party held by an autonomous "corporate adult" responsible for its own emissions.

This analogy, of course, is not perfect. One could argue the Minister is less passive than the social hosts as the company was required to seek permission for the mine expansion. A similar exchange seems unlikely in the social host context. Why would a guest ask permission to drink their own alcohol at a "BYOB" party? The more important question is: Would the Supreme Court recognize a proximate relationship between a permission-seeking guest and the permission-granting social hosts? Even if the social hosts were aware of the risk of drunk driving, granting an autonomous adult guest permission to drink their own alcohol is unlikely to create expectations or specific reliance between the parties (or a third-party motorist) sufficient to ground private party proximity.

Furthermore, drunk driving is not an inevitable consequence of a "BYOB" party, whereas some level of GHG emissions (and arguably, some resulting environmental harm) are inevitable if the company pursues the mine expansion after ministerial approval. However, directness still poses a problem.[133] Even if the Children's tipping cascade theory is correct, the Minister's approval will at best *indirectly* create a peril that will *indirectly* cause future physical harm or death to the Children. This is not the type of material risk creation that the Supreme Court identifies in the private party proximity cases.

Construing the Minister's future careless control of the mine owners and operators as creating a peril that gives rise to a duty to protect the Children is also difficult because of the discretionary nature of her regulatory control. The Minister enjoys a high degree of discretion when exercising her statutory powers over a regulated entity. Several policy considerations, such as budgets, may come into play. Focusing on factual control alone overlooks the importance of the discretionary nature of public decision-making,[134] which is not present in special relationships of control involving private defendants. Some *public* defendants in special relationships of control, like the wardens in *Dorset Yacht,* assume or obtain control over their

131 See *Sharma*, *supra* note 3 at para 315.

132 See *Childs*, *supra* note 49 at paras 44–45.

133 See also my discussion on directness regarding *Odhavji* at pp 209–210.

134 See *Anns*, *supra* note 47 at 754 (the majority rejected "control" for the purposes of finding a duty of care because it took no account of the public authority's discretion). See also Feldthusen, "Unique", *supra* note 20 at para 18; Michael G Bridge, "Government Liability, the Tort of Negligence and the House of Lords Decision in Anns v. Merton London Borough Council" (1978) 24:2 McGill LJ 277 at 283.

prisoners by operation of the law. However, even they do not enjoy the same level of discretion as the Minister. Surely they could not have unilaterally allowed the borstal boys to escape due to budgetary concerns. The same holds for special relationships of control involving private parties. A commercial host, for example, cannot decide to prioritize profits over patron safety and overserve alcohol because they believe their establishment provides an important public service.[135]

The nature of the peril in *Sharma* raises a further conceptual hurdle: the difficulty in characterizing the mine's GHG emissions alone as obvious or inherent perils. No one would dispute that drunk driving or an escaped prisoner are inherently dangerous. In subsection 3.1, I questioned a similar characterization of the mine extension's GHG emissions. Drunk driving, for example, requires intoxication beyond the limits set by criminal law. By contrast, there is no evidence that the GHG emissions from the mine extension will exceed any regulatory limits or prevent Australia from reaching a national emissions target.[136] GHG emissions well beyond the level emitted by the mine extension will still be added to the atmosphere, even under a two-degree warming scenario. The mine's tiny contribution to global atmospheric CO_2 only becomes dangerous due to the presence of existing emissions and other forces, and after an uncertain amount of time.

A final difficulty is that Bromberg J does not uncover the type of "high" or "extra" foreseeability required to justify a duty to protect a third party.[137] The specific impact of the mine's GHG emissions on the Children is not predictable like the physical harm was to the car passenger and patron in *Stewart* and *Jordan House,* or as property damage was to the yacht owners in *Dorset Yacht*.[138] The Children are even further removed than Hall's unforeseeable farmer. The GHG emissions facilitated by the Minister's approval will contribute to *global* average temperature rise, which may result in more frequent or severe bushfires and heatwaves, which will subsequently injure citizens worldwide. Tracing the specific GHG emissions from the mine extension to the Children's potential future physical injuries is impossible. Despite their vulnerability, it makes no legal sense to refer to the Children as the Minister's neighbours in this context.[139]

---

135 The level or degree of control exercised is also different. There are special relationships of control, such as warden-prison, police officer-perpetrator, hospital-psychiatric patient, where there is total or near total control over the vulnerable party's fundamental right to control her body. Direct physical restraint is often used. This high level of control surely supports an obligation to protect both the vulnerable party and foreseeable third parties who may be injured by them. The Minister has comparatively less control. The mine owners/operators voluntarily submitted to her control (by applying for approval) when they decided to pursue a regulated activity for commercial benefit. The Minister's control will not be total: specific conditions will likely be attached to the approval, license or permit issued, and the Minister will not necessarily have authority over the mine owner/operator's other activities.

136 Statutory standards, of course, do not set the standard for tort liability, but their breach would offer some evidence of dangerousness in this context.

137 See Hall, *supra* note 114.

138 See *Dorset Yacht*, *supra* note 118 at 307, 310–11, 319, 321, 334–35; *Stewart*, *supra* note 119 at para 28; *Jordan House*, *supra* note 114 at 247–49, 251.

139 The Minister appeared to be alive to this point when she argued the Children's vulnerability was not unique. Bromberg J replied by noting the existence of other people vulnerable to climate change does not deny the fact that the Children are vulnerable: see *Sharma*, *supra* note 3 at para 297. While this is true as a factual matter, it gets us no closer to sufficient private party proximity.

The above difficulties suggest that "more" proximity is required to support a duty of care between the Minister and the Children. What form would this take? The case law provides an answer—specific reliance. A private defendant may say or do something that induces or invites the plaintiff to rely on them for protection from a third party. A duty may then arise if the plaintiff reasonably relied on the defendant to their detriment.[140]

Specific reliance is absent in *Sharma*. Bromberg J notes that the Children must be able to rely or depend on the Minister to exercise her statutory powers reasonably because they cannot protect themselves from climate change–related risks. However, this is a reference to general reliance—the idea that citizens expect or rely on public authorities to "conduct their operations without negligence."[141] While this expectation is likely reasonable, it does not give rise to private party proximity. Bromberg J held the Minister did not assume responsibility for the Children.[142] She had no contact with the Children and made no representations to them. I return to the issue of general reliance in subsection 4.2.

To summarize, in *Sharma*, vulnerability, risk creation and control, and reliance amount to general principles. Despite any relational nearness they may communicate, they do not give rise to sufficient private party proximity under Canadian negligence law. Bromberg J imposed a unique public duty on the Minister to avoid climate change–related physical harms. This duty is rooted in double foreseeability alone, which *Cooper*, *Livent*, and *Maple Leaf Foods* make clear is insufficient to impose a *prima facie* duty of care on a public authority.[143] The *EPBCA* does not support a finding of proximity; it just does not negate a private duty.[144] Recent accounts of *Sharma* have overlooked these critical points.[145]

4. DISTINGUISHING *SHARMA* AS A UNIQUE PUBLIC DUTY

This section considers whether a Canadian court would recognize a *Sharma*-type unique public duty. I address two types of duty involving Canadian public authorities and vulnerable plaintiffs such as children, seniors, and Indigenous Nations.[146] The first is the duty to avoid causing climate change–related physical harms to these vulnerable groups.[147] *Sharma* covers

---

140 See Feldthusen, "Unique", *supra* note 20 at para 11. See also Bruce Feldthusen, "Hedley Byrne: Misused, then Exiled by the Supreme Court of Canada" in Kit Barket, Ross Grantham & Warren Swain, eds, *The Law of Misstatements: 50 years on from Hedley Byrne v Heller* (Oxford, UK: Hart Publishing, 2015) at 261.

141 Feldthusen, "Unique", *supra* note 20 at para 21 (noting that the Australian High Court has "mused" about the concept). See also Feldthusen, "Ten Reasons", *supra* note 19 at para 13.

142 See *Sharma*, *supra* note 3 at para 298.

143 See *Cooper*, *supra* note 10 at paras 22, 29; *Livent*, *supra* note 10 at para 23; *Maple Leaf Foods*, *supra* note 10 at para 30.

144 See *EPBCA*, *supra* note 106.

145 See Peel & Markey-Towler, *supra* note 5 (referring to a "duty *to* care" [emphasis added]); Ellen Rock, "Superimposing Private Duties on the Exercise of Public Powers: *Sharma v Minister for the Environment*" (11 August 2021), online: *Australian Public Law* <auspublaw.org/2021/08/superimposing-private-duties-on-the-exercise-of-public-powers-sharma-v-minister-for-the-environment/> (referring to Bromberg J's reasons as being tantamount to the "superimposition" of a private duty on a public authority).

146 This would likely include the federal and provincial governments and their respective ministers of environment and climate change, and, possibly, more specific regulatory bodies.

147 I accept for the purposes of this article that a Canadian court would agree with Bromberg J that there

this duty insofar as a public authority engages in misfeasance when it negligently approves a GHG-emitting activity or project. The second is the affirmative duty to protect these vulnerable groups. This duty arises when a public authority has failed to enact sufficiently ambitious GHG-emissions reduction target legislation (nonfeasance). Duty to protect claims have arisen in Canada, but are framed as rights violations under sections 7 and 15 of the Canadian *Charter of Rights and Freedoms* ("*Charter*").[148]

A few preliminary comments are required before I proceed to my analysis. First, *Sharma*-type plaintiffs are not in a position of strength, because unique public duties in Canada are rare and controversial. Feldthusen notes the Supreme Court has only created five public duties and never admitted to doing so.[149] Some may have been accidents.[150] Feldthusen raises several objections to unique public duties. He mainly argues courts lack jurisdiction to impose unique public duties due to our historical understanding of the separation of powers between the courts and other branches of government, as evidenced by Crown liability legislation.[151] Judges, he contends, should not second-guess benefits that are best left to the discretion of more competent legislative and executive branches.[152] Tort scholars have not deeply interrogated the objections to unique public duties or explicitly addressed Feldthusen's argument regarding the separation of powers. Judges are a fairly conservative group and would likely hesitate to engage in this form of judicial activism.

Second, any statutory regime relevant to a *Sharma*-type duty claim is unlikely to include language that supports a finding of proximity. Canadian courts have consistently held that federal and provincial environmental statutes have public purposes and do not create private duties of care.[153] A court is likely to reach the same conclusion when interpreting applicable emission reduction targets or climate change–related legislation.[154]

---

is no duty on a public authority to avoid climate change–related property damage and pure economic losses: see *Sharma*, *supra* note 3 at paras 148, 416.

148 Often section 15 of the Charter is invoked. See e.g. *La Rose v Canada*, 2020 FC 1008 [*La Rose*]; *Misdzi Yikh v Canada*, 2020 FC 1059 [*Misdzi Yikh*]; *Mathur v Ontario*, 2020 ONSC 6918 [*Mathur*]. For a discussion of these Charter-based claims: see Camille Cameron & Riley Weyman, "Recent Youth-Led and Rights-Based Climate Change Litigation in Canada: Reconciling Justiciability, Charter Claims and Procedural Choices" (2022) 34:1 J Envtl L 195. Where a public authority repealed emissions target legislation, this would count as misfeasance and the duty to avoid climate change–related physical harms would arise.

149 See Feldthusen, "Unique", *supra* note 20 at para 2.

150 *Ibid* at paras 10–11 (noting that the Supreme Court has cited the prohibition against unique public duties in *Welbridge Holdings v Winnipeg* and then gone on to do the opposite).

151 See Feldthusen, "Ten Reasons", *supra* note 19 at paras 9–11. See also Feldthusen, "Bungled", *supra* note 117 at paras 7–8, 35–36, 43–60.

152 See Feldthusen, "Ten Reasons", *supra* note 19 at paras 16–22 (referring specifically to the Good Public Samaritan principle, which I also discuss in subsection 4.2).

153 See e.g. *MacQueen v Sidbec Inc*, 2006 NSSC 208 at paras 36–37, 48–51 [*MacQueen*] (finding that various federal and provincial environmental statutes related to public, not private interests), rev'd on other grounds 2007 NSCA 33; Lynda Collins & Jasmine Van Schouwen, "Regulatory Negligence in Environmental Law" in Allan E Ingelson, ed, *Environment in the Courtroom* (Calgary: University of Calgary Press, 2019) 187 at 189.

154 For example, the federal *Canadian Net-Zero Emissions Accountability Act*, SC 2021, c 22, does not include any duty-creating language. The reference to Indigenous Peoples in the *Act*'s preamble might support a

Third, the conceptual hurdles concerning the Minister's approval I discuss in section 3 apply to both the duty to avoid and to protect. The only difference is that the duty to protect would involve unambitious target legislation that would amount to the careless control of more than a single entity or project (such as the control of all fossil fuel emitters in Canada), resulting in a higher level of GHG emissions. That might marginally, but not meaningfully, improve the optics with respect to double foreseeability and risk-creation.

The real issue is whether Canadian courts would overlook these conceptual hurdles to find proximity by referring to the existing unique public duty precedents and the general principles and special relationships behind them. Subsection 4.1 considers dual unique control-and-protect police duties and one unique municipality duty where control is absent. I argue that *Sharma*-type duty claims are distinguishable because they involve discretionary policy-based decisions made by public authorities. Such claims do not compel a finding of proximity based on fairness or justice, do not meet a lowered bar for causal directness, and do not meet the high level of double foreseeability present in these unique public duty cases. Subsection 4.2 covers the general reliance–based unique public duties created by the Supreme Court that relate to discretionary inspections. I predict a Canadian court is unlikely to accept a *Sharma*-type duty based on general reliance, given the Supreme Court's shift towards a corrective justice or rights-based approach to duty. The ongoing requirement of specific reliance or other indicia of private party proximity in analogous duty situations involving environmental decision-making and regulatory action further supports this conclusion.

4.1. The Dual Control-and-Protect and Power-and-Dependency Precedents

Peel and Markey-Towler are optimistic that Bromberg J's acceptance of the Children's vulnerability opens pathways for creative arguments in common law jurisdictions.[155] Similarly, Stepan Wood has wondered whether parties disproportionately affected by the impacts of climate change or related legislative inaction could establish a proximate relationship with a government defendant.[156] The optimism surrounding *Sharma* should be tempered, however, as vulnerability alone does not justify the imposition of a private duty of care.[157] Control and

finding of proximity between the federal government and Indigenous Nations, like the *EPBCA*'s reference to intergenerational equity allegedly supported the Minister's duty to the Children: see *Sharma*, *supra* note 3 at paras 150, 158, 273, 416; *EPBCA*, *supra* note 106. There is no such language in British Columbia's version of the same legislation: see *Climate Change Accountability Act*, SBC 2007, c 42.

155 See Peel & Markey-Towler, *supra* note 5 at 727, 735.

156 See Stepan Wood, "Climate Change Litigation in Ontario: Host Prospects and International Influences" (3 February 2016) at 7, online (pdf): *York U* <ejsclinic.info.yorku.ca/files/2016/03/S-Wood-OBA-Institute-2016-climate-change-litigation.pdf> (discussing the Urgenda decision's significance in Canadian Law). See also Martin Olszynski, "Regulatory Negligence Redux: Alberta Environment's Motion to Strike in Fracking Litigation Denied" (14 November 2014), online: *ABLawg* <ablawg.ca/2014/11/14/regulatory-negligence-redux-alberta-environments-motion-to-strike-in-fracking-litigation-denied/> (wondering if "dependency" on a regulator to ensure activities are conducted in an environmentally safe manner might support a finding of proximity).

157 See e.g. *Das v George Weston Ltd*, 2017 ONSC 4129 at para 450, explaining that "the mere fact that a plaintiff is vulnerable does not entail that he or she will be owed a duty of care … Proximity and the idea of fairness remain factors even for the vulnerable. To return to the Good Samaritan parable, the victim on the side of the road was vulnerable, but that in and of itself will not determine whether he is owed a duty of care under the law."

vulnerability must usually work together, as discussed in subsection 3.3.

Some Canadian courts, however, appear willing to adopt a broad view of "controlling the risk" when imposing affirmative duties on police to warn or protect vulnerable victims of crime. The best-known example is *Doe v Metropolitan Toronto (Municipality) Commissioners of Police*.[158] Jane Doe was one of five known victims sexually assaulted by a balcony rapist. She brought a negligence claim, among other claims, against the Toronto Police for their failure to warn her about the rapist, alleging this omission deprived her of an opportunity to protect herself. At trial, MacFarland J determined the police owed Jane Doe a duty to warn and breached this duty when they decided not to issue a warning, as they held the stereotypical belief that women would become "hysterical and panic" and jeopardize their investigation.[159] The *Anns/Cooper* test was not applied since *Cooper* was decided a few years later. MacFarland J appears to find a special relationship between the parties, based on the police's statutory duty to "preserve the peace" and "prevent crimes," and their knowledge of the specific risk (sexual assault by an unknown perpetrator) to a specific class of vulnerable plaintiff (single women living in apartments accessible by balconies in the Church and Wellesley area of Toronto).[160]

Doe arguably created a unique police duty based upon "eminent" double foreseeability.[161] There was no private party proximity. The police did not create the peril; rather, they failed to warn Doe. They never had or lost control over the balcony rapist that directly harmed her. There was no transaction-specific reliance between the parties. Feldthusen suggests the duty in *Doe* is based on an "expanded notion of control beyond custody."[162] I take this to mean the duty to warn arose because the police have the statutory power to control criminals within their jurisdiction.[163]

An expanded notion of risk control is also at play in *Haggerty v Rogers*, a case that Erika Chamberlain describes in her recent comparison of proximity in police duty cases in Canada and the UK.[164] In *Haggerty*, Turnbull J refused to strike a negligence action against the

---

158 *Doe*, *supra* note 11.

159 *Ibid* at para 175. See also Hall, *supra* note 114 at 676–78 (noting that the court "seemed to suggest that warning was part of a larger duty of protection", which, if true, she takes issue with on practical and conceptual grounds).

160 See *Doe*, *supra* note 11 at paras 141–42, 164.

161 *Ibid* at para 164.

162 Feldthusen, "Bungled", *supra* note 117 at para 41, n 167. See also Feldthusen, "Please Anns", *supra* note 8 at para 65 (referring only to a "special relationship").

163 Police-suspect cases like *Hill* are not controversial. They involve police actions that have a close and direct effect on a particular suspect. An analogy can also be made to the power/dependency precedents: see Feldthusen, "Please Anns", *supra* note 8 at 127.

164 See Erika Chamberlain, "To Serve and Protect Whom? Proximity in Cases of Police Failure to Protect" (2016) 53:4 Alta L Rev 977 at 981–84 [Chamberlain, "Proximity"]. Chamberlain also discusses *Patrong v Banks*, 2015 ONSC 3078 [*Patrong*], where Myers J appears to abandon the *Anns/Cooper* framework altogether and find proximity between the police and an unknown victim based on a sense of fairness: see Chamberlain, "Proximity", at 982–83. Nevertheless, Chamberlain suggests that private party proximity may have been present since the known perpetrator (a gang member) and the victim (a black man who was mistaken as a rival gang member) were confined to a relatively small geographic area: *ibid* at 984. See also *Patrong* at para 78 (describing potential private party proximity, but choosing a fairness analysis instead). Arguably, including possible or mistaken membership in a small and well-defined class of vul-

Hamilton Police Services Board by the estate of a man who was murdered by a wanted criminal at a nightclub in Hamilton. Prior to the murder, the criminal attempted to turn himself in by calling 911 and asking the police to pick him up. The police arrived an hour later, and he was gone. No further action was taken by police until the murder.[165]

Chamberlain describes Turnbull J's approach to proximity as "broad" and "expansive."[166] Put simply, there was no evidence of private party proximity. Turnbull J relies on *Doe* to conclude the plaintiff had a pre-existing relationship with the wanted criminal, creating "geographic proximity." This is a softening of *Doe*'s eminent double foreseeability requirement.[167] The police had no reason to suspect the plaintiff was vulnerable to the risk of violence; he was unknown to them. Unlike *Doe*, there was no small and well-defined class of potential victims; the wanted criminal could have attacked anyone he came across in Hamilton, or elsewhere if he decided to travel. *Haggerty*, however, is arguably less of an extension of risk control since, unlike the officers in *Doe*, the officers here at least attempted to exercise their statutory powers of control over a wanted criminal whose location was known to them.[168]

Turnbull J's reliance on *Just v British Columbia* is another strong sign that he was willing to create a unique police duty to protect.[169] The Supreme Court in *Just* held that a government authority owed an affirmative duty to highway users to maintain highways in a nonnegligent manner. In *Haggerty*, Turnbull J rejected the police's argument asserting there could be no proximity because the plaintiff was unknown to them. He reasoned that the plaintiff was in no different position than the many unknown highway users in *Just*. This is true, but there was also insufficient private party proximity in *Just*. Feldthusen argues the Supreme Court there created a unique public duty. Proximity was based on double foreseeability (some physical harm might befall motorists on poorly maintained highways) and general reliance (the general expectation of motorists "invited" to British Columbia's many tourist attractions was that highways will be reasonably maintained).[170] "There was no pre-accident connection between the parties … There was no transaction-specific reliance. The defendant did not push the rock down the slope, but rather failed to prevent it from falling [on the plaintiff's vehicle]."[171]

Outside of the police context, the Ontario Court of Appeal has imposed on a municipality a unique public duty to warn vulnerable tenants of rent decreases, based only on a high level of double foreseeability and absent any control over the risk. In *Williams v Ontario*, the City of Toronto ("City") engaged in community consultations to address the problem of illegal rooming houses in the Parkdale area of Toronto. This led to the creation of the Parkdale Pilot Project ("PPP"), which mainly aimed to make rooming houses safer through regular

---

nerable plaintiffs is still an extension of *Doe*: see Chamberlain, "Proximity", at 982.

165 See *Haggerty*, *supra* note 11 at paras 16–23.

166 Chamberlain, "Proximity", *supra* note 164 at 981, 982.

167 *Ibid* at 982.

168 It is not clear from the facts if the wanted criminal escaped the control of the specific police defendants, in which case, this is a more traditional application of careless control.

169 Turnbull J referred to the duty as a "failure to apprehend," which is more consistent with a duty to protect an unknown victim, than to warn them: see *Haggerty*, *supra* note 11 at para 42.

170 See *Just*, *supra* note 18 at 6–7.

171 Feldthusen, "Unique", *supra* note 20 at paras 29–30.

inspections and enforced standards. The province changed the classification of rooming houses for assessment purposes, which lowered the applicable property tax. Ontario passed legislation requiring landlords of rooming houses to reduce their rent on account of the tax decreases and municipalities to notify affected tenants of the rent reductions. The landlords did not reduce their rents, and the City failed to provide the notices. As a result, tenants living in low-income rooming houses in Parkdale did not know about or benefit from the rent reductions and overpaid for their rent. Tenants brought a class action in negligence against the City.[172]

On a motion for summary judgement, Perell J declared the City owed the tenants a duty of care rooted in a "special relationship" arising from the PPP.[173] The Ontario Court of Appeal upheld this decision, despite the absence of "many of the typical factors that have led courts to find proximity."[174] Feldthusen suggests that *Williams* may have been an unproblematic, albeit unspoken, application of the power-and-dependency precedents.[175] Klar appears to disagree. He argues the Ontario Court of Appeal was ultimately swayed by the City's knowledge that the class members were particularly vulnerable to higher rents if the PPP's goal of making rooming houses safer was accomplished or if the City failed to perform its statutory notification duties.[176] This knowledge, Klar contends, relates to foreseeability, not relational proximity.[177] There was no evidence that Williams interacted with the City, relied on the PPP, or was even aware of it. By implication, the Ontario Court of Appeal and Perell J created a unique public duty.[178]

Williams is different from *Doe* and *Haggerty* because of the absence of any underlying duty to control. The City never had effective factual control over the risk, as it was the landlords who overcharged the tenants. The City only had a statutory duty to warn; it had no statutory power to control rental rates or landlords more generally—the province would have. Perhaps the easiest way to explain *Williams* (and *Doe*) is to focus on the nature of the duty. When there is a less onerous affirmative duty to warn, as opposed to a duty to control, relying on a high

---

172 *Williams I*, *supra* note 12 at paras 1–2, 15–47.

173 *Ibid* at paras 12–13, 51, 53, 70–78. Perell J initially refused to certify the class action, finding that the legislation did not create a relationship of proximity between the City and tenants: see *Williams v Ontario*, 2011 ONSC 2832. The Divisional Court and Ontario Court of Appeal remitted the matter to Perell J for reconsideration. Both courts agreed that he had erred in focusing only on the applicable legislation, without considering the "special relationship" between the parties arising from the PPP: see *Williams v Ontario*, 2011 ONSC 6987 at paras 43–46; *Williams v Ontario*, 2012 ONCA 915 at para 18.

174 *Williams II*, *supra* note 12 at para 35.

175 See Feldthusen, "Please Anns", *supra* note 8 at paras 65, 74; Feldthusen, "Bungled", *supra* note 117 at paras 14, 74.

176 The Court of Appeal also mentions a direct interaction between the City and the Parkdale Resident's Association, which represented many of the class members and in which the representative plaintiff had a role. That interaction, however, involved another association member who asked the City about an entitlement to a rent reduction after notice of the rent reduction ought to have made: see *Williams II*, *supra* note 12 at paras 38–41. Klar notes that was no evidence that the representative plaintiff interacted with the City, relied on the PPP, or was even aware of it: see Klar, "Proximity Hurdle", *supra* note 79 at para 30.

177 See Klar, "Proximity Hurdle", *supra* note 79 at para 30; *Williams II*, *supra* note 12 at paras 30–31, 49. Assumedly, the tenants could have protected themselves from overpaying rent had notice been given. One wonders, however, if that is always true for precariously housed individuals.

178 But see Feldthusen, "Please Anns", *supra* note 8 at paras 73–74 (wondering if *Williams* was decided based on a "power-dependent special relationship", which would make the duty to notify unproblematic).

level of double foreseeability is uncontentious. [179]

A final example to consider is *Odhavji Estate v Woodhouse*,[180] which involved a motion to strike. The Supreme Court left open the possibility of recognizing a unique public duty owed by the Chief of Police, to ensure that their officers cooperate in a Special Investigations Unit ("SIU") investigation when a suspect is killed. The duty was owed to members of the deceased suspect's family who suffered mental injuries because the SIU investigation was not carried out fairly. Feldthusen suggests this duty was founded entirely on the *Police Services Act*, and he can find no principle to explain the decision other than the notion that "a sympathetic case always has a puncher's chance."[181]

In *Odhavji*, the Supreme Court does not, at *Anns/Cooper* step-one proximity, refer to any of the unique police duty cases such as *Doe*. They are not analogous, in any event. The Chief's failure to supervise their police officer employees to prevent them from indirectly causing psychiatric damage is distinct from a police officer's failure to maintain or exercise control over a perpetrator who causes direct physical harm to the plaintiff. *Odhavji* does involve a broad element of control if the police officers under investigation are characterized as the "potential murderers" of the suspect. Feldthusen questions whether the Chief was able to exercise control over the police officers if they were protected by a strong union.[182] Even if the union created difficulties for the Chief, however, *Odhavji* would still fall within the continuum of relevant control established by police cases like *Doe* (where police had less control over an unknown perpetrator), *Haggerty*, and *Dorset Yacht* (where the control of a known perpetrator and the borstal boys would be similar or possibly greater).

Odhavji comes closest to being a helpful precedent for *Sharma*-type plaintiffs since the Supreme Court considered the causal connection between the Chief's failure to control the officers and the relative plaintiffs' harm to be "direct."[183] It is, however, hard to see how. As Feldthusen wonders: How can a "failure to act, that indirectly failed to benefit the plaintiffs, who were relatives of the actual victim of the shooting, which in turn caused them psychiatric damage, be described as meaningfully close"?[184] This is especially so since Canadian courts usually treat psychiatric harm as less foreseeable than physical harm.[185] Yet the psychiatric harm in *Odhavji* is still more direct (temporally and geographically speaking) than the future indirect harms that *Sharma*-type plaintiffs would experience. More importantly, subsequent courts have refused to apply *Odhavji* to regulatory negligence claims, especially when there is no

---

179 See Hall, *supra* note 114 at 673. A power-and-dependency relationship might have existed between the police and Doe, insofar as citizens generally depend on the police to control crime.

180 *Odhavji*, *supra* note 11.

181 Feldthusen, "Ten Reasons", *supra* note 19 at para 2. See also Feldthusen, "Unique", *supra* note 20 at para 39.

182 See Feldthusen, "Unique", *supra* note 20 at para 45.

183 *Odhavji*, *supra* note 11 at para 56.

184 Feldthusen, "Unique", *supra* note 20 at para 43.

185 See e.g. *Mustapha v Culligan of Canada Ltd*, 2008 SCC 27 at paras 14–18 (which requires a higher threshold for the foreseeability of psychiatric harm at the remoteness stage). While recent jurisprudence has tried to soften the distinction between physical and mental injures, *Mustapha* stands: see e.g. *Saadati v Moorehead*, 2017 SCC 28.

statutory duty to act.[186] *Sharma*-type duty claims are identically situated because they would involve discretionary decisions to approve projects or enact target legislation. The discretionary nature of *Sharma*-type decisions and their impact would still preclude the recognition of a unique public duty based on control or power-and-dependency, [187] even if a Canadian court was willing to find a sufficiently direct causal connection between the public authority's misfeasance or nonfeasance and the plaintiffs' harm.

One might justify the unique public duties in the police and municipal precedents (and their expanded view of control and power-and-dependency) using the Bad Samaritan principle: liability should arise for those failing to perform an easy rescue.[188] Had the police simply left sooner to pick up the wanted criminal, he would have been in custody and unable to murder Haggerty. Had the City circulated notices, Williams and the other vulnerable tenants could have avoided overpaying rent.[189] Had the police warned Doe about the balcony rapist through, for example, a televised broadcast, she could have taken steps to protect herself. One could argue that, given the significant threats posed by climate change, a government is acting like a Bad Public Samaritan when it approves a GHG-emitting project or fails to enact stronger target legislation. However, these situations do not involve easy rescues like in the cases above.[190] The passing of federal or provincial target legislation, or any number of project rejections across Canada, may be politically or logistically *easy* actions, but their impact is limited: they will not fully or adequately protect Canadians from climate change–related harms. Some harm is already inevitable, and worst-case warming scenarios are only avoidable through coordinated action involving private and public actors globally.

The Bad Samaritan principle may also not perfectly apply to cases such as *Williams*, since the facts do not clearly demonstrate that the economically vulnerable tenants, if properly warned, would easily have been able to enforce their legal rights and rescue themselves.[191]

---

186 See *Waterway Houseboats Ltd v British Columbia*, 2020 BCCA 378 at 265 [*Waterway*] (distinguishing *Odhavji* and *Fullowka v Pinkerton's of Canada Ltd*, 2010 SCC 5 [*Fullowka*] based on the absence of a statutory duty to act and the grant of an approval as a "discretionary decision based on what the regulator 'considers advisable'"). See also *Dawson v Vancouver Coastal Health Authority*, 2021 BCSC 2060 (finding no proximity between a statutory body that processes complaints and a patient complainant who suffers psychiatric harm due to the body's negligent investigation); *Wellington v Ontario*, 2011 ONCA 274 (refusing to impose a duty of care on the SIU for negligent investigation).

187 The former would include a broad special relationship of control between a public authority and a regulated industry (under the duty to avoid) or one or more industries (under the duty to protect). The latter would include a power-and-dependency relationship between a public authority and a class of plaintiff particularly vulnerable to climate change.

188 See Allen Linden, "Toward Tort Liability for Bad Samaritans" (2016) 53:4 Alta L Rev 837 (QL). No common law province has imposed a Bad Samaritan liability rule, but Quebec, some US states and civil law countries have them: *ibid* at paras 15–18.

189 The principle does not fit perfectly with *Williams I* and *II*, since the municipality needed to "save" the tenant class members from economic harm, not death or serious bodily harm: *ibid* at para 3.

190 One could argue that rejecting a project or passing legislation is "easy" in that there exists political and public will to do so.

191 I leave open the possibility that in police duty to warn cases, crime victims may be able to take sufficient precautionary measures. In *Doe*, for example, the plaintiff may have been able to secure alternative accommodations while the police conducted their investigation and eventually apprehended the balcony rapist.

Another way to tackle this issue is to say the courts were compelled to find proximity as a matter of fairness and justice because the state conduct was reprehensible (*Haggerty*, *Doe*) or at least inexcusable (*Williams*). The discretionary decisions at issue in *Sharma*-type duty claims are unlikely to give rise to a similar compulsion. Such decisions are not *prima facie* "bad" like the decisions to use vulnerable women as "bait" to catch a serial rapist and otherwise remain silent due to discriminatory gender stereotypes (*Doe*); have inadequate 911 response protocols to catch dangerous wanted criminals (*Haggerty*); or forget, without any excuse, to easily notify vulnerable tenants about a rent reduction (*Williams*).

Another factor that precludes the recognition of a unique *Sharma*-type duty is the absence of sufficient double foreseeability—what Chamberlain might refer to as "geographic proximity."[192] *Doe* and *Williams* meet Hall's "high" or "extra" double foreseeability standard.[193] Even *Haggerty* involved city-wide geographic proximity between the defendant police and the murdered plaintiff. This is not the case for *Sharma*-type duty claims for the reasons discussed in section 3. It should thus come as little surprise that courts have refused to extend *Doe* where a regulator is unable to clearly identify a small and well-defined class of vulnerable plaintiffs.[194]

Creating a *Doe*- or *Williams*-type vulnerable class of plaintiffs for a *Sharma*-type case using factors such as time and geography is possible. Children living near the coasts may be more vulnerable to climate change than children living in the interior of Canada.[195] Seniors may be more vulnerable to certain climate change–related physical risks in the short term than children or non-senior adults.[196] Indigenous Nations may be uniquely vulnerable to climate change impacts regardless of the time period, given their special relationship with the land.[197] At a certain point, however, distinctions based on vulnerability become arbitrary. Imagine, for example, if MacFarland J in *Doe* required the police to warn only women who lived on the second (but not the third) floor of apartment buildings because there was evidence that the balcony rapist was most likely to attack those living closest to street level. Distinctions like this do not justify why one class of vulnerable plaintiff is more deserving of tort law's protection or

192 Chamberlain, "Proximity", *supra* note 164 at 982.

193 Hall, *supra* note 114 at 646.

194 See *Taylor v Canada (AG)*, 2020 ONSC 1192 at paras 571–73; *Deluca v Canada*, 2016 ONSC 3865 at paras 55–56. The Supreme Court of Canada did not mention *Doe* in *Edwards v Law Society of Upper Canada*, 2001 SCC 80 [*Edwards*] although Sharpe J's original decision in *Edwards* did, but on the basis that the Law Society was not engaged in a quasi-judicial function: see *Edwards v Law Society of Upper Canada*, 37 OR (3d) 279, [1998] OJ No 132 (QL) (ON SC) at para 19); *Cooper*, *supra* note 10.

195 See Ben Cousins, "Rising Seas are Threatening Canada's Atlantic and Pacific Coasts: Report", *CTV News* (9 December 2021), online: <ctvnews.ca/climate-and-environment/rising-seas-are-threatening-canada-s-atlantic-and-pacific-coasts-report-1.5699675>; Matthew McClearn, "Canada's Disappearing Coastline: How Climate Change puts our Beaches in Jeopardy", *The Globe and Mail (*25 October 2021), online: <theglobeandmail.com/canada/article-canadas-disappearing-coastline-how-climate-change-puts-our-sandy>.

196 See "Who is Most Impacted by Climate Change" (24 January 2022), online: *Government of Canada*, <canada.ca/en/health-canada/services/climate-change-health/populations-risk.html>; Amit Arya & Samantha Green, "Climate Change puts Canada's Seniors at Risk", *The Globe and Mail* (16 September 2021), online: <theglobeandmail.com/opinion/article-climate-change-puts-canadas-seniors-at-risk/>.

197 See Mark Blackburn, "Indigenous Communities to be Hit with 'Ecological Grief, Loss of Land and Traditional Knowledge' because of Climate Crisis", *APTN News* (11 February 2022), online: <aptnnews.ca/national-news/indigenous-communities-to-be-hit-with-ecological-grief-loss-of-land-and-traditional-knowledge-because-of-climate-crisis/>.

has a stronger right to compensation than another.

The issue of arbitrary vulnerability arose in *Environnement Jeunesse c Canada (PG)*.[198] A nonprofit called ENJEU brought a class action on behalf of Quebec citizens aged 35 and under against the Government of Canada for its inaction on climate change[199] in violation of class members' rights under the Canadian and Quebec *Charter*. ENJEU sought a declaration and punitive damages. While Morrison J held that the *Charter* claims were justiciable,[200] he refused to authorize the class action because the class definition was "purely subjective," "random," and "arbitrary."[201] ENJEU argued the youngest residents of Quebec would "suffer more infringements of their human rights" and referred to Canada's acceptance of the principle of intergenerational equity.[202] Morrison J was not persuaded. He still took issue with the decision to cap the class at the age of 35, which "excluded millions of other Quebecers" without any rationale.[203] We are left to wonder if Morrison J would have accepted the class definition had ENJEU included all Quebecers or excluded anyone over the age of 18 based on a vulnerability or harms-based justification.[204] The Quebec Court of Appeal agreed with Morrison J on this issue and further added that the action was not justiciable and should be left to the legislature.[205]

Canadian courts, including the Supreme Court, have at least been sympathetic in the non-tort[206] and class action contexts[207] to the special vulnerabilities of certain groups to climate change. None of the past cases, however, included a request for compensatory damages. Judges more readily speak of vulnerability when they are simply approving a government action or declaring that a public authority must do something more. I doubt Canadian courts would

---

198 2019 QCCS 2885.

199 The allegations included that the Government of Canada had set insufficient greenhouse gas reduction target and failed to create an adequate plan to reach the target. *Ibid* at paras 2, 9–13.

200 *Ibid* at paras 40–88.

201 *Ibid* at paras 123, 135, 137 [translated by author].

202 *Ibid* at para 118 [translated by author].

203 *Ibid* at para 135 [translated by author]. See also *ibid* at paras 119–22, 135–37.

204 The latter would give rise to another issue. Morrison J noted that class members who are minors would be "quasi-parties," creating an unreasonable obligation on millions of parents to potentially exclude their children from the proceeding. Morrison J might have considered the class definition as a strategic attempt to increase class members' claim for punitive damages: *ibid* at paras 124–33.

205 See *Environnement Jeunesse c Canada (PG)*, 2021 QCCA 1871 at paras 22–43, leave to appeal to SCC refused, 40042 (28 July 2022) [*EnJeu*].

206 See *References re Greenhouse Gas Pollution Pricing Act (Canada)*, 2021 SCC 11 at paras 185, 206. While upholding the constitutionality of the federal *Greenhouse Gas Pollution Pricing Act* under the national concern doctrine, Wagner CJ noted that the participating provinces were vulnerable to the consequences of the emissions of the nonparticipating provinces. More specifically, he noted that climate change harms would be "borne disproportionately by vulnerable communities and regions, with profound effects on Indigenous peoples, on the Canadian Arctic and on Canada's coastal regions": *ibid* at para 206.

207 See e.g. *Mathur*, *supra* note 148 at paras 172–89 (Brown J refused to strike a novel claim that Ontario violated the section 15 *Charter* rights of "uniquely vulnerable" youth and future generations when it repealed the *Climate Change Act* and set an unambitious GHG emissions reduction target). However, similar claims have also been struck: see e.g. *Misdzi Yikh*, *supra* note 148; *La Rose*, *supra* note 148. Both these cases have pending appeals.

act like one of Lord Denning's "bold spirits"[208] and recognize a unique public duty to avoid or protect against climate change–related physical harms when damages are requested. They have already refused to extend *Doe* beyond the duty to warn.[209] In *Grove v Yukon (Ministry of the Environment)*, for example, ranchers suffered property damage caused by wild elk. They brought a negligence action against the Yukon government when the Minister for Environment failed to implement a management plan to control the wild elk. They relied on *Doe* to argue for the existence of a special relationship based on their membership in a small and well-defined group of agriculturalists known to the government. Duncan CJ struck the negligence claim. She considered the ranchers' reliance on "the *Jane Doe* duty to warn case unhelpful" because their allegations focused on a failure to act.[210] *Grove* at least signals a willingness to strike *Sharma*-type duty to protect allegations. It does not foreclose duty to avoid claims based on misfeasance, but these claims would likely fail at step-one proximity for the other reasons discussed above.

4.2. The Supreme Court's General Reliance Precedents

Feldthusen suggests the Supreme Court has created five unique public duties.[211] They are affirmative duties to protect the public from harm inflicted by a third party. They are usually grounded in what Feldthusen calls the Good Public Samaritan principle, which holds that "once a public defendant begins to exercise a discretionary power [to confer a gratuitous public benefit], it then comes under a duty to exercise the power with reasonable care."[212] These discretionary public benefits include housing,[213] highway,[214] and workplace[215] inspections in the interests of public safety.[216]

Feldthusen has previously attempted to identify a unifying theme or principle behind these duties or when the Supreme Court will invoke the Good Public Samaritan principle. His strongest suggestion is that up to four of these duties are supported by an unarticulated principle of general reliance.[217] Not only was this principle present in Bromberg J's reasons, but

---

208 Peel & Markey-Towler, *supra* note 5 at 736.

209 *Grove v Yukon (Ministry of the Environment)*, 2021 YKSC 34 [*Grove*].

210 *Ibid* at para 58.

211 See Feldthusen, "Unique", *supra* note 20 (he discusses each unique public duty in detail).

212 Feldthusen, "Ten Reasons", *supra* note 19 at para 3. See also Feldthusen, "Please Anns", *supra* note 8 at para 76 (identifying Lord Wilberforce's judgment in *Anns* as the primary source of the Good Public Samaritan principle).

213 See Feldthusen, "Unique", *supra* note 20 at paras 16–26 (describing relevant cases). These case impose a duty on a municipality to a home owner "when the municipality decides to exercise its powers to inspect housing": see Feldthusen, "Ten Reasons", *supra* note 19 at para 5.

214 See *Just*, *supra* note 18 and accompanying text.

215 See *Fullowka*, *supra* note 186 at paras 15–27, 37–75 (the Supreme Court recognized an affirmative duty on a government inspector to protect the deceased plaintiff miners from the criminal activity of a third party).

216 *Schacht v O'Rourke*, [1976] 1 SCR 53, 55 DLR (3d) 96 did not involve an inspection, but like *Just*, did involve highway safety. The Supreme Court imposed a unique public duty on police officers to "ensure the safety of motorists after a highway traffic accident": see Feldthusen, "Unique", *supra* note 20 at paras 8–15.

217 See Feldthusen, "Unique", *supra* note 20 at paras 24 (municipal housing inspection cases), 32 (*Just* and highway inspections), 44 (*Odhavji*, referring to the "public expectations approach" as a possible

it could conceivably justify the unique public duties in *Doe*, *Williams*, *Haggerty*, and *Odhavji*. The Supreme Court's remaining unique public duty in *Fullowka v Pinkerton's of Canada Ltd* is based on almost sufficient private party proximity and would not assist *Sharma*-type plaintiffs.[218]

Would a Canadian court recognize a unique public duty to avoid or protect against climate change–related physical harms owed to vulnerable plaintiffs based on their general reliance? Answering this question gives rise to an immediate concern: neither duty shares the characteristics common to the Supreme Court's general reliance–based unique public duties. The decision to approve a project does not involve a failure to act. The Good Public Samaritan principle is also less applicable in this context. While (private) project approvals may involve an aspect of public safety or confer collateral public benefits (such as employment opportunities or a healthier economy), they more directly impact the private interests of the project owners, operators, funders, among others.[219] Moreover, while the enactment of target legislation more directly engages public benefits and interests (such as in a healthy environment or public safety), operational decisions to undertake an inspection for reasons of public safety are distinct.

I do not consider these differences necessarily fatal, since a court could recognize a unique public duty based on general reliance outside of the inspection context, where both misfeasance and nonfeasance are at issue. Nothing stopped Turnbull J in *Haggerty*, for example, from drawing an analogy between the police's failure to apprehend a wanted criminal to protect an unknown victim and the government's failure in *Just* to inspect a highway to protect an unknown motorist. My main reason for skepticism is the Supreme Court's recent shift back to a corrective justice or rights-based approach to duty, which emphasizes private party proximity. Feldthusen suggests the Supreme Court would not have found a unique public duty in *Just* had it come before them today.[220] His prediction arguably applies with equal force to the other general reliance–based unique public duties. Most were created in the 1990s, at a time when there was more room for instrumentalist concerns under the *Anns* policy approach.[221] Since

---

euphemism for "general reliance"), n 129 (*Fullowka*, but with respect to the Pinkerton's duty). See also Feldthusen, "Ten Reasons", *supra* note 19 at para 13 (explaining the principle).

218 See *Fullowka*, *supra* note 186 at paras 38–45 (this duty is based on inspectors' statutory obligations and direct and personal contact with a small, clearly defined group (those working at the mine)). Feldthusen suggests that there was still insufficient private party proximity in this case, especially given the Court's reliance on on *Kamloops*, which approved the public duty to inspect from *Anns*): see Feldthusen, "Unique", *supra* note 20 at para 56. Regardless, there is more private party proximity than would be present in *Sharma*-type claims.

219 See e.g. *Cobble Hill Holdings Ltd v British Columbia*, 2019 BCSC 151 at para 69 [*Cobble Hill I*], aff'd 2020 BCCA 91 [*Cobble Hill II*], leave to appeal to SCC refused, 39170 (1 October 2020). Power J referred to the Minister of Environment's decision to cancel the plaintiff's quarry mine permit due to noncompliance with its terms as "possibly operational." While the cancellation "likely had broader impacts and ripple effects" such as "consequences on the local environment and community," it did "not affect a broad swath of the public" and it was "mostly concerned with the interests of [the applicant] itself." The BCCA did not disturb this finding: *ibid* at paras 95–96. A permit cancellation is likely different from a project approval and I return to this distinction in section 4 with my discussion of common law policy immunity. My general observation about collateral public impacts, however, holds.

220 See Feldthusen, "Unique", *supra* note 20 at para 30.

221 See Feldthusen, "Please Anns", *supra* note 8 at para 13. See also *Cooper*, *supra* note 10 at para 22. More generally, unique public duties are rare in Canada because courts adhere to the Diceyan notion that all

Cooper, no Canadian court has explicitly endorsed general reliance.[222] Rather, the Supreme Court has twice emphasized the importance of step-one proximity and its impact on both foreseeability of harm and the residual policy concerns at step two.[223] Unsurprisingly, the Supreme Court has not created a new public duty in the past decade, and its last (*Fullowka*) comes closest to establishing sufficient private party proximity. These are not encouraging signs for the creation of a sixth unique public duty to avoid or protect against climate change–related physical harms.

Feldthusen's prediction finds further support in the public authority case law. In Canada, there is no tort of negligent public policy–making.[224] Nor does the administration and enforcement of a statutory scheme directed at a public good generally give rise to a relationship of proximity between the regulator and affected third parties.[225] Courts have applied this principle when a public authority, like the Minister in *Sharma*, has only issued environment-related permits or project approvals.[226]

Some negligence claims have survived a motion to strike where a minister of environment is alleged to have undertaken and unreasonably carried out an inspection regarding land contamination[227] or a remediation plan for an oil spill.[228] These cases are sometimes referred

---

are equal before the law: see Feldthusen, "Ten Reasons", *supra* note 19 at paras 9–11.

222 See Feldthusen, "Unique", *supra* note 20 at para 24. See also *Taylor*, *supra* note 78 at n 10 (to the court's knowledge, "the concept of 'general reliance' has not been adopted in any Canadian jurisdiction").

223 See *Livent*, *supra* note 10, *Maple Leaf Foods*, *supra* note 10, and my discussion in section 2.

224 See *George v Newfoundland and Labrador*, 2016 NLCA 24 at para 161.

225 See generally *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24; *Los Angeles Salad Company Inc v Canadian Food Inspection Agency*, 2013 BCCA 34, leave to appeal to SCC refused, 35293 (15 August 2013); and *Wu v Vancouver (City)*, 2019 BCCA 23, leave to appeal to SC refused, 38561 (20 June 2019).

226 See e.g. *Waterway*, *supra* note 186. A blockage under a restored private bridge caused a restored creek to overflow, which damaged the plaintiffs' property. The BCCA held that the province did not owe the plaintiff a private duty of care, even though an engineer from the Ministry of Environment issued approvals for the restoration work under the *Water Act*. The statutory regime did not impose a private duty of care and there were no representations to create a relationship of reliance between the engineer and the plaintiffs. See also *Imperial Metals Corp v Knight Piesold Ltd*, 2018 BCSC 1191 at para 114 (issuing a permit to the plaintiffs which approved the original design of a tailings storage facility could not, alone, give rise to an action in negligent misrepresentation).

227 See *Pearson v Inco*, [2002] OJ 2764, 115 ACWS (3d) 564 (Ont Sup Ct) at paras 27, 62–65, 85–86, 109 [*Pearson I*], aff'd (2004), 128 ACWS (3d) 875, [2004] OJ No 317 (QL) (Ont Div Ct), rev'd on other grounds in (2005) 78 OR (3d) 641, 143 ACWS (3d) 973 (Ont CA). Nordheimer J determined the class members' allegation that Ontario was negligent for failing to enforce the *Environmental Protection Act* was not a reasonable cause of action. However, he did not object to an allegation in an amended pleading that "[Ontario] adopted various policies of inspecting and issuing certificates of approval and was negligent in carrying those policies out." Collins & van Schouwen, *supra* note 153 at 192, appear to rely on this decision for their claim that a stronger argument for private party proximity exists where an environmental regulator has failed to enforce relevant statutory standards and affirmatively facilitated harmful pollution by issuing specific permits. The inspection and approval allegations were not tested at trial. Furthermore, it is likely impossible to unravel the approvals from the decades of inspections and investigations they were connected to.

228 See *Swaita v Ontario (Ministry of Environment)*, 2016 ONSC 5785 [*Swaita*]. But see *Pearson v Inco Ltd*, [2001] OJ No 4990, 110 ACWS (3d) 444 (Ont Sup Ct) [*Pearson II*]; *Ernst v Encana Corp*, [2013] AJ No 1054 (QL), 2013 ABQB 537 [*Encana I*], aff'd [2014] AJ No 975 (QL), 2014 ABCA 285 [*Encana II*];

to as unique public duty inspection cases[229] and are generally consistent with the Good Public Samaritan principle. However, they also include allegations that, if true, would establish private party proximity, likely to the same degree as *Fullowka*.[230] The case for proximity would certainly be stronger than in *Just*[231] or in a *Sharma*-type duty claim. There were site visits involving a relatively contained area of contamination and interactions between the public authority and either a known single plaintiff or a relatively well-defined class of plaintiffs. Sometimes representations were alleged to have been made.[232]

More significantly, none of the inspection cases refer to or rely on general reliance. Some speak directly to specific reliance. *Pearson* (later *Smith*) *v Inco Ltd* is illustrative.[233] This was the first environmental class action tried in Canada. The historical operations of a nickel refinery in Port Colborne, Ontario, contaminated the soil of nearby residential properties. Property owners sought to certify a class action against the refinery, Ontario, and other defendants. Property owners initially alleged that the Minister of Environment was negligent for failing to inspect the refinery and carry out investigations. Nordheimer J, in striking this claim, offered a hypothetical situation involving specific reliance that would have supported a finding of proximity: if the Minister had undertaken an inspection of class members' properties and provided the results of their inspections to class members "knowing [they] would rely upon those results then, if the inspections had been done negligently, that would … give rise to … proximity."[234] MacAdam J in *MacQueen* relied on this hypothetical when striking similar regulatory negligence claims against Nova Scotia and Canada related to their oversight of coke ovens and tar ponds in Sydney, Nova Scotia.[235]

Ernst v Encana Corp is another example of apparent dependence on specific reliance.[236] Ernst's well water was contaminated by hazardous chemicals used for hydraulic fracturing as part of a nearby drilling program. Ernst sued the drilling company ("Encana"), Alberta, and the regulator (the Energy Resources Conservation Board ("ERCB")). She argued, inter alia, that she relied on the ERCB to prevent the contamination of her well water and to take remedial action given the numerous public representations the ERCB made to landowners potentially affected by oil and gas activities.[237]

Wittmann CJ struck Ernst's negligence claim against the ERCB and briefly discussed proximity. He did not squarely address Ernst's reliance allegation but presumably found it unpersuasive. He held the ERCB had no direct authority over Ernst as a member of the public,

---

MacQueen, *supra* note 153.

229 See e.g. *Swaita*, *supra* note 228 at para 16; *Pearson I*, *supra* note 228 at para 19; *Encana I*, *supra* note 228 at paras 21–22, 24, 26–27.

230 See *Fullowka*, *supra* note 186.

231 See *Just*, *supra* note 18.

232 See *Swaita*, *supra* note 228 at para 17; *Pearson I*, *supra* note 228 at paras 26–27, 62, 65; *Encana*, *supra* note 228 at paras 17, 33.

233 See *Pearson II*, *supra* note 228.

234 *Ibid* at para 30.

235 See *MacQueen*, *supra* note 153 at paras 47–48.

236 See *Encana I*, *supra* note 228; *Encana II*, *supra* note 228.

237 See *Encana I*, *supra* note 228 at para 17.

and there was no relationship between the parties outside of the statutory regime. Ernst communicating her concerns about the drilling activities directly to ERCB employees through compliance and enforcement mechanisms was not relevant.[238] The Alberta Court of Appeal upheld the decision, while, interestingly, deciding to further mention policy factors that ought to negate a regulator's duty of care at *Anns/Cooper* step two.[239]

Exceptionally, some Canadian courts have not required plaintiffs to plead detrimental reliance on a public authority's representations. *Paradis Honey Ltd v Canada (AG)* provides one example.[240] It involved a rare instance of a negligence claim arising from legislative action or inaction. A 2-1 majority of the Federal Court of Appeal was unwilling to strike the negligence claim, made by a group of commercial beekeepers, that alleged the government's adoption of a blanket prohibition on the importation of honeybee packages from the United States was contrary to existing statutory law, which conditionally allowed imports. Although the beekeepers did not plead they relied on Canada's representations that honeybee imports were regulated in their economic interest, the majority described the parties' relationship as one based on "specific legislative criteria" and "specific interactions and assurances."[241]

Another example is *James v British Columbia*, where the British Columbia Court of Appeal held that the province may owe a duty of care to a group of employees for failing to include a job-protection clause in a tree farm license extension. The court of appeal relied on the statutory regime, which appeared to protect the employees' economic interests. It also mentioned, without any discussion, interactions between the employees (through their union) and the Minister of Forests, when referring to the argument that the missing clause was originally included in the tree farm license at the union's urging.[242] The court of appeal did not require the plaintiffs to plead reasonable or detrimental reliance. Instead, it accepted the employees were entitled to rely on the Minister to exercise reasonable care to retain the job-protection clause until "he reached a decision on policy grounds to remove it."[243]

Both *Paradis Honey* and *James* rely on the concept of general reliance[244]—or what the Ontario Court of Appeal in *Taylor* describes as being "close to" general reliance.[245] *Sharma*-type duty claims are distinguishable from these cases on two grounds. The first is the nature of the decisions at issue. The Minister of Forests' decision in *James* was an operational failure: he simply forgot to include the job-protection clause in the license terms. The court of appeal's reasons suggest the employees would have had no cause of action if the job-protection clause

238 *Ibid* at para 28. Wittmann CJ also determined that Ernst's negligence claim was barred by an immunity clause under the *Energy Resources Conservation Act*: *ibid* at paras 57–58.

239 See *Encana II*, *supra* note 228 at paras 16–19.

240 *Paradis Honey Ltd v Canada (AG)*, 2015 FCA 89 [*Paradis Honey*].

241 *Ibid* at paras 58, 63.

242 See *James v British Columbia*, 2005 BCCA 136 at paras 5–8 [*James*].

243 *Ibid* at para 47.

244 This reasoning has drawn criticism from now Supreme Court Justice Brown: see Brown & Brochu, *supra* note 54. *James* was also decided before *Imperial Tobacco* and subsequent courts have refused to follow it: see e.g. *Cobble Hill I*, *supra* note 219 at paras 47–51; *Cobble Hill II*, *supra* note 219 at paras 28, 57 (neither party relied on *James* on appeal).

245 See *Taylor*, *supra* note 114 at note 10. It is "close" because representations were actually made by the public authority.

had been removed for policy reasons. *Sharma*-type duty claims would also involve exactly the type of decision involving "a general benefit that may or may not be granted depending on a subjective weighing and assessment of policy factors" that the majority explained was not before them in *Paradis Honey*.[246] The second ground for distinguishing *Sharma* is the absence of enhanced double foreseeability. Both *James* and *Paradis Honey* included foreseeable economic harm to a fairly small and well-defined class of plaintiff.

The Supreme Court's recent decision in *Marchi*[247] does not change the force of Feldthusen's or my prediction. In *Marchi*, the Supreme Court extended *Just* to find a relationship of proximity between a municipality and a plaintiff who was physically injured while traversing a parking lot snowbank to reach a municipal street.[248] Recall, however, that the unique public duty in *Just* was rooted, according to Feldthusen, in the application of the Good Public Samaritan principle and general reliance. The provincial authority did not create or control the physical risk to which the plaintiff motorist was invited;[249] it did not push the boulder towards the plaintiff's car; rather, it failed to stop the boulder from crashing upon it. The municipality in *Marchi* was in a very different position. Its employees plowed the snow in the parking space where the plaintiff parked. They created the very snowbank that the plaintiff attempted to cross and, in so doing, seriously injured her leg.[250] *Marchi* involves an uncontroversial duty based on the create the peril principle. If the municipality were a private party, there would still have been sufficient proximity. The Supreme Court has thus still not accepted general reliance as a basis for proximity since *Just* or possibly, *Odhavji*.[251] Nor does *Marchi* assist *Sharma*-type plaintiffs, for the reasons discussed in section 3.[252]

Citizens will expect public authorities to act reasonably in every environmental decision-making situation. There are no meaningful differences between discretionary decisions involving more localized environmental issues and those related to climate change that would support a proximate relationship based on general reliance. The only difference is that the latter has the potential to facilitate or indirectly contribute to the physical harm or death of more Canadians over time. But that alone does not explain why public authorities owe a duty of care to and must compensate, for example, children killed by a bushfire, but not children who die from cancer due to exposure to contaminated soil.

5. NOT MUCH OF A LEGACY

This article has offered two reasons for why a Canadian court is unlikely to recognize a *Sharma*-type duty of care to avoid or protect against climate change–related physical harms:

246 *Paradis Honey*, *supra* note 240 at para 91.

247 *Marchi*, *supra* note 25.

248 *Ibid* at paras 29–30. See generally *Just*, *supra* note 18.

249 These cases approach invitation to risk generously: see *Just*, *supra* note 18 (the Supreme Court states the province invites motorists to access the provincial highway leading to tourist attractions); *Marchi*, *supra* note 25 at paras 30–31 (the Supreme Court also refers to the municipal defendant inviting citizens to use parking lots). But recall that an invitation is not necessary for the create the peril principle to apply: see n 187 and related commentary.

250 See *Marchi*, *supra* note 25 at paras 6–7.

251 See *Just*, *supra* note 18; *Odhavji*, *supra* note 11.

252 *Marchi* is also not a dual control and protect case and thus, factually different from *Sharma*.

insufficient private party proximity and the unlikelihood of creating a new unique public duty. The same outcome is likely within common law jurisdictions, including the United Kingdom[253] and New Zealand,[254] that treat private party proximity seriously or refuse to recognize unique public duties. Thus, even if *Sharma* is revived by a successful appeal to the High Court of Australia, it is unlikely to have the type of widespread doctrinal impact on common law negligence that many might hope for. Nor does it appear to have created a chilling effect on project approvals in Australia: the Minister approved both the mine extension and another project with limited consideration of the duty she owes to Australian children.[255]

Canadian negligence law has oscillated between a corrective justice or rights-based approach and social policy engineering to achieve distributive justice. Prior to *Anns*, there was little of the latter.[256] Between *Anns* and *Cooper*, there were more policy and unique public duties, tempered by judicial deference to the legislature through various immunities.[257] Reasonable minds can disagree on whether these cases resulted in good policy outcomes. Post-*Cooper*, and especially recently, the corrective justice or rights-based approach has re-emerged as dominant. Proximity is king. As long as this continues, common law negligence will not be the tool for regulating Canadian public authorities and their climate change–related discretionary decisions.

This conclusion raises important questions regarding the appropriate orientation of Canadian negligence law and the scope of public authority liability in Canada. The Supreme Court of Canada has not thoroughly justified its acceptance of corrective justice as *the* theory underlying negligence law.[258] It has also created unique public duties on at least five occasions without explanation or analysis. In contrast, the United Kingdom Supreme Court refused to

---

253 See *Michael v Chief Constable of South Wales Police*, [2015] UKSC 2 [*Michael*] (refusing to create unique public duties for police).

254 See *Smith v Fonterra Co-operative Group Ltd*, [2021] NZCA 552 at paras 13–16, 118–26 (New Zealand Court of Appeal struck a new "inchoate duty" that would have made corporate defendants liable for their GHG emissions, observing that tort law was an inappropriate vehicle for addressing the problem of climate change). But see Maria Hook et al, "Tort to the Environment: A Stretch Too Far or a Simple Step Forward?" (2021) 33:1 J Envtl L 195 (concluding that "a duty to protect the environment may be a natural evolution of the New Zealand law of torts").

255 The Minister's reasons approving both projects include a justification is likely to raise eyebrows: the mine's approval "is not likely to cause harm to human safety because, if the proposed action is not approved, it is likely that a comparable amount of coal will be consumed in substitution of the proposed action's coal. Therefore, I found that the proposed action is unlikely to result in an increase in global GHG emissions": see Austl, Commonwealth, Department of Agriculture, Water and the Environment, *Statement of Reasons for Approval Under the Environment Protection and Biodiversity Conservation Act 1999* by Sussan Ley (Canberra: Australian Government Publishing Service, 2021) at para 204, online (pdf): <climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210916_VID-389-of-2021-2021-FCA-560-2021-FCA-774-2022-FCAFC-35-2022-FCAFC-65_na.pdf>.

256 See *Anns*, *supra* note 47.

257 *Ibid*; *Cooper*, *supra* note 10.

258 The Supreme Court has cited corrective justice ideas and scholarship on several occasions without much discussion: see e.g. *Livent*, *supra* note 10 at paras 30–31; *Maple Leaf Foods*, *supra* note 10 at paras 19, 34–35; *Rankin*, *supra* note 101 at para 63; *Clements v Clements*, 2012 SCC 32 at paras 7, 13, 21, 32, 37. See also David Mangan, "Confusion in Material Contribution" (2012) 91:3 Can Bar Rev 701 at 725–30 (noting the Supreme Court barely engaged with corrective justice as part of its endorsement in *Clements*).

adopt unique public duties after detailed consideration.[259] A majority of the court preferred a Diceyan approach to public authority liability—an approach that applies ordinary negligence law to public authorities based on the idea that the law should apply equally to public and private actors.[260] The policy approach attributed to *Anns* was rejected. One reasonably hopes that if a *Sharma*-type duty case were heard in Canada, its importance would compel courts to finally consider these questions.

Tort law scholars will likely disagree on these questions. Some, like Feldthusen, follow the Diceyan approach and reject unique public duties.[261] Others in Canada[262] and the United Kingdom[263] do not strictly adhere to the Diceyan approach or are interested in the broader policy dimensions of public authority liability. Still other Canadian tort scholars and one judge, writing extrajudicially, have wondered whether a new regime based on public law principles is preferrable to negligence law altogether.[264]

---

259 See *Michael*, *supra* note 253. For UK commentary on this decision: see McBride, *supra* note 51; Nicholas McBride, "Michael and the future of tort law" (2016) 32 J Professional Negligence 14. See also Feldthusen, "Bungled", *supra* note 117.

260 See McBride, *supra* note 51 at 5. See generally Donal Nolan, "The Liability of Public Authorities for Failing to Confer Benefits" (2011) 127 Law Q Rev 260 at 31 (supporting the Diceyan approach).

261 See Feldthusen, "Ten Reasons", *supra* note 19 at paras 9–11, 16–22. See also Feldthusen, "Bungled", *supra* note 117 at paras 7–8, 35–36, 43–60.

262 See especially Price, *supra* note 22 (Price is a UK-trained tort scholar, but defends Canada's approach to police duties, which does not strictly follow Diceyan orthodoxy); Hall & Chouinard, *supra* note 22 (exploring the narrative character of tort law as it relates to public authorities and noting Feldthusen's work on unique public duties); Chamberlain, "Proximity", *supra* note 164 (noting that proximity in police duty cases is infused with policy considerations); Lorian Hardcastle, "Government Tort Liability for Negligence in the Health Sector: A Critique of Canadian Jurisprudence" (2012) 37:2 Queen's LJ 525 (noting that in health sector cases, courts should focus more on proximity than policy at the duty stage to, inter alia, improve accountability); Dan Priel, "The Indirect Influence of Politics on Tort Liability of Public Authorities in English Law" (2013) 47:1 Law & Soc'y Rev 169. But see De Vries, *supra* note 20 (wondering if a Diceyan approach would have "left the present law of public authority liability in a less chaotic situation than we find it today" at para 54).

263 See e.g. Stelios Tofaris & Sandy Steel, "Police Liability in Negligence for Failure to Prevent Crime: Time to Rethink" (2014) University of Cambridge Law Faculty Working Paper No 39/2014), online: *SSRN*, <papers.ssrn.com/sol3/papers.cfm?abstract_id=2469532> (suggesting police should owe a duty of care owed to citizens to protect them from the criminal acts of third parties). See also Stelios Tofaris & Sandy Steel, "Negligence Liability for Omissions and the Police" (2016) 75:1 Cambridge LJ 128. However, Feldthusen argues Tofaris and Steel's proposal is unnecessary in Canada because ordinary common law negligence is capable of addressing bungled police calls: see Feldthusen, "Bungled", *supra* note 117 at paras 65–73.

264 See Feldthusen, "Bungled", *supra* note 117 at para 74. See also Blom, *supra* note 79 at 911 (wondering if "public authority duty cases could … be dealt with squarely on the basis of the relevant policies, which are linked to constitutional and administrative law, without the distraction of the [*Anns*/*Cooper*] test"); Klar, "Proximity Hurdle", *supra* note 79 at paras 44–46 (describing some alternatives and noting public authority cases that succeed "despite the absence of meaningful proximity" create a proximity concept this is "dangerously vague, unpredictable and incoherent" at para 44); Stratas, *supra* note 28. Determining the advantages of a public law regime over tort law is beyond the scope of this article. However, the Supreme Court has struggled to abandon tort law principles when confronted with requests for damages under section 24(1) under the *Canadian Charter* against environmental regulators and other public defendants: see especially *Ernst v Alberta Energy Regulator*, 2017 SCC 1 ("[w]hile … *Charter* damages are an autonomous remedy, … the same policy considerations as are

The Diceyan/policy divide raises several important yet unexplored doctrinal, normative, theoretical, and empirical questions specific to public authority liability for climate change–related harms. Should we view governments as Good Public Samaritans when they enact climate change–related legislation? Is such legislation accurately described as a gratuitous benefit?[265] Are courts competent to make difficult, policy-based decisions in this context, and by what standard would they assess climate change–related legislation or a GHG-emitting project approval?[266] Would judges, some of whom have already questioned the justiciability of climate change–related claims under the *Charter*,[267] even want to engage in such an exercise? Would imposing a *Sharma*-type unique public duty have detrimental effects, for example by discouraging governments from taking further action on climate change?[268] Is Feldthusen's historical separation of powers argument persuasive? Are Canadians still strongly Diceyan or have public expectations shifted, possibly in the face of the unprecedented threats posed by climate change? Are distributive justice goals under the *Anns* policy approach even possible through climate change–related tort litigation involving classes of vulnerable plaintiffs if the public purse is finite and every citizen faces climate change–related harms? These questions and others require investigation. As climate change–related harms continue to materialize and demand the immediate attention of governments and courts, now is the time for tort scholars to address them.

ADDENDUM

This article was written and accepted for publication before the Federal Court of Australia Full Court ("FCAFC") released its unanimous decision to allow the Minister's appeal.[269] Several of my proximity-based arguments in section 3 regarding the *EBPCA*,[270] the Children's vulnerability,[271] the indirect relationship between the parties,[272] and general reliance[273] were mentioned by the FCAFC. There were some minor points of departure. Beach J and Allsop CJ concluded that the harm to the Children was reasonably foreseeable.[274] I addressed this

present in the law of negligence nonetheless weigh heavily here" at para 49). This situation is avoidable: see Lorne Sossin, "Crown Prosecutors and Constitutional Torts: The Promise and Politics of Charter Damages" (1993) 19:1 Queen's LJ 372.

265 See e.g. Chamberlain, "Affirmative", *supra* note 20 at para 41, n 98 (taking issue with Lord Toulson's reference to the police providing "gratuitous benefits" in *Michael,* and noting Feldthusen's proximity-based argument in Feldthusen, "Bungled").

266 To be clear, I do not dispute that courts have an important oversight function in this context under administrative and public law.

267 See e.g. *EnJeu*, *supra* note 205.

268 See e.g. Jef De Mot & Michael G Faure, "Public Authority Liability and the Chilling Effect" (2014) 22 Tort L Rev 120 (discussing the impact of chilling effects on public authority liability).

269 See *Sharma Appeal*, *supra* note 3.

270 *Ibid* at paras 214–17 (Allsop CJ), 700 (Beach J), 843–52 (Wheelahan J).

271 *Ibid* (Allsop CJ finds that the Children are "in the same position as everyone in the world" at para 338). See also *ibid* at paras 669–77 (Beach J finds that while Bromberg J was partially correct in his conclusion on vulnerability, it is impossible to determine which children will be vulnerable to unpreventable physical harm from climate change).

272 *Ibid* at paras 334–37 (Allsop CJ correctly refers to general reliance).

273 *Ibid* at paras 339–40.

274 *Ibid* at paras 300–33 (Allsop CJ), 414–42 (Beach J). Interestingly, Beach J went so far as to suggest

possibility in subsection 3.1. Beach J also accepted that the Minister had sufficient control over the risk of harm to the Children,[275] but later concluded there was insufficient proximity—including in terms of directness and causal closeness—to ground a duty of care.[276] Finally, the FCAFC considered government immunities. The justices did not unanimously agree that the Minister's approval was a "core policy" decision.[277] This reinforces my observations on common law policy immunity in section 1.

the Minister might have had actual knowledge of the risk because she knew the likely consequences of the approval (that coal would be mined, sold, exported, burnt, and consequently produce scope 3 emissions) and did or ought to have foreseen all realistic intervening events after the approval: *ibid* at para 420. However, Beach J's or Allsop CJ's reasons do not clearly address whether the Minister knew of, or could foresee, the Children's tipping point theory. The Minister did not argue this point. One is left with the impression that the FCAFC was unimpressed with the Minister's "strategic" decision not to call evidence or cross-examine the plaintiff's expert and then engage in "belated stone throwing" on appeal: *ibid* at paras 369, 407. Wheelahan J concluded that the harm to the Children was not reasonably foreseeable, but appears to rely heavily on causation principles: *ibid* at paras 869–86.

275 Beach J found that extensive or exclusive control is not required when a positive act (the Minister's approval) "ignites" the causal chain by "facilitating" the acts of a third party (the coal mine): *ibid* at para 658. This reasoning is difficult to square with the Canadian dual control-and-protect private party cases discussed in section 3. Allsop CJ mentioned that third parties worldwide can mitigate (or, assumedly, also contribute to) climate change risks, which created an indirect relationship between the parties: *ibid* at paras 334–37. Wheelahan J focused on the statutory regime, explaining that the *EBPCA* did not give the Minister control over CO_2 emissions or the protection of the public from personal injury caused by the effects of climate change: *ibid* at para 839. I agree, although the Minister did have control over an activity that will create some CO_2 emissions. I argued in section 3 that a critical difference between private defendants and public authorities is the discretionary nature of the latter's regulatory control.

276 *Ibid* at paras 697–99 (Beach J).

277 Allsop CJ characterized the Minister's approval as "not only core policy, but public policy of the highest importance to the nation," but left open the possibility that a duty connected to a different decision made under the *EPBCA* could arise: *ibid* at paras 261–62, 265. Beach J disagreed, and refused to deny a duty based merely on these "policy questions": *ibid* at paras 615–22, 633. Wheelahan J disagreed with Beach J, noting "the nature of the issues raised by this particular case are not such that the matter can be left to the breach stage of the analysis": *ibid* at para 868.