RESOURCE MANAGEMENT AND THE RULE OF LAW: THE ROLE OF THE COURTS

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Lynnette E. Lochhead

Centre for Resource Management

University of Canterbury

and

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CONTENTS

ABSTRACT

This study examines the ways in which legal remedies can be used in order to achieve the goals of resource management. However, the discussion is confined to remedies available under the common law. The introduction sets out the background to the study and defines the nature of the problem. Chapter One outlines the constitutional principles underlying the legal system which define the scope of the courts' power. An appreciation of the courts' constitutional position is essential for understanding both the limits and the potential of the courts' role.

Chapter Two discusses the major private law actions applicable to resource management problems. These are the torts actions of trespass, nuisance, public nuisance, negligence, breach of statutory duty, and the rule in Rylands v Fletcher. It concludes that their very nature as private law actions entails serious disadvantages from the perspective of resource management which is concerned with the public interest. Of these actions public nuisance is best suited to dealing with resource management problems.

Chapter Three deals with the public law remedy of judicial review. This remedy is designed to ensure that administrative agencies operate within the limits of power delegated to them by the legislature. Because of the nature of this remedy, resource management issues

can not be examined on their merits. Nevertheless, in spite of its limitations, judicial review can be a useful tool for achieving resource management goals.

The final chapter examines the arguments for and against expanding the role of the courts in resolving resource management disputes. It focuses on the Michigan Environmental Protection Act as an example of potential measures in overcoming the limitations of the common law in dealing with resource issues.

INTRODUCTION

The controversial High Court decision to deny water rights for the Clyde High Dam and the even more controversial decision of Parliament to override the Court's decision by enacting the Clutha Development (Clyde Dam) Empowering Act 1982 are now part of our resource development history. But the saga of the dam, for a brief period, focussed public attention on the role of the courts in resource related disputes. It was clear from the public discussion surrounding these events that the function of the courts within our legal system is not well understood.[2] This prompted the present study, which examines the role of the courts within the legal system from the perspective of resource management.

It seemed important to undertake an examination of the role of the courts from this perspective for a number of reasons. Inevitably, improper understanding of their role results in failures to take advantage of opportunities for the courts to make significant contributions to the resolution of resource management problems. On the other hand, where inappropriate demands are made of them, problems which might have been resolvable by other means may remain unresolved or be resolved in a less satisfactory manner. Lack of understanding of their role can also lead to misdirected criticism of their performance which serves

only to divert attention away from desirable reform of other institutions or away from the failure of other institutions to undertake reforms which are within their powers. Furthermore, it is necessary to understand the wider role of the courts in the legal system before making any recommendations for improvement of the courts' role from a resource management perspective.

The recently announced intention of the Government to introduce a Bill of Rights into Parliament gives an added reason for examining the role of the courts. If the Bill of Rights were to be extended beyond the traditional range of subject matter for such documents to include environmental rights, it would significantly alter the existing role of the courts from a resource management perspective. An examination of the strengths and weaknesses of the judicial approach to decision making can assist discussion of whether or not it would be desirable to seek inclusion of environmental rights.

With these issues in mind, this study has four objectives: to improve the understanding of those concerned with resource management of the role the courts are able to play in the resolution of resource management issues; to outline their strengths and weaknesses in this regard; to examine briefly potential means of remedying any weaknesses; and finally to consider the ramifications of any such proposed changes.

CHAPTER I

CONSTITUTIONAL BACKGROUND

This chapter examines the position of the courts and the Judiciary within our constitutional system as a necessary preliminary to the discussion of the role the courts are able to play with respect to resource management problems, which follows in subsequent chapters.

Three fundamental concepts underpin our constitutional system: the concept of the rule of law, the doctrine of separation of powers, and the doctrine of parliamentary sovereignty. Together these determine the role of the courts and the bounds of their power.

The meaning of the rule of law is not easy to define concisely. It is a complex concept with shades of meaning that vary with the context. But at the core of the concept is the view that the relationship of power between those who govern and those who are governed should be regulated by the idea of law. In essence, this means that every act of governmental power affecting the legal rights, duties, or liberties of a citizen must be authorised by either Act of Parliament or decision of the courts. However a further gloss needs to be added to this. So baldly stated, the rule could be satisfied by an enactment giving government unrestricted discretionary powers. This would permit rule by arbitrary power rather than in accordance with ascertainable law. Hence the rule

is taken to demand in addition "that government should be conducted within a framework of recognised rules and principles which restrict discretionary power." (Wade, 1977)[1] The concept as described would also be hollow without the essential corollary that everyone is subject to the law, including the government.

Two consequences which are relevant for our purposes follow from these points. First, citizens must have recourse to legal suit against the State where the State is in breach of the concept. Second, the State must guarantee the protection of the law against interference with the legal rights of citizens by other citizens or the State. (Aubert, 1983)

The Judiciary occupies a central position in the rule of law ideology, which emphasises the controlling power of independent and authoritative courts. It is their function to uphold the rule of law. The importance attached to an independent Judiciary interrelates closely with the doctrine of separation of powers but entails some conflict with the doctrine of parliamentary sovereignty, which will be returned to below.

The emergence of the concept in its modern form[2] took place alongside the growth of free market ideology and a view of the state in which it was the task of government "to create and enforce a set of constituent rules, to defend law and order, while simultaneously granting the citizenry the freedom to choose its own strategies within this framework." (Aubert, 1983) The main task

of legal authorities was to ensure that property and contracts were protected. The law was seen as providing a stable environment for individual action and thus both complemented and assisted the free market. (van Gunsteren, 1976) Clearly, those with existing property rights had more to gain from guarantees of rule in accordance with law as the concept was traditionally conceived.

However, the theory of state under which the concept developed is no longer the dominant one today. The traditional 'law-state' model, with its relatively passive and circumscribed view of the proper role of the State has been replaced by the welfare state model. The welfare state is one in which the State itself controls a large share of resources, it shares responsibility for economic growth with the market system, and provides guarantees against certain events which are beyond the control of either the State itself or its citizens. Under this model the law is increasingly used as a means of promoting social change. The State is more powerful than under the law-state model where its central function was protection of the individual citizen's sphere of freedom. The range of activities undertaken by the welfare state requires greater use of discretion to function efficiently. The growth of discretionary power has outpaced growth of the rules designed to control abuse of discretion. Not only has this tended to make the courts appear increasingly irrelevant but it also places the rule of law itself at risk. This situation seems to have arisen, at least in

part, from failure to adapt the other two major constitutional concepts to the realities of the modern state. If the rule of law is to remain a worthwhile ideal (and there are no obvious competitors) the courts will have to develop their techniques for upholding it in a way that takes greater account of these realities. The issues raised by this situation are dealt with in chapters three and four.

The doctrine of the separation of powers[3] rests on the sound proposition that concentration of power in the hands of one group or person leads to despotism and threat to individual liberty. According to the doctrine each of the three main classes of governmental function, legislative, executive (or administrative) and judicial, should be kept distinct and be exercised by separate agencies. But rigid adherence to the doctrine has never been more than a theoretical ideal. In spite of this, it remains a useful guideline and an important means of helping to ensure government under the rule of law.

New Zealand has three main branches of State corresponding to the three classes of function in accordance with the doctrine: the Legislature (or Parliament), the executive (comprising the Executive Council,[4] Cabinet, government departments and agencies, local and regional government) and the Judiciary (or the courts). It is the role of Parliament to enact new laws, that of the Executive to enforce and administer the laws, as well as determining policy within the framework of those laws,

and it is the role of the courts to apply and interpret the law where disputes arise between either citizens and the State or between citizen and citizen. Although this division of function corresponds with the theory of the separation of powers, such a broad description of function glosses over significant divergences from the theoretical ideal.

The role of the courts is not confined to declaring and applying the meaning of statutes. Not all of our law is derived from statutes. Over the centuries the courts have themselves developed a body of law known as the common law to distinguish it from statutory law. Much former common law has been codified into statutory form or modified by statute but where it remains unaffected by statute, the courts enjoy a freedom to alter or develop the law which they do not have with statute law. In doing this they are effectively law-making. But application of the common law was not always perceived as law-making. The courts were said to be declaring what the law had always been, which raised no conflict with the doctrine of separation of powers. This is now recognised as a fiction. (Lloyd, 1977, 1979)[5] With this recognition the conflict can no longer be ignored but judicial law-making is sufficiently distinct from legislation to retain a meaningful separation of function.

The difference is one of scope. Legislation has no procedural or substantive bounds. (Cappelletti, 1975 1981) The legislator is free to make innovative changes

as he sees fit and to deal abstractly with future situations. Judicial law-making does not deal abstractly with the future. It is grounded in and constrained by the issues in the litigation before it (which is not to say that judges do not bear in mind the future consequences of their decisions). (Lloyd, 1979) Because judicial law-making arises in response to sporadic litigation it is necessarily gradual and limited in effects. Furthermore, the doctrine of precedent[6] ensures that development usually proceeds by analogy with established principle (although new principles may be laid down). If the courts were to attempt sweeping reform they would clearly be overstepping their constitutional role.

However, there is room for divergence of opinion as to when judges have stepped beyond the bounds of legitimate law-making. The extent to which judges should expand the common law is the subject of considerable debate.[7] New Zealand courts have tended to adopt a conservative stance. On the other hand in respect of the related issue of whether the courts should extend principles found in statute by analogy to like situations, there is reasonable concensus against their assuming such power. (Burrows, 1976) Filling in gaps in statutes by analogy is a characteristic feature of the European Civil Law and it is an approach that is favoured by some prominent Common Law jurists, including Lord Scarman (1974). Long-standing adherence to the fiction that judges don't make law in order to maintain the apperance of strict conformity to

the separation of powers has hindered the development of guidelines to govern the proper limits of judicial law-making.

Divergence from the strict theory of separation of powers is even more apparent in relation to the executive branch. The demands of the welfare state have resulted in an increasing quantity of law-making being carried out by the Executive. Such law is collectively referred to as subordinate or delegated legislation[8]. It must be authorised by Act of Parliament[9] and accord with any conditions set down in the empowering statute. So great is the quantity of this form of legislation that it now exceeds statutes in volume. (O'Keefe and Farrands, 1976)

Furthermore, the Executive effectively control the making of statutory law. Although the power to pass statutes remains strictly that of Parliament, the party system has given rise to a situation in which Parliament is dominated and controlled by the government of the day. This contrasts with the situation in the United States where the President and his appointees (the Executive) cannot be members of Congress (the law-making branch). Overlapping membership of the executive and legislative branches under our system clearly conflicts with the ideal of the separation of powers, limiting the effectiveness of Parliament in restraining the power of the Executive. As a consequence one might expect to find our Judiciary more vigorous than its American counterparts in protecting citizens against abuse of power. That this is not so

is attributable in no small measure to the doctrine of parliamentary sovereignty (coupled with judicial self-restraint in deference to the theory of separation of power).

In essence, the doctrine of parliamentary sovereignty means that there is no legal limit to the power of parliament to make and repeal legislation. Unlike those countries which have a written constitution or a bill of rights containing fundamental principles against which legislation can be judged and set aside if it contravenes those principles, in our system no person or body is recognised as having a right to override or set aside an Act of Parliament on the grounds that it is unconstitutional.[10] This means that our courts have a more restricted role than their counterparts operating under a written constitution. This would be altered if proposals to enact a Bill of Rights proceeds. Indeed, our courts lack the security of status that a written constitution setting down their role gives.[11] If, for example, Parliament believed they had overstepped the limits of judicial law-making or had intervened too much in controlling the Executive it could curtail their jurisdiction. Respect for convention and public opinion are the only real safeguards against any such action.

It should be noted that it is implicit in the doctrine of parliamentary sovereignty that Parliament can legislate to override a judicial decision. It is, of course, in accordance with democratic theory that Parliament should

have final law-making power. But there is inherent potential for conflict with the rule of law and the separation of powers if Parliament does not respect the convention that it may override a judicial decision for the future but not overturn the actual decision between the parties. Failure to observe this convention was at the heart of the Clyde controversy.

It may have been fear of having their wings clipped that has resulted in what some commentators[12] view as the excessive deference paid by the English judges to the doctrine of parliamentary sovereignty which has characterised judicial attitudes for most of this century. With a few notable exceptions they have shown unwillingness to extend old doctrines or develop new ones. Where the common law has conflicted with modern conditions they have usually left it to Parliament to remedy the situation. In the area of statutory interpretation they have constrained themselves by literal interpretations.[13] These comments apply with equal force to New Zealand judges.

This judicial timidity was reinforced in England by a ruling of the House of Lords[14] that it was bound to follow its own previous decisions, a ruling which stood until 1966. The New Zealand Court of Appeal never adopted such a strict approach, although it did generally follow its previous decisions. But the English ruling inevitably influenced the development of our law because House of Lords decisions are frequently followed.

Deference to both parliamentary sovereignty and

the separation of powers led the courts to insist upon excluding policy issues in reaching decisions. The result was that the courts came to be viewed as increasingly irrelevant for dealing with the injustices and problems of modern society (Abel-Smith and Stevens, 1967)

The position in England and New Zealand contrasted strongly with that of the United States, where the courts were very active in extending doctrines and developing new ones. It is easy to suggest that this happened because the courts there have power to review legislation. Indeed part of this activity did arise from the power to review, but by no means all of it. They were also active in expanding the common law to meet changing social conditions. This included efforts to deal with the increasingly pressing problems of natural resources management. It may be that the power to review legislation encourages a greater disposition to develop the common law as well.

However, from around 1955 there was a shift in attitude on the part of the English judges. Stimulated by the Lord Chancellor of the day, Lord Kilmuir, who believed the courts should help solve social problems, the courts began to take a more active role in adapting the common law and also began to take a broader approach to statutory interpretation. (Abel-Smith and Stevens, 1967) The New Zealand courts have participated in this trend toward greater activism. Mr Justice Cooke, (1975) referring specifically to environmental problems, has

stated that 'the common law is not yet past the age of child-bearing.' This promises hope for the development of the common law in response to resource management problems, within the constraints of the courts' constitutional role. The extent of any such development will depend upon prevailing views as to the proper limits of judicial activism.

In the following chapters I turn to an examination of those aspects of the common law relevant to resource management. For convenience the discussion is broken into two parts, one dealing with private law and one dealing with public law. This is a conventional distinction. The nature of the actions and remedies available are quite different, reflecting their respective emphasis on private and public rights.[15] I deal with the court's role in interpreting statutes only indirectly. It would be another study in itself to examine the court's interpretation of statutes relating to resource management.

CHAPTER TWO

PRIVATE LAW ACTIONS

Over the centuries the common law has developed a group of actions, collectively known as the law of torts, which are concerned with adjustment of the risks and losses that are an inevitable by-product of social contact. Although the law of torts uses the language of rights, duties, and interests, essentially, in adjusting risks and losses, judges are involved in a resource allocating task. For that reason, this branch of private law has potential to assist in dealing with the problems which are of central concern to resource management; the problems of environmental degradation and resource scarcity. It is a branch of law which by its very nature is continually evolving to take into account changing social conditions and changing social and moral values. Even at the height of their deference to the doctrines of parliamentary sovereignty and separation of powers, the judges never entirely abandoned the task of developing the law of torts to meet new situations. But in spite of the trend for judges once again to play a more active role in developing the law, the potential of torts from a resource management perspective has scarcely been explored in New Zealand. Although the issue has been the subject of limited discussion in the legal literature[1], on the whole it has not developed into a body of concrete case law through litigation, as has happened in the United

States.

There is no single cause of action which is suitable for dealing with resource management problems. The law does not recognise any general right to a safe, healthful, productive and aesthetically pleasing environment. There are six different causes of action in tort which may be applicable, with varying degrees of suitability, to the resolution of resource management problems: trespass to land, nuisance, public nuisance, negligence, breach of statutory duty, and what is known as the rule in Rylands v. Fletcher. The present nature of these actions is the product of a complex history of development, reflecting the particular social conditions to which they were a response.

(i) Trespass

The action of trespass protects the interest of the plaintiff in having his land free from physical intrusion. (Street, 1983) Although in the past the action has most commonly been associated with unauthorised entry by a person onto the land of another, the intrusion referred to is not confined to that of people or indeed animals. It may be by any physical matter, including smoke and particulates and probably gases.[2] Hence, trespass may be turned into a useful weapon to help control pollution. The act causing the invasion must be either intentional or negligent[3], that is, not purely accidental or involuntary, and the invasion must be direct.[4] It is unclear whether the intervention of natural forces such

as wind, tide, waves, rain, render an invasion consequential rather than direct. Discharge of oil from a ship which was subsequently carried by wave action to the plaintiff's foreshore has been held not to constitute trespass because the invasion was consequential.[5] This contrasts with an earlier trespass decision in which it was held that it was trespass to allow faecal matter under the defendant's control to escape into a river so that it was carried to the plaintiff's land, whether by the current or wind.[6] If the approach taken in the oil discharge case were to prevail, it would pose a major stumbling block for development of trespass as a means to control pollution. The argument that the influence of natural forces prevents actionable trespass has not found favour with most courts in the United States. For example, in Martin v. Reynolds Metals Co.[7] the Supreme Court of Oregon rejected the defendant's claim that the settling of fluoride deposits on the plaintiff's land constituted only a consequential as opposed to a direct invasion of property. So long as this issue does not restrict the use of trespass, the action is characterised by several features which may make it more attractive than alternative actions. If the action is brought in nuisance, it is relevant to consider whether the invasion of interest was unreasonable in the circumstances. In trespass it is no defense that the defendant's conduct was reasonable. Furthermore, it is no defense that the plantiff's use of land is abnormally sensitive. (Fleming, 1983) Thus, in trespass the

plaintiff faces a slightly lesser burden of proof. The burden of proof is also eased by the fact that for intentional trespass at least, actual damage need not be proved. It is sufficient to prove the act of trespass. However, this advantage is perhaps more theoretical than real. Unless actual damage is proved only nominal damages will be awarded, which is unlikely to have much deterrent value. Where the plaintiff seeks an injunction rather than an award of damages, undoubtedly absence of proof of actual damage will not incline the court in his favour when the object of the injunction is to prevent a factory polluting.[8]

(ii) Nuisance

Nuisance, like trespass, protects interests in land. While trespass is concerned to protect the interest in exclusive possession of land, nuisance is concerned with balancing interests in the enjoyment and use of land. Unlike trespass, it is not confined to direct invasions of land, which makes it potentially applicable to a much wider range of environmental problems. These include pollution in all its forms[9] - gases, particulates, noise, smell, solid waste, problems of flooding, subsidence and erosion, fire, noxious weed encroachment, protection of views, indeed, almost any adverse environmental impact over which adjoining property owners might come into conflict. There is some debate whether it is necessary to a cause of action in nuisance that the nuisance emanate from land of the defendant. The view favoured in

New Zealand is that it need not. The action is available, it would seem, if the defendant misuses someone else's land, or public land, or even the plaintiff's own land.[10] The interference complained of need not necessarily have been created by the defendant. A landowner may become liable for a state of affairs which he has added to, or which he has or ought to have become aware of, and did nothing about.[11] It is sometimes said that nuisance does not apply where there is an isolated event rather than interference of a continuing nature. However, New Zealand courts do not adhere strictly to this rule,[12] which if enforced, would restrict the potential of the action.

The mere fact of interference is not a sufficient ground to succeed in a nuisance action. The courts must be satisfied that the interference is both substantial and unreasonable in the sense that the plaintiff should not be required to suffer it. The defendant may be operating his factory with care, but it still may be adjudged unreasonable after taking into account the balance of interests. In performing the balancing exercise, the courts take into account such matters as the purpose of the defendant's conduct, its suitability to the locality, its value to the community, the duration of the interference and the practicality of avoiding the interference; the extent and character of the harm to the plaintiff, the value of the use interfered with, its suitability to its locality, and whether the plaintiff could have avoided the harm. Once the plaintiff proves an interference caused

by the defendant, the burden of satisfying the court that the interference was reasonable shifts to the defendant. (Fleming, 1983) Although the action is concerned to protect interests in land, the damages recoverable are not limited to land, but also cover injury to chattels and loss of commercial profit.[13] However, the liability of the defendant is limited to harm that was a foreseeable consequence of the nuisance. Where there is actual physical damage to land or chattels theron, the courts seem more ready to infer that the interference is unreasonable, without regard to the locality or the utility of the defendant's conduct. Indeed, the New Zealand position seems to be that where there is material injury to property not only do utility and locality become irrelevant, but so also does foreseeability. The nuisance will be actionable so long as the damage "represents the consummation of a risk, however remote, inherent in the conduct of the defendant".[14]

Factors such as zoning, whether or not the defendant is acting in compliance with various statutes such as the Clean Air Act or the Water and Soil Conservation Act, will be relevant to the issue of whether the interference is unreasonable, although not necessarily conclusive.[15] Nevertheless, where there has been full compliance with any necessary statutory consents, this is likely to weigh heavily with the court when it decides whether, on balance, the interference is unreasonable.

It is unclear to what extent the court would consider broad environmental concerns such as ensuring sustainable use of renewable resources, preserving diversity, or protecting ecological processes, relevant to the balancing of interests, except to the extent that they directly affect the plaintiff. In a leading American case[16] the Court took the view that they were irrelevant. However, in considering the utility of the defendant's conduct, the courts frequently take into account such matters as the importance of the offensive enterprise to the locality in terms of employment. This, too, is a matter of public rather than private concern. There is surely no justification for treating broad environmental concerns on any different footing from broad economic concerns. But there can be little doubt that the courts would be entitled to take these broader considerations into account in an action for public nuisance. This gives the tort of public nuisance a significant advantage from a resource management perspective.

(iii) Public Nuisance

Public nuisance is an act which seriously interferes with the health, comfort, or convenience of the public generally, or interferes with rights which members of the community generally might otherwise enjoy.[17] The action is a curious hybrid of public and private law. Public nuisance is classified as a misdemeanour or petty crime. For this reason, before

a private individual can bring an action in tort[18] he must establish not only the nuisance but also that he has suffered harm over and above the public at large.[19] Alternatively, he must obtain the consent of the Attorney-General to bring relator proceedings (an action taken in the name of the Attorney-General) [20] which removes the need to show special injury. If neither situation applies it must be left to the Attorney-General to bring action. In practice, this seldom occurs.

Although public nuisance will frequently overlap with private nuisance, it is not limited by the requirement that there be an invasion of the plaintiff's interest in land. The relevant criterion is invasion of a public interest. Hence, unlike private nuisance, this action has the potential to be used by concerned citizens to protect public lands and waterways or other common property resources.[21] This makes it the most valuable action from a resource management perspective.

But in spite of the apparent advantages of the public nuisance action, these could remain theoretical if the special damage rule is interpreted restrictively or the Attorney-General's consent to undertake proceedings is sparingly granted. At present, the law is uncertain as to what sort of damage will suffice to permit a private action. On the strictest view, the damage must differ not only in degree but in kind from the injury suffered

by the public at large. This is an onerous burden, which led to a decision that commercial fishermen could not bring an action for loss of their livelihood against polluters of public waters because their injury did not differ in kind from that of the general public, although it was significantly greater.[22] Not all courts have adopted such a restrictive approach. The modern tendency is to adopt a more liberal approach, which allows a private action so long as the plaintiff's hardship is appreciably more substantial, more direct, or more proximate. (Fleming, 1983). Personal injury or pecuniary loss will usually amount to particular damage. In a line of American decisions, the courts relied on proximity of the plaintiffs to the location of the nuisance as sufficient to distinguish their injury from others.[23] Even this more liberal approach, although helpful, will not greatly extend the situations when suit can be brought by private citizens to prevent various forms of environmental degradation. Public nuisance will not be widely useful at the instance of members of the public unless recreational interests or what may for convenience be termed 'ideological'[24] interests, are recognised as giving a greater interest than the public at large. The very fact that public nuisance is treated as a crime may also restrict the approach potential of this action. The courts may hesitate to fix the label of a crime to an action, notwithstanding that it interferes with the interests of a large section of the public. This difficulty is likely to be felt most

strongly in the area of protecting aesthetic values. The potential problems are well illustrated by a leading Australian case in which the court declined to treat a proposal to build a tower in a public park, which would have an adverse impact upon a prominent skyline view, as a public nuisance.[25] The presiding Judge stated "it is the existence of conflicting points of view which points up the difficulty of treating a dramatic change in the landscape which shocks those of one point of view, but does not shock but even attracts others, as a fit subject for public nuisance....it is going much too far to suggest that it might be a crime to construct a building which offends even a large majority of citizens in some locality by reason that it is considered to break a skyline...."

(iv) Negligence

Negligence frequently overlaps with the actions already described. However, unlike those actions, which focus on the impact of the defendant's activity on the interest of the plaintiff, negligence focuses attention on the conduct of the defendant. It is conduct falling below a standard demanded for the protection of others against unreasonable risk of harm. It is judged against the impersonal standard of how a reasonable man would have acted in the circumstances. Factors the courts take into account in determining whether the required standard of care has been met include the likelihood of harm, the magnitude of the risk, the risk of serious injury, the utility of the defendants act, the burden of eliminating

risk, whether or not the defendant's conduct conforms to standard practices, and whether or not it is in compliance with any appropriate standard of conduct prescribed by legislation. (Fleming, 1983; Street, 1983) The fact that conduct conforms to common practice does not necessarily avoid liability if common practice is not in accord with what ought to be done. For example, a court might well find that a proper regard for environmental safety would require adoption of abatement technology that is not in common use, or adequate research into the safety of a product before its release onto the market.

Because negligence is not defined in terms of either a particular type of harm or a particular type of interest invaded, it is a tort of very wide ranging application, the boundaries of which are being extended steadily. However, if the scope of the action were allowed to be extended indiscriminately, it would become an undue fetter on freedom of action. Hence the courts must strive to strike a balance between the protection afforded by the action and freedom of action. They do this principally through the concept of a duty of care. Behaviour which the man in the street would label as negligent will not necessarily entail liability. Liability only arises in a situation where the courts hold that there is a duty in the circumstances to observe care. Their approach to the creation of new duties consists of asking first whether there is a sufficient relationship of proximity between the plaintiff and the defendant that the latter must have reasonably foreseen

that carelessness on his part would be likely to cause damage to the plaintiff. If this test is satisfied, they will consider whether there are any policy considerations for not recognising a duty, or for limiting its scope.[26] The plaintiff, having established that the defendant owed him a duty of care which he has breached by failing to attain the required standard of care, must, in addition, be able to show that breach of the duty caused him harm which was reasonably foreseeable. In general it can be said that the plaintiff in negligence faces a more difficult burden of proof than plaintiffs in the actions considered so far.

Thus far in the development of negligence the courts have tended to restrict liability to situations in which injury occurs to the person or to physical property. They have even resisted allowing liability for economic loss unless it is consequential upon injury to person or property, although recently some inroads have been made in this area.[27] The need to show injury to person or property means that for the purposes of resource management, negligence has a narrower range of potential applications than an action in public nuisance.[28] For example, those whose recreational or commercial interests have been affected by toxic discharges from a factory, but have suffered no harm to person or property, would have no claim in negligence, but might well have an action in public nuisance. Furthermore, in negligence actual physical injury must be sustained. Mere interference with personal comfort or enjoyment of property cannot give

grounds for an action as it does in nuisance.

(v) Breach of Statutory duty

The action for breach of statutory duty cannot be disregarded as a possible basis for actions concerned with environmental issues, although by the very nature of the action it is not possible to say much about the situations in which it might apply. Both the interests protected and the conduct giving rise to a cause of action will depend on the statute concerned. In order to succeed the plaintiff must first of all persuade the court that the Act intended to confer a right of action in tort and that he is one of the persons protected by the statute. He must then establish that the defendant was in breach of a mandatory duty[29] imposed upon him which caused the plaintiff harm within the scope of the general class of risks at which the statute is directed.[30] Parliament seldom indicates whether a private action in tort was intended. It is therefore a matter for interpretation by the courts, although inevitably there is a degree of artificiality about this, because if a right of action had been intended, the Act would almost certainly say so. Clearly, policy considerations play a large part in whether an action will be allowed. However, in general it can be said that it is easier to prove the Act created a private right where the duty is imposed for the benefit of an ascertainable class and where no alternative remedy for breach of the duty is provided.[31] Furthermore, the courts will not readily allow an action in tort where public bodies have breached general statutory duties. (Street, 1983

(vi) The rule in Rylands v Fletcher

The rule in Rylands v Fletcher applies to much more specific situations than the actions previously discussed. It applies to interference with the land of another[32] caused by the escape of something accumulated on the land of the defendant, in the course of non-natural use of his land, which is likely to cause harm if it escapes. Although nuisance, negligence, and trespass may be alternative causes of action, the rule in Rylands v Fletcher sometimes applies where the others cannot succeed. If the plaintiff successfully establishes all the elements of the cause of action the defendant will be liable regardless of whether he was negligent in allowing the escape or whether the circumstances of the escape were foreseeable, except where he can show the escape was caused by an unprecedented natural act ("act of God") or by the deliberate act of a stranger which could not reasonably have been anticipated.[33] No liability would arise in negligence, trespass or nuisance for unforeseeable harm resulting from escape of the accumulated object (save in the case of the exception noted above to the general requirement of foreseeability in nuisance). A landowner's liability for the actions of independent contractors, lawful visitors, servants and agents is also more extensive than it is under the other torts.[34]

Whether or not a use of land is held to be non-natural is critical to the outcome of an action under the rule. It is usually defined as "some special use bringing

with it increased danger to others, not merely ordinary use of land or such use as is proper for the general benefit of the community"[35]. However, this gives little indication of the situations in which the rule will apply. The definition is sufficiently flexible to allow the courts to adjust to changing patterns of social and economic need. In New Zealand it has been held to cover scrub burn-offs[36], roadside spraying with weedkiller[37], altering the natural contour of the land to create an artificial accumulation of soil[38] and diversion of water from its natural watershed to another.[39] Elsewhere, aerial spraying of weedkiller, slag heaps, phosphate slime reservoirs, and bulk storage of water, gas, oil, even electricity, have been held non-natural uses for the purposes of the rule. Approval of a particular use by a planning authority does not automatically make it 'natural'. (Fleming, 1983) Nor is it necessary that the thing 'accumulated' be inherently dangerous. In spite of the very specific requirements of the rule, the examples cited above indicate that it is applicable to a number of important environmental problems. However, the courts have tended on the whole to be conservative in extending the rule to new situations.

Although the potential of these actions for dealing with various environmental problems is undoubtedly much greater than the limited number of New Zealand cases would suggest, the very fact that they are private law remedies entails certain inherent disadvantages from a resource

management perspective, in addition to any disadvantages generally inherent in litigation as a form of problem solving, which is to be the subject of discussion in Chapter Four.

We have seen, that with the exception of public nuisance, the court is concerned with the issue of whether the actions of the defendant have caused injury to private rights of the plaintiff. Whether or not his actions also cause injury to the environment is peripheral to the courts' central inquiry. In some situations the injury to the plaintiff's interest will coincide closely with the injury to the environment, as, for example, where toxic emissions from a factory or leaching of toxic wastes from a hazardous wastes disposal site, impair or destroy the biological productivity of the plaintiff's land. Very often the wider environmental harm is incidental to the injury sustained by the plaintiff which gives rise to a cause of action. A typical, if rather mundane example of this category of injury, is the case of air pollution from an adjoining factory which interferes with the plaintiff's enjoyment of his land by damaging paintwork on his buildings, preventing washing from being hung outside and generally making outdoor activities unpleasant. The action must stand or fall on the merits of this particular injury to this particular plaintiff, not on the basis that it is contributing to the cumulative problem of air pollution. Indeed, as has been noted previously, there is some doubt

concerning the extent to which it is relevant at all to take into account the wider environmental problem of which the particular injury in question is but a part.[40] Courts will differ in their attitudes on this point. Likewise, they will differ in the extent to which they will take account of the wider socio-economic issues which also ought to be part of sound resource management decision-making. The selective basis on which the courts process information makes litigation a crude tool for striking the best balance between development of resources and protection of the environment. It is a very indirect means of dealing with widespread environmental problems, although it may resolve or ameliorate a particular problem in a particular place.

A further consequence of the central emphasis on injury to private interest is that the actions outlined are not useful for dealing with the problems of longterm harm to the environment, where injury is caused to future rather than present generations, or where the immediate injury to individuals is insufficient to give grounds for litigation. Unless the courts modify the special injury requirement for public nuisance, even that action would be unavailable at the suit of private individuals in this type of situation.[41]

Issues of resource scarcity will frequently fall into the category of causing harm to future rather than present generations. Hence the law of torts is in general less able to deal with scarcity issues than those

of environmental degradation. Clearly there are exceptions. The threat of scarcity may be imminent. Yet even then, this of itself does not fit any of the interests protected by these actions.[42] The issue of resource scarcity may be approached indirectly where this issue merges with problems of environmental degradation. For example, where environmental degradation poses a present threat to the sustainability of renewable resources, or where wasteful, inefficient use of resources creates pollution problems.

Although interference with property is one of the private interests protected by the law of torts, substantial damage may be caused to a plaintiff's land and the ecological communities living on it without necessarily constituting injury to land for the purposes of legal action. The anthropocentric nature of what is meant by injury is graphically illustrated in a recent New Zealand decision.[43] The case concerned a fire which had escaped from neighbouring property onto the land of Forest Products, where it had burnt scrub and bracken but not any of the plantation timber. The issue for the Court to decide was whether in a Rylands v Fletcher action the plaintiff could recover costs incurred in firefighting. It found that there had been no injury to land. However, because interference with use of land fell within the rule and the need to firefight was such an interference, recovery of the cost of doing so was allowed.

One of the most serious limitations arising

from the fact that these are private remedies designed to compensate for injury to private interests is perhaps self-evident. A right of action can only accrue once injury has been sustained. Apart from certain limited exceptions threat of injury does not suffice to give a cause of action. Clearly, action taken after the event is far from an optimum means of problem solving and is the antithesis of the desired resource management goal of anticipatory planning. Thus, where the harm is irreversible the law of torts can at best act as a deterrent. Its effectiveness as a deterrent against repetition of similar harm by the defendant will depend on the severity of the damages awarded against him. This is the principal remedy of torts. The basic aim of damages is to restore the plaintiff to his previous position subject to the rules concerning foreseeability of damage which were noted above. Clearly, if the court is concerned to restore the plaintiff to his previous position the damages awarded will not necessarily result in the best allocation of resources. In economic terms the amount of damages may not reflect social willingness to pay for the offending activity. The effectiveness of the law of torts as a deterrent against similar acts by others will depend first and foremost upon the risk of being subjected to legal action, as well as the severity of the possible damages award. Where there is a high risk of legal proceedings one would expect potential defendants either to spend up to the anticipated cost of damages to prevent harm or to take out liability

insurance. In either case this should cause a shift in consumer demand through cost internalisation (provided that consumer demand for the product or service is elastic). (Thompson, 1973) If the law acts as a poor deterrent because risk of legal proceedings is low, not only will it be inequitable between those in similar situations but it may also distort efficient resource allocation. Assuming that the defendant is able to pass on the costs of the legal action through the pricing system, the effect of a completely random selection of defendants is that similarly harmful or more harmful behaviour by others may gain a market advantage.

In the case of reversible harm torts actions can play a more positive role by stopping the cause of the harm. This may be achieved either by an award of damages or by grant of an injunction. In order to put an end to the harm, damages must of course be sufficient to cause the defendant to alter his behaviour. An inadequate award of damages may simply have the effect of licensing the harmful activity. From the point of view of preventing continuation of the harm the injunction is a more useful remedy.

An injunction is an order of the court requiring the defendant to do or refrain from doing a particular thing. Where the defendant is restrained from committing or repeating a tortious act the injunction is termed prohibitory. This is the usual form of injunction and is frequently used to prevent a nuisance or a trespass.

An injunction may also take the form of requiring a positive act to put an end to the tort, for example, an order to install pollution control equipment. This is termed a mandatory injunction. It can be argued that this form of injunction is less desirable in the interests of wise resource use than an order which simply requires an end to the harmful activity but leaves it to the defendant to find the means of doing so. It is perhaps for the best then that mandatory injunctions are sparingly granted.[44] Indeed, there are practical limitations as to the types of act that the courts can compell. They are not equipped to provide continuing supervision to ensure that an order is complied with, so where this would be necessary a mandatory injunction is unlikely to be granted.[45]

An injunction may be applied for once litigation has commenced but before it has proceeded to a hearing. This is known as an interim or interlocutory injunction. This is obviously an important advantage where proceedings are likely to be protracted or delayed. In theory the injunction will either be confirmed or revoked when the cause of action is tried, but in practice, the grant of such an injunction usually results in settlement between the parties so that the matter never proceeds to trial. If this happens the plaintiff will benefit from not facing the full burden of proving his case. Where the injunction he seeks is prohibitory he need only satisfy the court that there is a serious question to be tried and that damages would not be an adequate remedy. Having satisfied

this test, the court will decide whether or not to grant an injunction on the basis of the balance of hardship between the parties. If the plaintiff succeeds in obtaining an injunction, it may in effect be granted in a case where he would not be successful in establishing all the elements of the cause of action at full trial.[46] In the case of mandatory injunctions the plaintiff has the more substantial task of establishing a prima facie case, that is, he must go some way towards proving the merits.[47]

Although injunctions will not be granted where damages would be adequate compensation, it is relatively easy to show they would not where damages can't easily be quantified or where the wrongful activity is of a continuing nature, or is likely to be repeated. This, of course, will frequently be the case with environmental harm. However, injunctions have been held not to be available in negligence actions, even though the wrongful activity is of a continuing sort which would be eligible for an injunction if tried in nuisance, trespass or Rylands v Fletcher.[48] This reduces the usefulness of this cause of action.

The courts are not influenced in their decision whether or not to grant an injunction by considerations such as the greater economic or social value of the offending activity. If damages would not be an adequate remedy the courts may grant an injunction although it is against the public interest to restrain the activity

concerned. Indeed, injunctions have been granted when it would have been cheaper for the plaintiff to prevent the harm. Having excluded wider public interest issues from consideration in deciding whether the plaintiff should succeed, one might expect such issues would be considered relevant in deciding what form of remedy should be granted.[49] Apart from the traditionally high regard for private property rights in the common law, the policy behind this attitude seems to be based on the belief that to provide otherwise could in effect force the plaintiff to sell out to the wrongdoer or put up with the harm on the defendant's terms.[50] To the extent that environmental concerns would in all probability be subordinated to economic considerations if the public interest were taken into account, undoubtedly this attitude is often advantageous to the environmental plaintiff. But overall, exclusion of the public interest cannot serve the interests of sound decision-making. It is perhaps partly recognition that the adversary format of torts proceeding cannot produce a fine enough balance between public and private interests that leads the courts to exclude public interest altogether. But this yet again illustrates that torts proceedings are not an ideal tool for striking the best balance between protecting the environment and the legitimate needs of resource users.

The one exception to the normal situation that no right of action can accrue unless injury has been sustained, lies in the courts' power to issue quia timet injunctions. This form of injunction may be issued to restrain a threatened

tort. In spite of the obvious application of this sort of injunction to environmental problems, it is important not to exaggerate its potential. The courts are sparing in their use of them.[51] There must be a strong probability that what the defendant is intending to do will in fact take place and will cause substantial injury if it does. The degree of probability required will depend upon the circumstances but in particular the gravity of the possible injury and the balance of hardship between the parties. If the damage would be irreparable there is a greater likelihood of an injunction being granted but clearly if something other than an injunction could avoid the threatened damage the courts would not issue one. Hence the imminence of the threat will be an important consideration. A major practical difficulty in the way of obtaining a quia timet injunction will be proving that injury will be caused. Even though the possibility of obtaining this sort of injunction is preferable to a remedy after damage has occurred, it is clearly no substitute for anticipatory planning.

Proof of causation is a difficulty shared by all torts actions, not just an application for quia timet injunctions. It is essential to the logic of the law of torts that the defendant must have caused the injury complained of. In the interests of fairness he should not be liable for harm he has not caused (or will not cause). The usual test of causation is known as the "but-for test". The plaintiff must be able to show that the harm would not have occurred but for the defendant's

act. Two sorts of difficulty typically arise in the environmental context: problems of linking the harm to the challenged activity because of scientific uncertainty about causation, and problems of linking the harm to the defendant because of multiple causation. Both sorts of difficulty may be encountered in one action. Even when there is a single identifiable defendant and no doubt that his activity causes the type of harm alleged by the plaintiff, actual proof of cause may involve considerable expense, requiring expert witnesses and use of complex technology such as radio-isotope tracing or remote sensing.[52] This will not always be so, of course. In some cases evidence of visual observation may be sufficient, or something as relatively straightforward as ambient air test or water samples.

Scientific disagreement about the nature and extent of the harm caused by various pollutants or chemical toxicants places a serious obstacle in the way of greater use of the law of torts to deal with many of the serious problems of environmental degradation and threat to basic life support systems. It is self-evident that with many environmental problems action must be taken on the basis of risk rather than certainty because if harm does result it will be irreversible. In any particular case the degree of probability of harm occurring needs to be balanced against the severity of the possible injury. A legislator is freer to act on a lower degree of probability than is proper for a judge. Legislation will apply to all those who carry

out the potentially harmful activity. The judge, faced with a quia timet application, has to decide whether an individual defendant should be stopped from carrying out an activity he is otherwise lawfully engaged in. This, in fairness, must demand a high degree of probability, which is not to say that a plaintiff should be denied a remedy against the potential harm simply because the legislators have not seen fit to control the risk. The point is that judges and legislators are faced with quite different balances of interest.

Although there is general scientific agreement about the harm caused by an activity courts may be reluctant to trust the evidence of new and relatively untried scientific methodologies. Even longstanding methodologies such as statistics may, depending on the circumstances, be considered an insufficient basis for imposing legal liability.[53] On the other hand, because the requisite legal standard of proof is the balance of probability, the courts may find that legal cause has been established where scientists would not be prepared to assert causation.[54]

Multiple causation problems arise whenever the injury to the plaintiff is the result of a combination of causes or where it could have been caused by any one of a number of defendants. This sort of situation commonly arises in litigation over pollution, especially in an urban context where there will be numerous sources, many of which may act synergistically. In these circumstances the "but-for"

test will be very difficult to apply. But the law does not leave a plaintiff entirely remediless. In what may be described as the "contribution-to-aggregate-condition test", several defendants who, for example, pollute a stream may be held separately liable even though the contribution of each alone would not cause substantial harm.[55] Each defendant will be held liable for all the harm though, of course, the plaintiff can only recover one lot of damages.[56] The situation is a little different when natural conditions contribute to the aggregate cause, as for example, where emissions from a geothermal power plant combine with natural geothermal emissions to cause harm. On normal rules the defendant should only be liable for harm caused by the amount he contributed unless it was foreseeable that the addition of his emissions would result in harm where there had been none before. If there is no base line data available for gauging the natural contribution it will be very difficult to determine the appropriate extent of the defendant's liability.[57]

Where injury could have been caused by one of a number of defendants the plaintiff faces greater difficulties. He can join all the possible defendants and hope that by attempting to exculpate themselves they will assist him to prove which caused the injury. American and Canadian courts have developed certain burden of proof-shifting rules which may assist the plaintiff under some circumstances. In negligence suits, where the plaintiff

is able to prove two or more persons acted negligently and the injury was caused by one of them, each defendant will be held liable unless he proves he did not cause the injury.[58] A variant on this rule has been developed in relation to negligence suits for dangerous products. The market share liability theory imposes liability on all producers of a product from an identical design or formula to the extent of their share of the market unless a defendant can exonerate himself. This rule could be extended to situations where the activities of a group of defendants result in substantially the same discharges and the plaintiff is unable to trace the actual source of those eventually deposited on his land. Although the plaintiff must still prove his injury was caused by the emissions, in effect, under this rule he would no longer have to prove the defendant caused the harm.

Notwithstanding the potential usefulness of these various rules in environmental litigation, there are limits to the assistance which can be derived from them. Their value decreases as the number of contributing causes or possible defendants increase. If pursued too far they would quickly bring the courts into the borderline area between lawmaking which is a valid exercise of judicial creativity and that which encroaches on the legislators role.

Discussion of the contribution the law of torts can make to dealing with resource management problems

would not be complete without a brief consideration of the effect of statutes on these remedies. Legislation now provides statutory procedures for dealing with many resource management problems. There is a presumption of statutory interpretation that statutes are not intended to abolish common law remedies unless there is a statement of specific intent or unless they do so by necessary implication. None of the major pieces of environmental legislation expressly exclude the common law remedies, but they inevitably affect them. Evidence of non-compliance with the conditions of a water right or a licence under the Clean Air Act, for example, will provide strong support for a plaintiff who claims a nuisance exists, and may assist him to establish that there has been breach of a duty of care. On the other hand evidence of compliance may provide a defense for the defendant. Possession of a water right has been held no defense to a defendant who causes damage to the property of another in the exercise of his right by, for example, negligently diverting a stream in such a way as to cause flooding to neighbouring land.[59] But where effluent disposal complies with the conditions of a water right granted in a valid exercise of statutory power, undoubtedly the courts would not impose liability. By effectively setting a higher standard than that imposed by the statutory authority, they would be taking upon themsleves a decision-making power which Parliament has vested in another body.[60]

Where a statute does not expressly exclude common law remedies, a defendant who is acting pursuant to statutory authority will nevertheless be sheltered from liability if he can prove that commission of the tort was an inevitable consequence of carrying out the authorised act. He will be able to do this if he can show that he used all reasonable skill and care in carrying out the activity, in the light of contemporary scientific knowledge. Thus the operators of a coal-fired power plant in Britain were unable to excuse themselves from a claim in nuisance by arguing that sulphur emissions are an inevitable consequence of operating such plants.[61] The court was of the opinion that they had shown "callous indifference in planning the construction of the station to all but its own efficiency". They could have done a great deal more to find out how to mitigate the emissions.[12] However, where a statute vests a body with a power to execute a variety of works of a specified description (such as flood control works) as and when it deems necessary, the defense of statutory authority will usually apply. Although the injury might be avoidable to this particular plaintiff by siting the work elsewhere, injury to someone is inevitable if the work is to be carried out. If the courts were to intervene by granting an injunction they would here again be substituting their opinion for that of the authority in whom Parliament has vested the power. But a statutory authority cannot excuse itself on these grounds if it is acting outside its powers, or if the injury results from

negligence in carrying out the work.[63]

Where the injury to a plaintiff arises from a failure to provide a service or benefit pursuant to a statutory power,[64] the concern of the courts not to substitute its opinion for that of the statutory authority has a decisive bearing on whether or not a remedy will be available. A distinction is drawn between planning or policy decisions, which cannot give rise to a cause of action and what the courts describe as operational decisions. This relates to the manner in which a policy, once determined, is carried out. Thus a decision whether or not to provide a sewage system is a policy matter. Failure to provide one could not give rise to liability for damage caused by pollution, but damage caused by an unrepaired leak comes within the operational sphere and could give rise to liability.

The most significant statute which excludes common law remedies is the Accident Compensation Act, 1972. This abolishes all actions for personal injury, replacing them with a statutory compensation scheme. This curtails the value of torts actions for dealing with environmental problems which cause serious health problems, unless actionable property damage also occurs. However, Vennell (1975) argues that the Act does not prevent an injured party seeking an injunction.[65] If this is so, the most valuable remedy from the environmental standpoint remains intact, but the Act still has a major impact upon the opportunites for bringing negligence actions. This

is perhaps unfortunate. Though the law of torts may have had little deterrent effect in the typical road accident injury case, a substantial award of damages in a case such as the Bhopal gas leak can be a more effective deterrent than regulations which may or may not be enforced and are certainly unlikely to provide penalties comparable to a damages claim.[66]

In conclusion, it needs reiterating that the law of torts cannot substitute for sound planning or for regulatory control. Even if the scope of these actions were broadened to include interests which are not at present recognised, many of the inherent difficulties would remain. But their limitations should not lead us to overlook the positive contributions they can make. By preventing or ameliorating many local sources of environmental harm, which individually may be relatively insignificant, they can make an important contribution to the problem of gradual attrition of environmental quality. They can supplement the enforcement of regulations or deal with problems which are not controlled by regulation or fall outside the scope of planning controls. Not least of all, a torts action can perform a valuable publicity function, providing a catalyst for change, even though the action itself might fail. Part of that value comes from the language of the law, which may help induce attitudinal changes, as Thompson (1983) has observed. 'Negligence', 'nuisance', and 'trespass' convey a moral force which is not matched by terms such as 'cost-internalisation'.

CHAPTER THREE

PUBLIC LAW ACTIONS

The actions discussed in the previous chapter were principally concerned with preventing or ameliorating environmental harm caused by the actions of private individuals rather than public authorities,[1] although the latter can also be held liable under those actions. However, the defense of statutory authority and the limitations upon imposing liability where planning or policy decisions are involved often preclude actions in tort against public authorities. Furthermore, a public authority may, of course, act unlawfully without committing a tort. This chapter, therefore, examines the main method available to citizens for challenging the acts or decisions of the administrative branch through the courts, the procedure of judicial review.

The importance of the State as both a major owner and regulator of resources means that the decisions and actions of public authorities frequently have a greater impact upon the environment and resource allocation than the actions of private individuals. Resource management disputes arising between citizens and the State typically fall into one of three categories:

1) Disputes over management policies for publicly owned resources.

2) Disputes over the expenditure of public money on projects which may harm the environment or restrict the

freedom of future generations to choose different patterns of resource use.

3) Disputes concerning the nature or scope of regulatory control over actions which affect the environment or the allocation of resources (including failure to regulate and authorisations of resource development by the private sector).

Not all such disputes are capable of resolution in the judicial arena. We saw in chapter one that our courts have no power to review legislation. Hence, where inadequate legislation is the underlying cause of the dispute, judicial review will be of no assistance, except to the extent that there is any scope for creative statutory interpretation. For example, where statutory criteria governing the development or management of a resource are deficient from a resource management perspective, the courts cannot supplement those criteria. The best they can do is to interpret the existing criteria in the most favourable possible way.

It should be noted here that a statute may purport to exclude the acts or decisions of an administrator from review. But because of the importance of the power of review to the rule of law, the courts will seldom accept even the clearest words as entirely excluding review, notwithstanding the doctrine of parliamentary sovereignty.[2] However, they will adhere to a provision that a right of review must be exercised within a specified time, as is provided in the National Development Act, or that appeal rights must first be exhausted, as is provided in the Town and Country Planning Act.

Judicial review is concerned with ensuring the legality of the acts and decisions of administrative authorities. It is not concerned with their merits. If the courts decide whether the acts or decisions are right or wrong, desirable or undesirable, they would be substituting their own opinion for that of the authority vested with the power (the same reason that leads the courts to deny tortious liability under certain circumstances). Not only would this breach the doctrine of separation of powers, but on more pragmatic grounds, if all administrative decisions and actions were open to challenge in the courts, the administrative process would soon grind to a halt. It will be apparent from this, therefore, that although a citizen who seeks to challenge the actions of a public authority is almost invariably concerned to attack the merits of the act or decision in question, once again the attack must be indirect. This, then, removes from the judicial arena all those disputes where no possible question of illegality arises. A statute may, of course, provide a right of appeal, which does allow the courts to reconsider some aspect of a decision on its merits.[3] Appeal rights are entirely dependent on statutory provision and should not be confused with judicial review, which is a common law right that exists irrespective of any right of appeal.

The courts can grant relief against the actions of an administrative authority where it has gone beyond the powers conferred upon it by its enabling statute (or regulation). This is known as the doctrine of ultra vires[4].

An authority may go beyond its powers by failing to perform its duties, by doing something which is not authorised by the enabling statute, or by misusing or abusing discretionary power.

Failure to perform a statutory duty is probably the least important ground of review from a resource management perspective because most disputes will revolve around the manner in which a discretionary power has been exercised. Discretion, of course, implies a power to make a choice between alternative actions. Even where an administrative authority is under a duty to do certain things, frequently it has a discretion as to the manner of doing so. To take a typical example, the Forest Service has a general duty to control and manage state forest land in accordance with the objectives of the Forests Act, but it has wide discretionary power concerning the manner of carrying out that duty and what weight to place on the various objectives of the Act in any particular case. Conversely, a statute may confer a discretionary power to do something but impose a duty to observe certain requirements that condition the manner in which the discretion may be exercised. For example, Regional Water Boards have discretionary power to grant or decline applications for local water conservation notices, but in doing so, they are under a duty to take into account the matters specified in section 20 F (7) of the Water and Soil Conservation Act. There will seldom be deliberate failure to perform a duty. Usually any cause for challenge will arise from misinterpretation of the duty

or oversight. Clear cases of failure to perform a duty often arise in the context of non-compliance with procedural requirements such as a duty to consult with specified persons or bodies before reaching a decision or a duty to give notice of some matter.[5]

Just as failure to perform a duty frequently arises from misinterpretation of the duty, so too, misinterpretation of the scope or meaning of a power is the usual cause of doing something which is not authorised by the relevant enabling statute (i.e. regulation). Thus, the situations in which unauthorised acts or decisions may occur are many and various. However, the courts will construe a statutory power as impliedly authorising whatever may fairly be regarded as incidental to or consequential upon the power itself.[6] A power to mine coal, for example, must necessarily include a power to dispose of overburden and slag.

A typical example of an unauthorised action arises where a statutory authority which is empowered to make regulations or by-laws, regulates something it is not entitled to because it has misinterpreted the scope of the empowering provisions.[7] Another common example is improper delegation of a power or duty. A statutory power or duty must be carried out by the authority on which it is conferred, unless delegation is authorised. Any such power to delegate must, of course, be exercised within any limits prescribed by the empowering provision.[8] However, in recognition of the realities of administration, a function conferred upon a Minister is usually held to be exercisable by his department

without an express delegation power, unless it is clear that the Minister is required to act personally.[9]

Abuse of power may be said to occur when the act or decision in issue is of the general type authorised by the enabling statute, but in the course of exercising its discretion the administrative authority acts in a way that the courts imply could not have been intended by the legislature. The courts recognise eight main categories of abuse, although new categories may be recognised in the future. These are acting under dictation, acting on predetermined policy rules, agreement not to exercise a discretion, acting in bad faith, exercise of the power for an improper purpose, acting on irrelevant grounds or without regard to relevant grounds, unreasonable exercise of power, and insufficiency of evidence.

i) Dictation, predetermined policy, agreement not to exercise discretion.

We saw above that a statutory power must be exercised by the authority on which it is conferred, unless subdelegation is authorised. Where an authority purports to exercise the discretion itself, but acts under the dictation of another (who is not authorised to do so), it effectively fails to exercise the power.[10] Thus where a Minister dismissed a planning appeal on the strength of policy objections from another Minister, his decision was invalidated because he had, in effect, surrendered his discretion to the other Minister.[11] Advice may be sought but it must not be followed uncritically.

It is quite normal for administrators to adopt general rules or policies governing the manner in which a discretion will be exercised. This is in the interests of efficiency, certainty, and consistency. However, consistency must not be pursued at the expense of merit. An administrative authority is not entitled to blindly follow rules of its own creating. It must be prepared to consider the merits of an individual case or listen to a substantial argument, reasonably presented, urging a change of policy.[12] The effect of this rule is illustrated by a recent House of Lords decision,[13] which held that a local authority unlawfully exercised its discretion by considering itself irrevocably bound by an election promise it had made. The Court acknowledged that considerable weight must be attached to such a promise but it couldn't validly be regarded as a binding fetter on the exercise of the discretion. By doing so, the authority erred in law.

The rule that a public authority cannot bargain away a discretionary power is another way of saying that it must not enter any contract or take any other action which is incompatible with fulfilling the primary purposes for which it was created. For example, a body which has statutory powers and duties in respect to public lands cannot disable itself from fulfilling those purposes by exercising a subordinate power (such as a power to grant concessions in a reserve) in a manner incompatible with the primary purpose.[14]

ii) Bad faith, improper purposes, relevant and irrelevant considerations, unreasonableness, no evidence.

These categories of abuse often tend to overlap although bad faith, which refers to intentional misuse of power for extraneous motives, should be distinguished from abuse which arises from ignorance or misunderstanding. In practice it is very difficult, indeed, often impossible to obtain evidence of improper motive, so this will seldom be a fruitful basis for challenging administrative action.

The courts will intervene if they are satisfied that a discretionary power was exercised for a purpose that was not contemplated by the enabling statute or regulation.[15] Even discretions as broad and subjective as a power to make such decisions as an authority thinks fit or to impose such conditions as an authority thinks fit, must be exercised in accordance with the purposes of the Act of which they are part. Thus, a power cannot be exercised to give effect to departmental interests or a government policy if those interests or the policy are inconsistent with the purposes of the enabling statute.[16] Policy cannot override legislation. If government policy is inconsistent with the purposes of the Act in question the law must be amended in order to give effect to the policy. This is a fundamental aspect of the rule of law.

The examples given above fall just as readily into the category of exercise of discretionary power on irrelevant grounds. Here again statutory interpretation looms large. Where a statute specifies relevant factors the courts must determine whether they are mandatory and whether they are exhaustive. Where the powers are given

in the sort of broad terms illustrated above the courts must determine whether there are any implicit restrictions on the considerations that can properly be taken into account and equally, whether there are considerations that must be taken into account in spite of the apparently unlimited discretionary power conferred.

To say that the exercise of discretion was unreasonable may just be another way of saying that it was exercised on irrelevant grounds, for a wrong purpose, or for a wrong motive. Often this will be the case. Irrelevancy in particular, will often be so closely intertwined with unreasonableness as to be indistinguishable. As De Smith (1973a, p.305) notes: "Unreasonable acts and decisions usually take place because an authority has deviated from the path of relevancy in coming to its decision". Even though all relevant matters are taken into account and no irrelevant matters are allowed to influence the decision, nevertheless an authority may act unreasonably through giving undue weight to one particular factor.

A statute may prescribe reasonable conduct, but even where there is no express statutory duty to act reasonably the courts will imply a requirement to act reasonably on the basis that Parliament could not intend to authorise unreasonable exercise of power. Clearly, review on this basis could very easily become review on the merits. The courts are well aware of the thin line they tread between review and what amounts to substitution of their own opinion. Hence, they will not lightly invalidate a decision on the ground of unreasonableness

unless it meets the fairly stringent test of "being so unreasonable that no reasonable authority could ever have come to it".[17] But courts will differ widely as to whether this test is satisfied. Caldwell (1980 a) observes that since the rule was first laid down, the cases have not tended to be so rigorous in their requirement. The courts will have little hesitation about finding a decision which is manifestly absurd, arbitrary, or capricious to be unreasonable.[18]

The courts will also intervene where an administrative authority has acted on no evidence, or has reached a conclusion to which it could not reasonably come on the basis of the evidence before it.[19] In doing so they may once again appear to come very close to deciding the merits of the decision. The recommendation of the Planning Tribunal concerning a water right for the Motunui Synthetic Petroleum Plant was recently the subject of an unsuccessful review on this basis.[20] The Tribunal granted the water right with the proviso that the point of discharge be extended further out to sea. The Court of Appeal found that, contrary to the plaintiff's allegation, there was adequate evidence to justify this decision. However, it indicated that there might have been force in the plaintiff's claim if the Tribunal had found that the proposed point of discharge was unsafe, as there was little specific evidence to show that an extension would make an unsafe point of discharge safe. If this had been an appeal the court

could have reached its own conclusions about the safeness of the point of discharge, rather than being confined to a consideration of whether there was sufficient evidence to support the Tribunal's decision.

One type of statutory power requires special mention. This is the power to make subordinate or delegated legislation. The courts power to review such legislation is of considerable importance, given its vast volume, the fact that it is seldom subject to parliamentary scrutiny, and the fact that it may come into force with little or no publicity.[21] A number of environmental statutes contain very important powers to make subordinate legislation. District schemes are one of the most significant examples of subordinate legislation from a resource management perspective.[22] In general this type of power is subject to the same grounds of review as the exercise of other powers. However, subordinate legislation may also be challenged on the basis of uncertainty and on the basis that it is in conflict with other statutes.

It is clearly much easier for the courts to establish that an administrative authority has acted invalidly where powers are worded objectively. Subjectively worded powers do not prevent the courts from examining the manner in which they have been exercised to ensure that

it is within the scope of the power granted, as we have seen. But subjective powers make it less easy to challenge a decision. The more a power relates to policy issues, the more difficult and, indeed, the more reluctant the courts are to intervene.[23] Review relating to resource management issues often confronts this difficulty. The problems are well illustrated by the litigation concerning application of the National Development Act to the proposed Aramoana development.

Opponents of the smelter challenged the decision to apply the Act on two main substantive grounds:[24]
1) Failure to give due weight to the statutory requirement that it is "essential" a decision be made "promptly".[25]
2) Failure to take into account relevant considerations such as the net economic effect of the proposed work, the economic risk, or the affect on New Zealand's energy supply. It was claimed that had such matters been taken into account no reasonable person could have reached the conclusion that the work was "likely to be in the national interest" or to be "essential".[26]

On the first ground the court concluded, after examining a Cabinet paper which analysed the application, that there was no evidence to suggest that the strength of the word "essential" was lost on the Ministers. Although not beyond argument, the view that promptness was essential in this case was tenable. The Act did not require the Governor-General in Council to consider whether proceedings under the Act would enable a prompter

decision than the normal procedure.

Challenge on the second ground also failed. The court made it clear that a distinction must be drawn between considerations which a statute expressly or impliedly identifies as having to be taken into account, those that must not be taken into account (irrelevant considerations) and those which may be taken into account, indeed, which many people would have taken into account, but which are not mandatory. It stated that where a statute specifies a criterion such as the national interest, it is not easy to assert the particular considerations that have to be taken into account. It was of the opinion that if the facts alleged by the plaintiffs (as to the economic effect of the smelter etc.,) were proven and it was also proven that they had not been taken into account, then the Order-in-council might well have been invalid. In that event it would have been hard to see how the Ministers could have reasonably regarded the statutory criteria as satisfied. However, the court found neither proven.[27] So long as the view the Ministers formed as to the national interest was reasonably open to them, though some might disagree, the court could not intervene. Although the court was willing to closely scrutinise a decision at the very highest level of government to ensure strict compliance with the statutory criteria, the large policy element in the discretion posed an insurmountable hurdle for the plaintiffs.

The grounds of review discussed so far have been directed at the substance of an administrative act or decision (with the exception of non-compliance with procedural requirements). The courts have also developed grounds of review which are directed at administrative procedure. Fairness in decision making is considered to be such an important aspect of the rule of law that the courts are prepared to imply that Parliament must have intended administrators to observe certain minimum standards of fair procedure. This sometimes leads them to impose further requirements even where Parliament has provided procedural requirements. The required standard will vary from case to case according to the nature of the function involved, the context in which the power of decision is exercised, and the subject matter of the power. If the requisite standard is not observed, the administrative authority is said to have exceeded its powers. The idea of substantive fairness is embraced in the concepts of unreasonableness and bad faith which were discussed above.

Traditionally, the minimum standards applied by the courts have consisted of two main rules: the rule that the decision maker must not be biased and the rule that a person affected by a decision has a right to be heard. These are known as the principles of natural justice. For a long time the courts would only apply the principles of natural justice where the decision was adjudicative in character.[28] These are now generally recognised to be subcategories of a wider duty to act fairly, which is not dependent upon any classification of function as judicial

or administrative.[29]

As has already been observed, the content of the duty to act fairly is variable. The courts may go so far as to require a judicial type hearing, with opportunities for cross-examination, or they may simply require disclosure of the opposing case and an opportunity to comment on it. Decisions affecting rights in property, personal liberty, livelihood, status, or reasonable expectations of preserving or acquiring benefits such as licences will usually be held to require greater procedural protection (if this is not already provided by statute). But as always, this must be balanced by the circumstances. As Cooke J. stated recently[30] with respect to decisions on matters of national interest by the Executive Council:

> It would be very unusual to impose on this body of Ministers a duty of considering, whether directly or even in summarised form, the views on matters of national interest and the economy of all individual property owners affected by a proposal who happened to wish to make representations....It is easier to import a duty of administrative fairness when a decision relates essentially to the personal circumstances of an individual.

The courts do not recognise a general duty to give reasons for decisions as part of the duty of fairness (although it is increasingly common for statutes to provide such a duty). One cannot but agree with Whitmore and Aronson (1978) that it is perhaps a pity no such general common law rule has emerged. As they rightly observe, reasoned decisions are usually better decisions and such a rule would greatly assist the courts in their judicial review.

Statutory rules of procedure effectively displace the common law duty to act fairly in most major legislation concerned with the environment or resource development. The courts will not lightly supplement a statutory procedure. For example, the Court of Appeal was not prepared to supplement the procedural scheme of the National Development Act by implying a duty that property owners affected were entitled to a hearing before the Order in Council applying the Act was made. They would have the normal right of objection before the Planning Tribunal.[31] On the other hand the court held the decision of a town planning committee void because it failed to disclose a report from its town planning officer at the hearing - thus the parties to the hearing were denied an opportunity to comment on the report.[32]

The rule against bias can be more precisely stated. A decision can be set aside on this basis in three situations:

1) Where the decision maker can be shown to have a direct pecuniary interest in the subject matter in issue.

2) Where an observer unacquainted with the facts would conclude from the outward form or conduct of the proceedings that there was a reasonable suspicion of bias.

3) Where the totality of evidence of the proceeding disclose a real likelihood of bias even though on the surface they appear to be fairly conducted.

The question which most frequently arises with resource related issues is wheter pre-determination of policy amounts to disqualifying bias. This will only be so if the court is satisfied that the decision maker had a completely closed

mind, which will clearly be very difficult to prove. Frequently, statutory provisions implicitly overrule the common law rules on bias.[34] It is common for Ministers to be given a power of decision over matters in which his own policies are likely to be at issue. This is the case under the National Development Act, for example.[35]

A person seeking a remedy for an alleged wrongful use of a statutory power or non-compliance with a statutory duty must make an application for review in accordance with S. 9 of the Judicature Amendment Act 1972.[36] This provides a statutory procedure in place of the five separate remedies which were available at common law - mandamus, prohibition, certiorari, injunction, and a declaratory order. These common law remedies are complex and it was not uncommon for a litigation to lose a meritorious case because he had chosen the wrong remedy. The application for review overcomes this difficulty by providing a single procedure. But the common law remedies continue to govern the grounds on which relief is available and the nature of the relief. (Sim and Cain, 1978) In other words the litigant still needs to establish that one of the remedies would have been granted under the previous law except in the few instances where they have been extended by the Act. Hence it is necessary to examine them briefly.

Mandamus is used to compel the performance of a public duty, but not all duties will be compellable. Some are what the law terms duties of imperfect obligation. For example, the National Water and Soil Conservation Authority has a general duty to promote the best uses of

natural water. But a duty of this type has a large discretionary element. Short of the Authority failing to act at all, it is difficult to imagine how the courts could compel the performance of such a duty without making decisions on the merits. Environmental and resource statutes contain many examples of this type of duty.

Certiorari and prohibition are complementary remedies. Certiorari is used to 'quash' (set aside) an order or decision of an authority made without jurisdiction, in excess of jurisdiction,[37] or where the decision makers record displays an error of law.[38]

At common law this was the sole remedy available to set aside a decision, but along with prohibition it suffered the defect of applying only where the decision-maker was said to be under a duty to act judicially. The Judicature Amendment Act now extends the power to set aside[39] and removes the restriction that orders in the nature of certiorari and prohibition only apply where there is a duty to act judicially.[40] Certiorari simply sets aside decisions. It cannot be used to order the decision-maker to start again. This defect is also remedied by the Judicature Amendment Act,[41] which gives the court the power to order the decision-maker to reconsider any specified matters. Where no final decision has yet been made prohibition applies to prevent an authority from commencing or continuing an illegal course of action, which if continued, would give rise to grounds for granting certiorari.

Injunctions have already been discussed in the context of private law. They are also available as a public law

remedy to restrain acts that are ultra vires. The declaratory order is a statement or declaration by the courts as to the legal rights or duties of a person. However, it is simply that. Unlike the previous four remedies it cannot be enforced if it is disobeyed. In spite of this shortcoming, it is probably the most flexible and useful remedy. It is applicable to all the situations referred to above but it can also be used where a public authority wishes to know the extent of its powers or the limits of its duties, where an individual wishes to establish the exact scope of a public duty, or to determine the true construction of a statute or subordinate legislation. (De Smith, 1973 a)

The declaration is particularly useful in actions against the Crown.[42] Neither mandamus nor an injunction are available against the Crown. Even more importantly, where a declaration is sought a court may order interrogatories and discovery, which it cannot in the case of the other remedies.[43] An interrogatory is a procedural device by which a party may ask the other side questions about any matters of material fact relevant to the proceedings (with certain exceptions). Discovery is an order requiring a party to the proceedings to disclose all documents in his possession relevant to the proceedings, unless he can establish that they are privileged and therefore exempt from disclosure.[44] Clearly, both devices are potentially very useful means of obtaining information which is necessary for success in an action, but the courts will not permit them to be used merely to "fish" for further causes of action.[45]

Another possible advantage the declaration offers over other remedies (whether in Crown proceedings or not) is a relatively liberal standing requirement. Standing, or the law governing who is entitled to bring on action to court, is of critical importance in determining how useful public law actions can be from a resource management perspective.[46] Public interest litigants such as the Environmental Defense Society have usually been denied standing in the past.[47] The situation is complicated by the fact that varying tests for standing apply for each remedy and often there is inconsistency of approach even within a single remedy. The courts seem to be moving towards a much more liberal and consistent approach. If the trend continues standing should cease to be a major obstacle. However, as the law is in a state of flux at present it is necessary to outline briefly the differing tests for each remedy.

Standing for declarations is governed by S 3 of the Declaratory Judgments Act 1908 which provides:

> Where any person has done or desires to do any act the validity, legality, or effect of which depends on the construction or validity of any statute, or any regulation...or any by-law...or where any person claims to have acquired any right under any such statute, regulation, by-law...or to be <u>in any other manner interested</u> in the construction or validity thereof, such person may apply...for a declaratory order....

The Court of Appeal[48] recently considered the meaning of the section, rejecting an earlier line of cases which had taken a narrow approach, in favour of a line of decisions which accepted that the section confers broad standing.

However, it declined to express a final opinion as to the scope of the section.

In contrast with the requirement that a party be "in any...manner interested", in order to obtain mandamus the applicant is usually required to show that the breach duty complained of was owed to him personally or as part of a class. Sometimes the requirement is widened to include damage to a 'special interest' held by the applicant. Although this expression is capable of widely differing interpretation, in New Zealand litigants asserting damage to their 'special interest' in the environment have been denied standing.[49] A similar test applies for injunctions. The applicant must either establish that private rights were affected or that special damage was suffered over and above that suffered by the public at large. The usual test of standing for certiorari and prohibition requires the litigant to be a person aggrieved, that is, a person with a peculiar grievance of his own beyond some grievance suffered by him in common with the public. However, the standing rules for certiorari and prohibition tend often to be treated more liberally. The courts sometimes grant standing to members of the public who do not fall within this test. The great difficulty confronting the litigant who is concerned with protection of environmental quality or wise management and use of resources, is that no matter how strong and sincere his concern might be, the nature of the interest which he claims may be affected is not distinct from interests shared by the public generally. For that reason, the courts have been reluctant to include them within the categories of

"special interest", "special damage", or "peculiar grievance".

The reluctance of the courts to grant standing to those who seek to assert the public interest is based on the theory that it is the role of the Attorney-General to protect the public interest. Members of the public who do not have a legally recognised private interest affected must either persuade the Attorney-General to bring proceedings or obtain his consent to undertake relator proceedings. (Cappelletti, 1975) In spite of the undeniable usefulness of the relator proceedings device, it has obvious disadvantages. It is undesirable to have to rely on the consent of an authority who is at the same time a member of government, especially when by their very nature these actions will frequently be sought against government. Moreover the courts have generally held the exercise of the Attorney-General's discretion to grant or refuse relator proceedings is not reviewable.

The courts' restrictive attitude towards standing seems to have stemmed in part from fear of a flood of litigation, and in part from the belief that persons directly affected are the best ones to put the issues before the court. There is undoubtedly merit in the latter view where the substance of the litigation concerns, for example, a claim that the plaintiff has been unfairly denied a license as a result of an abuse of discretionary power. But it is not at all persuasive where the illegal action has no direct impact on legally recognised private interests but significantly affects interests held by the public in common. As Stein (1979) rightly points out, litigants are unlikely to spend time and money unless they have a real interest at

stake. Restrictive rules of standing simply result in the anomalous position that the more people who are affected by an illegal act the less likely it is to be challenged. The courts have severely impeded their ability to uphold the rule of law by adopting such self-imposed rules.

The belief that protection of the public interest should be left to the Attorney-General has come in for increasing criticism from environmentalists amongst others, leading to calls for relaxation or total abolition of the rules of standing.[50] In 1978 the Public and Administrative Law Reform Committee considered the question of standing for judicial review. It recommended adoption of a single test of "sufficient interest" which it felt was broad enough to cover litigants whose interests are not distinct from interests shared by the public generally.[51] As yet there has been no legislative response to this recommendation. However, as noted above, the Courts seemed to have taken a more liberal attitude of their own accord, no doubt in response to the changing climate of opinion. The Court of Appeal[52] was quick to follow a recent House of Lords decision[53] rejecting a restrictive approach to standing, even though the English decision was based on a statutory provision. It granted standing to the Environmental Defense Society and the Royal Forest and Bird Protection Society to challenge administrative action taken under the National Development Act. The general tenor of the court's decision suggested that a liberal approach would continue to be followed in future. Nevertheless, the decision placed emphasis on the purpose and policy of the National Development Act.[54] The court expressly left

open the question of standing where review is sought of administrative actions governed by other legislation. Inevitably, therefore, uncertainty remains, making legislative reform desirable.

Judicial review provides the courts with varied and flexible tools for controlling the actions of the executive branch. It can make a useful contribution to the resolution of resource or environmental disputes between citizen and State even though the courts must operate within the confines of concern with illegality rather than with the merits of an act or decision. A successful action may, of course, result in the enforcement of a statutory duty or invalidation of an action or decision. Although the courts can only set aside an ultra vires decision or order it to be reconsidered in accordance with the law, the practical outcome will often be the same as a finding on the merits. If a decision is found to be ultra vires for unreasonableness, the decision-maker is effectively precluded from reaching the same decision again. Where challenge is based on a ground such as irrelevancy or improper purpose, the courts will only exercise their power to set aside if they are satisfied that the decision would have been different but for the irrelevancy or improper reason. (Smillie, 1980) Clearly, challenge on procedural grounds does not necessarily prevent the decision-maker from ultimately reaching the same decision, but again, a remedy may well be denied in that instance (ibid).

Review also serves a number of other purposes. The demonstrable willingness of the courts to scrutinise the actions of all administrators from the highest government officials to the most lowly, should encourage better administrative decision-making. Review based on grounds such as irrelevance, unreasonableness, wrong purpose, and insufficiency of evidence forces administrators to justify their decisions in a public forum, subject to the close scrutiny of cross-examination. The judicial process ensures that they listen to and respond to viewpoints or values which they have chosen to ignore, of which they were unaware, or which they had underestimated the strength or feeling about. The need to openly justify decisions, and in doing so, to take account of opposing points of view, must have a beneficial effect on planning. Even an action which is unsuccessful on legal grounds may, by highlighting strength of public feeling about an issue, result in a decision being modified. Of course, not all grounds of review will allow a direct airing of resource management issues. This is obviously true in the case of challenge on procedural grounds, but it is also true where a fairly narrow point of statutory interpretation is involved. It needs emphasising here, once again, that the possibilities for review are closely linked with the nature of the legislation in question. If an Act gives clear precedence to development over environmental values review may be of little avail. However, by emphasising this, unsuccessful review may provide the necessary stimulus to give reform of the legislation in question a higher place on the political

agenda.

It must be admitted, however, that review is an expensive means of improving the planning process, achieving participation in decision-making or gaining legislative reform. It is, therefore, unlikely to be undertaken unless there is a reasonable prospect of influencing the outcome of a decision. As we have seen broad discretions to make policy, a common feature of environmental legislation, reduce the likelihood of a favourable outcome,[55] although they also allow greater scope to argue that resource management criteria should have been considered. This paradoxical situation highlights the difficulties of using review (the basic aim of which is to ensure that administrators remain within the powers granted to them by the legislature) to effect sound resource management practices.

CHAPTER FOUR

AN EXPANDED ROLE FOR THE COURTS?

We saw in Chapter Two that the emphasis of the law of torts on injury to private interests constitutes a serious impediment to the use of those actions for protecting the environment or ensuring wise resource management. Even the action of public nuisance, though capable of directly addressing environmental issues, suffers from the requirement that a plaintiff must show some injury greater than the public at large. In Chapter Three we saw that, at least until very recently, the value of the so-called public law actions has also been impeded by the need for a plaintiff to show injury to private interests. The most recent decisions indicate a willingness on the part of the courts to grant standing to those concerned with the environment, where this interest is affected, but it cannot be stated with certainty that the barriers have finally fallen. We saw, too, that the concern of the courts with the legality of the actions or decisions being challenged rather than with their merits, restricts the usefulness of these actions for dealing with environmental issues.

In response to these limitations, a number of jurisdictions in the United States have enacted measures which are designed to overcome the limitations of the

common law and strengthen the role of the courts in dealing with environmental issues. Should similar legislation be adopted in New Zealand? No attempt is made here to give a definite answer to this question. Rather, the purpose of the present chapter is to outline the types of reforms which have been adopted and to examine their implications.

There have been four main types of reform.

1) Liberalisation of standing to sue by eliminating the requirement that private parties seeking redress for environmental injuries must show injury to private interests.

2) Creation of an enforceable legal right to environmental quality.

3) Alteration of the burden of proof rules.

4) Authorisation of judicial review on the merits in relation to alleged harm to the environment.

All of these measures are incorporated into the Michigan Environmental Protection Act 1970,[1] the most far-reaching and influential reform which has provided a model for a number of subsequent statutes.[2] Because of its breadth and its importance as a precedent I will discuss the Michigan Act in some detail.

The legislation authorises any person or organisation to bring an action "for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction" against any legal entity whose conduct has or is likely to cause such harm.[3] Once the plaintiff has demonstrated

that the defendant's conduct has or is likely to cause harm, the burden of proof shifts to the defendant who must show either that the allegations are untrue or that "there is no feasible and prudent alternative to [his] conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction."[4] If an action is successful a court may grant an injunction or impose any conditions which are required to protect the environment.[5] The courts are also empowered to set standards for pollution control where any standards relevant to the action in question are found to be deficient.[6] Provision is made for an action concerning matters which would normally be the subject of administrative proceedings (such as planning hearings or licensing hearings) to be remitted to such proceedings. However, the court retains the jurisdiction to review the outcome of the proceeding to ensure that adequate protection from pollution, impairment or destruction has been afforded.[7]

As well as creating a cause of action for protection of the environment, the Act provides that where administrative proceedings or judicial review of such proceedings involve conduct which it is alledged will affect the rights protected by the legislation, it must be determined whether this is so. No conduct "shall be authorised or approved, which does, or is likely to have such effect

so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare."[8] Persons asserting that the proceeding does involve conduct likely to cause harm to the environment may be joined as parties to the proceeding, but this is not mandatory.[9]

In essence, therefore, the Act recognises a public right to a decent environment and creates a duty to take environmental considerations into account, which is enforceable by anyone.[10] Its effect is to give the courts the final power of decision in relation to any environmental dispute where it is invoked, unless the decision is overriden by the legislature. No criteria are provided to guide the courts in reaching their decisions. It was intended by the author of the legislation that the courts should be left "to formulate a solution appropriate to the occasion", "rather than to create confining definitions." (Sax, 1971, p. 248) Some of the variants on this Act limit the action to protection of defined ecologically valuable areas. (DiMento, 1977) Others provide the defense of statutory authorisation where the conduct which is the subject of an action is in compliance with permits or regulations. (Bryden, 1978)

The arguments put forward in support of an expanded role for the courts can be summarised as follows:

1) Administrative behaviour typically exhibits characteristics which inhibit good decision-making. Because administrators are zealous to protect their own programmes

they tend to become inordinately responsive to the special interests in society that they are created to regulate or assist, at the expense of other interests, particularly unorganised or under-represented interests such as environmental interests. (Sax, 1971; Rosenbaum, 1981) Agencies with development oriented functions readily align themselves with developmental interests to enhance their organisational power and try to ignore, if possible, the environmental harm caused by their activities which threatens their power. (Weisbrod, 1978) This is an aspect of what Sax (1971) terms "the insider perspective", decision-making influenced by the corporate needs of the administrative agency which have nothing to do with the public interest.[11] Indeed, administrators often seek to extend their power under the guise of "the public interest". (Rosenbaum, 1981) The bias in favour of organised interests in the decision-making process is exacerbated by a tendency for administrators to economise on the costs of gathering information by limiting the range of alternatives considered and relying on existing information or information supplied by organised interests. Frequently the result of this is that past policies are continued, even though they have failed. (Weisbrod, 1978) These problems are said to be so deeply entrenched that although administrative reforms are desirable, the only real solution lies in a fundamental realignment of power. Hence it is necessary to open access to the courts to interest groups that are under-represented in the normal decision-making processes

and grant the courts power to review administrative decisions on the merits. The political neutrality of the courts, it is believed, will ensure that they do not fall prey to the insider perspective syndrome. (Sax, 1971; Oakes, 1977)

2) The judicial process, once commenced, must be completed, whether by settlement or by judgment. Hence, judicial proceedings can force issues onto the political agenda which it has been found convenient to delay delaing with or to ignore. (Sax, 1971) Furthermore, with the best will in the world, administrators cannot deal with all problems. Legal proceedings allow some of these issues to be addressed as a result of the initiative of private citizens. (Sax, 1971)

3) Legislators cannot anticipate all problems in advance. The courts are able to respond more quickly to new problems as they arise than the legislative or the administrative process. (Sax, 1971; Cappelletti, 1981)

4) Court proceedings force problems to be confronted in concrete terms. Major environmental problems are often discussed at such an abstract level that action is interminably delayed. The concrete nature of legal proceedings allows small beginnings to be made in tackling these large problems. (Sax, 1971)

5) Because law suits are tailor-made to particular facts, they are more precise and discriminating tools for environmental control than broad regulatory devices. (Tribe 1973)

6. Court proceedings encourage private initiative and allow a sense of direct participation in the democratic process. (Cappelletti, 1975 and 1981; Sax, 1971; Tribe, 1973)

7. The courts have the possibility of being in continuous and actual contact with the concrete problems of society while at the same time being sheltered to an extent from the pressures of the moment. (Cappelletti, 1975)

8. The courts do not suffer from the difficulties and perils of prophecy which beset legislative and regulatory measures. They work through specific cases developing the law on a step by step basis. General principles are evolved after a process of trial and error which minimises the risk of unintended consequences. (Cappelletti, 1975; Rosenbaum, 1981)

The arguments most frequently cited in opposition to extending the role of the courts to the extent proposed in measures such as the Michigan Environmental Protection Act can be summarised as follows:

1. The courts lack the technical competence or the institutional capacity to deal with complex environmental issues. Judges are ill-equipped to deal with the technical knowledge from a diverse variety of unrelated disciplines that typify most environmental issues. (Cramton and Boyer, 1972) The very nature of judicial proceedings means that the courts are reliant on the expert evidence presented to them by the opposing parties.

Parties simply find experts willing to support their case, therefore, the courts are not presented with a fair picture of scientific opinion.[12] Not only do they lack information but they often lack the skill and experience to interpret such information as they receive. (Horowitz, 1977) Furthermore, the courts do not have the capacity to undertake research, devise programmes to test problems or to investigate alternatives. They cannot hire consultants or break down problems into manageable units to be dealt with by different people. (Stevens, 1964; Cramton and Boyer, 1972) Once a decision is made, they lack the machinery to receive reports on the implementation of their decisions, to do follow up studies on their effect, or to ameliorate any unintended adverse consequences. (Horowitz, 1977) Judicial decision-making is inevitably spasmodic and unsystematic because it must be initiated by the parties and the judge only has power to deal with the issues before him. (Jaffe, 1971; Cappelletti, 1975) This prevents consideration of policy priority. (Horowitz, 1977) There is often inconsistency between the decisions of courts until resolved by a higher court. (Cramton and Boyer, 1972)

2. The court system has evolved to deal with two-sided controversies where the facts are within the knowledge or control of the parties and a 'yes' or 'no' answer is called for. (Flick, 1979) Environmental controversies, however, are characterised by what have been termed 'polycentric' problems - problems in which there are a "multiplicity of variable and interlocking factors, decision on each of

which presupposes decisions on all others."[13] There is no 'right' answer to such problems as they are essentially political in nature. By dealing with political questions, the courts place at risk the appearance of impartiality. Their most important function is removal of the sense of injustice. If they are perceived as being partial they threaten this function and undermine their key importance in assuring the rule of law. (Cramton and Boyer, 1972; Moeller, 1978; Devlin, 1979)

3. The judiciary, unlike the legislative branch, is not accountable to the public and unlike both the legislature and the administrative branch, it is not open to lobbying or other means of allowing participation by many interested groups. (Cramton and Boyer, 1972; Moeller, 1978)

4. Readiness to resolve disputes by litigation causes political consciousness to atrophy. Rather than stimulating private initiative, by leaving decisions to the courts, "citizens will soon forget how to fight for their own interests in the political arena". (Moeller, 1978 p. 818; Stewart, 1975)

5. Environmental litigation directed against administrative agencies impedes rational long-range planning, policy formulation and regulation by diverting attention to individual controversies. (Cramton and Boyer, 1972)

6. There is no guarantee that the litigants in judicial proceedings are representative of the problem being dealt with. This brings danger of reductionist solutions. (Horowitz, 1977)

7. Lawsuits cause unnecessary and expensive delays in resource use decisions. (Cramton and Boyer, 1972; Stewart, 1975; Moeller, 1978)

8. Unrestrained use of judicial procedures for resolving environmental disputes will clog the court system, diverting scarce judicial resources away from the matters they are most competent to adjudicate. (Cramton and Boyer, 1972)

9. Litigation is an expensive and inefficient way of achieving better public participation in environmental decision-making. (Cramton and Boyer, 1972)

It is clear from the various arguments for and against a greater role for the courts listed above that these are to some extent contradictory. Furthermore, the validity of some of the arguments can only be verified by empirical testing. A limited number of follow-up studies have been made of the Michigan and similar Acts. (Sax and Conner, 1972; Haynes, 1976; DiMento, 1977; Bryden, 1978) These provide some support for both the advocates and critics of a greater role for the courts. No evidence emerged in support of the view that such legislation would result in overcrowding of the courts or cause unacceptable delays. (Haynes, 1976; DiMento, 1977; Bryden, 1978) Environmental litigation under the Michigan Act comprised 0.02% of the courts' case load and their average duration from filing suit to resolution of appeal was twelve months. (Haynes, 1976) The surveys did not investigate whether the length of legal proceedings caused actual delay to the projects of a

corresponding length. Of course, the acceptability or non-acceptability of delay must be balanced against the end result - whether gains, if any, achieved for the environment or improvements in administrative behaviour out-weigh the losses caused by delay. The surveys did not attempt to make any assessment of this. It was clear, however, that the Act was used successfully in a number of situations which previously fell outside statutory or regulatory control. (Haynes, 1976)

An early survey of litigants under the Michigan Act revealed that the majority of both plaintiffs and defendants perceived the judges involved in their litigation as capable of dealing with the issues involved. (Sax and Conner, 1972; DiMento, 1977) However, no attempt was made by the authors of the study to assess the complexity of the cases surveyed.

The authors of a preliminary survey of the first sixteen months of operation of the Michigan Act found that lawsuits proved a useful device for defusing volatile controversies. (Sax and Conner, 1972) Neither this nor subsequent surveys attempted to assess whether there was any change in the public perception of the courts' impartiality as a result of their deciding issues which were essentially political in nature.

Hopes that easing access to the courts would result in a rise in actions by formerly under-represented groups do not seem to have been realised. Few actions were brought by public interest law firms or environmental groups. There was, in fact, evidence that such groups,

because of limited budgets, tended to concentrate their resources on direct political lobbying. It seems that the courts are not perceived as such a valuable forum as their most ardent supporters would have us believe. Analysis of cases brought under a similar Act in Minnesota showed that the typical plaintiff was an aggrieved property owner. (Bryden, 1978)

In spite of the discussion contained in the surveys cited above, one may agree with DiMento (1977 p. 447) who states that "there remains much room for debate on the advisability of such laws". The most fundamental criticisms of this kind of legislation, those relating to the institutional capacity of the courts to deal with environmental issues and those concerned with the constitutional difficulties entailed in this sort of legislation, have not been adequately addressed. In the present context it is only possible to indicate those areas where further debate is essential.

While the provisions relating to standing contained in the Michigan Act may seem attractive to environmentalists, they raise important issues which their advocates tend to overlook. Unrestrained access to the courts, in association with an enforceable legal right to environmental quality, or the right to seek judicial review on the merits, provide no means for exclusion from the jurisdiction of the courts cases which they are manifestly unsuited to deal with.[14] Under public nuisance the scope of the tort is, in part, defined by the rules of

standing. The substantive environmental right provided in the Michigan Act contains nothing to delimit the scope of the action. It would be possible, for example, to bring an action against drivers of all motor vehicles within the state, to prevent them using their vehicles. Although such an action would be unlikely to succeed, it is a waste of scarce judicial resources to entertain cases which are so totally unsuited to resolution in the courts. It seems clear that criteria need to be developed to define more carefully the extent of the courts' jurisdiction. The question then arises whether the courts should be left to decide the criteria for excluding inappropriate actions, or whether this is a matter for the legislature.

The development of workable criteria is, in itself, a complex issue. In framing criteria, due consideration must be given to the undeniable weaknesses of the court system for dealing with complex resource management issues. If suitable criteria can be defined this would remove force from some of the criticisms concerning the expansion of the courts' role. It does not, however, displace the constitutional objections which have been raised in expanding the role of the courts.

Constitutional issues become most accute in considering judicial review on the merits. If the courts are able to set aside administrative regulations or frame new regulations, they are clearly taking on a law-making function. This is fundamentally opposed to the

doctrine of the separation of powers. The uncertain benefits to the environment resulting from the granting of such powers must be carefully weighed against possible threats to the courts' fundamental role, that of upholding the rule of law. Furthermore, it has to be asked why such power should be granted only in relation to environmental matters when other issues are arguably as important.

Given the constitutional sensitivity of judicial review on the merits, it needs to be considered whether appeal to an independant administrative tribunal would not be just as suitable a remedy. These need not be constrained by the adversary format of the courts, can draw on the resources of the administration to gather information and so on. If the courts were to be modified to achieve the flexibility possible with an administrative hearing, they would cease to be courts. In focusing so exclusively on the judiciary, advocates of a greatly expanded role for the courts seem to have overlooked other, perhaps more satisfactory, means available to achieve the results they seek to obtain through the courts. That the courts can and should continue to respond more effectively to the pressing environmental problems of the day, is undoubted. It is far from clear that the contribution they can make is so important as to justify fundamental alterations to their constitutional role. The doubts which have been raised concerning the effectiveness of the Michigan Act in achieving wider representation of interests, one of

its major goals, demands that closer attention be paid to alternative means of improving representation in administrative decision-making. The effectiveness of such an Act in the New Zealand context may be considered even more doubtful, given the generally less litigious character of New Zealanders and the absence of public interest law firms. Achievement of the other goals of such legislation may prove equally elusive. It may well be, as Stewart (1975) and DiMento (1977) suggest, that the discretionary behaviour of administrators will be altered more durably through pervasive changes in the social environment in which they function than through the effect of sporadic legal decisions.

Emphasis on judicial review of the merits of administrative decisions has diverted attention away from the potential for more modest reforms of the power to review, which respect both the constitutional role of the courts and the inherent limitations of the adjudicative approach to decision-making. At present judicial review has tended to focus on the boundaries of discretion. This gives insufficient weight to the fact that the centre of policy-making has, for all intents and purposes, shifted from the legislative to the administrative branch. (van Gunsteren, 1976) Effective protection against arbitrary uses of power requires the development of criteria that look not just to the boundaries of power but which are also capable of controlling the manner of exercising discretion within the boundaries. The rules

of natural justice do this but criteria which relate to the substance of decisions are lacking. The courts might do more, for example, to ensure that administrators exercising planning or management functions either explore all reasonable options, or can provide sound reasons for not doing so. This, of course, is clearly capable of falling within the existing ground of relevancy but it goes further than the courts are at present prepared to go on that ground. Similarly, it would seem possible to develop criteria to ensure that factors such as irreversibility, impact of decisions on future generations and sustainability of resources, are given adequate consideration in decision-making processes. Although creative interpretation should allow such criteria to be implied into legislation which is silent as to these matters, a statute which incorporates environmental concerns into all legislation, as the Michigan Act does, would undoubtedly assist the judiciary in developing criteria.

In conclusion, it is indisputable that improved methods of decision making are essential if sound environmental policies and wise resource management practices are to be implemented. The courts can make a valuable contribution in this area. It is probable, however, that those who advocate an expanded role for the courts expect too much from the judicial system. As DiMento (1977, p. 428) has stated: "even if it can be established that the citizen suit can serve a legitimate and useful function in environmental policy-making, an

important question remains as to whether there are more cost-effective methods for accomplishing the same objectives."

If the courts are to retain their vital function in upholding the rule of law they must be able to respond to the changing needs of society. In facing the problems of environmental control and resource allocation the role of the courts has already begun to change from within. It is a measure of the magnitude of these problems that we are now forced to consider whether the role of the courts is able to evolve rapidly enough to meet these challenges. Yet in the face of these pressures to expand the role of the courts it is essential that, as with a Bill of Rights, society should be given the opportunity to debate the issues in a fully informed way.

FOOTNOTES

INTRODUCTION

1. Annan v National Water and Soil Conservation Authority and Minister of Energy (No 2) (1982) 8 NZTPA 369.

2. The actions of our lawmakers in relation to the Clyde Dam demonstrate that they too, for the most part, have an imperfect understanding of the respective roles of the courts and Parliament. For discussion of the constitutional issues involved see article by Brookfield (1983).

CHAPTER ONE

1. The system of rules concerned with prevention and control of abuse of discretionary powers is dealt with in Chapter Three.

2. O'Keefe and Farrands (1976) note that the first clear expression of the concept in Britain dates from the thirteenth century but its origins are traceable back to Greek and Roman thought.

3. Like the rule of law concept, this doctrine has a long history, traceable back to Aristotle. However, it was stated in its purest and best known form by the eighteenth-century French political philosopher, Montesquieu.(de Smith, 1973)

4. The Executive Council comprises the Governor General and the Ministers of the Crown.

5. The very nature of litigation ensures some degree of law-making. Usually litigation is only proceeded within situations which differ in some degree from previously litigated situations. If the legal outcome can be anticipated, the parties are most likely to settle their disputes. The application of the law to resolve conflict in a new area results in the making of a new rule which will apply in all like situations in the future.

6. The doctrine of precedent requires that courts lower in the heirarchy of courts follow the decisions of superior courts on similar issues. Courts at the same level of jurisdiction are not bound by each others decisions. The Privy Council is at the apex of our heirarchy of courts but only its decisions relating to New Zealand are binding on us. Other

Privy Council decisions are persuasive but not binding, as is also true of English House of Lords decisions. European Civil Law jurisdictions do not follow this doctrine. Posner (1977) points out that without the doctrine, the volume of litigation would rise because of reduction in certainty. He also points out that it reduces the cost of litigation to the parties because it incorporates information that has been generated in previous cases. However, if too rigidly adhered to it reduces the ability of the courts to adapt to social change. In practice, imaginative judges have always found a variety of techniques for circumventing undesirable precedent.

7. See for example Jaffe, 1969; Devlin, 1976, 1979; Horowitz, 1977; Moeller, 1978; Lücke, 1983.

8. It usually takes the form of Proclamations, Orders-in-Council, Regulations, Rules or By-laws. The usual justifications given for Executive law-making are that emergency conditions requiring urgent action can best be handled by this form of legislation which doesn't go through the lengthy procedures required to pass a statute; that it permits flexibility and opportunity to experiment; and that Parliament does not have time to consider matters of detail or technicality. (Palmer, 1979) These are valid enough reasons and law-making by the Executive is acceptable provided that there is adequate protection against abuse. This question is examined in Chapter Three.

9. This statement is not strictly correct. The Governor-General acting in his own right possesses power to make subordinate legislation. However, this power has never been exercised. (Palmer, 1979)

10. However, it is possible that an act might be declared invalid if it were not made for the peace, order or good government of New Zealand as required by section 53 of the New Zealand Constitution Act. In practice, of course, it would be an extraordinary statute that did not fall within such broad grounds. Moreover, it is arguable that a statute which doesn't comply with section 53 could be said to impliedly repeal it. For further discussion see Mulholland, 1980. An act could also be invalidated in the unlikely event of established procedures for enacting legislation not being followed.

11. A written constitution is not inalterable but it can only be altered by a specially prescribed procedure which is more difficult than for ordinary legislation. Typically the procedure for amendment

will require that the amending provision be passed by a special majority of the legislature (e.g. 75%) or be submitted to referendum or perhaps both. For discussion of the pros and cons of a written constitution see Palmer, 1979; Jaconelli, 1980.

12. See for example Abel-Smith and Stevens, 1967; Jaffe, 1969; Jaconelli, 1980.

13. Under this approach to interpretation judges held that the literal meaning of the words of a statute would prevail even though this resulted in a conclusion inconsistent with what the judge believed to be the primary purpose of the statute.

14. London Street Tramway Co. v L.C.C. [1898] AC 375. This is one aspect of the doctrine of precedent.

15. The Oxford Companion to Law notes that it is hard to state the precise basis of the distinction. Although public law generally deals with relations between citizen and state as opposed to relations between citizen and citizen, we shall see that government agencies may both initiate or be the subject of private law actions.

CHAPTER TWO

1. The most significant discussions of this issue in New Zealand are a brief survey by Holm (1976) and by Williams (1980) in his textbook on environmental law. Most discussion has taken place in the United States. See for example, Lohrmann (1970), Bryson and Macbeth (1972), Yannocone et al (1972), Tribe (1973), Baurer (1980), Fischer (1981), Large and Michie (1981). The International Bar Association (1978) has addressed the question of control of pollution through torts.

2. Street (1983) believes gases and flame would be physical matter within the rule, but not vibrations. Traditionally, only invasion by tangible physical matter has been actionable but courts in the United States have gone so far as to include vibrations as well as fumes and gases. (Lohrmannn, 1980)

3. A negligent act is one a reasonable person would foresee as leading to invasion of the interest which constitutes that tort. (Street, 1983) In practise where that act is negligent the action of negligence will usually be brought because the courts will apply the negligence test for liability (damages will be available only for harm which was a reasonably foreseeable consequence of the trespass). On the other hand, where the trespass is intentional the prevailing view seems to be that the plaintiff can recover for any consequential injury, whether foreseeable or not (strict liability). Fleming (1983). Street (1983) takes the view that the burden of proving negligence rests on the plaintiff in conformity with the tort of negligence but Fleming (1983) considers the rule to be unsettled.

4. Thus, if water, for example, is discharged upon someone else's property and ultimately flows to the plaintiff he has no cause of action in trespass. He must bring an alternative action.

5. Southport Corporation v Esso Petroleum Co. Ltd. [1954] 2QB 182 CA (UK) supported by the House of Lords [1956] AC 218 at pp 242, 244.

6. Jones v Llanrwst U.D.C. [1911] 1Ch 393. See also Gregory v Piper (1829) 9 B & C 591 (rubbish rolled onto plaintiff's land by wind is trespass).

7. 221 Ore. 86, 342 P. 2d 790 (1959) cited in Lohrmann, (1970). The deposit of fluoride from the defendant's aluminium smelter contaminated forage and water on the plaintiff's land, causing poisoning of his cattle.

8. Remedies will be discussed further below.

9. The precedent for pollution is well established. See for example St Helen's Smelting Co. v Tipping (1865) 11 H.L. Cas. 642 (fumes from a copper-smelting plant); Nichols v Ely Beet Sugar Factory Ltd. [1936] Ch. 343. C.A. (effluent from a factory).

10. Clearlite v Auckland City Corporation [1976] 2 NZLR 729 (defendant a licensee of land occupied by the plaintiff). However in Southport Corp. (supra note 5) Lord Denning held there could be no nuisance where the nuisance emanated from a ship at sea.)

11. For example, a landowner may become liable for spread of fire from his property, although it was started by lightning (Landon v Rutherford [1951] NZLR 975) or for harm caused by subsidence, although resulting from geological conditions (Leakey v National Trust [1980] 1 All ER 17 CA).

12. See for example Geothermal Produce New Zealand Ltd. v Goldie Applicators Ltd. [1983] BCL 166 (damage caused by an isolated incidence of spray drift).

13. Because this is an action to protect interests in land it is clear that damages cannot be recovered where personal injury alone occurs. It is less clear whether damages are recoverable for personal injury which is consequential upon harm to property. There appears to be no authority on this point. However, they have been held to be recoverable for public nuisance, so the same rule seems likely to be applied to private nuisance.

14. Clearlite (supra, note 10) per Mahon J. at p. 741. See Vennell (1977).

15. See below (p. 42) for further discussion of the relationship between statutes and torts.

16. Boomer v Atlantic Cement (1970) 257 NE 2d 870.

17. To qualify as a nuisance it is sufficient that the interference materially affects a class of the public or a representative cross section of the class. Attorney-General v P.Y.A. Quarries Ltd. [1975] 1 A11 ER 894. Some statutes establish the crime of public nuisance but the action is not confined to statutorily defined nuisances.

18. An action in tort has the advantage over a criminal action that the complaint need only be proved on the balance of probabilities instead of the much more stringent criminal standard of proof beyond reasonable doubt.

19. This is based on the policy (increasingly under challenge) that redress for wrong to the community should be left to the Attorney-General as its representative. Where monetary compensation is sought, it is logical enough to restrict a right of action to a plaintiff who has suffered injury greater than the public at large. There is no reason why a person who has suffered the same injury as the rest of the public should receive compensation. This logic does not apply where an injunction is sought, because this remedy will benefit everyone alike.

20. Relator proceedings will be dealt with in Chapter Three.

21. It is, of course, open to the administering agencies concerned with public lands and water ways to bring actions in either public or private nuisance. However, actions by members of the public have great value where the administering agency shows little inclination to prevent the nuisance, perhaps on account of scarcity of resources, perhaps because another government agency is causing the nuisance. Where the administering agency is the cause of the nuisance it is likely that public law remedies will be the only ones available (if at all). See Chapter Three and see discussion of the relationship between torts and statutes below.

22. Hickey v Elec. Reduction (1970) 21 DLR 3d 368.

23. See for example Kapisek v Cather and Sons Construction Inc. (1962) 117 NW 2d 322 (action against emissions from an asphalt plant).

24. In this case the basis of the plaintiff's claim is harm to interests which are the subject of strongly held beliefs. This may include concern for environmental conservation.

25. Kent v Minister for Works (1973) 2 ACTR 26 The Judge was, however, prepared to say that injury to flora and fauna in a public reserve could constitute a public nuisance although on the facts he did not find sufficient interference to justify a decision in favour of the plaintiff.

26. Anns v Merton London Borough Council [1978] AC 728 HL. The law of negligence is at present undergoing considerable development in the area of the duty of care to be ascribed to public authorities. Recent decisions which may have considerable importance from a resource management perspective concern duty of care in giving planning approvals and granting subdivision approvals. For a thorough discussion see Palmer (1982). See also Blewman v Wilkinson 1979 2 [NZLR] 208 CA concerning duty of care regarding excavations by a subdivider; Brown v Heathcote C.C. 1982 2 [NZLR] 584 HC concerning duty of care on part of Drainage Board regarding advice about susceptibility of land to flooding; Geothermal Produce New Zealand Ltd. v Goldie Applicators [1983] BCL 166 concerning duty of care of landowner and independent contractor for spraying weedkiller.

27. The major exception is in the area of negligent misrepresentation but see Caltex Oil (Australia) Pty. Ltd. v The Dredge "Willemstad" (1976) 136 CLR 529 which paves the way for a further extension of liability.

28. The usefulness of the action is also affected by the Accident Compensation Act, which prohibits actions for personal injury. See below (p.44) for further discussion.

29. The courts may interpret a duty as being only directory. It goes without saying that it cannot apply where the statute sets down a power rather than a duty.

30. Clearly, if the statute is directed at protecting personal safety, an action for damages to property could not be sustained.

31. Phillips v Britannia Hygiene Laundry Co. Ltd. [1923] 2 KB 832 CA. Brown v Heathcote C.C. supra n 25.

32. Not all the decisions support the view that the action only applies where the plaintiff suffers injury to an interest in land.

33. The defense of statutory authority also applies. See below p. 42.

34. Generally under other torts there must be some form of personal negligence before liability will arise for an independent contractor, e.g. failure to provide in the contract precautions against foreseeable harm. Employers are liable for torts committed by servants in the course of employment.

35. Rickards v Lothian [1913] AC 263 at 280.

36. N.Z. Forest Products v O'Sullivan [1974] 2 NZLR 80; Holderness v Goslin [1975] 2 NZLR 46; Nolan v Millar (unreported judgement, White J. 31 August 1978 A48/73 noted in [1979] NZLJ 269). Weather conditions held to be relevant to whether the use was non-natural in the circumstances in all three cases. The Forest Products case is important in establishing that compensation for economic loss alone can be recovered even though there was no damage to land. The rule simply requires interference with use of land.

37. Geothermal Produce New Zealand Ltd. v Goldie Applicators (supra).

38. Knight v Bolton [1924] NZLR 806.

39. Simpson v Attorney-General [1959] NZLR 546.

40. See p. 20 above. Although the issue was raised in relation to private nuisance, it is relevant to a greater or lesser extent for all these actions with the exception of public nuisance.

41. Relator actions or actions initiated by the Attorney-General would be possible.

42. A public nuisance action might be conceivable but might well be rejected on the grounds that the issue was not one the courts are fit to decide. Even if the courts did undertake jurisdiction, in most cases the plaintiffs would face serious difficulties in overcoming a defense of statutory authorisation for the resource development.

43. N.Z. Forest Products v O'Sullivan (supra).

44. The principles the courts apply are set out in Morris v Redland Bricks Ltd. [1970] AC 396 (defendants ordered to fill a clay pit to prevent slipping of the plaintiff's land). In general the injury must be substantial, and as for all injunctions, not able to be compensated by damages.

45. This sort of difficulty could arise where what is needed to abate the harm is not installation of new technology, which solves the problem once done, but a modification in operational practice which is of a continuing nature.

46. The relative strength of the cases will be taken into account if all other factors are equal.

47. For fuller discussion of the principles involved in granting interim injunctions see Towner, 1983. For a discussion of injunctions generally in the context of environmental litigation see Williams, 1980.

48. Miller v Jackson [1977] 1QB 966 at 980 per Lord Denning. Also, injunctions cannot be issued against the Crown. The courts will instead make a declaration of the rights of the parties. It is assumed the Crown will comply.

49. Kennaway v Thompson [1981] Q.B. 88 (CA). In the United States the public interest is considered relevant in deciding what form the remedy should take.

50. See for example Morris v Redland Bricks (supra).

51. Some of the difficulties confronting applicants are illustrated in Fletcher v Bealy (1885) 28 Ch.D. 688 and in US v Reserve Mining Co. (1974) 380 F. Supp 11 (quoted at length in Williams, 1980). Also Hooper v Rogers [1975] Ch 43 (erosion from track threatening to remove support for a building).

52. See Fischer, 1981 for a description of cases in which such technology has been used.

53. A quite different problem can arise from statistics than the question of whether or not to accept causal links as proven. A court may be prepared to accept scientific testimony that a particular chemical causes cancer, for example. However probably the most it will be possible to say is that the particular activity concerned will cause a rise of X% of cancer over what would be expected in the population at large. Even though there is a high probability that the plaintiff contracted his cancer as a result of the defendant's activity, there can seldom by any certainty, which may cause reluctance to impose liability. A possible approach would be to reduce the amount of damages according to the statistical probability. (This example could not arise in New Zealand because the Accident Compensation Act has displaced an action for damages for personal injury).

54. For an interesting discussion of the differences between scientific and legal proof see Large and Michie, 1981.

55. Pride of Derby v British Celanese [1952] 2 A11 ER 1326.

56. The reason for holding each defendant fully liable rather than apportioning costs is that the plaintiff shouldn't be deprived of a remedy because a defendant is, for example, insolvent. The defendant will be left to pursue his own action for contributions to the damages.

57. If there is sufficient probability that the defendant has significantly contributed to the problem but the contribution cannot be easily quantified, an injunction is clearly a more appropriate remedy.

58. This is known as the rule in Summers v Tice. For a discussion of this rule and the market share liability theory to be discussed below, see Fischer, 1981.

59. J.W. Birnie Ltd. v Taupo Borough unreported judgement, Haslam J. Wellington, 11 June 1975, A 153/70 Hamilton, A 179/73 Rotorua.

60. The courts' powers to control the exercise of statutory power will be the subject of the next chapter.

61. Manchester Corporation v Farnsworth [1930] AC 171.

62. The court raised but left open the question of whether nuisance may be committed if a plant which was satisfactory when first built, doesn't keep up with beneficial changes of technology.

63. Marriage v East Norfolk Rivers Catchment Board [1950] 1 KB 284.

64. For example, failure to upgrade a sewage system to cope with an increased load. This needs to be contrasted with failure to exercise a duty discussed at p. 26 above.

65. An action is still available for exemplary damages but these are only awarded in exceptional circumstances, as where a defendant has deliberately calculated that his profit will exceed the plaintiff's loss. Obviously, it will not be easy to prove intent of this kind. Donselaar v Donselaar [1982] 2 NZLR 97.

66. Vennell (1975) and Klar (1983) favour restoration of liability in tort in some circumstances (e.g. where acts are intentional and in the case of hazardous products).

CHAPTER THREE

1. In this section the terms public authority, statutory authority, and administrative authority are used interchangeably to refer to the administrative branch of government.

2. The leading case in this area of law is Anisminic Ltd. v Foreign Compensation Commission [1969] 2 AC 147. (The Act in question provided that the determination of the commission shall not be called in question in any court of law. This did not prevent the court from holding that the commission had exceeded its jurisdiction.)

3. Frequently rights of appeal are limited to questions of law. In this situation the distinction between law and fact becomes one of great significance. The two are usually closely intertwined which gives the court great leeway in deciding whether to hear an appeal or not. The Town and Country Planning Act and the Mining Act both confine rights of appeal to questions of law. The Water and Soil Conservation Act has no right of appeal to the courts at all. Appeal to the Planning Tribunal (which is an administrative tribunal) is final and conclusive.

4. Ultra vires means beyond the power. Where a statutory authority is exercising adjudicative powers it is usual to speak in terms of exceeding jurisdiction rather than acting ultra vires.

5. Courts classify procedural requirements as mandatory or directory. If it is classified as directory then non-compliance will not necessarily affect the validity of the action taken. Which way the courts will classify a procedure will depend upon a number of factors, including the consequences of holding an action to be invalid or whether the rights of individuals are substantially affected by failure to comply with the procedure.

6. A.G. v Great Eastern Railway Co. (1880) 5 App Cas 475.

7. For example in an Australian decision a local authority passed a byelaw requiring the addition of fluorine to the water supply pursuant to an empowering provision which authorised the making of by-laws "providing for the health of the residents in the municipal district." The by-law in question was held to be unauthorised because some fluorine compounds were harmful to humans. Kerlberg v City of Sale [1964] V.R. 383.

8. Most statutes concerned with the environment contain broad powers to delegate. The Clean Air Act contains the limitation that any delegation must be made to employees of the Department of Health. However, the most fruitful sources of challenge will arise from limitations as to the substantive actions which may be carried out by the delegate.

9. Carltona Ltd. v Commissioners of Works [1943] 2 All ER 560.

10. De Smith (1973, 1973 a) classifies these three categories, as well as unauthorised delegation of power, as failure to exercise a discretion.

11. Lavender (H) & Son Ltd. v Minister of Housing and Local Government [1970] 1 WLR 1231.

12. British Oxygen Co. Ltd. v Minister of Technology [1971] AC 610 (HL).

13. Bromley London Borough Council v Greater London Council [1982] 1 All ER 129. The New Zealand courts have adopted the same position. For a discussion see Caldwell, 1982.

14. For example, in Ski Enterprises Ltd v Tongarairo National Park Bd. [1964] NZLR 884 the Board inserted in a licence to erect ski tows, a condition depriving itself of the right to provide access to a large part of the park except with the approval of the licensee. This was held to be inconsistent with the Board's primary function of administering, managing, and controlling the park in such a manner as to reserve to the public the fullest proper use and enjoyment of it. Other examples of agreements not to exercise a discretion include contracts or undertakings not to make or enforce a by-law, contracts to exercise a power in a particular way, contracts not to refuse a planning permission.

15. This rule does not always work to the advantage of resource management. In Currie v Waimairi District Council [1983] BCL 440, the court concluded that the Council had refused a permit to build a bridge, not because it breached the Local Government Act as alleged, but in sympathy with the view of local residents that a reserve should be created where the bridge would cross the stream.

16. Dannevirke Borough Council v Governor-General [1981] 1 NZLR 129. (A recommendation not to compulsorily acquire land was based on government policy not to acquire Maori land, which was not part of the policy of the Public Works Act). See also Rowling v Takaro Properties Ltd. [1975] 2 NZLR 62. Consents required under certain regulations were refused because the Minister wished to see a reversion of foreign owned land to the Crown or New Zealand interests in accordance with government policy. This was outside of the scope of the relevant regulations; Fiordland v Minister of Agriculture and Fisheries [1978] 2 NZLR 341 (Refusal of game licence because not required in accordance with policy of rationalising the industry, but this not an authorised ground under the relevant regulations.) In the Aramoana Smelter litigation the plaintiffs were unsuccessful in attempts to prove the decision to place the development on "fast track" was based on government policy rather than the statutory criteria.

17. Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223; Van Gorkom v A.G. [1978] 2 NZLR 387 (CA) Acting unreasonably might also give rise to liability in tort (nuisance, negligence) as we saw in Chapter Two.

18. Decisions which involve oppressive interference with the rights of individuals or are unequal in operation as between different classes will be held unreasonable. This may form a basis for challenging by-laws or provisions of planning schemes.

19. Ashbridge Investments Ltd. v Minister of Housing and Local Government [1965] 1 WLR 1320. The second aspect of this rule is simply another illustration of the requirement to act reasonably.

20. North Taranaki Environment Protection Assoc. v G-G [1982] 1 NZLR 312 (CA).

21. See Chapter One, footnote 8 for the forms of delegated legislation. A parliamentary mechanism for review of statutory regulations by the Statutes Revision Committee exists under Standing Orders 378 and 379. The grounds for review are in some respects wider than those open to the courts. For example, they include power to examine whether the regulation makes an unusual or unexpected use of the powers conferred by the statute. Clearly a power may be unusual without necessarily being ultra vires on one of the grounds discussed above. For discussion of this procedure see Frame & McLuskie, 1978.

22. Other important examples of powers to make subordinate legislation are found in the Clean Air Act, the Soil Conservation and Rivers Control Act, the Water and Soil Conservation Act, the Pesticides Act, the Toxic Substances Act and the National Development Act.

23. The grant of discretion which relates to policy making must, of course, be distinguished from the situation discussed above, where policy is wrongly allowed to influence the exercise of a discretion.

24. Unsuccessful challenges were also made on procedural grounds: failure to give a hearing to interested parties before the decision was made, predetermination, and effective non-compliance with the requirement to produce an impact report. On this last issue, it was argued that although an impact report had been done it was so deficient as to be a nullity because it did not consider the impact of the electricity supply. The Court of Appeal considered the case was marginal but it was not prepared to say the report was so defective that it did not in fact constitute a report. But the case did establish the important point that discussion limited to on-site impact will not satisfy the statutory requirement in every context. Environmental Defense Society Inc. v South Pacific Aluminium Ltd. (No 4) [1981] 1 NZLR 530.

25. Reported in EDS v South Pacific Aluminium Ltd. (No 3) [1981] 1 NZLR 216.

26. Reported in CREEDNZ Inc. v Governor-General [1981] 1 NZLR 172.

27. The Court acknowledged that it will usually be more difficult to prove relevant matters have not been taken into account, than an allegation that something has been taken into account which should not have been. See cases cited in note 16 for examples.

28. The courts frequently use the term quasi-judicial to describe administrative functions which are judicial in character. However, often such labelling was rather artificial, appearing to depend largely upon whether the courts wished to apply the rules of natural justice or not.

29. For general discussion of the duty to act fairly see Caldwell, 1980 b. It is sometimes said that the duty to act fairly does not apply to an administrative body exercising functions that are legislative in form (e.g. exercising a power to make regulations) but this is not the New Zealand position. See CREEDNZ (supra, p. 189).

30. CREEDNZ p. 177.

31. CREEDNZ (supra).

32. Denton v Auckland City [1969] NZLR 256. But compare EDS v NWASCA (1980) 7 NZTPA 385 where the court declined to require that the Authority give an opportunity for objectors to comment on a report of the Regional Water Board concerning whether a Crown water right should be granted. Provision in the Act for appeal from the decision of the Authority gave adequate protection to the interests of objectors.

33. For further discussion see Rawlings, 1980.

34. Mahon J. in Anderton v Auckland City Council is of the view that legislation will not override the first category (direct pecuniary interest).

35. In CREEDNZ (supra) the court rejected a claim of bias. It was in the nature of the legislation that Ministers must have formed views before advising the Governor-General in Council. Further examples of statutory overriding of the bias rules include the Town and Country Planning Act (Councils must propose schemes and adjudicate on them); the Water and Soil Conservation Act (Minister of Works is Chairman of NWASCA which has power to decide Crown water rights).

36. Where an application for review is concerned with the National Development Act, the application must be made to the Court of Appeal not to the High Court as is the usual case.

37. This includes breach of the rules of natural justice.

38. The courts will intervene where an error of law is apparent from the record of the proceedings (the decision read in conjunction with the relevant statutory provisions), even though the tribunal has not exceeded its jurisdiction. However, there will be a few errors of law which do not result in the tribunal exceeding its jurisdiction.

39. s 4 (2).

40. s 4 (2A).

41. s 4 (5).

42. It is not easy to define when proceedings are against the Crown but in general it refers to actions against the Governor-General, Ministers and other government servants in their official capacity.

43. Environmental Defense Society v South Pacific Aluminium Ltd. [1981] 1 NZLR 146 (CA). The fact that the other remedies are sought does not prevent the court from ordering discovery, so long as a declaration is also sought and is properly claimed. Ng v Minister of Immigration [1981] 1 NZLR 235 (CA). For further discussion see Hannan, 1981.

44. Formerly, a claim by the Crown of public interest immunity (or privilege) presented a major obstacle to discovery of Crown documents. If a Minister objected to production, certifying that disclosure was not in the public interest, the Court would not question his decision. Now, however, they are prepared to inspect the relevant documents to assess for themselves whether the public interest in disclosure is out-weighed by the public interest in non-disclosure. The power to inspect will be sparingly exercised in relation to current government policy papers, government advice to the Governor-General and cabinet discussion papers. EDS v South Pacific Aluminium Ltd (No. 2) [1981] 1 NZLR 153. (Although the court exercised its power to inspect in this case, after doing so it held disclosure was not required in the interests of justice).

45. EDS V South Pacific Aluminium Ltd. (supra, note 43). The usefulness of discovery is not necessarily confined to the proceedings. Even though an action is unsuccessful on legal grounds the information obtained may prove useful for political persuasion.

46. This issue is also very important in relation to rights of participation under various statutes concerned with the environment. The question of who has standing is governed by statutory interpretation in those cases.

47. See for example Collins v Upper Hutt City Corporation [1961] NZLR 250; EDS v Agricultural Chemicals Board [1973] 2 NZLR 758. However the courts are not consistent. Sometimes they simply ignore the question of standing altogether. (Caldwell, 1982)

48. Wybrow v Chief Electoral Officer [1980] 1 NZLR 147.

49. EDS v Ag. Chem. Bd. (supra).

50. See for example, Cane, 1980; Cappelletti, 1981; Cappelletti and Jolowicz, 1975; Davis, 1970; Holm, 1979; Stein, 1979; Smillie, 1978; Stone, 1974; Williams, 1980; Jolowicz, 1983.

51. A minority of the Committee expressed reservations as to whether the test proposed by the majority would help public interest litigants and put forward an alternative proposal.

52. EDS v South Pacific Aluminium Ltd (No. 3) (supra).

53. Inland Revenue Commissioner v National Federation of Self-employed and Small Businesses Ltd. [1981] 2 A11 ER 93. The Court stated, "it would be a grave lacuna in our system of law if a pressure group...or even a single public spirited taxpayer was prevented by outdated rules of locus standi from bringing [a] matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped."

54. The Court of Appeal seems to be leaning toward a test for standing which resembles the "zone of interest" test often adopted in the United States. For criticism of that test see Davis, 1970.

55. See above pp. 57-8.

CHAPTER FOUR

1. The concept of the Act was promoted by Joseph Sax in his book Defending The Environment. He was also responsible for drafting the Act. For discussion of the operation of the Act see Sax and Conner, 1972; Haynes, 1976. For a critical review of Defending The Environment see Jaffe, 1971.

2. For a list of States adopting similar legislation see DiMento, 1977, note 4, and Van Tol, 1979.

3. s 2 (1).

4. s 3 (1).

5. s 4 (1).

6. s 2.

7. s 4 (2).

8. s 5 (2).

9. s 5 (1).

10. This is reinforced by placing the burden of proving likelihood of harm or justifying any harm caused on the defendant. As Krier (1970) points out this should not be an onerous task if the defendant has in fact duly weighed environmental factors and considered alternative options before undertaking the challenged activity.

11. This is more popularly known as the "Yes Minister" syndrome.

12. The courts do have the power to appoint experts but this power does not impress those who doubt the expertise of the courts. It does not sufficiently remove the problem of lack of expertise and creates its own problems. Some of these problems have been outlined by Mahon (1979). If the court appointed expert simply reports to the court without any opportunity to present counter-arguments, this must cast doubt about the fairness of the trial. On the other hand, if cross-examination is permitted little has been gained because the judge must still decide between conflicting expert evidence. If he automatically accepted the opinion of the court expert, the expert would, in effect, take over the role of the judge.

13. Julius Stone, quoted in Lloyd, 1979 p. 819.

14. The scope of traditional judicial review, as opposed to review on the merits, is defined by the grounds of review, discussed in Chapter Three. Thus extending standing raises no major difficulties.

15. The American courts seem prepared to adopt the sort of approach suggested here. In Scenic Hudson v FPC [1965] 1 ER 1084 the U.S. Court of Appeals ordered the Federal Power Commission to consider a number of alternatives which the record of its proceedings disclosed it had ignored.

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