LAW AND THE ENVIRONMENT: A SYMPOSIUM
ENVIRONMENTAL LAW — SOME RECURRING ISSUES

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1. *Introduction*

The Editors initially invited a contribution on *"Law and the Environment"* and suggested that the article should deal in a general way with the existing legal controls relating to the physical environment in New Zealand. In April 1975, His Honour Mr Justice Cooke delivered a paper on this topic to an Environmental Law Conference in Auckland.[1] It would be presumptuous, as well as repetitious, for me to traverse the same ground again. Instead I propose to examine some general questions of fundamental importance which have appeared repeatedly, in one form or another, across the field of environmental law. But first a word or two about the current surge of interest in environmental law.

Environmental regulation has a very long history. The first smoke abatement law was passed by Edward I in 1273 prohibiting the use of coal as being detrimental to human health.[2] Early cases of torts with environmental overtones may be found in the history of English law. For example, in *William Aldred's Case*[3] a landowner recovered damages from a neighbour who had intentionally placed a pigsty upwind from the plaintiff's property. But in recent years there has been a marked tendency to bring together in a coherent fashion the many diverse parts of the law which deal with the use of natural resources and man's relationship to the physical environment. The so-called "ecological crisis" of the 1960's was the catalyst for this development. While some critics have contended that the growing concern for environmental problems is a passing fad, developments in recent years suggest quite the opposite. At the international level the most important event has been the United Nations Conference on the Human Environment in Stockholm in 1972. The declaration framed at that Conference states that man "bears a solemn responsibility to protect and improve the environment for present and future generations".[4] In this country the passage of legislation such as the

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1 *The Concept of Environmental Law — the New Zealand Law — An Overview*, paper delivered to Environmental Law Conference sponsored by the Environmental Defence Society Inc. at Auckland May 3, 1975: published in [1975] N.Z.L.J. 631.

2 See Chass and Feldman, "Tears for John Doe" (1954) 27 Southern California Law Review 349, 352.

3 (1611) 9 Co.Rep. 57, 77 E.R. 816.

4 For a very helpful and concise introduction to international environmental regulation see Bleicher, "An Overview of International Environmental Regulation" (1972) 2 Ecology Law Quarterly 1.

Water and Soil Conservation Act 1967, The Clean Air Act 1972, and the Marine Pollution Act 1974, as well as the creation of the Commission for the Environment, and the establishment of courses on environmental law at Law Schools, demonstrate that environmental problems will continue to rank high among the concerns of our legal system.

From a pedagogical point of view, there are considerable advantages in a comprehensive approach to the subject. It enables the student to be freed from the unfortunate piecemeal approach to environmental law which, for example, gave him water law under the law of property, nuisance as a part of the law of torts, and probably omitted all reference to topics like air pollution. Furthermore, as the authors of a recent American case book have said, "environmental law offers an opportunity to explore the legal process in an especially appealing substantive context . . ."[5] and the way in which the legal system deals with environmental problems may enable us to assess the adequacy of the response of the law to the contemporary challenges which it faces. It is noteworthy that Lord Justice Scarman devotes a chapter to the environment in his landmark analysis of the current condition of English law.[6]

The practising lawyer has much to gain from a systematic approach. Many pitfalls await those who endeavour to treat one aspect of an environmental problem in isolation. To give but one illustration, it is unwise in obtaining a town planning consent to under-estimate the importance of a related water right. A recent Practice Note[7] from the Town and Country Planning Appeal Boards now requires that where a development proposal requires both a planning consent and a water right, applications for the consent and the right should be made at the same time. The Boards have said that where the development proposal requires both a consent and the grant of a right, as a general practice, an appeal lodged under one Act will not be heard until the result of the application under the other Act is known. If appeals follow under both Acts, all appeals will normally be dealt with together.

The increasing inter-relationship of questions of land and water use was graphically illustrated by the recent decision of Mr Justice Cooke in *Metekingi* v. *Rangitikei-Wanganui Regional Water Board.*[8] This case raised the very important question as to whether, on an application under the Water and Soil Conservation Act 1967 for water rights involving the diversion and damming of a stream, it is relevant to consider the loss for primary production purposes of the land proposed to be flooded by the dam. His Honour decided the Appeal Board must weigh the loss of 700 acres of farmland against any advantages likely to result from the granting of the water rights which were to be used for the purpose of an electricity generating station.

5 Hanks, Tarlock, and Hanks, *Cases and Materials on Environmental Law and Policy* (1974) XI.

6 Sir Leslie Scarman, *English Law—The New Dimension* (Hamlyn Lectures, 1974) Chapter IV.

7 Appeal Board Practice Note (1975) 5 N.Z.T.C.P.A. 160.

8 [1975] 2 N.Z.L.R. 150.

I propose to discuss three broad issues:[9] (1) the continuing importance of private litigation, (2) the question of *locus standi* and (3) matters relating to the burden of proof in litigation. My thesis will be that the role of the judiciary in environmental matters should be expanded by the creation of new or more effective remedies, the elimination of restrictive rules about standing, and the restructuring of procedural principles relating to the burden of proof and standards of proof.

2. *Public Regulation and Private Litigation as modes of Environmental Control*

Private litigation based upon common law remedies has declined in importance. The tendency has been to replace the common law with comprehensive statutory provisions for the protection of the environment.[10] Perhaps the best illustration of this development is in the field of water law. Until the introduction of the Waters Pollution Act 1953 legislative intervention had been minimal. While there were a number of earlier statutes which contained provisions dealing with the use of water (for example, the Land Drainage Act 1908, the Public Works Act 1928, the Municipal Corporations Act 1954, and the Counties Act 1956) water law consisted primarily of principles laid down by the English courts which governed the use of water by riparian owners and regulated the rights of competing land owners.[11] Water law was basically a branch of private law, a special branch of the law of property. Rules were developed to determine how private rights to water were to be acquired, validated, and held or lost. Considerations of social utility, while not wholly absent, were taken into account only indirectly. Not surprisingly, these traditional doctrines were found inadequate to deal with the complexity of modern water resources problems. Government regulation, at first somewhat unsophisticated and unrealistic (Water Pollution Act 1953[12]) but sub-

9 I do not pretend that the three questions I propose to discuss are novel. Indeed, in the preface to their pioneering casebook, Jaffe and Tribe mentioned all of them in their outline of the key issues of environmntal law:
". . . in a society increasingly influenced by science and technology, and increasingly concerned with the quality of its natural environment . . . how should choices be made among alternative forms of private litigation and public regulation as modes of social control? How can conflicting interests best be identified and represented in processes of lawmaking and administration? Who should have the responsibility to consider the future and how much weight should such considerations be given? By what criteria should the factual and economic burdens of uncertainty be allocated among the prospective beneficiaries and victims of environmental alterations? How can the use of expertise and of systematic, quantitative analysis in decision-making be reconciled with the goals of pluralism and participation? With the preservation of intangible, unquantifiable values? Through what institutional arrangements, and under what assumptions, are such competing values as 'economic growth' and 'quality of life' best reconciled?"—see Jaffe and Tribe, *Environmental Protection* (1971), Preface.

10 See generally Cooke J. supra footnote 1, and Sir Leslie Scarman supra footnote 6.

11 For a recent discussion of riparian rights in the context of an existing use claim under the Water and Soil Conservation Act 1967 see *Glenpar Homestead Ltd.* v. *North Canterbury Catchment Board* [1975] 2 N.Z.L.R. 71.

12 As to which see *Williams* v. *Huntly Borough* [1974] 1 N.Z.L.R. 689.

sequently of a more comprehensive nature (Water and Soil Conservation Act 1967 and Amendments[13]) inevitably followed.

It should not be thought, however, that the new style of statutory regulation is free from difficulties. Far from it. There appears to be an established pattern with such legislation. Public concern develops over an environmental matter and the Government of the day eventually responds by accumulating information on the subject and then enacting a statute. Almost invariably the legislative framework involves delegation of responsibility for future administration and control to an administrative agency of one kind or another. The legislature then largely drops out of the picture and, in theory at least, the agency moves forward to carry out the legislative mandate, solve the identified problems, and make adequate plans to meet future crises. The whole process is based on the familiar myth that if you find a social problem the guaranteed remedy is to pass a law on the subject. New Zealand legislators appear to be under the impression that the mere introduction of the new law will largely eliminate the problem. One is reminded of the sarcastic observation of Mr Justice Holmes that many politicians "seem to believe that they can legislate bliss".[14]

However, the unimpeachable evidence is that the regulatory efforts of administrative agencies in the environmental field have been uneven and often unimpressive. Charged with the administration, interpretation, and enforcement of environmental laws, the agencies often are forced to operate with insufficient sanctions and grossly inadequate resources. In many cases, they lack sufficient expertise for proper analysis of complex and highly technical issues.[15] Often indifference, misinformation, or lack of adequate preparation leads to an embarrassingly poor response to matters of serious public concern. In some cases there is also the disturbing picture of agencies unduly influenced, and even controlled, by the very industries they were intended to regulate.[16] There is a good case for a thorough re-examination of the composition of the agencies and clearly much greater resources and manpower should be provided for them. But even if these matters receive immediate attention, which is most unlikely, there will still remain a compelling need to ensure that individual citizens or citizens' groups have an opportunity through the courts to challenge administrative decisions and procedures. There will always be a need for someone

13 This statute has now received authoritative interpretation by the No. 1 Town and Country Planning Appeal Board and Mr Justice Cooke in the series of cases commonly called the *Southland* and *Bay of Islands Classification Cases*. Judgment in these five cases was delivered July 3, 1975, by Mr Justice Cooke sitting in the Administrative Division. (Nos. M.339/74, M.230/74, M.231/74, M.281/74, M.331/74, all Wellington Registry.)

14 Letter of Justice O. W. Holmes to Professor Harold Laski, December 31, 1961, contained in *Holmes-Laski Letters* (Howe Ed., Hiss Abridgment, 1963) Volume 1, 34.

15 See for example the disturbing report on the Regional Water Boards by J. W. Lello in *Environmental Planning: The Case for Management*, M.T.P. Thesis, University of Auckland, April 1974.

16 There is an excellent account of this syndrome, and a criticism of its overstatement by some writers, in the review by Professor Jaffe of Professor Sax's leading work, *Defending the Environment: A Strategy for Citizen Action*: Book Review (1971), 84 Harvard Law Review 1562, and in Professor Jaffe's article "The Administrative Agency and Environmental Control" (1970) 20 Buffalo Law Review 231. See also Douglas J. dissenting in *Sierra Club* v. *Morton* 405 U.S. 727 (1972).

to "regulate the regulators". This leads me to the conclusion that for the foreseeable future administrative law will be of extreme importance in the field. This opinion receives strong support from contemporary developments in the United States summarised recently by Professor Stewart of Harvard in a fascinating article entitled "The Reformation of American Administrative Law".[17]

It is therefore pleasing to note that the cumbersome and outdated procedures for challenging administrative action, which often had a bias towards inaction and which frequently frustrated private citizens who sought the aid of the courts, are gradually being eliminated and replaced by simple and effective methods of judicial review. Perhaps the most important recent development has been the Judicature Amendment Act 1972 which is aimed at simplifying procedure by introducing an application for review as a substitute for actions for mandamus, prohibition, certiorari, declaration, or injunction. While it is by no means a universally satisfactory procedure at this stage, it has been found to be a fairly effective and expeditious way of challenging decisions made pursuant to statutory powers. It is to be hoped that the procedure will be futher developed and refined as was suggested by several of the commentators on the paper of Mr Justice Cooke, delivered at the recent New Zealand Law Society Conference.

Thus while the centre of power may appear to have moved from the courts via the legislature to the administrative agencies, I believe that the role of the judiciary is still critically important because of its continuing surveillance of the performance and procedures of administrative agencies. That role must be expanded rather than curtailed.[18]

Furthermore, there is reason to think that insufficient attention has been given in New Zealand to the imaginative, and even daring, use of traditional common law remedies which has been a feature in recent times in the United States. In this connection it is a mistake to think that the activist role often played by the American judiciary generally has its origin in the provisions of the Federal or State Constitutions.[19] More often the landmark cases are grounded upon an expansive approach to statutory interpretation or a carefully reasoned extension of traditional common law doctrines. A classic illustration of the former is the case of *Calvert Cliffs* v. *United States Atomic Energy Commission*[20] where the U.S. Court of Appeals for the District

17 Richard B. Stewart, "The Reformation of American Administrative Law" (1975) 88 Harvard Law Review 1669. See also David Sive, "Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law" (1970) 70 Columbia Law Review 612.

18 In particular, there is a good case for giving the present environmental impact statement procedures statutory force (as in the U.S.A. and Australia) so that the Supreme Court may ensure that justice is done to both proponents and opponents of major developments. At present the system has numerous defects not the least of which is that a proponent of a scheme may have it rejected on the basis of comments submitted to the Commission for the Environment which, although groundless, are not open to challenge by the proponent. In a more general context it is suggested that the development in New Zealand of an "interest representation" theory of administrative law to replace the traditional model of administrative law would facilitate the expansion of the judicial role: see Stewart, supra footnote 17 especially at 1759-1760

19 See Jaffe, *English and American Judges as Lawmakers* (1969) 4-5.

20 *Calvert Cliffs* v. *Atomic Energy Commission* (1971) 499 F. 2d. 1109, 1110, 2 E.R.C. 1779, 1780.

of Columbia Circuit had to interpret the National Environmental Policy Act in the context of a licensing proceeding conducted by the Atomic Energy Commision relating to a proposed nuclear power station. The unanimous decision of the Court was delivered by Circuit Judge Wright who began with the following statement which epitomizes the style of the whole opinion:

> These cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment. Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material "progress". But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role. In these cases, we must for the first time interpret the broadest and perhaps most important of the recent statutes: the National Environmental Policy Act of 1969 (NEPA). We must assess claims that one of the agencies charged with its administration has failed to live up to the congressional mandate. Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.[21]

The most notable example of the development of common law principles is the so-called "public trust doctrine", initially brought into prominence through the writings of Professor Joseph L. Sax of the University of Michigan Law School, and now firmly established by the judiciary in a number of American jurisdictions. According to this doctrine, public lands dedicated to certain uses (for example, use as a park, a recreation ground, or a forest preserve) cannot be diverted by a public authority (such as a Highway Commission) to other uses less environmentally worthy, unless the diversion is relatively inconsequential and does not seriously disturb the dedicated use. In his seminal article entitled "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention", Professor Sax concludes with the statement that "the courts, in their own intuitive way —sometimes clumsy and cumbersome—have shown more insight and sensitivity to many of the fundamental problems of resource management than they have any of the other branches of government".[22] In the New Zealand context recent decisions of the Supreme Court and the No. 1 Town and Country Planning Appeal Board lend support to the view espoused by Professor Sax.[23]

3. *Standing to Sue*

This is the familiar question of *locus standi*: who can initiate or participate in proceedings to preserve or improve environmental amenities? The proceedings may be administrative or judicial or a combination of both. The only thing that can be said with certainty is that there are a bewildering range of answers to the question of standing depending on the nature of the proceedings, the wording of the appropriate statute, or, if the provisions of the statute are not dispositive of the issue, the approach of the presiding judicial officer.

21 Ibid.

22 (1970) 68 Michigan Law Review 471, 565-566. The leading cases are *State* v. *Public Service Commission* (1957) 257 Wis. 112, 81 N.W. 2d. 71 and *Paepeke* v. *Public Building Commission* (1970) 46 Ill. 2d. 330, 263 N.E. 2d. 11, 2 E.R.C. 1291. Compare the New Zealand case of *Mayor of Auckland* v. *Dixieland Ltd.* [1927] G.L.R. 486.

23 See, for example, the *Southland* and *Bay of Islands* classification cases, supra footnote 13; and *Mahuta and Environmental Defence Society Inc.* v. *National Water and Soil Conservation Authority* (1973) 5 N.Z.T.C.P.A. 73.

In some statutes, for example, the Water and Soil Conservation Act, different tests for standing appear in different sections of the Act but it is impossible to ascribe to the legislature any rational explanation for the different formulae.[24] It hardly needs to be stressed that the question of standing is of critical importance in present day environmental law. The existence of attractive remedies is of no consequence if procedural obstacles prevent their use. Regrettably, the law is littered with cases where responsible and worthy litigants have been refused standing.

Space does not permit an exhaustive analysis of the numerous decisions on standing.[25] In any event, there is now a vast literature on the topic and very little of it has been illuminating.[26] Instead I propose to present some of the arguments in favour of a liberalised law of standing.

The litigant who does not have a specific interest but endeavours to intervene on "public interest grounds" has not fared well at the hands of the legislature or the courts. Thus in relation to a proposed amendment to a district scheme, the Court of Appeal held in *Rogers* v. *Special Town and Country Planning Appeal Board*[27] that an objector must show that his property was one "appreciably affected" by the proposal, and a matter of public interest is not a ground for objection. Following this decision the No. 1 Town and Country Planning Appeal Board held in *Houston and the Environmental Defence Society* v. *The Thames County*[28] that the Society could not object in relation to an application for consent to a change of use because it did not own any land or have any existing operations likely to be affected by the proposal, nor did the proposal touch directly any of the rights of the Society as such nor the property rights or operations of any of its members.[29]

24 In respect of applications for ordinary water rights, section 24(4) confers the right of objection (and consequently of appeal) upon "any Council, Board, Public Authority or person . . . on the ground that the grant of the application would prejudice its or his interests *or the interests of the public generally*". At the other extreme, in relation to Crown water rights, section 23(5) provides that a person appealing against the grant of water rights to the Crown must demonstrate that the grant of the rights will *detrimentally* affect him and that such detrimental effect will be appreciable. Between these two extremes stands section 26(G) which relates to appeals against classifications and provides that "any body or person claiming to be affected" may challenge a classification. Assuming there is a case for the first and the third tests, what argument can there possibly be for the "detrimentally affected" test when the Crown, if it wishes to avoid the public objection procedure entirely, may do so by declaring the waters in question to be of national importance under section 23(7). See the judgments of Cooke J. in the *Southland* and *Bay of Islands* cases, supra footnote 13 on this matter.

25 See Thio, *Locus Standi and Judicial Review* (1971) for an examination of many leading cases and articles.

26 The notable exceptions are the articles of K. C. Davis, Jaffe, R. B. Stewart, and K. E. Scott in the U.S.A., de Smith in England, and Benjafield and Whitmore in Australia. See K. C. Davis, infra footnote 35; Jaffe, "Standing to Secure Judicial Review: Public Actions" (1961) 74 Harvard Law Review 1265; "Standing to Secure Judicial Review: Private Actions" (1962) 75 Harvard Law Review 255; R. B. Stewart, supra footnote 17; K. E. Scott, infra footnote 42; de Smith, *Judicial Review of Administrative Action* (3rd ed. 1973), especially Appendix 13; Benjafield and Whitmore, *Principles of Australian Administrative Law* (4th ed. 1971).

27 [1973] 1 N.Z.L.R. 529.

28 (1973) 4 N.Z.T.P.A. 9.

29 Ibid., 14.

It may be said in defence of the Court of Appeal and the Appeal Board that the wording of the Town and Country Planning Act dictated the result in each case. But even when untrammelled by statutory provisions the courts have often adopted a restrictive approach to "public interest" litigants. Reference may be made to the 2,4,5-T case, *Environmental Defence Society Inc.* v. *Agricultural Chemicals Board*,[30] where Mr Justice Haslam held that the Society did not have standing to bring proceedings in its own name. The plaintiff had sought a writ of mandamus against the Agricultural Chemicals Board claiming that the Board's restrictions on the use of the chemical 2,4,5-T were insufficient to protect the public health or safety. There had been hopeful pronouncements on standing emanating from the English Court of Appeal and the plaintiff decided to test the matter by purposely avoiding relator proceedings which require the consent of the Attorney-General. However, Mr Justice Haslam held that the Society did not have standing, holding instead that an applicant for mandamus seeking to compel the performance of a public duty generally has to establish breach of a concomitant duty owed to him as an individual and under that test the Society did not qualify.

After discussing at length the English Court of Appeal decisions and also mentioning a very recent decision of the United States Supreme Court in *Sierra Club* v. *Morton*[31] Mr Justice Haslam concluded as follows:

> I regard the petition of the plaintiff to the Board as the equivalent of the demand which usually must precede the proceedings for mandamus . . . and cannot accept the contention that its presentation confers a qualifying special interest on the applicant. Clearly the plaintiff can set up no breach of statutory duty towards itself, nor any other grounds justifying its standing. While I have devoted more attention to the later examples of relaxation of the earlier strictness, I should feel obliged to find on the balance of authority that the plaintiff lacked the requisite locus standi. The alternatives suggested by Lord Denning in *McWhirter's* case were not argued before me, and the most that can be deduced from the two *Blackburn* decisions is that *strong intrinsic merits may let the Court take a more lenient view of the plaintiff's deficiency in standing*.[32]

Thus Mr Justice Haslam appears to conclude that the message from the English decisions is that if a plaintiff is strong enough on the merits a more lenient view will be taken on standing. Surely the law should be able to give better guidance to prospective litigants than that.

The law relating to standing is obviously in need of comprehensive review and consolidation. I advance two alternative proposals for reform and suggest that the adoption of one of them (or a combination of the two) would substantially improve the law of standing.

1. All of the significant restrictions as to standing of litigants should be eliminated and private litigation costs, in combination with the discretionary power to award costs against unsuccessful parties, should be allowed to serve as the sole screening mechanism for access to the courts and quasi-judicial bodies. To achieve this objective, legislation should be enacted granting any person the right to sue or defend if he claimed that his interests *or the interests*

30 [1973] 2 N.Z.L.R. 758.
31 [1972] 405 U.S. 727.
32 [1973] 2 N.Z.L.R. 765-766 (Emphasis added).

of the public generally would be affected by the challenged acts or omissions.[33]

2. In place of all restrictive standing requirements one simple test should be introduced, namely, whether the litigant "is affected by" the activities which are the subject of the litigation.[34]

It can be seen that the two proposals are not mutually exclusive. If the first was considered to be too radical then it might be regarded as the standard formula but in those few situations where a strong case was made for a restrictive approach, the second formula would be employed.[35] If reform along these lines were to be undertaken it would be of the greatest importance to establish a consistent pattern of terminology on standing. Otherwise the existing illogical variations would merely be replaced by another set of equally contradictory definitions. Clearly a number of Acts would have to be amended, most notably the Judicature Act, the Magistrate's Courts Act, the Town and Country Planning Act, and the Water and Soil Conservation Act.

What are the arguments that can be used to support these proposals? First, concerned individual citizens or citizens' groups would have a much greater opportunity through the courts to challenge the actions of administrative agencies and government departments where such actions were allegedly against the public interest. Secondly, administrative agencies and branches of the bureaucracy would become responsive to a wider range of interests and would be prodded by actual or potential litigation into a more energetic fulfilment of their responsibilities. Thirdly, the first proposal would provide an auto-

33 Cf. Water and Soil Conservation Act 1967, s. 24(4), which rights of objection to "any . . . person . . . on the ground that the grant of the application would prejudice . . . his interests or the interests of the public generally".

34 Cf. Town and Country Planning Act 1953, s. 38A, and on this section see *Mundy* v. *Cunningham* [1973] 1 N.Z.L.R. 555 and *Blencraft Manufacturing Co. Ltd.* v. *Fletcher Development Co. Ltd.* [1974] 1 N.Z.L.R. 295. See also Water and Soil Conservation Act 1967, s. 26G(1), which gives rights of objection to ". . . any . . . person claiming to be affected . . ." by a preliminary classification and the interpretation and application of this provision by Cooke J. in the *Southland* and *Bay of Islands* cases, supra footnote 13. The "affected by" formula appears in its practical application to be very similar, if not identical, to the "injury in fact" test long espoused by Professor K. C. Davis and recently adopted as part of a two-stage test on standing by the U.S. Supreme Court in relation to cases under the Administrative Procedure Act 1946 s. 10. The Court allows standing to those who can show that the challenged action caused them injury in fact and where the alleged injury was to an interest arguably within the zone of interests to be protected or regulated by the statute in question. See *Sierra Club* v. *Morton*, supra footnote 31, and *U.S.* v. *Students Challenging Regulatory Agency Procedures* (SCRAP) (1973) 412 U.S. 669, 5 E.R.C. 1449.

35 It is not, of course, suggested that where there are presently very liberal standing requirements they should be tightened by the introduction of the "is affected by" test. For example, under the Water and Soil Conservation Act 1967, s. 24(4), the right of objection is given to "any . . . person . . . on the ground that the grant of the application would prejudice . . . his interests or the interests of the public generally". Such liberal test should be retained and if the "is affected by" test is introduced at a higher level in the judicial structure, e.g. under the Judicature Amendment Act, this should not be interpreted to require a re-examination of standing. In other words, if standing is shown at one level it should be taken to be established at every other level. An objector who qualifies under s. 24(4) should not have to argue in challenging a decision of a Regional Water Board or the Appeal Board that he is "affected by" the decision appealed against.

matic measure of sufficient interest, i.e. the willingness of the litigant to bear the costs of his appearance in the litigation and to undertake the risk of an award of costs against him. The Courts would no longer have to spend their valuable time deciding whether a litigant was entitled to participate in the proceedings. The same advantage, to a lesser extent, would flow from the second proposal. Finally, the proposals should eliminate any potential difficulties about parties who appear in a representative capacity.[36]

There are two main arguments always raised against a liberalised law of standing. The first is that to ease standing requirements would "open the flood-gates of litigation". Every meddlesome busybody, some imagine, would sue and the courts would be brought to a virtual standstill. The saving in judicial time would be minimal compared to the time that would have to be spent in deciding frivolous cases which would not previously have got off the ground. The second argument is that restrictions on standing have a constitutional role which would be seriously undermined if they were eased or eliminated. The "flood-gates" argument is generally found to be vastly exaggerated, particularly in environmental cases which are often so complex and costly as to daunt all but the most determined litigants. It also overlooks the extent of public apathy and inertia. I now turn to examine some of the evidence that is available to help us predict the consequences of a substantial relaxation of standing requirements.

One is hesitant to introduce information from the U.S.A. where the volume of litigation and the attendant delays are notorious but, nevertheless, I submit that some considerable support can be gained from that country for the view that there would not be a vast increase in litigation. Professor K. C. Davis has reported that when state courts have relaxed the requirements for standing the dockets have not increased appreciably as a result of new cases in which standing would previously have been denied. Furthermore, he contends that the experience in the federal courts shows that floods of litigation do not result when the judicial doors are opened to all.[37]

We may also refer to the Michigan Environmental Protection Act of 1970. That statute is astonishing in its brevity and simplicity. It authorises *any person* to bring suit against either a public agency or private entity for declaratory or equitable relief to protect the "air, water and other natural resources and the public trust therein from pollution, impairment or destruction". After sixteen months only several dozen cases had been brought to judgment notwithstanding the total absence of standing requirements and the exceptional broadness of the statute.[38]

If we examine the available evidence in England and New Zealand the picture is much the same. It is worth remembering that in

36 The matter of representative appeals was touched upon by Cooke J. in the *Southland* and *Bay of Islands* cases, supra footnote 13. The learned judge was able to find that the Oyster Farmers Association had status to object because it was in fact "affected by" the classification. He said however that he was certainly not ruling out the possibility of representative appeals.

37 Davis, "The Liberalized Law of Standing" (1970) 37 Univ. of Chicago Law Review 450, 470-471.

38 See Sax and Conner, "Michigan's Environmental Protection Act of 1970: A Progress Report" (1972) 70 Michigan Law Review 1003.

the famous case of *Dyson* v. *Attorney-General*[39] it was argued strongly that to allow actions for declarations against the Crown would lead to innumerable actions as to the meaning of Acts of Parliament and the courts would be overwhelmed with frivolous proceedings. Of course, nothing of the kind ever happened. The idle and whimsical plaintiff, a dilettante who litigates for a lark, is a spectre which haunts the legal literature not the courtroom.[40] The presence of unlimited rights of objection, in certain parts of the Town and Country Planning Act[41] (for example, in relation to proposed District Schemes) and in the Water and Soil Conservation Act, has not led to disaster. Nor has the unrestricted right to bring private prosecutions under section 13 of the Summary Proceedings Act 1957. It must be remembered too that at present a citizen without standing may initiate a substantial piece of litigation by persuading the Attorney-General to bring a relator action, or by suing the Attorney-General if he wrongfully refuses his consent to a relator action.[42]

The "constitutional" argument against liberalisation is based upon the contention that the doctrine of standing has constitutional underpinnings. It is said that "insensitive judicial intervention may be destructive of the constitutional structure of a tripartite allocation of power".[43] But it may be a mistake to think that the law of standing is in fact a doctrine whose purpose is to keep judicial law-making within acceptable limits. The point has been vividly expressed by Professor Scott in his recent article entitled "Standing—a Functional Analysis".[44] He argues convincingly that, while the denial of standing has the effect of removing a case from the reach of judicial determination, the role of the doctrine of standing is to ration scarce judicial resources, not to determine the proper scope of judicial policymaking responsibility. The point is a good one. A liberalised law of standing does not mean that the lawmaking function of the judiciary will assume unacceptable proportions. There are a whole host of "avoidance techniques" which will ensure that the intervention of the courts is timely and appropriate. These include the ability of the courts to refuse

39 [1911] 1 K.B. 410, [1912] 1 Ch. 158.

40 This vivid sentence comes from Professor K. E. Scott: see infra footnote 44 at 674.

41 In fact the Town and Country Planning Act Review Committee in its report to government in November 1973 has recommended that rights of objection be widened even further:—
"The greatest scope for streamlining procedures and speeding up planning decisions lies in some reduction in the present rights of objection and hearings before local bodies. However, these wide rights have grown up over a long period and New Zealand is now unique in the extent to which its planning legislation confers upon third parties such full opportunities of objection and appeal. The community now greatly values these rights and accepts them as positive tools of planning. Cumbersome though some of these procedures are, local government is stimulated by extensive third party rights to seek a higher quality in planning. Many submissions to the Committee request a further extension of these third party rights and the Committee recommends accordingly. Only when the quality of planning performance rises very appreciably could some reduction in these rights be contemplated with satisfaction."

42 See *Collins* v. *Lower Hutt City Corporation* [1961] N.Z.L.R. 250; *Attorney-General (on the relation of McWhirter)* v. *Independent Broadcasting Authority Authority* [1973] 2 W.L.R. 344, Noted (1973) 89 L.Q.R. 322.

43 Thio, supra footnote 24 at 3.

44 Scott, "Standing in the Supreme Court — A Functional Analysis" (1973) 86 Harvard Law Review 645, 683-684.

declaratory judgments on hypothetical or non-justiciable questions,[45] the discretion to refuse relief in relation to the prerogative writs,[46] the power of the court to refuse relief under section 5 of the Judicature Amendment Act 1972 in respect of defects of form or technical irregularities, and the inherent jurisdiction to strike out proceedings which are frivolous or vexatious.

In any event, there should not be too much concern about a modest expansion of the role of the judiciary in New Zealand. As Professor Jaffe has so wisely observed, "the judicial function is not a single, unchanging, universal concept. In any one habitat it differs from era to era. Not only the sum of governmental power but its distribution is constantly changing. The powers of the executive and the legislative wax and wane at the expense of each other. But it does not occur to us as often as it might that the judiciary also is, or at least can be, one of the great branches of the tree of government . . . and the judicial element must not be regarded as any more fixed than static than the other two elements".[48] If this be so, then there is good reason for the judges to commit themselves to a more creative role and, indeed, there has been recent evidence of such a trend.[49]

To sum up, the law of standing is in many respects confusing and contradictory and there is a compelling case for reform. If standing requirements were to be abandoned entirely this would not lead to a flood of unnecessary litigation nor would the traditional role of the courts be in any way impaired. There is a great need for consistency of terminology. It is to be hoped that one of the Law Revision Committees will examine the subject in the near future. In the meantime, the judiciary should, it is submitted, follow the example of Mr Justice Cooke and approach the interpretation of existing standing provisions "in a fair, large, and liberal way".[50]

4. *The Burden of Proof—Who Should Bear the Burdens of Factual and Economic Uncertainty?*

In spite of the dramatic advancement in scientific knowledge, policy decisions in respect of many pollutants still have to be grounded upon an uncertain informational base. It therefore becomes critical to decide who should bear the burden of such uncertainty.[51] The following extract from a report of the National Academy of Sciences, U.S.A., highlights this problem:

45 See Sim's *Practice and Procedure* (11th ed. 1972), Vol. 1, 822-823.
46 See Halsbury, *Laws of England* (4th ed. 1973-), Vol. 1, paras. 91, 132, 161, 186.
47 Jaffe, supra footnote 10 at 10.
48 Scarman, supra footnote 6 at 74.
49 See, e.g., *Dragicevich* v. *Martinovich* [1969] N.Z L.R. 306; *Bognuda* v. *Upton and Shearer* [1972] N.Z.L.R. 741 (especially North P. at 775). The principled lawmaking of the Court of Appeal in the latter case contrasts favourably with the explicit policymaking approach of Lord Denning M.R. in *Spartan Steel and Alloy Ltd.* v. *Martin and Co.* [1973] 1 Q.B. 27. As Professor Dworkin has convincingly shown, lawmaking by judges, especially in "hard cases", should be generated by principle not policy: Dworkin, "Hard Cases" (1975) 88 Harvard Law Review 1057. On this topic generally see Lord Reid, "The Judge as Law Maker" (1972) 12 J.S.P.T.L. (N.S.) 22.
50 This is a quotation from *Minister of Agriculture and Fisheries* v. *Water Resources Council*, one of the *Southland* cases: see supra footnote 13.
51 See Jaffe & Tribe, supra footnote 9 at 242, in the context of air pollution from motor vehicles.

> In any situation of imperfect knowledge, when the consequences of contemplated action can only be surmised and when its costs and benefits cannot be reduced to a net quantity, it becomes critical to decide where the burden of such uncertainties should fall. Historically, that burden has tended to fall on those who challenge the wisdom of an on-going technological trend. The working presumption has been that such a trend ought to be continued so long as it can be expected to yield a profit for those who have chosen to exploit it, and that any deleterious consequences that might ensue will either be manageable or will in any event not be serious enough to warrant a deliberate decision to interfere with technological momentum.
> . . . Why should this be so? *Are there not many areas in which the prevailing assumption that the technological status quo can safely be permitted to continue or expand is unwise and should be altered?* Should there not be some limits on the extent to which any major technology is allowed to proliferate (or, conversely, to stagnate) without the gathering of fairly definite evidence, either *by the developers themselves* or by some public agency, as to the character and extent of possible harmful effects and the relative merits or dangers of various technological alternatives?[52]

A recent example of this dilemma is provided by the controversy concerning possible health hazards from airborne lead emitted from motor vehicle exhausts. A majority of the N.Z. Clean Air Council Committee on Motor Vehicle Emission Standards decided that no reduction in the amount of lead emitted from motor vehicles into the atmosphere was necessary.[53] In a minority report I respectfully disagreed and noted that there was a very basic threshhold issue to be considered: in view of the fact that insufficient monitoring of airborne lead had been performed in New Zealand could we safely say that lack of evidence of harm equalled probable proof of safety and thus justify only very limited action against the particular pollutant. I went on to say that neither the oil industry nor the majority of the Committee had been able to point to evidence which demonstrated clearly that there was no harm presently being done to the health of the urban population by airborne lead. On the other hand, there was a growing body of medical opinion which viewed airborne lead as an undesirable pollutant and, accordingly, I submitted that it was possible to argue with considerable strength that the suspected harmful pollutant should be substantially reduced in the near future and eliminated as soon as practicable alternatives were found.[54]

The same conflict, in the setting of a legal challenge to regulations on airborne lead, can be found in the recent decision of the United States Court of Appeals for the District of Columbia Circuit in *Ethyl Corporation* v. *Environmental Protection Agency*.[55] Under the U.S. Clean Air Act the E.P.A. Administrator was authorised to prohibit the sale of any fuel or fuel additive "if any emission products of such fuel or fuel additive *will endanger* the public health or welfare". The majority of the court held that the Administrator could control or prohibit the use of particular fuel additives only when he can conclude from all relevant medical and scientific evidence that the additive

52 Report of the National Academy of Sciences, U.S.A., *Technology: Processes of Assessment and Choice* (1969) pp.33-34, 38-39, quoted in Jaffe & Tribe, supra footnote 9 at 242-243 (emphasis added).

53 Clean Air Council, *Report of the Motor Vehicle Committee on Proposed Motor Vehicle Emission Standards* (23 August 1974).

54 Ibid., 3-5 of Minority Report.

55 Decided 28 January 1975, unreported. References are to the official transcript issued by the Court. A petition for re-hearing has apparently now been granted and, whatever the outcome, the case is likely to go to the U.S. Supreme Court.

causes an emission which *causes* a significant health hazard to a substantial portion of the general population and that the threshold determination whether an emission "will endanger" the public health turns crucially on factual issues and not choices of policy. The majority further held that the "will endanger" standard is a rigorous one which requires a substantial quantum of proof and that the Administrator had applied an incorrect standard of proof and the evidence did not support his findings. The regulations providing for the phased reduction of the lead content of motor vehicle gasoline were therefore set aside. Circuit Judge Wright dissented and on the fundamental question of the proper interpretation of the statute his reasoning appears to have much to commend it. He said:

> . . . the majority proceeds to distort its reading of the statutory standard into a requirement that lead emissions cause *actual harm* not merely the threat of harm, before the public health is endangered. . . . And, having transformed the required showing from one of risk to one of fact, the majority takes the next logical step and forbids the Administrator from assessing risk in making his determination. I believe the Administrator properly interpreted the statute, and that the majority's interpretation would make it virtually impossible for the Administrator ever to regulate lead additives . . ., a result that would certainly surprise the Congressmen who labored so long to authorise a regulation. The case meaning of "endanger" is, I hope, beyond dispute. Case law and dictionary definition agree that endanger means something less than actual harm. When one is endangered, harm is *threatened*; no actual injury need ever occur. . . . The statute allowing for regulation in the face of danger is, necessarily, a precautionary statute. Regulatory action may be taken before the threatened harm occurs; indeed, the very existence of such precautionary legislation would seem to *demand* that regulatory action precede, and, optimally, prevent, the perceived harm. As should be apparent, the "will endanger" language of section 211 (C) (1) (A) makes it such a precautionary statute.[56]

Wright J. seems to have perceived, far more clearly than the majority, that the "will endanger" standard employed by the legislature was intended to ease the burden of proving actual harm which would otherwise have made the task of the Administrator difficult, if not impossible, in view of the scientific uncertainties relating to the health effects of airborne lead.

When we move from the context of standard setting by administrative agencies to judicial decisions on factual issues we find that the approach to the burden of proof is often equally decisive. As any experienced lawyer knows, the burden of proof rules can be decisive in borderline cases where the facts are not entirely clear. In the environmental field the allocation of the burden of proof and the imposition of a certain standard of proof is frequently of even greater significance because human life, or an irreversible ecological change, may well depend upon what procedural framework is adopted. One may doubt therefore whether the imposition of the burden of proof on objectors in some of the water right cases is justifiable. In *North Canterbury Acclimatisation Society* v. *North Canterbury Catchment Board*[57] the Ellesmere County Council, being desirous of constructing a sewage system to serve Leeston County Town, adopted a design prepared by its Engineer. The design required that during part of the winter when the oxidation ponds could not be used, effluent would be discharged from the ponds at a specified point into the Leeston Creek which flowed into Lake Ellesmere. The Catchment Board

56 Ibid., 9-12, 34, 46.
57 (1970) 3 N.Z.T.C.P.A. 329.

granted the County a right to discharge subject to certain conditions. The Acclimatisation Society unsuccessfully appealed. The No. 1 Town and Country Planning Appeal Board said that the proper approach was to balance the competing interests of the parties. It noted that one of the demands made on natural water (recognised by section 21 (3) of the Act) was to use it as a means of conveying away waste. Therefore the Board held that its function was to balance the interests of the County, which wished to use Leeston Creek as the vehicle for conveying away some of the effluent from the Leeston oxidation ponds, and the public interest in protecting the creek and Lake Ellesmere from the effects of such waste. The Board was faced with the familiar problem of insufficient scientific evidence and it concluded its analysis of the facts by saying that it was not satisfied on the evidence that it could be said with any degree of scientific certainty that Lake Ellesmere was in the critical condition alleged by the appellant.

Thus, it appears that in the *North Canterbury* case, the burden of uncertainty was imposed upon the objectors. Because they could not show with any degree of scientific certainty that Lake Ellesmere was in a critical condition, the Board apparently considered that the right had been properly granted. This, in effect, appears to establish the principle that there is a prima facie entitlement to a water right in such cases because one of the demands made on natural water is to use it as a means of conveying away waste. This observation receives support from *Henderson* v. *Water Allocation Council*[58] where the judgment of the No. 1 Appeal Board made it fairly clear that the onus was on the objectors to show the possibility of detrimental effect. Whether this approach is required by the Act as now interpreted in the *Southland* and *Bay of Islands* cases is doubtful and it is to be hoped that the Appeal Board, and perhaps the Supreme Court, may review this important matter before too long. It is submitted that the basic proposition should be that the applicant for a statutory right or privilege must always carry the burden on proof. If some credible evidence is brought by objectors to show that environmental damage may be caused by the grant of the application then the applicant should carry the ultimate burden of proving either (1) that no such damage will follow or (2) that the occurrence of the damage is no more than a remote possibility or (3) that if damage is likely to occur the creation of such damage is not incompatible with the policies of the Act in question. In the words of Professor Jaffe:

> Statutes old and new are to be read in light of the needs of the times. These needs will be expressed explicitly or implicitly in the ongoing current of legislative enactment as projected against the more general background of public opinion. A prime function of the courts is to give these values an operative form. Thus, courts should conclude that a serious environmental impact must be justified by relevant and weighty considerations. This is, in a sense, a burden of proof rule, and we know that a skilful manipulation of such burdens can be decisive. It is, of course, implicit in such a rule that proponents of the administrative action may justify by considerations having substantial weight. Merely verbal, trivial, or marginal factors should be disregarded as frivolous. Needs must be verified; alternatives must be explored; and costs of alternatives must be quantified. But if the considerations in favour of the action are weighty, the burden will have been satisfied.[59]

58 (1970) 3 N.Z.T.C.P.A. 327.

59 Jaffe, Book Review (1971) 84 Harvard Law Review 1562.

There may well be room for improvement in the way the legislature and the courts deal with the burden of uncertainty. There are some statutes which should be rewritten to incorporate a precautionary approach involving a "will endanger" standard or something of the same kind. A good illustration is the Agricultural Chemicals Act 1959 which was enacted at a time when an appreciation of the threat posed by dangerous chemicals was much less than it is now. When a question is raised about the safety of an agricultural chemical such as 2,4,5-T the administrators tend to argue that a pesticide should not be restricted until proven harmful in man and they place the burden of proof on the consumers and environmentalists, not on the producer who markets it.[60]

So far as the courts are concerned, perhaps more than any other procedural rules, those relating to burden of proof deserve the attention of environmental lawyers. As Professor Krier says in his essay, there are three good reasons why this is so:

> First, burden of proof rules at present have an inevitable bias against protection of the environment and preservation of natural resources. [Users of resources] . . . will almost inevitably be *defendants* and those whose uses preserve rather than deteriorate will ineluctably be *plantiffs*. And it is one of the simple facts of our present system that plaintiffs most generally carry the major burden of providing most of the basic issues in law suit. The result is striking: even with a system of substantive rules *against* resource consumption, our present rules ensure that in cases of doubt about any facet of those rules, the resource consumption will prevail. At one point in our history, such a result was by no means intolerable. [There was] a common law preference . . . favouring industrial expansion and economic growth at the expense of natural resource conservation. Today, however, conditions are radically different. Yet the burden rule, the justifications for its existence largely dead and gone, lives on to govern the allocation of the obligations of persuasion in a large number of suits.
>
> A second reason why environmentalists and the lawyers might wisely focus attention on burden of proof rules grows from the argument that Judges traditionally have felt least restrained about lawmaking activity when they could operate through the medium of burden of proof. As Julius Stone has pointed out, the burden rules seldom touch "the major prejudices of the age". They are quiet, bland, unspectacular.
>
> Related to the second reason is a third, the fact that the judiciary has formed a habit of showing favour or disfavour for various allegations and interests by resort to the broad array of burden rules. . . . Allegations of fraud, for example, have traditionally been disfavoured by the courts. This penchant for recourse to burden rules to mother favoured interests is an important point in a time when we can sense an emerging awareness and worrying about deteriorating environmental quality.[61]

60 In its Annual Report for the year ended 30 June 1971 the Agricultural Chemicals Board noted that restrictions had been imposed on the use of 2,4,5-T in the United States and recorded that it had carried out a review of the uses of 2,4,5-T in New Zealand. The Board stated that after reviewing all aspects it did not feel it necessary to impose restrictions on the registered uses of 2,4,5-T. However, after a petition had been filed by the Environmental Defence Society Incorporated and after a good deal of public controversy, the Board did on April 4, 1972, announce certain restrictions on the use of the chemical. This is not the time or the place to examine the arguments about the adequacy of the restrictions (Haslam J. held them to be adequate) but rather to point to the time lag which occurred between the 2,4,5-T question first coming to the attention of the Board and the date of the introduction of the restrictions. See generally *Environmental Defence Society Inc.* v. *Agricultural Chemicals Board* [1973] 2 N.Z.L.R. 758.

61 Krier, "Environmental Litigation and the Burden of Proof" in Baldwin and Page (Eds), *Law and the Environment* (1970) 105, 107-109.

The message is clear. Lawyers pleading environmental causes should take every opportunity to argue for change in burden of proof rules when such rules are unfavourable and unrealistic. As a matter of interest, one major opportunity may be at hand. In *American Cyanamid* v. *Ethicon Ltd.*[62] the plaintiffs in a patent action applied for an interlocutory injunction which was granted by the judge at first instance but was reversed by the Court of Appeal on the ground that no prima facie case of infringement had been made out. The House of Lords reversed the Court of Appeal and held that, in *all* cases involving patent cases, the court must determine the matter on a balance of convenience, there being no rule that it could not do so unless first satisfied that, if the case went to trial on no other evidence than available at the hearing of the application, the plaintiff would be entitled to a permanent injunction in terms of the interlocutory injunction sought. Lord Diplock, delivering the judgment of the Lords, said that the use of such expressions as "a probability", "a prima facie case", or "a strong prima facie case" in the context of the exercise of a discretionary power to grant an interlocutory injunction was inappropriate and unless the material available failed to disclose that the plaintiff had any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience favoured the granting or refusal of the interlocutory relief.[63] His Lordship condemned by implication the tendency in interlocutory injunction proceedings to undertake what is, in effect, a preliminary trial of the action upon evidential material different from that upon which the actual trial will be conducted.

In the subsequent Court of Appeal decision *Fellowes & Son* v. *Fisher*[64] Lord Denning said that the *Cyanamid* case had perplexed the profession and been criticised in the law journals so much so that counsel had appealed for guidance. Lord Denning said, with a touch of sarcasm, that although he found it impossible to reconcile *Cyanamid* with *Stratford v. Lindley*[65] he did not like to suggest that *Cyanamid* was decided *per incuriam* because "when I last made so bold as to make such a suggestion (in *Broom* v. *Cassell & Co.* [1971] 2 Q.B. 354) it had been regarded as a piece of lèse majesté. The House of Lords never does anything *per incuriam*". The position in New Zealand will certainly have to be clarified because our Court of Appeal has, as recently as last year, followed *Stratford* v. *Lindley* and held that the court has to consider whether the plaintiff has made out a prima facie case on the cause of action.[66]

What significance has all this for environmental law? In the first place, there may be cases where the court might find that a plaintiff seeking to prevent environmental damage had not reached the point of establishing a prima facie case and yet it could not be said that

62 [1975] 2 W.L.R. 316.
63 Ibid., 322-323.
64 [1975] 3 W.L.R. 184. See also (1975) 48 A.L.J. 255.
65 [1965] A.C. 269.
66 *Northern Drivers Union* v. *Kawau Island Ferries Ltd.* [1974] 2 N.Z.L.R. 617. One judge has already followed *American Cyanimid* without criticism: *Auckland Medical Aid Trust* v. *Burnside and Attorney-General,* judgment of McMullin J., March 18, 1975, at Auckland, as yet unreported. However, in that case, all counsel, including the Solicitor-General, adopted as correct the test set forth in *American Cyanamid Co.*

the claim was frivolous or vexatious: there might be a serious question to be tried. On the *Cynanamid* approach, assuming the other criteria were satisfied, an interim injunction would be granted. On the *Stratford* v. *Lindley* test it would not. When one considers that an undertaking as to damages must always be given, there does not seem to be any great harm in the new rule and the considerations which may be advanced to support the prima facie rule in England do not appear to apply with such force. Secondly, if as Lord Denning suggests, the decision in *Cyanamid* is not to be applied universally but selectively, there may be a special case for adopting it in regard to environmental litigation where the public interest in the preservation of the environment is becoming increasingly important.[67] In this connection it is important to note that Lord Diplock concluded his statement of principles and guidelines by reiterating that in addition to the matters mentioned by him, "there may be other special factors to be taken into consideration in the particular circumstances of individual cases".[68]

67 Cf. *Mundy* v. *Cunningham* [1973] 1 N.Z.L.R. 555.
68 [1975] 2 W.L.R. 316.