Who bears the burden?

Assessing the evidential test required in RMA decisions.

LAWS477 – Advanced Resource Management Law

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1. Introduction

This assignment will consider the burden of proof in environmental cases, and on whom this burden should rest. Although there is much existing case law on this subject, the approach the Courts should take is still unsettled. This uncertainty is due to the difference between 'traditional' legal cases and RMA[1] cases, and was summarised by the Privy Council in *Fernandez v Government of Singapore*. A burden of proof is difficult to establish when it is not in regard to "what has already happened but prophesying what, if it happens at all, can only happen in the future"[2].

Fernandez explains a concept of law that is also applicable in RMA cases, that due to decisions being made about future probability rather than past facts, possibly a different type of burden of proof should exist. I will firstly explain the different concepts of the burden and standard of proof, before examining how NZ courts have dealt with this, then concluding my opinion on the best way to approach this problem.

2. Explanation of the concepts.

Before discussing the relevant law and cases, it is important to understand what the evidential test in question includes.

Legal burden:

The first of these is the legal burden of proof, which is the requirement that one party must prove the facts. A statement in *Dickinson v Minister of Pensions* has become the accepted authority in evidence law on this issue, where the Court said that a "fundamental requirement of any judicial system is that the person who desires the Court to take action must prove his or her case to its satisfaction"[3].

Evidential threshold:

The evidential threshold is "the hurdle that a party must pass when seeking to make an issue live before the Court"[4]. This is the idea that one party must prove a point to a satisfactory standard, before the other party is obliged to answer to it. In *Shirley* the Court ruled that a "scintilla of evidence"[5] may be all that is required to pass this hurdle, while *Ngati Maru* extended this requirement slightly, saying that "a scintilla of evidence may be sufficient, but it must be probative evidence"[6].

Burden of proof:

If the above evidential threshold is reached, the next point is on whom the burden of proof rests. Case law has noted that this burden will always rest on the applicant for a resource consent, "because of the fundamental requirement of any judicial system that the person who desires the

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[1] Resource Management Act 1991.
[2] *Fernandez v Government of Singapore* [1971] 2 All ER 691.
[3] *Dickinson v Minister of Pensions* [1953] 1 QB 228.
[4] Claire Kirman, Ellis Gould and Catherine Somerville "Carrying the Burden: Considering the appropriate evidential test in resource management decisions" (2006) Resource Management Journal at 3.
[5] *Shirley Primary School v Telcom Mobile Communications Limited* (1999) NZRMA 66.
[6] *Ngati Maru Iwi Authority v Auckland City Council* (High Court, Auckland AP 18/02, 7 June 2002).

Court to take action has to prove his or her case"[7]. Therefore, the burden is on the applicant to show that their proposed activity can be granted within the law. However, if sufficient evidence is provided by the applicants, the burden then 'swings' to the party opposing the application, as they would now fail without producing evidence to the contrary. This idea of a swinging burden was noted in *Shirley*, however there have been some who criticise this approach, notably Professor Krier and Justice Preston of the Environment and Law Court of New South Wales.

Justice Preston is opposed to this idea of a swinging burden in his paper on environmental justice. He says that "the laws skew distribution of environmental benefits to consuming . . . as only persons who wish to consume or exploit these natural resources can apply under these laws for statutory approval to do so"[8].

Justice Preston's argument is supported by Professor Krier, who states that there is an inherent bias against the protection of natural resources. He implies that this initial burden that the applicant must meet is straightforward, and then the burden shifts to the other party who is trying to protect our resources. So even though the RMA is meant to act as a substantive system to protect against excessive natural resource use, the rules "ensure that in in cases of doubt about any facet of those rules, resource consumption will prevail"[9].

Standard of proof:

As will be discussed below, the RMA has its own provisions which relate to the standard to proof. However, it is accepted by Kirman, Gould and Somerville that "in resource management cases the relevant standard of proof is that of a civil court, being on the balance of probabilities".[10] I will submit that this standard should not be taken as settled law.

3. Guiding principles and sections from the RMA.

The RMA statute is relatively quiet about what standard of proof is required. However, there are several relevant provisions. The first of these is that the Environment Court is not bound by the same laws of evidence as apply in other judicial proceedings, set out in s276(2) of the RMA.

Although the RMA does not explicitly state what evidentiary burden is to be met, and who is charged with the onus of this burden, it does offer some guiding principles in s3(e) and (f). These two subsections set out that "effects" is to include any potential effect of high probability, and any potential effect of low probability which has a high potential impact.

It becomes apparent when considering case law that these 'guiding' sections result in more questions than answers. It appears that these would imply that in instances when something could result in great harm (even if unlikely) the evidentiary burden to prevent a resource consent being

[7] LexisNexis NZ Ltd "Part Three: The problem of proof in environmental cases, questions of causation and environmental risks" (2013) at http://www.lexisnexis.com/nz/legal/search/commentarysubmitForm.do
[8] Justice Brian J Preston "The effectiveness of the law in providing access to environmental justice: an introduction" (presented to the 11th IUCN Academy of Environmental Law Colloquium, Hamilton, New Zealand, 28 June 2013).
[9] J Krier "Environmental litigation and the Burden of Proof" in M Baldwin and J Page *Law and the Environment* (Walker and Company, 1970) at 105.
[10] Kirman, Gould and Sommerville "Carrying the Burden".

granted may be lower. However, it does not expand on this point at all, which has resulted in much uncertainty.

It is here that it makes sense to look at what the courts have made of the above rules in case law, before attempting to determine the rules as they currently stand, and whether or not these are desirable or more guidance should be given.

4. The Courts approach and interpretation of this issue in case law.

McIntyre v Christchurch City Council:

The Environment Court first dealt with the standard of proof, and who bears the burden of proving it in the case of *McIntyre v Christchurch City Council.* This case considered whether resource consent should be granted to allow a telecommunications tower to be constructed, as the residents contested that the potential for harm existed from radiation. One of the issues in this case was the lack of scientific proof regarding the likelihood of harm actually existing. On this matter the Court said:

"We do not accept that the existence of a serious scientific hypothesis, or even one that is regarded as deserving priority for testing, is necessarily sufficient by itself to establish a potential effect, even a potential effect of low probability which has high potential impact".[11]

The above reinforces the idea that the Court is not bound by the traditional rules of evidence, and so they have the authority to consider whatever they feel is relevant in aiding a decision.

Shirley Primary School v Telecom Mobile Communications Ltd:

The second Environment Court case that addressed this question of the burden of proof and what standard was provided was *Shirley.* Although the facts of the two cases were largely similar, the Environment Court adopted a different approach, bringing in the idea of a 'swinging burden' as mentioned above. They also determined in this case that there was no one standard of proof that was to be applied (going against the idea that cases under the RMA were held to the same standard as civil proceedings). The Court said that because the decision was to be made "on the balance of probabilities having regard to the gravity of the issue" one all-inclusive test would be inappropriate[12].

Clifford Bay Marine Farms Ltd v Marlborough District Council:

The *Clifford Bay* case was another high profile Environment Court case looking at what standard of proof should be imposed on a possible future effect. Judge Jackson stated that "to apply the balance of probabilities test to predictions of risk or any other prediction of future effects on every occasion is unhelpful"[13]. He also appeared to take the view that the guiding principles of s3 (e) and (f) were obstructive, as they do not outline who must find the effects trivial or serious.

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[11] *McIntyre v Christchurch City Council* [1996] NZRMA 289 (PT) at 306-307.
[12] LexisNexis Part Three article.
[13] *Clifford bay Marine Farms Ltd v Marlborough District Council* NZEnvC Christchurch C 131-2003, 22 September 2003 at [63].

Arguably the most influential part of the *Clifford Bay* case was the concluding remarks, which have been often cited when discussing this aspect of Environmental law. Judge Jackson said:

"In our view the approach the Act requires is that under section 104(1)(a) and (i) of the Act, each potential effect raised in the evidence should be assessed qualitatively, or preferably quantitatively, in the light of the principles of the RMA, and the objectives and policies of the relevant instruments as to:

(a) Probability of occurrence; and
(b) Force of input.

Whilst facts that may be proved on the balance of probabilities, there is no single standard of proof for most of the judgements involved in those two steps, nor does the same standard have to be used for each risk, the standard varies according to the weighing of the potential impact of the effects"[14].

Clifford Bay was the first case that seemed to suggest outright that there was no one standard that an RMA case should reach, instead the Court should take the individual circumstances and potential for harm into account.

Westfield (New Zealand) Ltd v North Shore City Council:

Richardson J considered this question of what test should be applied to determine the standard of proof in an obiter statement in the Supreme Court. He particularly focussed on the two separate terms that are used in the legislation – actual effects and potential effects. On this point he said:

"Potential is often used in the sense of possible, something which may or may not happen, as opposed to actual. Depending on context, that can range in the level of certainty from highly probable, more probable than not, reasonably probable, significant or substantial possibility, distinct possibility, something that might well happen – down to the slim or faint possibility and on to barely conceivable"[15].

In making this statement, Richardson J suggested something of a 'sliding scale' similar to that made by Pankhurst J in *D and K Francks v Canterbury Regional Council* where the *Clifford Bay* approach was approved. This approval resulted in the outcome that the decision maker should consider both the likelihood or probability of something happening, and the likely impacts or consequences that hazard could have.

Richardson J also seems to approve this idea first suggested in *Clifford Bay* that every case is assessed on its own merits using this 'sliding scale', as he went on to say:

"The question then becomes whether, on a factual assessment of a particular application, any adverse environmental effects can only be characterised as potential. If so, the qualifiers under s3 limit consideration to '(e) any potential effect of high probability; and (f) any potential effect of low probability which has a high potential impact'. Whether distinctions of this kind can and should be drawn in future applications and with what legal consequences must be a matter for argument when they arise".

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[14] *Clifford Bay* at [68] – [69].
[15] *Westfield (New Zealand) Ltd v North Shore City Council* [2005] NZSC 17.

Royal Forest and Bird Protection Society of NZ Inc. v Buller District Council:

The *Buller* case is the most recent consideration of the standard of proof question. The decision was made in the High Court by Panckhurst J, where he reached a substantially different approach than was adopted in *Clifford Bay*. This High Court case was to answer whether the Environment Court had been correct in implementing a civil standard of balance of probabilities on this case. Forest and Bird submitted that this civil standard was inappropriate due to the "uncertainty as to the success of the mitigation plans, the significance of the national values involved and the potential impact on those values if the mitigation plans were unsuccessful"[16]. The High Court determined that RMA cases do not have their own standard of proof, Panckhurst J said in his speech that there exists no "separate and special standard of proof which falls somewhere between the criminal and civil standards"[17]. This is a markedly different approach to his judgement in *D and K Francks v Canterbury Regional Council* where he appeared to agree with the *Clifford Bay* idea that "there is no single standard of proof" when considering these cases. This change is particularly surprising considering the support the *Clifford Bay* approach got from the Supreme Court (albeit an obiter statement).

5. Are ss5 and 6 of the RMA given due consideration?

Section 5 outlines the purpose of the Act, and it uses language such as "sustainable management", "safe-guarding" and "avoiding, remedying or mitigating any adverse effects". All of these suggest that when interpreting other parts of this statute, the Courts should keep in mind that at its core, this is an Act that is meant to be precautionary. Some statutes in New Zealand have adopted the precautionary approach openly, while the RMA is less explicit in its acceptance of this idea, it "can be seen in the need to have regard to the potential effects of activities on the environment"[18].

An article by Alexander Gillespie[19] states the importance of the precautionary principle in international environmental law since 1992. His article also helps outline the role of the precautionary principle, and the relationship it has with the standard of proof. He explains that the standard of proof that must be reached for the precautionary principle to be triggered is accepted on an international scale as there must be "reason to assume" that damage was "likely". However, the Second International Conference on the Protection of the North Sea emphasised that "absolutely clear scientific evidence"[20] was not required. Instead, Gillespie suggests that "the scientific standard of proof should be substantive. Although it may not have to be a majority opinion, it should be at least a reputable scientific minority"[21].

This article by Gillespie seems to suggest that the approach taken by the Courts in previous case law has been largely in line with the precautionary principle (with *Westfield* being the possible exception). In these cases, the scientific evidence opposing the application (particularly in *McIntyre* and *Shirley*) would not be considered enough to be the "reputable scientific minority" Gillespie spoke of. The Courts did make reference to this precautionary principle in both cases, stating in

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[16] "Carrying the Burden"
[17] *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2006] NZRMA 193 (HC) at [73].
[18] LexisNexis Part Three Article.
[19] Alexander Gillespie "Precautionary New Zealand" (2011) New Zealand Universities Law Review Vol 24 no3
[20] Ibid.
[21] Ibid.

McIntyre that "there needs to be some plausible basis, not mere suspicion or innuendo, for adopting (the precautionary) approach".

Despite this, Nolan and Somerville state in their article[22] that the matter is far from settled, as various judges within the Environment Court have adopted different views of how the precautionary approach would be applied to RMA cases, and what its relevance is. This uncertainty causes further problems for judges determining what burden of proof is required in these RMA cases.

The second aspect of the Act which arguably is not given due consideration by the Court when determining the burden of proof, is the matters of national importance set out in section 6 of the Act. These seven subsections (s6(a) – (g)) are meant to be the most important factors that the Court must consider when determining an RMA question. The RMA is a hierarchical statute, and the section 6 considerations are the highest of Act. Despite this, as Justice Preston highlights in his article, stating that: "environmental laws typically prohibit or restrict the use or exploitation of the environment, including the consumption of natural resources, but then enable that prohibition or restriction to be lifted by a person applying for and a regulatory authority granting some form of approval to use or exploit the environment"[23].

Justice Preston's theory is clearly apparent when one looks at the percentage of resource consents applied for and granted in New Zealand during the 2001/02 financial year. Of the 49 012 applications processed through to a decision, only 274 (0.6%) were declined[24]. Looking at these figures, it appears that although the considerations in s6 are meant to be the most important in the RMA hierarchy, they are often getting overlooked in favour of granting resource consents.

Therefore, we can see that although the RMA decisions are complying with the precautionary principle on the surface, the considerations of s6 are getting overlooked when making these decisions.

6. *My suggestions*

The reading of the Act by Richardson J in *Westfield* supports the idea that every case should be considered on its merits. Although some may argue against this reading due to the uncertainty it could cause (for example rather than a 'one-size-fits-all approach like the civil standard on the balance of probabilities) I support his reasoning. New Zealand is a diverse country, and arguably no two environmental issues are the same. I strongly believe that acts which have a high potential effect on the environment should have a much stricter test applied than the balance of probabilities.

I would argue that the approach that best encapsulates the purpose of the RMA, as well as providing a guideline to other judges, is the *Clifford Bay* case, with particular reference to their concluding statement and the suggestions it gives on how to approach this question.

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[22] D A Nolan and RJ Somerville "The Relevance of the Precautionary Principle or Approach Under RMA 1991" *New Zealand Law Society Seminar Resource Management Act update* (October-November 2001) at 47-52.
[23] Justice Preston Article p4.
[24] The Resource Management Act: Key Facts About Local Authorities and Resource Consents in 2001/2002. http://www.mfe.govt.nz/publications/rma/annual-survey/2001-02/

In my view, section 3 (e) and (f) were put into the RMA by its creators to set a different standard of proof than applies in other case law. By attempting to graft a different meaning onto this section (such as fitting it within the confines of traditional civil liability) it undermines its purpose.

7. Conclusion.

It becomes clear on examination of these cases, that the issue of the burden of proof to be applied in Resource Management cases is far from certain. The vast majority of this uncertainty comes from the fact that unlike traditional legal cases, decisions about environmental law are often made in a 'forward looking' manner, where a judge is attempting to discern what will occur in the future. Further confusing the process is the fact that on some issues, there is not enough scientific evidence to make an authoritative call either way, which can confuse the precautionary approach.

To conclude, it is obvious that further case law, or more instructive legislation is required to remove the confusion over the question of the necessary standard of proof. Ideally, with the proposed changes to the Resource Management Act, the Minister for the Environment would have included detail or guidance on this point. However, in the proposed changes there is no mention of this issue. The second way that would firm up the issue, would be for the *Buller* court to be taken to a higher court, so that the High Court approach could be upheld or changed by a Court with more authority. However, Forest and Bird were unsuccessful in their application for leave to appeal to the Court of Appeal[25], and so it appears that until a different case appears, we are left with the uncertainty the conflicting judgments mentioned above have given us.

[25] Scoop Politics (2013) <http://www.scoop.co.nz/stories/PO1307/S00150/leave-dismissed-forest-bird-v-buller-dc-ors.htm>

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