

ROLE OF THE JUDICIARY IN EARTH JURISPRUDENCE:

AN ANALYSIS OF CLIMATE CHANGE AND ENVIRONMENT
JUSTICE LITIGATION

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Role of Judiciary

- Exercise of Judicial Power: binding decisions which affects the rights and duties of citizens and institutions.
- Power is limited by:
 - ▣ Courts may only deal with matters brought before them;
 - ▣ Matters can only be brought by a party with a sufficient interest in the outcome (standing);
 - ▣ Courts do not deal with matters that are considered 'non justiciable';
 - ▣ Decisions of most courts may be overruled by a higher court.

Freedom of Judiciary

- Judicial independence achieved
 - ▣ Separate arm of government from legislative and executive branches;
 - ▣ Security of tenure – judges can not be removed from position by government (retirement age 70 years).
- Judicial independence in environmental disputes
 - ▣ Executive may be party to litigation: must ensure that this power does not inappropriately influence the outcome.
 - ▣ Ensure that private parties (mining companies, multinationals) do not unduly influence the decision making process.

Functions of judging

Hon Justice Brian Preston - opportunities for sustainability in

- ▣ Finding the law:
- ▣ Interpreting the law:
- ▣ Applying the law:
- ▣ Upholding the law:

Hon Paul de Jersey AC

- “ While judges must be astute to comprehend, respect and uphold such pivotally important issues as environmental protection, they must be careful not to arrogate to themselves any radical power to vary the composition of environmental law as declared by the legislature... it is part of the rule of law”
- ▣ But when circumstances dictate in accordance with view of plain community view that incremental development is justified – courts may effect it.

Common harm

v Personal harm

Climate
Change

- Legal action to redress damage arising from activities said to be causing global climate change

Environmental
Justice

- Legal action to redress personal damage suffered from unsustainable practices.

Public interest litigation

1. Public interest litigation

- ▣ Attention to the determination which best serves or advances the interest of welfare of the public, society or the nation.
- ▣ Contrast public interest and private interest :McKinnon v Dep T

2. Public interest environmental litigation

- ▣ Barker: legal remedy, decision, which has effect of conserving or protecting the environment.
- ▣ McGrath: proceedings in ct by private individual or community group where dominant purpose is not to protect or vindicate a private interest, but to benefit the public. Protection of env = matter of public interest.

(Is protection of individual harm within the scope of public interest litigation **and or** public interest environmental litigation?)

Basis for Litigation

Common Law Tortious Actions

- Sue industrial polluters on the basis of claims in negligence or nuisance.
- Challenges: standing, causation, costs, apportioning liability.

Environmental Law Administrative Actions

- Challenges gov decisions: EIS have inadequately considered CC impacts.
- Challenges: merit review, causation, cost

America

Env Law
(Admin)

- Public harm
- Personal harm

Tort Law

- Public harm
- Personal harm

Env Law: Public Harm

- Massachusetts et al v Environmental protection Agency
 - ▣ Standing: EPA's failure to regulate GHG led to actual and imminent harm to state of Massachusetts (sea level rise).
 - ▣ EPA has authority to regulate GHG.
 - ▣ EPA must protect public health and welfare.
- Judicial action made significant contribution to law (standing principles) and ultimately paved the way for reforms of the federal Clean Air Act).

Env Law: Private Harm

- Solar Case Law: Imperial Valley Solar Project
 - ▣ Claim by Native American Group: La Cuna de Azland Sacred Sites Protection Circle.
 - ▣ Project will threaten rare plants and animal species.
 - ▣ Project sponsors did not consult Native Americans about project.
 - ▣ Development will desecrate Native American cultural resources and sites.
 - ▣ Injunction awarded:

Tort Law: Public Harm

□ AEP v Connecticut

- AEP actions contributing to global warming – emissions unreasonably interfered with public rights in violation of federal common law of interstate nuisance.
 - Fed Law nuisance: states maintain action action to abate air, water pollution produced by other states or by act of other states industry.
- Remedy sought: Cap on emissions (reduced annually)
- Decision: Clean Air Act (EPA Fed) statute speaks directly the question, federal common law displaced.
 - Does not matter if regulatory authority not yet used. Test is whether the field has been occupied.

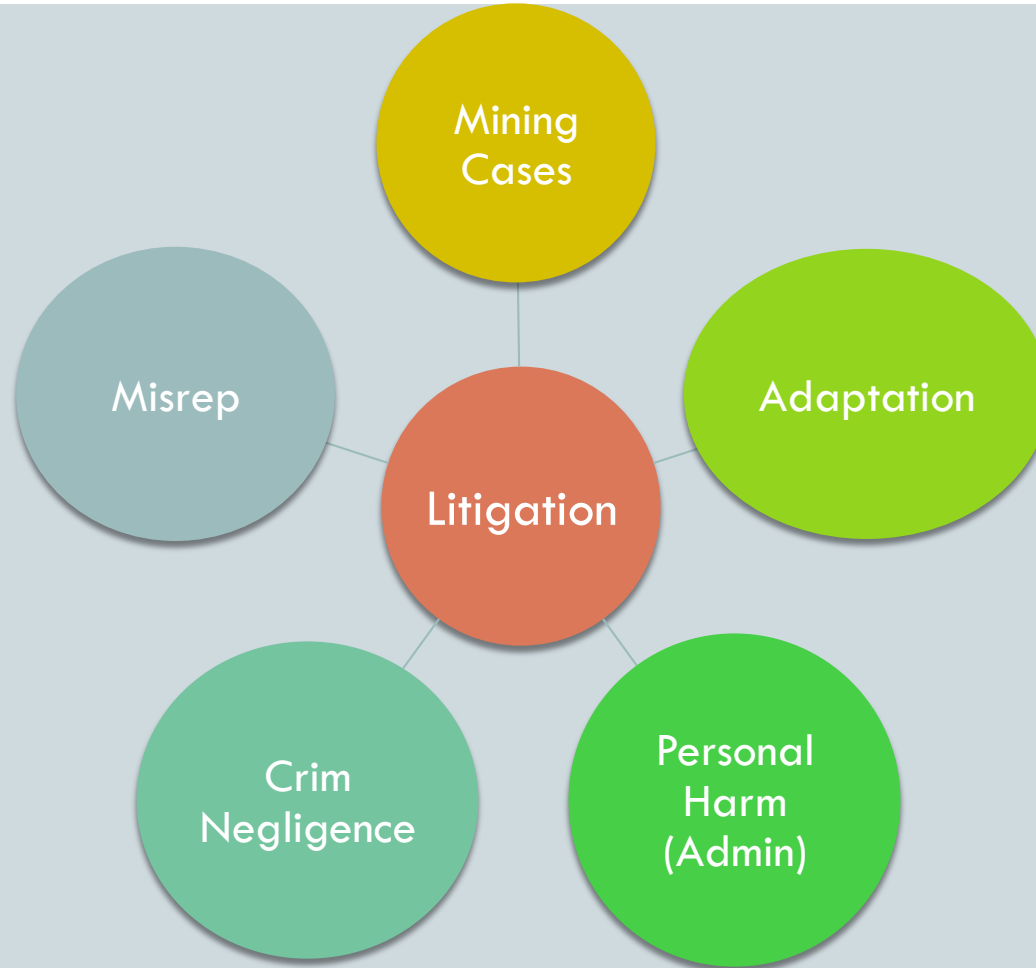
CC Tort Law: Private Harm

- **Comer v Murphey Oil**
 - ▣ Victims of Hurricane Katrina suing oil companies
 - ▣ Case dismissed
 - Standing: harm not traceable to individual defendants.
 - not justicible (political question doctrine).
- **Native Village of Kivalina v Exxon Mobil Corporation**
 - ▣ Public and private nuisance claim (causation will present challenges).
 - ▣ Civil conspiracy and concert of action: allows for multiple defendants to be held jointly liable when it is impossible to determine which defendant is responsible for individual harm.

Env Justice Tort: Private Harm

- Ayers v Jackson Township
 - ▣ Pollution entered neighboring drinking wells, causing an unreasonable risk of future personal injury risk.
 - ▣ Remedy: polluter charged with reasonable cost of medical monitoring program to mitigate or avoid personal harm to the plaintiffs (equitable remedy).

Australia



Mining Cases – Public Harm

- These cases were seeking to protect the broader public interest, though sites of such project could also lead to more personal harm issues for local residents:
 - ▣ Redbank Power:
 - ▣ Hazelwood Case:
 - ▣ Anvil:
 - ▣ Wildlife Whitsunday Case:
 - ▣ Xstrata Case

Personal Harm - Administrative

- Building of industrial / facilities – community harm
 - ▣ Telstra Corp: impact on community health – precautionary principle.
 - ▣ Hub Action Group: waste facility on prime agriculture land – good governance principle.
- Wind Farm Cases
 - ▣ Local community members or groups on the basis of concerns over the amenity, landscape and potential health effects of windfarm developments.
 - ▣ Taralga Landscape Guardians Inc: “broader public good” – intergenerational equity principle.

Personal Harm: Crim Negligence

- Esperance
 - ▣ Dep of Env & Conservation charged Esperance Port Authority – causing pollution with criminal negligence.
 - ▣ Port fined \$525,000 for lead and nickel contamination.
- Alcoa
 - ▣ Charged with causing criminal negligence – Alcoa plead guilty to alternative charge outside of court.
 - ▣ Residents in areas were susceptible to nosebleeds and cancer.
- Queensland Mines

Planning: Adaptation Case Law

- Coastal Planning Laws: sea level rise and flooding
 - ▣ Gippsland Coastal Board:
- Planning Laws – areas prone to extreme weather events
 - ▣ *Carey v Murrindini*:
- Disaster risk reduction policy: relevant for climate adaptation policy.

Misrepresentation

- ACC v Global Green Plan Ltd.
- ACC v Prime Carbon Pty Ltd
- ACC v GM Holden

Harm

- ▣ Public: integrity of regulation undermining env reg.
- ▣ Personal: consumer, investors.

Conclusions



- Justice and public harm
- Justice and personal harm
- Role of the court in addressing this.