Environmental law

Enforcement through civil proceedings

by Richard Burnett-Hall

Strict liability is also a necessary element of the polluter pays principle. If an economic activity causes social costs, this principle requires the operator to bear those costs in full — at least in the absence of consent by the victims, or where, in the wider public interest, this is deemed to be made on their behalf and there is a licensing regime in operation. Considerations of intent, negligence, or any other blameworthiness have no place.

The European Commission in its green paper Remediing Environmental Damage specifically stated: 'strict liability appears to be particularly suited to the specific features of repairing environmental damage' and this view was supported by the report on this green paper by the House of Lords Select Committee on the European Communities.

CRIMINAL CONTEXT

Strict liability is therefore appropriate to environmental enforcement. Nevertheless, it sits most uneasily in the context of the criminal law, not only as a matter of principle but also on purely practical grounds. It is clearly wrong in principle that a person can be convicted of a criminal offence in circumstances where he may never have intended the consequences of his act or omission, was not negligent, and indeed may have done his level best to avoid the consequences that precipitated the prosecution. To brand such a person a criminal is bound to be unfair, he is, quite rightly, afforded a whole range of evidential and other procedural safeguards, notably the appreciably heavier criminal burden of proof. This protection inevitably means either that there are more acquittals than would otherwise be the case or — no doubt much more often — that proceedings are never brought in the first place. The adverse consequences for society at large if actions that damage the environment are not seen to be condemned, and recurrences effectively discouraged are, however, ignored. While the reluctance of the regulators in Britain to bring prosecutions is in part attributable to a culture that avoids confrontation to a degree that some might regard as excessive, it is understandable that they should regard proceedings that fail as counter-productive.

WHO IS RESPONSIBLE?

The problem is perhaps most acute in circumstances where the separate actions of two or more people have together resulted in a pollution offence, and yet it is just such situations that increasingly arise. Constructive collaboration between two or more parties is frequently called for, e.g. in the duty of care in dealing with waste, the discharge of trade effluent to a sewage treatment works, or the use of subcontractors to do work that calls for an appreciation of all the surrounding potential environmental hazards. In such
cases who, if anyone, may be found guilty of an offence may well bear little or no relation to who was in practice at fault, and who should, in an effective system, be held at least partly accountable. The criminal process is not suited to allocating degrees of responsibility.

Thus Global Environmental, a waste management company, in responding to a charge brought under the Environmental Protection Act 1990, s. 33(1)(c), made much of the fact that an appreciably more serious incident had occurred shortly after the one the subject of the charge, McTay Construction Limited (unreported, 14 April 1986), one of McTay’s sub-contractors had polluted a local watercourse. The parallel proceedings against McTay, as the main contractor, were rejected by the court, very largely it seems on the ground that if the main contractor was liable, then the principal, the Greater Manchester Council, should have been too. The logic was sound. It is the assumption that the Council could not be regarded as responsible that is questionable, even though it had a major hand in determining what was done on the site.

and yet no proceedings were taken in that second case. The West Yorkshire Waste Regulation Authority, then the responsible regulator, did not bring a prosecution because of the difficulty of apportioning responsibility between Global and the producer of the waste that Global was treating. Each blamed the other, and the Authority considered there was a severe risk that both parties might have made a sufficient case that the other was principally responsible, and that both would have been acquitted.

The reluctance of the courts to convict one of multiple parties was exemplified also in National Rivers Authority v Welsh Development Agency [1993] Env LR 407 where the defendant landlord was acquitted (in the writer’s view wrongly), with harsh words from the judge for the prosecuting authority for bringing the case against the Agency, rather than the polluting tenant. Similarly, in North West Water Authority v applying administrative law, have not been faced with this problem. However other common law jurisdictions, notably Australia, especially New South Wales, and the US, have shown how administrative actions can be given effect through proceedings in the civil courts. A development along comparable lines in this country would be highly desirable. What is required, in essence, is a system of administrative sanctions that, as a minimum, would deprive those who fail to comply with environmental obligations of all profit from their default, coupled with an ability to require the polluter both to remedy whatever environmental harm may have been caused, and also to take appropriate steps to minimise the chance of a recurrence.

Until very recently, the regulators have merely had a right to do necessary works, and to recover their costs from the relevant person. This has been of limited value, given the regulators’ limited resources to fund such works, and particularly so where there is a substantial likelihood that they may fail to obtain reimbursement. Enforcement notices under the Integrated Polluted Control (IPC) regime allow the regulator to require work to be done without putting public funds at risk, but the power only applies to those operating processes subject to IPC. Works notices may now be served under the Water Resources Act 1990, as amended by the Environment Act 1995 and remediation notices, introduced by Part II of the Environment Act 1995 into the Environmental Protection Act 1990 will, eventually, likewise be available to deal with significantly contaminated land. Nevertheless these provisions operate independently of court proceedings, and must be activated only if the relevant regulator chooses to do so. While this should undoubtedly be the norm, it is anomalous that any person may, in England and Wales, institute prosecutions for environmental offences yet have no direct influence over whether and how administrative proceedings are pursued.

PRIVATE ACTIONS

‘Citizen suits’ have been pioneered in the US, being first introduced in 1972 in amendments to the Clean Air Act 1993. With minor variations, they are now provided for in virtually all US
AMERICAN EXAMPLE

The US Environmental Protection Agency has issued guidelines on its own practice for determining the level of penalties it imposes, and these include the seriousness of the violation, any economic benefit of non-compliance, previous violations, and the impact of the penalty on the violator.

Statutory maxima are prescribed for the civil penalties, usually around $25,000 per day of violation. The figure corresponds relatively closely to the £20,000 generally applicable to most environmental offences, when tried summarily, but since they may accumulate on a daily basis, the actual penalties imposed can on occasion be very large indeed. For example, in 1995, General Motors was reported to have agreed a settlement of an action for £8.75m worth of compensatory measures to offset excessive emissions resulting from the non-compliance – a total cost of some $45m.

**The Environment Agency website provides much interesting information about its work, including its State of the Environment Report. This provides a ‘snapshot look at the pressures on the environment and how the quality of the environment has changed over the last twenty-five or so years’.