

Environmental Damage



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8 June 2016

Law and environmental damage

- Common law:
 - Trespass
 - Rylands and Fletcher
 - Nuisance (private and public)
 - Negligence
- Tort of breach of statutory duty

Early Legislation

- The Alkali Act 1863: early attempt to regulate heavy industry by an Inspectorate
- 19th century Public Health legislation to tackle air pollution and river pollution

Modern UK legislation on environmental damage

- Environmental Protection Act 1990:
 - Local authority pollution control
 - Waste controls and prosecutions for breaches
 - Contaminated land
 - Statutory nuisances
 - Litter
- The Town and Country Planning Act 1990
- Wildlife and Countryside Act 1981
- Water Resources Act 1991
- Environmental Permitting (England and Wales) Regs 2010

EU law on environmental damage



- Environmental Impact Assessment: Directive 85/337/EEC
- Habitats (92/43/EEC) and Birds (79/409/EEC) Directives
- Marine Strategy Framework Directive 2008/56/EC
- Water Framework Directive 2000/60 (and associated water pollution Directives)
- Waste Framework Directive 2008/98/EC
- Air Quality Directive 2008/50/EC

Treaty on the Functioning of the EU: Title XX: Articles 191-193

Article 191 TFEU (ex Article 174 TEC)

1. Community policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems.

2. Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that **environmental damage should as a priority be rectified at source and that the polluter should pay.**

Environmental Liability Directive (“ELD”)



- Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.
- Long and difficult history:
 - First proposal for civil liability for environmental damage in 1976
 - Directive finally transposed by all Member States in July 2010, following infraction proceedings against 23, and references to the ECJ for 9 Member States (inc. UK) due to failure to transpose.

Purpose of ELD

The purpose is set out in Article 1: “to establish a framework of environmental liability based on the ‘polluter pays’ principle, to prevent and remedy environmental damage.”

- Strict liability on persons who carry out various activities that are subject to certain specified EU legislation if such activities cause an imminent threat of, or actual, environmental damage to biodiversity, water or land
- Fault-based liability on persons whose activities, which are not subject to any of the specified EU legislation, cause damage to biodiversity.

ELD Transposition

The Environmental Damage (Prevention and Remediation) (England) Regulations 2015 (replacing the original 2009 Regulations)

3 reasons for replacement:

- Extension by Art. 38 of Directive 2013/30/EU to the definition of ‘environmental damage’ to include damage to the environmental status of marine waters: see regs 8, 10, 11.
- References in the 2009 Regs to “renewable energy zone” are updated to “exclusive economic zone”
- Reg. 35 imposes new requirement on SoS to review and report on the operation and effect of the Regulations

2015 Regs



Part 1:

- Reg 4: specifies the types of damage to a protected species or natural habitat, an SSSI, water or land which constitute “environmental damage”
- Reg 5: specifies the types of activity causing environmental damage.
- Regs 8 and 9: Exemptions and exclusions from the application of the Regulations.
- Regs 10-12: specifies the authorities whose function it is to enforce the Regulations.

2015 Regs cont.



- Part 2: prevention of environmental damage, including action which may be taken by an enforcing authority.
- Part 3: remediation:
 - enforcing authority has a duty to establish whether environmental damage has occurred.
 - It must then serve a notice on the operator whose activities were the cause of the damage, requiring them to submit proposals for remedial measures.
 - A remediation notice must then be served, specifying the measures to be taken.
 - Failure to comply with a remediation notice is an offence.
 - Statutory right of appeal against notices

2015 Regs cont.



Part 4:

- Enforcing authority can recover its costs in certain cases
- Third parties can notify the enforcing authority of damage caused or being caused, or of which there is an imminent threat (regulation 29)
- Payment of compensation to third parties in certain circumstances (regulation 30).
- Powers of persons authorised by enforcing authorities (regulation 31)
- Penalties for offences under the Regulations (regulation 34):
 - Fine or up to 2 years imprisonment or both.

Recent case law (1)

R. (on the application of Seiont, Gwyrfai and Llyfni Anglers' Society) v Natural Resources Wales [2016] P.T.S.R. 505

Issue: whether, for the purposes of the ELD, “environmental damage” includes the prevention or deceleration of recovery from an existing, already-damaged environmental state; or whether it is restricted to a deterioration from an existing state.

High Court (Hickinbottom J) said NO.

Court of Appeal heard appeal two weeks ago.

Llyn Padarn



Arctic Charr



Llanberis Sewage and Waste Water Treatment Works



Facts



- Sewage and waste water treatment works discharged into a lake designated an SSSI and populated by Arctic charr.
- Claimant Angling Society became concerned about the effect of water quality on the dwindling number of charr, and sent a notice of environmental damage to Natural Resources Wales (enforcing authority) pursuant to the Welsh 2009 Regs.
- NRW said “damage” refers only to a deterioration or worsening of the environmental state and concluded that an algal bloom caused by discharges from the sewage treatment works had caused damage.
- Liability notice issued to the works operator requiring the submission of remediation proposals.

Relevant definitions in the ELD



- Article 2(2): “‘damage’ means a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly.”
- Article 2(1): “Environmental damage” means ...
 - (a) *damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I; Damage to protected species and natural habitats does not include previously identified adverse effects which result from an act by an operator which was expressly authorised by the relevant authorities in accordance with provisions implementing article 6(3) and (4) or article 16 of [the Habitats Directive] or article 9 of [the Wild Birds Directive] or, in the case of habitats and species not covered by Community law, in accordance with equivalent provisions of national law on nature conservation;*
 - (b) *[see also definitions of ‘water damage’ and ‘land damage’]*

High Court decision



Para.133:

“The Environmental Liability Directive is firmly focused on deterioration of the environment of bodies of water, notably the prevention of deterioration and, if such occurs, its remediation by the operator who caused it under the polluter pays principle. Crucial concepts in the Directive are (a) the “baseline condition”, defined in article 2(14) as “the condition at the time of the damage of the natural resources and services that would have existed had the environmental damage not occurred” and (b) “recovery”, defined in article 2(15) as “the return of damaged natural resources and/or impaired services to baseline condition””

The “polluter pays” principle

- Judge considered the “main premise of the [ELD] namely that the polluter pays for preventive or remediative measures to avoid or remedy environmental damage which it causes.”
- If the damage could be in the form of decelerated improvement, the remediation measures would ... in practice often be tantamount to requiring an operator to pay, not for its own polluting activities, but earlier polluting activities (possibly of entirely distinct operators) or simply paying to establish appropriate environmental status which is in the primary realm of the Water Framework Directive”

(para. 137)

Other languages

Para.140 –

French ELD: the definition of “damage” in article 2(2) provides:

“«dommages» une **modification négative** mesurable d'une ressource naturelle ou une **détérioration** mesurable d'un service lié a des ressources naturelles, qui peut survenir de manière directe ou indirecte.”

Recent case law (2)

Ministero dell'Ambiente e della Tutela del Territorio e del Mare v Fipa Group Srl (C-534/13) [2015] Env. L.R. 32

European Court of Justice (Third Chamber) - 4 March 2015

Issue: can a landowner be liable to remediate environmental damages in circumstances where the damage was caused by someone else?

Massa Carrara



The less nice part...



Facts



- 1960s-80s: manufacture of insecticide and herbicide left behind considerable in the vicinity of the town of Massa Carrara, leading it to become an “area of national interest” for the purposes of contamination remediation.
- 1995: relevant land decontaminated, but not very well.
- 2006 onwards: Current owners, who are real estate merchants, vendors of electronic devices and boat repairers, did not cause the pollution.
- 2007-2011: Italian authorities ordered current owners to carry out remediation measures as “guardians of the land”.
- Owners challenged their liability.

Italian legislation

- National legislation did not permit authorities to require the “innocent” owner of land to adopt preventive and remedial measures, in cases where it was impossible to identify the polluter or to have the polluter adopt remedial measures.
- “Owners not responsible for the pollution may be required to reimburse ... the costs relating to the measures adopted by the competent authority only within the limits of the market value of the land, determined after the implementation of those measures.”
- “If an owner who is not responsible for the pollution has rehabilitated the polluted site on a voluntary basis, that person shall be entitled to bring an action for damages against the person responsible for the pollution in respect of costs incurred and any additional damage suffered.”

CJEU's judgment



- Parties cannot rely on the “polluter pays” principle in 191(2) TFEU directly, but they can in so far as it is implemented in the ELD.
- Art.17 ELD: The directive applies only to damage caused by an emission, event or incident which took place on or after 30 April 2007 (or from activities which took place before that date, but were not brought to completion before that date)
- ELD aimed at operators who engage in any of the activities listed in Annex III to the ELD (strict liability), or who, under art.3(1)(b), which concerns damage caused by activities other than those listed in that annex, are “at fault or negligent” (fault liability).

CJEU's judgment continued



- “In order for the environmental liability mechanism to be effective and for remedial measures to be required of an operator, the competent authority must establish a causal link between the activity of one or more identifiable operators and concrete and quantifiable damage, irrespective of the type of pollution at issue”: [54]
- Art.8(3)(a): the operator is not required to bear the costs of preventive or remedial action taken pursuant to that directive if he can prove that the environmental damage was caused by a third party, and occurred despite the fact that appropriate safety measures were in place, or resulted from an order or instruction emanating from a public authority.

But: Member States can go further

- Art.16 allows Member States, in accordance with art.193 TFEU, to maintain and to adopt more stringent measures in relation to the prevention and remedying of environmental damage, including the identification of additional responsible parties, provided that such measures are compatible with the Treaties.
- The Italian legislation for requiring the owner to contribute to the remediation costs is therefore not precluded by the ELD.

Position in the UK



Section 78F of the Environmental Protection Act 1990

“Determination of the appropriate person to bear responsibility for remediation.

(1) This section has effect for the purpose of determining who is the appropriate person to bear responsibility for any particular thing which the enforcing authority determines is to be done by way of remediation in any particular case.

(2) Subject to the following provisions of this section, any person, or any of the persons, who caused or knowingly permitted the substances, or any of the substances, by reason of which the contaminated land in question is such land to be in, on or under that land is an appropriate person.

...

(4) If no person has, after reasonable inquiry, been found who is by virtue of subsection (2) above an appropriate person to bear responsibility for the things which are to be done by way of remediation, the owner or occupier for the time being of the contaminated land in question is an appropriate person.”

But, wide discretion on costs recovery

If, for whatever reason, the authority decides to carry out the remediation works themselves, the authority can decide to reduce or waive cost recovery from the owner in circumstances where:

- The costs would cause hardship to the owner (s.78P(2)(a))
- The costs of remediation exceed the likely value of the land in its current use after the remediation has been carried out. (s.78P(2)(b) and para.8.28 of the 2012 DEFRA Guidance on Contaminated Land.
- The owner took reasonable precautions at the time of purchase, but did not discover the contamination: para.8.30

Recovered contaminated land case awaits decision

- Inquiry in December 2015 into the appeal by a developer under section 78L(1) EPA against a remediation notice served on it by Walsall Metropolitan Borough Council.
- The notice requires de-contamination of the land under 69 residential properties, some of which were developed by the appellant, which form part of the Stonegate Housing Estate.
- Land formerly occupied by the Willenhall Town Gas Works.
- The pollutant is Benzo(a)pyrene (“B(a)P”), a carcinogen commonly found in Gas Works waste.
- Second ever inquiry notwithstanding the regime having been in force for 15 years.
- Appeal recovered due to “potential policy implications for contaminated land law”.

Landmark
CHAMBERS