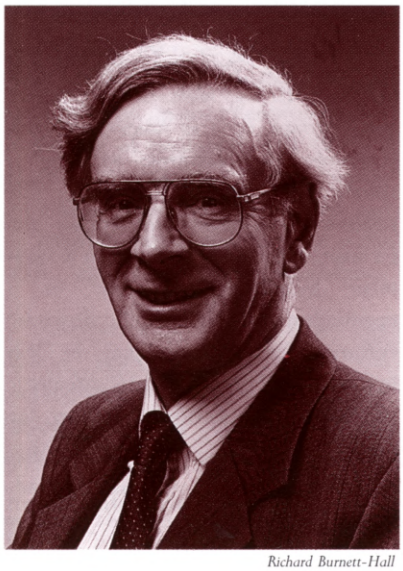
Environmental law

Enforcement through civil proceedings

by Richard Burnett-Hall



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Environmental legislation in the UK consists largely of prohibitions, which may be disapplied by a licensing regime. Non-compliance is almost invariably a criminal offence of strict liability, requiring no mens rea. This approach can be traced back to cases such as *R v Stephens* [1866] LR 1 QB 702 which were based in public nuisance, where likewise mens rea is not relevant. Justification was given by Lord Salmon in *Alphacell v Woodward* [1972] AC 824 where he said:

'The offences created by the [Rivers (Prevention of Pollution) Act 1951] seem to me to be prototypes of offences which 'are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty' ... If this appeal succeeded and it were held to be the law that no conviction could be obtained under the Act of 1951 unless the prosecution could discharge the often impossible onus of proving that the pollution was caused intentionally or negligently, a great deal of pollution would go unpunished and undeterred to the relief of many riparian factory owners. As a result, many rivers which are now filthy would become filthier still and many rivers which are now clean would lose their cleanliness. The legislator no doubt recognised that as a matter of public policy this would be most unfortunate. Hence s. 2(I)(a) which encourages riparian factories not only to take reasonable steps to prevent pollution but to ***do everything possible to ensure that they do not cause it.****'(my emphasis).*

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 *Remedying 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 and conviction. To brand such a person a criminal is bound to be seen by most lay people at least as wholly unreasonable and is liable to bring the law and those who enforce it into disrepute.

If the fines were comparable to those for parking offences (as they used to be, and occasionally still are) this consideration would carry less weight; but with the magistrates now able to impose fines of up to £20,000 and, in many cases, unlimited fines and prison sentences available on convictions on indictment, the anomalous nature of strict liability for such criminal offences cannot be lightly disregarded.

There are also cogent practical grounds for this concern. To avoid convicting a defendant on a criminal charge unfairly, 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.

STRICT LIABILITY

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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 sub-contractors 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, 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 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.

Environment Agency

PENALTIES

The inappropriateness of the criminal law for normal environmental regulation appears also from the sanctions imposed on a convicted defendant. The fine or other penalty is, quite properly in the criminal context, related in large part to the culpability of the defendant. However, this bears no necessary relation whatever to the environmental consequences of the incident, and may throw the burden of these on to the public and fail to give effect to the polluter pays principle. Even to the extent that a fine to some degree reflects the severity of an incident, as a matter of public policy, the defendant cannot seek reimbursement from third parties whose own behaviour may have contributed to it.

CIVIL REMEDY

Continental European jurisdictions, with their separate regimes and courts for 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 most can 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 but 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

on the internet

http://www.environment-agency.gov.uk

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'.

environmental legislation. Thus any legal person may take such proceedings against anyone who is in breach of an environmental regulatory requirement, seeking a penalty and/or an injunction. The defendant may also be a relevant enforcing authority being required to perform its statutory duties. To avoid duplication of proceedings, citizen suits may only be executed after the relevant regulator has been given suitable notice, e.g. of 45 to 60 days, and it has failed to bring any proceedings or to pursue them diligently.

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 breaches of the *Clean Air Act* 1993 which involved payment of a penalty of $11m, an undertaking to carry out a recall and refit of certain cars, which would cost over $25m and to undertake up to $8.75m worth of compensatory measures to off set excessive emissions resulting from the non compliance – a total cost of some $45m.

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.

The use of administrative/civil proceedings therefore in no way signifies a softer regime. 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. A factor the courts take into account, in particular, is whether the defendant has an environmental management system in place and is operating it properly – a strong incentive to have a suitable system.

A feature of particular significance in considering the introduction of civil actions is the ability in formal proceedings to apportion responsibility between two or more people who both may have been involved in a regulatory breach, e.g. a landlord and his tenant, or a principal, his contractor and a sub-contractor. It is of the essence of citizen suits in the US that all relevant parties should be involved, to allow a proper allocation of liabilities. This enables the courts to get away from the sometimes arcane arguments as to just who has 'caused' a pollution incident, and whether the defendant can properly plead *actus novus interveniens* and on how foreseeable any such intervention should be.

In practice, a high proportion of civil suits in the US are settled by way of a consent decree which, as in the General Motors case, may entail not only acceptance of a civil penalty, but also undertakings to carry out certain specific steps to deal with the environmental damage and avoid future damage. Although criminal courts in Britain can make compensation orders, these are of very limited scope in practice, and would be unlikely to include any measures that cannot be readily supervised by the court directly.

BRITISH SOLUTION

What is called for therefore is a tribunal of law, independent of the Environment Agency, but no doubt in practice operating closely alongside it, that would have jurisdiction to impose civil sanctions, including in particular monetary penalties and mandatory orders. To gain both the confidence and the respect of those coming before it and of the public at large, it would have to be under the control of a judge or judges who had both practical experience in environmental law and sufficient technical ability and business experience to determine effective and relevant sanctions. Such a body would also be most appropriate for hearing appeals on the merits from decisions of the Environment Agency which are currently subject either to appeals to the Secretary of State or else only to judicial review.

CIVIL REMEDY

What is called for therefore is a tribunal of law, independent of the Environment Agency, but no doubt in practice operating closely alongside it, that would have jurisdiction to impose civil sanctions, including in particular monetary penalties and mandatory orders.

To establish such a system would require decisions on several contentious issues, such as the joinder of parties and questions of evidence, that cannot be adequately discussed here. Nevertheless, as experience in other jurisdictions clearly shows, the difficulties are not insuperable, and the potential benefits would fully justify the effort to resolve them. In particular, the main impact of these proposed changes would be to make enforcement of environmental regulation through the courts a more constructive process than is the case at present, which leaves it to a convicted defendant to devise, if he can or will, and as he sees fit, improvements to his system of operation.

These changes would not of course make the criminal law redundant; it would continue to be a vital weapon in the environmental regulator's armoury, but would be held in reserve to deal with those who act in wilful disregard of the law, or are otherwise seriously culpable, and not the merely incompetent.

Richard Burnett-Hall
Bristows Cooke & Carpmael