

Recent Developments in Environmental liability

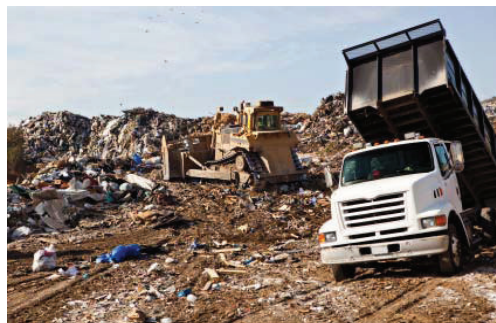
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Introduction: liability

Environmental liability can be broken down into:

- Criminal liability; and
- Civil liability
 - in tort; and
 - under statute



Introduction: liability

- Civil liability can be split into:
 - Liability in tort; and
 - Liability under statute



Introduction: coverage

- Civil Liability
 - Civil liability coverage gap in traditional liability policies has been much publicised in recent years. Note in particular:
 - Statutory liabilities not covered
 - Gradual pollution exclusion
 - “Bartoline extension” and specialist environmental insurance
 - IUA’s “Environmental risks: insured or not?”
- Criminal liability:
 - Fines – not covered
 - Costs – may be covered

Civil liability under statute

- Wallis v Bristol Water plc
 - Wide meaning given to word "likely" in the environmental context



Civil liability under statute

- Environmental Liability Directive
- Progress report of European Commission



Civil liability in tort

- Lambert v Barratt Homes and Rochdale MBC
 - Examined the measured duty of care of landowners
- Lawrence and another v Fen Tigers Ltd and others
 - Approach to assessing damages in nuisance



Civil liability in tort

- Dobson v Thames Water Utilities and the Water Services Regulation Authority
- Nuisance – sewage works
- Judgment pending
- Will examine human rights and damages issues



Civil liability in tort

- Westmill Landfill Group Litigation: Barr & others v Biffa Waste Services Limited
- Worthy of note:
 - Court's approach to this type of common law nuisance case
 - Costs issues



Westmill Landfill Group Litigation

- Biffa had an environmental permit to run a landfill site in Hertfordshire
- Persistent odour issues led to a claim by 152 households in nuisance
- No allegation that Biffa had been negligent or had breached its environmental permit

Westmill Landfill Group Litigation

- The Court's approach:
 - The implication of there having been no allegations of negligence or breach of permit
 - The importance of the "threshold"
 - The lack of contemporaneous records
- Judgment and costs in Biffa's favour
- Claimants' appeal scheduled for 2012



Westmill Landfill Group Litigation

- Cost is a key consideration in this type of case
- Claimants have little or no costs risk:
 - They have a "no win no fee" conditional fee arrangement with their lawyers. If the claimants lose, they owe their lawyers nothing
 - They have after-the-event ("ATE") insurance which pays out if the claimants lose and have to pay the other side's costs
 - Even if they do not have ATE insurance and they lose, claimants know that few defendants will come after them individually for their costs

Westmill Landfill Group Litigation

- Defendants are under considerable costs pressure
- If they lose, they have to pay damages plus:
 - Claimants' lawyers uplifted costs
 - ATE insurance premium
 - Defendant's lawyers' costs
- If they win, they will be awarded their costs
 - But these may be difficult to recover if there is no/insufficient ATE insurance

Criminal liability: sentencing

- R v Thames Water Utilities Ltd
 - Sentencing for environmental crimes in circumstances where the defendant has already made significant pledges of compensation



Criminal liability: civil sanctions

- Civil sanctions were added to Environment Agency's existing armoury of non compliance enforcement options at the start of 2011
- In addition to any specific clean-up powers, the Agency has traditionally had four enforcement options, namely:
 - prosecution;
 - formal caution;
 - warning; or
 - doing nothing at all

Criminal liability: civil sanctions

- Six civil sanctions are available to the Agency
 - Fixed monetary penalties
 - Variable monetary penalties
 - Compliance notices
 - Restoration notices
 - Stop notices
 - Enforcement undertakings
- Restoration notices and enforcement undertakings are of particular interest to insurers

Criminal liability: civil sanctions

- New enforcement guidance has been published
- It explains which civil sanctions the Agency can use and under what circumstances it might use them
- Holdup in the use of civil sanctions?

