

# Water pollution – criminal and civil liability

Karl Jackson

Water pollution is an area causing much concern at the moment. In this article, Karl Jackson discusses the current law regarding criminal and civil liability for the pollution of water.

## Criminal liability

The law concerning water pollution is now contained primarily in the Water Resources Act 1991 and the Water Industry Act 1991. In simplified terms, the Water Resources Act contains the law regarding the pollution of 'controlled waters,' which are essentially rivers, streams, groundwaters and coastal waters. The Water Industry Act contains the law regarding discharge into sewers.

The Water Resources Act is policed by the National Rivers Authority (NRA) and the Water Industry Act is policed by the various sewerage undertakers – usually the various regional water companies.

## *The Water Resources Act 1991*

By virtue of section 85 of this Act, it is a criminal offence to cause or knowingly permit any poisonous, noxious or polluting matter or any solid waste matter to enter any controlled waters. The section goes on to provide a series of inter-related offences regarding the discharge of trade effluent and sewage effluent into any controlled waters or drains or sewers in contravention of a relevant prohibition.

Section 85 can be divided into two distinct offences that of 'causing' pollution and that of 'knowingly permitting' pollution. Recent cases have shown us that 'causing' requires a positive act by the defendant and inactivity alone will not amount to 'causing' pollution whereas 'knowingly permitting' usually does come about as a result of inaction, inactivity or turning a blind eye to the pollution.

The distinction between the two is neatly shown in two recent cases: *Wychavon District Council vs National Rivers Authority* (unreported 31 July, 1992) and *National Rivers Authority vs Welsh Development Agency* [1993] EGCS 160. In the former case, the council was found not to have 'caused' pollution when sewage effluent from a hospital had entered a storm overflow and subsequently polluted the river Avon. It was the council's

responsibility only to check and maintain the overflow and the court found that, since it had not committed a deliberate or positive act to cause the pollution, it could not be liable. In the latter case, the Welsh Development Agency had built an industrial estate and had laid the drainage system to it. It had let the individual units on the estate and following the lettings one or more of the tenants had caused pollution to enter a nearby stream. It was held, following the *Wychavon* case, that the Development Agency had not 'caused' the pollution since it had not brought about the pollution by its own deliberate or positive act; all it had done had been to build the drainage system. In both cases, if the defendants had been aware that pollution was entering the watercourse and simply allowed it to continue, commentators have indicated that they would probably have been guilty under the 'knowingly permitting' arm of Section 85. Perhaps the lesson is to check carefully a summons issued by the NRA to ensure that it is brought under the correct part of section 85.

Section 85 offences are strict liability offences. This means that it is not incumbent upon the prosecutor to prove criminal intention or negligence. As long as the activity which caused the pollution was intentional, the prosecutor need only prove a causal link between that activity and the discharge which caused the pollution. This means that all the prosecuting authorities need to show is that the pollution emanating from your premises was as a direct result of your working practices.

There are a number of statutory defences to section 85, the most common being where a polluter has a consent from the NRA, HMIP or other regulatory authority to discharge the polluting matter into the waters concerned.

Other defences may also include the act of a third party, such as a vandal, causing the offence. However, the recent case of

*National Rivers Authority vs Wright Engineering Co. Ltd* has shown that, if vandalism was reasonably foreseeable, this could be taken into account by the court in deciding whether or not a company should be liable. An act of God, or a discharge made in an emergency in order to prevent danger to life or health, are also defences.

If you wish to discharge effluent into controlled waters (and your process is not subject to Integrated Pollution Control (IPC) under Part I of the Environmental Protection Act 1990) you must obtain a discharge consent from the NRA. If your process is subject to IPC control, authorisation will come from HMIP.

## *Water Industry Act 1991 (WIA)*

More commonly, the discharge of trade effluent will be to sewer and, in this case, a trade effluent consent will be required. Since 1989 it has been the responsibility of the sewerage undertaker (which is predominately also the private water supplier for the area in question) to regulate discharges to sewers.

Section 118 of the WIA provides that any discharge of trade effluent from trade premises without a trade effluent consent or other such authorisation is a criminal offence which on summary conviction is currently liable to a fine not exceeding £20 000, and on indictment to an unlimited fine.

Trade effluent is defined in section 141 of the WIA as meaning 'any liquid, either with or without particles of matter in suspension in the liquid, which is wholly or partly produced in the course of any trade or industry carried on at trade premises...' and trade premises means 'any premises used or intended to be used for carrying on any trade or industry.'

It is now commonplace for existing consents to be varied unilaterally by the sewerage undertakers to comply with their own revised consent levels from their treatment works set by the NRA; no doubt

this will continue for some time. It should be remembered that, save in exceptional circumstances, a consent can only be varied two years after being issued or previously varied. There is a right of appeal to the director general of water services against such variation. As with discharge consents, a fee is levied in respect of discharges to sewers.

#### *Directors' liability*

It is worth noting the provisions of section 217 of the Water Resources Act 1991 and section 210 of the Water Industry Act 1991 which are in identical terms:

'Where an offence under any provision of this Act committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect or on the part of any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity then he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.'

This means that if someone in a position of responsibility within the polluting company either knew about the pollution and agreed to it, or turned a blind eye to it or committed some act or made some omission that he ought to have done or not done which led to the pollution, then that individual is liable to be fined or imprisoned. Directors and officers insurance may assist but it will not prevent the individual from being imprisoned or having to pay the fine.

#### *Civil liability*

The law regarding the pollution of a neighbour's property and, in particular, pollution of water, has recently been in the headlines in what has been described as the most important environmental case of the last decade – the Cambridge Water Company case (Cambridge Water Co. Ltd vs Eastern Counties Leather plc). The facts of this case are well known; until 1976 Eastern Counties Leather used perchloroethene (PCE) for degreasing pelts in its tannery process. In 1976, Cambridge Water bought a nearby borehole for abstraction of water for public supply. As a result of Eastern Counties' working practice, PCE was spilt on a regular basis and eventually seeped into the aquifer beneath the works and entered the borehole. However, water quality standards at the time of the spillages were such that the level of solvents within the borehole was acceptable. Four years after the last spillage at the tannery occurred, the EC issued new water quality standards in the form of a directive. When this directive was adopted it was found that

the level of solvents within the borehole was unacceptable and the water abstracted could no longer be used for human consumption. As a result of this, the water company had to cease abstracting water from the borehole, purchase another borehole and carry out extensive works in making the new borehole suitable for water abstraction. The company sought to recover their costs from the tannery.

In the High Court, claims in nuisance and negligence were rejected because it was said that in 1976 when the last pollution incident arose, the damage caused was not reasonably foreseeable.

Nuisance has been neatly summarised as 'the unreasonable interference with the reasonable use and enjoyment of land'. In this case it was the use of the borehole on the land owned by Cambridge Water.

Negligence is often difficult to prove since the plaintiff must show that the defendant polluter owed him a duty of care and had breached that duty and that, as a result of the breach, the plaintiff had suffered damage. Unlike nuisance, where liability is strict, negligence is fault-based and often difficult to prove.

The High Court also considered the rule in *Rylands vs Fletcher* – that a person who brings onto his land anything likely to do mischief must be liable for the damage caused by the natural consequences of its escape, decided (following previous rulings) that it would not apply as the substance brought on to the land had to be a non-natural user of that land. In this case, the storage of solvents in an industrial area was a natural use of the land.

The Court of Appeal overturned the High Court decision by following the 1885 case of *Ballard vs Tomlinson* which imposed strict liability for any interference with a natural right incident to the ownership of land. Here, the natural right incident to the ownership of the borehole was the abstraction of unpolluted water and in interfering with that right by polluting it the defendant was strictly liable in nuisance.

The decision by the Court of Appeal was criticised by legal commentators because it failed to take into account the principle of remoteness of damage. It was felt that one should only be liable for damage which could be reasonably foreseen.

The House of Lords in its judgment on 9 December 1993 overturned the Court of Appeal decision and ruled that Eastern Counties Leather could not have reasonably foreseen, at the time of the spillages, the damage to the borehole which was caused. This decision effectively prevents the introduction of retrospective strict liability into English common law.

Interestingly, the House of Lords then went on to examine the rule in *Rylands vs Fletcher*. It considered that the use and storage of solvents on land, albeit within an industrial community, did not render that use natural or ordinary to thus avoid liability under *Rylands vs Fletcher*. The Lords confirmed that as with nuisance and negligence the same test of remoteness of damage should apply.

The House of Lords went on to state that, where certain industries were of a particularly high risk in respect of pollution, it would be more appropriate for parliament to impose strict liability rather than the courts. This issue is particularly relevant at the moment because of the current EU Green Paper which appears to be in favour of imposing an EU-wide no-fault/strict-liability regime. This is to be combined with a compensation fund where the polluter is unable to pay or cannot be found and the funds for which could be created by way of a levy on businesses.

Although industry has welcomed the House of Lords' decision, the question many businesses must start asking themselves is, 'At what point and on what date did damage caused by pollution emanating from their processes, and in particular (as in this case), seepage, become reasonably foreseeable?' The decision is certainly not a polluter's charter.

There is no doubt that public tolerance of pollution is a great deal less than it was a few years ago. The result of this is an increased amount of legislation, more vigilant monitoring of watercourses and an increasing amount of civil litigation for damage caused by pollution. Many businesses have carried out or are in the process of carrying out environmental compliance audits and, in some cases, drainage audits, and this is strongly recommended as it may identify potential problems at an early stage, preventing either a fine or a civil claim in the future.

The result of the consultation on the Green Paper may soon be known – we must wait to see whether the EU produces a draft directive introducing a European wide regime of strict liability coupled with a compensation fund drawn from a levy on industry.

There is no doubt that the next year promises to be an extremely interesting one.

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