e - law

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UKELA
UK ENVIRONMENTAL LAW ASSOCIATION

UK REGISTER OF EXPERT WITNESSES

UKELA has linked up with the publishers of the UK Register of Expert Witnesses to offer free access to the next edition of the Register.

This offer is open to all UKELA members but you need to register an interest in order to secure your copy.

The UK Register of Expert Witnesses is the UK's largest vetted expert witness resource. It currently lists around 3,000 UK-based expert witnesses, all of whom have been recommended by lawyers. The directory is published on paper, on CD-ROM and on-line, and edition 17 was due out in May 2004. The publishers are keen to provide their experts with as much exposure as possible and therefore this product is free of charge to UKELA members.

If you would like to receive a copy please contact (Vicki.elcoate@ntlworld.com or write to Vicki Elcoate, The Brambles, Cliftonville, Dorking, RH4 2JF).

Please state your preference of paper copy, CD or online and she will arrange for you to receive one. In your request please include your name and address and email address if requesting on line access.

E-LIBRARY

A study commissioned by UKELA on access to information on environmental law has concluded that there is a serious lack of resources available to the general public.

The major websites that offer detailed information on environmental law (eg NetRegs) are too specialised for the public and not written in plain English. Others, which are aimed at the public (eg Citizens Advice Bureau) do not provide enough information to answer even basic questions, but redirect enquiries elsewhere.

The study carried out by the Centre for Business Relationships, Accountability, Sustainability and Society, at Cardiff University, concluded that there was an urgent need for UKELA's proposed e-library on environmental law.

"Scoping of the existing market confirms that there is a need for an e-library of the type proposed that would provide ordinary citizens in the UK with access to qualitative environmental law information", the study says.

It is unclear otherwise how the objectives of the Aarhus Convention on access to environmental law information can be met in the UK.

The study consulted other organisations (including the Environmental Law Foundation, Friends of the Earth, Black Environment Network and Women's Environmental Network), which deal with public enquiries about environmental matters. It concluded: "all consultees agreed that an environmental law library, which was free and accessible to the public, did not exist and was

required. Information on environmental law would assist citizens in understanding their rights and obligations and therefore would encourage public participation in the democratic process".

UKELA is now working with BRASS to finalise the budget and develop a fundraising strategy for setting up the e-library. Funding partners are sought who can help take the project forward.

A pilot subject for the proposed e-library has already been developed to see how it would work in practice. The chosen topic was noise and was well received by those who had the opportunity to test it out.

TRAINING SESSION

UKELA held a successful masterclass, "Update on Environmental Law" in partnership with the Association of Personal Injury Lawyers; 45 members of both organisations booked on to the afternoon event, with expert speakers on a range of topics. Feedback on the event is being analysed to decide if further events should be held. Initial reactions indicate that the event was very useful and attendees were pleased with the quality of speakers. Further events are being considered and any suggestions for future topics for training would be welcomed (Vicki.elcoate@ntlworld.com).

WEB-SITE

The new look UKELA website is now on line at www.ukela.org. It has a similar structure to the old site with special sections on regional groups and working parties, events and media. However the design is much clearer and brighter with less scrolling and less text. There are also photos, the choice of which caused some lively debate within the design team. Keep an eye on www.ukela.org over the coming weeks and do let us know what you think as the new site develops. We are also interested to know if you think discussion areas for members would be helpful. This does requires some work to moderate the contents of the discussion areas and will only go ahead if there is enough demand for it.

NORTHERN IRELAND

A UKELA report into environmental regulation in Northern Ireland is pressing for urgent reform and the setting up of an independent regulatory body. UKELA is recommending a package of reforms to address a legacy of environmental failings which civil servants are struggling to put right. The UK already faces costly fines through the European courts for failing to enforce environmental legislation in Northern Ireland. The report can be accessed at www.ukela.org and comments are welcome.

The report has been prepared in parallel, but separately from, a report by Professor Richard Macrory, "Transparency and Trust, Reshaping Environmental Governance in Northern Ireland". This report was commissioned by a group of NGOs in Northern Ireland and is now out for consultation. UKELA members can access his report at www.epconsultni.org.uk and email comments by June 30th to respond@epconsultni.org.uk.

"Northern Ireland has a uniquely serious problem of weak environmental regulation and enforcement", says UKELA Chairman Andrew Wiseman who took part in a seminar in Belfast on the issues in early May. "It is only now beginning to address what was done in the rest of the UK in the 1970s and 1980s. Even so, the actions now being taken are largely limited to a programme of some legislative reform or 'catch up' with the rest of the UK. The real issues of regulation and enforcement and the structures needed are still being ignored by government".

UKELA is calling for an independent environment agency to be established, with the resources and political commitment to support it and provide new leadership. This would be accompanied by a skills exchange with similar bodies in England and Wales and Scotland and better promotion of environmental laws.

"A new sense of priority for the environment in Northern Ireland is urgently required and a new form of environmental governance must be devised" said Andrew Wiseman. "While there is strong demand within Northern Ireland for an independent environmental agency, structural reforms alone will fail if the cultural attitudes continue to be ignored. Northern Ireland should be able to trade on a clean and green environment, which will attract investment and tourism, but years of The Troubles and economic problems have meant the environment has been a low priority".

Environmental fines – all small change?

By Martha Grekos, Advisory and Prosecuting Counsel, Environment Agency[1]

This article has been written for the Journal of Planning and Environmental law and is due to be published shortly. Sweet & Maxwell have given kind permission to have this published in e-law.

Introduction

Recently, there has been a growing body of research regarding fines and sentencing for environmental offences in England and Wales. These studies are contributing to a fundamental rethink about the structures and processes of environmental law in Britain. For instance, recent Defra-sponsored studies have considered the case for an environmental tribunal; proposals for civil fines for environmental offences; and the adequacy of current arrangements for access to justice[2] in conjunction with smaller scale reform to the criminal regime.

We should have as one of our goals to increase recognition of environmental crime as a threat to public safety and to encourage, support and facilitate the enforcement of environmental legislation and access to environmental justice. Hence, striving for the overall objective of preventing further damage to the environment. However, before we all "jump on the bandwagon" that we need all this reform, which might be a good thing, we need to look at the achievements

[1] The views expressed in this article are the author's views and are not necessarily those held by the Environment Agency. Any comments are welcomed: martha.grekos@environment-agency.gov.uk

[2] See "Environmental Justice?" A draft report by the Environmental Justice Project: ELF; WWF; Leigh Day & Co 2003; "Using the Law: Barriers and Opportunities for Environmental Justice", Maria Adebowale 2003; "Modernising Environmental Justice: regulation and the role of an environmental tribunal", Richard Macrory and Michael Woods, UCL 2003.

that have taken place and are taking place. We cannot dismiss the changes that are slowly unfolding, or what needs to be done to 'boost' what is happening within the system that we currently have and work with. After all, "Rome was not built in a day".

The final Environmental Justice Report published by the Environmental Justice Project in March 2004[3] correctly sets out that: "In contrast to the civil law system[4], respondents and workshop participants *do* believe the existing criminal justice framework is one within which environmental justice can be obtained. We do not, therefore, recommend any substantial change to present structures within the criminal system."[5]

"Trends in Environmental Sentencing"

There is no centralised data for sentencing and fines of environmental offences. However, some bodies do keep their own record. For instance, the Environment Agency successfully gathers and keeps records on the number of prosecutions, cautions, warning letters, enforcement notices, total fines, total costs imposed (not the actual costs paid), total successful prosecutions and custodial sentences etc.[6] However, others prosecuting authorities do not.

On behalf of Defra, consultants ERM carried out a study to provide evidence to inform possible action in order to improve the consistency and proportionality of sentencing.[7] The research gathered information on fines and sentences in England and Wales between 1999 and 2002. The areas that were covered were: industrial pollution control, water pollution, waste management, statutory nuisances, contaminated land, hazardous substances and installation and wildlife offences. ERM identified 6,283 offences in the four-year period, and that over 90% of the prosecutions were brought by the Environment Agency.

ERM concluded that the total number of offences had increased steadily. The Crown Courts ruled on 48 offences in 1999 rising to 252 in 2002, while the number before Magistrates rose from 798 to 1,550. Custodial sentences were imposed for just 1.2% of offences, whilst 68% resulted in fines. More than 80% of offences involving companies resulted in a fine.[8]

In the Magistrates Court, ERM found a general increase in the average fine per offence: from £1,979 in 1999 to £2,730 in 2002, but well below the £20,000 maximum available for most offences.[9] Average fines for pollution offences were higher and rose from about £2,400 to almost £3,000 over the four years. The

[3] Environmental Justice Report published by the Environmental Justice Project, March 2004, ELF, Leigh, Day & Co, WWF. The EJP's executive summary and recommendations are set out at pages 14-18 of the final report. Part III of the final report (pages 50-92) focus on their research into criminal law.

[4] 97% of leading practitioners and NGOs questioned in England and Wales believe the civil law system fails to provide environmental justice. The most significant single barrier is perceived to be the application of the current rules on costs, followed by a lack of judicial understanding of, and/or sympathy with, environmental issues, the limited scope of judicial review proceedings and an inability to obtain interim (injunctive) relief. Many respondents point out that the current regime precludes the UK from compliance with the Aarhus Convention and by implication, social exclusion from the Courts, and believe that a review of the current costs regime for public interest cases lies at the very heart of achieving access to environmental justice.

[5] Page 14.

[6] NED - OPM Reports. The Environment Agency also publishes reports such as "Spotlight on Business Environmental Performance for 2001 – 2003".

[7] "Trends in Environmental Sentencing": Claire Dupont and Dr Paul Zakkour, Environmental Resources Management Ltd, Defra 2003.

[8] It has to be borne in mind that community service cannot be given to a company. Community service can only be applied against an individual. Companies can only be fined.

[9] The majority of cases which constitute these average fines tend to be fly-tipping cases. There is high amenity impact, but low environmental impact. It has to be borne in mind that even though these might be fairly trivial offences, prosecutions are brought for deterrence purposes. Construction and demolition waste forms part of these prosecutions, too.

study further stated that Magistrates have a very low level of exposure to environmental offences and that the Magistrates Guidelines[10] may have come too late to have a clear impact in the period covered by the survey.[11]

ERM found that the Crown Courts were imposing more lenient sentences than a few years ago. The average fine per offence dropped sharply from around £8,500 in 1999 and 2000 to £4,500-5,000 in the following two years. The number of custodial sentences also fell sharply after a peak in 2000.[12] ERM suggest that the Magistrates may have been referring a greater number of less serious cases to the higher courts.[13] ERM suggest that guidance on sentencing for environmental offences could be developed for the Crown Court.

In addition, one significant finding was that the average fine varied by a factor of three between the nine regions[14] and that the average costs awarded were £1,600 per offence.[15]

Underlying issues

The ERM study tends to suggest that insufficient discretion is being used in imposing deterrent fines which could lead to greater environmental protection. However, it needs to be borne in mind that there are several underlying issues that have not been addressed and it is not just the issuing of low fines that results in a failure to deter environmental offenders. A reason why the scale and nature of the crime does not always correspond to the seriousness of the crime is that environmental crime is not regarded as a 'real' crime. Participants in the Criminal Law Working Group for the Environmental Justice Project noted that "the Crown Court appears to lack interest and conviction in environmental matters. This was felt to be due to a lack of relevant education, training and experience and issues such as fly-tipping lack the "glamour" of Grievous Bodily Harm and, accordingly, do not attract the same degree of respect".[16] Also, the legislation in place does not legislate for the seriousness of the environmental crime. For example, the dredging of a river, which has enormous environmental consequences, is only enforced through Land Drainage Byelaws, which is a summary offence only.[17] In addition, not all offenders

[10] Sentencing guidelines for Magistrates were issued in 2001 and reinforced by guidance from the Magistrates Association in late 2002.

[11] ERM conducted a limited case study at one Magistrates' court in the south-east of England which suggests that the guidelines are not fully accepted. Fewer than a quarter of the 32 Magistrates surveyed appeared reasonably aware of the guidelines - and more than one third were unaware of them. Such cases typically accounted for just half a dozen of the 3,500 cases heard in the case study area each year - which is covered by 149 Magistrates.

[12] There are only a tiny handful of imprisonments each year, therefore any slight rise or slight fall will have a huge effect on statistics.

[13] It has to be borne in mind that it is more often the case that the defendant has the right to elect trial in the Crown Court.

[14] The highest average fines were imposed in London and South East England, at £4,800 and £3,600, respectively. In contrast, fines in Wales and the North East averaged just £1,650 and £2,000 - though these two areas accounted for over one-third of all prosecutions. In Wales, which accounted for a quarter of the 692 cases brought to Crown Court, the average fine was £1,874. In contrast, the 18 offences heard in London's Crown Courts attracted an average fine of £52,167. In the West Midlands, the Crown Courts imposed a fine for only 24% of offences - although offenders in the region had a relatively high chance, compared to other regions, of ending up with a custodial sentence.

[15] Higher costs were awarded in the East Midlands, but the figure fell to £1,000 or less in the South East and South West. Magistrates awarded costs in a fairly constant 72-74% of cases. In the Crown Court, while costs were awarded in 81% of cases in 1999, the figure fell to just 42% in 2002.

[16] Page 79, paragraph 178.

[17] A summary offence is one that has to be brought within 6 months of commission of the offence and there is usually a maximum fine of £5,000 (triable only in Magistrates' Court), in contrast to triable either way offences (in either in the Magistrates' Court or in the Crown Court) which can be brought any time and there is a maximum fine of £20,000 in the Magistrates' Court (unlimited fine and/or imprisonment in the Crown Court).

consider themselves as 'criminals' e.g. larger companies and for licence breaches.[18] Even the UCL report concluded that some environmental offences did not fit well with the ideology of criminal prosecution and therefore made courts "more reluctant to impose a sentence or fine commensurate with the environmental damage caused". Environmental criminal offences should not be considered only in terms of efficiency or utilitarian cost-benefit analysis. Criminal provisions express society's moral condemnation of pollution. There is therefore a need to elevate further the status of environmental protection and to understand the seriousness of environmental degradation. Better education is needed.[19] For example, the EA has stated that its statutory powers could usefully be augmented by various ways and benefits could come about by various amendments to legislation and guidelines.[20]

Antonio Vercher Noguera has quite rightly pointed out that "the penal protection of the environment is relatively new. This is completely logical since environmental law itself is basically 'virgin law', unprecedented in history. In fact, as has been observed, most environmental legislation has emerged in these last decades. In addition, environmental science, the study of ecology, environmental systems, zoology, conservation etc. and the interconnection of these studies is a new 'science'. This is all a product of the latter part of the 20th century. Besides, environmental matters constitute a specialised area of science which has its own terminology, its own technical concepts, and so on. This means that the judiciary will have to deal with some special aspects with which it will not be familiar."[21] Training for the Magistrates' has been instigated since the introduction of the Magistrates' Association Guidelines on Sentencing (May 2001). Health and Safety and Environmental prosecutors have since then brought these guidelines to the attention of even more Magistrates by literally handing up copies or guiding Magistrates and their legal advisors/clerks through the principles. The Environment Agency, for example, even regularly produces "friskies schedules", that is a schedule of aggravating features as per *R v Friskies Pet Care*[22], *R v F Howe and Son (Engineers) Ltd*[23] and the Magistrates' Court Sentencing Guidelines, to assist Magistrates with fining and sentencing. These sentencing guidelines have been helpful and a strong message has been sent out as it usage has increased since 2001. The final Environmental Justice Report published by the Environmental Justice Project in March 2004, states at page 82, paragraph 186, that despite *R v F Howe and Son (Engineers) Ltd* being an important step forward: "… it is perhaps unfortunate that the Court of Appeal did not use *Environment Agency v Milford Heaven Port Authority* (2000) 2 Cr App R(S) 423 as an opportunity to provide more prescriptive guidance on how the Courts should assess financial penalties. The EA has hoped the Court of Appeal would address precisely where the level of fine should be pitched i.e. on profitability or turnover – and what would be a reasonable bracket of financial penalty for the Court to consider. Although this has been done for "mainstream crime", *Howe* did not go beyond the sentencing of cases on an individual basis to establish any sort of tariff. The EA believes that this has left

[18] As Hazlitt argued: "Corporate bodies are more corrupt and profligate than individuals, because they have more power to do mischief and are less amenable to disgrace or punishment. They feel neither shame, remorse, gratitude or good will…" 'Table Talk', at 254.
[19] As Heine indicated: "… it may appear as a necessity, even a duty for government to provide the criminal law with adequate instruments for the protection of the environment". G Heine, 'Environmental Protection and Criminal Law' in 'Frontiers of Environmental Law' (Owen Lomas, editor), at 76-77.
[20] See pages 68-69 of the Environmental Justice Report published by the Environmental Justice Project, March 2004, ELF, Leigh, Day & Co, WWF.
[21] 'Criminal Law and Environmental Protection', [2002] 3 Env Liability 107, at 110.
[22] (2000) 2 CAR(S) 401.
[23] [1999] 2 AII ER

Magistrates somewhat at a loss to the correct entry points into the sentencing matrix [Navarro, R. and Stott D. (2002) A Brief Comment: Sanctions for Pollution JEL Vol 14/3]." Training for Magistrates has been offered by the Environment Agency since the issuing of the Magistrates' Association toolkit on sentencing, "Costing the Earth 2002", which should also assist in a greater understanding of the sentences and the seriousness of environmental crime.[24] Further education is planned, such as issues surrounding awarding prosecuting costs.

The Environment Agency, like the final Environmental Justice Report published by the Environmental Justice Project in March 2004, recommends that tariff guidelines (as opposed to Guidance) would be helpful.[25] Two recent cases reinforce the case for guidelines, though it seems the opportunity to pick up the recommendations has been lost. In *R v Yorkshire Water Services Ltd*[26], the Court of Appeal found that a fine of £119,000 for committing four breaches of section 70 of the Water Industry Act 1991 was too high and substituted it with a total fine of £80,000. The Court of Appeal set out a number of considerations that the sentencing court ought to have in mind, rather than endorsing the suggestion for tariff guidelines. These included: (a) the degree of culpability involved in the commission of such offences of relatively strict though not absolute liability; (b) the damage done in a spatial and temporal ambit and its effects; (c) the offender's previous record, including failure to heed the warnings; (d) that a balance had to be struck between a fitting penalty and the effect of that penalty on an already underfunded organisation; (e) the offender's attitude and performance after the events, including the plea; and (f) that it should determine for any one incident rather than add up the manifestations of that incident represented by the court in that indictment,.

Furthermore, the Court of Appeal in *R v Anglian Water Services Ltd*[27] has recently endorsed the use of the Magistrates' Association Guidelines on Sentencing, which is a step forward. The Court of Appeal found that a fine of £200,000, imposed by Basildon Crown Court, in a case involving a serious local case of water pollution (that was caused by the discharge of sewage effluent into a river) was manifestly excessive. The Court of Appeal accordingly reduced the fine to £60,000. In January 2002, Roy Hart brought a private prosecution against Anglian Water Services (AWS) when he discovered sewage in the River Crouch. Despite alerting AWS, it took 4 hours for them to shut off the flow from the works. In the meantime, over two kilometres of the river had become polluted and caused serious damage to fish and wildlife. The Court of Appeal found that, in the circumstances, a fail-safe system should have been in place to deal with such polluting events. However, in reducing the fine, the Court of Appeal took into account the prompt remedial action by AWS, their guilty plea and the steps taken by AWS to prevent recurrence of such an incident. The Court of Appeal confirmed that the number of AWS's prior convictions[28] was not of great significance in light of the scale of AWS's operation. The Environment Agency asked the Court of Appeal to establish a sentencing tariff system based on the Environment Agency's common incident classification system for prosecuting pollution

[24] Some Magistrates' benches take a traditional view and do not wish to be trained by prosecuting authorities. Others, however, welcome such training. The training is not obligatory. In fairness to the Magistrates, at the National Association of Magistrates annual general meeting in 2002, they invited all the environmental enforcement groups to take part in presentations if they so wished. Four to five different bodies took part in the presentation to the Magistrates. Even the local Magistrates associations have invited presentations from prosecuting authorities. The Environment Agency has published its comments in the Magistrates' Association local newsletters, too.
[25] Page 14.
[26] (2002) Env L.R. 18.
[27] [2003] EWCA Crim 2243.
[28] 65 including 64 for sewage discharge.

offences. The Court of Appeal found this inappropriate, as each case should be considered on its own facts. However, the Court of Appeal did endorse the use of the Magistrates Association Guidelines on Sentencing, which they found helpful. Despite reducing the level of the fine in this particular case, they specifically referred to the guideline which calls for Magistrates to accustom themselves, in appropriate cases, to imposing far greater penalties than have generally been imposed in the past. The final Environmental Justice Report published by the Environmental Justice Project in March 2004 states that: "The EA now believes it is unlikely that any tariffs or sentencing guidelines will be forthcoming and, accordingly, sentencing will be dependent very much on the expertise of the sentencing judge or bench".[29]

It will take time for the education and the training to percolate through to the Magistrates generally. The guidance is still at its 'teething' stage in order for it to have made any huge impact on sentencing, though changes are being noted and as such these changes are trickling through.[30] The ERM mainly took into account figures before the introduction of the Magistrates' Guidelines on Sentencing (pre 2001), which is now having an affect. Furthermore, the regions the ERM looked at are not the same as the EA's regions. This was pointed out by the final Environmental Justice Report published by the Environmental Justice Project in March 2004: "…we would point out that two of our respondents highlighted differences in the data obtained from the Department of Constitutional Affairs and their own datasets. The Environment Agency (EA) noted the DCA boundaries did not accord with its Regions, which made comparisons problematic. There was also a discrepancy in the databasets in that the EA seems to record prosecutions and the DCA's data seems to concern charges. Similarly, the CIEH noted a significant difference with respect to data on the conviction rates for statutory nuisance, which significantly skewed the findings of the statistical analysis. Accordingly, the EJP focused its attention on the analysis of data from the EA's National Enforcement Database (NED) and data on district and unitary authorities obtained directly from the authorities themselves and the CIEH."[31] In addition, as the Environmental Justice Report published by the Environmental Justice Project, March 2004, quite rightly states: "…we accept that it is not always appropriate to make comparisons between average fines – as they may vary for valid reasons. Fines take into account many more factors than culpability and environmental impact including, in particular, the defendant's ability to pay. For example, the Environment Agency reports the average fine for waste offences in the region of £600, whereas the average fine for water related offences is £6,485 because prosecutions involving water quality are often progressed against corporate offenders."[32]

[29] Page 83, paragraph 188.

[30] Example of cases: A Surrey traveller was fined £31,500 on 20 February 2004 at Woking Magistrates' Court for unconsented works at Chobham field which is within the Addlestone Bourne flood plain. The Addlestone Bourne flood plain is a water meadow, which has official conservatory status due to rare botany. Tony Doherty, of Hunters Grove, Harrow, Middlesex failed to appear at court and was found guilty in his absence of seven counts for his part in the unconsented works at the field in Pennypot Lane near Chobham, Surrey. The prosecution was brought under the local Land Drainage Byelaws and the Water Resources Act 1991 and he was also ordered to pay costs of £1,217.50. Thames Water Utilities Ltd was fined £8,000 on 20th February 2004 after pleading guilty at Hemel Hempstead Magistrates' Court to polluting a Watford river and stream with sewage effluent killing a small number of fish. They were fined £8,000 and ordered to pay £2,010 in costs under section 85(3)(a) of the Water Resources Act 1991.

[31] Page 55, paragraph 117.

[32] Page 81, paragraph 184.

As Magistrates might only see an environmental case every 7 years[33], the problem is more lack of experience rather than education and training. Some Magistrates might not have come across environmental crimes as often as they do with other crimes or applications (such as theft, bail applications etc) and some are not used to dealing with a £20,000 maximum fine. Nonetheless, there has been a 'cultural change' as the Magistrates that have been trained and have had experience of environmental cases being heard before them have been keen and interested in environmental guidance.[34] The Environment Agency, for example, gives the court as much information on the environmental impact as possible.[35] A better understanding of environmental law cases will take a bit of time. Thus, even though the courts might be averse to setting specific sentencing levels for particular environmental crimes (and they seem to be reducing excessive fines), where appropriate, the Magistrates are being urged to take a harder line on sentencing in environmental cases generally. This should continue and these Guidelines should be expanded to include environmental offences currently not covered and should specifically be stated to apply to all individuals and not just companies. Lastly, the Guidelines should be adapted for use by the Crown Courts (*despite R v Anglian Water Services* which specifically endorses the Guidelines).[36] The Environment Agency has even called for individual Magistrates and District Judges to be nominated to handle environmental cases. The same approach could be applied to judges, as only 10% of the Environment Agency's cases are dealt with by the Crown Court. There would be no cost implications, and the number of people needing training would be limited.[37] It is also of interest to note that there has been a call, for places like London, to have one dedicated location in order to transfer all non-CPS prosecutions – in effect forming a specialist environmental court building out of administrative expediency.

Even with the training and the attainment of experience, a severe problem that the Environment Agency, and other prosecutors, faces is that many individuals as well as commercial companies tend to plea impecuniosity before the Magistrates. Therefore even if the Magistrates can fine heavily for the environmental crime, they have to reduce the fine substantially as a result of the plea which means that many defendants end up paying a minimal weekly/monthly fine (e.g.

[33] There are roughly 700-800 cases per year to be dealt with by 28,000 Magistrates, so that on average a Magistrate hears an environmental case only once every seven years.

[34] The Environmental Justice Report published by the Environmental Justice Project, March 2004, ELF, states as follows at page 77, paragraph 172: " The 90%-100%, conviction rates for offences prosecuted by the Environment Agency are high. The EA believes there are a number of reasons why this may be so, including enhanced training of its officers (leading to better evidence) and lawyer involvement in the early stages of investigations to provide advice on admissibility and evidential issues. Detailed licences for radioactive substances and process industry regulation enable prosecution to be undertaken for most serious regulatory breaches, and there is strict liability with regard to the majority of environmental offences. Furthermore, due to the relatively low number of crimes of this nature encountered by the Courts, the EA has made efforts to educate Magistrates – and, as a result, believes that there is a growing understanding of environmental concepts such as the "precautionary principle", and the "polluters pays". Reference was made to training undertaken by the Magistrates' Association and the contribution made by "Costing the Earth – Guidance for Sentencers". However, in this respect the EA distinguishes between the Magistrates' and Crown Courts, noting that Crown Court judges encounter even fewer cases, because of enhanced statutory maxima in the Magistrates' Courts, which tends to keep cases in the Magistrates' Courts. Furthermore, the EA notes that judges routinely deal with serious criminal offences of a very different nature and have not enjoyed environmental training – which may take it difficult for them to sentence such offenders."

[35] E.g. In a prosecution brought by the Environment Agency under section 85 of the Water Resources Act 1991, Gatwick Airport Ltd – a subsidiary of airport operators BAA plc – pleaded guilty before Haywarths Heath Magistrates Court on 31st October 2003 to polluting the Crawters Brook and River Mole with a detergent used to clean and remove oil, grease and rubber build-up from the runway. The incident had killed several thousand fish in September 2002. The Magistrates considered the case serious enough to refer sentencing to the Crown Court. Lewes Crown Court fined Gatwick Airport Ltd £30,000 with £3,458 in costs.

[36] At the moment, the Guidelines have been specifically promulgated by the Crown Court and given to their judges. Strong efforts are being made.

[37] See further ENDS report, January 2004, page 31.

£10)[38]. This is despite the fact that illegitimate savings made by criminals are pointed out to the courts. However, prosecutors do not have evidence to the contrary to show that the defendant has money/savings etc. This plea of impecuniosity before the Magistrates heavily impinges on punishment and, quite importantly, deterrence. The Environment Agency spends 12 million a year on all enforcement work, but fines are only one way of punishing offenders and not always the most appropriate method[39]. It has also to be noted that regulatory activity is subject to institutional and functional limitations such as lack of time, lack of money and not having enough 'man-power' or resources[40]. A possible solution to the plea of impecuniosity would be to break the nexus of fining and Community Service. The Environmental Justice Report published by the Environmental Justice Project, March 2004, urged Magistrates and judges to apply the full range of sentencing options available to them (including greater use of custodial sentences[41], fining or imprisonment or disqualification of individual company directors[42], and the imposition of Community Service Orders in respect of individuals[43]). Thus, as local authorities carry out various environmental projects, fly-tippers could be asked to assist in environmental clean-up projects if they are unable to pay.[44] The Environmental Justice Project also came to the conclusion that "the most significant problem in the criminal justice system seems to be that the penalties routinely imposed vary, and do not provide a deterrent to corporate and persistent offenders".

One step forward has been the Environment Agency's policy on 'naming and shaming' companies that have been responsible for serious pollution event - the Annual Spotlight on Business Performance Report[45]. There has been an impact here, specifically on major utility corporations and investors such as in the waste industry and the water quality industry. The reality of convictions and the 'naming and shaming' is that it is effective. It does modify company behaviour as it has caused problems here in England and Wales and overseas. Experience has been had, for example, of other companies contacting the EA to seek advice of how to best avoid doing something illegal that their competitors have done. Public limited companies do not like bad publicity. Shareholders buy shares and when take-overs happen abroad, the due diligence analysis reveals all prosecutions, so this can have a huge effect on such take-overs. This is also an area where there has been an emergence of ethical shareholders. Greater publicity of environmental cases therefore raises awareness about sentences. In addition, as the

[38] For example, in Maidenhead Magistrates Court on 24th March 2004, Derrick Fox was fined £100, for a fly-tipping offence under section 33(5) of the Environmental Protection Act 1990. Costs of only £35 were awarded to the Environment Agency when he told the Magistrates that he only has an income of £220 a week. He was ordered to pay the £135 at a rate of £10 a week.

[39] In addition, last year the Environment Agency dealt with 90% of environmental crimes and only 5% of cases were lost, dismissing suggestions that the Environment Agency only takes cases they know would win. The Environment Agency uses the same guidelines as other prosecutors to decide whether cases should be taken, such as evidential sufficiency and public interest.

[40] Various groups do try to work together to overcome such hurdles. For example, A database called 'Flycapture' has recently been launched as part of a concerted effort being made by government, the Environment Agency and local authorities to identify the true scale and nature of the fly-tipping problem and to find new ways of tackling this anti-social crime.

[41] See specifically pages 86-89 of the Environmental Justice Report published by the Environmental Justice Project, March 2004.

[42] See specifically page 89, paragraphs 209-210.

[43] See specifically page 89, paragraphs 211-212.

[44] Changes have already been noted. For instance, John Hibbert of Stockbreach Close, Hatfield, Hertfordshire pleaded guilty before St Albans Magistrates Court on 19th November 2003 to dumping for bulk containers filled with hazardous waste on 13th June 2002 on a pathway near Codicote Road, Wheathamstead, Herts. He was jailed for two months under section 33(1)(a) of the Environmental Protection Act 1990.

[45] E.g. see "Spotlight on Business Environmental Performance for 2001 – 2003".

Environmental Justice Report published by the Environmental Justice Project, March 2004, states: "the EA would wish to see turnover and profitability being taken into account when fines against companies are levied. However, the EA also points out that financial liability does not always end with a fine. A company may have to improve its practice around the country to ensure future compliance – and incur costs of a much higher order of magnitude. In once case, a manufacturer of domestic fridges breached its duty of care and was fined £2,000 – but had to spend in excess of £250,000 to ensure future compliance."[46] Furthermore, the waste industry has been impacted due to the requirement of "fit and proper person"[47] in order to be able to hold a waste management licence[48] and the publication of Enforcement Notices and OPRA scores[49]. Regulation will remain, thus regulators should be our 'champions' of the environment, preventing environmental harm and altering people's behaviour for the better. National and European administrations[50] must be more inventive and use a full range of instruments and tools to apply and enforce environmental law to find the right mix between incentives (carrots) and threats (sticks). Nonetheless, it is worth noting that higher fines and more prosecutions are failing to stop multi-million pound businesses from committing environmental crimes. De Prez[51] has argued that while successful prosecutions and naming and shaming does have a deterrent impact, this is only in exceptional cases and the effect is sporadic. She concludes that if all offences were to be prosecuted this would further undermine the impact, as it would become more normal and common for companies to be known to have committed environmental offences. The confiscation provisions in the Proceeds of Crime Act 2003 may help, as the Assets Recovery Agency has been set up

The "Environmental Civil Penalties" report prepared by Woods and Macrory concluded that "Criminal prosecution is too rigid an approach to be used for all but the most serious offences. It focuses on achieving punishment rather than prevention, and requires more stringent procedural safeguards, which undermine regulatory efficiency... this is leading to systemic problems involving the trivialisation of environmental offences and the imposition of inadequate fines, and may also give rise to reluctance on the part of regulatory agencies to pursue more difficult cases". Even though there is merit here in considering the introduction of civil penalties for some environmental crimes, more research needs to be carried out. More needs to be thought about, for example, where the line would be drawn in relation to particular offences; how a criminal/civil system could operate with clarity; the role of regulators; and how public opinion would view what is currently a crime becoming (perhaps negatively viewed as being downgraded) a civil offence. In addition, criminal courts do not sentence on the basis of broad environmental principles, including the principle of sustainable development. These are principles the planning regime takes into account as it focuses on 'land use'. This should therefore add more force to why

[46] Page 83, paragraph 189.
[47] The EA has promulgated guidelines requiring its staff to keep fitness of licence holders under review.
[48] See e.g. section 74 of the Environmental Protection Act 1990.
[49] Operator Pollution Risk Appraisal ("OPRA") is a multi-attribute risk assessment tool developed by the Environment Agency to determine the environmental hazards associated with a site and how well they are being managed. I.e. the rating system for quantifying in simple terms the environmental risk from an IPC process. It now also applies to waste. Future Environment Agency OPRA systems will be based on an assessment of a site's emissions, location, complexity and recent operator performance. OPRA allows the targeting of regulatory effort. It supports the polluter pays principle and through a cost recovery charging framework can provide a financial incentive to operators to reduce their environmental risks. For further details see "Delivering for the environment - a 21st Century approach to regulation".
[50] See, e.g. EU Council of Ministers adopting a Framework Decision 2003/80/JHA, on the protection of the environment through criminal law, adopted on 27th January 2003.
[51] Paula De Prez, 'Beyond Judicial Sanction: the Negative impact of conviction for environmental offences' [2000] Env L R 11.

planning and environmental law should be combined to better serve the "total" environment. A Planning and Environmental Tribunal, if it is established, is perhaps a way forward, and the criminal regime would go hand-in-hand. This is something that is attracting quite a lot debate and more discussion is required.

Companies are "sitting ducks" and do have capital, thus civil penalties might be more appropriate for them and the biggest offenders. It has to be remembered that many individuals do not wish to be detected (e.g. the "waste cowboys") and will avoid being found. Thus, a penalty should be administered where they are found – i.e. in the local Magistrates' Courts. It would be impractical to take an individual who has fly-tipped 3 cubic metres of controlled waste in Cumbria to the Royal Courts of Justice or to an Environmental Tribunal/Court. In order for environmental law to be effective it has to apply to everyone across the country and not just companies. Normal behaviour can be, and has been, laid down by criminal rules and the Magistrates' Courts have been there to enforce these rules. The distinction between civil law and criminal law will continue. There seems to be a confusion between the function of criminal law and the wider function of the civil system (e.g. judicial review proceedings, costs etc.).

Conclusions

Traditional criminal law tries to obtain a certain degree of social stability, using methods of social control and prevention. Environmental crimes, however, do not so much threaten social stability as pose a threat to the survival of the human beings. It is the survival of society itself that it is at stake and not the maintenance of social stability. Thus, environmental crimes must expand the stereotypical traditional definition of crime and the traditional portrayed criminal, to embrace those who break this new form of socio-economic and industrial wrong against society. New developments need to be made, e.g. new types of punishments applicable to corporations; using a variety of penalties etc., as well as further education to be provided to the Magistrates. However, changes are slowly unfolding within the system that we currently have and work with. Many of the issues mentioned in this article have also been voiced to the Environmental Audit Committee of the House of Commons, and a response is awaited from them (probably in the summer of 2004). We should not be too quick to dismiss it, and allow time for all the hard work to percolate through to the Magistrates. Nothing can ever be 100% perfect, but we can strive towards that. It is quite evident that environmental criminal law is undergoing an unstoppable evolution. This is essential in achieving our overall objective – that of preventing and deterring further damage to the environment.

ENVIRONMENTAL JUSTICE PROJECT

The report of the Environmental Justice Project is now available on the UKELA website, www.ukela.org.
The report reviews the operation of environmental law in England and Wales, identifies inadequacies with regard to access to justice and makes recommendations for change.

Its central finding is that the legal justice system in the UK simply does not provide anything like a proper mechanism for the individual citizen and NGOs to gain justice in environmental matters. The Environmental Justice Project canvassed the views of over 50 leading practitioners and environmental NGOs on the effectiveness of the civil law system. 97% of those questioned did not think it provided environmental justice.

Those contributing to it include Pamela Castle, former UKELA chair and now chair of the Environmental Law Foundation, Martyn Day of Leigh, Day & Co and Carol Hatton of WWF-UK. Those involved in the project have now formed a Coalition for Access to Justice for the Environment, which is holding a parliamentary seminar in July on the real cost of environmental justice. UKELA will be participating in the seminar.

ENVIRONMENTAL LITIGATION WORKING PARTY

CALL FOR NEW MEMBERS

The Practice and Procedure Working Party will now be known as the Environmental Litigation Working Party.

Its remit is to influence, review, comment and inform UKELA members on environmental litigation matters. Environmental litigation matters include (but are not limited to)

- Civil, criminal and public law litigation.
- Significant developments in court procedures
- judicial remedies,
- access to courts/tribunals including standing (not access to environmental information),
- costs of litigation,
- forums for dispute resolution
- implementation of the "access to justice" pillar of the Aarhus Convention

The Working Party is currently focusing on the following workstreams:

- The proposal for a specialised Environmental Tribunal
- The use of civil penalties
- The Environmental Audit Committee inquiry into environmental crime
- The Proposed European Directive on Access to Justice

Meetings will be quarterly. Information and work in progress will be exchanged via e-mail between meetings.

Comments on the chosen workstreams are welcome
The Working Party is seeking new members to assist with the current projects.

The Working Party will meet four times a year, and will use an e-mail circulation list for work between meetings.

For further information please contact Justine Thornton (justine.thornton@allenovery.com) or James Kennedy (james.kennedy@freshfields.com)

EAST ANGLIA REGIONAL GROUP RELAUNCH

UKELA members living in the East Anglia Region are invited to attend a meeting in Cambridge to mark the relaunch of the UKELA East Anglia Regional Group. The meeting will feature a talk by environmental law specialist Stephen Tromans, of 39 Essex Street: “A year in the life of environmental law - current themes and trends."
Date: Tuesday June 8th 2004
Time: 5.30pm – 7pm
Venue: Taylor Vinters, Merlin Place, Milton Road, Cambridge CB4 0DP
Telephone: 01223 423444 Fax: 01223 423486 www.taylorvinters.com. Thanks to Neill Campbell for arranging this.
CPD points accredited: 1
The evening will be chaired by the UKELA chairman, Andrew Wiseman.
Coffee/tea available from 5.15. Please stay for drinks and nibbles afterwards.
Cost (to cover refreshments): UKELA members £5; non-members £10
Please do bring along anyone interested in environmental law as we are keen to promote UKELA and its activities.

Booking:
For a booking form please contact the UKELA Executive Officer Vicki Elcoate, The Brambles, Cliftonville, Dorking, 01306 501320 or email vicki.elcoate@ntlworld.com.

WATER WORKING PARTY:

Mark Brumwell is the temporary convenor of the working party and a permanent arrangement is urgently sought (this role could be shared). If you plan to attend the meeting or could offer to help convene the group please tell Mark Brumwell
Mark.brumwell@sjberwin.com (tel: 020 7533 2784).

UKELA LONDON MEETING
WEEE IMPLEMENTATION IN PRACTICE

Tuesday 8th June 2004 at 6pm
At Denton Wilde Sapte
1 Fleet Place
London
UKELA members are cordially invited to this early evening session where the subject will be on the UK's implementation of the WEEE Directive. There will be three speakers with wide ranging practical experience: Jackie Downes, Senior Consultant at ERM will introduce the issues and will speak on 'An Introduction to the WEEE Directive and Implementing Legislation in the UK.'

Ken Norman, WEEE Co-ordinator at European Metal Recycling Limited will talk about the practical issues in 'A Recycler's Perspective on the WEEE Directive.'
Jeff Cooper, Head of Producer Responsibility at the Environment Agency will speak on 'The Regulatory Issues Raised by WEEE.'
The Meeting aims to present an overview of the WEEE Directive that was adopted in the EU Parliament in August 2003 and which the UK Government has two years to implement into domestic legislation.
The Meeting will last for approximately 90 minutes after which refreshments will be provided to enable attendees and participants to discuss the issues informally. There will be a small contribution to cover costs at £10 for Members and £20 for Non-members, Student and Unwaged members are free.
To Accept
If you wish to attend please complete the booking form or contact by e mail Simon Boyle at Argyll Environmental Limited: Simon.boyle@argyllenviro.com
All cheques should be made payable to UKELA and sent to:-
UKELA
C/o Simon Boyle
77 Pashley Road
EASTBOURNE
BN20 8EA
Booking Form
Please book you place by returning the form below to the UKELA, C/o Simon Boyle, 77 Pashley Road EASTBOURNE, BN20 8EA. Please make cheques payable to the UK Environmental Law Association.

UKELA meeting Tuesday June 8th

WEEE Implementation in Practice.

Please book me a place at the meeting. I enclose a cheque payable to the UK Environmental Law Association (£10 members; £20 non-members)

Name:	
Address:	
Firm (if applicable):	
Tel no:	
Fax no.	
email:	

Please return to:
UKELA, C/o Simon Boyle, 77 Pashley Road, EASTBOURNE, BN20 8EA.
If you have any queries email: simon.boyle@argyllenviro.com or phone 0845 458 5250
No tickets will be sent out but your reservation will be confirmed by email.

E – LAW

The editorial team want letters, news and views from you for the next edition which will be issued in July 2004 – **Copy to Catherine Davey by 7 July 2004. Please use Word in Arial Font 12pt size. Thankyou**

By Email to: Catherine.Davey@stevens- bolton.co.uk

Letters to the editor will be published, space permitting

Environmental Law aims to update readers on UKELA news and to provide information on new developments. It is not intended to be a comprehensive updating service. It should not be construed as advising on any specific factual situation

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