In our opinion, it follows from the comments of Lord Ackner that a Judgment for damages to be assessed does give rise to a judgment debt and Mr Justice Turner is, therefore, regrettably at odds with the House of Lords.

Support for the House of Lord's view, if support is needed, can be found in the decision of Mr Justice Drake in *Wilson v Graham* reported in The Times on 22nd June. Mr Justice Drake found that it was correct to backdate the award of damages to the date on which liability was determined and that interest as claimed by the Plaintiff from the date of Judgment on liability should apply.

All those writing motor business await with interest the first House of Lords decision following *Putty v Barnard* but unless the House of Lords decides to disregard the approach adopted for many years and referred to by Lord Ackner we consider that the only remedy for the insurance industry is for Section 17 to be amended by legislation.

To finish on a note of optimism, however, reported in The Times on Friday 28th June was the case of *Legal Aid Board v Russell.* In the case it held that contrary to the common view prevailing within the legal profession the acceptance of a payment into Court did not amount to a Judgment for the purpose of the Judgments Act 1838 and accordingly a Plaintiff was not entitled to interest on costs unless he became entitled to apply for a Judgment on costs under Order 45 Rule 15. This decision, however, is, we understand, now the subject of an appeal to the House of Lords.

STRICT LIABILITY FOR ENVIRONMENTAL DAMAGE - EUROPEAN INITIATIVES AND THE INSURANCE EFFECT

by John Garbutt, Nicholson Graham & Jones.

1. Introduction

Whenever two or more are gathered together to discuss environmental insurance the air quickly becomes distinctly chilly. Meteorological phenomena are now common in relation to major pollution but the climate change for insurers arises mainly from the discomfort of knowing that in the US and elsewhere, pollution claims are having a serious effect upon profitability. The onrush of environmental directives from Brussels, particularly in relation to ground water and air pollution is now supplemented by the proposal for a council directive on civil liability for damage and injury to the environment caused by waste. At first sight this looks like an attractive resource for new business opportunities but the draft proposes new concepts of legal liability which serve only to increase the dilemmas of British industry and its insurers.

2. The Draft Directive

The directive relates to civil liability for damage and injury to the environment caused by waste generated in the course of a professional activity. However, excluded are most nuclear wastes and those covered by legislation relating to oil pollution damage. The meat of the liability provision is in Article 3 which provides that the producer of waste shall be liable under civil law for damage and injury to the environment caused by waste, irrespective of fault on his part. Included in the definition of the 'producer' is any person or company whose professional activity creates the waste and all those down the waste stream who carry out pre-processing mixing or other operations resulting in a change in the nature or composition of the waste. 'Waste' has the definition ascribed to it in the landfill directive 75/442 which at the moment means that the main complaint about 75/442 is still maintained. This is that the definition presently does not differentiate between materials destined for recycling and waste for disposal. The commission is planning to secure amendments to the waste directive to seek to overcome this anomaly and judging by the way the liability directive is drafted, it is anticipated that these modifications will be secured before the liability directive becomes law.

In place of the producer of the waste as described above, we have in Article 2 a substitute list, to include:-

a) The importer of the waste into the community but not where the waste was previously exported and there is no change in its nature or composition.

b) The person in control of the waste when the incident giving rise to the damage or injury to the environment occurred unless he is able within a reasonable period to identify the creator or modifier of the waste as described above. However, if the waste is in transit inside the community with no substantial change in its nature or composition before the incident occurs, then the person in control is liable.

c) The person responsible for the licensed waste installation for treatment or disposal.

It will have been appreciated that it would be possible for at least two producers to be liable and in these circumstances Article 5 of the draft directive makes them jointly and severally liable. Whilst there is no right for the defendant to claim that the damage or injury is caused both by the waste and the act or omission of a third party a contributory negligence excuse is available.

What are the liabilities? The right to take legal action is available under Article 4 to obtain

a) an injunction to stop the damage or injury to the environment

b) reimbursement of expenditure arising in the prevention of such damage or injury and

c) reimbursement of the cost of repair of damage of property

d) restoration of the environment to the status before damage. However, this is not available if the cost would substantially exceed the gain arising from restoration and there are alternative measures available at substantially lower cost in which case those measures can be demanded, alternatively the cost of them.

In summary then, liability is for

a) Damage resulting from death or physical injury

b) Damage to property

c) Injury to the environment.This last category is defined in Article 2 as an "important and persistent interference in the environment caused by the modification of the physical, chemical or biological of water, soil and/or air" insofar as this is not considered to be the damage as in b) above.

We shall see that this is the last head of damage is, in many respects, quite new to the British code of law so far as civil liability is concerned. Of course, the draft directive does not effect criminal liability.

As with most cases of strict liability, it is easier to look at the defences that are not available rather than those that are but if the damage or injury results from force majeure then there is no liability.It is no defence to show:-

1) That the producer holds a permit for the activity complained of.

2) That a third party was responsible.

3) That the producer's liability has been excluded or limited by contractual

provision.

4) That the claim is statute barred, unless a period of three years has expired since the plaintiff should have had knowledge of damage, or injury and of the identity of the producer or in any case, 30 years has passed from the date of accident giving rise to the damage.

5) The damage or injury arose from an incident which occurred before the date of the directive.

6) That the defendant has used 'state of the art' techniques and complied otherwise fully throughout. However, the 'state of the art' defence is presently understood to be under consideration by the Commission. If approved, this would bring the directive somewhat into line with the product liability provisions.

Finally, it should be noted that Article 11 requires the council of the European community to decide by the end of 1992 how to deal with circumstances where either the party liable cannot be identified or is incapable of fully compensating all the damage and/or injuries caused. It is here that the requirement for compulsory liability insurance is surely based.

3. Responses

UNICE (the Union of Industrial and Employers Confederations of Europe) have strongly opposed the strict liability concept on the grounds that whilst some wastes represent a high risk, the majority are much more innocuous. In the league table of ravages of people and their environment, there are other products far more deserving of strict liability rules e.g. the motor vehicle. UNICE also attacks the concept of legal liability irrespective of operational responsibilty. They are against the imposition of liability on the producer of the waste, even when he no longer responsible for it operationally. This might arise even when if he has legally passed it on to an authorised waste disposal operator. There is no complaint that the producer should satisfy himself that successors to the waste are properly qualified to handle it, an element of 'duty of care' responsibilities established by the Environmental Protection Bill. (See Dr Aickin's article in the previous journal).

UNICE are also very concerned about the innovatory 'injury to the environment'. The identification of 'injury' would be extremely difficult given for example the existing responsibilities of public bodies to prevent pollution or restore the quality of the environment. The right to sue may be available to an enormous number of legal

persons and entities, say when there is a significant pollution of a river. There would also be significant difficulties where elements of the environment which are injured are those where there is no ownership e.g. a flock of birds. In these circumstances the existing criminal sanctions designed to be preventative rather than corrective represent the best option.

Conveniently, the House of Lords Environment Sub-Committee has recently given a range of interested parties the opportunity of a platform for their views and also enabled some valuable informed discussion without the unwelcome emotive context so prevalent with matters concerning environment. The plight of the producer who remains liable even after safely consigning his waste has been recognised by the UK Environmental Law Association who argue that a system of carrier registration (now in place under the Control of Pollution (Amendment) Act 1989 but not yet brought into force) would be an adequate substitute, provided it is backed up by a proper standard of technical competence. Such an approach has been acknowledged as at least a possible solution by the European Commission's representative who gave evidence to the sub-committee at an early stage. There have been arguments both for and against the notion that a properly obtained permit for an activity does not exempt liability under the directive, a situation which the sub-committee's chairman Lord Nathan regarded as 'extraordinary' and which is certainly opposed by CBI and those representing the Chemical Industries Association.

The ABI and Lloyds Underwriters have both given evidence to the sub-committee. There is a strong objection to the introduction of mandatory insurance described by the Association as effectively turning insurers into 'licensors'. They distinguish such a regime from the close parallel, the Motor Insurers Bureau, whose known and finite characteristics would be absent in those circumstances where there were pollution catastrophes. The limitless financial liability insurance concept is completely unacceptable as is the idea of giving special interest groups the right to take proceedings. This the association felt would lead to claims determined by political activity. It was not suprising to read that insurers could see the inevitability of substantial increases in costs of insurance. The insurance industry favours a state of art defence as well as the avoidance of any retrospective liability.

4. Implications for the Insurance Industry

To the informed reader with a knowledge of the insurance industry the implications are pretty obvious. The proposed civil liability directive is just one more legislative initiative which brings into closer focus the need for the industry to come to grips with responsibilities as insurers of liabilities in these fields. Lloyds underwriters recently

announced substantially lower profits arising from major pollution and environmental damage in the US. They reported to the House of Lords that environmental impairment insurance is now virtually unobtainable there, apparently partly blamed on fears of retrospective liability. They concede that these fears have been significantly reduced for UK and the community by the wording of the draft directive.

There is certainly a crisis in many parts of the US waste business. The difficulty in obtaining operating permits and the inter-related non-availability of insurance is causing real and significant damage to an industry which itself is an essential element of pollution and environmental control. In the absence of the proper disposal of waste the environmental consequences are harrowing. The development by the insurance industry of new initiatives deriving from a responsible and long term approach is all important. Among the new or modified products must be included the environmental impairment liability cover, based upon full environmental audits and perhaps prior clean-ups. The Chemical Industries Association already has a policy in place for its members in association with Willis Wrightson. This is a small start but it is bound to develop. The largely European approach to insurance pools with mutual re-insurance which are largely reported to be established in Italy, France and Holland, again on a small scale also represents a possible way forward.

There is another important area of potential liability for insurers which could arise from the directive whether directly or through indemnities available to lenders. For example, the taking possession by a mortgagee of a mortgaged waste facility which has caused injury to the environment might contemplate say the completion of the waste tip which would then bring the lender within the definition of 'producer'. This in turn could lead to substantial producer's obligations if a serious pollution incident occurred. Lender's advisors will do well to ensure that their clients are satisfied, if necessary by environmental audit, that the security as well as the borrowers are as safe and sound as possible. The longer term consequences could be very damaging.

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