

ENVIRONMENTAL LIABILITIES

1993 was a landmark year for insurers in respect of environmental claims against public liability insurers for UK risks. Unlike the US, where environmental claims had been made against London insurers for cleaning up contaminated land for many years, the big environmental event of 1993 in England was a common law case. Liability for cleaning up contaminated land and similar legislative liabilities seemed far away, if they were conceivable at all, under England law.

This paper reviews environmental liabilities in 1993 followed by a review of current and proposed environmental liabilities. The paper then discusses the implications for insurers.

I. ENVIRONMENTAL LIABILITIES IN 1993

Environmental liabilities in England in 1993 were minimal. As indicated above, although environmental legislation existed, the most newsworthy environmental legal development of that year was a common law case.

A. Common law

In December 1993, in *Cambridge Water Company v. Eastern Counties Leather plc* [1994] 2 A.C. 264, [1994] 2 W.L.R. 53, [1994] 1 All E.R. 53, [1994] 1 Lloyd's Rep. 261 (H.L.), the House of Lords ruled that a claimant must prove that the relevant harm was reasonably foreseeable when the act or omission that caused the harm occurred. The case arose when a water company abstracted water polluted with organochlorines from its borehole. It traced the pollution to a tannery 1.3 miles away. The tannery had ceased using the organochlorines in 1976. The House of Lords held that the tannery was not liable because the water company had not proved that a reasonable supervisor at the tannery would have foreseen the groundwater pollution when the organochlorines were used.

Insurers and British industry were delighted with the result. *Insurance Times* declared that the "pollution cloud lifts". *Business Insurance* reported that: "British companies and their liability insurers breathed a sigh of relief last week as the United Kingdom's highest court limited the scope of strict and retroactive liability for pollution cases". *The Independent* announced that "City welcomes pollution ruling". *Products Liability International*, meanwhile, sounded a more cautious note, stating that the "decision means that [the US retroactive liability] situation will not be duplicated in the UK unless and until Parliament considers that it is desirable that it should be".

B. Environmental legislation

In 1993, environmental regulation in England and Wales was fragmented. The environmental regulator for water pollution was the National Rivers Authority ("NRA"). Her Majesty's Inspectorate of Pollution ("HMIP") regulated emissions to the ambient air. County councils were the waste regulation authorities. Regulation, however, was less than stringent.

1. Water pollution

The NRA had the power to prosecute a company for causing or knowingly permitting “poisonous, noxious or polluting matter or any solid waste matter” to enter controlled waters, that is, surface, coastal and ground waters. Water Resources Act 1991, § 85(1) (“WRA 1991”). It also had the power to remediate water pollution and, if it was reasonably practicable to do so, to “restor[e] the waters, including any flora and fauna dependent on the aquatic environment of the waters, to their state immediately before the matter became present in the waters”. WRA 1991, § 161. If it did so, it could seek reimbursement of its reasonable costs.

“Causing” water pollution is a strict liability offence. *Alphacell Ltd. v. Woodward* [1972] A.C. 824, [1972] 2 W.L.R. 1320, [1972] 2 All E.R. 475 (H.L.). The NRA, therefore, was likely to prevail in the majority of prosecutions brought by it. Despite this, however, the NRA brought few prosecutions. Indeed, it considered it a sign of failure to do so because it indicated that the NRA had failed to persuade a company not to pollute water. The NRA considered that the lack of prosecutions was evidence of the success of the exercise of its regulatory powers. When it brought a prosecution, with one notable exception of a £1 million fine, the courts imposed low fines and, in some cases, failed to award the NRA the total amount of its costs, making it not worth the time and expense involved.

The NRA used its powers to remediate water pollution sparingly when the costs were substantial. A key factor was the need to ask central government for any funding over £500,000. Another key factor was that the NRA did not know, when it conducted the remediation, that it would recover its costs.

2. Contaminated land

Local authorities had the power under the statutory nuisance regime to abate “any accumulation or deposit which is prejudicial to health or a nuisance”. Environmental Protection Act 1990, § 79(1)(e) (“EPA 1990”). Although this power was broad enough to enable the local authorities to remediate contaminated land, they used it, at most, to require the superficial remediation of land on which pollutants had been dumped.

The county councils could require a person who occupied land to remove fly-tipped waste from it. EPA 1990, § 59(1). The occupier could appeal the waste removal notice, however, if he proved that he was an “innocent occupier”, that is, if he proved that he “neither deposited nor knowingly caused nor knowingly permitted the deposit of the waste”. EPA 1990, § 59(3).

Central government had proposed requiring local authorities to compile registers of land that was subject to contaminative uses. EPA 1990, § 143. The proposed registers were withdrawn in 1993, however, following widespread criticism that they would cause blight. Instead, the government proposed a “wide-ranging review”.

C. European Communities Environmental Liabilities

European Communities (“EC”) environmental law is the source of about 80 per cent of environmental law in the UK. Most of the environmental legislation up to 1993,

however, concerned regulatory law, standards and conservation measures rather than liability for unauthorised acts or omissions. The European Commission broadened the scope in 1993 when it issued a green paper on environmental liability. The paper discussed, among other things, the imposition of strict and retroactive liability for remediating contaminated land. Criticism of the green paper was intense. In particular, the UK government opposed the imposition of environmental liabilities by the EC as being unnecessary, declaring that:

“We think that we should keep national control over the legal framework for civil liability for remedying environmental damage ... we are ... currently reviewing provisions for dealing with contaminated land”.

D. Environmental Insurance Claims

Environmental claims against public liability policies for UK risks were rare in 1993. Whilst there were a small number of claims for the costs of defending environmental offences, the amounts were minimal. There were no claims for the costs of cleaning up substantial water pollution because the NRA rarely conducted the clean ups and, when it did so, did not seek to recover its costs. There were no claims for cleaning up contaminated land caused by past pollution incidents because there was no legislation requiring the clean ups.

II. ENVIRONMENTAL LIABILITIES IN 2003 AND BEYOND

Environmental law has changed dramatically since 1993. The common law has evolved and continues to do so in respect of claims for environmental harm. Environmental legislation has increased exponentially. EC legislation imposing liability for remediating contaminated land, water and protected species and habitats is imminent.

A. Common law

Three key ways in which the common law has evolved since 1993 are a broader interpretation of “property damage” as opposed to economic loss; an increased number of cases concerning continuing nuisance for the failure to act; and the relaxation of the burden of proof in some cases and the expansion of joint and several liability. In addition, the introduction of conditional fees in 1995 has led to an increase in the number of claims for bodily injury and property damage.

1. Property damage/economic loss

Financial, or economic, loss is not recoverable under English law unless it is a foreseeable consequence of physical damage by the defendant to the claimant’s property. *Murphy v. Brentwood District Council* [1991] 1 A.C. 398, [1990] 3 W.L.R. 414, [1990] 2 All E.R. 908, [1990] 2 Lloyd’s Rep. 467 (H.L.).

In recent years, the Court of Appeal has adopted an increasingly flexible approach to the issue of whether there is property damage rather than financial loss. In a ruling that was not appealed to the House of Lords with other issues in the action, the Court of Appeal held that the cost of professional cleaning to remove the effects of large quantities of dust and damage to fabric resulting from the cleaning is not pure

financial loss. The dust had entered homes that were located near to Canary Wharf during the extensive redevelopment of the London Docklands area. The court concluded that property damage also occurred when large quantities of dust, which were trodden into the carpet in the claimants' homes, resulted in the carpet undergoing a physical change that made it less useful or less valuable. *Hunter v. Canary Wharf Ltd.* and *Hunter v. London Docklands Development Corporation* [1996] 2 W.L.R. 348, [1996] 1 All E.R. 482 (Q.B.D.), *rev'd on other grounds* [1997] A.C. 655, [1997] 2 W.L.R. 684, [1997] 2 All E.R. 426 (H.L.).

In a case involving a dredging company's negligent deposit of between 10 and 15 centimetres of silt onto a nature reserve owned by the Hampshire Wildlife Trust, the Court of Appeal held that an investigation commissioned by the trust at a cost of over £100,000 was not pure financial loss. The court stated that the silt had physically and significantly affected the nature reserve, the trust had suffered damage by having paid for an investigation to avoid worrying about the effect of the silt on its breeding programme for waterfowl and the investigation was conducted reasonably and cost a reasonable amount. The investigation led to the conclusion that the siltation would not cause any long-term damage to the reserve. The defendant had argued that the owner of the reserve was entitled to damages only for actual damage to the reserve and not the cost of finding out that damage had not occurred. *Jan de Nul (UK) Ltd. v. Axa Royale Belge S.A.* [2002] Lloyd's 1 All E.R. (Comm) 767, [2002] 1 Lloyd's Rep. 583 (C.A.).

Property damage may occur even though the substances causing it do not exceed a regulatory standard for harm. The Court of Appeal concluded that plutonium that had migrated from the Atomic Weapons Establishment at Aldermaston to a small area of marshland on an adjacent estate during a storm had caused "damage ... to property" under section 12 of the Nuclear Installations Act 1965. Aldous LJ stated that the plutonium had intermingled with the soil in the marsh and had changed the marshland's physical characteristics, resulting in a loss in value to the entire estate and causing money to be spent to remediate the contamination. He rejected the Ministry of Defence's ("MoD's") argument that physical damage had not been caused by the plutonium's radioactive properties because the levels of radioactivity were below regulatory limits and thus, below levels that would pose a risk to human health. He, therefore, rejected the MoD's argument that the damage was pure financial loss. *Blue Circle Industries plc v. Ministry of Defence* [1999] Ch. 289, [1999] 2 W.L.R. 295, [1998] 3 All E.R. 385 (Q.B.D.).

2. Continuing nuisance

An occupier has a duty to remove or abate a nuisance on its land even though it did not create it. In a landmark case, the failure to unblock a culvert subjected the occupier of the land on which the culvert was located to liability for losses arising from the flooding of its neighbour's land even though the culvert had been blocked by a trespasser. The House of Lords concluded that the occupier must have known that the culvert had been blocked for nearly three years. *Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880, [1940] 3 All E.R. 349 (H.L.).

The imposition of liability for the failure to act has substantial implications for environmental claims. In *Cambridge Water Company v. Eastern Counties Leather plc*, the House of Lords ruled that the owner and occupier of the tannery was not

liable for any harm caused by the migration of the organochlorines after the time that the tannery had reasonably foreseen the consequences of their escape because they were “irretrievably lost in the ground below” and had “passed beyond the control of” the tannery. *Cambridge Water Company v. Eastern Counties Leather plc* [1994] 2 A.C. 264, [1994] 2 W.L.R. 53, [1994] 1 All E.R. 53, [1994] 1 Lloyd’s Rep. 261, [1994] Env. L.R. 105 (H.L.). Lord Goff commented that, “[a]t best, if the case is regarded as one of nuisance, it should be treated no differently from, for example, the case of the landslip in *Leakey v. National Trust for Places of Historic Interest or Natural Beauty*”.

In *Leakey*, the Court of Appeal had held that the National Trust was liable to adjoining landowners for failing to minimise or prevent the known risk of damage to their property caused by a landslip from an unstable natural condition on the trust’s property. Megaw LJ stated that the trust had a duty to conduct reasonable actions to minimise or prevent the damage. The reasonableness of the actions was to be determined according to the particular person, that is the trust, rather than the average person. In particular, Megaw LJ stated that the criteria of reasonableness includes measures that the particular person could be expected to conduct having regard, among other things, to its financial means when “a serious expenditure of money is required”. *Leakey v. National Trust for Places of Historic Interest or Natural Beauty* [1980] Q.B. 485, [1980] 2 W.L.R. 65, [1980] 1 All E.R. 17 (C.A.).

The inference from the House of Lords’ reference to *Leakey* in *Eastern Counties Leather* is that a person who owns contaminated land may be liable to persons who suffer harm from pollutants that migrate from the land, whether or not the person caused the pollution, when the factors enumerated in *Leakey* make it reasonable for the occupier to remove or abate the contamination. Lack of knowledge about the presence of the pollutants under the land when the defendant acquired it is not a defence provided that the owner knew or reasonably should have known about the risk posed by the pollutants before they originally caused harm or resulted in further harm another person’s land. In such a case, the owner/occupier of the contaminated land could be liable for permitting a nuisance, of which he was aware, to continue. The advance of technology has also made it unlikely that a court would now conclude that a pollutant in the groundwater was “irretrievably lost in the ground below” and, thus, incapable of remediation.

The Court of Appeal refined the principle that a landowner may be liable for harm arising from a condition that it did not cause on its land in *Wandsworth London Borough Council v. Railtrack plc* [2002] Q.B. 756, [2002] 2 W.L.R. 512, [2002] Env. L.R. 218. The defendant, who owned a railway bridge, had attempted to stop pigeons from nesting under the bridge by installing netting but had removed it when pigeons had died after becoming trapped in it. Following complaints about the pigeons fouling the pavements under the bridge, the local authority began spending £12,000 each year to clean the pavements. The defendants offered to let the local authority enter the bridge and re-pigeon-proof it at its expense. The local authority refused and brought an action for damages for its cleaning costs and an injunction. The Court of Appeal concluded that Railtrack was liable for the local authority’s additional cleaning costs up to the time that it had offered the local authority access to the bridge to abate the nuisance. The court emphasised that a landowner is liable for a nuisance

on its land if it knows or should have known of its existence, has a reasonable time to remedy it and fails to do so.

In *Marcic v. Thames Water Utilities Ltd.* [2002] Q.B. 929, [2002] 2 W.L.R. 932, [2002] 2 All E.R. 55, the Court of Appeal held that a sewerage undertaker was liable to a man whose home had repeatedly been significantly affected by flooding and the backflow of foul water from drains for approximately ten years. The cause of the flooding was the sewerage undertaker's foul and surface water sewers. Mr Marcic had complained repeatedly to the local council and Thames Water and had spent £16,000 in an attempt to prevent the water from entering his house. The court concluded that Thames Water had failed to show that its system of prioritising works satisfied the requirement for it to take all reasonable steps to prevent the nuisance. Although Thames Water argued that the prioritisation system was a fair way to devote its limited resources to the widespread problem of nuisances caused by its sewers, the court concluded that its adoption of the system failed to satisfy its burden when viewed in the context of all measures that it could take including the use of its statutory powers. *Marcic* is currently on appeal.

3. Relaxation of burden of proof/expansion of joint and several liability

In 2002, the House of Lords adopted a relaxed burden of proof of causation in actions in which an employee has developed mesothelioma due to having been exposed to asbestos by more than one employer. *Fairchild v. Glenhaven Funeral Services Ltd.* [2003] 1 A.C. 32, [2002] 3 W.L.R. 89, [2002] 3 All E.R. 305 (H.L.). It is impossible under the current state of scientific knowledge, to identify the precise fibre or fibres that triggers the disease. Further, the disease may be latent for over 40 years in some people. Accordingly, if an employee is exposed to asbestos fibres at more than one workplace, he cannot identify the source of the fibre or fibres that caused the malignant tumour to develop on a balance of probabilities.

Lord Bingham stated that strong policy considerations in favour of compensating individuals who suffered grave harm but could not, due to limitations in science, prove which employer was the source of the harm outweighed the interests of the employers who had negligently exposed the claimant to the harm. Lord Hoffmann stated that when the following five factors are present, a material increase in risk is sufficient to establish causation in a negligence action involving exposure to asbestos dust in a workplace. The factors are as follows:

- a duty that is specifically intended to protect employees from being unnecessarily exposed to the risk, among other things, of contracting a particular disease;
- the duty is intended to create a civil right to compensation for injury relevantly connected to its breach;
- the risk increases with the increased exposure to asbestos;
- medical science cannot prove which exposure to the asbestos produced the cell mutation that caused the disease; and

- the employee has contracted the disease against which his employers should have protected him.

Fairchild also stands for the principle that an employer defendant may be jointly and severally liable if it materially contributes to an employee's risk of developing mesothelioma by exposing the employee to asbestos and the employee, who has been exposed to asbestos by other employers, develops mesothelioma. Lord Bingham outlined the following conditions for the imposition of joint and several liability in a mesothelioma claim as follows:

- “(1) C was employed at different times and for differing periods by both A and B, and
- (2) A and B were both subject to a duty to take reasonable care or to take all practicable measures to prevent C inhaling asbestos dust because of the known risk that asbestos dust (if inhaled) might cause a mesothelioma, and
- (3) both A and B were in breach of that duty in relation to C during the periods of C's employment by each of them with the result that during both periods C inhaled excessive quantities of asbestos dust, and
- (4) C is found to be suffering from a mesothelioma, and
- (5) any cause of C's mesothelioma other than the inhalation of asbestos dust at work can be effectively discounted, and
- (6) C cannot (because of the current limits of human science) prove, on the balance of probabilities, that his mesothelioma was the result of his inhaling asbestos dust during his employment by A or during his employment by B or during his employment by A and B taken together”.

The principle in *Fairchild* may be extended to other claims. Lord Bingham stated that the principle would “be the subject of incremental and analogical development” as further actions arose. Lord Hoffmann commented that the specification of the five principles “does not mean that the principle is not capable of development and application in new situations”.

B. Environmental legislation

An increasing number of prosecutions are being brought but sanctions continue, generally, to be minimal despite calls by the Environment Agency (“EA”) and Ministers for higher fines. There are signs, however, that this is changing.

1. Prosecutions

In July 2003, the Court of Appeal finally rejected the judicial view of environmental offences as “not [being] criminal in any real sense”. The case involved a water company that had appealed a £200,000 fine for causing sewage effluent to be discharged into a river in breach of section 85(3) of the WRA 1991. The company argued that the fine was manifestly excessive and that an offence without a *mens rea*

requirement, such as causing water pollution under section 85(3) of the WRA 1995, “should be distinguished from acts of criminal nature”. Scott Baker LJ stated that the court “would not categorise breaches of section 85(3) of the nature that occurred in this case as being of a non-criminal character, albeit the offence is one of strict liability”. He continued:

“The environment in which we live is a precious heritage and it is incumbent on the present generation to preserve it for the future. Rivers and watercourses are an important part of that environment and there is an increasing awareness of the necessity to preserve them from pollution”.

Hart v. Anglian Water Services Ltd. [2003] EWCA Crim 2243 (C.A.).

2. Water pollution

In April 1999, the EA gained the power to serve works notice on persons who cause or knowingly permit water pollution. Anti-Pollution Works Regulations 1999, SI 1999/1006. The EA “requests” someone who they suspect of causing or knowingly permitting water pollution to remediate it before serving a notice. Due to this “request” being under threat of a works notice and a prosecution, few works notices have needed to be served.

If the water to be remediated is groundwater, the costs can be substantial. Therefore, even if the fine in a subsequent prosecution for causing water pollution is minimal, an insured may face significant costs.

3. Contaminated land

Part IIA of the EPA 1990, which creates a regime to remediate land contaminated by past pollution incidents, entered into force in England on 1 April 1996. The regime imposes liability for remediating contaminated land on persons who cause or knowingly permit the presence of pollutants on the land. These persons are known as Class A persons. If an enforcing authority (the local authority or, for a subset of “special sites”, the EA) cannot find a Class A person, the current owner or occupier of the land is liable regardless of whether it knew its land was contaminated.

Local authorities have designated over 55 contaminated land sites, of which over 14 are special sites. By June 2003, they had defined 15,716 sites are being potentially contaminated land under Part IIA. The EA has a target of 60 special sites designations by 2005 and 80 by 2007.

C. European Communities Environmental Liabilities

In June 2003, the Council of the European Union reached a political agreement with the European Parliament on a proposed Directive on environmental liability. The Council will adopt a common position this month, with the European Parliament holding a second reading probably in October 2003.

The Directive will impose liability for remediating land, water and protected species and natural habitats. Liability will be strict and prospective only. Operators of “occupational activities” under EC legislation listed in an annex (Annex III) to the Directive will be liable.

Proposals for mandatory financial security have been withdrawn in lieu of Member States “encouraging” the development of insurance and other financial security instruments. The European Commission is to issue a report on “the availability at reasonable costs and on conditions of insurance and other types of financial security for the activities covered by Annex III”. The Commission may then submit a proposal for mandatory financial security.

The proposed Directive is likely to enter into force in 2004. Member States will then have three years to transpose it into their domestic law. The European Commission’s report is due eight years after the Directive enters into force.

D. Environmental Insurance Claims

There have not been any reported pollution insurance coverage cases on key issues such as whether public liability policies cover clean-up costs or the extent of the most commonly used pollution exclusions. The following describes some of the major issues that are likely to arise.

1. Coverage of the costs of defending prosecutions for environmental offences

Many, if not most, public liability policies provide cover for the cost of defending a prosecution in the magistrates court and, in some policies, also the Crown Court. It is generally a condition of the policy that the prosecution be brought in connection with the property damage or bodily injury indemnified under the policy. With the increase in prosecutions for environmental offences, insureds are likely to bring more claims under such provisions.

Due to the most prevalent environmental prosecutions being based on strict liability, insureds generally plead guilty. The quandary then arises of the extent of the cover. The insured wishes to reduce the amount of the fine by incurring more legal costs and, thus, persuading the EA to reduce the charges against it or entering a robust plea in mitigation. Insurers, meanwhile, wish to keep legal costs to a minimum because the insured is pleading guilty.

2. Are clean-up costs covered by public liability policies?

English law is unclear as to whether the costs of remediating contamination are covered by a public liability policy. In *Hall Brothers Steamship Company Limited v. Young* [1939] 1 K.B. 748 (C.A.), Sir Wilfrid Greene MR stated that the term “damages” had a precise meaning to an English lawyer, that is, “sums which fall to be paid by reason of some breach of duty or obligation”. Because the insured vessel at issue in the case was not at fault, he concluded that the sums which the vessel owners were obliged to pay were not payments “by way of damages”.

Hall Brothers was cited by the Court of Appeal in *Yorkshire Water Services Ltd. v. Sun Alliance & London Insurance plc* [1997] C.L.C. 213. In *Yorkshire Water*, the court held that the terms and conditions of Yorkshire Water’s public liability policies did not cover the cost of conducting works in order to avoid or mitigate a loss which the insurers would or might have had to pay under the policies. The water company had spent £4,601,061 in conducting works to alleviate flooding following the spill of a large quantity of sewage sludge into the River Colne from its waste tip. The court

did not discuss *Hall Brothers* but simply cited it for the proposition that the word “damages means ‘sums which fall to be paid by reason of some breach of duty or obligation’”.

Hall Brothers and *Yorkshire Water* can be distinguished when insurers provide cover for “all sums which the insured shall become legally liable to pay as compensation”. In *Lancashire County Council v. Municipal Mutual Insurance Ltd.* [1996] 3 All E.R. 545, Simon Brown LJ rejected a narrow “legalistic” interpretation of the word “compensation” in a third-party liability insurance policy. In holding that “compensation” includes exemplary as well as compensatory damages, Simon Brown LJ remarked that although:

“the natural and ordinary meaning of “compensation” in the context of a legal liability to pay damages is one which excludes any element of exemplary damages, I cannot accept that this meaning is wholly clear and unambiguous. On the contrary it involves very much a literal, lawyers understanding of the term and is one which would not command universal acceptance.”

If the Court of Appeal’s reasoning in *Lancashire County Council* is applied to the issue of whether remediation costs are included in the word “compensation”, the court may hold that they are depending, of course, on the wording at issue. The court would, however, have to surmount the substantial hurdle that costs incurred by an insured prior to a settlement, award or judgment were covered.

The position has been further confused by the Court of Appeal’s judgment in *Jan de Nul (UK) Ltd. v. Axa Royale Belge S.A.* [2002] 1 All E.R. (Comm) 767, [2002] 1 Lloyd’s Rep. 583, in which it held that the cost of works conducted by an insured to remove silt that had damaged property as a result of its dredging operations was covered under a public liability policy. Claims for property damage caused by the siltation were brought by the Ministry of Defence, owners and occupiers of berths and wharfs, yacht builders and repairers, shipyards, a fishing association and the Hampshire Wildlife Trust, among others.

The Court of Appeal further concluded that the Hampshire Wildlife Trust’s costs of conducting a study of the effect of silt on its nature reserve were covered. The survey had concluded that the silt did not need to be removed from the nature reserve because it would not cause any long-term damage. Schiemann LJ concluded that it was in insurers’ interests in such a case for the insured to conduct investigations when property damage from its activities was reasonably suspected. He considered that insurers were protected due to the need to commission an investigation and the costs of the investigation having to be reasonable. The Court of Appeal did not mention *Yorkshire Water* in its judgment.

3. Trigger of coverage

If progressive environmental damage such as groundwater pollution from an insured site occurs, the question may arise as to whether it is covered by an old public liability policy. Cases that may be analogised to the applicable trigger of coverage point to an injury-in-fact trigger, that is, the policies that are triggered are those that were on the risk during the time of the bodily injury or property damage. The following briefly

describes the case involving a property policy that points to such a conclusion. Other analogous cases involve an indemnity and the statute of limitations.

Kelly v. Norwich Union Fire Insurance Ltd. [1990] 1 W.L.R. 139, [1989] 2 All E.R. 888, [1989] 2 Lloyd's Rep. 333 (C.A.), involved a homeowners policies that covered, among other things, the leakage of water. The policies provided that insurers would "indemnify or pay the insured in respect of events occurring during the period of insurance". The word "events" was not defined. Significant leakage had occurred before the policy periods at issue. The Court of Appeal concluded that the word "events" referred to the occurrence of perils covered by the policy that resulted in the insurer's liability, that is, the leakage of the water and not the resulting damage. The court found that the damage to the house had begun prior to the policy periods although the cumulative policies covered the entire period during which the damage occurred. The homeowner had accepted that he could not show that his house had suffered any quantifiable loss or damage as a result of the leak before the inception of the policies. The court, therefore, concluded that the "event" may have taken place entirely outside the policy period and, because the homeowner had the burden of proving that the "event" occurred during the period of the policy, the loss and damage were not covered.

4. Allocation

If an insured is liable for progressive environmental damage that has occurred during several policy periods, the issue may arise as to whether insurers who are on risk during the damage are liable for some or all of it. Two cases provide guidance on the issue: *Phillips v. Syndicate 922* [2003] EWHC 1084 (Q.B.); and *Municipal Mutual Insurance Ltd. v. Sea Insurance Company Limited* [1998] Lloyd's Rep. I.R. 421 (C.A.).

Phillips v. Syndicate 992 involved the issue of whether insurers were liable under an employers liability policy only for the amount of damages for a mesothelioma claim that was proportional to the time on which they were on the risk during an employer's continuing negligence in exposing an employee to asbestos.

Kinkia Ltd. had negligently exposed its employee, Mr Phillips, to asbestos dust between 1955 and October 1957 and between October 1959 and 1970. The company, which was dissolved in 1979, had employer's liability policies for the period of October 1959 to November 1968. In October 2002, following Mr Phillips' death from mesothelioma, his widow obtained a judgment against Kinkia (which had been brought back onto the companies register) for £205,000.

Insurers argued that they were liable only for the proportion of the damages that corresponded to the time on which they were on the risk. That is, they contended that they were liable for only 72.5 per cent of the £205,000 claim because they were on the risk for only nine of the 13 years during which Kinkia had exposed Mr Phillips to asbestos. Mr Phillips' widow brought an action against insurers under the Third Parties (Rights Against Insurers) Act 1930 for the outstanding balance for the remaining four years in the amount of £56,375 plus interest.

Insurers based their defence on the "rateable proportion" clause and an implied term due to custom and practice. The "rateable proportion" clause provided that:

“If at the time any claim arises under this policy there be any other insurance covering the same liability the Underwriters shall not be liable to pay or contribute more than their due proportion of any such claim and costs and expenses in connection therewith”.

Eady J rejected insurers’ argument that they were liable only for a proportion of the damages, concluding that the clause was designed to apply when there was double insurance, that is, when more than one policy covered a risk at the same time, not when there were successive policies. He further concluded that there was a separate liability, rather than the “same liability” for each period during which an employer made a material contribution to the harm suffered by Mr Phillips (that is, his development of mesothelioma) by continuously exposing him to asbestos. Eady J also rejected insurers’ argument that it was necessary to imply a provision covering successive policies into the rateable proportion clause in order to give the policy business efficacy. He concluded that such a clause was not needed to make the policy workable.

Finally, the judge concluded that insurers had failed to establish a generally recognised custom or practice according to which underwriters would cover only the proportion of the risk of an indivisible injury claim, such as one arising from harm caused by mesothelioma, that occurred during their policy period. He accepted that insurers may have established a practice between themselves during the late 1980s or early 1990s to pay asbestos-related claims on a time on the risk basis. He further accepted that some insureds may have accepted liability for uninsured periods. He concluded, however, that any such practice by insurers did not establish a custom and practice between an insured and insurers during the 1950s and 1960s when Mr Phillips was exposed to asbestos or even during the mid-1990s when he developed mesothelioma. In his judgment, Eady J referred to the 1981 decision by the federal Court of Appeals for the District of Columbia in *Keene Corporation v. Insurance Company of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982), for the failure of insurers in the 1950s and 1960s to develop policy language “that would directly address the full complexity entailed by asbestos-related disease”.

Eady J stated that, under *Fairchild v. Glenhaven Funeral Services Ltd.* [2003] 1 A.C. 32, [2002] 3 W.L.R. 89, [2002] 3 All E.R. 305, an employer is liable if it has made a material contribution to an employee’s risk of contracting mesothelioma by negligently exposing him to asbestos. He stated that it is irrelevant to an employer’s liability whether it had exposed an employee to asbestos during the entire period of the employee’s exposure because each period of the employer’s continued negligence in exposing the employee is a separate material contribution. Therefore, because the insured employer was liable for negligently exposing Mr Phillips to asbestos during the nine years in which insurers’ policies were on the risk, insurers were fully liable for the claimant’s damages.

In *Municipal Mutual Insurance Ltd. v. Sea Insurance Company Ltd.*, the Court of Appeal concluded that a loss occurred at the same rate during consecutive policy periods. The case involved a liability policy issued to the Port of Sunderland Authority by Municipal Mutual Insurance Ltd. Between 1986 and 1989, Sea Insurance Company Ltd. and other reinsurers issued separate facultative excess of loss reinsurance contracts to Municipal Mutual for the three 12-month periods beginning

on 24 June 1986. The identities of the reinsurers and their subscriptions varied with each contract.

During the three-year period, machinery that had been stored at the port by a third party was pilfered and vandalised. Municipal Mutual indemnified the port authority for the loss but did not apportion it between the three years of the policy period because it was not necessary to do so. Hobhouse LJ decided that even though the acts of pilfering and vandalism were conducted by individuals who were probably acting independently, the acts were attributable to a single source, namely, the port authority's failure to safeguard the machinery. The loss was, therefore, covered by the reinsurance agreements that provided cover for compensation that was payable "in respect of or arising out of any one occurrence or in respect of or arising out of all occurrences of a series consequent on or attributable to one source or original cause".

Hobhouse LJ concluded, therefore, that Municipal Mutual had established that it was entitled to cover for the losses under each reinsurance contract subject to its excess. He referred to the lower court's finding that, although some pilferage and vandalism had occurred between March 1985 and September 1988, most of the loss and damage caused by the pilfering and vandalism had occurred between 24 June 1987 and 24 June 1988. Hobhouse LJ concluded that the claims under the first and third reinsurance contracts failed because, on a balance of probabilities, the loss and damage during those periods did not exceed the applicable excesses. He further concluded that, on a balance of probabilities, two-thirds of the loss and damage occurred during the period of the second reinsurance contract.

In reaching his conclusion, Waller J referred to *Keene Corporation v. Insurance Company of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982), and *Stonewall Insurance Company v. Asbestos Claims Management Corporation*, 73 F.3d 1178 (2d Cir. 1995) (applying New York and Texas law). He commented, however, that the US cases arose "from the special problems of liability for asbestosis claims arising from long periods of potential exposure and are clearly governed by policy considerations relevant to special factors affecting that part of the insurance market in the United States". As such, the cases do not "provide guidance for the much simpler questions raised by the present case which are already governed by established principles of English law and authority".

According to *Phillips*, if more than one policy is triggered in a progressive environmental damage action, each insurer could be liable to an insured for the entire loss, subject to contribution from other insurers, if the insured made a material contribution to the loss during its policy period. According to *Municipal Mutual*, it is not necessary for an insured to prove the precise amount of damage that occurred during a policy period in a triggered policy in order for insurers to be liable for part or all of a claim for progressive environmental damage.

5. The extent of pollution exclusions

The two most commonly used pollution exclusions in public liability policies are the Association of British Insurers ("ABI") model pollution exclusion and the Lloyd's Underwriters Non Marine Association 1685.

a. *The ABI model pollution exclusion*

The ABI exclusion provides as follows:

“This policy excludes all liability in respect of Pollution or Contamination other than caused by a sudden identifiable unintended and unexpected incident which takes place in its entirety at a specific time and place during the Period of Insurance.

All Pollution or Contamination which arises out of one incident shall be deemed to have occurred at the time such incident takes place”.

“Pollution or Contamination” is defined as:

- “(i) all Pollution or Contamination of buildings or other structures or of water or land or the atmosphere; and
- (ii) all loss or damage or injury directly caused by such Pollution or Contamination”.

To impose an aggregate liability limit, the ABI suggested the following language:

“The liability of the Company for all compensation payable in respect of Pollution or Contamination which is deemed to have occurred during the Period of Insurance shall not exceed £... in the aggregate”.

To date, no court has been called on to interpret the meaning of the ABI pollution exclusion. Issues that have arisen include the definitions of the words “incident”, “pollution” and “contamination”.

b. Lloyd’s Non Marine Association Pollution Exclusion

NMA 1685 excludes cover for any liability for:

- (1) Personal Injury or Bodily Injury or loss of, damage to, or loss of use of property directly or indirectly caused by seepage, pollution or contamination, provided always that this paragraph (1) shall not apply to liability for Personal Injury or Bodily Injury or loss of or physical damage to or destruction of tangible property, or loss of use of such property damaged or destroyed, where such seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening during the period of this Insurance.
- (2) The cost of removing, nullifying or cleaning-up seeping, polluting or contaminating substances unless the seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening during the period of this Insurance.
- (3) Fines, penalties, punitive or exemplary damages.

This Clause shall not extend this Insurance to cover any liability which would not have been covered under this Insurance had this Clause not been attached”.

NMA 1685 has not been interpreted by an English court. Several US courts have reached different conclusions as to the meaning of the words “sudden, unintended and unexpected”.

c. Other pollution exclusions

English courts have construed the meaning of pollution exclusions in two cases involving public liability policies. One case involved claims against an insured dredging company for causing excessive silt to be deposited on various properties in Southampton Water including shellfish beds and a nature reserve. The public liability policy provided, among other things, cover for “pollution, environmental impairment and nuisance to neighbours” with the exception of “non-consequential immaterial damage for the risks of environmental impairment and nuisance to neighbours”. The policy excluded cover for nuisance if the pollution was “non-accidental pollution”. The word “pollution” was defined to mean “impairment by alteration of the existing quality features of the air, the water [or] the earth by adding or withdrawing substances or energy”. The word “accident” was defined as “a sudden occurrence which is unintentional and unexpected for the policyholder”.

Moore-Bick J concluded that the deposit of silt on a nature reserve was not within the definition of “pollution” when the siltation did not cause any significant damage. He further concluded that the deposit of silt on shellfish beds resulting in the destruction of a significant proportion of the shellfish was an “impairment” of the environment within the meaning of the word “pollution”. He stated, however, that the damage to the beds was not “accidental” because “it was not on any view the result of a sudden and unforeseen occurrence but of a particular method of working persisted in over a period of many weeks”. *Jan de Nul (UK) Ltd. v. N.V. Royale Belge* [2000] 2 Lloyd’s Rep. 700, [2001] Lloyd’s Rep. I.R. 327 (Q.B.D.), *aff’d* [2002] 1 All E.R. (Comm) 767, [2002] 1 Lloyd’s Rep. 583 (C.A.).

The second case involves the application of a pollution exclusion to the losses arising from the grounding of the *Exxon Valdez* in Prince William Sound, Alaska, on 24 March 1989. The clause, entitled “Seepage and Pollution Exclusion”, provided that:

“This contract excludes any loss arising from seepage, pollution or contamination on land unless such risks are insured on a sudden and accidental basis”.

The Commercial Court concluded that the clause applied only to seepage, pollution or contamination from a land-based source and not a vessel. *Commercial Union Assurance Company plc v. NRG Victory Reinsurance Ltd.* [1998] 1 Lloyd’s Rep. 80 (Comm Ct.), *rev’d on other grounds* [1998] 2 All E.R. 434, [1998] 2 Lloyd’s Rep. 600, [1998] Lloyd’s Rep. I.R. 439 (C.A.).

6. The extent of the owned property exclusion

Public liability policies generally contain an owned property exclusion which provides that the policy does not cover, for example, “damage to property owned or occupied by or in the care, custody or control of the Assured or of any servant of the Assured”.

Although insurers will probably succeed in an argument that the owned property exclusion bars the cost of remediating pollution from an insured's land when the land is remediated for the insured's benefit, an insured may be able to persuade a court that not all of the costs of remediating its property are barred by the exclusion. Under English law, landowners do not have property rights in groundwater beneath their land but only have the right to abstract the water. *Ballard v. Tomlinson* (1885) 29 Ch. D. 115 (C.A.). If insureds are required to remediate polluted groundwater beneath their property, therefore, they could argue that the cost of remediating groundwater that they do not own is not within the owned property exclusion. An opposing argument is that the groundwater is not third-party property.

III. CONCLUSION

A trend by English and EC environmental law to follow US law is developing although there are many differences between the laws, both in the actual laws and their implementation. Of the many similarities that exist, the most significant to public liability insurers are:

- liability for the cost of remediating contamination from past pollution incidents; and
- liability for natural resource damages.

Whether English insurance law will follow the insurance law of various states in the US remains to be seen due to the lack of pollution insurance coverage cases in England. One thing now appears certain, however. Some of the issues faced by English courts will be those already ruled on by courts in the US.