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Environmental Risks: *insured or not?*

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Summary of key points

In recent years, liability for environmental harm has become much more common.

Why is this? Bit by bit, the old tort system, in so far as it relates to environmental matters, has been bolstered by an elaborate system of statutory liability. The statutory system is generally much more effective than tort at imposing liability on polluters for the environmental harm that they cause and already underpins the majority of UK environmental liability cases.

The statutory liability system is growing all the time. Last year, for example, as a result of the Environmental Liability Directive, the environmental damage regime was introduced in the UK. It increased the potential remediation liability of operators that cause environmental damage at a stroke. Who knows what might happen in the future? Some commentators think that even a statutory liability regime for damage arising out of climate change could be introduced one day.

Although both types of liability lead to similar practical consequences for the organisations that incur them (namely potentially considerable expense and effort over a long period), tort liability and statutory liability are actually very different legal beasts indeed.

When it comes to insurance cover for environmental matters, the difference has important repercussions. The key thing to remember is that the insuring clause of traditional liability policies (in particular public liability policies) covers environmental liabilities established in tort but stops short of covering liabilities established under the very different statutory environmental liability system. This point was rammed home in stark fashion in the 2006 *Bartoline* decision where, when it was made liable by the Environment Agency for significant statutory remediation costs, a company found that its public liability policy did not respond.

Traditional liability policies are, of course, indispensable for dealing with a diverse range of the more common liability risks. However, the lack of cover provided for statutory environmental liabilities greatly diminishes their value as environmental liability management tools.

When, in addition, the effect of common exclusions in traditional policies are considered (for instance exclusions for gradual pollution and owned property), it becomes clear that, in addition to their lack of cover for statutory liability issues,

traditional policies only actually provide a relatively basic level of cover for tort-based environmental liabilities.

The fundamental message of this guide is simple. The gap between traditional insurance cover and the range of environmental liability to which an organisation is exposed has become uncomfortably wide and will get wider. Insureds need to appreciate the extent of the gap in their particular case and understand what products are available to fill it. There is a very good range of specialist environmental insurance products currently available in the UK market.

Below, we look at:

- The different types of environmental harm and the ways in which it can occur;
- The four main environmental torts and why they impose liability in a limited range of situations;
- The statutory environmental liability regimes, which in practice impose liability in the majority of situations;
- How liability, when it arises, is covered by traditional policies (if at all); and
- Environmental insurance policies.

Environmental harm and liability

There are four key things to note about environmental harm:

- Environmental harm encompasses a very wide range of environmental impairments, including pollution of land, waters of all kinds and the air, and biodiversity damage (i.e. damage to protected species and habitats).

- From a temporal standpoint, environmental harm can come about in many different ways. Sometimes it arises suddenly and very obviously following an incident, for example an explosion or pipe rupture. On other occasions, it develops gradually and surreptitiously, for example from a leaking underground tank, its full extent only coming to light late in the day.

- Organisations can have a hand in causing environmental harm in a variety of different ways. It can result directly from their on-site operations, but it can also result from their off-site transport operations, and from the off-site use or disposal of their products.

- Environmental harm can lead to other problems, for example illness to those that drink contaminated water or breathe contaminated air; property damage to cars showered with corrosive chemicals; or "amenity" issues for those that have to live in the changed environment.

The environmental torts

Where environmental harm has occurred, four torts can theoretically be used to impose liability on those responsible:

- Negligence;
- Nuisance;
- The rule in *Rylands v Fletcher*; and
- Trespass.

A brief description of these torts is set out in **box 1**.

Box 1: The Environmental Torts

Negligence

In very simple terms, liability in negligence exists where one person falls short of the standard of conduct that is expected in relation to another person, and personal injury or property damage results. The scope of the tort is easily wide enough to encompass situations where, for example, a company carelessly causes the release of a chemical or waste into the local environment and residents become ill or suffer damage to their tangible property, such as their homes or cars.

Three elements must be present to establish negligence:

- The defendant must owe a "duty of care" to the claimant;
- That duty must have been breached. This will have occurred if the defendant falls below the standard of behaviour that it should show towards the claimant; and
- Personal injury or damage to property must have been suffered by the claimant. This must: (i) have been caused by the defendant's breach of duty and not by some other factor; and (ii) be of a kind that is not so unforeseeable as to be too remote.

Nuisance

In general terms, private nuisance is unlawful interference with a person's use or enjoyment of his/her land. The scope of the tort is easily wide enough to encompass, and allocate liability in connection with, a wide range of neighbourhood environmental problems.

Private nuisance can be broken up into three different kinds:

- Nuisance through an encroachment on the claimant's land (for example where tree roots grow from the defendant's land onto the claimant's land or when the defendant's trees overhang the claimant's land);
- Nuisance through physical damage to the claimant's land (for example, where a defendant company's emissions cause actual damage to a claimant's curtains or paintwork); and
- Nuisance through interference with the claimant's use and enjoyment of the land (for example where things like the defendant's noise, dust, odour or vibration stop short of causing actual damage but spoil the claimant's enjoyment or "amenity" nevertheless).

Rylands v Fletcher

The judgment in this nineteenth century case established the following strict liability principle for persons who deal with dangerous materials on their property:

"....the person who for his own purposes brings onto his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of the escape."

This tort can potentially encompass, and be used to allocate liability in, a range of environmental incidents.

Trespass

Trespass to land is the voluntary, direct and unjustified intrusion by one person onto the land of another. When it comes to environmental matters, trespass has a relatively narrow scope of application. However, a good example of where the tort of trespass may have been committed is where one person comes onto another's land and flytips waste there.

The shortcomings of tort in relation to environmental liability

In theory, the scope of the four torts set out above is easily wide enough to encompass the majority of environmental harm situations. However, in practice, tort has been criticised for failing to protect the environment and deliver environmental liability effectively. Why is this?

The first reason is that for there to be any liability in tort, a third party has to be prepared to sue the polluter. Tort actions are not available to regulators like the Environment Agency. There are many reasons, financial or otherwise, why third parties – even if they have suffered at the hands of the polluter - might not want to sue. If they do not sue, there will be no tort liability for the polluter.

Second, tort is largely reactive rather than proactive. It is able to help compensate claimants that have suffered injury or damage, but is often unable to stop offending behaviour in its tracks before it has led to environmental harm.

Third, each of the torts has its own idiosyncrasies which make liability hard to establish in practice. The main ones are set out in **box 2.**

Box 2: The problems with tort

Negligence

- Negligence requires a claimant to show that the defendant has fallen below the standard of behaviour that it should show towards the claimant. In other words, there must be proof of fault. However, getting to the bottom of a company's activities to find out where it went wrong can be extremely time consuming, especially if its operations are complex or highly regulated. Demonstrating fault can therefore be very hard.
- Negligence also requires a claimant to have suffered personal injury or property damage. These are the things that are compensated for in the tort of negligence, not the pollution that caused such injury or damage. Unless personal injury or property damage arises, negligence damages will not be available – even though serious pollution may have occurred.
- There has to be a causal link between the breach of duty and the damage or injury. This is often enormously difficult to show in environmental cases. Much expert scientific evidence could be required to show how, for example, a factory's operations have led to the claimant being exposed to a chemical in sufficiently high quantities to enable a cancer to develop.
- Negligence also requires there to have been foreseeability by the defendant of the relevant type of damage or injury when it performed the negligent acts. Quite often, the acts under scrutiny were committed many years ago. Whilst a type of damage might be foreseeable today, claimants need to show that it was foreseeable in the past. This can be difficult.

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Box 2: The problems with tort (continued)

Private nuisance

- Like negligence, private nuisance also requires there to have been foreseeability by the defendant of the relevant type of damage or injury when it performed the acts complained of.
- In addition, however, a claimant can only bring an action in private nuisance if it can demonstrate a legally protected interest (e.g. a freehold or leasehold interest) in the property affected. In practice, this knocks out large numbers of would-be claimants affected by a defendant's activities.
- Compensation for personal injury is not possible in private nuisance.

Rylands v Fletcher

- The rule in Rylands v Fletcher has many of the same idiosyncrasies as negligence (except of course that, with the rule in Rylands v Fletcher being one of strict liability, there is no need for the claimant to prove fault).
- Compensation for personal injury is not possible under the rule in Rylands v Fletcher.
- Subsequent case law has made clear that although the rule in Rylands v Fletcher still exists, it will rarely apply on its own in the absence of other torts being committed. In practice, the mischief or danger requirement is not easily satisfied.

Trespass

- A claimant must be in possession (i.e. occupation or physical control) of the affected land before it can sue.
- Compensation for personal injury is not possible in trespass to land.

Summary of the new statutory regimes

In recent years, Parliament has introduced a string of statutory environmental liability regimes that make up for the lack of delivery of environmental liability by the tort system. The regimes have a number of common themes:

- They focus on a particular type of environmental harm or type of activity that might cause environmental harm;
- They are strict liability (thus avoiding the need to prove fault);
- They are regulator-enforced (thus avoiding all of the restrictions in the tort system associated with who can sue and for what);
- They are usually triggered by environmental harm or the threat of it rather than by resulting personal injury or property damage. This makes them more flexible and more easily triggered than the more reactive tort regime;
- They require the polluter to clean up rather than simply compensate third parties for their loss; and
- They are backed up with criminal sanctions.

There are many statutory regimes. The key ones are set out in **box 3.**

Box 3: Statutory Liability Regimes

Water Pollution

The most important statutory water pollution clean up provision is set out in Section 161A of the Water Resources Act 1991. Where it appears to the Environment Agency that any poisonous, noxious or polluting matter or any waste matter is or has been present in, or is likely to enter, any controlled waters, it can serve a works notice on any "responsible person".

"Responsible person" means a person who has "caused or knowingly permitted" the matter to be present in the controlled waters, or to be at a place from which it is likely, in the opinion of the Agency, to enter the controlled waters.

The works notice can require the responsible person to conduct preventive works, to remove or dispose of the polluting matter, to mitigate the effect of its presence in the water, and to restore the waters, including any flora and fauna dependent on the aquatic environment.

Rather than serving a works notice on the responsible person, the Environment Agency can, if it wishes, conduct works itself and claim the associated cost from the responsible person.

Contaminated Land

Where land satisfies the definition of "contaminated land" in Part 2A of the Environmental Protection Act 1990, the relevant local authority or (in some cases) the Environment Agency can serve a remediation notice requiring clean up.

The notice is served on the potentially wide range of persons who "caused or knowingly permitted" the contamination to get in, on or under the land. If such a person cannot be found, the notice can be served on the current owner or occupier of the land.

Waste

There are a number of powers available to regulators to remove waste from public or private land. In particular, section 59 of the Environmental Protection Act 1990 provides that if any controlled waste is unlawfully deposited in or on any land in the area of a waste regulation authority or waste collection authority, the authority may serve a notice on the "occupier" requiring him to remove the waste from the land and/or take steps with a view to eliminating or reducing the consequences of the deposit of the waste.

In certain circumstances, Section 59 of the Environmental Protection Act 1990 allows a waste regulation authority or waste collection authority to conduct removal works itself and claim the associated cost from the occupier.

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Box 3: Statutory Liability Regimes (continued)

Statutory Nuisance

Part III of the Environmental Protection Act 1990 deals with statutory nuisances, clean air and controls over offensive trades. The legislation lists a number of circumstances (involving odour, dust, noise, smoke, etc) that amount to statutory nuisances.

Where a local authority is satisfied that such a statutory nuisance exists, it may serve an abatement notice prohibiting or restricting its occurrence or recurrence on the person responsible for the nuisance or, where that person cannot be found, the owner or occupier of the relevant premises.

Environmental Damage

Where damage has occurred (or there is an imminent threat of damage) to protected species or natural habitats, a Site of Special Scientific Interest, waters or land, the environmental damage regime set out in the Environmental Damage (Prevention and Remediation) Regulations 2009 comes into play.

Operators are required by the regime to be proactive in dealing with imminent threats of environmental damage and remediating any environmental damage that does occur. The relevant regulator (usually the Environment Agency) will serve a notice on the relevant operator requiring it to conduct potentially extensive remediation including 'complementary' and 'compensatory' remediation. Liability for many operators is strict.

Coverage issues

It should by now be clear to the reader that, owing to its unique mix of tort and statutory liability, environmental liability is like no other. This booklet now looks at the extent to which environmental liabilities are covered by traditional insurance policies.

Do these policies fully cover the exposures emanating from the developing environmental liability system? As will become clear, the answer is a definite "no". Indeed, the gap between traditional insurance cover and the range of environmental liability to which an organisation is exposed has become uncomfortably wide and will get wider.

Cover – Public liability insurance policies

Public liability policies are extremely common. As their name would suggest, they give insureds vital protection against a variety of general third party liabilities that are occasionally suffered in the course of day-to-day activities.

However, when it comes specifically to environmental liabilities, public liability policies offer limited protection. Why is this? In short, public liability policies were never designed to cover the range of environmental liabilities now encountered by insureds. Many claims for environmental liabilities (in particular statutory liabilities) do not even fall within the insuring clauses of these policies. Of those that do, many fall foul of the various exclusions and other clauses that these policies commonly contain. This is elaborated on further below.

Incompatibility with statutory liabilities

Insuring clauses in public liability policies only cover civil law/tort liabilities. They do not cover the rather different statutory environmental liabilities. This was very clearly demonstrated in the 2006 case **(see box 4)** of *Bartoline Limited v Royal & Sun Alliance Insurance plc and Heath Lambert Limited.*

In this case, the court was effectively asked the following question: are statutory environmental clean up liabilities covered under traditional public liability insurance policies? The court's response, based on the public liability insuring clause at the centre of the case indemnifying Bartoline against legal liability for "damages", was "no".

Because the majority of environmental liability situations that an organisation is likely to encounter will involve statutory, rather than tort, liabilities, the case means that companies that only have traditional public liability policies will not be covered for the majority of environmental liability situations that they might encounter.

Box 4: Bartoline v RSA and Heath Lambert: the facts

The water pollution in this case resulted from spilled chemicals and foams used to fight a fire at Bartoline's warehouse.

Pursuant to the statutory water pollution regime, the Environment Agency took emergency measures to clean up and (as it was entitled to do) sent Bartoline the bill. It also ordered Bartoline to carry out further clean up works.

Bartoline claimed its clean up costs (£147,988) and the Environment Agency's clean up costs bill (£622,681) under its public liability insurance, which indemnified Bartoline against "legal liability for damages in respect of....accidental loss of or damage to property.....nuisance, trespass to land or trespass to goods or interference with any easement right of air, light, water or way".

The Mercantile Court in Manchester, hearing the case, decided (on 30 November 2006) that the sums claimed did not constitute "damages" and were not therefore covered under this common policy wording.

The case has led many insurers to offer "Bartoline extensions" to their public liability policies with the aim of including statutory liabilities to some extent within the policy cover. No accepted standard Bartoline extension wording exists. In the main, the various extensions in existence are helpful, but they do not rectify the gap in cover for statutory liabilities highlighted in the case completely, and they do not close any of the other coverage problems highlighted in this section at all.

In particular (and recognising that different extensions will cover slightly different things), the extensions are unlikely to cover:

- Any liability incurred as a result of 'gradual' pollution;
- Statutory liability for remediation of own site pollution;
- Statutory liability for costs of regulator relating to own site pollution;
- Statutory liability for biodiversity damage; and
- Statutory liability for dealing with imminent threats of environmental harm.

Need for "reasonable precautions", a "claim" against the insured, and "legal liability"

As a precondition to indemnification, a public liability policy will usually require:

- Reasonable precautions to have been taken at the insured's expense to prevent or diminish losses or liability arising in connection with the insured risks;

- A formal "claim" to have been made against the insured by a third party; and

- "Legal liability" on the part of the insured. Legal liability arises when the insured and the claimant have agreed to settlement, or there is a judgment or arbitration award.

In the context of the wider third party claims that public liability policies are designed to cover, the reasons behind these requirements are understandable and the requirements themselves are manageable.

However, very often in cases involving environmental harm, the sensible approach is for the insured to be proactive and take early action to reduce or avoid a liability, loss or claim that is likely, in time, to arise. Where this approach is taken, these requirements mean that the insured should not expect to be indemnified.

The "Gradual Pollution" Exclusion

Virtually all public liability policies have contained an express "gradual pollution" exclusion since about 1990. The ABI's model exclusion, which the vast majority of UK public liability policies follow closely, is set out in **box 5**.

The gradual pollution exclusion means that of all of the liability claims that fall within the scope of the insuring clause (and, to re-emphasise, statutory liability claims do not fall within the insuring clause unless there is a Bartoline extension), the only ones that will be indemnified by the insurer are those 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".

Demonstrating a causative incident with the right characteristics could be difficult for the insured. Not only does the incident have to be sudden, identifiable, unintended and unexpected, it also has to take place in its entirety at a specific time and place during the Period of Insurance. The effect of the pollution exclusion is therefore to exclude from cover a great many environmental liability scenarios that fall within the insuring clause.

Box 5: ABI Pollution Exclusion

A. This policy excludes all liability in respect of Pollution or Contamination other than that 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.

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

C. For the purpose of this Endorsement "Pollution or Contamination" shall be deemed to mean:

(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 or indirectly caused by such pollution or contamination."

There are three interesting points to note about the "gradual pollution" exclusion:

- In the ABI wording, it is not the pollution that has to be "sudden, identifiable, unintended and unexpected". It is the incident that caused it. Liabilities stemming from gradual pollution are not excluded where the pollution is caused by the right type of incident (i.e. sudden, identifiable, etc).

- The word "incident" is not defined in this context.

- When it was introduced, insurers were keen to emphasise that the exclusion was not materially changing the cover afforded by a public liability policy. Their view at the time was that gradual pollution liabilities were not covered by public liability policies and the express exclusion merely spelled this out. Thus, it is not necessarily true to say (as is commonly done) that all pollution liabilities falling within the scope of the insuring clause (including gradual pollution liabilities) were covered until the express exclusion was introduced.

Owned property exclusion

Public liability policies provide cover for claims by third parties against the insured. They do not cover a claim by the insured for damage to its own property. This is because the insured has no legal liability in tort for such damage. Policies usually contain an exclusion which bars cover for damage to property which is owned or occupied by, or is in the care, custody or control of, the insured. Many policies now extend cover to include damage to any premises leased or rented by the insured but such cover would typically only apply to pollution damage to the premises themselves and would exclude any contractual liability.

If the insured incurs costs in remediating contamination on its own site (a very plausible scenario following an environmental incident), the owned property exclusion will very likely operate to deny cover for such costs – possibly even where the remediation is intended to diminish off-site risks.

Cover - other policies

D&O

Traditionally, D&O policies have contained an absolute pollution exclusion, with the result that they do not indemnify directors or officers in respect of liabilities stemming from most forms of environmental harm.

It is fair to say that since the mid 1990s, some D&O policies applied a sub limit of indemnity for costs incurred by the insured in defending criminal or civil environment-related claims. It is also fair to say that some insurers are reviewing their stance in relation to the absolute pollution exclusion. The position is not clear cut or uniform, however.

Property

Property policies, which provide cover for losses resulting from damage to property which is owned or occupied by an insured, cannot be relied upon to provide comprehensive cover for environmental liabilities.

- First, a property policy provides cover only in respect of specific buildings and not as a general rule land. Thus, when a chemical escapes and damages an insured building, there might be cover. However, when it enters the soil which then has to be cleaned up, a property policy will invariably not respond, even when the area of contaminated soil is confined to the area underneath the insured building.

- Second, since the early 1990s, most property policies have included a qualified or absolute pollution exclusion.

- Third, the cover for "debris removal" in most property policies is of limited value. The debris in question usually has to come from the insured property and is invariably expected to be solid in nature.

Employers' liability

These policies will provide cover to an insured in respect of a claim by an employee who has suffered injury or disease as a result of exposure to a dangerous substance.

However, there is no cover for anything other than claims made by employees. There is no cover in respect of any form of remediation or property damage.

Motor

Motor policies cover the driver's liability to third parties (including passengers) for personal injury and property damage arising out of use of a vehicle. They can also cover injury to the driver and damage to his/her property.

Essentially, the liability section of motor policies are structured in the same way as public liability policies, with the result that, although the sudden, identifiable, unintended and unexpected incident requirement for pollution incidents would not generally cause a problem in relation to motor accidents, the extent of cover is limited.

Environmental Insurance

It will be clear from the last section that when it comes to environmental liability risks, standard or traditional policies fall short of providing comprehensive cover.

Insureds need to appreciate the extent of the gap between the environmental liabilities that they might incur, and the cover that they have.

Environmental insurance products are available in the market to help fill the gap. They are worded so as to provide far more comprehensive coverage of environmental liabilities than the more standard policies.

The key points relating to environmental insurance policies are that:

- Most cover statutory liabilities as well as tort liabilities arising out of environmental harm;
- In covering statutory liabilities, they cover the full range of investigation and remediation that can be ordered, in particular the complementary and compensatory remediation that can be ordered under the new Environmental Damage regime implemented pursuant to the EC Environmental Liability Directive;
- They cover liability for environmental harm, even where the harm has not arisen as a result of pollution or contamination (e.g. where the harm results from a fire or a flood);
- They cover liabilities resulting from gradual pollution as well as liabilities resulting from pollution caused by a sudden incident (as long as the relevant release and/or harm post dates a retroactive date which is clearly set out in the policy); and
- They are very likely to provide cover in the very common situation where an insured sensibly takes action in respect of environmental harm before a formal claim is made and before legal liability is officially established.

Depending on the precise environmental policy purchased, there is cover for statutory and tort liabilities that arise from environmental harm that is:

- On the insured's site; and/or
- Off the insured's site.

Cover can also be arranged for liability arising out of historical contamination at specific sites (whether currently owned or previously sold), liability for environmental harm arising from products, and liability associated with installation, repair and servicing work at third party premises.

Notes

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