C.E.D.R.

European Council for Agricultural Law
Comité Européen de Droit Rural (C.E.D.R.)
Europäisches Agrarrechtskomitee

XXII European Congress and Colloquium of Agricultural Law – Almerimar-El Ejido (Spain) – 21-25 October 2003

XXII Congrès et Colloque Européens de Droit Rural – Almerimar-El Ejido (Espagne) – 21-25 octobre 2003

XXII Europäischer Agrarrechtskongress mit Kolloquium – Almerimar-El Ejido (Spanien) – 21-25 Oktober 2003

Commission I – Kommission I

AGRICULTURE, ENVIRONMENT AND FOOD PRODUCTION: THE ROLE AND LIABILITY OF THE FARMER/GROWER

AGRICULTURE, ENVIRONNEMENT, ALIMENTATION: FONCTIONS ET RESPONSIBILITES DE L'AGRICULTEUR

LANDWIRTSCHAFT, UMWELT UND ERNÄHRUNG: ROLLE UND HAFTUNG DES LANDWIRTS

National Report – Rapport national – Landesbericht

United Kingdom – le Royaume-Uni – Vereinigtes Königreich

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United Kingdom report – Rapport du Royaume-Uni –
Bericht des Vereinigten Königreichs

Geoff Whittaker
Consultant & Adviser, UK Agricultural Law Association

1. Are there specific norms in your country dealing with civil liability of farmers?

To appreciate the consequences of any provision of English law, it is necessary first to understand the terminology used in application to a person's liability. English law is a common law system. There is no formal written code, either civil or criminal, and there are, at the most fundamental level, no restrictions or parameters on activities which may be undertaken – unless there is a specific legal provision, by way of case law (established by the law of precedent), statute or regulation, prohibiting or restricting an activity, a person may do what it pleases him to do.

Thus, English statute law, and its derivative regulations, are (in theory, at least) drawn in precise terms so as to prohibit or restrict only the particular act which is the target of the legislation, and not inadvertently to catch other acts which may be regarded as socially or politically 'legitimate'. Contrast this with the approach of many other jurisdictions, whose laws are 'permissive' and thus drawn as widely as possible to permit as much as possible. The ultimate goal is the same, but the mechanics radically different.

The expression "civil liability", in England, refers principally to the rights and liabilities of citizens between themselves; for example, the liability of one person who causes physical injury to another through his negligence, or who damages the other's property by trespass.

The liability owed by a citizen to society as a whole is referred to as "criminal liability". This covers not only the more obvious criminal acts, such as theft or personal assault, but also breaches of what other jurisdictions may call "administrative" regulations, such as those governing acts which may harm the environment.

Thus, as we shall see, regulations dealing with environmental harm or product liability, and other such matters, impose criminal sanctions on the party who breaches them, as well as, in some cases, imposing civil liability to parties affected by the breach. Particular provisions exist relating to land contamination which impose liability on a responsible person to clean up the contaminated land.

Additionally, there are many different ways of achieving a result. 'Information instruments' are used to advise, train and raise awareness of issues, such that the recipient may adapt his practices to a more beneficial result.

'Voluntary instruments', such as the crop assurance schemes and the several agri-environmental schemes operated under the England Rural Development Plan, offer an incentive to parties to enter into long-term agreements for environmentally friendly farm management practices, but carry no element of compulsion on parties to enter into the schemes.

'Economic instruments' use financial burdens or disincentives to persuade parties into practices which are more beneficial. A classic example is the landfill tax, levied on those who would use landfill sites for the disposal of waste rather than recycling or disposing in a less environmentally harmful way; or deposit/refund schemes whereby a sum of money is recoverable on presentation of an empty container for re-use or recycling.

'Regulatory instruments' are favoured where there is a need for a high degree of certainty in the outcome, or where there is a constraint on timing of the required result. Thus one finds controls on emissions which are harmful; or mandatory operator training or licensing in relation to potentially dangerous machinery or chemicals.

All of these features, in their various combinations, operate within the sphere of what other jurisdictions may regard as "civil liability". In this paper the terms "civil liability" and "criminal liability" are used in the sense that they apply in English law.

2. Does the implementation of Council Directive 85/374/EEC of 25th July 1985 concerning liability for defective products apply to agricultural products?

The Products Liability Directive was transported into English law by the Consumer Protection Act 1987. Initially this exempted agricultural products from the effect of the Directive, but an amending regulation was passed in 2000 removing that exemption. Agricultural products are now therefore covered in the same way as others.

The Act imposes civil liability on producers to persons who suffer damage as a result of a defect in a product. The 'producer' is the person who manufactures, wins or abstracts the product, or who applies a process to a product which changes its essential characteristics. Suppliers are similarly liable if they are requested by the injured party to provide details of the producer but fail to do so within a reasonable time.

A 'defect' arises where the safety of the product is not such as persons generally are entitled to expect, taking into account all the circumstances (mirroring the wording of the Directive itself). Thus before a breach can be proved, it is necessary to consider the safety standards that persons generally are entitled to expect.

The Act states the general safety standard to be that by which the product is "reasonably safe having regard to all the circumstances", which does not reduce by much the scope for argument.

Several defences are provided to a person proceeded against under these provisions. He will not be liable if:–

1) the defect arises as a result of compliance with any UK law or Community obligation;
2) the person can prove that he was not the supplier of the product;
3) that the product was not supplied in the course of a business;
4) that the defect did not exist in the product at the time of supply;
5) that the level of scientific and technical knowledge was not such that the producer might be expected to have discovered the defect; or
6) that the defect did not exist in the original product supplied but only came into being as the result of a subsequent process in which the producer was not concerned, or as a result of the original producer's complying with instructions given by the producer of the subsequent product.

In addition to this civil liability, a producer is criminally liable if he supplies any consumer goods failing to comply with the general requirement of safety, or offers, shows or possesses any such goods for supply. On conviction, an offender is liable to a fine or to a maximum of six months' imprisonment.

3. When implementing Directive 91/676/EEC of 12th December 1991 concerning the Protection of Waters against Pollution caused by Nitrates from Agricultural Sources, are the farmers included as subjects of civil liability for environmental damages?

Implementation of the Nitrates Directive in the UK has been by means of designation of affected areas as Nitrate Vulnerable Zones (NVZs) (see further the section on NVZs below).

Sixty-six areas covering approximately 8% of England's land area were designated in 1996. Following a review, further areas were designated in 2002 so that now approximately 47% of the area of England is covered.

Farmers in NVZs have been obliged since December 2002 to abide by the terms of the NVZ 'Action Plan', which prescribes management practices. Failure to comply with the Action Plan is a criminal offence, and a guilty farmer is liable to a fine.

4. Does a code of good agricultural practices exist in your country? Does it include any regulation of civil liability for environmental damages?

The Ministry of Agriculture Fisheries and Food (MAFF) produced three Codes of Good Agricultural Practice in the early 1990s, dealing respectively with the protection of water, air and the soil. They were revised in 1998, and secondary Codes have also been published dealing in more detail with certain elements of the principal Codes, such as agricultural use of sewage sludge and use of herbicides and pesticides near water.

Whilst they do not have the force of law – in the sense that neither is breach of the Code an offence in itself, nor is compliance with the Code a defence to a prosecution for causing pollution – the extent to which a farmer has complied with the Code will be taken into account in dealing with any case of suspected pollution and may serve to reduce the punishment which he might otherwise receive.

Those sections of the Code dealing with the protection of water which relate particularly to nitrate pollution are taken as complying with the UK's obligations in that behalf created by the Nitrates Directive.

As previously stated, the Codes have no force of law, but in certain instances their 'recommendations' have been transported into legally enforceable provisions elsewhere; for example, in the context of the NVZ Action Plan discussed below.

5. Is there any regulation concerning diffuse contamination in your country?

The issue of diffuse contamination of water by agriculture is under strategic review by the Department for Environment Food and Rural Affairs (DEFRA – established in 2001 as the successor to MAFF), but has not yet resulted in any regulation.

The review began at the beginning of 2002, and a Discussion Document was issued by DEFRA in April 2003 reporting on their present thinking and inviting comments. Formal consultation is expected later in 2003.

The difficulties perceived in formulating policy are various. First, a wide range of disciplines is involved, including hydrology, ecology and agriculture, which have no history of interaction.

Secondly, the extent of the problem is unknown. Evidence is largely anecdotal, and statistical analysis – such as there is – results from estimate and extrapolation.

Further research is being undertaken and 'stakeholders' – current UK management-speak meaning interested parties – are being invited to make representations with a view to the development of an acceptable and sustainable policy.

6. When using phytosanitary products and pesticides, are there specific limits as to the use in respect to the quantity and in respect to the locations where they can be used?

There are many legislative provisions dealing with the application of pesticides which, directly or indirectly, affect the levels of phytosanitary products or pesticides which can be used.

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Regulations prescribe the maximum levels of pesticide residue acceptable in crops, foods and animal feeding stuffs; or in bottled water for drinking by humans.

The Water Resources Act 1991 makes it a criminal offence to discharge any poisonous, noxious or polluting matter or solid waste matter (which will include pesticides and pesticide residues) into any controlled waters (meaning groundwater, coastal and inland waters) without a licence issued by the Environment Agency (a Government Agency established under the Environment Act 1995 and charged with the responsibility for preventing or minimising pollution and to protect and enhance the environment as a whole).

That is a general prohibition – a farmer causing or permitting chemicals to discharge into a waterway will be committing this offence and will be liable to prosecution and a fine.

Additionally, the Groundwater Regulations 1998 dictate particular substances the discharge of which is either absolutely prohibited (List I) or restricted (List II) – biocides and their derivatives appear in List II. Discharge of restricted materials requires a licence from the Environment Agency.

The Environment Agency is entitled to impose such conditions on any permission as it thinks fit, and will refuse unless it is satisfied that the discharge will not produce unacceptable environmental consequences.

7. Are there any vulnerable zones or special zones of protection included in those zones in regard to which the use of chemical products is prohibited or restricted?

The first designation to be applied on the basis of an area's vulnerability to environmental damage was the Nitrate Sensitive Area (NSA) designation. Ten pilot areas were designated in 1990, and 22 more followed later. According to DEFRA approximately 35,000 ha. of agricultural land is now covered.

Farmers in areas so designated were invited on a voluntary basis to enter into management agreements governing their use of the land in return for additional support payments. All areas designated as NSAs are now included within Nitrate Vulnerable Zones, and the scheme was therefore closed to new applications in 1998.

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The first designations of Nitrate Vulnerable Zones (NVZs) were made in 1996. Some 66 areas, covering 600,000 ha. (about 8% of the national area of England), were designated.

However, there was litigation over the correctness of the extent of the designations and over the methodology used for assessment of water nitrate levels in the processes leading to the designations. Following the result of that litigation, which was heard in the ECJ at the end of 2000, further designations have been made.

The criteria used to establish the extent of the designations were:–

1) Surface freshwaters which contain or could contain, if preventative action were not taken, nitrate concentrations greater than 50mg/l.

2) Groundwaters which contain or could contain, if preventative action were not taken, nitrate concentrations greater than 50mg/l.

3) Natural freshwater lakes, or other freshwater bodies, estuaries, coastal waters and marine waters which are eutrophic or may become so in the near future if protective action were not taken.

Using those criteria, approximately 47% of the land area of England is now within a designated NVZ.

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Within those areas, farmers have been obliged since 19th December 2002 to follow an 'Action Plan'. The legal obligation for compliance rests with the 'occupier' of each 'farm'. In most cases, the extent of a 'farm' will be obvious, as will the identity of the 'occupier', but where the parties, for example, operate under a share farming agreement, whereby each 'occupies' the land in his own right and the parties each take a reward from their working of the land, the position may not be as clear cut.

The guidance for farmers and landowners on the operation of the NVZ Action Plan published by DEFRA attempts to indicate how it will treat particular cases, whilst retaining the flexibility that each case will be taken on its own facts.

The Action Plan itself provides quantitative limits on the amounts of fertiliser which may be applied to the land – 210kg/ha on arable land, 250kg/ha on grassland – and prohibits application during the autumn (precise periods of prohibition vary according to the type of fertiliser being applied and the nature of the land to which it is applied).

There are particular rules regarding the storage of slurry and an obligation for a farmer to have sufficient storage to accumulate the quantity of slurry produced during the autumn prohibition period. Limited financial assistance is available to farmers who need to create or expand their slurry storage capacity to meet this requirement.

The restriction on amounts of fertiliser have had severe implications for livestock farmers. It is necessary to calculate the amount of manure likely to produced by each animal (by reference to formula based on the animal's weight); if the result is overfertilisation, farmers must either acquire – or at least make arrangements to have access to – more land on which to run the animals, or reduce the size of their herd.

All farmers must keep records for the previous five years of all livestock numbers, cropping and use of nitrogen fertilisers and organic manures.

Responsibility for enforcement of the NVZ Action Plan lies with the Environment Agency. It serves the dual role of adviser to farmers and landowners and the ultimate prosecuting authority – DEFRA encourages farmers and landowners to seek the advice of the Environment Agency, with the clear implication that if they do not follow the advice, enforcement action will follow.

In addition to, or in minor cases as an alternative to, prosecution, the Environment Agency has power to issue an enforcement notice, requiring remedial action to be taken to prevent continuation or repetition of the breach, and failure to comply with the enforcement notice is an offence in its own right.

The maximum penalty on summary conviction (i.e. in a Magistrates' Court) for breach of the Action Plan is a fine of £20,000. Further liability may arise according to the nature of the breach under other principles of law.

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Running in parallel with the NVZ designations is the Environmentally Sensitive Area (ESA) scheme. Twenty-two areas in England have been designated since 1987. Farmers are encouraged to adopt agricultural practices which safeguard and enhance parts of the country of particularly high landscape, wildlife or historic value and to improve public access to those areas where possible, in return for additional support payments. The basis of this agri-environment scheme is broader than simply to prevent pollution: the practices required of participating farmers are also intended to conserve the landscape, flora and fauna, and to promote biodiversity.

Farmers enter into a 10-year management agreement (with an option for either the farmer or DEFRA to terminate the agreement after five years) which gives them the right to additional, area-based payments in return for their restricted agricultural practices. Rates of payment vary according to the area in question, the nature of the land and the activity undertaken or forgone.

By the end of 2002, according to DEFRA, some 12,000 agreements had been entered into, covering approximately 570,000 ha.

8. In the case of non-compliance with the before-mentioned limitations, is there a civil liability of the farmer or is it considered as a simple administrative infringement?

The nature of the liability of a farmer failure to comply with the terms of a scheme varies according to the scheme in question.

As has been seen, breach of the requirements of the NVZ Action Plan in Nitrate Vulnerable Zones carries liability to prosecution and a fine.

In other cases, such as ESAs, where the farmer has voluntarily entered into an agreement limiting or dictating his management practices, the penalty for breach is set out in the contract, and will amount to loss of all payments made under the contract to the point of breach, plus interest on monies paid to the farmer under the contract. In other words, the State is put financially in the position it would have been had the agreement never been made, on a similar basis to the compensation payable by way of damages for a breach of any other contract.

Breach of the management agreement does not, by itself, render the farmer liable to recompense environmental damage occasioned by the breach, although there may, of course, be cases where the breach results in damage giving rise to such liability under other principles of law (see for example comments on the application of the 'polluter pays' principle, below).

9. Is it planned to provide for licences or administrative authorisations for the realisation of certain activities of the farmer which may affect the environment? If yes: Is the action of the farmer causing environmental damages, even when acting within the limits of the licence, subject to civil liability of the farmer or is it covered by the licence?

There are cases, as we have seen, where for reasons of pollution control, a farmer's practices are dictated by law. In the sense that a farmer, or his workers, has to be licensed, for example, in the use of pesticides, it can be said that activity involving certain practices is 'licensed'.

The Environmental Protection Act 1990 provides a comprehensive scheme for the licensing of waste disposal activity. Disposal of agricultural waste is presently exempt, but there are powers for the Secretary of State to designate additional categories of waste to be brought into the regime. (This power was used to temporarily designate animal carcases being disposed of in 2001 during the foot-and-mouth disease outbreak as 'controlled waste' and to require a waste management licence to be obtained for their disposal).

The question of licensing other agricultural activities is under consideration by DEFRA, but at the time of writing no concrete proposals have been brought forward. It is thought that regulations are likely in the near future which will include limiting application of chemical sprays near dwellings.

10. Are there any specific norms of civil liability concerning agricultural activities causing environmental damages within protected areas?

As has been seen, the enactments and other provisions relating to the liability of farmers and growers in environmental matters are many and various. Most impose a level of criminal liability, resulting in a fine; many additionally impose a civil liability requiring the payment of compensation in one form or another. Each of those provisions must be considered applicable only to its own particular cases and, although there is clearly a degree of interaction between some of them, the punitive provisions of each stand in isolation.

Regardless of any principles enacted in statute or derivative legislation, the English common law imposes a tortious liability on those who by their acts or omissions injure others or their property. So, where, for example, a farmer causes damage to a neighbour by allowing a substance to escape from his property, he will be liable to that neighbour to compensate him.

The compensation under such tortious principles is known as 'damages', and will, to express it in its simplest way, will be the amount required to put the injured party in the position in which he would have been but for the act or omission of which he complains.

11. Does the application of the polluter pays principle have any concrete manifestations with regard to agricultural activities?

It might be said that the tortious principle of compensation ('damages') referred to in the preceding paragraph applied the 'polluter pays' principle in English law in a limited way long before it became popular to talk of it at the level of the European Communities. In the case of *Rylands v Fletcher* in the 19th Century, it was established that a person was liable to others affected by the escape from his property of something (in that case, water) which he ought to have contained and which was likely to cause damage if it escaped. No proof of negligence is required for liability to arise under this principle. (This gave rise to the specific tort of *Rylands v Fletcher*, named after the case.)

That can easily be extrapolated to the case of the escape of polluting matter to the extent that another identifiable party might suffer damage as a result.

But as regards damage to the environment in general, the position is now governed by Part IIA of the Environmental Protection Act 1990, comprising sections 78A-YC. (The unconventional numbering of the sections results from the provisions originally enacted being found to be totally unworkable in practice. They were never brought into force and were repealed and replaced by the Environment Act 1995 which has been in force, in certain respects, since September 1995, and in all respects since April 2000.)

The new legislation requires every local authority to compile a record of any land in its area which is "contaminated" – defined as land being in such a condition, by reason of substances in, on or under it, that significant harm is being caused, or there is a possibility of such harm arising, or that controlled waters are being or may be polluted. ('Controlled waters' here means the same as it does under the Water Resources Act 1991 – see above.)

The authority must then require remediation of the contamination so recorded. The person liable for the remediation is the person who "caused or knowingly permitted" the contamination (whenever it may have occurred), or, if that person cannot be found, the current occupier of the land. The liability of the person who caused or permitted the contamination is limited to the extent of the contamination caused or permitted by him only, but the liability of the current occupier (if he becomes the responsible person) is not limited. Where two or more persons are found to be responsible – as will be the case where the contamination has occurred at separate and distinct points of history – the authority must decide the degree of apportionment of responsibility between them.

Not only must the responsible person pay for the clean-up of the contamination, any neighbouring person, or other person whose consent is needed for the remediation operations, is obliged to consent and is entitled to receive compensation from the responsible person in an amount set out in regulations.

Before issuing a notice requiring remediation, the local authority is under a duty to consult with all persons it thinks may be responsible with a view to the remediation being carried out by agreement. If agreement cannot be reached, the authority may proceed to enforce the remediation by issuing a formal notice, non-compliance with which renders the recipient liable to prosecution and a fine.

In certain instances, involving severe contamination or contamination over a wide area, the duties of the local authority can be passed to the Environment Agency who will supervise the remediation.

There are provisions allowing the authority to limit the liability of the responsible person in cases of hardship, or permitting it to undertake the remediation work itself.

It can be seen that, in cases where the person who caused or permitted the contamination cannot be found, the position of the current occupier is particularly vulnerable, since he is responsible without limit for the costs of clean-up, even though he may have acquired the land in ignorance of the contamination. Modern purchasers can and do carry out an 'environmental audit' to discover for themselves any potential problems, but the Act applies the responsibility retrospectively and those who acquired before matters were considered so important as they now are, and who did not carry out any such audit, are nevertheless exposed to the liability.

12. Is there any jurisprudence in your country related to the civil liability of the farmer for environmental damages? Which subjects are concerned?

English jurisprudence being what it is – founded on common law, supplemented by Acts of Parliament and derivative legislation – it cannot realistically be said that there is any single body of law or any single place to discover the jurisprudence relating to the liability of a farmer for environmental damage. The jurisprudence amounts to the collective effect of, amongst others, the various matters discussed elsewhere in this paper.