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THE CRIMINAL ENFORCEMENT OF WASTE MANAGEMENT LAW IN IRISH DISTRICT COURTS: A CRITICAL ANALYSIS

L'APPLICAZIONE PENALE DELLA LEGGE SULLA GESTIONE DEI RIFIUTI NEI TRIBUNALI DISTRETTUALI IRLANDESI: UN'ANALISI CRITICA

di Kevin O'LEARY

Abstract. The paper analyzes the criminal-environmental regulatory framework in Ireland and looks at the strengths and weaknesses of the environmental criminal justice system and how that system could be made more effective.

Abstract. Il documento analizza il quadro normativo penale-ambientale in Irlanda e esamina i punti di forza e di debolezza del sistema di giustizia penale ambientale e come tale sistema potrebbe essere reso più efficace.

Parole chiave: Tribunali distrettuali irlandesi, giustizia penale ambientale.

Key words: Irish District Courts, enviromental criminal justice.

LEXAMBIENTE
Rivista Trimestrale di Diritto Penale dell'Ambiente
Fasc. 1/2021

1. **Table of Contents**

Table of Cases

CJEU

C-494/01 *Commission v. Ireland*[2005] ECR I-3331.
C-176/03, *Commission v. Council*[2005] ECR I-7879.
C-440/05, *Commission v. Council* [2007] ECR I-9097.
C-113/12 *Brady v. EPA* [2013]ECLI:EU:C:2013:627

ECtHR

Özturk v. Germany No. 8544/79. [1984] ECHR. [1984] ECHR 13.

Ireland

Grimes v. Owners of SS Bangor Bay [1948] 1 IR 350.
Melling v. Ó Mathghamhna[1962] IR 1
Conroy v. Attorney General [1964] IR 411
State (Murray) v. McRann[1979] IR 133.

The People (D.P.P.) v. Tiernan [1988]IR 250.
McLoughlin v. Tuite [1989] IR 82.
Maguire v. Shannon Regional Fisheries Board[1994] 3 IR 580
Shannon Regional Fisheries Board v. Cavan County Council [1996] 3 IR 267
Mallon v. Minister for Agriculture, Food and Forestry [1996] 1 IR 517.
Meagher v. O'Leary [1998]4 IR 33.
Wicklow County Council v. Fenton [2002] IEHC 102.
Registrar of Companies v. Judge Anderson [2005] 1 IR 21.
Cork County Council v. O'Regan [2005] IEHC 208.
CC v. Ireland[2006] 4 IR 1
Brady v. EPA[2007] IEHC 58.
Wicklow County Council v. O'Reilly [2007] IEHC 71.
EPA v. Neiphin Trading Ltd [2011] IEHC 67.
John Ronan & Sons v. Clean Build Ltd [2011] IEHC 350.
D.P.P. v. Fitzgibbon [2014] IECCA 12.
D.P.P. v. Ryan [2014] IECCA 11.
D.P.P. v. Z [2014] IECCA 13.

Canada

R. v. M(CA)[1996] 1 S.C.R. 500 at [80], (1996) 105 C.C.C. (3d) 327.
R. v. City of SaulteSte. Marie[1978] 2 R.C.S. 1299.

United Kingdom

Sherras v. De Rutzen [1895] 1 QB 918.
Alphacell Ltd. v. Woodward [1972] 2 All ER 475
Gammon (Hong Kong) Limited et al v. Attorney General of Hong Kong [1985] AC 1.
NRA v. Empress Car [1998] 1 All ER 481.

Table of Legislation

CJEU

Treaties

Treaty on the Functioning of the European Union, OJ C 326/323 (2012).

Directives

Council Directive No. 442/1975, OJ L194 (1975).
Council Directive No. 98/2008, OJ L 312/3 (2008).
Council Directive 99/2008, OJ L328/28 (2008).

Recommendations

Council Recommendation of 3rd March 1975, OJ L194 (1975) (concerning cost allocation and action by public authorities on environmental matters).

Ireland

BunreachtnahÉireann(Constitution of Ireland) (1937, as amended)

Primary Legislation

Courts of Justice Act 1924
Courts (Establishment and Constitution) Act 1961.
Waste Management Act 1996.
Protection of the Environment Act 2003.
Fines Act 2010.

Secondary Legislation

Waste Management Act 1996 (Commencement) Order 1996. (SI No. 192 of 1996).
Waste Management (Collection Permit) Regulations 2007 (SI 820 of 2007).
European Communities (Waste Directive) Regulations 2011 (S.I. No.126 of 2011).
District Court (Civil Procedure) Rules 2014 (SI No. 17 of 2014).

LEXAMBIENTE
Rivista Trimestrale di Diritto Penale dell'Ambiente
Fasc. 1/2021

District Court Districts and Areas (Amendment) and Variation of Days and Hours (Abbeyfeale, Carrickmacross, Cavan, Limerick, Monaghan, Newcastle West and Virginia) Order 2014 (SI No. 142 of 2014)

United Kingdom
Environmental Protection Act 1990.
Tribunals, Courts and Enforcement Act 2007.
Regulatory Sanctions and Enforcement Act 2008.
Coroners and Justice Act 2009.

Introduction

Much of the existing academic literature relating to waste management legislation in Ireland has focussed on the case-law of the Court of Justice of the European Union (CJEU), and that of the High Court and the Supreme Court. In the case of the Irish Superior courts, the existing literature relates mainly to the civil remedies provided by the Waste Management Act 1996, as amended (WMA).[1]This particular focus in the existing literature is understandable, to a certain extent, given that these courts set binding precedents. However, most environmental cases in Ireland come before the District Court, in the form of criminal prosecutions.

The District Court is a court of summary jurisdiction, similar to the Magistrates Courts in England and Wales. At present, the maximum fine it can impose per offence is €5,000 and the maximum custodial sentence it can impose is 1 year per offence, subject to a maximum of 2 years for all charges brought in any one case. A relatively small number of cases are prosecuted on indictment in the Circuit Court, which can impose a maximum fine of €15,000,000 and/or a custodial sentence of 10 years.[2]

There is a considerable volume of literature on the use of the criminal law to enforce environmental law in England and Wales. The law in that jurisdiction has evolved significantly with the development of sentencing guidance[3], administrative and civil sanctions[4] and most recently, an

1 The Waste Management Act 1996 came into force on 1st July 1996 (Waste Management Act 1996 (Commencement) Order 1996 SI 192 of 1996), with the exception of sections 6(2), 32(2), 57 and 58, which were commenced on 20th May 1998 (Section 1(2) of the WMA) and has been substantially amended over the years by primary and secondary legislation, including the Protection of the Environment Act 2003, the Fines Act 2010 and the European Communities (Waste Directive) Regulations 2011 (SI 126 of 2011). The cases include *Wicklow County Council v. Fenton* [2002] IEHC 102; *Cork County Council v. O'Regan* [2005] IEHC 208; *Wicklow County Council v. O'Reilly* [2007] IEHC 71; *EPA v. Neiphin Trading Ltd* [2011] IEHC 67; *John Ronan & Sons v. Clean Build Ltd* [2011] IEHC 350, all of which look at the polluter pays principle vis a vis Sections 57 and 58 of the Act.
2 Section 10 Waste Management Act 1996 Revised Acts (lawreform.ie)
3 Sentencing Council, UK. *Environmental Offences. Definitive Guideline*. (London, Sentencing Council, 2014) <http://sentencingcouncil.judiciary.gov.uk/docs/Final_Environmental_Offences_Definitive_Guideline_(web).pdf>(accessed July 2014)
4 Regulatory Sanctions and Enforcement Act 2008 (UK).

environmental tribunal.[5] In sharp contrast, there has been very little research to date on the role of the criminal law in environmental law enforcement in Ireland.

The use of criminal sanctions to enforce environmental law in Ireland is a topical issue. To put the matter into context, two separate developments emanating from the European Union (EU)have impacted on this issue. The first development was a ground-breaking case taken by the European Commission against Ireland. In that case, Case C-494/01*Commission v. Ireland*,[6] the CJEU found that Ireland had failed to properly implement the original waste directive (Directive 75/442/EEC).[7] The judgment referred to a number of locations around the State where this directive was not being implemented by public authorities and the CJEU used this evidence as a basis on which to find Ireland guilty of what the European Commission had described as, "systemic deficient administrative practices."[8]

Representatives of the European Commission subsequently met the Environmental Protection Agency (EPA)[9]during May and June 2007. Among the allegations of continued systemic failures made by the Commission officials were the low number of prosecutions brought on indictment and inadequate sanctions and deterrents imposed by the courts.[10]

The second development relates to the growth at EU level of criminal law as a means of enforcing compliance with environmental legislation. This development is premised on a belief (by no means universally accepted)[11] that there has been a rise in environmental crime across the Union and furthermore, that non-criminal sanctions have not been effective in curtailing these activities. There is certainly evidence that the lucrative waste industry has attracted the involvement of organised crime and increased illegal cross-border activity.[12]

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5 Tribunals, Courts and Enforcement Act 2007 (UK).
6 *Commission v. Ireland* [2005] ECR I-3331.
7 The original waste directive, 75/442/EEC was amended on a number of occasions and subsequently the directive and its amendments were codified in Directive 2006/12/EC. The 2006 directive was repealed and replaced by Directive 2008/98/EC.
8 *Commission v. Ireland* [2005] ECR I-3331 at paragraph 24.
9 Established in1993 by the *Environmental Protection Agency Act 1992*.
10 J D Lynott, "The Detection and Prosecution of Environmental Crime." [2008] Judicial Studies Institute Journal 185 at pages 187 to 188.
11 The premise on which directive 2008/99/EC was introduced i.e. a rise in environmental crime, has not gone unquestioned e.g. P. Pagh, "Administrative Criminal Law Systems in Europe: An Asset for the Environment?" in Françoise Comte and Ludwig Krämer eds.*Environmental Crime in Europe. Rules of Sanctions.*(Groningen, Europa Law Publishing, 2004) at page 163.
12 E Mullier, "The Emergence of Criminal Competence to Enforce EC Environmental Law: Directive 2008/99 In the Context of the Case-Law of the European Court of Justice."[2010] Cambridge Student Law Review 94 at page 94. EUROPOL has also noted that: "While mafia-type structures have sufficient resources to participate in large scale illegal waste management, there is evidence that lower level groups are engaged in the illicit harvesting of hazardous waste, such as used cell and car batteries. Illicit waste trafficking is often facilitated by cooperation with legitimate business, including those in the financial services, import/export, and metal recyclingsectors…."EUROPOL Organised Crime Threat Assessment 2011 accessed at: https://www.europol.europa.eu/sites/default/files/publications/octa2011.pdf

In Case C-176/03, *Commission v. Council*[13], the CJEU found that the European Community (as it then was) had competence to impose an obligation on Member States to adopt criminal measures for breaches of EU law in situations where:

the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combatting serious environmental offences.[14]

The judgment was controversial and not without criticism from those who viewed criminal law as being the preserve of the Member States,[15]although the CJEU subsequently held that the criminal law competence of the EU was restricted to requiring Member States to impose criminal sanctions, and could not specify the type or the severity of the sanctions.[16]

The above cases were followed by Directive 2008/99/EC, which noted that the Community was concerned at the rise in environmental offences and their effects,[17]stated that the existing systems of penalties were not sufficient and as such, compliance should be enforced by the availability of criminal sanctions, which demonstrate, "social disapproval", of "a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law."[18]The preamble stated that effective protection of the environment requires more dissuasive penalties for environmentally harmful activities, which typically cause or are likely to cause significant damage to the environment.[19]Such activities should be criminal offences where committed with intention or serious negligence.[20] Finally, the directive provided for minimum rules and Member States could adopt or maintain more stringent measures.[21]

The purpose of this article is to ascertain whether the use of the criminal law in the Irish District Courts is effective in enforcing the WMA. This is a requirement of Directive 2008/98/EC on waste, which requires that penalties for infringing the directive should be, "effective, proportionate and dissuasive."[22]

This article will also look at the nature of the offences created by the WMA and whether they are in fact criminal offences. Indeed, the concept of defining criminal law in terms of effectiveness and efficiency is unique to regulatory law, not to mention controversial. Consideration will therefore be given to whether breaches of the WMA should be criminal offences at all.

13 [2005] ECR I-7879.
14 Ibid at paragraph 48.
15 Supra note 11 for a discussion of these criticisms.
16 Case 440/05*Commission v. Council* [2007] ECR I-9097.
17 Recitals, paragraph 2.
18 Ibid, paragraph 3.
19 Ibid, paragraph 5.
20 Ibid, paragraph 7.
21 Ibid, paragraph 12.
22 Council Directive No. 98/2008, Article 36, OJ L 312/3 (2008).

This article will examine the various actors in WMA prosecutions: the District Courts; environmental agencies and officers; prosecutors; and the defendants.

This article takes a narrow focus in discussing the effectiveness of criminal enforcement of the waste management code. It does not examine the wider issue of the effectiveness of the detection and investigation of offences. These are an extremely important issues that necessarily impact on the effectiveness of environmental criminal justice, a point noted by Advocate General Geelhoed in *Commission v. Ireland*,[23] where he stated:

In my view, effective enforcement means that offenders run a credible risk of being detected and being penalised in such a way as at least to deprive them of any economic benefit accruing from their offence.[24]

There is a dearth of data relating to waste management prosecutions in Ireland. There is currently no meaningful database of waste management convictions. While the EPA publishes information on its website identifying the prosecutions it brings on an annual basis, the information provided is quite limited and in any event, the EPA prosecutes very few criminal cases.[25] The EPA also possesses some data on the number of cases commenced and concluded by each local authority every year, but this data does not give details of the particular offences concerned or of the penalties (if any) imposed by the courts.

The majority of waste management cases are prosecuted by local authorities (although in recent years there has been an increase in the number of prosecutions taken by the Environmental Protection Agency) However details of the number of cases prosecuted and the fines imposed are not easily accessible.[26]

While mention will be made of alternatives such as administrative and civil sanctions, this article does not present an exploration of the effectiveness of the criminal justice system in comparison to the administrative and civil enforcement systems. I will look at the strengths and weaknesses of the environmental criminal justice system and how that system could be made more effective. In the conclusion, I consider the possibility of introducing a system of administrative sanctions.

Waste Management Offences and Prosecutions

23 *Commission v. Ireland* [2005] ECR I-3331
24 ECLI:EU:C:2004:546at paragraph 28
25 8 cases up to October 2020; 9 in 2019; 21 in 2018; 23 in 2017; and 6 in 2016. Accessed 20th December 2020: http://epa.ie/enforcement/prosecute/
26 F. McCarthy. "Enforcement and Remedies Under Environmental Legislation – Obtaining Compliance." <www.ucc.ie/law/events/environ05papers/**mccarthy**.doc>

A. The Act

The WMA came into effect on 1st July 1996[27] and transposed a number of EU Directives into Irish law[28], but perhaps most importantly, Directive 75/442/EEC. While the Act has been amended substantially in the intervening years, it remains the primary legislation in this field.

B. Characteristics of Waste Management Offences

WMA offences, similar to other regulatory offences, have some or all of the following features: strict liability, omissions liability, reverse burden of proof, provision for potentially large fines, provisions for corporate liability, mandatory provisions for the recovery of costs and expenses incurred by the prosecution, and extensive powers of entry and inspection of premises and vehicles.[29]Some of these characteristics have proved controversial in the literature on criminal law: strict liability because it excludes mens rea; the omissions liability has been described as "exceptional"; and the reverse burden of proof runs counter to the "golden rule" that the burden of proof lies on the prosecution.[30] I will examinea number of these features below to the extent that they have a bearing on the effectiveness of the criminal enforcement of the WMA. I will examine a more fundamental issue, namely whether infringements of the WMA are truly criminal offences.

1. <u>'True' Crime versus 'Quasi' Crime</u>

A key issue in determining the effectiveness of the criminal enforcement of the WMA is whether breaches of the Act are true criminal offences. Related to this question is the perception of the public, the judiciary and the offenders themselves.

There is certainly a perception that WMA offences, and regulatory offences in general, are somehow not real criminal offences, that while they have some of the attributes of true crime (e.g. the imposition of fines and possibly custodial sentences) they are not matters that society and the judiciary regard as carrying the same degree of opprobrium as offences commonly held to be criminal; in other words, they are 'quasi-criminal'.

27 Waste Management Act 1996 (Commencement) Order 1996. SI No. 192/1996. Sections 6(2), 32(2), 57 and 58 of the Act came into force 2 years later.
28 Section 2.
29 Y. Scannell, "Environmental Criminal Law in Ireland" in Michael G. Faure and Günter Heine eds. *Final Report. Criminal Penalties in EU Member States' Environmental Law* (Maastricht, Maastricht University, 2002) at pages 196 to 197. Also A. Ashworth. "Is the Criminal Law a Lost Cause?" [2000] LQR 225 at page 228 (hereinafter Ashworth). Also P. de Prez. "Excuses, Excuses: The Ritual Trivialisation of Environmental Prosecutions." [2000] Journal of Environmental Law Vol 12, No. 1, 65 at page 67.
30 Ashworth ibid p. 228.

Irish courts have defined crime by reference to characteristics of the traditional criminal law procedures such as arrest and detention, the role of the State as arresting agent and prosecutor, mens rea, and punishment as being the primary rationale behind sentencing.[31]

This definition is at odds with the features of regulatory crime, including WMA offences.[32]Furthermore, a clear distinction cannot be drawn between WMA offences and real crime, since many WMA offences have serious consequences, while not all offences prosecuted by An Garda Síochána[33] or the D.P.P. can be regarded as serious offences. The fact that the offences may be strict liability should not necessarily detract from their serious nature, since making them strict liability offences is mainly about making the investigation and prosecution of these offences easier and does not imply that they are not wrong.[34]

It has also been suggested that regulatory crime is not regarded as true crime because it is victimless crime, although this is arguably less applicable to some WMA offences, where breaches lead to immediately noticeable environmental pollution.

The issue of moral condemnation also influences perceptions of whether breaches of the WMA are truly criminal. At a fundamental level, the WMA, like much environmental legislation does not seek to completely outlaw environmental pollution. This is because there is an acknowledgement that industry is a necessary part of any economy and all industry will entail varying degrees of environmental pollution.

What the WMA seeks to do is regulate a permissible level of environmental pollution, but in doing so, it arguably undermines itself by implying that a certain level of environmental pollution is acceptable, rather than prohibiting pollution in toto. The counter-argument is that the WMA – indeed regulatory legislation as a whole – is not unique in this regard.

Perceptions of what is, and what is not, morally reprehensible are not set in stone. They can change over time and criminalisation of certain conduct can be instrumental in this change. An important

31 *Melling v. Ó Mathghamhna* [1959] IR 1, per Lavery J. at 14, Kingsmill-Moore J. at 25 and Ó Dálaigh J. at 40. C. Abbot. *Enforcing Pollution Control Regulation: Strengthening Sanctions and Improving Deterrence* (Oxford, Portland, OR, Hart Publishing, 2009) at page 59. In sharp contrast to the Irish courts' distinction between regulatory and real crime, is the approach taken by the European Court of Human Rights, which found in the case of *Öztürk v. Germany*that criminal law can have a regulatory aspect to its character and the fact that the offence does not carry any stigma does not mean that it is not a criminal offence.

32 C.Scott "Regulatory Crime: History, Functions, Problems, Solutions" [hereinafter Scott] in Shane Kilcommins and Ursula Kilkelly eds. *Regulatory Crime in Ireland*. (Dublin, First Law/Lonsdale Publishing, 2010) [hereinafter Kilcommins] at page 81.

33 The police force of the Republic of Ireland. Literally, "Guardians of the Peace" but sometimes translated as, "Civic Guards."

34 C.Scott "Regulatory Crime: History, Functions, Problems, Solutions" [hereinafter Scott] in Shane Kilcommins and Ursula Kilkelly eds. *Regulatory Crime in Ireland*. (Dublin, First Law/Lonsdale Publishing, 2010) [hereinafter Kilcommins]at page 81.

factor to bear in mind is that the change in perception will be largely dependent on the effective enforcement of the law in question.[35]

Finally, the moral authority of local authorities is undermined by the fact that local authorities themselves have been prosecuted for committing offences under the WMA (not to mention other environmental offences), especially when the prosecutions against local authorities and the local authority initiated WMA prosecutions invariably come before the same District Judges.[36]

2. Strict Liability Nature of the Offences

Most regulatory offences, including those created by the WMA, are strict liability offences. There is no one definition of strict liability, but for the purposes of this article, a strict liability offence is defined as one in which the prosecution is not required to prove mens rea but the accused can rely on as a defence, the fact that he/she took reasonable steps to prevent the incident, as a defence.

From a WMA prosecutor's perspective, strict liability offences can be justified on a number of grounds. First, the offences are not regarded as, "truly criminal", and therefore minimal stigma attaches to a conviction for such an offence. Secondly, there is a public interest element in regulatory bodies being able to prosecute such offences expeditiously and if it was necessary to prove mens rea, these cases would entail greater investigation and defence costs. The issue of costs is especially important, bearing in mind the limited resources of WMA enforcement bodies. Being in a stronger position to prosecute means that they are in a better position to ensure compliance, as the existence of no-fault offences strengthens their general deterrence function.[37]

Thirdly, the defendants in waste management cases are involved in activities that quite often have the potential to harm the environment and/or human health, if not immediately, then certainly in the long-term and, as such, the threat of potential criminal proceedings provides an incentive to ensure adequate safeguards are put in place and maintained.[38]In addition, those who have chosen to legally engage in the waste industry have voluntarily submitted themselves to a licensing regime.[39]Fourthly, the availability of strict liability offences strengthens the role of the criminal law in protecting, "fundamental social interests", by making it easier to prosecute these offences. While it can be

35 S. Coyle and K. Morrow. *The Philosophical Foundations of Environmental Law.* (Oxford and Portland, OR, Hart Publishing, 2004), page 141. Also EH Sutherland, "White Collar Crime and Social Structure" (1945) 10 American Sociological Review 132, 139.
36 The EPA prosecuted Monaghan County Council in 2007; Longford County Council in 2014; and Clare County Council, Galway County Council and Limerick County Council in 2013; and Cork County Council in 2020. Records of prosecutions against other local authorities go back to 2002.
37 C. Abbot. *Enforcing Pollution Control Regulation: Strengthening Sanctions and Improving Deterrence* (Oxford, Portland, OR, Hart Publishing, 2009) at page 124
38 See *Maguire* infra note 44.
39 Ibid.

argued that many criminal offences are a threat to fundamental social interests, environmental crime is distinguished by the long-term significance of environmental harm for future generations.[40]

Finally, it overcomes what could potentially be insurmountable obstacles in securing convictions. In many, if not most cases, the prosecutor will not be in a position to obtain sufficient evidence regarding the manner in which an offender's business operates, in order to prove mens rea (i.e. that the incident happened because the offender intended it to, or was reckless as to whether the incident occurred). Furthermore, many defendants in such cases are corporate bodies and it can be difficult to identify an individual who acted as a company's agent in a particular incident. This being the case, it follows that it can be difficult to prove the offence was committed by the company at all.

Quite apart from overcoming any difficulties a prosecutor may have, it can be argued that corporate convictions do not entail the same level of stigma as would be the case if an individual was convicted of an offence. There is also a public interest element in applying strict liability to waste management offences committed by corporate bodies in that corporate crime is often committed on a larger scale and therefore poses a larger threat to society than crime committed by individuals.

There are however, counter-arguments to the above views. One English commentator has noted that environmental offences do, in fact, involve "significant social stigma"[41] and that while strict liability may have been suitable for pollution cases at the time of the *Alphacell*[42] judgment in 1972, perceptions have changed and environmental crime is now considered to be, "truly criminal" in character.[43] Similarly, while Lynch J. in *Maguirev. Shannon Regional Fisheries Board*[44] referred to the case in question as, "a minor offence"[45], increasing public awareness of environmental issues in the intervening 26 years, means that it is unlikely that a current District Judge would regard a case involving a fish-kill, as this particular case did, as a minor offence and neither would the public consider it minor.

Environmental offences were initially viewed as absolute liability offences. That is, offences where no mens rea is required and no defence is available to the accused. This view was reflected in *Sherras v. De Rutzen,*[46]where Wright J. stated that there was a presumption of mens rea in every crime, except for, "acts which are not criminal in any real sense, but are acts which in the public interest, are prohibited under a penalty"[47] and "acts which are a public nuisance."[48] In *Maguire*[49], a

40 Ibid at page 126
41 A.P. Simester, J.R. Spencer, G.R. Sullivan, G.J. Virgo. *Simester and Sullivan's Criminal Law. Theory and Doctrine* (Oxford, Hart Publishing, 2010), footnote 52, page 181.
42 *Alphacell Ltd. v. Woodward* [1972] 2 All ER 475
43 Supra note 41 at page 184.
44 [1994] 3 IR 580
45 Ibid, at page 591.See section D.1.a of this chapter, for an analysis of the constitutional case-law on "minor offences." <http://epa.ie/enforcement/prosecute/#.VBRPB_N0zIV>(date accessed: 13th September 2014).
46 *Sherras v. De Rutzen* [1895] 1 QB 918.
47 Ibid at page 921.

water pollution case, Lynch J. approving *Sherras,* stated that the offence in question fell within the category of offences that are not, "truly criminal."[50] The approach of Lynch J. was followed by the Supreme Court in a subsequent water pollution case, *Shannon Regional Fisheries Board v. Cavan County Council*[51], but this particular case appears to have marked a turning point in the Irish judiciary's attitude to absolute liability, and possibly to strict liability, offences. In a dissenting judgment, Keane J. referred with approval, to the Canadian Supreme Court case of *R. v. City of SaulteSte. Marie*[52] in which Dickson J. summed up the counter-argument succinctly when he stated that the:

[A]rgument that no stigma attaches [to a conviction for a strict liability offence] does not withstand analysis, for the accused will have suffered loss of time, legal costs, exposure to the processes of the criminal law at trial and, however one may downplay it, the opprobrium of conviction.[53]

Dickson J. went on to suggest that there were three categories of offences, rather than just absolute liability and strict liability offences and defined strict liability offences as those:

In which there is no necessity for the prosecution to prove the existence of mens rea; the doing of a prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care.[54]

This approach has been accepted by the Irish judiciary since then, most notably in the case of *CC v. Ireland*[55], where section 1(1) of *the Criminal Law (Amendment) Act 1935*[56]was struck down as unconstitutional for imposing a severe penalty while failing to provide a defence of honest mistake. The section was silent on the requisite mens rea for the offence, so the offence was deemed to be one of absolute liability, but the maximum penalty on conviction was life imprisonment. Severe penalties for absolute liability offences will fall foul of Article 38.1 of the Constitution.[57] The State's argument that, in characterising the offence, the court should take little or no account of the maximum penalty, but instead presume that those who are truly blameless will suffer only a conviction and a light penalty, was explicitly rejected by the Supreme Court.[58]This would be of particular concern to WMA prosecutors, since arguments that the courts ordinarily impose low fines in WMA prosecutions,

48 Ibid.
49 [1994] 3 IR 580.
50 Ibid at page 589.
51 [1996] 3 IR 267.
52 [1978] 2 R.C.S. 1299.
53 Ibid at 1311 – 1312.
54 [1978] 2 R.C.S. 1299at 1326.
55 [2006] 4 IR 1.
56 "Any person who unlawfully and carnally knows any girl under the age of fifteen years shall be guilty of a felony, and shall be liable on conviction thereof to penal servitude for life or for any term not less than three years or imprisonment for any term not exceeding two years."
57 "No person shall be tried on any criminal charge save in due course of law."
58 [2006] 4 IR 1.

would fall on deaf ears, as it is not the fines ordinarily imposed that will be taken into consideration but the maximum penalty that could be imposed. In the case of the WMA that could be a €15,000,000 fine and/or up to ten years' imprisonment following a conviction on indictment.[59]

More worryingly for WMA prosecutors, in the *CC* case, Hardiman J. noted that the Supreme Court in an earlier decision had declared as unconstitutional a Bill which would have imposed fines of up to IR£15,000 and imprisonment of up to 2 years, even though it contained a due diligence defence[60] as propounded by Dickson J. and approved by Keane J.While the observations of Hardiman J were made *obiter*, they do expose the waste management prosecutor's dilemma: it is perceived that the courts do not impose penalties that are severe enough, but the imposition of severe penalties is not possible for breaches of strict liability offences. On the other hand, the introduction of a mens rea element to these offences may allow for harsher penalties, but, as explained above, securing convictions for waste management offences could become problematic if it is necessary to prove that the defendant intentionally or recklessly contravened the relevant section of the WMA.[61]

In a subsequent High Court case, *Brady v. EPA*[62], Charleton J. stated that:

It is difficult to see offences of absolute or strict liability being compatible with the constitutional scheme where they go beyond the regulation of society through the imposition of small penalties based upon absolute or strict liability.[63]

Again, Charleton J.'s observation was made *obiter*, but taken together with the decision of the Supreme Court in *CC*, and the remarks of Hardiman J., it would seem to indicate a move away from treating environmental offences as strict liability offences.If this is the case, then it would appear that strict liability offences have turned full circle and that we are faced with a return to the nineteenth century Factories Acts situation, where it was felt necessary to introduce strict liability offences, in part to overcome the difficulties in proving mens rea for offences.[64]

C. Definition of "Waste"

59 Section 10 of the *Waste Management Act 1996*, as amended by Section 22 of the *Protection of the Environment Act 2003*, as amended by Section 5 of the *Fines Act 2010*.
60 [1997] 2 IR 321. The case was a referral of a bill – The Employment Equality Bill 1996 - to the Supreme Court under Article 26 of the Constitution, for a decision on its constitutionality.
61 Section 10 of the *Waste Management Act 1996*, as amended by Section 22 of the *Protection of the Environment Act 2003*, as amended by Section 5 of the *Fines Act 2010*.
62 [2007] IEHC 58.
63 Ibid at paragraph 41.
64 A Norrie. *Crime, Reason and History: A Critical Introduction to Criminal Law* (London, Butterworths, 2001) at page 86.

The judgment of the CJEU in the case of *Brady v. EPA*[65] may have implications for the effectiveness of the criminal enforcement of the WMA. This judgment arose from a reference for a preliminary ruling from the Irish Supreme Court in relation to the concept of "waste", in particular the level of certainty of re-use that would be required in order for a substance (in this case, pig slurry) to be classified as a by-product rather than waste. The CJEU held that slurry is a waste but could become a by-product if its re-use was certain. The fact that its re-use would not become certain until spreading had taken place would not preclude its classification as a by-product.[66] Furthermore, even if the national court formed the view that the slurry was a by-product, it could become waste after its delivery to a third party, particularly if that party discharged the slurry into the environment in an uncontrolled manner.[67]

While the judgment provided clarity on the definition of waste, it has implications for the prosecution of WMA offences. In terms of investigating and prosecuting cases, it will in certain cases become more difficult to prove that a substance is, "waste." The judgment does not preclude placing the burden of proof on the defendant in terms of proving a substance is a by-product and in order to do so, the defendant would have to prove evidence of: his intention to re-use the substance; of the financial advantage to be gained from such re-use; of the needs of those to whom he transfers the by-product; of certainty of re-use; and that no further processing would be necessary before the by-product was re-used.[68] Nevertheless, it is by no means certain that the courts will require this of defendants and may be inclined to give them the benefit of the doubt.

D. The Actors

1. Environmental Officers

There has been little, if any, academic attention paid to Irish regulatory officers, particularly those involved in enforcing the WMA.

Environmental officers are generally, engineers and scientists. The experiences of environmental officers in the courts as set out in the literature and in this writer's own experience, illustrate that their expectations quite often go unfulfilled, leaving them dissatisfied with the court process. Often, environmental officers want to explain the facts of the case in detail, facts they believe relevant, yet this is inconsistent with the manner in which District Court cases are handled, where the daily caseload requires the concise presentation of evidence and where judges have neither the time nor the inclination to hear detailed, and often quite technical, evidence. The judges' attitudes are to a

65 C-113/12 [2013]
66 Ibid, at paragraph 48.
67 Ibid, at paragraph 50.
68 S. Guerin SC, "Key Issues in Environmental Prosecutions." Lecture, Dublin. 19th June 2014.

degree, understandable as the District Court is a court of summary jurisdiction and was intended as a court that deals with a high volume of cases that are relatively straightforward in both the law behind them and the facts required to prove the offences in question. This situation arises in both contested cases and those where a guilty plea is entered. Environmental officers can be faced with District Judges who are less than sympathetic and occasionally hostile, particularly where the risk of environmental pollution is less obvious than in other cases, or where the offence relates to a technical breach of a waste licence[69]. Environmental officers can also be subjected to quite intense cross-examination by lawyers acting for defendants, where their qualifications, professionalism and competence are questioned. And even where a guilty plea is entered, or an offender is found guilty following a trial, the environmental officers are often frustrated at the defendant's solicitor's plea in mitigation, which may seek to downplay the seriousness of the offence and the prosecuting solicitor's perceived failure to counter the mitigating factors presented.

The extent to which environmental officers themselves view certain infringements as criminal offences may also have a bearing on their decisions to prosecute. A study of Scottish environmental officers found that 42% did not believe they were dealing with criminal offenders, and were of the view that only those whose infringement was intentional or negligent, or those who attempted to conceal a breach, were criminal.[70] This showed that environmental officers were making moral judgments and it would seem that the strand of morality runs through the criminal enforcement of environmental legislation, from the legislators determining what should be criminal, to the enforcement officers deciding who should be prosecuted and the judges in passing sentence.

Since WMA enforcement bodies cannot appeal a lost prosecution to the Circuit Court and since the vast majority of their cases are prosecuted summarily, environmental officers can be preoccupied by a lost case to an extent that would be puzzling to the D.P.P. This preoccupation is not entirely baseless, since losing a case before a District Judge before whom a WMA enforcement body regularly appears, can have the practical effect of setting a precedent that can only be reversed by challenging the District Judge by way of a case stated to the High Court. As a result, environmental officers may decide against prosecuting a particular case if they feel that there is a possibility that it will fail.[71]

Enforcement Strategies

69 Waste licences are issued by the Environmental Protection Agency, waste permits are issued by local authorities and waste collection permits are issued by the National Waste Collection Permit Office but for the sake of consistency, I shall refer to them all as, 'waste licences' for the purpose of this article.
70 C. Lovat. "Regulating IPC in Scotland: A Study of Enforcement Practice" (2004) J Environmental Law 16(1):49
71 Ibid, at page 382.

Regulatory regimes – not just the WMA regime and not just those in Ireland – are characterised by the low number of prosecutions that are brought before the courts.[72] Bell identified an enforcement approach which he called, "responsive regulation", whereby environmental officers will move from persuasion to sanctions if the polluter fails to comply with his/her obligations.[73] This style of enforcement is illustrated by the "enforcement pyramid", with 'persuasion' at its base, moving up to 'warning letter', 'enforcement notice', 'criminal penalty', 'suspension of licence' and then 'revocation of licence' at its apex.[74]

The current shortage of accessible and detailed local authority prosecution data makes it difficult to develop an understanding of precisely how individual local authorities enforce the WMA. While there are certain common factors that influence decisions made by all local authorities in the area of WMA enforcement e.g. EPA guidelines, and national and EU legislation and case law, each local authority is an independent body with its own decision-making processes and priorities.[75] The EPA however, has published an enforcement policy, which sets out how it regulates activities licensed by the EPA[76]

Yet while the number of prosecutions is low, the availability of criminal sanctions is regarded as an important part of the enforcement pyramid, since a strategy based entirely on persuasion and cooperation will not work in the case of a regulated party who decides to offend on the basis that it is more profitable to offend than to comply.[77] This is reflected in the enforcement policy of the Environment Agency (of England and Wales), which highlights the importance of a cooperative approach and its advisory and educational role, but goes on to state that prosecutions will be brought where necessary. It sees these prosecutions as having a deterrence and punishment function, punishing offenders and acting as a specific deterrent against re-offending in the case of the accused in a particular case, and as a general deterrent to others.[78]

The roles of the regulator and D.P.P. differ in a number of respects. WMA enforcement bodies tend to use prosecutions as a last resort, rather than the first port of call and can rely upona number of alternative remedies to prosecution. The investigation and prosecution of 'real' crime is victim-

72 See for example, P. Appleby "Compliance and Enforcement – The ODCE Perspective", in Kilcommins supra note 34, at page 181. A. Reilly "Food Safety Authority of Ireland: Role and Functions", in Kilcommins supra note 34 at page 238. In relation to Scotland, see Scott's observation based on J. Rowan-Robinson, P.Q. Watchman and C.R. Barker, "Crime and Regulation: A Study of the Enforcement of Regulatory Codes (Edinburgh, T & T Clark, 1990) – "A Scottish study showed most regulatory authorities exhibited low incidences of prosecution….[T]he priority given to the efficient promotion of compliance with the regulatory rules has led to many enforcement agencies developing practices in which prosecution is very much the last resort" quoted in Scott supra note 34 at pages 72 to 73.
73 Ibid page 293.
74 S. Bell, *Environmental Law* 8th Edition (Oxford, Oxford University Press, 2012) at page 293.
75 S. Kilcommins and B. Vaughan, "The Rise of the Irish Regulatory State: A Response to Colin Scott" in Kilcommins supra note 34 at page 112.
76 G. O'Leary, "Delivering Outcomes from Environmental Regulation"inKilcommins supra note 34, page 222.
77 O'Leary ibid at page 224.
78 Supra note 34 at page 112.

focussed, with the penalty largely determined by the impact the crime has on the victim, whereas regulatory enforcement will not necessarily result in the wrong-doer being prosecuted. Regulators unlike the DPP, also have an educational role.[79] A key difference between the two philosophies of prosecution, is that the WMA regulator uses the compliance model to develop a working relationship with the licence holder – it is a model involving cooperation, with the regulator and the regulated on the same side, so long as the regulated complies with the licence. The D.P.P. relationship with an offender is always an adversarial one.[80] The fact that the WMA regulator seeks to work alongside the licence holder may also be a reason for the low number of prosecutions, in that the use of criminal sanctions will inevitably sour the working relationship.[81] It has been noted that different strategies are necessary when dealing with different types of offenders. Sanctions are generally more appropriate when dealing with rational actors than those who are incompetent; in fact the use of sanctions can be counter-productive, "prompting the development of a culture of resistance" or leading the offender "to take a defensive stance, suppressing information and failing to investigate the underlying causes of incidences for fear this information will be used against them in court."[82]

The criminal law is traditionally concerned with culpability and the related sentencing models of punishment and rehabilitation. Regulatory systems on the other hand, are more concerned with utilitarian concepts of efficiency and effectiveness, to the extent that culpability is not regarded as a primary concern.[83] This in turn, leads to tension with the criminal law as traditionally viewed, in particular the principle of equal treatment which requires that those who have committed similar wrongdoings are exposed to similar punishment,[84] which in a wider social context, could see environmental corporate offenders escape prosecution, while individuals guilty of relatively minor criminal offences are punished.[85] These are not just academic issues since it is not unreasonable to assume this lack of equality in treatment of offenders will negatively impact on the courts' perceptions of the equity of WMA prosecutions.

An issue related to the WMA enforcement strategy is the type of offence local authorities prosecute. There are certain offences created by regulations made under the WMA that arguably should not be criminal offences at all and would be better suited to a system of administrative fines for their breach.[86] Sentencing is central to the effectiveness of the environmental criminal enforcement system

79 P. Appleby, "Compliance and Enforcement – The ODCE Perspective", in Kilcomminssupra note 77 at page 181.
80 Supra note 34 at page 44.
81 Ibid, pages 53 to 54.
82 N. Gunningham. "Enforcing Environmental Regulation." J Environmental Law (2011) 23(2): 169 at pages 186 to 187.
83 Supra note 34, pages 70 to 71.
84 Ashworth supra note 29 at page 245.
85 Ibid at page 249.
86 For example, failure to carry a copy of the waste collection permit on all vehicles listed in a waste collection permit and failing to ensure that the National Waste Collection Permit Office number is placed on the vehicle was a criminal offence until the introduction of fixed penalty notices under section 10B(1) of the WMA, as inserted by section 36 of the Environment (Miscellaneous Provisions) Act 2015.

and this writer suspects that making these breaches criminal offences downgrades the WMA criminal enforcement regime in the eyes of the judiciary, which has sentencing implications.

2. Offenders

There is no such thing as a typical offender in waste management prosecutions. Some are corporate bodies, while a significant number of offenders are individuals. Some are involved solely in the waste management industry, while for others, waste is very much a secondary part of their business in that it is an inescapable by-product of their primary business. Some offenders are fully aware that their activities are illegal, others less so.

The financial resources of offenders often vary significantly. It has always been a strategy on the part of some offenders as part of their mitigation, to plead straitened means.[87] The restrictions on prosecutors countering an offender's plea in mitigation and the shortage of public sector resources that render an investigation of an offender's financial health unlikely in a District Court prosecution, have always given offenders an advantage with this form of mitigation.[88]

The attitudes of offenders to the WMA also vary widely. Some offenders do take their environmental responsibilities seriously, while others do not want the potentially negative connotations associated with a conviction, especially if the case is reported in the media. The holders of waste collection licences and waste facility licences are aware that a conviction could lead to the licence issuing authority no longer regarding them as "a fit and proper person" and revoking or refusing to renew their licences.[89]On the other hand, some offenders are not unduly concerned about the prospect of a conviction for an offence under the WMA, perhaps a reflection of the belief that environmental crime is not real crime. The holders of licences are aware that convictions for minor infractions are unlikely to have serious consequences and a significant number of those convicted for serious offences under the WMA are, in fact, licence holders.

All of the above are relevant factors for consideration in determining whether the criminal law should be used to ensure compliance with the waste management code. Assuming that it is, these factors also illustrate that offenders come from different backgrounds, have varying financial resources and offend for a variety of reasons. It therefore follows that sentencing practice and the range of penalties available to a sentencing judge, should reflect this variety.

87 M Grekos. "Environmental Fines – All Small Change?" [2004] Journal of Planning and Environmental Law 1330 at pages 1335 to 1336.
88 Ibid.
89 Section 34(5) Waste Management Act 1996.

3. The District Court

At present, there are 63 District Judges, of whom 43[90] are permanently assigned to Districts, the remainder being moveable District Judges who take the place of a sitting judge who is absent for whatever reason. The State is divided into 23 Districts, together with the Dublin Metropolitan District[91], most of which in turn are divided into a number of District Court Areas. So for example, District Number 20, which covers north and east Cork, consists of the District Court Areas of Fermoy, Mallow and Midleton. The District Judge appointed to a particular District will sit in each District Court Area in his/her District on certain days each month, the days being set down in various statutory instruments.[92]

While the District Court is a court of summary jurisdiction and deals with the less serious criminal cases, it is "the initial point of contact with the court system for all persons accused of criminal offences. It disposes of more than 90% of criminal cases in the State"[93]

District Judges are appointed by the Irish President on foot of a binding recommendation of the Cabinet.[94]In order to become a District Judge, it is necessary to be a barrister or solicitor with at least 10 years' professional experience. While this experience can prove invaluable, District Judges currently receive little training before or after becoming judges and not all appointees will have had 10 years' experience practising in the District Court.

In keeping with the Irish constitutional guarantee of judicial independence, guaranteed by Article 35.4.1° of the Constitution, Irish judges can only be removed from office for, "stated

90 These figures are correct as at13th August 2019. https://www.courts.ie/judges
91 http://www.courts.ie/Courts.ie/library3.nsf/pagecurrent/E110997F0240362D80256D8700505112?opendocument
92 *District Court Districts and Areas (Amendment) and Variation of Days and Hours (Abbeyfeale, Carrickmacross, Cavan, Limerick, Monaghan, Newcastle West and Virginia) Order 2014* (SI No. 142 of 2014). The Dublin Metropolitan District differs in that 18 District Judges are appointed to this District. Similarly, with District No. 19 (Cork City), there are 3 District Judges sitting in one courthouse. These figures are correct as of 8th April 2014, although there should be 21 District Judges for the Dublin Metropolitan District and one of the Cork City District Judges may move to the Circuit Courthouse to deal solely with District Court civil cases. The number of district courts has declined over time. Former Governments appear to have adopted a policy of rationalising the district court system, by reducing the number of district courts throughout the country. The previous Government accelerated this process by further reducing the number of district courts and centralising district court offices.
93 O'Nolan, C. *The Irish District Court: A Social Portrait*(Cork, Cork University Press, 2013), page 2. In 2019, 406,480 criminal cases came before the District Court, 34,616 before the Circuit Court, 1,982 before the Central Criminal Court, 70 before the Special Criminal Court, 1,440 before the Criminal Court of Appeal and 10 before the Supreme Court. Page 46, Courts Service Annual Report 2019.
94 The Cabinet is advised by the Judicial Appointments Advisory Board (JAAB), which was established in 1995 as a means of reducing political interference in the appointment of judges, although recent research carried out by Jennifer Carroll as part of her unpublished doctoral research on the selection process between 1982-2007, would seem to indicate that JAAB is failing in this regard – "Judicial appointments board 'gave discretion back to politicians'" Irish Times, 23rd June 2014.

misbehaviour"[95] if a joint resolution is adopted by both houses of the Oireachtas.[9697] District Judges are also largely immune from censure of any other kind and their work is subject to little by way of oversight.[98] Written transcripts are not kept of District Court proceedings and it is only recently that digital audio recording of District Court proceedings was introduced.[99]

District Judges have a considerable degree of sentencing discretion, a fact exacerbated by the relative absence of sentencing guidelines for the Irish judiciary.[100] Furthermore, outside Dublin and Cork, there is only one District Judge per district and he/she hears cases and passes sentence in isolation, unlike the situation in England and Wales where magistrates sit as a bench. There is some evidence that where judges sit as a group, this has a bearing on colleagues' decisions on sentencing.[101]

The current situation in Ireland leads to considerable variations in the sentences passed for waste management offences. This writer regularly appears before District Judges in three different districts and has observed marked differences in judicial attitudes to waste management offences. A number of prosecutions brought by Cork County Council before four different District Judges against one individual offer a perfect illustration of this. The individual in question operated an unauthorised end of life vehicle (ELV) facility in County Cork. The facility was spread over six acres, and apart from the fact that the operator of the facility did not have a waste licence, he had failed to put in place impermeable surfacing or bunded containers, with the result that pollutants from the numerous ELVs on site were able to seep into the ground. The operator was prosecuted on four separate occasions in Cork City District Court by the writer, the facts of each case being essentially the same, yet the penalties imposed differed considerably. On the first occasion, the accused was convicted and fined €500 for a breach of Section 39 of the WMA and €600 for a breach of Section 55 of the WMA.[102] On the second occasion, he was convicted and fined €800 for a breach of Section 39 and €600 for a breach of Section 55. The judge in this particular case informed the accused that if he appeared before the court again, he ran the risk of a custodial sentence.[103] On the third occasion, the District Judge took the view that the Council should provide the accused with a solution, and ultimately only

95 Article 35.4.1°. of the Constitution provides that, "A judge of the Supreme Court or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by DáilÉireann and by Seanad Éireann calling for his removal." Section 20 of the *Criminal Justice (District Court) Act 1946* provides that, "Justices shall hold office by the same tenure as the Judges of the Supreme Court and the High Court."
96 The Irish Parliament, consisting of two houses, DáilÉireann and Seanad Éireann.
143 Supra note 93, pages 29 to 30.
98 Supra note 93, page 4. They are of course, subject to judicial review and habeas corpus.
99 Courts Service. *Courts Services Annual Report 2011* (Dublin, Courts Service, 2011). Accessed at: < http://www.courts.ie/Courts.ie/library3.nsf/16c93c36d3635d5180256e3f003a4580/5429b2c7c7b74bd180257a3e004ecf1d ?OpenDocument>
100 Supra note 93, page 3.
101 Sunstein, C. *Are Judges Political?: An Empirical Analysis of the Federal Judiciary*. (Washington DC, Brookings Institution Press, 2006).
102 Cork County Council v. Sean Murphy. Cork City District Court. 23rd January 2002..
103 Cork City District Court. 23rd October 2002.

imposed a total of €200 in fines and refused our costs and expenses.[104] On the fourth occasion, the District Judge fined the accused €2,000 for a breach of Section 55 of the WMA.[105]

104 Cork City District Court. 20th February 2006.
105 Cork City District Court. 4th September 2007.