



Environmental Law Foundation

**Civil law aspects of
environmental justice**

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This report is part of the Environmental Justice Project being undertaken by the Environmental Law Foundation, Leigh Day and Co. solicitors and WWF-UK

Environmental Justice Project

The purpose of the Environmental Justice Project (EJP) is to identify and address any inadequacies in access to justice under environmental law in England and Wales covering the full range of criminal, administrative and civil law. It is intended that the implications of its findings will be reported on or about December 2003.

Pamela Castle, Chairman, Environmental Law Foundation

About the Author

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The **Environmental Law Foundation** is the leading national charity providing legal advice for all communities and individuals facing a threat to their environment. Through its nationwide network of specialist lawyers and consultants, it provides pro bono guidance and continuing support to those in such need. ELF is particularly concerned with securing access to justice for the socially disadvantaged and has been involved in some of the most significant environmental test cases in recent years. Since its launch in 1992, ELF has won a number of awards for justice and community action.

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We hope that this report demonstrates the case for providing an environmental justice system that is fair, timely, effective and not prohibitively expensive; something, it may be argued, that it is not at present. It cannot be right that communities and individuals must pay, through general taxation, for public bodies to protect and preserve the environment and then be subject to environmental harm and/or have to pay once again when it appears that that task isn't being done. Environmental law is unique in that it provides the opportunity to protect and enhance living things and humankind, our neighbours, children and grandchildren, the majority of whom do not have any direct rights or access to law. This uniqueness should be accepted and then taken into account in its treatment of citizens aiming to protect the environment for the benefit of all through equality in access, cost and treatment before the law.

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Executive summary

This report, *Civil law aspects of environmental justice*, publishes the conclusions of a six-month project, the Environmental Law Study (ELS), which was grant-funded by the Sustainable Development Unit at Defra in order to investigate aspects of access to environmental justice. The ELS was itself a component of the Environmental Justice Project being co-ordinated by the Environmental Law Foundation (ELF), Leigh Day & Co. solicitors and WWF-UK.

The primary purpose of the ELS was to begin to evaluate the effectiveness of environmental justice for communities and individuals experiencing environmental problems and how they are assisted by the present judicial system. It was carried out in three distinct parts: Part I was a review of cases from ELF's Advice and Referral Service. Part II was an evaluation of concluded environmental cases from the County Courts and High Court of Justice in England and Wales relating to private civil law matters. Finally, Part III was an analysis of reported environmental law cases.

The review of ELF's A&R service highlighted one of the unique aspects of environmental law; that the impact from one polluting activity or from a specific decision being taken often results in 100's if not 1000's of people being potentially affected. The review itself found an average of 869 people affected by each environmental problem.

The review of ELF's equal opportunities monitoring programme found that, in terms of the respondents' financial status of those people contacting ELF, the largest majority stated that they had incomes in the lowest income group (45% under £10,000) and over 65% stating that they had annual incomes under £15,000. The review also found that people in the 51-60 year old age group were the most frequent users of ELF's service and it may well be that they are most likely to consider taking legal or other action to resolve an environmental concern. The gender of people being referred by ELF to its members were 54% male and 46% female, although there was a clear trend over the four year study period of an increase in the number of female respondents to the extent that by 2002 it was 50% male and 50% female respondents. The single largest ethnic group was English/Welsh which accounted for 85% of respondents. There had been an increase in the number of Indian respondents contacting ELF over the study period but no Pakistani, Black African or Black Caribbean respondents after 1999, the first year considered by the study.

The ELF review found that environmental concerns involved more than 21 discrete areas of civil and public law. The area that the overwhelming majority of environmental concerns were based upon was the land use planning system. Over 61% of all concerns related to decisions, acts or omissions arising out of the Town and Country Planning regime. This was five times as common as the next legal area, statutory nuisance.

Over one third of ELF referrals were regarded by the client as successful in that the environmental concern had been resolved. Of the concluded cases that were not regarded as reaching a satisfactory outcome over 30% of respondents stated that they had been advised that their case had merits but that they did not pursue the matter because of the cost in taking legal action.

From the outcome of the Reported Cases Analysis, environmental action appeared to be moderately successful; 47% of decisions were successful compared to 53% that were regarded as unsuccessful in terms of environmental benefit. The most frequent court users according to the reported cases were residents, which accounted for 36% of claimants. Company or business organisations made up 27%, local authorities 21%, Government agencies (eg, health authorities) 7% and Non Governmental Organisations (NGOs) 5%.

The results of the ELS questioned the effectiveness of the private civil law system in offering an effective form of environmental protection. Most often, the only relief that can realistically be achieved is to financially compensation for someone with an interest in property and for environmental harm that has already occurred. Moreover, there is no compulsion on a successful claimant to use the damages awarded to make good the environmental harm. It seems that, in practice, private civil law remedies are not an adequate form of resolving environmental disputes. They remain expensive and generally fall outside any benefits in time and cost that the Civil Procedure Rules may offer. It is accepted that if the limitations of complexity and cost are overcome it remains an option for environmental protection that could be of use in certain circumstances. However, the present operation of the Civil Rules appears to perpetuate the belief that there is one law for the rich and no law for the poor.

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Introduction

1. This report, *Civil law aspects of environmental justice*, publishes the conclusions of a six-month project, the Environmental Law Study (ELS), which was grant-funded by the Sustainable Development Unit at Defra¹ in order to review ELF's own referral system, evaluate private environmental cases in the County Courts and High Court and to undertake a desktop study of reported environmental cases. It is also a component of the Environmental Justice Project being co-ordinated by the Environmental Law Foundation (ELF), Leigh Day & Co solicitors and WWF-UK.²
2. One of the main reasons why environmental justice and law is so important and deserves perhaps greater analysis and consideration than it is, at present, afforded is that, unlike many legal areas, each issue that arises has the potential to affect a large number of individuals and other living things - in that sense, it is unique. Further, it relies upon a range of laws that cross the public/private law divide and each of which, alone, may not be regarded as substantive environmental laws. An example of this is the role of personal injury law in settling environmental poisoning claims.
3. Much of the tension in environmental law that cause concern to people and can result in litigation arises from conflicting pressures on the environment from a number of stakeholders. Landowners want to develop their land, principally for profit, whereas local communities are keen to preserve open space and limit traffic congestion (and the related pollutants) in order to protect their health. Yet, at present, there is inequality of rights. The landowner has a right, albeit restricted by legislation, to develop his or her land but there is, as yet, no equivalent fundamental right to a healthy environment. Instead, the environment and its agents including public authorities, the Environment Agency and communities must work within the existing legal parameters to best protect humankind and other living things.
4. Another reason why environmental law is important has been explained by David Wilkinson³ who notes that left to its own devices, humanity will eventually bring about complete environmental degradation. Yet, one of the difficulties in trying to advocate a more environmentally benign or sustainable way of life is that the environment itself is very complex. The interrelation between different species, ecosystems and life cycles is

¹ Department for Environment, Food and Rural Affairs

² Worldwide Fund for Nature - UK

³ pp. 8-9 Wilkinson, D (2002). *Environment and Law*. Routledge: London.

not readily understood and is often ignored as a result. Wilkinson concludes that environmental law provides the overarching framework for the multidisciplinary approaches that are necessary if we are to halt the trend of environmental decay. And while ethics, economics and education can provide strategies for change, each of these require 'legal embeddedness' to have the necessary strength to succeed. The environment needs good law if it is to avoid suffering further serious harm.

5. The primary purpose of the ELS was to begin to evaluate how effective environmental justice is for communities and individuals experiencing environmental problems and how they are assisted by the present judicial system. It was carried out in three distinct parts:
 - Part I: a review of cases from ELF's Advice and Referral (A&R) service.
 - Part II: an evaluation of concluded environmental cases commencing in the County Courts and High Court of England and Wales relating to private civil law matters.
 - Part III: an analysis of reported environmental law cases.

This report considers the findings of the study areas and draws conclusions from each.

Background to the Environmental Law Study

6. The UK government and judiciary are committed to helping to secure access to environmental justice. This is demonstrated by the signing and anticipated ratification of the UN Convention on Access to Environmental Information, Public Participation in Decision Making and Access to Justice in Environmental Matters 1998 (the Aarhus Convention),⁴ which lays down minimum standards for securing access to information, public participation in decision making and access to justice in environmental matters. It is also evident by recent support for more effective sentencing in environmental crime cases with, for example, the publication of magistrates guidelines on sentencing: *Costing the Earth: information for sentencers*.⁵
7. Environmental justice itself comprises at least two key parts. The first and more straightforward aspect involves access to the law in resolving environmental problems and providing the opportunity to have a voice in relation to the environment.

⁴ For the full text of the Convention visit: www.unece.org/env/pp.

⁵ Edited by Stookes, P (2002). *Costing the Earth: information for sentencers*. Magistrates Association/ Environmental Law Foundation: London.

Environmental justice in its broader sense means securing environmental equity on a local, national and international scale to help ensure that everyone enjoys a clean, healthy environment regardless of their means, where they live or their background. It includes equity between nations and between generations, as set out in Principle 3 of the Rio Declaration 1992.⁶ The more direct notion of access to the law and environmental justice is the focus of this report, although it will be evident that the two aspects are often inextricably linked. For simplicity, the distinction between the two is made with reference to environmental justice and equity respectively.

8. Something that must be regarded as fundamental to securing access to environmental justice is being aware of, or understanding, how effective the present judicial system is in terms of resolving environmental problems; understanding the present position is critical to preparing and planning where to go and how to get there. Thus, one of the first tasks of the ELS was to consider whether there were any existing reports, studies or information setting out key judicial data on environmental law. For example, prior to the study there was no way of estimating how many environmental cases were taken to court each year, the success of any cases that were taken, the areas of law that the cases derived from and who the claimants for these cases may have been. Further, it was not clearly known what factors influenced potential claimants in deciding to pursue a claim. Importantly, without key information it was found impossible to assess where any gaps may have been in the provision of access to justice and therefore begin to fill any potential gaps. While the ELS did not attempt to answer all of these questions, it is submitted that it provides a good base, together with the related projects (discussed below) with which to start to build a comprehensive picture of the reality of environmental law and justice.
9. A desk top study carried out at the start of the ELS found that there were no known specific studies completed on access to environmental justice in England and Wales that provided even basic information on the number of environmental cases taken each year. As a result, the ELS started with a blank canvass having to carry out primary research in law to get even core data together and, as it will be seen below, it was found necessary to set out quite clearly the scope and boundaries for the project.

⁶ UN Declaration on Environment and Development 1992 (the Rio Declaration).

Related environmental justice projects

10. Part I reports on the findings from research undertaken on ELF's own data and further research carried out to clarify that data where necessary. It directly considers the experience and opinion of community groups and individuals faced with an environmental concern and making efforts to use the law to resolve that concern. One aspect of the *Environmental Justice Project* (EJP) being undertaken by Leigh Day & Co solicitors and WWF-UK complements this research by asking environmental practitioners of their experiences when taking cases on behalf of communities and individuals and of practising within the field of environmental law. Part I does not consider the action taken by corporate or public bodies in pursuing an environmental action, although the associated studies consider this in some detail. They are complementary and provide a contrast for corporate activity. This is further supported in Part III of this report, the Reported Cases Analysis, which provides a benchmark on which to contrast the findings of the respective studies with the public reporting of environmental law.

11. Part II of this report considers private environmental law cases that began and concluded in either the County Courts or the High Court. The key aim was to begin to understand how effective the private civil law system was in resolving environmental disputes. This part was complemented by two other studies being undertaken concurrently; another aspect of the EJP considered the criminal justice system and includes an analysis of the number of prosecutions pursued, on average, each year.⁷ Also, the report *Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal* (MEJ),⁸ carried out by the Centre for Law and the Environment at University College London, tested the merits of the Royal Commission of Environmental Pollution's proposal for an environmental tribunal and investigated systems of appeal currently in place for environmental regulation.

Study scope and boundaries

12. In order to provide consistency across the study and report, certain boundaries and definitions were used. This aimed to ensure that the review of ELF's Advice and Referral service in Part I was comparable to evaluation of environmental court cases

⁷ For further details about the project contact: WWF-UK at www.wwf.org.uk.

⁸ To download the report see: www.ucl.ac.uk/laws/environment.

(Part II) and to the Reported Cases Analysis (Part III). The study boundaries are detailed below.

Spatial boundaries

13. Each part of the study was evaluated according to which region in England and Wales cases began. To achieve this, geographical, or spatial, boundaries were used in analysing data. These were based on the Regional Circuits of the Court Service including the Midlands, the North East, the North, the South East (including London), Wales and the West. The Court Service clearly plays a critical role in determining access to environmental justice and it was considered appropriate to base regional evaluation on that system. While the scope of each region may not fit other distinct regional sectors such as regional government sectors or the Legal Services Commission regions, it did provide consistency across the ELS itself and provides a base for any future analysis that may take place. For a detailed breakdown of each region see Appendix 3.

Jurisdiction

14. The study focused on environmental action and court cases that relate to activity within England and Wales. However, as part of the study it was necessary to consider matters outside this jurisdiction. For example, the Reported Cases Analysis involved checking all reported cases and then making a distinction between those for England and Wales and those outside the jurisdiction for example in Northern Ireland, Scotland and the European Union.

Historical period

15. The review of ELF's A&R service (Part I) and the Reported Cases Analysis (Part III) covered a period of four years from January 1999 to December 2002. The Civil Court Evaluation (Part II) considered sample cases taken from 2002.

The public/private law divide

16. In the UK and most other common law countries there are two broad legal categories: private and public law. Private law covers relationships, agreements and disputes between two or more person (including corporate law). Public law covers the administration and regulation of activities taken on behalf of, and for the benefit of, society. It includes criminal law, which aims to protect society and punish those who act unlawfully, and administrative law, which includes the regulation of public bodies and agencies.⁹ For the purposes of the ELS and the related studies there were three distinct legal divisions: private, public and criminal law. Part I of the ELS focussed on private and public law matters as they related to individuals and community groups. Part II

⁹ Extract from Section 3.1 of the proposed *Environmental Management Handbook*. IEMA: Lincoln.

considered only private law matters arising in the County Courts and High Court. Part III considered reported cases that related to either private or public law.

Court case

17. A court case was defined as legal action where court proceedings had been issued. For the Civil Court Evaluation (Part II), the case conclusion was where judgement had been given.

Environmental case

18. An environmental case was defined as any legal activity (including but not exclusively court proceedings) that was substantially about the environment or had a significant aspect of the case relating to impacts on the environment and the environmental implications on quality of life.

Environment

19. The definition of the environment was transposed from that contained in the new draft Environmental Information Regulations.¹⁰ Draft Regulation 2 provides that environmental information is any information relating to the direct and indirect effects on human beings, fauna, flora, cultural sites, and built structures, soil, water, air, atmosphere, climate, the land, landscape, natural sites (including wetlands, coastal and marine areas), biological diversity (including Genetically Modified Organisms (GMOs)), energy, noise, radiation, waste, material assets and the cultural heritage; and the interaction between these elements.

Type of claimant

20. The study considered a range of claims taken by a variety of claimants although, by the very nature of that part of the study, the review of ELF's A&R service this was almost exclusively an individual and/or community group seeking to resolve an environmental concern or problem. In the Reported Cases Analysis, all environmental-based cases were considered and a breakdown of the type of claimant was made.

¹⁰ The new draft Regulations can be downloaded from: www.defra.gov.uk/environment/consult/env.info.

Part I: Review of ELF's Advice and Referral service

1.1 Introduction

21. ELF provides advice and assistance to communities and individuals throughout the UK via a nationwide network of over 150 specialist environmental solicitors, barristers and technical consultants. These experts make up its referral member base, which enables ELF to provide community support through a range of services including the Advice and Referral (A&R) service.
22. In 2002, ELF was awarded Quality Mark status by the Community Legal Service (CLS) for its services to individuals and communities. Attaining Quality Mark status means that ELF's services operate to a required standard determined by the CLS and which is monitored on an annual basis. ELF services are also subject to internal management based on review, planning, monitoring, auditing and then further review. In this way, ELF's service aims to secure continuous improvement in operation and performance.
23. ELF has, since its launch in 1992, referred over 1,700 cases to its members and dealt with many tens of thousands of inquiries. It is estimated that 100,000s of people across the UK have benefited from its services. ELF cases have included matters heard in the House of Lords and the European Court of Human Rights. Accordingly, it is believed that ELF's collection of cases is the single largest collection of data relating to citizen environmental action in the country and a key factor in securing Defra's support for the study. It offers the opportunity of providing a useful insight into many aspects of environmental legal action and access to justice. It also provides the opportunity of showing how the law may be used to resolve environmental concerns prior to taking formal legal action. The particular areas of interest arising from the A&R service review were:
 - The type of the environmental problems that were of concern to people eg, noise, air or water pollution.
 - The areas of law that regulate or control pollution or environmental harm (eg, the pollution control regime or statutory nuisance) or the particular area of law forming the basis of a claim (eg, nuisance or negligence).
 - The estimated number of people affected by any particular environmental problem.

- The types of people who contact ELF for help in terms of age, gender, ethnicity, income and region.
- How the case concluded. For example, was the case environmentally successful?
- Were there any barriers to taking legal action? And if so, what?

24. Each one of these areas of interest is considered in more detail below. There is clearly a need for such information when considering access to environmental justice because, along with most other areas of law, the vast majority of environmental problems are resolved before formal legal action begins. As indicated in Part II for every 1,000 legal cases concluded, just 140 will result in proceedings being issued and six will result in judgement following trial.

25. ELF currently refers around 200 community groups and individuals to its members for further advice and assistance each year. Table 1.1 sets out the total number of inquiries received by ELF and referred to its members between 1999 and 2002 throughout the UK. Due to the range of experience of ELF members, it is likely that individuals or community groups will often be referred to more than one member. For example, after a first referral to a member solicitor the matter may then also be referred to either a barrister or technical consultant, or both. However, for the purpose of the ELS, referrals have been considered on a case-by-case, rather than referral, basis.

	1999	2000	2001	2002	1999-2002
<i>Inquiries about environmental concerns</i>	450	615	619	635	2319
<i>Cases referred</i>	141	136	203	188	668

Table 1.1: ELF inquiries and referrals 1999-2002 throughout the UK

26. As shown in Table 1.1, a significant number of the inquiries received by ELF from the public are not referred on to an ELF member. Reasons for this include:

- That there is no substantive environmental problem. That is, after discussing the query with a caseworker, there is no identifiable environmental aspect to the problem. If so, that person will be signposted to the most appropriate organisation, which may be a similar voluntary advice agency, such as a local law centre.
- That there may be a more appropriate course of action. At times, an inquirer will contact ELF about an environmental problem and the caseworker concludes after discussing the matter with the inquirer, that they have not yet exhausted all other

avenues that may be available. For example, someone concerned about a factory emitting black smoke should initially contact their local authority environmental health team, who are most likely to be the public body responsible for controlling air emissions. If this option has not yet been pursued then the environmental problem may well be resolved by the local authority taking action against the polluter.

- The inquirer decides not to proceed with the referral. At times, an inquirer who will be given initial advice and details of how to refer the matter on to one of ELF's members, declines to pursue the matter and accept the option of a free initial opinion on whether the case has any legal merits. Reasons for this may include a more general reluctance to instruct a lawyer.¹¹

1.2 Methodology

27. The review of ELF's A&R service involved detailed consideration of the ELF referrals from January 1999 to December 2002. The research programme included an initial review of any earlier monitoring and reviews over this period that had been undertaken for other purposes such as the initial four-week case review, carried out as part of the normal A&R service.
28. The initial scoping review found that there was insufficient consistency in any previous analytical studies carried out and it was therefore necessary to undertake fresh research within the referral case files to ensure consistency in approach when using data. In total, 668 ELF cases were reviewed, of these 35 related to Scotland and Northern Ireland. For the purposes of the ELS, 633 cases were analysed in detail. Thus, totals between analyses differ eg, there were 136 cases referred throughout the UK in 2000 (table 1.1) yet the total areas in 2000 (table 1.3) for England and Wales was 132.
29. Once the data relevant to the study had been taken from the case files, the research and findings were peer-reviewed and then cross-checked for accuracy. Gaps in the data were then identified and it was necessary to undertake further research on many of the files. One of the difficulties in the file review was that, despite regular monitoring, a

¹¹ See for example other studies in this area such as: Genn, H and Paterson, A (1999). *Paths to Justice - Scotland: What People in Scotland Do and Think About Going to Law*. Hart Publishing: Oxford. - its summary notes that 'with the exception of divorce and separation problems and accidental injury, involvement in legal proceedings is a rare event for most members of the public ... Reluctance to become involved in legal proceedings stems from beliefs about cost, discomfort and uncertainty about outcome. These factors will continue to affect the threshold at which people will take steps to access the legal system.'

conclusion to the case could not be determined with accuracy and it was often necessary to contact the original inquirer and check the status of their case and whether or not the matter had concluded.

1.3 The type of environmental concerns

30. The environmental concern(s) affecting, or potentially affecting, the communities and individuals was identified in each case and allocated to a specific range that fell within the study definition of the environment (see paragraph 18 above). The range of environmental concerns raised is detailed in Table 1.2, and includes 13 specific types and a residual 'other' section for uncommon concerns.

<i>Environmental concern</i>	Number and percentage of environmental concerns raised on referral									
	1999		2000		2001		2002		1999-2002	
	No.	%	No.	%	No.	%	No.	%	No.	%*
Land including open space, landscape, CPOs,** rights of way & visual amenity	31	19%	35	21%	37	14%	54	23%	157	19%
Noise	24	15%	27	17%	50	18%	43	18%	144	17%
Biodiversity including wildlife and habitat conservation	31	19%	28	17%	45	16%	35	15%	139	17%
Air pollution inc. odours dust & smell	25	16%	25	15%	36	13%	24	10%	110	13%
Human health	11	7%	11	7%	38	14%	20	8%	80	10%
Radiation including telecommunications mast emissions and radioactive waste	6	4%	9	6%	14	5%	5	2%	34	4%
Built environment including cultural and heritage sites	7	4%	4	2%	11	4%	11	5%	33	4%
Water pollution including contamination from sewage	3	2%	8	5%	9	3%	8	3%	27	3%
Flooding	2	1%	5	3%	6	2%	12	5%	25	3%
Light pollution	6	4%	2	1%	11	4%	3	1%	22	3%
Waste inc. fly-tipping & hazardous waste	5	3%	4	2%	3	1%	9	4%	20	2%
EIA concerns (or lack of one)	1	1%	0	0%	5	3%	6	3%	12	1%
Vibration	0	0%	2	1%	1	0%	1	0%	4	0.5%
Other including eviction, access to information, costs, participation, tax, trusts	7	4%	3	2%	10	4%	8	3%	29	4%
Totals	159		163		276		239		836	

*Variation arising from rounding up/down of percentage figures. **Compulsory Purchase Orders

Table 1.2: Type of environmental concerns

Highlights of results

31. Many people contacting ELF stated that there were two or more environmental concerns. For example, proposals to develop a rail freight yard in a residential area raised concerns about dust, vibration and noise. Where there was clearly more than one environmental concern these were recorded as separate items. The most common problem for people contacting ELF (19% of all concerns raised) was to do with land use. This included the loss of open space, impact on landscape and visual amenity and restricted access to public rights of way. The second largest cause for concern was noise (17%), followed closely by the impact of decisions and actions on biodiversity, wildlife and habitat conservation (nearly 17%). Problems of air pollution were significant (over 13%) with the impact of problems on human health also featuring significantly (nearly 10% of concerns).

Trends

32. Land use matters were the primary concern for people in every year of the study, except 2001 when noise was of more concern. The comparable levels of concerns about land use remained consistent (2001 excepted) at around the 20% level. There was a slight year on year increase in concerns about noise level with an average annual increase of 1%. There was an equivalent fall in concerns over biodiversity, and a greater drop in concerns about air pollution. This mirrors the general trends in the UK which suggest that levels of air pollution tend to be falling.¹² There were increases in concern over the lack or inadequacy of environmental impact assessment (EIA) relating to land use planning (something that is reflected in the increasing level of litigation in this area over the past four years¹³) and also in relation to flooding. Referrals about water pollution and waste were comparatively uncommon. This contrasts with the Reported Cases Analysis (Part III) and it may well be that concerned individuals are, at an earlier stage, referred to the appropriate public bodies to resolve these matters and that the regulatory bodies, such as the Environment Agency and local authorities, are well placed to tackle these concerns directly. This will be of interest when considering the comparative studies, particularly in relation to prosecutions.

¹² See pp 17-23 Defra (2002). *The environment in your pocket 2002*. Defra/National Statistics: London.

¹³ See further: pp 661-664 Purdue, M (Ed.) (2003), *Current Topics, Journal of Planning and Environment Law June 2003*. Sweet & Maxwell: London,

1.4 Areas of environmental law

33. An important aspect of access to environmental justice is the ability to resolve the environmental problem through either the common law or a regulatory system. The review examined which areas of law each concern was most closely based upon. Importantly, some concerns may have been based on two or more legal areas eg, a civil claim may commonly arise in nuisance and/or negligence. The results of the analysis are provided in Table 1.3.

Area of environmental law	Number and annual percentage of referrals to ELF members in England and Wales									
	1999		2000		2001		2002		1999-2002	
	No.	%	No.	%	No.	%	No.	%	No.	%*
Planning all aspects of strategic planning and development control including Tree Preservation Orders but excluding breach of conditions	81	60%	74	56%	133	62%	121	65%	409	61%
Statutory nuisance	16	12%	16	12%	27	13%	19	10%	144	12%
Private nuisance	6	4%	11	8%	16	8%	6	3%	39	6%
Negligence	2	1%	3	2%	8	4%	5	3%	18	3%
Housing (landlord & tenant)	3	2%	6	5%	1	0.5%	5	3%	15	2%
Water	2	1%	3	2%	4	2%	6	3%	15	2%
Transport	3	2%	3	2%	3	1%	2	1%	11	2%
Contract including land and property	4	3%	1	1%	0	0%	5	3%	9	1%
Waste	2	1%	2	2%	0	0%	5	3%	9	1%
Breach of planning conditions	3	2%	0	0%	1	0.5%	3	2%	7	1%
Integrated pollution control	5	4%	0	0%	2	1%	0	0%	7	1%
Radiation inc Rad. Substances Act	1	1%	1	1%	2	1%	3	2%	7	1%
Village green applications	1	1%	1	1%	4	2%	1	0.5%	7	1%
Biodiversity including hedgerow wildlife and habitats	1	1%	1	1%	0	0%	1	0.5%	3	0%
Contaminated land	0	0%	0	0%	2	1%	1	0.5%	3	0%
Intellectual property rights	3	2%	0	0%	0	0%	0	0%	3	0%
Other including trespass, allotments ombudsman, tax & human rights	3	2%	10	8%	7	4%	8	4%	28	4%
Totals	136		132		210		191		734	

*Variation arising from rounding up/down of percentage figures

Table 1.3: Areas of environmental law

Highlights of results

34. The area of law that the overwhelming majority of environmental concerns arise from is the land use planning system. Over 61% of all concerns relating to decisions, acts or omissions arose out of the Town and Country Planning regime (excluding breach of planning conditions). It was over five times as common as the next legal area, which was statutory nuisance with nearly 12% of relevant legal areas. The only other reasonably significant legal area was the common law area of nuisance as the legal basis of claims at around 6%. Beyond this, the range of legal areas was wide but with modest percentages from each group with, for example, negligence, housing, water and transport comprising around 2% of legal areas respectively. Areas of law making up 1% of cases included contract, waste law, breach of land use planning conditions, village green applications, specific radiation legislation, and legislation relating to contaminated land. One of the clearest outcomes from this section of the study was that the number of areas of law covering environmental concerns is high; with more than 21 discrete areas.

Trends

35. In terms of land use planning, there is an overall percentage increase in the number of matters arising from the legislative regime, with a slight dip in 2000. In relation to statutory nuisance, the proportion of cases remained reasonably constant at around 12%, although 2002 recorded a slight reduction. The civil law claims of nuisance (6% of all legal areas) and negligence (nearly 3%) did not provide any clear trends except that nuisance, as a legal remedy, provided more opportunity than other legal areas for formulating claims although the frequency fluctuated year on year.

1.5 Number of people affected

36. The ELS included an analysis of the number of people estimated to be affected by each concern¹⁴ being raised by people contacting ELF. This information was requested at the initial inquiry stage and was usually confirmed by the inquirer when formally requesting assistance through the A&R service. In some instances, the inquirer was not able to specify the numbers of people affected in numerical form and, instead, provided a description such as '10 neighbours' or 'a small village'. In these circumstances, a best estimate was made to provide the total number of people likely to be directly affected

¹⁴ The years 1999 and 2000 were not assessed. The question of how many people were affected was not put to inquirers during these years. Any attempt to second-guess numbers some three to four years later would not provide accurate information. It was considered that such estimated information would not add to the ELS.

by the problem.¹⁵ The numbers recorded tend to be conservative, with under-estimating of numbers wherever there was uncertainty. For the purpose of the study, referrals that were county-wide, regional or that related to general environmental/government policy, were recorded as nought to avoid distorting the final analysis. Similarly, concerns that were identified as primarily causing harm to wildlife were not registered as directly affecting people. According to information from inquirers when requesting assistance, the total number of people affected by the specified environmental problems was 98,981 during 2001 and 224,141 in 2002. Overall, these figures provided an average of 869 people affected by each environmental problem.

1.6 Who contacts ELF?

37. ELF operates an equal opportunities (EO) programme, which includes monitoring its A&R service to help ensure that it is made available to everyone regardless of means, ethnicity and gender. As part of the programme, people requesting referral to an ELF member are asked to anonymously complete an EO form. In this way, ELF can more effectively understand the representation of its service users and address any gaps in service provision as required.
38. Completion of the EO form is voluntary and does not influence any further action taken by ELF or its members. Completed forms are not returned with all requests for assistance. Almost always, someone requesting assistance is doing so on behalf of a community group and often they do not find it appropriate to complete and return an EO form. Nevertheless, over the study period, a high number of EO forms were completed and returned and provided the data for this part of the ELS, including the age, gender, ethnicity, disability and income group of those people using ELF's service and returning completed EO forms (respondents). As part of the study, 569 EO forms between 1999 and 2002 were analysed (see Table 1.4). The subsections below highlight some of the key data from the EO analysis.¹⁶ Because of the anonymous nature of the EO programme it was not possible to make a distinction between England, Scotland, Northern Ireland and Wales and the analysis covered the UK as a whole.

¹⁵ Pre-set numbers to estimate numbers of people affected by environmental concerns included assessing the number of people per household as 2.4 in accordance with the National Census 2001 statistics.

¹⁶ Not all equal opportunity forms were fully completed. This accounts for the disparity between data sets. Further, the style of the EO forms changed from 2001 resulting in more detailed information being secured.

	1999	2000	2001	2002	1999-2002
<i>Cases referred</i>	141	136	203	188	668
<i>EO forms received</i>	106	134	181	148	569

Table 1.4: Comparison between cases referred and EO forms received

39. Table 1.5 indicates the age of respondents to ELF's EO monitoring programme. The most common age of people contacting ELF was from the 51-60 year group with over 32% of all respondents stating that they fell into this group. Over 25% of respondents stated that they were from the 41-50 year group. The 61-70 and 31-40 year groups each attracted around 17%. While the 70+ and 21-30 year groups accounted for 4% of respondents. There were no referrals from the under 21 age group.
40. Trends in the respondents ages are that the 51-60 year olds were consistently the most frequent users of ELF's A&R service and it may be implied that they are most likely to consider taking legal or other action to resolve an environmental concern. The 41-50 year group was the second most common age of respondent for all years. There was an interesting rise in the number of people aged over 70 years contacting ELF in 2001 and 2002 compared to 1999 and 2000. There was also a slight decline in the number of 21-30 year olds responding to ELF's equal opportunities monitoring.

<i>Age group</i>	<i>Number of respondents and percentage according to each year</i>									
	<i>1999</i>		<i>2000</i>		<i>2001</i>		<i>2002</i>		<i>1999-2002</i>	
	<i>No.</i>	<i>%</i>	<i>No.</i>	<i>%</i>	<i>No.</i>	<i>%</i>	<i>No.</i>	<i>%</i>	<i>No.</i>	<i>%*</i>
<i>Under 21s</i>	0	0%	0	0%	0	0%	0	0%	0	0%
<i>Age 21- 30</i>	5	5%	5	4%	6	3%	5	3%	21	4%
<i>Age 31-40</i>	19	18%	22	17%	26	14%	28	19%	95	17%
<i>Age 41-50</i>	28	26%	29	23%	51	28%	34	23%	142	25%
<i>Age 51-60</i>	41	39%	42	33%	54	30%	45	30%	182	32%
<i>Age 61-70</i>	12	11%	28	22%	31	17%	26	18%	97	17%
<i>Over 70 years</i>	1	1%	1	1%	12	7%	10	7%	24	4%
<i>Totals</i>	106		127		180		148		561	

*Variation arising from rounding up/down of percentage figures. See also footnote 14 above.

Table 1.5: Age of respondents in equal opportunities programme

Gender

41. Gender analysis of respondents over the 1999-2002 period found that 54% were male and 46% female. However, there was a clear trend over the four years of an increase in the number of female respondents and a corresponding decline in male respondents. In 1999 the ratio was 43% female to 57% male, 2000 was 46% female to 54% male, 2001 was 45% female to 55% male and in 2002 it was 50% male and female.

Disability

42. Nearly 11% of respondents to ELF's EO programme stated that they had a disability. These included arthritis, asthma, deafness, epilepsy, heart conditions, multiple sclerosis, nerve disease, quadraplegia, spinal injuries and blindness. There was no particular trend in the figures. The level of respondents with a disability remained broadly constant with a slight decrease in 2002.

Ethnic origin

43. Table 1.6 provides a detailed breakdown of the ethnic origin of respondents during 1999-2002. The single largest group was the English/Welsh group, which accounted for 85% of respondents. Approximately 2% of respondents were Scottish and 3% Irish. Over 1% of respondents indicated that they were English/Irish and 1% Polish.

<i>Ethnic origin</i>	Number of respondents and the annual percentage of ethnic groups									
	1999		2000		2001		2002		1999-2002	
	No.	%	No.	%	No.	%	No.	%	No.	%*
Asian British	0	0%	1	1%	0	0%	1	1%	2	0.5%
Black African	2	2%	0	0%	0	0%	0	0%	2	0.5%
Black Caribbean	3	3%	0	0%	0	0%	0	0%	3	1%
Chinese	0	0%	0	0%	2	1%	0	0%	2	0.5%
Dutch	0	0%	2	2%	0	0%	0	0%	2	0.5%
English/French	0	0%	0	0%	3	2%	0	0%	3	1%
English/Irish	0	0%	0	0%	4	2.5%	3	2%	7	1%
English/Scottish	0	0%	0	0%	2	1%	0	0%	2	0.5%
English/Welsh	90	89%	94	84%	136	84%	108	84%	428	85%
German	0	0%	0	0%	0	0%	2	2%	2	0.5%
Greek	0	0%	1	1%	1	0.5%	1	1%	3	1%
Indian	0	0%	0	0%	2	1%	2	2%	4	1%
Iranian	0	0%	0	0%	0	0%	1	0.1%	1	0%
Irish	1	1%	6	5%	5	3%	2	0.2%	14	3%
Mexican	0	0%	2	2%	0	0%	0	0%	2	0.5%
Pakistani	4	4%	0	0%	0	0%	0	0%	4	1%
Polish	0	0%	2	2%	4	3%	0	0%	6	2%
Scottish	0	0%	0	0%	3	2%	9	7%	12	3%
Turkish	1	1%	4	4%	0	0%	0	0%	5	1%
Totals	136		132		210		191		504	

*Variation arising from rounding up/down of percentage figures. See also footnote 14 above.

Table 1.6: Ethnic origin of respondents to ELF's equal opportunities programme

The level of English and Welsh respondents declined from 89% in 1999 to 84% in 2000 and then remained constant during 2001 and 2002. Other trends were that there was an increase in the number of Indian respondents over the study period but no Pakistani, Black African and Black Caribbean respondents after 1999.

Income group

44. The stated income of respondents over the study period provides that the lowest income bracket (under £10,000) was the highest group with nearly 45% of all respondents. This was the case for each study year period. Further, over 65% of all respondents stated that they had incomes of under £15,000. Table 1.7 provides a detailed breakdown of income groups. A clear trend is that there were fewer respondents in each income group as incomes increased. This was, with one or two minor exceptions, consistent over the four-year period.

Income group	Annual number of respondents and percentage according to income group									
	1999		2000		2001		2002		1999-2002	
	No.	%	No.	%	No.	%	No.	%	No.	%*
Under £10,000	19	36%	67	57%	63	38%	60	46%	209	45%
£10-14,999	14	26%	21	18%	41	25%	19	15%	95	20%
£15-19,999	9	17%	10	9%	20	12%	19	15%	58	12%
£20-29,999	7	13%	13	11%	20	12%	14	11%	54	12%
£30-39,999	3	6%	3	6%	7	4%	10	8%	23	5%
£40-49,999	0	0%	3	6%	8	5%	4	3%	15	3%
£50,000+	1	2%	0	0%	5	3%	5	4%	11	2%
Totals	53		117		164		131		465	

*Variation arising from rounding up/down of percentage figures. See also footnote 14 above.

Table 1.7: Income group of respondents in equal opportunities programme

1.7 Locality of cases

45. The analysis of regional distribution of cases was carried out according to the Regional Court Circuit. The majority of referrals came from the South East of England with just over 50% of all referrals being based in the region. The second highest number of referral requests came from the West of England with over 16% of referrals being located in the area. 12% were from the Midlands, 8% from Wales 7% from the North East and 6% from the North. Table 1.8 provides a breakdown.

Region	Annual number and percentage of ELF referrals according to region									
	1999		2000		2001		2002		1999-2002	
	No.	%	No.	%	No.	%	No.	%	No.	%*
South East	58	43%	60	47%	99	51%	101	57%	318	50%
West	33	25%	18	14%	28	15%	24	13%	103	16%
Midlands	19	14%	18	14%	22	11%	19	11%	78	12%
Wales	5	4%	11	9%	17	9%	17	10%	50	8%
North East	7	5%	9	7%	16	8%	12	7%	44	7%
North	12	9%	12	9%	11	6%	5	3%	40	6%
Totals	134		128		193		178		633	

*Variation arising from rounding up/down of percentage figures

Table 1.8: Regional analysis of ELF case referrals

Trends

46. The proportion of cases from the South East is particularly high and increased year on year over the study period with a corresponding percentage reduction in cases from the West and the Midlands, although on a case-by-case basis the number of referrals from the Midlands remained constant. There was a large increase in the number of referrals from Wales accounting for a proportionate increase from 4% in 1999 to 10% in 2002. Proportionately, the number of cases arising from the South East is significantly higher than the demographic distribution of the UK population, which is around 40%.¹⁷ There is no apparent explanation for this in the way that ELF provides its services. It relies on a national network of members and provides community outreach services throughout the UK, specifically designed to raise the profile of ELF across the country.

1.8 The conclusion of a case

47. As indicated above, clarifying the conclusion to many environmental cases required further investigation including contacting the original inquirer to ask how their case had progressed. Further research was undertaken for 2001 and 2002. Table 1.9 summarises this.

Status of case	2001		2002		2001-2002	
	No.	%	No.	%	No.	%
Successful	46	42%	33	30%	79	36%
No successful conclusion	64	58%	76	70%	140	64%
Ongoing matter	10		39		49	
No recent response	74		30		104	
Total respondents	194		178		372	

*Percentage between successful and unsuccessful

Table 1.9: Status of cases

¹⁷ National Statistics – Census 2001: www.statistics.gov.uk

Highlights of results

48. From the research, it was possible to clarify, with reasonable certainty, the conclusions to over two-thirds of referrals in 2001 and 2002. 36% of concluded outcomes were successful ie, the environmental problem was completely or substantially resolved. This was achieved through a mix of quasi-legal and pre-proceedings advice coupled with more conventional assistance such as issuing court proceedings. Further, with a high proportion of cases being based on the land use planning regime, many cases were concluded by successful representations to planning committee meetings and appeals.

How success was attained	2001		2002		2001-2002	
	No.	%	No.	%	No.	%*
<i>Planning meeting/inquiry/appeal</i>	19	41%	17	52%	36	46%
<i>Alternative/extra legal success</i>	10	22%	10	30%	20	25%
<i>Pre-proceedings legal assistance</i>	5	10%	4	12%	9	11%
<i>Problem resolved by its own accord</i>	8	17%	1	3%	9	11%
<i>Court judgement</i>	4	9%	0	0%	4	5%
<i>Mediation</i>	0	0%	1	3%	1	1%
<i>Proceedings settled</i>	0	0%	0	0%	0	0%
<i>Total</i>	46		33		79	

*Variation arising from rounding up/down of percentage figures

Table 1.10: Successful outcomes from referrals

49. Table 1.10 provides an indication of the range of solutions to environmental problems. The most frequent successful resolution of cases was via the land use planning system accounting for 46% of successfully concluded cases. This would have included representations to local authority planning committees, appeals and inquiries and is likely to be influenced by the high number of planning cases that are referred by ELF. The role of mediation in environmental disputes has begun to arise, although it is the author's opinion that there is still greater opportunity in this area.

1.9 Barriers to a satisfactory conclusion

50. Over two thirds of the concluded cases did not according to respondents reach a satisfactory conclusion. In 35% of these cases the clients were advised that there were no reasonable prospects of success. In a further 31% of cases the cost of pursuing legal action was the main reason for its failure ie, they were advised that they could reasonably pursue the matter and were likely to have done so *but for* the cost or potential costs that may be incurred. In 9% of cases potential claimants were time-barred from taking action. A further 9% cited personal reasons for deciding not to pursue a remedy. Four cases went to court (3%) and judgement was given against the respondent. Finally, there was a range of other reasons given for not concluding the matter, this included

not having any further contact with the ELF member despite being advised of the prospects of success. Table 1.11 provides a breakdown of reasons for unsuccessful cases.

Reason for lack of success	2001		2002		2001-2002	
	No.	%	No.	%	No.	%
<i>No reasonable prospect of success</i>	28	41%	23	29%	51	35%
<i>Cost</i>	23	34%	23	29%	46	31%
<i>Time-barred</i>	5	7%	8	10%	13	9%
<i>Personal</i>	4	6%	9	11%	13	9%
<i>Court judgement</i>	2	3%	2	3%	4	3%
<i>Stress</i>	1	1%	0	0%	1	1%
<i>Other</i>	5	7%	14	17%	19	13%
<i>Total</i>	68		79		147	

*Variation arising from rounding up/down of percentage figures

Table 1.11: Reasons for unsuccessful cases

1.10 Conclusions

51. Certain conclusions can be drawn from the review of ELF's A&R service, some of which may clarify the perceptions and/or assumptions already being made in relation to environmental law.
52. The wide range of concerns raised by individuals emphasises the complexity of environmental law and demonstrates the need for greater awareness and understanding when deciding environmentally related matters. Over 33 separate environmental issues were raised ranging from air, noise and water pollution to less indirect measures such as the right to participate or to be informed about environmental matters.
53. There is a particularly high number of referrals arising in the South East of England. Even allowing for the demographic distribution of the population, there is a disproportionately high number of problems arising. This trend is likely to persist with the latest government proposals to increase development in the region.¹⁸
54. While a few concerns raised only impacted on one or two individuals or the immediate environment, the overwhelming majority affected a high number of people, often whole communities. Frequently, the number of people affected ran into thousands.

¹⁸ ODPM (2003). *Communities Plan*. ODPM: London.

55. A range of legal areas provide either the source of the environmental concern, or the remedy. However, the land use planning regime dominates civil litigation in relation to the environment and is by far the most visible factor influencing the environment in England and Wales. While direct land use concerns such as loss of open space and impact on landscape are of importance they arise only as frequently as other concerns such as noise, biodiversity and air pollution. Further, matters that are quite prominent in terms of environmental crime such as water pollution and waste¹⁹ appear to be relatively rare concerns for communities and individuals. This may be due to the regulatory regime in place. It may also be that people do not perceive these environmental concerns as much of a threat compared to developments proposed in their neighbourhood.
56. Significantly, the overwhelming majority of the people contacting ELF on behalf of either themselves or their communities do so as third parties to any activity or decision being taken. Communities and individuals often find themselves in a position where there are unable or prevented from taking direct action to resolve a dispute because of the rules of engagement within the legal system. In particular, with so many environmental and social concerns arising out of the land-use planning system it seems perverse to continue to deny even a limited third party right of appeal²⁰ (although it is understood that the National Assembly for Wales is now reviewing this position).
57. Many of the people contacting ELF have low incomes. This could imply that communities within lower income groups are suffering disproportionately from environmental problems. This supports recent research,²¹ which concluded that most often it is the poorest people in society who suffer from a poor environment. It also suggests that people in lower income groups may be more likely to need and value the free initial consultation provided by ELF members as part of its A&R service. However, how far those people are able to take legal action depends on the availability of pro-bono support by the legal and technical experts and/or the availability of public funding. The provision of pro-bono services is invaluable but can only assist up to the point where costs arise external to the pro-bono service provider (such as the liability for another party's costs, court fees or expert evidence) or to the extent that the provide

¹⁹ 'The waste industry is still responsible for more pollution incidents than any other sector ... while the water industry remains responsible for many serious pollution incidents' pp 22-26 Environment Agency (2003). *Spotlight on business environmental performance 2002*. Environment Agency: Bristol

²⁰ pp. 54-55, DTLR (2001). *Delivering a fundamental change*. DTLR: London.

²¹ Stephens, C, Bullock, S and Scott, A (2001). *Environmental Justice: rights and means to a healthy environment*. ESRC, Friends of the Earth and University of Sussex. See: www.foe.co.uk.

is able to provide advice and assistance without charge.²² This is evident from the high number of people citing cost as a barrier to success. Access to a legal remedy whereby each party pays their own costs is largely unavailable in environmental cases; it is not, in practical terms, available in the civil courts (see Part II) and for people on low incomes the risk of losing a court case is proportionately much greater than those who are not. Further, public funding is not widely available for environmental cases not least because of the small number of expert environmental lawyers with relevant public funding certificates and also because of the financial and other restrictions placed on applicants for public funding.²³

58. The number of people contacting ELF about concerns for their environment is increasing with the half-year to the end of June 2003 showing a significant increase (28%) on the number of case referrals for the same period in 2002 to ELF members. The need for access to environmental justice for all remains.
59. Over one third of concluded cases referred by ELF to its members were regarded by the client as successful in that the environmental concern had been resolved; success being achieved through a variety of means including, in some instances, issuing proceedings. Of the 64% of concluded cases that were not regarded as reaching a satisfactory outcome over 30% of respondents stated that they had been advised that their case had merits but that they did not pursue the matter because of the cost in taking legal action.

²² ELF members undertake to provide a free initial consultation. While this undertaking is given on the basis of providing up to one hour of time, in practice ELF members invariably dedicate many hours of free time to each referral.

²³ In March 2002, just 30 out of 8,319 solicitors firms in England had a full legal aid franchise for public law: p. 51, Stookes, P & Razzaque, J (2002): *Community Participation: The UK planning reforms and international obligations*. ELF: London. This may be as a result of the comparative remuneration available in comparison to the administrative work required to secure a public funding certificate.

Part II Civil Court Evaluation

2.1 Introduction

60. The evaluation of the private civil legal system aimed to provide an indication of how often the County Courts and High Court were used as a means of protecting the environment. It has long been argued that many civil law remedies to environmental problems were inadequate.²⁴ The disadvantages include the cost of taking action, the question of reasonableness and foresight of defendants and that, while injunctive relief may be available in some instances, most often decisions are based on compensation being paid to a claimant, rather than any preventative actions being taken or ordered. Further, the House of Lords in *Hunter v Canary Wharf* [1997]²⁵ affirmed that the availability of private nuisance was limited to those with rights to any land affected by the environmental harm. The judgement in *Hunter* also restated the approach taken in *Cambridge Water Company v Eastern Counties Leather* [1994]²⁶ that there was less need for the courts to develop a common law principle to protect against the escape of pollution when that should really be left to Parliament and legislation. Nevertheless, action in the civil courts does remain an option for environmental protection and a means of redress.
61. The need for this part of the study was confirmed by the fact that, to date, there has been no way of calculating or even estimating with any certainty how many civil environmental cases are taken to court each year. Accordingly, there has been no opportunity to identify any trends occurring or to tackle any problems that may be identified within the judicial system. This contrasts with other legal areas of law such as family law, debt or personal injury cases for which the Department for Constitutional Affairs (DCA) (formerly the Lord Chancellor's Department) provides annual judicial statistics and analysis.²⁷ To complement this part of the ELS, similar evaluation work was carried out in the criminal and public law field.²⁸
62. Finally, it is important to emphasise that the evaluation was a starting point and, although the outcomes should be of real value, they cannot conclusively state the position in relation to civil environmental action. The limitations to the study were that

²⁴ Richard Burnett-Hall (1995) cites McClaren from 'The Common Law of Nuisance Actions' that by the 1970's, nuisance reached a point where the English and Canadian authorities present a confused picture: "In the minds of many judges nuisance seems to conjure up a rather messy collage of strict liability and negligence, with no clear pointers to the applicability of either." *Environmental Law*. Sweet & Maxwell.

²⁵ 2 WLR 684

²⁶ 2 AC 264

²⁷ See the Department for Constitutional Affairs (formerly the Lord Chancellor's Department) www.lcd.gov.uk

²⁸ See paragraphs 10-13 above.

the evaluation was based on a sample case study from selected courts, that the evaluation only considered tried cases and not those that had settled prior to trial and that the case sample was taken from 2002 only.

2.2 Methodology

63. To ensure that the ELS was not duplicating other studies, a scoping review of recent environmental law literature was undertaken. This included reviewing journals such as *Environmental Law & Management* (ELM), the *Journal of Environmental Law* (JEL), the *Journal of Planning and Environmental Law* (JPL), *Environment Action*, *the environmentalist*, the *Environment Times* and the *ENDs Reports* (ENDs).²⁹ It was also necessary to confirm with the DCA whether it had carried out or knew of any comparable studies. The scoping review confirmed that there were no known judicial statistics on environmental law matters and that there was value and originality in proceeding with this part of the ELS. The DCA then provided sample data from selected County Courts and the High Court. From this, it was possible to identify those cases that potentially related to environmental problems and, as a result, consider those cases in more detail.
64. After an initial analysis of the DCA information, a sample set of 466 cases from six of the 220 County Courts in England and Wales and the High Court in London was prepared. The County Courts were:
- Bow County Court (South Eastern Circuit)
 - Gloucester Crown and County Court (Western Circuit)
 - Llangefni County Court (Wales and Chester Circuit)
 - Oxford Combined Court Centre (Midlands Circuit)
 - Sheffield Combined Court (North Eastern Circuit)
 - Stockport County Court (Northern Circuit)
65. From the sample set of 466 cases, 157 were identified as potentially having an environmental aspect. In particular, some of these were classified as personal injury cases and it was necessary to clarify whether any of these would also fall within the environment category. A Privileged Access Agreement prepared by the DCA was entered into so that the potential cases could be inspected in detail. The cases examined had concluded by trial and for which judgement had been given. They included a

²⁹ See Appendix 2: References for details.

mixture from the Small Claims, Fast Track and Multi-Track Court systems in the County Courts³⁰ and from the Queen's Bench Division of the High Court, the appropriate court dealing with the major private civil law claims.

66. A case was regarded as an environmental case in accordance with the study boundaries³¹ and any discretion was determined by the research and report author. For instance, if an environmental aspect, say noise, was only a minor element of a claim, this would not be regarded as an environmental case. However, if the primary particulars of a claim arose out of noise nuisance then this would be regarded as an environmental case.
67. For each potential environmental case the court file was inspected or a copy of the Particulars of Claim or judgement obtained. For those cases where no court file was available, a copy of the Judges summary was provided from which an assessment of the case was made.

2.3 Findings

68. From the 466 case samples, just two were found to be environmental cases. These were both claims for compensation arising out of nuisance, negligence and/or trespass and related to the alleged unlawful interference with land and property. Injunctive relief was not claimed. One of the claims was dismissed completely and the other was dismissed in terms of the general environmental claim although a related claim for special damages was allowed. In short, neither of the environmental civil cases could be regarded as successful in terms of resolving the environmental problem or securing compensation for it. Each of the cases identified in the sample set as personal injury cases related to individual claimants almost entirely from road traffic accidents. It was concluded that all the personal injury claims did not fall within the study definitions of an environmental case.
69. With such a low number of environmental cases it was impossible to reach any rational conclusion or to try and attempt to extrapolate the findings to national statistics. By way of example during 2001 71,763 cases were disposed of by the court in the County

³⁰ Under Part 26 of the Civil Procedure Rules, the court will allocate a claim to a track according to the scope of each track. Part 26.8(1) provides that, when deciding the track for a claim, the matters to which the court shall have regard include (a) the financial value of the claim; (b) the nature of the remedy; (c) the likely complexity of the facts, law and evidence; (d) the number of parties; (e) the value of a counterclaim; (f) the amount of oral evidence; (g) the importance of the claim to person who are not parties to the proceedings; (h) the views expressed by the parties; and (i) the circumstances of the parties.

³¹ See paragraphs 12 to 20.

Courts (compared to 71,233 in 2000) and 460 cases concluded in the Queen's Bench Division of the High Court (590 in 2000). Table 2.1 provides an outline summary of court action in England & Wales with an indication of how many claims arise under each head.

	2001	
	<i>Proceedings issued</i>	<i>Disposal by court*</i>
Chancery Division of the High Court including corporate and personal insolvency, business, professional negligence, trusts, wills and contentious probate	37,034	2,736
Queen's Bench Division including contract, tort, judicial review, the Commercial and Admiralty Courts and the Construction Court. <i>This includes environmental and planning judicial review and civil claims.</i>	21,613	460
County Courts including debt, housing and other litigation of less complex matters and generally smaller sums than in the High Court. <i>This includes any private environmental claims.</i>	1,739,090	71,763
Family matters arising in both the High Courts and County Courts including public and private children cases, divorce (decree nisi), matrimonial financial matters, domestic violence and contentious probate matters.	(estimate) 656,000	656,003
Criminal cases including Crown and Magistrates Courts	2,265,000	1,031,000

* Involves the court taking a role in reaching settlement eg, providing a court order, further matters may be resolved by informal settlement.

Table 2.1: Summary of legal action in 2001

70. It may well be that there is a larger number of private civil environmental law cases than the research suggested. There may, for instance, be clusters of activity which the sample selection of cases did not highlight. Clearly, notwithstanding the lack of data, some civil environmental claims still arise and are successful, see for example the case briefings on *Milka v Chetwynd Animal By Products (1995) Ltd* (2000)³² and *Dinotaro v Marshall* (2001).³³ Although for both reports the author accepted that they did not give rise to any novel point of law, but that they were of interest simply because they illustrated that private civil law environmental cases do still arise.

2.4 Conclusions

71. The Civil Court Evaluation focussed solely on private civil law proceedings and did not include public law matters arising by way of judicial review. Further, although the study found only two out of 466 cases, it should be emphasised that this is only part of the picture and account should be made of the potential cases that do not conclude by way

³² ENDS Report 301 at 56

³³ ENDS Report 314 at 55

of court judgement. Importantly, access to environmental justice includes the opportunity of securing legal and technical expertise and advice in environmental matters and, while court proceedings are a vital element of access to justice, the concept is much broader.

72. In 1978, the Pearson Commission³⁴ concluded that 86% of cases settled without proceedings being issued. More recently, the Lord Chancellor's Department investigated the effectiveness of the Woolf Reforms in its report: *Emerging Findings: An Early Evaluation of the Civil Justice Reforms*.³⁵ It stated that, overall there had been a drop in the number of claims issued; in particular in the types of claim where the new Civil Procedure Rules had been introduced, that there was evidence to show that settlements at the door of the court were fewer, and that settlements before the hearing day had increased. Research by Goriely *et al* in 2002 affirmed this.³⁶ The present position, encouraged by the Woolf Reforms, that the success of the civil legal system is outside the court door; tends to complement the findings of the ELF review discussed in Part I with only a small fraction of cases resulting in trial yet a much greater proportion being regarded as successful.
73. Regardless of the potential number of cases that may resolve without proceedings, the results of the study question the effectiveness of private law giving any effective form of environmental protection. Most often, the only relief that the private law system can realistically achieve is to attempt to financially compensate for environmental harm. Moreover, there is no compulsion on a successful claimant to use the damages awarded to make good the environmental harm. This is illustrated by two recent nuisance claims: *Marcic v Thames Water Utilities Ltd* [2002]³⁷ and *Dennis v Ministry of Defence* [2003].³⁸ Both of these cases resulted in compensation being awarded but that it was not for the claimant to then rectify the environmental damage that arose. In *Marcic*, Thames Water have appealed to the House of Lords and the matter will be heard in October 2003. The case of *Dennis* raises some interesting questions of equality before the law and is discussed below in more detail.
74. It is submitted that the Civil Procedure Rules do not favour environmental law cases. The system of small claims, fast track and multi-track seek to produce a system that is more efficient and effective in operation in order to reduce the time it takes to resolve a

³⁴ The Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd 7054. Chairman: Lord Pearson. LCD: London.

³⁵ LCD (2001). LCD: London.

³⁶ Goriely, T *et al* (2002). *More Civil Justice: The impact of the Woolf Reforms on pre-action behaviour. Research Study 43*. The Law Society & Civil Justice Council: London.

³⁷ AER 698

³⁸ EWHC 793 (QB)

dispute, reduce the costs involved in taking action and remove some of the stress and anxiety of taking action. However, environmental cases often involve complex issues of evidence, causation, liability or quantum and, by their nature, may well be unsuitable for the simplified court rules.

75. This should be seen as a genuine concern as it appears that one option for access to justice ie, the private civil court system has restrictions. In particular, the small claims court, which is based on the principles of speed, efficiency and, importantly, each party paying their own costs, is effectively unavailable to individuals and communities seeking to use the legal system to resolve a problem. This mirrors the position of the Administrative Court system whereby the option of challenging public decision-making on the environment is often prohibitive because of costs and time.
76. To find that such a small proportion of environmental cases are reaching the courts may be regarded as a concern for the private civil law system. In theory it provides an environmental remedy in certain circumstances but the reality is that the action available is limited to nuisance and negligence and, in practice; it is an inefficient tool to prevent environmental harm. Further, the cost-effective court system is outside the scope of environmental law, rendering environmental action expensive. The role of pre-proceedings legal action is a vital element of access to environmental justice but it remains a concern that so few cases result in legal action. Importantly, the threat of legal action is only effective if it is a real threat; otherwise it is without force.
77. It is submitted that the case of *Dennis v MoD* [2003] illustrates the inequality of access to environmental justice in the present private civil law system. Mr and Mrs Dennis owned Walcote Hall Estate, Cambridgeshire with around 1,400 acres including a large house, associated buildings, farmland and woodland. In 1986, Mr Dennis began complaining about the noise from the use of nearby land caused by the Ministry of Defence operating Hawker Harrier jets. Some years, later, the Dennis' issued proceedings claiming damages of around £10,000,000 for noise nuisance. The hearing in the High Court lasted eight days with leading and junior counsel instructed by both parties. The Dennis' were awarded £950,000 in damages to compensate for past and future nuisance until around 2012 at which point it was likely that the nuisance would stop. If it continued in a different form (eg, different aircraft being tested) then the judge indicated that that would give rise to a fresh cause of action.
78. There is no suggestion that the Dennis' should not have claimed damages, however they were in a rather exceptional situation that would not have arisen for almost all other claimants suffering from nuisance, and particularly noise. This enabled them to

use the legal justice system to the best of their ability. They were, it is assumed, in a position to carry the risk of an eight-day trial and its costs. This would not be the case with most other noise sufferers. Also, they were able to claim the nuisance not only caused them to suffer personal inconvenience, but also a loss in the value of their estate. Again, this is not open to most other sufferers. In essence, much of the claim was to remedy a reduction in property value, rather than environmental harm. Finally, they were suing a defendant, who could pay the cost of such an award (ie, society and/or taxpayers).

79. The exceptional nature of the case is that if you are rich enough to use the law then it can be of assistance. If not, then the legal system provides little remedy. If you are wealthy enough for noise to materially affect your property value then the law can assist; if not, then you should not be compensated.

Part III Reported Cases Analysis

3.1 Introduction

80. The third part of the ELS involved an analysis of reported environmental law cases between 1999 and 2002. This was: a) to provide a benchmark of the type of cases being pursued by analysing those reported cases publicly available; b) to assess whether the reporting of environmental law cases is an accurate reflection of practice and; c) to offer a comparison between the number and type of environmental cases reported and the number of cases actually being pursued in court.

3.2 Methodology

81. The scope of the Reported Cases Analysis (RCA) included:
- An evaluation of the decisions reached and whether they were successful in terms of protecting and/or enhancing the environment.
 - An assessment of the type of claimants taking legal action eg, whether the claim was made by an individual/residents, a local authority or other public body.
 - An assessment of the problem the litigation was trying to resolve.
 - An evaluation of the legal area upon which the claim was based eg, if it related to a regulatory regime such as the integrated pollution prevention and control regime.
82. The survey was based on all the cases reported in the Environmental Law Reports (ELR) published by Sweet & Maxwell between 1999 and 2002. This was supported by consideration of case reports or synopses in other environmental/legal journals. The analysis of comparable reports found that over half the cases reported in ELR were also reported in JEL and ELM. For example, in the six 2001 editions of ELM there were 38 detailed environmental cases synopses on cases relating to England and Wales (compared to 29 in ELR for the same period). Of those 38 cases, 20 were also reported in ELR. However, in order not to place undue emphasis on the level of case reporting in environmental matters, the reports from the various publications were not accumulated. The purpose of considering other publications was essentially to confirm

that the ELR provided a reasonable representation of environmental case law. In total, 153 case reports were reviewed. Of these, 17 were criminal cases, 7 related to causes arising in Scotland or Northern Ireland and 12 were either European or International matters. Also, over the study period, some cases were reported at both lower and higher court stages, and in these circumstances only the highest appellate court decision was analysed. As a result, 103 cases were considered in detail.

3.3 Findings

Environmental success

83. Success was defined according to whether the environmental problem was resolved or alleviated. Importantly, in the RCA success was not only based on the success of the claimant in their particular matter but also on whether environmental benefit was secured or was likely to result from the decision. For example, if a person who had been served with a noise abatement notice, successfully appealed against that notice, this was regarded as unsuccessful because the environmental problem (the noise) is likely to continue. It is accepted that determining success in these terms, the ELS was ultimately subjective, however it was regarded that this was a necessary and unavoidable aspect of the study. Some level of subjectivity was inevitable to ensure that the study progressed and that some conclusions could be drawn. The need to import an element of subjectivity highlighted, very early in the study, one of the unique problems with securing access to environmental justice, which is that the environment itself and benefit arising from it may be regarded differently by a range of people and organisations and that it can be infinitely variable.
84. Between 1999-2002, 36% of the cases were considered successful ie, the claim or appeal was granted or allowed, compared to 64% whose claims were dismissed. However, this did not accurately reflect whether there was environmental benefit deriving from the decision. For instance, if a company was taking legal action to avoid compliance with waste regulations and failed this would be regarded as an environmental success even though the court dismissed the action. Thus, in terms of environmental benefit, 47% of decisions were successful, compared to 53% that were regarded as unsuccessful. The determination as to whether a decision was successful was ultimately subjective and determined by the researcher and author.

Types of claimants using the courts

85. The most frequent court users according to the reported cases were residents, which accounted for 36% of claimants. Company or business organisations made up 27%, local authorities 21%, Government agencies (eg, health authorities) 7%, Non Governmental Organisations (NGOs) 5% and a final residual group comprising a number of non-specific claimants accounted for the remaining 5%. This outcome, at first glance, conflicts with the findings in MEJ which found that there were more corporate bodies taking action than individuals/associations and NGOs at a ratio of 28 compared to 22 (the RCA ratio being 27:41). However, this may be explained by the fact that the UCL report does not cover land use planning matters whereas the RCA does. This is significant because judicial review of land use planning decisions is the only means of challenge for individuals and NGOs that are not applicants in the planning process. Whereas corporate bodies making planning applications have the planning appeal process as an alternative means of action. Planning appeals were not reported in the ELR during the course of the study period.³⁹

Regional basis of claims

86. The region with the largest number of reported environmental cases was the South East, including London, with 40% of all cases being based on matters arising from this area. A further 18% related to the Midlands, 12% to the North, 11% to the West, 9% to the North East and 5% to Wales. There were around 6% that were either not region specific because they were dealing with general environmental policy, or that the region could not be identified from the case report. The proportion of cases for respective regions is broadly comparable to the ELF review as far as London and the South East generated an overwhelming majority of cases. However, there were distinctions between the regions with the ELF review noting a larger number of cases in Wales (8%) and the West (16%) and less cases from the Midlands (12%), North (6%) and North East (7%).

Types of environmental problem

87. The most frequent concern or environmental problem related to waste with around 18% of all concerns based upon this. This was followed closely by the lack of an EIA in land use planning matters and complaints about noise which each accounted for 16% of the cases considered. Concerns about water pollution related to 7%, as did matters relating to the built environment. Air pollution accounted for 6% of the concerns while

³⁹ In 2002, there were 13,539 planning appeals in England of which around 350 related to major development and therefore, it is submitted, likely to have an environmental impact. ODPM (2002) *Development Control Statistics 2002* and *Further Research into Mediation in the Planning System*. See www.odpm.gov.uk.

human health and matters relating to land use (excluding EIAs) such as the loss of open spaces represented 5% each.

Legal area

88. The legal framework or regime that the environmental concerns were based upon shows that 27% of all reported cases related to the statutory nuisance regime, with the land use planning system being the basis of challenge in 25% of cases. 13% of cases related to the waste regulations. Common law claims in nuisance were the basis of 7% of reported cases and negligence 5%. The Integrated Pollution Control regime gave rise to 6% of reported cases. With the exception of the land use planning regime and waste, the legal area forming the basis of the environmental concern was broadly comparable to the ELF review with statutory nuisance prominent and nuisance and negligence playing a moderate role.

Comparable analysis

89. Due to the lack of private civil law cases arising from the study it was not reasonably practicable to provide a comparable analysis in terms of accuracy of reported cases, however this may be something that can be returned to when considering the associated studies being carried out (see paragraphs 10 and 11 above). Compared to the ELF review there were far fewer reported cases on land use planning although the prominence of EIA related decisions before the courts is significant and indicates that this aspect of regulating planning and the environment remains contentious. An interesting comparison is that issues around waste were high, yet were less of a concern overall, for communities and individuals (according to the ELF review in Part I). The high number of cases relating to noise complements the ELF review findings.
90. In terms of legal areas of cases, statutory nuisance claims were prominent in both the RCA and the ELF review. The land use planning regime was also the basis for a high number of cases in the RCA but far fewer than the ELF review.

3.4 Conclusions

91. The RCA found that the highest proportion of cases arose from individuals, residents and NGOs taking action. This was not the conclusion reached in MEJ. However, MEJ did not cover judicial review of planning decisions, many of which were taken as a means of last resort by communities and individuals having no other form of legal remedy.

92. In terms of the aims of the RCA, the environmental cases that were reported appeared to be reasonably consistent with the number of cases being referred to ELF with some important exceptions in relation to regulatory type cases such as waste, water and IPC. There was a broad mix of water, waste air pollution, land use and noise. However, it remains uncertain whether the cases reported accurately reflect environmental law in action. Overall, there were 153 case reports over the four year study period appears quite a high percentage of cases compared to the possible numbers of environmental cases subject to court proceedings. The MEJ suggested that around 600 environmental appeals may arise each year from the various regulatory regimes. It is the author's opinion from carrying out the Civil Court Evaluation (Part II above) and considering the ELF review that there could be anything from between 100 and 1500 civil law cases concluding in the courts each year. It is believed that any number of cases exceeding this should have been evident from the research carried out.
93. The fact that there is a comparatively large number of reported cases suggests that the environmental law is legally significant. Indeed, its uniqueness derives from the fact that pollution and environmental decision-making has many implications in terms of permanence, uncertainty, associated consequences of quality of life, ecology and health and the impact on future generations. It also gives the impression that there are more environmental cases than may be suggested by the Civil Court Evaluation and MEJ. However, if they raise important points of law, then this may be justified.
94. In recent years there has been an increase in the number of cases relating to EIAs. It is recommended that further research is carried out in this area and in particular whether the thresholds that determine whether development constitutes EIA development are too high and whether there is sufficient expertise among officers deciding when EIAs should be carried out.⁴⁰

⁴⁰ pp 143-151 Stookes, P (2003). *Getting to the real EIA*. *Journal of Environmental Law*. Vol. 15 No. 2. Oxford University Press: Oxford.

Part IV Overall conclusions

95. Environmental justice operates across a wide range of legal areas from land acquisition to trespass, housing to eviction, taxation to transport. It is also based on a range of discrete environmentally specific regulation and case law on biodiversity, water law, integrated pollution prevention control, radioactive substances and land use. Moreover, there are as many different types of environmental concern operating across these legal areas including air pollution, human health, noise, flooding and loss of open spaces. Over 33 separate environmental issues were raised ranging from air, noise and water pollution to less indirect measures such as the right to participate or to be informed about environmental matters (paragraph 33 of the Report). Finally, environmental law operates within the civil, public and criminal law fields. This complex, cross-cutting characteristic of environmental justice is unique in law. The purpose of the ELS was to begin to evaluate the effectiveness of environmental justice. Hopefully, it has achieved this.
96. The review of ELF's A&R service highlighted one of the unique aspects of environmental law in that the impact from specific environmental damage, one polluting activity or a specific decision regularly results in many 100's and 1,000's of people being potentially affected. According to information from inquirers when requesting assistance, the total number of people affected by the specified environmental problems was 98,981 during 2001 and 224,141 in 2002. Overall, these figures provided an average of 869 people affected by each environmental problem (paragraph 36). This should be effectively recognised when considering the public nature of environmental law.
97. The ELF review also found a disproportionate number of environmental problems arising in London and the South East compared to other regions of England and Wales (paragraphs 45 and 46). It is recommended that the latest government proposals for further intensive development in the region recognise this and take it into account when implementing policy.
98. The ELF review included an analysis of respondents to ELF equal opportunities monitoring programme. In terms of the respondent's financial status; the largest majority of people stated that they had incomes in the lowest income group. The stated income of respondents over the study period provides that the lowest income bracket (under £10,000) was the highest group with nearly 45% of all respondents. This was the

case for each study year period. Further, over 65% of all respondents stated that they had incomes of under £15,000. (paragraph 44). This suggests that people in this income group were in the greatest need of legal assistance. Yet the availability of public funding for environmental matters is, at best, uncertain and there is a real need to examine this further and to resolve any inequity that arises. The lack of public funding and therefore access to environmental justice is exacerbated by the operation of the Civil Procedure Rules (paragraph 74) and illustrated by recent case law. There remains, it seems, one law for the rich and another for the poor. It is recommended that there is examination and review of the role public funding plays in supporting environmental legal action.

99. The ELF review also found that people in the 51-60 year old age group were the most frequent users of ELF's service and it may be that they are most likely to consider taking legal or other action to resolve an environmental concern (paragraph 40). The gender of people being referred by ELF were 54% male and 46% female. However, there was a clear trend over the four years of an increase in the number of female respondents and a corresponding decline in male respondents; in 2002 it was 50% male and female (paragraph 41). The single largest ethnic group was English/Welsh which accounted for 85% of respondents. There was an increase in the number of Indian respondents over the four year study period but no Pakistani, Black African or Black Caribbean respondents after 1999, the first year of the study (paragraph 43).
100. The ELF review found that environmental concerns were covered by more than 21 discrete areas of law. The area that the overwhelming majority of environmental concerns were based upon was the land use planning system. Over 61% of all concerns relating to decisions, acts or omissions arose out of the Town and Country Planning regime (excluding breach of planning conditions). It was over five times as common as the next legal area, which was statutory nuisance (paragraph 34).
101. From the outcome of the A&R review, and the fact that other areas of related research have not considered the land use planning system, it seems that planning remains comfortably detached from environmental matters and continues to fall largely outside the scope of environmental matters. It is recommended that land use planning reforms incorporate greater access of review for all interested parties. The simplest and most effective mechanism for this would be a limited third party right of appeal on the occasions that justify this. It is recommended that further research is carried out in this area. It must be acknowledged that land is only one environmental media together with air and water; yet its use, or misuse, gives rise to a vast array of adverse environmental impacts.

102. Over one third of ELF referrals were regarded by the client as successful in that the environmental concern had been resolved. Of the concluded cases that were not regarded as reaching a satisfactory outcome over 30% of respondents stated that they had been advised that their case had merits but that they did not pursue the matter because of the cost in taking legal action (paragraph 59).
103. From the outcome of the Reported Cases Analysis (Part III), environmental action appeared to be moderately successful; in terms of environmental benefit, 47% of decisions were successful, compared to 53% that were regarded as unsuccessful (paragraph 84). The most frequent court users according to the reported cases were residents, which accounted for 36% of claimants. Company or business organisations made up 27%, local authorities 21%, Government agencies (eg, health authorities) 7%, Non Governmental Organisations (NGOs) 5% and a final residual group comprising a number of non-specific claimants accounted for the remaining 5% (paragraph 85).
104. The RCA found that the most frequent concern or environmental problem related to waste with around 18% of all concerns based upon this. This was followed closely by the lack of an EIA in land use planning decisions and complaints about noise which each accounted for 16% of the cases considered. In terms of EIA this raises concern whether the EIA regime is working effectively when it is giving rise to a comparatively large number of complaints. It is suggested that further research may be needed in this area and in particular whether the thresholds that determine whether development constitutes EIA development are too high and whether there is sufficient expertise among officers deciding when EIAs should be carried out. Interestingly, and in contrast to the RCA, ELF referrals about water pollution and waste were comparatively rare which suggests that individuals concerned about these types of problems are, at an earlier stage, referred to the appropriate public bodies to resolve these matters and that the regulatory bodies, such as the Environment Agency and local authorities, are well placed to tackle these concerns directly (paragraph 33).
105. The results of the ELS question the effectiveness of private civil law giving any effective form of environmental protection. Most often, the only relief that can realistically achieve is to attempt to financially compensate for environmental harm. Moreover, there is no compulsion on a successful claimant to use the damages awarded to make good the environmental harm (paragraph 73).
106. It seems that, in practice, private civil law remedies are not an adequate form of resolving environmental disputes. They remain expensive and generally fall outside any benefits in time and cost that the Civil Procedure Rules may offer. However, it is

accepted that if the limitations of complexity and cost are overcome it remains an option for environmental protection that could be of use in limited circumstances. There are clearly some words of wisdom in the House of Lords suggesting that environmental protection should be left for Parliament and legislation and that, given the complexities of environmental law, its protection and enhancement is left to public bodies who have the responsibilities, duties and resources for this. If so, all those responsible for environmental protection must fully understand the broad principles underpinning environmental protection.

107. If public bodies are given greater responsibilities, powers and duties, then the ability to challenge public decisions, acts or omissions taken on behalf of society must be made more accessible. The Government is confident that the present system of judicial review complies with the requirements of the Aarhus Convention but the findings of the ELS test this reasoning. With so many individuals and communities concluding that the reason for not taking legal action was one of cost and liability (see paragraph 50) it cannot be correct to assume that the present system provides a means of review that is 'fair, equitable, timely and not prohibitively expensive'.⁴¹ Clearly access to environmental justice must mean access for all, regardless of means and the outcome of both the ELF review and the ELS test this.
108. There needs to be further investigation into the role and ability of public bodies taking greater positive action to protect the environment. If there are gaps in operation, for example, that resources are limited, then there should be serious consideration on securing greater finance for these areas. There is inconsistency in a Government that promotes sustainable development and produces a strategy to that effect,⁴² yet advocates a large road building programme⁴³ which will exacerbate the problems most citizens feel most strongly about.
109. There should be a review of the role of judicial review in supporting environmental justice and in particular the potential for establishing the principle that each party pays their own costs. Too often, legal action that had reasonable prospects of success has not been pursued because it has been prohibitively expensive. The traditional court approach of the loser paying the winners costs is discriminating against those without adequate resources to cover the potential of losing. Some leading judiciary have raised the principle of greater use of no-costs orders.⁴⁴ This principle should be adopted so

⁴¹ This is required under Article 9(4) of the Aarhus Convention 1998.

⁴² DETR (1999). *A better quality of life: UK Sustainable Development Strategy*. DETR: London (currently under review).

⁴³ The Observer 15 June 2003, see: www.observer.co.uk

⁴⁴ p. 6, LJ Sedley (2002). *Aarhus Convention Conference Report*. Environmental Law Foundation: London.

that it provides some certainty, prior to issuing proceedings, for environmental matters that affect a significant proportion of a locality. Environmental champions should be praised not financially persecuted.

Appendix 1

Glossary

A&R	Advice & Referral
CLS	Community Legal Services
CPO	Compulsory Purchase Order
DCA	Department for Constitutional Affairs
Defra	Department for Environment, Food and Rural Affairs
EIA	Environmental Impact Assessment
ELF	Environmental Law Foundation
ELM	Environmental Law and Management
ELR	Environmental Law Reports
ELS	Environmental Law Study
ENDs report	Environmental Data Services report
EO	Equal Opportunities
GMOs	Genetically modified organisms
IEMA	Institute of Environmental Management and Assessment
JEL	Journal of Environmental Law
LCD	Lord Chancellor's Department
MEJ	Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal
NGOs	Non Governmental Organisations
RCA	Reported Cases Analysis
UCL	University College London

Appendix 2

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Appendix 3

Geographical regions of study

Midland Circuit

Banbury	Hereford	Mansfield	Oxford	Tamworth
Birmingham	Evesham	Melton Mowbray	Redditch	Telford
Boston	Grantham	Newark	Rugby	Walsall
Burton upon Trent	Herford	Northampton (bulk centre)	Shrewsbury	Warwick
Buxton	Kettering	Northampton	Skegness	Wellingborough
Chesterfield	Kidderminster	Nottingham	Stafford	Wolverhampton
Coventry	Leicester	Nuneaton	Stoke On Trent	Worcester
Derby	Lincoln	Oswestry	Stourbridge	Worksop
Dudley	Ludlow		Stratford Upon Avon	

Northern Circuit

Accrington	Bolton	Lancaster	Penrith	Stockport
Altrincham	Burnley	Leigh	Preston	Tameside
Barrow-in-Furness	Bury	Liverpool	Rawtenstall	Whitehaven
Birkenhead	Carlisle	Manchester	Salford	Wigan
Blackburn	Chorley	Nelson	Southport	
Blackpool	Kendal	Oldham	St. Helens	

North Eastern Circuit

Barnsley	Durham	Hull	Pontefract	South Shields
Bishop Auckland	Gateshead	Keighley	Rotherham	Sunderland
Bradford	Great Grimsby	Kingston Upon Hull	Scarborough	Teesside
Consett	Halifax	Leeds	Scunthorpe	Wakefield
Darlington	Harrrogate	Morpeth & Berwick	Sheffield	York
Dewsbury	Hartlepool	Newcastle Upon Tyne	Skipton	
Doncaster	Huddersfield	North Shields		

South Eastern Circuit

Ashford	Chelmsford	Haywards Heath	Lewes	Shoreditch
Aylesbury	Chichester	Hertford	Lowestoft	Slough
Barnet	Clerkenwell	High Wycombe	Luton	Southend
Basildon	Colchester	Hitchin	Maidstone	St Albans
Bedford	Croydon	Horsham	Mayor's & City of	Staines
Bow	Dartford	Hove	London	Thanet
Brentford	Eastbourne	Huntington	Medway	Tunbridge Wells
Brighton	Edmonton	Ilford	Milton Keynes	Uxbridge
Bromley	Epsom	Ipswich	Newbury	Wandsworth
Bury St Edmunds	Gravesend	King's Lynn	Norwich	Watford
Cambridge	Guildford	Kingston-Upon-Thames	Peterborough	West London
Canterbury	Harlow	Lambeth	Reading	Willesden
Central London	Hastings		Reigate	Woolwich
			Romford	Worthing

Wales & Chester Circuit

Aberdare	Cardiff	Llanelli	Newport (South Wales)	Swansea
Aberystwyth	Carmarthen	Llangefni	Northwich	Warrington
Blackwood	Chester	Macclesfield	Pontypridd	Welshpool and
Brecknock	Conwy & Colwyn	Merthyr Tydfil	Pontypool	Newtown
Bridgend	Crewe	Mold	Rhyl	Wrexham
Caerarfon	Haverfordwest	Neath & Port Talbot	Runcom	

Western Circuit

Aldershot & Farnham	Bristol	Plymouth	Taunton	Weymouth & Dorchester
Barnstaple	Cheltenham	Poole	Torquay & Newton Abbot	Winchester
Basingstoke	Exeter	Portsmouth	Trowbridge	Yeovil
Bath	Gloucester	Salisbury	Truro	
Bodmin	Newport (Isle of Wight)	Southampton	Weston Super Mare	
Bournemouth	Penzance	Swindon		

Environmental Law Foundation

Advice and Referral

This national service provides advice and assistance in all matters relating to the law and the environment, using ELF's network of expert environmental solicitors, barristers, scientists and consultants, who help people resolve their environmental and community problems.

Should legal or technical assistance be required, the case is referred to a solicitor, barrister or technical expert for further advice. The initial consultation is free and any further assistance is provided free, at cost or at an agreed reduced rate. To find out more please call 020 7404 1030.

Outreach

ELF has been running an Outreach programme since 1999. Its objective is to help and support community groups on all aspects of environmental law by organising and running workshops, seminars, environmental law surgeries and other events in their region. It provides information and publications for individuals and groups, raises awareness about environmental rights and justice and informs people about ELF and its services.

The programme emphasises the importance of community empowerment. It has been very successful in helping groups to help themselves, advising them on the current state of the law and how it impacts on their particular concern.

Events

ELF organises at least two major events each year to raise awareness about specific aspects of environmental law. In 2001 it presented the inaugural Professor David Hall Lecture, entitled *Environmental Risk: The Responsibilities of the Law and Science*, by Lord Woolf, the Lord Chief Justice. In 2003, the David Hall Lecture was presented by Fiona Reynolds CBE, Director-General of the National Trust and ELF Patron entitled, *Planning for a Small Island*. Other recent events have included the Aarhus Convention Conference in November 2002.

Training and Education

The skills and expertise of ELF and its members are used to inform the legal and other professions about topical environmental issues through the provision of training programmes.

ELF provides Continuing Professional Development training that is accredited by the Law Society, the Bar Council and the Institute of Legal Executives and the Council for Licensed Conveyancers. It also runs a training programme for volunteers and interns covering the practice and process of environmental law, case management and the principles of sustainable development.

Policy Development

ELF aims to promote access to environmental justice for communities throughout the UK and to encourage environmental awareness at every opportunity. It seeks to empower communities and individuals to take action and make real change for the better, for the environment and for the future.

We hope that this report demonstrates the case for providing an environmental justice system that is fair, timely, effective and not prohibitively expensive; something, it may be argued, that it is not at present. It cannot be right that communities and individuals must pay, through general taxation, for public bodies to protect and preserve the environment and then be subject to environmental harm and/or have to pay once again when it appears that that task isn't being done.

Environmental law is unique in that it provides the opportunity to protect and enhance living things and humankind, our neighbours, children and grandchildren, the majority of whom do not have any direct rights or access to law. This uniqueness should be accepted and then taken into account in its treatment of citizens aiming to protect the environment for the benefit of all through equality in access, cost and treatment before the law.

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