
Alexander Putz
University of Mannheim

# Typical Problems of Liability Law and Possible Solutions through the Structure of the German Environmental Liability Act

as part of the

**Master of Comparative Law Programme 2001/2002**

**Comparative Environmental Law**

Dr. Kristian Fischer

# Bibliography

*Bartsch*, Elga:
Liability for Environmental Damages: Incentives for Precaution
And Risk Allocation; Mohr Siebeck, Tübingen, 1998
(cited as: *Bartsch*, Liability)

*Bender*, Bernd; *Sparwasser*, Reinhard; *Engel*, Rüdiger:
Umweltrecht – Grundzüge des öffentlichen Umweltschutzrechts;
3rd ed., Müller, Heidelberg, 1995
(cited as: *Bender/Sparwasser/Engel*, Umweltrecht)

*Grant*, Malcolm:
"Environmental Liability",
in: *Winter*, Gerd (ed.), European Environmental Law: a comparative perspective;
Dartmouth, Aldershot, 1996, pp. 219
(cited as: *Grant*, Environmental Liability)

*Kloepfer*, Michael:
Umweltrecht; 2nd ed.; Beck, München, 1998
(cited as: *Kloepfer*, Umweltrecht)

*Menell*, Peter S; *Stewart*, Richard B.:
Environmental Law and Policy;
Little, Brown; Boston, London, 1994
(cited as: *Menell/Stewart*, Environmental Law and Policy)

*Schlemminger*, Horst; *Wissel*, Holger (eds.):
German Environmental Law for Practicioners;
Kluwer Law International; The Hague, London, 1996
(cited as: *Schlemminger*, in: *Schlemminger/Wissel*, German Environmental Law)

## Introduction

In the sphere of environmental law, there characteristically under the regime of conventional regulatory systems, an amount of problems arise as to liability for occurred damages. In the following, this essay will attempt to highlight the most common and problematic features of liability law without pretending to cover all aspects entirely. As an example of a liability regime, the structure of the German Environmental Liability Act will be addressed to, not without trying to trace some possible solutions this statute can contribute to solving typical problems of environmental liability law.

## A. Lack of Surveillance

(1) One of the ordinary problems going hand in hand with conventional regulatory systems is the lack of proper monitoring surveillance. Conventional in this sense means a scheme of command and control or the arrangement of prohibition and permission, respectively[1]. This method of establishing liability once the harm has come about may be an adequate means to deal with discharge at source. But, conversely, suitability descends the more the discharge gets away from source but rather becomes diffuse: who is there to properly monitor the coherence of prohibition and permit[2]? Lack of supervision often meets lack of enthusiasm where enforcement touches the realm of supra- or international relations of countries involved[3].

(2) A possible solution to this problem can be the shift of enforcement power from a mere governmental to a civil societies' sphere. Where individuals and public interest groups come into play, inability or unwillingness of government might not be longer a threat to appropriate surveillance and enforcement[4]. In concrete, an extension of standing to the cited personae would meet this aim[5].

(3) In Germany, no such shift has taken place. The provision of § 1 of the 1990 Act on Liability for Environmental Damage (hereinafter: Environmental Liability Act – ELA) grants a right to claim only to the person who suffers from the environmental effect.

## B. The Role of the State Regarding Unowned Environment

(1) A further predicament of conventional protection systems is the matter of unowned environment. Usually, compensation is being awarded only to those who can claim the infringement of a personal right, such as one's health or private property[6]. As has been pointed out above, no

---

[1] *Grant*, Environmental Liability, 219 et seq.
[2] *Grant*, Environmental Liability, 220.
[3] *Grant*, Environmental Liability, 220.
[4] *Grant*, Environmental Liability, 220.
[5] Cf. *Grant*, Environmental Liability, 230 et seq.
[6] *Grant*, Environmental Liability, 220.

shift in standing in favour of a further plaintiff takes place. Given the prerequisites for full monetary compensation by the polluter, however, may not put away the entire damage which has been caused by wrongful conduct. Rather, responsibility for damage on the unowned environment is not being covered under such liability system.

(2) A possible solution can be found in the enhancement of the role of the state: it is deemed to have standing when environment is no longer a free good but belongs to the state itself[7]. This functions through state agencies or trustees[8] or by way of cessio legis[9]. It must, however, be stated that the CERCLA regulation which provides for such conduct on the other hand does not grant private compensation to individuals for private damage incurred[10].

(3) The German ELA does not provide for full relief in the sense of the abovementioned. Purely ecological damages are kept out of compensation; no incentives were made in order to give claiming capacity to others than individuals personally involved[11]. However, § 16 ELA puts compensation matters in a slightly different light: if there is stated an overlap of environmental damage and individual property rights, expenses required for restoration rather than mere compensation are granted for even if some kind of disproportion appears with respect on the value of the property[12]. Through this concept, a slight enhancement of ecological interests gets contour[13].

## C. Accidental Damages Vs. Long-Term Impairment

(1) The factor of time in liability law plays a dominant role, too. Especially in the field of long-term contamination of the environment, problems as to the applicability of usual liability rules arise. Here, liability can be dismissed because of prescription or due to the fact that parties once responsible can no longer be attributed to a certain land regarding ownership matters. In addition, there may have been an alteration in industrial practices and scientific knowledge over time[14]. In this respect, it must not be forgotten the difficulties in providing for appropriate insurance cover for historic damages already occurred[15].

(2) Whereas under regimes such as CERCLA, notwithstanding a contra-retroactive wording, the fiction of continuing damage is upheld through wide interpretation of terms[16], the German ELA is

---

[7] *Grant*, Environmental Liability, 221 and 224; cf. also *State of Ohio v. DOI*, 880 F.2d 432, 460 (D.C. Cir. 1989), where, instead of governmental ownership, rather a substantial degree of government regulation, management, or other form of control is held sufficient, cited after *Menell/Stewart*, Environmental Law and Policy, 1180.
[8] *Menell/Stewart*, Environmental Law and Policy, 1181.
[9] *Kloepfer*, Umweltrecht, 420.
[10] *Bartsch*, Liability, 13.
[11] Cf. *Bartsch*, Liability, 33 and 43; *Kloepfer*, Umweltrecht, 407 et seq.
[12] Cf. *Bartsch*, Liability, 33.
[13] *Kloepfer*, Umweltrecht, 419.
[14] *Grant*, Environmental Liability, 221.
[15] *Grant*, Environmental Liability, 229.

[16] *Menell/Stewart*, Environmental Law and Policy, 1181.

structured differently. Following § 23 ELA, long-term impairment of the environment is not being solved under the act since it is not applicable to damages that root in discharges prior to its enactment in 1991[17]. Furthermore, the ten-year-rule as set out in § 6(4) no.2 ELA presents a limitation of liability relating to proper plant operation[18].

What has been said concerning historic damages also holds good for future long-term mutilation. No national trust or fund program comparable to the U.S. superfund regime or the Dutch compensation scheme has been established under the German environmental law, which could address itself to further distance or summation damages[19].

According to § 17 ELA together with § 852 of the German Civil Code, prescription starts after three or thirty years, respectively, depending on whether the injured party has knowledge of the damage and the polluter.

## D. Solution for Damage Cocktail?

(1) Closely linked with the abovementioned problem of long-term and historic damages are environmental implications caused by diverse polluters in action over time and harmful combination of the substances discharged. This so-called 'cocktail' effect of actors and substances is difficult to cope with under traditional liability rules[20]. Solutions hereby range from the 'polluter pays' to joint and several liability principles. It remains difficult to distinguish between owners and lenders of a site, people who granted capital and key players out of a range of possible injurers[21]. Moreover, the question of proof with relation to distinct causal substances is a complex matter before court.

(2) However, no explicit provision concerning these matters has been set out under the ELA. Lacking a special proviso, it rather has to be fallen back upon general rules of liability law. This leads to the fact that in cases of alternative causation, § 830 German Civil Code becomes applicable. It may also be taken into account the provisions of the Water Pollution Control Act which refer to joint and several liability. Eventually, § 287 of the Civil Procedural Code comes into play in cases of proportional liability[22].

---

[17] *Bartsch*, Liability, 39 and 43.
[18] *Bartsch*, Liability, 39.
[19] In favor of this model cf. *Bender/Sparwasser/Engel*, Umweltrecht, 55; cf. also *Bartsch*, Liability, 38; different *Kloepfer*, Umweltrecht, 409, who wants the ELA to apply to these damages as well.
[20] *Grant*, Environmental Liability, 222.
[21] *Grant*, Environmental Liability, 232.
[22] Cf. *Bartsch*, Liability, 39.

## E. The Burden of Proof and Alleviations

(1) It has been mentioned the difficulties with proving the exact cause of a harm, fact which, under traditional civil liability regimes, lies within the realm of the plaintiff[23]. Also, the relation between the cause and the actual damage occurred has to be proven independently of the fact whether strict liability or negligence is at stake. In most cases, the plaintiff finds himself in a weak position since he does not have access to the plant and the procedures and processes within a plant or a site. Exclusive knowledge lies with the defendant. Thus, conventional rules of proof of causation means to be a high threshold to the efficiency of liability law. A possible solution could be a reverse of the burden of proof or a distinct shift in proving causation.

(2) As to the German liability law, regard has been paid to this matter. The ELA constitutes a strict liability scheme, which – versus traditional fault-based systems – gives rise to compensatory claims due to mere statement of environmental impact rather than demanding for negligence or other types of fault[24]. As to difficulties arising from the scope of the statute, further examination will be made[25]. One of the most striking and maybe the central feature of the ELA is the implementation of an alleviation of the burden of proof[26]. This is carried out through § 6 ELA, which establishes a presumption of causation and a liability for suspected responsibility for damage[27]. § 6(1) ELA introduces such presumption of a certain plant if only the installation is capable of causing harm of the kind which has shown up in the special case. It is up to the plaintiff to prove the discharge of substances that could have generated the impairment[28].

(3) However, there exist some exceptions to the presumption rule. In case the installation was run correctly, in compliance with the legal guidelines and free from disruptions – fact which has to be proven by the operator – the burden of proof completely falls back upon the plaintiff, as set out in § 6(2) ELA in conjunction with § 5 ELA[29]. A further exception can be seen in an alleviation on the defendant's burden of proof following the wording of § 7 ELA. Here, the presumption of causality is reduced in cases where other possible and capable injurers turn up. Presumption is also dismissed when the operator gives proof that the installation actually did not give rise to the injury[30].

(4) An important means to the plaintiff's disposal as to the enhancement of his standing considering the burden of proof is the introduction of rights to access to information. § 8 ELA provides for the right to obtain information from an operator which is relevant to the claim. A

---

[23] Cf. also *Schlemminger*, in: *Schlemminger/Wissel*, German Environmental Law, 187 et seq.; *Bartsch*, Liability, 34.
[24] *Bartsch*, Liability, 31; *Bender/Sparwasser/Engel*, Umweltrecht, 54.
[25] See *infra*.
[26] *Kloepfer*, Umweltrecht, 411.
[27] *Schlemminger*, in: *Schlemminger/Wissel*, German Environmental Law, 190; *Grant*, Environmental Liability, 228.
[28] *Schlemminger*, in: *Schlemminger/Wissel*, German Environmental Law, 190; *Bartsch*, Liability, 35.
[29] Cf. also *Schlemminger*, in: *Schlemminger/Wissel*, German Environmental Law, 190 t seq.; *Bartsch*, Liability, 34.
[30] *Bartsch*, Liability, 36, at footnote 42.

plaintiff's position is also backed up by the provision of § 9 of the act, granting the right to acquire information from government authorities[31].

## F. Limitations of Liability

(1) Apart from exceptions outlined above, further limitations of liability arise which constitute a threat as to the enforcement of environmental protection. At first, the circumstance of force majeure contributes to this. Exclusion of liability in such cases has been taken up by the German ELA under its provision of § 4.

Another peculiarity of the German law is the proviso of § 5 ELA: liability for insignificant impairment or damage to a minor extent shall be excluded in case of normal operation of the plant.

(2) Furthermore, restriction as to the final compensatory amount or the type of good which falls under the compensatory scope means a limitation on liability, too. Regarding the latter, there can be distinguished between property, other entitled rights or personal goods such as health or other forms of personal integrity.

Under the ELA, compensation is granted for damage to property and personal injury, as provided for in § 1. However, there is no claim available with regard on reimbursement because of pain and suffering. In this case, the law of torts is applicable[32]. Moreover, restitution of purely pecuniary loss is also barred[33].

Concerning the amount, the German law in § 15 introduces the maximum of DM 160 million for personal injury and damage to property, respectively. Hence, a polluter would be held liable for up to DM 320 million.

In this context, the question as to whether the party held liable is able to eventually grant the compensatory sum leads to another possible problem of enforcement of liability.

## G. Covering the Defendant's Solvency

(1) The problem at issue is that the whole liability regime entirely depends upon the solvency of the defendant[34]. It should be mentioned that the plaintiff plays an important role, too, as no lawsuit would be given rise to without his pecuniary capacity. Yet, ensuring a defendant's liability remains somewhat more difficult. Solution can be proper insurance or the establishment of a collective risk management[35].

(2) The German ELA is in favour of the former. The introduction of the precautionary cover device paved the way for properly 'ensuring insurance'. As set out in § 19 ELA, the operator is

---

[31] Cf. also *Schlemminger*, in: *Schlemminger/Wissel*, German Environmental Law, 192; *Bartsch*, Liability, 36.
[32] Cf. *Schlemminger*, in: *Schlemminger/Wissel*, German Environmental Law, 191.
[33] *Kloepfer*, Umweltrecht, 408.
[34] *Grant*, Environmental Liability, 222.
[35] *Grant*, Environmental Liability, 222 and 235.

under an obligation to provide for amply liability insurance or offer other financial security. This can be reached through third party insurance, government guarantee or bank warranty[36]. However, a certain reluctance on the insurer's part is not to be underestimated regarding future cover[37].

Besides, there must be avowed further jeopardy as to the well-functioning of liability law: accountability of an injurer can be dodged by clever corporate or property management[38]. This threat has not been coped with by implementing corresponding provisions under the ELA.

## H. Other Restrictions on Liability

(1) Very often, the mere scope of a statute means a restriction on liability. When key elements as to the listing of potential injurers fall behind of what would have been necessary in order to provide for full and most effective liability, limitation is inherent.

(2) The German ELA in its § 1 only mentions 'installations' falling within the sphere of application, which is further being concretized in Appendix 1 to the act. Other potentially harmful activities like transport or disposal of lingering wastes or pollution arising in consumption or consumption goods, respectively, do not fall within the scope of the law[39]. However, a wide conception of the term in question exists, as can be seen in § 3(2) and § 3 ELA[40].

## I. Complexity of Assessment of Damage

(1) An additional problem of liability law shows up when the facts leading to compensation have to be examined. Given both the proof of causation and even the will of the polluter to pay damage compensation: in which way can actual damage be assessed? How can long-term effects be measured with regard on concrete data needed when the case is pending? To what extent does natural recovery and revitalization of polluted fauna and flora equilibrate the disposal of waste? Can pollution of unowned nature be weighed up by monetary means[41]?

(2) Constituting facts on the case and rather being of procedural nature, this issue has not been dealt with in drafting the ELA.

## Conclusion

Even though awareness of safeguarding environment has been growing and notwithstanding the fact that this awareness paved the way for a number of environment protective regulations, there

---

[36] Cf. *Schlemminger*, in: *Schlemminger/Wissel*, German Environmental Law, 192.
[37] *Grant*, Environmental Liability, 235.
[38] *Grant*, Environmental Liability, 222.
[39] *Bartsch*, Liability, 42; *Schlemminger*, in: *Schlemminger/Wissel*, German Environmental Law, 189; in favour of an extension of the scope also *Bender/Sparwasser/Engel*, Umweltrecht, 55; more precisely in differentiation *Kloepfer*, Umweltrecht, 406 et seq.
[40] *Kloepfer*, Umweltrecht, 402; *Schlemminger*, in: *Schlemminger/Wissel*, German Environmental Law, 189.
[41] As to these questions cf. *Menell/Stewart*, Environmental Law and Policy, 1181.

still exist a quantity of major problems which are difficult to cope with, a quantity of which supra has been dealt with. The German ELA stands for one of these laws on environmental liability and has significantly taken up some of the problems mentioned. Major changes in handling the burden of proof and the structural approach constituting strict liability or enhanced informational rights, respectively, have taken place through this act. However, a few problems still remain to be solved. It also remains open whether future political willpower will be in favour of further enhancement of pro-environmental liability issues. But in reaching this aim, on the one hand due regard should be paid to solutions found in other jurisdictions. On the other, closer cooperation within the European Union might hold good for a positive development of environmental liability structures.