

Civil Liability for Environmental Damage

Comparative Analysis of Law and Policy in Europe and the US
Second Edition

By Mark Wilde



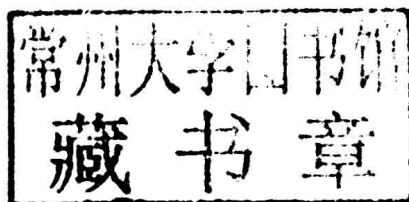
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Civil Liability for Environmental Damage

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The aim of the Editor and the Editorial Board of this series is to publish works of excellent quality that focus on the study of energy and environmental law and policy.

Through this series the Editor and Editorial Board hope:

- to contribute to the improvement of the quality of energy/environmental law and policy in general and environmental quality and energy efficiency in particular;
- to increase the access to environmental and energy information for students, academics, non-governmental organizations, government institutions, and business;
- to facilitate cooperation between academic and non-academic communities in the field of energy and environmental law and policy throughout the world.

List of Abbreviations

ABI	Association of British Insurers
ACA	Anglers' Cooperative Association
ADAS	Agricultural and Advisory Service
ATCA	Alien Tort Claims Act (US)
AWE	Atomic Weapons Establishment
BAT	Best Available Technique
BATNEEC	Best Available Technology Not Entailing Excessive Cost.
BREF	Best Available Technique (BAT) Reference Documents
BGB	Das Bürgerliches Gesetzbuch (German Civil Code)
BNFL	British Nuclear Fuels Limited
BOP	Blow-Out Preventer
BVD	Bowel Virus Diarrhea
CCS	Carbon Capture and Storage
CERCLA	Comprehensive Environmental Response Compensation and Liability Act (US)
CGL	Comprehensive General Liability
CO ₂	Carbon Dioxide
CVM	Contingent Valuation Method
DEFRA	Department for the Environment, Food and Rural Affairs
EIL	Environmental Impairment Liability
ELA	Environmental Liability Act (Germany)
ELD	Environmental Liability Directive
EA	Environment Agency (UK)
EPA	Environmental Protection Agency (US and Australia)
ESP	Electro-Static Precipitator
EURATOM	European Atomic Energy Community

FCS	Fat Cow Syndrome
FOE	Friends of the Earth
GLO	Group Litigation Order
GMO	Genetically Modified Organism
HMIP	Her Majesty's Inspectorate of Pollution
ICCOP	International Convention on Civil Liability for Oil Pollution Damage
IOPC	International Oil Pollution Compensation Fund
IPPC	Integrated Pollution Prevention and Control
ITIA	International Tanker Indemnity Association
MNC	Multinational Corporation
NGO	Non-Governmental Organization
NRPB	National Radiological Protection Board
OPA	Oil Pollution Act (US)
PAH	Polycyclical Aromatic Hydrocarbons
PCB	Polychlorinated Biphenyls
PCE	Perchloroethene
PHAH	Polyhalogenated Aromatic Hydro-carbons
PPI	Parental Pre-conception Irradiation
SAC	Special Area of Conservation
SEA	Single European Act
TCDD	Tetrachlorodibenzo-p-dioxin
UNICE	Union of Industrial and Employers' Confederations of Europe
WRA	Water Resources Act (Germany)
WTAC	Willing to Accept Compensation
WTP	Willing to Pay

Preface

The first edition of this book stemmed from postgraduate studies commenced in 1995. By the early 1990s, environmental law had matured into a distinct topic with its own textbooks, law reports and distinctive regulatory techniques. As stated in the preface to the first edition, the prevailing view has long been that environmental damage is a matter for state regulation necessitating the use of public law 'command and control' mechanisms such as emission limits and planning controls. However, the potential role of private law, in the shape of tort, was also a predominant theme. In the UK, the seminal case of *Cambridge Water v. Eastern Counties Leather* highlighted the limitations of conventional torts as a means of environmental protection. The House of Lords recoiled from delivering a judgment which would have thrown the costs of historic pollution onto current operators. Thus, although it was acknowledged that the successful assertion of private law rights could occasionally result in some collateral environmental benefit, the law of tort did not appear well suited to achieving public interest objectives such as environmental protection. Nevertheless, throughout the common law world it was clear that no matter how sophisticated and comprehensive one's environmental controls are, there will always be accidents and unforeseen consequences. In the US, the Exxon Valdez disaster and the subsequent twenty years of litigation threw the private consequences of environmental disasters into sharp relief.

Meanwhile, moves were afoot in the European Community (EC) (as it then was) to harness private law in pursuit of environmental objectives. By this stage, the EC was the main driver of environmental law and policy in Europe. However, there was a poor record of compliance amongst EC Member States and enforcement difficulties undermined efforts to secure reductions in pollution. The EC Commission formed the view that by linking environmental standards with the ability to pursue civil claims for infractions, the enforcement of EC environmental laws could be enhanced. To this end, early proposals for a Directive on civil liability for damage caused by waste were published, although these were quickly superseded by proposals for a more far-reaching environmental liability regime.

It was against this background that the research culminating in the first edition of this book was undertaken. I sought to draw the desperate threads of the debate together

and to clarify just what the proper role for tort should be in an environmental context. The book essentially operated on two levels. First, there was an attempt to establish a theoretical and conceptual basis for the use of tort in an environmental context. To this end, the book assembled a theoretical framework using historical, philosophical and economic components. This led to the conclusion that the pursuit of public interest objectives is a proper goal of tort. Second, there was an examination of the extent to which the main elements of tort could be manipulated so as to facilitate the attainment of environmental objectives. For example, adjusting causation rules and adopting stricter forms of liability.

Much of the first edition focused on the aforementioned EC initiatives which contemplated the introduction of an EC-wide civil liability regime designed to enhance the enforcement of environmental laws. This would have necessitated building more civil liability components into environmental measures with the result that breaching a statutory duty would trigger rights to compensation in addition to administrative and criminal penalties. However, just as the proofs for the first edition had been returned, the EC Commission published a draft environmental liability directive which was very different from the White Paper which preceded it. Rather than focusing on the role of private law, as the White Paper had done, the draft Directive set out a regulatory cost recovery system to be administered by public bodies. The draft Directive (which subsequently passed into law) was hurriedly included in an appendix to the first edition, although it was not entirely clear how it followed on from the previous policy initiatives and how it fitted in with the themes of the book. Indeed, for a time it looked as though the role of private law in environmental protection was no longer regarded as a pressing issue and that the book would be the first and last edition.

However, from my perspective, it is fortunate that reports of the premature demise of the environmental tort proved to be unfounded. Although the EU (as we can now call it regardless of the area of policy we are dealing with) has now moved its focus away from the development of an EU-wide tort-based environmental liability regime, events over the past ten years have demonstrated that tort still forms a very important part in the matrix of environmental law. A number of high profile cases have emerged which serve to underscore the point that 'accidents will happen' no matter how sophisticated one's environmental controls happen to be. In the UK, for example, a number of claimants were awarded damages in the high profile Corby Group Litigation case, which concerned birth abnormalities attributable to prenatal exposure to toxic substances released during the reclamation of a former steelworks site. Across the Atlantic, the Deepwater Horizon oil spill superseded Exxon Valdez as one of the worst environmental disasters in North American history. Moreover, a number of courageous litigants are currently stretching tort to its limits and beyond by endeavouring to sue polluters in respect of the mother of all environmental problems – climate change. Finally, those charged with administering international agreements on environmental damage continue to ponder the potential role of tort in transboundary pollution matters.

All this has provided an abundance of material to update the first edition and to develop the theoretical framework with a view to drawing some new conclusions and insights regarding the role of tort in an environmental context; although, as a result of

the above developments, the focus has inevitably moved away from the EU. The first observation to be made in this respect is that in the first edition, I may have been unduly conservative in the conclusions I drew regarding the potential scope of liability in tort. Events such as Deepwater Horizon show that tort may play far more than a niche role confined to the localized consequences of relatively small-scale events. Tens of billions of dollars have been set aside to deal with the environmental damage costs and the economic losses suffered by businesses. Second, as noted above, concerted efforts are being made to hold major emitters of greenhouse gases liable for property damage and personal injuries caused by climate change. This issue was not touched upon in the first edition as such claims appeared far-fetched. Indeed, those actions which have been launched are struggling to overcome initial hurdles. Nevertheless, they clearly demonstrate that litigants will still turn to tort where there is a perceived lack of activity on the regulatory front.

Notwithstanding these dramatic developments on the international stage, one must not overlook the continuing role which tort plays as a means of dealing with the more localized consequences of 'traditional' pollution type problems. As previously noted, despite the sophistication of environmental controls in most developed countries, it is noteworthy that old-fashioned nuisance type disputes still come before the courts on a regular basis. With any book, there has to come a cut-off point at which proofs are submitted; it is inevitable that an important case will emerge just when it is too late to make alterations. For example, it is with some regret that I could not include discussion of cases such as *Anslow v. Norton Aluminium* which raises some fascinating issues regarding causation in nuisance law. These cases demonstrate that one should never lose sight of the important role which tort plays in protecting those private interests which may have been overlooked by the broad sweep of the regulatory regime. Aside from examining new cases, I have re-evaluated certain older cases with a view to ascertaining what they can tell us about the extent to which tort serves to correct 'regulatory failure' of this nature. For example, a reappraisal of the standard textbook case of *Allen v. Gulf Oil Refining Ltd*, concerning the defence of statutory authority in nuisance, reveals that the tort action stemmed from a failure of the planners and regulators to anticipate or act upon the harm.

Thus, the fact that the EU now appears to have moved away from the policy of adopting a tort-based liability regime, has not served to lessen or undermine the role of tort. Rather, the emphasis of the debate has shifted somewhat. Whereas the first edition of this book focused on the use of tort as a means of strengthening the enforcement of environmental regulations (an instrumentalist approach), this edition focuses more on the use of tort as a counterbalance to public law based regulation. In this respect, one of the main insights generated by the second edition is that linking tort too closely with environmental regulations is a bad thing. Thus legislatures should be slow to oust conventional torts where statutory definitions of harm rule out many of the ongoing low level harms which form the mainstay of nuisance claims. We can see this effect in the narrow way in which harm has been interpreted under the nuclear liability regime in the UK.

Given the dynamic and ever changing nature of tort and the creativity of litigants and their lawyers, I am more hopeful of further editions than I was ten years ago.

Much has changed during the course of the ten years since the publication of the first book but the patience and support of my parents, Myra and Peter has been a constant. One major change has been my marriage to Charlotte whose support and encouragement has been invaluable in bringing this project to fruition. And the birth of our daughter Florence Rose, whose arrival exactly coincided with the publication of this edition. Many thanks also to all at Kluwer for asking me to write this second edition and for their speedy and efficient production process.

Mark Wilde
December 2012

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