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MARK WILDE, *CIVIL LIABILITY FOR ENVIRONMENTAL DAMAGE – A COMPARATIVE ANALYSIS OF LAW AND POLICY IN EUROPE AND IN THE UNITED STATES*, THE HAGUE, KLUWER LAW INTERNATIONAL, 2002.

By Lina Carlsson[*]

In light of the current developments within European environmental law, in particular, civil liability for environmental damage, the book of Wilde, from the department of Law, Brunel University, United Kingdom, is very timely. It provides a theoretical and comparative approach to the emerging civil liability for environmental damage regime in Europe, with comparisons between some European Union Member States, but he also covers some aspects of the United States' approach to the same issue.

Environmental damage has become highly discernible over the past few decades and has made the headlines with disasters such as *Exxon Valdez* or *Braer* causing environmental damage of extreme proportions. As Wilde points out, these calamities have given rise to a realization that whatever regulations and pollution control measures are in place, from time to time accidents will occur. It is important to resolve who should bear the loss in these cases, which Wilde suggests brings in the issue of tort. In his book he seeks to answer the question – as he puts it himself – of whether the law of tort can be harnessed as an effective additional weapon in the legal armory against polluters? In pursuing this objective, he starts by looking at the background developments that have lead to a need for environmental law, and in particular, the role of tort in the environmental context. Wilde goes on to look at common law approaches to environmental harm – from an Anglo-American perspective (although more Anglo than American) – such as trespass, negligence and nuisance, in some detail. He looks at the requirements for establishing liability for environmental damage, such as the notion of fault, causation and the burden of proof, in particular with respect to environmental damage. In this analysis Wilde also turns to the related issue of remedies and looks at damages, the notion of environmental values and injunctions. These are issues that appear throughout the book highlighting his arguments.

Another important addition to Wilde's contribution in this book is the Part on the role of tort as a means of environmental protection[1], which covers fundamental theoretical aspects of tort and environmental issues. These are issues that help put a

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1 Mark Wilde, *Civil Liability for Environmental Damage – A Comparative Analysis of Law and Policy in Europe and in the United States*, The Hague, Kluwer Law International, 2002, Part III, starting at 113 [*Liability for Environmental Damage*].

civil liability regime in perspective, and contribute to the understanding of why civil liability for environmental damage is important.

More than one third into the book Wilde turns to the analysis of the EU developments in this area and gives an introduction to what these involve. He also brings in the aspect of the – although not yet in force – *Lugano Convention*[2] on civil liability to a limited extent throughout the book.

He greatly discusses the issue of strict liability, how it has been introduced in certain EC Member States and the relevance of it in a potential EU liability regime. In this context Wilde also discusses the use and possibility of defenses within a strict liability regime.

Furthermore, he talks about the issue of reducing the burden of proof of causation, something which has been put on the table in the EC.

Access to justice is another important issue that Wilde brings up in his book. He looks at the issue of standing generally and at the issue of class actions particularly, the former of which is a highly discussed issue at present, not the least with regard to non-governmental organizations (NGOs) and their potential role in judicial processes.

Subsequently Wilde raises the imperative issue of remedies in particular for environmental damage, and concludes with the issue of financial provision for extended civil liability. The latter is critical for an effective and well-functioning liability regime and to ensure that there is enough support to cover often extensive environmental clean-up costs.

I. Background

In face of the inadequacy of existing regulation in Europe to mitigate the environmentally damaging effects of the industrial revolution, during the nineteenth and twentieth centuries there has been an attempt to control pollution by means of regulation. It is in light of these developments that Wilde attempts to address concerns whether tort has the potential to fulfill a role as part of an overall system of environmental regulation.

Wilde points out that the European Union has been in the process of developing a regime of civil liability for environmental damage during the past ten years[3], through measures designed to adapt tort as a means of environmental protection. Initiatives have also been taken by the Council of Europe through the Lugano Convention, mentioned above.

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2 *The Council of Europe Convention on Civil Liability Resulting From Activities Dangerous to the Environment*, March 21st 1993 [*Lugano Convention*].

3 A draft directive on civil liability for damage caused by waste was introduced in 1989 (EC, [1989] O.J.L. C-251/4); it was amended in 1991 ([1991] O.J.L. C-192/6). These proposals have been superseded by the publication of a Green Paper in 1993 (*Communication from the Commission to the Council and Parliament on Environmental Liability*, COM(93) at 47); finally, a White Paper published by the European Commission.

A problem with the early approaches to pollution control is that they concerned the protection of private interests, rather than the protection of the environment as a public interest objective. Wilde argues that the main problem in this context is the extent to which the focus of tortuous liability can be shifted from the protection of private interests to the protection of public interests, but also whether such an approach would enhance the regulatory responses which are already in place[4].

Wilde sets out the common law torts of nuisance, negligence and trespass and highlights the inherent problems with these torts, such as the fact that they are time-consuming, expensive, technical (referring to issues of e.g. causality) and the requirement that there be an interest in the subject matter of the action, i.e. the plaintiff must be the person injured[5]. The latter of these highlights the issue that tort is primarily concerned with the resolution of private disputes. Wilde explores whether it is conceptually and practically possible to adapt tort to the public interest objective of environmental protection. He finds that the modern law of tort should seek to attain a balance between corrective and distributive justice, that is, between the rights of individuals and the social preferences regarding who should bear the loss[6].

The common law torts of trespass, negligence and nuisance are discussed to some extent in Wilde's book, and although these give a helpful background of what tort is and has been intended to do, and what the requirements are with regard to causation and fault, the book becomes more interesting for modern purposes when he looks at the main issues of establishing liability for environmental damage, the EU developments and how the Member States individual initiatives are to be reconciled with the latter developments.

Wilde talks about the procedural costs involved with bringing a pollution claim as "transaction costs" and he argues that these are increased by the need to establish fault and causation, and that this is particularly the case for environmental damage cases[7].

II. Private vs. Public interests

Another important aspect that Wilde points out with regard to civil liability is the already mentioned focus of torts on the protection of private interests, which leads to a problem of the remedies available not reflecting the full costs of the damage caused to the environment[8]. This, Wilde argues, may prevent any effective clean-up[9].

Additionally, there is the limited notion of standing related to there being, traditionally, a private interest only, i.e. only someone who has suffered some form of loss, such as personal injury has standing to pursue an action. Consequently, if there is

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4 *Liability for Environmental Damage*, supra note 1 at 4-5.
5 *Ibid.* at 9-10.
6 *Ibid.* at 13-14.
7 *Ibid.* at 55.
8 *Ibid.*
9 *Ibid.*

no individual victim, organizations concerned with protecting the environment usually do not have standing to bring a claim, even if they did have the funds or the resources to do so.

Importantly, Wilde recognizes that a major draw-back of tort is that it cannot be used in order to protect the environment in its own right[10].

These are all issues which severely limit the role of civil liability in an environmental context[11], and Wilde suggests that the only way in which this can change is through a fundamental change of emphasis from the interest of the parties to the interests of the environment.

Although some perceive private and public law as operating in different spheres[12], Wilde does not believe that the objectives of public and private law are necessarily mutually exclusive, but that there is a role for both in the implementation of environmental policy.

Wilde points out that recent developments have been to the effect that environmental agencies (such as EPA in England and Wales) have adopted more assertive enforcement strategies, taking on a role of punishing environmental regulation violators[13]. He welcomes these advances, but yet expresses concern about the inability of such agencies to cover all ground (due to limited resources), resulting in many polluters not being called to account[14]. Wilde believes that tort may have a useful role in reducing the resulting gap.

Another positive aspect that tort could contribute to in this regard, that Wilde points out, relates to the internalization of pollution costs, a concept which derives from the well-known polluter pays principle. He argues that the criminal procedures and sanctions involved in actions taken by enforcement agencies as a result of a breach of a certain license are less appropriate than the procedures involved with a tort claim. This is because, Wilde goes on to say, fines are arbitrary and go straight to the Treasury, while damages more accurately reflect the value of the damage and may be applied to the costs of remediation[15]. He makes an even stronger case from an environmental perspective when he argues that injunctions – as one of the remedies available as a result of a tort action – enable the court to take a proactive stance in requiring the polluter to take abatement measures or to rectify damage which has already occurred[16].

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10 *Ibid.* at 81.

11 *Ibid.* at 110.

12 Bergan J. in the US case of *Boomer v. Atlantic Cement*, stated that it is pointless to attempt to settle matters of public interest as a by-product of resolving private disputes. *Boomer v. Atlantic Cement* 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E. 2d870 (N.Y. Ct. App. 1970).

13 *Ibid.* at 137-138.

14 *Ibid.* at 138.

15 *Ibid.* at 138-139.

16 *Ibid.* at 139.

Furthermore, Wilde suggests that the law of tort has the capacity to improve and increase regulatory responses by giving each member of the society "an ability to participate in policing the environment"[17].

III. EC Development

Despite much upheaval about the EC development within the issue of civil liability for environmental damage, Wilde points out that there is not as yet any actual legislation implemented, but certain Member States of the EC have introduced their own schemes.

In light of the latter fact, Wilde explores the reasons for EC intervention in this field.

An emerging concept within EC environmental policy is that of environmental rights. Wilde argues that EC initiatives on civil liability for environmental damage represent an integral part in the development of this concept[18].

Although civil liability was introduced into the EC regime already in 1982[19], Wilde points out that the possible use of civil liability as a component of the EC's environmental strategy was formally recognized in the Fifth Environmental Action Programme[20]. A draft Directive on Civil Liability for Damage caused by Waste, focusing on the establishment of a strict liability regime, was published in 1989[21]. A new proposal was published in 1991[22], which went further in that it encompassed the establishment of clean up funds and increased standing for NGOs.

Since then, a Green[23] and a White[24] Paper has been published to stimulate the debate on an all encompassing civil liability for environmental damage. Both Papers raise the issue of reducing the burden of proof on causation and the imposition of strict liability as a means of implementing the polluter pays principle. The White Paper, however, goes further in that it increases the standing for environmental pressure groups[25].

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17 *Ibid.* at 161.

18 *Ibid.* at 163.

19 Council Directive 82/501/EEC was introduced as a direct response to the Seveso disaster of 1976, where TCDD (one of the most hazardous toxins) escaped from a factory and injured numerous people and 77,000 livestock had to be slaughtered.

20 [1986] E.C. Bull. 11, pt 2.1.146.

21 *Commission proposal for a Council Directive on Civil Liability for Damage Caused by Waste*, [1989] O.J.L. (C-251) at 3.

22 *Amended Commission Proposal for a Council Directive on Civil Liability for Damage Caused by Waste*, [1990] O.J.L. (C-192).

23 *Communication from the Commission to the Council and Parliament on Environmental Liability*, COM(93)47 final.

24 Commission of the European Communities, "White Paper on Environmental Liability", COM(2000)66 final, Brussels, 9 February 2000.

25 *Liability for Environmental Damage*, *supra* note 1 at 176.

Wilde sets out the importance of the polluter pays principle and the precautionary principle, both guiding principles of EC law[26], and how a rigorous liability regime would incorporate these principles. This is, he argues, because liability would enforce operators to bear the costs of any damage which they cause in line with the polluter pays principle, while the risk of incurring such liability would persuade operators to take sufficient steps to prevent future incidents in line with the precautionary principle.

Wilde points to some problems with this approach, in that the environmental damage costs – viewed as production costs for the purpose of internalization of costs – will not be fully reflected if available damages do not reflect environmental restorations costs[27].

Consequently, he argues that strict liability alone is not sufficient, but that there is a need to ensure that parties are "not dissuaded from pursuing civil litigation caused by the high transaction costs resulting from causation issues and limited access to justice"[28].

Wilde further argues that the EC is particularly attracted by the capacity of civil liability to serve as a means of private enforcement of environmental standards[29]. This is because, currently, Wilde suggests, the bulk of EC environmental legislation consists of Directives which seek to reduce the levels of certain contaminants released into the environment, but problems of enforcement powers and resources have arisen. Consequently, he goes on to say, (and with the support of a Commission report[30]) that the way forward is to increase access to justice for individuals and NGOs, which could allow for enforcement through claims being brought to hold polluters responsible. One possible solution of achieving this, according to Wilde, could be to confer "environmental rights", as already contemplated within the EU context, which the citizens could rely upon before the courts in civil actions against polluters[31]. Although there is some aspect of this in the *Francovic* case[32] in that it provides a limited private enforcement mechanism in respect of those directives which may be capable of conferring private rights, Wilde seems to suggest that a specialist civil liability regime would be preferable in that it would have the potential to afford full protection to those rights[33].

Another important issue is that of strict liability. Wilde points to the fact that it seems that strict liability is regarded as a "prerequisite of any environmental liability system"[34], and the countries discussed are indicators of this statement[35], as well as the Lugano Convention, mentioned above[36].

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[26] *Treaty of Amsterdam Amending the treaty on European Union, The Treaty Establishing the European Communities and Certain related Acts* at art.174.

[27] *Liability for Environmental Damage, supra* note 1 at 179.

[28] *Ibid.* at 179.

[29] *Ibid.* at 161.

[30] Communication from the Commission, COM(96) 500 final, Brussels, 22/10/1996.

[31] *Liability for Environmental Damage, supra* note 1 at 181.

[32] *Francovic v. Italian Republic*, Cases C-6/90 and 9/90, [1993] 2 CMLR 66.

[33] *Liability for Environmental Damage, supra* note 1 at 194.

[34] *Ibid.* at 207.

Furthermore, both the Green and the White Papers refer to the need for strict liability, stating for example that it requires the operator to internalize a greater proportion of the pollution costs. There is also a similar argument that "if the polluters need to pay for damage caused, they will cut back pollution up to the point where the marginal costs of abatement exceeds the compensation avoided"[37].

A related important issue that Wilde brings up is that of defenses. He argues that they are an important part to a strict liability regime to ensure that defendants are only held liable for costs over which they had control and were in a position to mitigate. Nonetheless, he goes on to say, it is critical to ensure that the scope for defenses is not too great such that the standard of liability is watered down and the distinction between strict and fault based liability is lost[38].

The issue of access to justice has to a certain extent already been mentioned. Nonetheless, Wilde dedicates two parts to this issue and it is currently of great relevance. As already mentioned, one of the main limitations of tort as a means of environmental protection is the fact that it is traditionally a private interest concept. Wilde argues that an environmental liability regime cannot have any useful role to play unless access to remedies in tort is opened to those who do not have direct proprietary interest in the resource in that traditional sense[39]. He thus attempts to say that it is necessary to recognize the existence of an equitable public interest in environmental protection.

Apart from this, it is, as mentioned above, a way of filling in the gap of the inadequacies of enforcement agencies.

Another important aspect of access to justice is the issue of class actions, something which forms part of civil procedure in EU Member States as well as in the US. Nonetheless, the EC initiatives in this context does not allow for class actions, even thought, as argued by Wilde, they greatly enhance the chances of success by reducing transaction costs. Additionally, he goes on to say, it provides one means of overcoming the central objection to the use of tort in an environmental context, namely, the assertion that tort is concerned with private interests rather than the impact of an activity on society as a whole.

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The title of the book by Wilde is slightly misleading in that is suggests a comparative analysis of the European and American systems of civil liability for environmental damage. Although Wilde incorporates examples of several European

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35 Wilde uses the examples of Sweden, Germany, Denmark and Finland, *Ibid.* at 207-213.
36 *Lugano Convention, supra* note 4 article 2(2)(a), 2(1)(b) and 2(1)(c).
37 *Liability for Environmental Damage, supra* note 1 at note 24, 11 and 3.1.
38 *Ibid.* at 231.
39 *Ibid.* at 265.

countries and the US to a limited extent, the main examples are drawn from the English system.

Disregarding that matter, the book encapsulates important aspects of civil liability law and policy that has not usually been brought up in discussions of EC initiatives in this regard. Theoretical and background aspects of tort law and the civil liability regime were most helpful when looking at the approach taken at the EC level. Even though he covers a lot of "old" ground, he does so in a helpful way so as to enlighten the current debate within civil liability for environmental damage and give logical explanations of why certain approaches are preferable to other.

Wilde gives suggests plausible and interesting solutions to many of the problems he raises in his book and bases them on existing law and discussion, which is a helpful and productive contribution to the present debate.