

PREFACE

This book provides an analysis of civil liability for environmental harm in an inter- and transnational context. It covers both liability of private parties and state liability under international and EC law, and discusses national law developments in this area. It explores in particular the relationship between public environmental law and private liability law. Applying an instrumental approach to legal instruments, it aims to redefine the role of liability in this heavily regulated area. This book is aimed at advanced law students, academic scholars, practitioners and judges, policy and legislative analysts, legislators, and government officials. I hope, however, that it will be of interest to a broader audience.

Much of the analysis set forth in this book builds on work I did at Yale Law School in 1988-1989. At that time, I started working on a paper on liability for damages caused by unavoidably unsafe products ("Born to Harm?") and a book in Dutch on economic analysis of civil liability. I then joined the law firm of Hunton & Williams in Brussels and never had time to finish them. Ten years have gone by and my views have changed, in particular with respect to the efficiency concept.^{1/} I have refined the analytical structure, which now incorporates both substantive and institutional, procedural analysis. Guido Calabresi's and George Priest's work on tort liability and insurance have shaped my thinking on the role of civil liability in a legal system. I have benefitted also from courses taught by Stephen Carter and Jay Katz and the writings of Jules Coleman and Peter Schuck. More recently, publications by my colleagues at Erasmus University, including Jan van Dunné, Roger Van den Bergh and Han Wansink, provided inspiration and food for thought.

Liability advocates have proposed numerous new regimes, principles and rules to expand liability. Their proposals would subject more and more entities to obligations to compensate another person's damages in a steadily increasing number of situations. I have not jumped on this bandwagon and do not endorse these proposals. On the contrary, I generally oppose further expansion of liability and, hence, reject virtually all of the liability advocates' ideas. Most of liability's social aspirations are unfounded and misguided, also in the environmental area. This book explains and documents that position. As a result, the reader's first impression may be that I am a negativist who criticizes all new ideas, and does not make any constructive proposals himself. I am not a negativist, and I do try to show how better results can be achieved.

^{1/} As the reader will notice, with respect to the efficiency concept, I hold two opposed ideas in my mind. I hope I retained the ability to function. "[T]he test of a first-rate intelligence is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function." F. Scott Fitzgerald, cited in Daines RM, Hanson JD. *The Corporate Law Paradox: The Case for Restructuring Corporate Law*. 102 Yale Law Journal 1992, p. 578.

If there is an imbalance between demolishing and building, it reflects the eternal truth that it is so much easier to uncover falsehood than to discover truth.^{2/}

This book challenges the conventional view that strict liability should be imposed for environmental harms. The conventional view relies to a significant extent on the polluter pays principle, which, in turn, is based on the theory of cost internalization.^{3/} While this theory as applied to tort liability is unpersuasive, it is even weaker when applied to environmental liability. I argue that civil liability should play a more modest, limited role in an environmental law system dominated by public law. Public law grants rights that should govern also private disputes. As a result of expanded liability on top of extensive regulation, the polluter pays twice. I argue for a more limited scope of liability for private parties and increased, or rather more vigorously enforced, liability of the state for failure to meet its environmental law obligations. Some critics have suggested that the system I am advocating would let the payor pollute twice. I will show in this book that the system I propose would make the polluter pay his fair share, but no more than that.

The topic of this book is complex and extensive. It requires that the whole legal system is analyzed from a moral perspective and as an instrument for achieving certain objectives. It requires that the roles of the judiciary and executive are examined. Hopefully, in conducting this complex analysis, I have not fallen into two many "old errors."^{4/} To allow the reader to assess the merits of the system I am advocating, I have outlined the main features of a liability system that has my support. In doing so, in addition to international and EC law theories, I have used mainly, but not exclusively, US and Dutch materials, as I know the US and Dutch legal systems better than any other and these jurisdictions have well developed regulatory and liability regimes. As to the substantive liability concepts,^{5/} tort law theories developed in the US, with few exceptions, are adopted also by European courts at some point in time.

^{2/} "Wish that I could discover truth as easily as I can uncover falsehood." Cicero (44 B.C.). Cited in: Pearl J. *Causality: Models, Reasoning and Inference*. Cambridge: Cambridge University Press, 2000, p. 259.

^{3/} Some advocates of strict environmental liability seem to say simply that strict liability is good for the environment. This view is based on the proposition that "Recht ist was der Umwelt nutzt" ("law is what benefits the environment"). See Teunissen JMHF, Tak AQC. *Recht ist was der Umwelt nützt? Over zorgplichtbepalingen, civiele acties en tweewegenleer. Een overdenking n.a.v. de opnemng van een zorgplichtbepaling in de Wet milieubeheer*. NJB 1994, pp. 605-616.

^{4/} "The danger is not that a new generation of intellectuals cannot add anything new or better to the stock of knowledge inherited from the past, but rather that it will not, or only incompletely, relearn whatever knowledge already exists, and will fall into old errors instead." Hoppe H-H. *Introduction*. In: Rothbard MN. *The Ethics of Liberty*. New York: New York University Press, 1998, p. xvii.

^{5/} This does not apply to the rules of civil procedure and evidence, the jury system and damage awards, as to which, as Rod Hunter and I have argued, the US system is out of line with Europe. Bergkamp L, Hunter R. *Product Liability Litigation in the US and Europe: Diverging Procedure and Damage Awards*. 3 *Maastricht Journal of European and Comparative Law* 1996, pp. 399-418.

Typically, however, they are watered down somewhat during their journey over the Atlantic ocean.

To show that the system I defend fits a coherent approach to environmental policy and can be made part of an overall legal order that is superior to the current legal system, I have examined political philosophy and regulatory theory and tried to state an outline of the major principles for a legal system based on the market paradigm. That obviously is an ambitious task, and it may have been overly ambitious. In trying to execute this task, I gained a much better understanding of our ignorance. Fortunately, "[k]nowledge of ignorance is not ignorance. It is knowledge of the elusive character of the truth, of the whole."^{6/} In any event, the theory I sketch focuses on the procedural aspects of the legal system, much less on substantive law. In future publications, I may decide to provide also an outline of a substantive theory of law.

A common limitation of legal studies in continental Europe is that lawyers try to understand the law solely by analyzing the work of other lawyers. This is useful if the objective is confined to understanding what other lawyers think. I have tried to conduct a somewhat broader research project, and have drawn also from other sources and disciplines. Since the polluter pays principle is chiefly an economic principle, I used many publications from the domain of law and economics. Dealing sensibly with some of the fundamental issues at stake necessitated also philosophical explorations.^{7/8/} I did not use any primary sources from the environmental science area, such as data on global warming and ozone depletion. To design good legal rules relevant and reliable information about environmental phenomena and their causes is essential. But the environmental science literature is voluminous and complicated, and time constraints did not allow me to delve into it.

As the reader will see, I added many rather lengthy footnotes to the main text, which is not only "un-European" but also "un-American" as far as books are concerned. In addition to references to sources and literature, some footnotes provide further explanation of, or support for, a statement in the main text, other footnotes provide background information or quotes or discuss an alternative or different opinion. I have not included these in the main text to avoid interruption of the flow of the reasoning. A number of footnotes discuss

^{6/} Tarcov N, Pangle TL. Epilogue. In: Strauss L, Cropsey J (editors). *History of Political Philosophy*. Third Edition. Chicago: University of Chicago Press, 1987, p. 920.

^{7/} Philosophy is the mother of all understanding. "The man who has no tincture of philosophy goes through life imprisoned in the prejudices derived from common sense, from the habitual beliefs of his age or his nation, and from convictions which have grown up in his mind without the co-operation or consent of his deliberate reason." Russell B. *The Problems of Philosophy* 156 (1912).

^{8/} "And as close as tort law ought to be to moral and political philosophy, neither the lawyers nor the philosophers know very much about each other's discipline." Owen DG. *Why Philosophy Matters to Tort Law*. In: Owen DG (editor). *Philosophical Foundations of Tort Law*. Oxford: Clarendon Press, 1997, pp. 1-27.

a related subject, or set forth an additional argument, a different position or a counter-argument. I have not always fully spun out the analysis, however. Nevertheless, I take responsibility also for the footnotes, if only to make my colleagues happy. (As Huber observed, "a lawyer rarely is happier than when denouncing some other lawyer's footnote."^{9/})

This book is not an introduction to positive environmental liability law, although it deals with the main features of existing law and can serve as a textbook. Nor is it a comparative analysis of environmental liability schemes, although I cross boundaries between jurisdictions and between areas of law. I took the existing environmental law system in the Western world, in broad terms, as a starting point for further analysis. I have used statutes and cases from Europe and the US to illustrate or exemplify points. But I would not want to claim that the material I used is representative of the state of the law in each of these jurisdictions. It is best characterized as a critical review of some trends in environmental and liability law and a conceptual outline of a fair and balanced environmental law system. In other words, this book is not so much about environmental liability as it is, but about how it ought to be. If it presents some ideas that readers,^{10/} including "madmen in authority,"^{11/} find useful, I have achieved what I set out to do.^{12/}

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^{9/} Huber PW. *Galileo's Revenge: Junk Science in the Courtroom*. Harper Collins: Basic Books, 1991, p. ix.

^{10/} "And though I deem the work unworthy of your greatness, yet am I bold enough to hope that your courtesy will dispose you to accept it, considering that I can offer you no better gift than the means of mastering in a very brief time, all that in the course of so many years, and at the cost of so many hardships and dangers, I have learned, and know." Machiavelli N. *The Prince* (II principe, 1513). Translated by NN Thomson. Mineola: Dover Publications, 1992, p. vii.

^{11/} "[T]he ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back. (...) [S]oon or late, it is ideas, not vested interests, which are dangerous for good or evil." Keynes JM. *The General Theory of Employment, Interest, and Money* (1936). Amherst: Prometheus, 1997, p. 383.

^{12/} Criticism, of course, is welcome. "The Disappointed One Speaks. - "I listened for the echo and heard only praise." Nietzsche F. *Jenseits von Gut und Böse* (1885). Translated by H. Zimmern Mineola: Dover, 1997, p. 48.

This book is to Katinka, Darius, Penelope and Scipio, who have created an excellent environment without liability.

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