Environmental liability in Belgium

§ 1. Introduction

This contribution attempts to provide an overview of the basic features of environmental liability in Belgium. In recent years particularly an increasing stream of literature on environmental liability has emerged in Belgium, starting with the doctoral dissertation of Hubert Bocken in 1978. Many other scholars deliberated on how the traditional rules of Belgian tort and nuisance law could be applied to environmental pollution. Indeed, during the 1970s and 1980s a growing number of cases could be seen where the traditional principles of private law were being applied to environmental pollution.

As in many other legal systems, Belgian case law shows the limitations of traditional concepts when they are applied to environmental problems. These limitations became clear in all of the traditional notions of liability based on fault. The question of under what kind of circumstances environmental pollution could be considered wrongful obviously came up. In addition, problems arose with respect to the concept of (ecological) damage and with respect to causation. Causation was more particularly a problem when the government had acted on the basis of a legal duty, as in cleaning up polluted sites, and then tried to recover the costs from the tortfeasor using the law of tort. Given the difficulties that arose when the traditional principles of fault liability were applied to environmental pollution, the literature has increasingly been pleading in favour of a separate regime for environmental liability. Such a specific regime became possible when the same Hubert Bocken was ordered by the former Flemish minister for the environment, Kelchtermans, to chair the Interuniversity Commission for the reform of environmental law in the Flemish region, which was given the task of reforming the whole body of environmental law in Flanders. Several years after the commission had been set up, a draft decree on environmental policy was presented, which also contained several chapters dealing with environmental liability. One of these chapters, related to liability for the soil clean up, has meanwhile already been implemented into legislation through the decree of 22 February 1995. At the time of writing, the other proposals of the commission with respect to environmental liability have not been implemented yet.
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This sketch of environmental liability in Belgium presents a mixture of the application of the traditional principles of tort and nuisance law on environmental pollution and the proposals of the Interuniversity Commission (and including the decree on soil clean up). In the near future the situation might, obviously, change in the sense that the proposals of the Interuniversity Commission on environmental liability might be implemented (if they can survive strong lobbying by industrial pressure groups against such implementation). But even if that were the case, providing an overview of the traditional private law remedies remains useful, since these will not be abrogated, even if the proposals of the Interuniversity Commission were to be implemented. In that case, the victim could choose either the traditional private law remedies or environmental liability as proposed by the Interuniversity Commission. The other reason why it is still worthwhile looking at traditional private law remedies is that they are Flemish, whereas the commission proposals are Flemish. Indeed, the private law remedies find their legal basis in the Belgian Civil Code of 21 March 1804, whereas the Interuniversity Commission proposals only relate to the Flemish region. This is a consequence of the process of federalisation that the Belgian State has gone through since the 1980s.

It has already been mentioned that environmental liability in Belgium is an area on which abundant legal literature exists\(^1\). There is no point in providing an in-depth overview of all that literature, since the goal of this presentation is just to give a brief overview of English and Belgian environmental law from a comparative perspective. A few main characteristics of the environmental liability system in Belgium will be presented and some cases will be discussed to illustrate these headlines. In principle only material environmental liability law will be discussed, not the way that these rights can be enforced in court. These issues will only be touched upon very briefly when discussing two specific "Belgian" aspects of the enforcement of civil claims. Even the overview of material environmental liability law will not be exhaustive. Issues such as the liability of the state or other public authorities for environmental pollution will not be discussed.

The contribution is set up as followed: after this introduction (§ 1) the basic conditions for tort liability according to art. 1382 of the Civil Code will be outlined (§ 2); then some cases of strict liability will be discussed (§ 3), as well as nuisance law (§ 4). The basic remedies will be presented (§ 5) and the question of the application of standards of care in retrospect will be discussed (§ 6). Then we shall turn to the proposals of the Interuniversity Commission on environmental liability (§ 7) and discuss the soil clean

up decree (§ 8). Finally, attention will be paid to a few aspects of the enforcement of civil claims (§ 9) and a few concluding remarks will be formulated (§ 10).

§ 2. Liability for negligence

Article 1382 of the Belgian Civil Code provides that anyone who negligently causes damage to someone else, must pay compensation. This is traditional liability based on fault or negligence. The literature therefore claims that there are three basic requirements that the victim has to meet in order to receive compensation: he must prove that he suffered damage, that the injurer was at fault and that there is a causal relationship between the fault and the damage. Each of these requirement will now be addressed in more detail, specifically with respect to their applicability to environmental harm.

A. Fault

1. Balancing of interests and BATNEEC

It is accepted that the injurer was at fault, as soon as it is established that he either violated a general duty of care or a specific regulatory provision that prescribed or prohibited certain behaviour (see Section A.2). As far as the question is concerned of whether the injurer violated a general duty of care, the legal doctrine and case law generally hold that whether the injurer behaved as could be required from a bonus pater familias has to be examined. This means that the general criterion to establish whether the due care standard has been violated is whether the injurer acted as a reasonable man or not. With respect to the more precise contents of this vague norm, detailed case law has been developed. The question of course arises of whether behaviour causing environmental pollution can be considered wrongful. Legal doctrine and case law in that respect usually hold that the various interests at stake have to be weighed up, so that on the one hand the interests of the for example polluting enterprise which is exercising a

2. "Any act by which a person causes damage to another makes the person through whose fault the damage occurred liable to make reparation for such damage.


socially beneficial activity are weighed against the interests of victims (such as the surrounding neighbours) to enjoy a pollution-free environment. A criterion that sometimes plays a role in that respect is the question of whether the polluting firm could have reduced the environmental harm by, for instance, investing in abatement technology. In that respect the costs of such preventive measures will also be compared with their capacity to reduce environmental harm.

This balancing process, taking into account costs and benefits of preventive measures has, as far as the Flemish region is concerned, to some extent to be made explicit since the so-called "BATNEEC" has been encapsulated in an executive order of the Flemish government, known as VLAREM II. The 1985 Flemish decree with respect to environmental licences had provided in art. 22 (2) a general provision that the operator of an establishment must use all appropriate means to prevent environmental nuisance and pollution. Afterwards the executive order VLAREM II incorporated the principle that the licensee must follow the best available clean technologies not entailing excessive costs. VLAREM II moreover stipulated that the licence conditions should be in compliance with the BATNEEC principle. This BATNEEC principle may have some effect on Flemish environmental liability law. It is only laid down in an implementing regulation and can therefore never replace or amend the tort provision art. 1382 of the Belgian Civil Code. Still, it may be argued that the acknowledgement of the BATNEEC principle means a specification of the general due care norm of the tort provision. A judge may be guided by that principle when specifying the vague due care norm. However, at this moment BATNEEC only gives an indication as to what interests should be taken into account when specifying the due care standard, as the criterion is still rather vague and leaves many questions open. Indeed, regarding the answer to the question when a technology is not or is no longer in accordance with the best available technology requirement and especially when costs are assumed to be excessive under the general tort provision, case law does not seem to be consistent. Judges seem to avoid

6. Best available technique not entailing excessive costs. Formally, the Best Available Technology (BAT) is required, but in practice the costs are taken into account as well.
formulating a clear theoretical criterium and deal with the problem on an *ad hoc* basis\(^9\).

It is, however, equally important to stress that Belgian case law regularly stresses the importance of the fault requirement. Hence, even recently there have been cases where it has been decided that the mere fact that victims claim that they suffer from environmental pollution does not fulfil the fault requirement since this fact alone does not make, for example, the operation of an industrial plant as such wrongful. The wrongfulness (fault or negligence) of the act or omission of the injurer must therefore still be proven by the victim. Nevertheless, Bocken equally states that the application of the fault concept in pollution cases has become increasingly stringent, so that the distinction from strict liability would often be quite theoretical \(^9\).

2. Violation of a regulatory standard

It has already been mentioned that the fault may not only consist in a violation of the general duty of care, but also in an unjustified violation of a regulatory norm. As soon as the victim can prove that a regulatory norm has been violated and that this violation stands in a causal relationship to his damage, he can claim compensation without the necessity of further argument that this breach of regulations violated a due care standard. Under Belgian tort law, any violation of a regulatory standard constitutes a fault \(^11\). It is therefore not necessary for the victim to prove that it consisted of a violation of a statute that particularly aimed at protecting the victim's interest \(^12\), which is the case under German (and some Dutch) law. This so-called "Schutznorm-theorie" is not accepted under Belgian tort law \(^13\). The rule that a violation of a regulatory standard is automatically considered as a fault under tort law and thus leads to the liability of the polluter is of major importance, in environmental cases. It means that as soon as, for instance, an establishment operates without the required licence and this causes harm to the victim, compensation can be claimed. The same is true if, for instance, the emission standards specified in licences or other regulatory norms have been violated.

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12. A so-called "Schutzgesetz".

There are several advantages to this system. One is that it makes the job of a judge in an environmental liability case a lot easier. The weighing of costs and benefits and balancing of interests to find out whether the polluter violated the bonus pater familias standard can be a highly complex exercise. Regulation gives information to the judge who has to evaluate the behaviour of the injurer ex post in a liability case. A judge can therefore easily accept a finding of negligence as soon as the regulatory standard has been breached. Thus, the regulatory standards are applied to define negligence. Another advantage of this system is that it gives victims incentives to prove that the regulatory standard has been breached. This in fact makes the victim an enforcer of regulatory standards. He can indeed claim compensation under the negligence rule as soon as a causal relationship between the violation of the regulatory standard and his damage has been established 14.

A consequence is that victims of environmental pollution will often try to prove that the environmental pollution that harmed them violated a criminal statute, since the violation of a criminal statute automatically constitutes a fault. Therefore victims will often initiate or at least join in criminal proceedings, since this might enable an easier recovery of damages 15. This explains why sometimes apparently minor offences are prosecuted before a criminal court, which mainly has to do with pursuing civil claims. An interesting example is that of a victim of smoke emitted by his neighbour who argued that the emission of the smoke constitutes the illegal "throwing" of objects which is penalized in art. 563 (3) of the Belgian Criminal Code. Although the sanctions on this crime are almost negligible, this case was tried up to the highest Belgian court (Cour de Cassation), because a conviction by a criminal court would automatically open the possibility of the victim claiming compensation under art. 1382 of the Civil Code, without any further requirement to prove wrongful behaviour 16.

Given the increasing number of environmental regulations and regulatory standards, very often a case of environmental pollution will automatically constitute a fault, because a breach of a regulatory duty has occurred. Only if there is not such a breach of a regulatory duty, will the judge have to engage in the balancing of interest between the freedom of industry and environmental protection 17.

15. The participation of victims of crimes in the criminal procedure will be further discussed below in § 9.
16. See, on the importance of this case from a civil law perspective, Bocken, H., "Luchtreiniging en het arrest van 12 april 1983", Leefmilieu, 1984, 89.
3. Justificatory effect of a licence

From the above, it follows that liability law in Belgium is to a large extent influenced by regulation, since the regulatory standards can be applied to define negligence. The question arises of whether the opposite is also true: does following a regulatory standard exclude a finding of liability? This question is obviously of particular importance in environmental law, since industrialists will often argue that as long as they follow the conditions of the licence, no finding of negligence in tort is possible. This point of view is, however, firmly rejected in Belgium. The basic idea is that the administrative authority, when granting a licence and setting permit conditions, cannot take into account the possible harm that the licensed activity might cause to all possible third parties. Their rights to compensation for damages may therefore not be impaired simply because the operator of a plant followed the conditions of a licence. Legal doctrine and case law therefore clearly state that keeping the conditions of the permit is just a minimum. In addition, the plant owner has to take all possible precautions as necessary under tort law to avoid his licensed activity causing harm to third parties.

B. DAMAGE

A second requirement for negligence liability is that the victim should have suffered damage. Therefore the Court of Appeals of Antwerp decided that the fact that an enterprise does not possess the required licence is irrelevant, as far as the negligence issue is concerned, when no one claims to have suffered any harm. The negligence liability according to art. 1382 of the Civil Code essentially requires that there is damage. Generally it is required that the damage should hurt the plaintiff personally. This will obviously often pose serious limitations as far as the possibility of using tort law in a case of environmental pollution is concerned, since environmental pollution often causes collective ecological damage, where no one is harmed individually. In those cases it remains difficult to apply fault liability.

When a victim has suffered personal damage, the tort liability requires full compensation of the victim, even in cases where this damage might be minor. A practical problem that will often arise in cases of environmental pollution is how to measure the amount of the damage. This has often led judges to underestimate the damage. An illustration is provided by a Hasselt case of 1972 in which it was established that someone had violated the emission standards of a licence. As a result of this, a fishermen's association claimed Bfr 250,000 compensation, but was only awarded a token of

21. This was argued by Bocken, H., *I.c.*, 1973-74, 1130, and Bocken, H., *O.c.*, 81.
one franc. The low amount was motivated by the fact that it was impossible to estimate the amount of the damage accurately. As early as 1972, Suetens criticized this judgement and rightly argued that even when the amount of the damage cannot be established precisely, the judge still has the possibility of making an estimation ex aequo et bono, which could lead to more serious amounts 23.

Legal practice has shown that these cases, where victims of environmental pollution are awarded only a token of one franc, are no exception. This often happens in cases of harm caused by noise 24. In other cases, civil claims for damages are simply denied because the victims are not able to prove that they actually suffered harm 25. Recently, a sum of Fr 500 was awarded for the damage resulting from the smell of a pig farm operating for just one day without a licence 26.

In legal practice, one can equally see that indeed problems arise as soon as ecological damage occurs, because every time the question arises of whether such ecological damage to collective environmental components can be considered as "personal" damage 27. These problems arise especially when local communities wish to act as victims in the case of environmental crimes that took place on their territory. In a case in which a defendant had illegally operated a waste deposit site, it was argued by the Court of Appeals of Antwerp that this had only caused damage to the property of the defendant himself, who owned the site, and not to the local community, who could not prove personal damage 28. It is different, however, when for instance waste water is emitted illegally into the sewerage system of a community. In such a case, the local community suffers personal damage and can, hence, present itself as the victim and claim compensation 29.

23. See Suetens, note to Criminal Court of Hasselt, 18 April 1972, RW, 1972-73, 778. He quotes case law with respect to water pollution where it was equally difficult to establish the amount of the damage precisely, but where nevertheless higher compensation was awarded.
24. See, for instance, Criminal Court of Antwerp, 32th Chamber, 30 June 1987, Case of Public Ministry, Hermans and others/Groynaert, unpublished.
27. For details, see the discussion in the dissertation by Bocken, H., o.c., 886 and following and Van Oevelen, A., i.e., 1991, 139-144 and see especially the recent dissertation by Carette, A., o.c., 78-87.
28. See Court of Appeals of Antwerp, 6th Chamber, 27 April 1983 in case of Public Ministry and local community/Brecht, Schrijvers and NV Terra Cotta, unpublished. In the court ruling it was also held that the protection of the interest of society at large should not take place through the local community presenting itself as victim of an environmental crime, but through the Public Ministry.
29. See Criminal Court of Leuven, 6th Chamber, 24 April 1978, in case of Public Ministry, City of Landen and Community of Zoutleeuw/Keyaerts, unpublished. This judgement was confirmed by the Court of Appeals of Brussels, 9th Chamber, judgement of 16 May 1979, unpublished. A request to revise that judgement was turned down by the Cour de Cassation in a decision of 29 January 1980, Paras., 1980, 1, 606, Arz. cass., 1979-80, 618.
Cases where courts have less difficulty in estimating the damage caused to environmental components are those concerning the illegal removal of trees. In those cases the courts usually use expert information to establish the value of a particular tree by, for instance, examining the price of a tree if it were to be purchased, replanted and had to grow for several years to reach the same height as the tree that was illegally removed. An interesting case in that respect concerns a decision of the court of Marche-en-Famenne, where the court also took into consideration the fact that the removal of a beautiful old oak in the community caused aesthetic damage which went beyond the material damage connected with the need to replant a similar oak. The decision was remarkable in that it not only accepted that the illegal removal of the tree had caused aesthetic damage, but also because the court accepted the local community not only as owner of the oak (which makes it automatically a victim suffering personal damage), but also as "protector of the general interest", which was certainly not generally accepted at that time.

C. CAUSATION

1. Equivalence of causes and proof of causation

Belgian legal doctrine holds that all possible causes that might have contributed to an accident are considered as equal. The result of this so-called equivalence doctrine is that as soon as a certain behaviour was the conditio sine qua non of the harm, meaning that the harm would not have occurred without the wrongful behaviour, there is liability, even if other factors have contributed to the environmental pollution as well. This theory provides far-reaching possibilities to apply fault liability for environmental pollution. Nevertheless, problems do often arise in practice when it comes to the requirement that the victim must prove specifically that the behaviour of the defendant has caused his personal damage. Nevertheless, it is increasingly noticeable that courts are willing to benefit victims by lowering the burden of proof of causation in cases of environmental liability. An example as old as 1973 from the Court of Appeals of Ghent can illustrate this point. A company had emitted waste water into a creek without a licence, which had caused considerable pollution of a particular creek. Three bulls which had drunk water from the creek died. The owner of the animals filed a civil law suit against the company concerned to claim compensation for the animals lost. The company, however, denied that there was a causal relationship between emission and

30. See the examples given by Bocken, H., l.c., 1997, 151.
32. See especially the case note by Jadot with the previous judgement.
33. This point is extensively discussed by Bocken, H., o.c.c., 112; Van Oevelen, A., l.c., 1991, 144-145.
34. For examples in case law see Van Oevelen, A., l.c., 1991, 145-147.
the death of the bulls, since it could not have been proven that the death of the animals was effectively caused through the pollution of the creek, nor was it excluded that third parties could have contributed to the pollution of the creek as well. This defence was, however, not accepted by the Court of Appeals of Ghent. The Court accepted that there was causation by eliminating all other causes for the death of the bulls. A veterinary surgeon had examined the bulls and discovered that they did not die from a disease, but from poisoning as a result of drinking the polluted water. In addition, there were no other polluting sources than the defendant’s company. Hence, having eliminated other possible causes of the death of the bulls, the Court accepted that the bulls died as a consequence of the defendant’s wrongful emissions.

This case provides an early example of the opinion defended in legal doctrine that courts should not put too heavy a burden on the plaintiff as far as the requirements of proving a causation relationship is concerned and should also accept plausible presumptions as sufficient evidence. It should also be mentioned that when more tortfeasors (emitting polluting substances) are responsible for a case of environmental pollution, a rule of joint and several liability applies. This means that the victim can claim full compensation from any of the defendants whose actions contributed to the loss. It will therefore not help a sole defendant to call on an exceptio plurium defence and to argue that his emission alone only contributed to a minor part of the pollution. As long as, with the help of the equivalence theory, it can be shown that the pollution would not have occurred in the same manner without this emission, every defendant will be liable jointly and severally with all the others for the full amount of the damage.

2. Fulfilment of a statutory duty breaks the chain of causation

The question arose in case law of whether the fact that the government has been fulfilling a statutory duty, for example, to clean up polluted soil, would mean that the chain of causation between the fault of a liable third party and the damage (the incurred costs by the government) would be broken. This question was answered in the affirmative by the Belgian Cour de Cassation in a decision of 28 April 1978. The logic is therefore that the chain of causation is broken because the only reason that the government incurred costs was to fulfill a statutory duty to clean up. The practical consequence of

36. For instance by Bocken, H., o.c., 117 and by Bocken, H., l.c., 1981, 53.
37. Another example can be found in Court of Appeals of Brussels, 14th Chamber, 15 January 1988, in case Ministry of State/boyce, unpublished.
38. This point is elaborated by Bocken, H., o.c., 124, Bocken, H., l.c., 1973-74, 1133 and by Derveaux, R., Frappier, F. and Renier, V., "Protection de nature et frontières de la répression", in Les frontières de la répression, Brussels, 1974, 401-435.
the Cour de Cassation's point of view was obviously that the government which fulfilled a statutory duty to clean up polluted soil could not recover these costs from the liable polluter. Although this point of view was heavily criticized in the literature, case law has followed this line set by the Cour de Cassation. For instance, the Court of Appeals of Mons refused civil claim of a local community to get compensation for the costs incurred in preventing pollution of surface waters, since it argued that these costs were only incurred as a consequence of the fulfillment of a statutory duty and therefore did not stand in a causal relationship with the fault. In two decisions of 1984-1985, the Cour de Cassation seemed to come back to this case law of 1978 and provided for a more balanced answer, claiming that the chain of causation would not be broken by the mere fact that costs were incurred as a consequence of the fulfillment of a statutory duty. However, in two new decisions of 1988 the Cour de Cassation seemed to change its opinion once more by claiming again that fulfillment of a statutory duty breaks the chain of causation. The least one can say is that from these confusing and contradictory tendencies in case law, it follows that at the end of the 1980s there were still substantial doubts with respect to the question of whether the public authorities could for instance use classical tort law to recover soil clean-up costs if they had first decided to clean the soil on the basis of a statutory duty. These problems were the reason why legislative action became necessary to provide a specific right for the competent public authorities to claim back from the liable polluter costs expended, for instance on cleaning up the soil. Therefore, the Flemish region adopted a decree on 12 December 1990, stipulating that the Flemish waste authority, OVAM, could treat polluted soil at the expense of those who had received a clean-up order and had omitted to react.

3. Causal uncertainty

There is a problem in tort law, which increasingly arises when exposure to polluting substances causes ill health effects. The question then often arises of how the courts should deal with uncertainty concerning a causal relationship. These problems of so-

41. This was neither possible on the basis of the negligence rule, discussed here, nor on the basis of the strict liability rule, to be discussed in § 3.
46. The liability for soil clean-up will be discussed in further detail in § 8.
called causal uncertainty play a particularly important role with regard to the so-called toxic torts. In those cases part of the population may have been exposed to hazardous substances or radiation and subsequently a certain disease, such as cancer, is discovered. The problem in those cases is that many unfortunate people may have got the disease from a variety of sources. The question therefore arises of whether the particular victim has got the disease from the so-called background risk or from the presence of, for example, the chemical plant.  

It is important to deal with these issues in research which aims at comparing British and Belgian environmental liability law. Causal uncertainty has indeed played a role in the famous British Sellafield case, where an English court had to decide on the causal relationship between childhood leukaemia and the nearby presence of a nuclear power plant at Sellafield. Belgian courts have been confronted with a similar question in the so-called Mellery case, where inhabitants of the community of Mellery in the Walloon region had physical complaints, and the question arose of whether these had been caused by emissions from a nearby waste site. This case has not been finally decided yet. The Court of Appeals of Antwerp has ordered an expert report to establish whether there is a causal link between emissions from the waste site and the damage suffered by the citizens. After the expert report the case still has to be heard before the Court of Appeals of Antwerp.

It is unclear how Belgian Law will deal with these cases of causal uncertainty, since it will still have to be proven that the emission was conditio sine qua non for the harm. Case law will probably assist the victim if he cannot provide full scientific proof of the causal link. In his dissertation, Bocken quotes cases in which the causal connection between drinking water which was contaminated with lead and certain

50. See, further to these problems on causal uncertainty, Faure, M., (Geeschijn van kans. Beschouwingen over het statistisch causaliteitsbewijs bij milieuzondezondheidschade, Antwerp, Maklu, 1993.
diseases was accepted on the ground of aetiological research\textsuperscript{52}. Causal uncertainty played a role in the well-known Amoco Fina case, which was heard before the Antwerp Court. Employees had been exposed to benzene and claimed that this exposure had had negative health effects\textsuperscript{53}. The Court of Appeals of Antwerp acquitted the directors of the company, who had been prosecuted, for reasons unrelated to the causation issue, but mentioned in an obiter dictum that there would only have been liability for the death of an employee if it had been likely that this death was caused by the exposure to benzene "with a probability amounting to almost certainty"\textsuperscript{54}. This can, however, be understood. It was a criminal case and, given the presumption of innocence, Belgian criminal law requires absolute certainty with respect to the causal connection\textsuperscript{55}.

\section*{§ 3. Strict liability}

\textbf{A. STRICT LIABILITY IN THE CIVIL CODE}

There have been a number of strict liability cases which have developed into legislation, often as a result of international agreements to which Belgium was a party. It is noticeable that a lot of these strict liability cases in statutes relate to environmental damage. Each of these statutory cases of strict liability relates to one particular type of damage or activity, for example, damage caused by toxic waste or as a result of nuclear accidents\textsuperscript{56}.

In addition to all these specific cases of strict liability which will be discussed below, there is also a strict liability rule which has a more general bearing and which is incorporated in the Belgian Civil Code. Article 1384, al. 1 of the Civil Code provides that the guardian of a defective property is liable for the damage caused by the particular defect of that property. Originally, this was not a strict liability rule, but this article 1384, al. 1 CC, has been interpreted so widely by case law that it amounts to strict liability. There is assumed to be a defect as soon as there is an abnormal feature that is deemed to cause damage\textsuperscript{57}. As a result of this, legal doctrine holds that the broad


\textsuperscript{53} The details of this case are discussed in Faure, M., \textit{o.c.}, 1993, 4 and 27.

\textsuperscript{54} Court of Appeals of Antwerp, 26 March 1993, \textit{TMR}, 1993, 239.


\textsuperscript{56} An overview of all these cases of strict liability in Belgian environmental law is provided by Bocken, H., "Van fout naar risico. Een overzicht van de objectieve aansprakelijkheidsregelingen naar Belgisch recht", \textit{TPR}, 1984, 329-415 and by Van Oevelen, A., \textit{i.c.}, 1991, 156-184.

\textsuperscript{57} Bocken, H., \textit{i.c.}, 1997, 144; Van Oevelen, A., \textit{i.c.}, 1991, 170-174.
interpretation in case law in fact amounts to a strict liability rule. The strict liability rule of art. 1384, al. 1 CC, is particularly important in cases of soil pollution. As early as 1958 the commercial court of Sint Niklaas decided that a real estate where the soil had been polluted with oil should be considered a defective property. The strict liability of article 1384, al. 1 CC rests on the guardian of the defective property. It is therefore applicable equally to the owner and to the leaseholder of polluted soil. The provision was therefore often used to recover costs incurred for the treatment of a particular polluted site. It is clear that this strict liability under art. 1384, al. 1 CC, potentially leads to very broad liability both for the innocent owner and the leaseholder of polluted soil.

B. STRICT LIABILITY IN TREATIES

1. Examples and legal basis

Many cases of strict liability have been introduced into Belgian law as a consequence of international conventions. As far as environmental liability is concerned, this specifically relates to oil pollution and nuclear liability. As far as oil pollution is concerned, there was the convention on civil liability for oil pollution held in Brussels (the so-called CLC Convention) on the 29 November 1969. This convention has been implemented in Belgian law through the act of 20 July 1976. According to this act there is strict liability for marine oil pollution, and liability is attached to the tanker owner. The same applies with respect to nuclear liability. The nuclear liability conventions (in Paris and Brussels) have been implemented in Belgian law through various statutes, the most recent one being that of 22 July 1985. According to this specific statute the licensee of a nuclear power plant is strictly liable for any damage caused through a nuclear accident. The strict liability in that particular case amounts almost to absolute liability, since the licensee is even liable when the nuclear accident is caused by an exceptional natural disaster. This therefore seriously limits the opportunity for the licensee of a nuclear power plant to call on the exception of force majeure in his defence.

60. See, on the use of this provision, Bocken, H., a.c., 1992, 37-39.
63. BS, 31 August 1985. See, with respect to the nuclear liability under these conventions, OECD, Liability and Compensation for Nuclear Damage, an International Overview, OECD, 1994.

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2. Limitations

Although Belgian law introduced, as required by the conventions, strict liability for nuclear accidents and marine oil pollution, it should be mentioned that there are specific features of the regimes of these conventions (and therefore also of the Belgian implementing legislation) which seriously limit the rights of a victim to compensation. One feature is that in both cases liability is attached to the tanker owner and the licensee. This attachment means that the victim can only base his law suit on the statutory liability based on the convention. Therefore the right of a victim to bring a suit under the common tort law regime is denied. This attachment of liability thus limits rights to full compensation and it has also been argued that it removes incentives for accident prevention from other parties whose actions could also influence the accident risk ⁶⁴.

In addition, the amount at stake is usually seriously limited by the introduction of financial caps. Indeed, the conventions on nuclear liability and on liability for marine oil pollution provide for serious limitation on compensation ⁶⁵. For instance, in the Belgian Act of 22 July 1985 the liability of the licensee of a nuclear power plant was limited to four billion Belgian francs, which amounts to only a fraction of the total damage of an average nuclear accident. It has therefore been argued in the literature that although this Belgian statute on nuclear liability introduces strict liability, it in fact limits the liability of a potential injurer, compared with the regular tort law system ⁶⁶. Indeed, some have argued that the object of these nuclear liability and oil pollution conventions was not so much to increase protection for the victim, but to limit the risks of, for example, a nuclear power plant operator ⁶⁷.

C. FEDERAL AND REGIONAL LEGISLATION

The introduction of strict liability in specific statutes in Belgium did not occur only as a consequence of international conventions. As early as 1963 strict liability for atomic

⁶⁵. These financial caps can lead to a problem of underdeterrence, see Faure, M., i.c., 1996, 93.
⁶⁷. See, for instance, Van Maanen, G.E., "Pleidooi voor verbetering van de rechtspositie van slachtoffers van kernongevallen", Nederlands Jurisprudentieblad, 1986, 1342; and Van Maanen, G. E., "De civielrechtelijke aansprakelijkheid voor kerngevallen naar Nederlands recht", in Faure, M. (ed.), Aansprakelijkheid voor het nucleaire risico, Antwerp, Maklu, 1993, 19. Note, however, that both with respect to oil pollution and nuclear accidents, there is a tendency to amend the existing conventions to increase the available amounts as a result of political pressure.
ships was introduced. The same applied to underground transport and the storage of natural gas and to the underground storage of gas. One of the early examples of strict environmental liability concerns the strict liability of the producer of toxic waste for all damage caused by the waste, either during transport or on discharge of the waste, even when this transport was not carried out by the producer himself. As a consequence of this strict liability regime instituted through article 7 of the Toxic Waste Act of 1974, the producer of toxic waste remains liable for damage caused by the waste, until the waste is finally eliminated. This also constitutes a case of attachment of liability, since only the producer of the toxic waste is liable for the damage caused by the waste and he can only be freed from liability if he can prove that there is no causal relationship between the toxic waste and the damage suffered by the victim.

When the most important legislative competencies for environmental policy-making were awarded to the regions as a consequence of the federalisation of Belgium, strict liability regimes in environmental law were also introduced in regional decrees. One can for instance mention the fact that strict liability for the removal of ground water already existed in the federal act of 10 January 1977 and that this was taken over in article 14, § 1 of the Flemish Ground Water Decree of 24 January 1984. This strict liability regime relates to damage that would be caused to plants or buildings on the surface as a consequence of the removal of ground water.

D. VALUATION

Many Belgian tort lawyers, among them Bocken, favour a strict liability regime for environmental liability, their main argument being that the interests of the victim are better served in this way. In addition to this victim compensation argument (also based on the polluter pays principle), the argument is also sometimes advanced that a

68. Act of 9 August 1963, BS, 8 October 1963. In fact this was a specific act which was only promulgated as a consequence of the arrival of an American atomic submarine, the NS Savannah, in the Antwerp harbour.
69. Act of 12 April 1965, BS, 7 May 1965. This strict liability regime is described by Bocken, H., o.c., TPR, 1984, 366.
70. Act of 18 July 1975, BS, 14 August 1975. See the discussion of this regime by Bocken, H., o.c., TPR, 1984, 368 and by De Decker, H. and Schautteet, M., i.c., 96 and 105.
71. Article 7 of the Act of 22 July 1974, BS, 1 March 1975. See, with respect to this regime, Bocken, H., o.c., 318; Bocken, H., o.c., TPR, 1984, 384; Bocken, H., i.c., 1997, 146 and De Decker, H. and Schautteet, M., i.c., 106.
72. See, on the competencies for law-making as far as environmental policy is concerned in Belgium, Deketelaere, K., i.c., 1996, 36-43.
73. BS, 5 June 1984. See on this regime Bocken, H., o.c., 308 and Bocken, H., o.c., TPR, 1984, 368.
strict liability rule would prevent more accidents, since it would give the injurer an incentive to take all efficient precautionary measures to reduce environmental harm.\textsuperscript{76}

$\S$ 4. Nuisance

In Belgium case law has been developed to regulate the conflict of property rights. This case law is based on article 544 of the Belgian Civil Code, which is the general clause protecting private property. According to this article, the owner of a property has the right to use and transfer his property at his own will, on condition that this use does not violate regulatory provisions. The Belgian Cour de Cassation has interpreted this provision to hold that a balance should be kept between neighbouring properties, so that one property may not cause unreasonable damage to the other properties, as this would upset the balance between them. If such unreasonable damage occurs, then compensation is due without fault. Ordinary consequences of the use of one property for other properties should, however, be accepted - as long as they do not go beyond the bounds of what might be considered "reasonable."\textsuperscript{77}

A first condition for this liability under nuisance law is that there has to be some relationship between the two properties. Case law, however, states that it is not merely the owner of a neighbouring property who can claim damage for unreasonable harm, but also, for instance, one who rents or otherwise has taken possession of the neighbouring property.\textsuperscript{78} The fact that nuisance law covers harm having an origin in one property and affecting another property, however, does not require that both properties should necessarily be "neighbouring" in the strict sense.\textsuperscript{79} According to newer case law, nuisance law is also applicable when the "victim" property is at some distance from the "injurer" property.\textsuperscript{80} A second condition for this nuisance law to apply is that the harm must exceed the normal level and kind of nuisance which has to be accepted from the fact that neighbours exercise their property rights.\textsuperscript{81} Only when such an exercise leads to excessive harm for the neighbour, will a claim for compensation emerge.\textsuperscript{82}

It is generally held that this case law is also of major importance in the field of environmental liability. A weakness of this doctrine is obviously that one cannot predict in

\begin{itemize}
\item \textsuperscript{77} These principles have been stated in two decisions of the Cour de Cassation of 6 April 1960, \textit{Arr.: Cass.}, 1960, 920, \textit{Par.}, 1960, 1, 915.
\item \textsuperscript{79} Although the older case law did require this, see Bocken, H., \textit{o.c.}, 280.
\item \textsuperscript{80} So De Pue, E., Lavrysen, L. and Stryckers, P., \textit{o.c.}, 602.
\item \textsuperscript{81} It also depends on what level and kind of nuisance is considered normal in that particular region (Bocken, H., \textit{i.c.}, 1997, 145).
\item \textsuperscript{82} De Pue, E., Lavrysen, L. and Stryckers, P., \textit{o.c.}, 663.
\end{itemize}
Environmental liability in Belgium

advance whether any particular harm will be considered excessive by the court. However, compensation was awarded in a case where the paint of a parked car was damaged by emissions from a chemical plant. Also the damage that was caused by moisture to green houses after a neighbour released excessive loads of rainwater had to be compensated on the basis of article 544 CC. The provision was also applied in the case of nuisance created by a smell resulting from the emission of waste water into a creek.

When the court has to decide whether a particular nuisance has an unreasonable or excessive character, it will take into account the use that is made of the specific site. This brought the Civil Court of Turnhout to the notable decision that a shepherd wishing to breed sheep who had located himself in the middle of an industrial area has no claim to compensation for the damage caused to his sheep by emissions coming from industry. The shepherd had freely taken the risk of harm by coming to the nuisance. This decision, however, certainly does not represent the common opinion of Belgian legal doctrine, since a so-called "first-use doctrine", awarding "first come, first served" rights to vested industry is certainly not accepted in Belgian law.

Summarising, one can state that the nuisance case law based on the property law provision article 544 of the Belgian CC can provide adequate protection in cases where nuisance is caused by emissions coming from neighbouring (in the broad sense) properties. The requirement that the nuisance must be excessive or unreasonable of course leads to uncertainty. This therefore sometimes leads to cases in which courts deny the application of this nuisance case law to environmental damage which they consider to be less important, since article 544 CC equally protects the right of industry to use its property in a reasonable manner.

The fact that only unreasonable nuisance has to receive compensation obviously has important consequences for the amount of compensation as well. In the case of ordinary tort liability, a victim must in principle be fully compensated and the compensation

86. Civil Court of Turnhout, 17 February 1978, unpublished, quoted by De Pue, E., Lavrysen, L. and Strickers, P., o.c., 663.
should aim to put the victim back in the situation where he would have been had the tort not been committed (the status quo ante). In the case of a nuisance, article 544 CC does not lead to full compensation for the damage, but only to compensation for the excessive damage. Another difference between the traditional tort liability and nuisance law is, as we shall immediately elaborate below, that the possibilities of restitutio ad integrum in the case of nuisance law are more limited than in the case of tort liability. Nuisance law does not give a right to the plaintiff to demand that the judge should give an injunction to prohibit further damage (for example, through ordering a shutdown of a company or installation). The dogmatic reason for this is that nuisance law does not assume wrongful behaviour on the part of the defendant and therefore the judge would not be able to prohibit behaviour which as such is not considered wrongful. Because nuisance law does not require a proof of fault, art. 544 CC is considered a strict liability rule in legal doctrine.

§ 5. Remedies

The most common remedy in case of a tort is monetary compensation. However, the only requirement is that the victim of the tort should be put back to the state he was in before the tort occurred (the status quo ante). This may not necessarily take place by means of monetary compensation: it can also occur by restitutio ad integrum, in which case the court can order that the victim is literally put back in the situation he was in before, for example, by ordering that polluting substances should be removed. In fact the courts have relatively wide freedom to determine all kind of measures that the tortfeasor should take to stop the harm from continuing or to repair damage caused in the past. As a consequence of this, the civil court has the right to order the shutdown of an enterprise that had been operated without a licence, simply as a restitutio ad integrum. The question arises of whether the civil court would have this right if the measure were not directed at restoring harm caused in the past, but at preventing future harm from occurring. Bocken holds that such a preventive measure is allowed (for example, a precautionary shutdown of a company) when there is a large likelihood that further damage will occur in the future.

The ability of civil courts to order a restitutio ad integrum as remedy for a tort, is just a matter of legal doctrine. In many cases courts do indeed order, for example, the

88. Derine, R., i.c., 1697.
89. See also Cour de Cassation, 14 December 1995, RW, 1996-97, 188.
90. These issues are extensively discussed (and criticized) by Bocken, H., i.c., 1973-74, 1142; Bocken, H., o.c., 291; Bocken, H., i.c., 1981, 60 and by Derine, R., i.c., 1707.
91. Deketeleere, M., i.c., 685; Van Oevelen, A., i.c., 1991, 158-163.
92. See, on these principle possibilities of both monetary compensation and restitutio ad integrum in tort liability, Bocken, H., i.c., 1973-74, 1133 and Bocken, H., i.c., 1981.
93. De Pue, E., Lavrysen, L. and Stryckers, P., o.c., 651.
94. Bocken, H., o.c., 141.
shutdown of a harmful installation as a civil remedy. When the defendant would not fulfil his duty to repair the damage done, the judge could equally give the right to the plaintiff to repair the damage himself at the expense of the defendant. In that case the plaintiff, however, runs the risk of the defendant being insolvent. More effective and more frequently used is therefore made of an order to repair damage done under the threat of a penalty payment if the ordered measures are not taken within a certain time.

It is important to note, however, that where the judge has a lot of discretion in choosing an appropriate remedy (monetary compensation or a variety of restoration measures) in the case of a tort (negligence or strict liability), the same is not true if, as we already indicated before, the law suit is brought under nuisance law. If a claim is based on article 544 CC, the judge can provide monetary compensation to the plaintiff, but may not grant an injunction aiming to prevent further harm in the future.

Finally, it should be noted that *restitutio ad integrum* can be ordered by the civil courts and also by the criminal court. The situation in Belgian law in that respect is rather complex because, as we shall discuss below, civil claims can be brought before the criminal court. In that case it is not always exactly clear whether the judge is ordering a *restitutio ad integrum* as a criminal sanction (in which case this has obviously to be provided for in the criminal statute because of the legal principle) or whether it is simply ordered by the criminal court as a civil remedy on the request of the victim who is acting as a civil party in the criminal court. There is, in any case, an important limitation on the competence of the criminal court: the criminal court can judge the consequences of a crime, but does not have the right to prohibit the defendant from undertaking specific acts in the future in order to prevent further harm. In other words, the criminal court does not have the competence to formally prohibit a defendant from repeating a similar act in the future. From this it follows that it does make a difference for a victim of environmental pollution whether he prosecutes the defendant before the civil court (as civil party) or before a criminal court. In the latter case, his opportunity to ask for preventive measures to avoid further pollution in the future are, according to case law and legal doctrine, more restricted.

95. See, for instance, Criminal Court of Tongres, 16 January 1969, RW, 1969, 87. In that case the Criminal Court ordered a shutdown of a company, not as a criminal sanction, but as a civil remedy.
§ 6. Retrospective law and the protection of innocent owners

An important issue within the field of environmental liability is no doubt whether the legal rules still are in balance and reasonable. A method of answering this vague question is to analyse whether the liability rules are put into effect in such a way that they adhere to basic principles of efficiency and fairness. From an efficiency point of view, one could argue that liability rules should have a preventive effect and should therefore only be directed to those whose incentives for proper behaviour can be affected. The same rule can be formulated as a principle of fairness: only those who actually contributed to the risk should be held liable and in principle only to the measure in which they actually contributed to the risk.

Environmental liability in some legal systems may collide with these principles on various occasions. This is especially the case as far as soil pollution is concerned. The policy makers often look for all kind of reasons to have the industry still in business pay for "the sins of the past", even when this may not serve preventive goals. Particularly since the government tends to be the victim of soil pollution, it will actively seek all kinds of methods to recover costs, even if this collides with the traditional principles. One example of such a collision has already been presented: in tort cases a joint and several liability rule often applies. To the extent to which the tortfeasor actually has to pay for damage that he did not cause and has no means of recovering these costs from other tortfeasors, he will have to compensate more than proportionately to his contribution to the risk. A second example lies in the area of causal uncertainty. When there is causal uncertainty, judges often have the tendency to shift the risk of causal uncertainty to enterprises. In those cases, the shift of this risk of proof will often be decisive for the outcome of the case. This was, for instance, the case in the Netherlands, where a joint and several liability rule (called "alternative causation") was applied in a case where it was uncertain which manufacturer sold a specific drug to a particular mother who later gave birth to a handicapped daughter. The result of such a shift of the risk of causal uncertainty is that the enterprise will to a large extent have to contribute for losses it did not cause. This perverse result can be avoided through a proportionate liability rule, such as a market share liability in product liability cases. This pro-

99. Causal uncertainty has also been discussed above at § 2, C, 3.
100. See, for examples of this tendency in case law, Faure, M. and Hartlej, T., "Towards an expanding enterprise liability in Europe? How to analyze the scope of liability of industrial operators and their insurers", Maastricht Journal of European and Comparative Law, 1996, 250-252.
portionate liability rule is less rigorous than the all-or-nothing approach of the reversal of the burden of proof and means that the victim can claim a proportion of the damage equal to the amount which the enterprise contributed to the loss. Thus, the exposure to liability of the enterprise corresponds precisely with the amount which the enterprise contributed to the risk \(^{102}\).

A third area in environmental liability where expanding liability might collide with principles of efficiency and fairness concerns retrospection. This can take different forms. The problem of retrospection always arises in cases of historic soil pollution. When new legislation is implemented, often the question will arise of whether the new statute also applies to old situations. Retrospection can also be hidden in the fact that judges sometimes apply an existing liability rule, but apply a new standard of care to an "old" situation. This obviously happens in almost every case where new standards of care are applied to old situations \(^{103}\).

Finally, in environmental liability the question also arises of whether good faith constitutes a ground of excuse. Again, this issue will often arise in the area of soil pollution. A so-called innocent owner, being someone who was not aware of the fact that the specific soil was polluted when purchased, will often claim that he cannot be held liable.

For many years, these issues were not dealt with explicitly in Belgian law. The retrospective aspect that is hidden in every change in case law in which new standards are applied to old situations is as such not discussed in Belgian law \(^{104}\). A possible solution to providing, on the one hand, an adaptation of the new care standard to new technological developments and, on the other hand, avoiding the harsh effect of applying the new standard to old situations could be found in the so-called "prospective overruling", whereby the court would announce that a new standard would apply in the future, but that the new standard would not yet apply to the existing situations, because those injurers could not foresee that their behaviour would be considered wrongful. There are no signs that such a prospective overruling theory is being followed in Belgian tort law.

The issue of retrospection and the protection of innocent owners has received a lot of attention in Belgian law. One of the criticisms on the strict liability regime of article 1384, al. 1 CC, was related to the fact that this provision leads to a strict liability of every possessor of an interest (referred to as a "guardian") in a polluted site, whereby the liability also applied to the one who had not caused the pollution himself even if the


pollution had a source in a distant past. For this reason, this provision was heavily criticized in Belgian legal doctrine. As we will show below, it led to a drastic change in the new Flemish decree on soil pollution, which provides for a ground of excuse for the owner of a polluted soil who is in good faith, i.e. who is not aware of the fact that the soil in question was polluted when he purchased it. With that new decree Flanders seems to have chosen a different approach to that of the United Kingdom’s Environment Act of 1995, in which a strict retrospective liability was instituted for the restoration of contaminated sites.

§ 7. Proposals of the Interuniversity Commission

A. THE INTERUNIVERSITY COMMISSION

In the introduction we have already mentioned that the current system of environmental liability in Belgium may dramatically change (and has already dramatically changed as far as soil clean-up liability is considered) as the result of the working of an Interuniversity Commission for the reform of environmental law in the Flemish region. In 1989, the former Flemish minister for environmental policy installed a commission of academics under the presidency of Hubert Bocken, with the task to draft a comprehensive code on environmental law and policy. A first report was presented in December 1991 and a final draft was presented in February 1995.

This draft decree on environmental policy contains both a title on environmental liability and a title on protection of the soil and soil clean-up. Even before the Interuniversity Commission presented its final draft, the Flemish authorities had already implemented the proposals of the commission in a soil clean-up decree of 22 February 1995. This new decree, which largely follows the proposals of the commission, is discussed below. We now concentrate on the proposals of the commission with respect to environmental liability.

Before doing so, it might be appropriate to briefly summarise why the situation with respect to environmental liability in Belgian law was not ideal before 1995. We showed that liability for negligence provided for a great deal of environmental liability, given the fact that every violation of a regulatory duty automatically constitutes a fault. Moreover, the causation requirement could easily be met as a result of the equivalence theory and case law was "victim friendly", as far as the burden of proof was concerned. In addition, in many cases proving a fault was not even required, since there were an increasing number of strict liability cases.

**B. PROBLEMS WITH THE EXISTING ENVIRONMENTAL LIABILITY SYSTEM**

Nevertheless, there remained several weaknesses in that system\(^{110}\).

First of all, it must be noted that the fault requirement might indeed easily be met in those cases where a regulatory standard had been violated, but that there were still a number of cases where the victim would not be able to prove such a breach of a regulatory duty. In those cases, the judge would still have had to engage in a balancing of interests between economy and ecology, of which the outcome is highly uncertain.

Second, the theory that the execution of a statutory duty breaks the chain of causation has as the consequence that in any case in which the government had a duty to clean up, for example, polluted sites, tort law could not be used to recover the court costs.

Third, there are indeed an increasing number of strict liability cases, but the introduction of strict liability is in no way justified by any economic or ecological logic. It seems more as if the authorities had simply introduced strict liability in specific statutes when there was public pressure to do so because, for example, of accidents or polluted sites. That was the reason why liability for damage caused by nuclear-powered ships was introduced and why strict liability for the producer of toxic waste came into being. There is no reason why there is strict liability in those cases but not when an accident happens as the result of the operation of a chemical plant.

Fourth, we indicated that the remedies are relatively broad in the case of tort liability but rather limited in the case of nuisance and when criminal liability is at stake. All of these weaknesses in liability are seen in dealing with environmental pollution.

However, in some cases expanding liability seems to reach far beyond what would be reasonable if liability were to serve the aims of prevention and justice. This is particularly true if one regards the liability of the guardian of polluted soil under art. 1384, al.1 CC. This amounts _de facto_ to a strict retrospective liability for the innocent owner or lesseeholder. That seems to be an example where the application of private law rules

\(^{110}\) For a summary of these weaknesses see Bocken, H., _I.c._, 1997, 147.
on environmental liability amounts to over-extended liability. Obviously the Interuniversity Commission took all of these shortcomings into account when it formulated its proposals.

C. PARTS 7 AND 9 OF THE DRAFT DECREE ON ENVIRONMENTAL POLICY

Environmental liability is dealt with in various places in the draft decree on environmental policy. Title 4 of part 7, which deals with enforcement, relates to the private law injunction. Title 5 of part 7 deals with the so-called "treatment project". The core of environmental liability is, however, dealt with in part 9 (compensation of damage caused by pollution). Title 1 deals with liability and financial guarantees; title 2 deals with compensation of damage by the Flemish region at the expense of the prevention and treatment fund for the environment and nature. Title 3 of this part 9 deals with deposits and title 4 with the so-called environmental guarantee account.

D. THE PROPOSED LIABILITY REGIME

Turning to liability and financial guarantees, the explanatory memorandum by the Interuniversity Commission first of all states, as we just have mentioned, that the then current Belgian environmental liability law had various shortcomings, one of them being that a fault may be difficult to establish; another that strict liability statutes remain limited and that ecological damage as such cannot be compensated 111. In addition, the victim had no guarantee against the insolvency of the injurer.

The key concept of the liability regime proposed by the commission, is that anyone who causes damage to or impairment of the environment as a result of an emission shall be held liable in accordance with the provision of title 1 of part 9 (article 9.1.3) 112. The explanatory memorandum makes clear that this is a strict liability. Fault or wrongfulness do not need to be proven. The arguments given are that modern technology creates an increased risk, so that the person who creates this risk and benefits from it, should also bear the negative consequences of damage. In addition, the commission refers to the polluter pays principle, arguing that the damage caused by environmental pollution should be allocated to the polluter 113.


There are, however, a couple of important exceptions to liability. Article 9.1.6 provides that there shall be no liability where:

a. the activity which lies at the root of the emission does not infringe any statutory provisions, and  
b. the emission corresponds to normal practice, taking into account local circumstances, and  
c. the pollution which results from it:  
   - corresponds to normal practice in the light of local conditions, or  
   - where quality standards apply, does not exceed the applicable guidelines.  

The reason for this exception is that when no regulatory standards are violated, the strict liability should not apply to "normal" pollution, which is inevitable in any industrial society. This refers to the tolerance standard, which could be found in Belgian nuisance law and which can also be found in article 8.6 of the Convention of Lugano.

The Interuniversity Commission also takes a specific point of view on the above mentioned retrospection issue by stating in article 9.1.12 that the provisions of the new title on environmental liability shall only apply to damage and impairment of the environment which are the result of emissions which took place after the entry into force of the new decree. Hence, retrospective application of the new regime is explicitly rejected.

Liability for environmental damage is attached according to article 9.1.4 § 1 to the operator of a classified installation, when the emission emanates from a classified installation or is the result of a classified activity. If no classified installation or activity is involved, the liability remains, according to article 9.1.3, with the person who actually caused the emission.

It is also important to stress that article 9.1.13 mentions that the proposed provisions shall apply without prejudice to the rights which the victim of the damage may exercise against the person liable or against a third party on a different legal basis. This means that the environmental liability regime proposed by the Interuniversity Commission is not exclusive. This is, hence, an important difference with from, for example, the nuclear liability conventions mentioned above. This means that the victim still holds the right to use the traditional Belgian tort law regime as well.

114. See Bocken, H., e.a., 1997, 147.  
115. See on this attachment of liability also above § 3. B. 2.
E. COMPENSATION FOR ECOLOGICAL DAMAGE

The proposal of the Interuniversity Commission also aimed at bringing ecological damage within the reach of the liability regime. It did so by introducing a different regime for, on the one hand, "damage", which is basically personal damage (such as damage to health, damage to property, economic loss) and, on the other hand, "environmental impairment", which covers ecological damage.

As far as damage is concerned, article 9.1.7 § 1 provides that any person who suffers damage as a result of an emission, may claim restoration in kind or compensation in money. In the case of impairment of the environment, which cannot be defined as damage, article 9.1.8 § 1 provides that it shall only be possible to apply for measures of reinstatement of the environment (restitutio ad integrum) or for the reimbursement of the cost of these measures. This claim can, according to article 9.1.8 § 2, only be made by the Flemish government, either on its own initiative or at the request of the municipality where the impairment of the environment took place. Environmental associations are thus not given standing to sue for the treatment of environmental damage. They can, however, seek an injunction to prevent illegal polluting activities.116

F. FINANCIAL GUARANTEES AND DEPOSITS

The proposals of the Interuniversity Commission also provide for several forms of financial guarantees. Article 9.1.14 § 1 provides that the Flemish government shall designate specific categories of classified installations and activities for which the permit holder is bound to provide financial guarantees against liability for the damage or impairment of the environment which may be caused by the installation or activities. However, the Interuniversity Commission has explicitly not chosen to impose compulsory insurance. Article 9.1.16 provides that the financial guarantee may assume any of the following forms:

- insurance policy;
- guarantee provided by a financial institution;
- any other form of personal or collateral security;
- a deposit paid by way of security on a separate account from the environmental guarantee account, in accordance with the provisions of title 3 (deposits) of this part.

In some cases, the permit holder may be required to pay a deposit into an environmental guarantee account. These deposits are held in a separate account for the benefit of the depositor and can only be used to cover expenses related to the treatment they are

116. See Bocken, H., Ryckbos, D. and Delodere, S., o.c., 220.
117. For a summary, see Bocken, H., i.e., 1997, 148-149.
intended to cover. When all the obligations have been fulfilled by the permit holder, the deposit and the interest relating thereto have to be repaid to the permit holder. This means that effectively the deposit is an amount of a guarantee that stays at the disposition of the authorities who run the environmental guarantee account and provides proceeds in the form of interest which are returned, for example, when an operation is terminated and no damage has occurred. Title 4 of part 9 deals in more detail with the environmental guarantee account.

Finally, it should be mentioned that the liability as proposed by the Interuniversity Commission is in principle unlimited. There is, however, an alternative mechanism provided for in article 9.1.24, under which the operator may limit his liability if he provides a financial guarantee to compensate for any damage or impairment of the environment that he might cause. If specific amounts are paid to a so-called voluntary guarantee fund, article 9.1.24 provides that the operator will benefit from a limitation of liability up to the amount which has been paid. Detailed rules concerning the conditions which must be met by such a guarantee fund in order to satisfy all the requirements still have to be worked out by the Flemish government.

§ 8. Liability for soil clean-up in Flanders

A. Waste Decree of 2 July 1981

On the particular topic of liability for soil clean-up in the Flemish region, the Flemish Waste Decree of 2 July 1981 is to be noted. This Decree instituted an administrative agency, OVAM, and gave it—inter alia—the task of organizing the clean-up of polluted soils. Originally the Waste Decree provided only that OVAM could ex officio treat polluted soils, but omitted to provide a specific regulation concerning recovery of the costs. That has been provided in the Decree of 12 December 1990, which stipulated that OVAM could treat the polluted soil at the expense of the one who had received an order to clean up and had omitted to react. This provision gave far reaching competencies to OVAM which could clean up at the expense of almost anyone (innocent or not) and under all circumstances (irrespective of whether the provisions of the Waste Decree had been violated or not). This provision, which amounted to strict liability, was


119. For further details concerning this guarantee fund, see Bocken, H., Ryckbost, D. and Deloddere, S., o.c., 222-223.

120. Openbare Vlaamse Afvalstoffenmaatschappij.

121. Art. 21, § 2, o of the Waste Decree.
heavily criticized in the literature\textsuperscript{122}. Since this provision was too broad and unspecified a new regulatory framework was necessary to provide for the possibility of recovering clean-up costs.

B. SOIL CLEAN-UP DECREES OF 22 FEBRUARY 1995

This new regulatory framework was provided through the working of the already mentioned Interuniversity Commission for the reform of environmental law in the Flemish region.

Part 11 of the Draft Decree on Environmental Policy contains a title on protection of the soil and soil clean-up\textsuperscript{123}. Even before the Interuniversity Commission presented its final draft, the Flemish authorities had already implemented the proposals of the commission in a Soil Clean-Up Decree of 22 February 1995. This new Decree contains detailed provisions both concerning the duty to clean up and concerning liability\textsuperscript{124}.

C. LIABILITY FOR NEW SOIL POLLUTION

As far as liability is concerned, a distinction is made between "old" and "new" pollution\textsuperscript{123}. The liability for new soil pollution is laid down in art. 25-29 of the Decree. The principle laid down in art. 25 § 1 is that anyone who has caused soil contamination as a result of an emission shall be liable for all expenses which have been incurred arising from the soil clean-up as well as for the further damage caused by the latter.


\textsuperscript{125} New and historic pollution are defined in art. 2, 4\textsuperscript{a} and 5\textsuperscript{a} of the decree as pollution that came into being before or after the entering into force of the Soil Clean-Up Decree. See Ryckbos, D., i.c., 1995, 181.
This is a new rule of no fault liability in respect of the costs of soil clean-up. However, when the emission which caused the soil contamination emanated from a classified installation or was the result of a classified activity, art. 25 § 2 of the Decree provides that it will be the operator who will be liable, i.e. the licensee of the classified installation. This is the so-called attachment of liability to the licensee.

It should also be noted that specific rules are laid down in the Decree, which favour the position of the "innocent possessor" who did not cause the contamination, but, without being aware of it, acquired contaminated land and who is actually the victim of contamination caused by others. In fact the Decree stipulates that the innocent possessor is not bound to carry out the cleansing treatment or to finance this himself. This in turn deals with the liability of the innocent possessor. The innocent possessor is not liable if he (1.) did not cause the contamination and (2.) was unaware of the contamination and was not deemed to be aware of it at the time when he became the operator.

D. LIABILITY FOR PAST POLLUTION

Liability for past pollution is regulated in a totally different way. Art. 32 § 1 of the Soil Clean-Up Decree provides that the new strict liability laid down in the Decree does not apply retrospectively. Liability for the cost of soil clean-up as well as any further damage shall be determined in accordance with the rules of tort liability which applied before the Decree entered into effect and which have been discussed above. Note that although the new Soil Clean-Up Decree does not apply to past pollution, innocent possessors of land polluted in the past can enjoy exemption from liability if they meet the criteria set out above. But this limitation only applies to the costs of soil clean-up. Liability based on fault continues to apply in full, even in relation to the innocent possessor.

Finally, we should also note that the new soil clean-up decree provides for a regulation of the public law liability.

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126. See Bocken, H., Ryckbos, D. and Delodende, S., o.c., 237; Deketelaere, M., l.c., 1995, 129; Ryckbos, D., l.c., 1995, 199.
127. See Bocken, H., Ryckbos, D. and Delodende, S., o.c., 888-895 and 1160-1161; Ryckbos, D., l.c., 1995, 199.
128. See Bocken, H., Ryckbos, D. and Delodende, S., o.c., 238-240; Ryckbos, D., l.c., 1995, 199-200.
129. The application of the exemption for cases of innocent possession is more wide-ranging in cases of past pollution. It is beyond the scope of this contribution to discuss this matter in detail.
§ 9. Enforcement of civil claims

Although it was stressed in the introduction that we would merely address material environmental liability law, there are two procedural aspects of Belgian law which do have an important bearing for environmental liability and which therefore merit discussion.

A. RIGHT OF ACTION OF NGOs

It has already been mentioned above that in principle under Belgian tort law a claim can only be filed by the one who has personally suffered harm. This obviously causes a problem in the case of so-called "ecological" damage 133. The requirement for personal damage traditionally caused a lot of problems when NGOs wanted to file a law suit, usually claiming an injunction to prevent threatening environmental damage. The traditional answer in Belgian procedural law was that an NGO could not represent collective interests. The general interest had to be defended by the Ministry of State 134.

The question whether or not NGOs could file a law suit "in the public interest" was heavily debated by Belgian case law in the early 1980s. The highest Belgian administrative court, Raad van State, declared a claim by an environmental action group admissible 135. But almost in the same period, the highest Belgian ordinary court, Hof van Cassatie, denied standing to environmental groups in decisions of 19 and 24 November 1982 136. These decisions were heavily criticized in the literature 137. This discussion, however interesting it may be, now largely belongs to legal history 138. The reason is simply that the Belgian authorities have intervened to grant a legal right of

133. That is precisely one of the reasons why the Interuniversity Commission worked out specific proposals in the case of so-called impairment of the environment.
134. See also on this development Bocken, H., i.e., 1997, 152-153.
action to NGOs. A new act of 12 January 1993 introduced the means for NGOs to ask the president of the court of first instance for an injunction if there was either a clear infringement of environmental legislation or a serious threat of such an infringement. Hence, the Belgian authorities introduced a right of action for environmental groups, more specifically aiming at prevention or treatment, even before the Interuniversity Commission for the Flemish region, which had formulated similar proposals, had presented its draft decree. The possibilities offered under the act of 12 January 1993 are now often used in practice by many NGOs 139, although the Ministry of State can use this preventive action as well 140.

B. CIVIL CLAIMS BEFORE THE CRIMINAL COURT

There is a second feature of Belgian environmental procedural law that is certainly important for environmental liability as well and therefore should be mentioned. This concerns the fact that in Belgium, just as is the case in France, victims of a crime may submit their civil claim to the criminal court as well. The victim may even initiate the criminal proceedings himself, either by filing a complaint with the Ministry of State, or with the juge d’instruction, or even by bringing a direct citation against the defendant before the criminal court. The method most commonly used by victims of crimes is simply to wait until the criminal investigation by the public prosecutor has come to an end, after which the victim may become a so-called partie civile during the criminal trial. The criminal court will then take a decision, not only with respect to the public action brought by the public prosecutor, but also with respect to the civil claim brought by the victim 141.

This system has obvious advantages for victims. First of all, they can make use of the investigation done by the public prosecutor, who in fact can also gather evidence which may be useful to support the civil claim brought by the victim. In addition, the victim has no need to file a separate claim with the civil court, but can simply join the prosecutor in the proceedings against the defendant. Hence, costs may be substantially lower for the victim than they would be in a separate civil proceeding.

In environmental practice in Belgium, it is therefore noticeable that victims do join the public prosecutor against a defendant. Often these victims are administrative authorities, such as the Flemish waste authority OVAM, which may be trying to get compensation if, for instance, a defendant committed illegal soil contamination. The only requirement

140. See, for details on this claim-for-suspension procedure, Deketele, K., i.e., 1996, 68-69.
141. For further details concerning this system, see Faure, M., i.e., 1992, 265-271.
in case law is that the administrative authority's interests had indeed been violated with respect to its private (usually monetary) interests. In such a case, administrative authorities may not only claim compensation, but also the *restitutio ad integrum* in the form, perhaps, of treatment of the polluted site. In that particular case, complications may arise, since a similar measure could also be ordered by the criminal court as a criminal sanction on the request of the public prosecutor. More particularly this may give rise to problems, where, for example, a victim or an administrative authority acting as partie civile would prefer a different method of treatment than that favoured by the public prosecutor.

Although these particular features of Belgian environmental procedure may prove to be quite beneficial in practice, since they allow for the use of an optimal mix of various legal instruments to attack the pollution problem, they might also pose problems. For instance, the act of 12 January 1993 gives the public prosecutor the right to intervene in a proceeding with the president of the civil court of first instance, asking for an injunction. However, one can also find administrative authorities acting as victims with a civil claim against the defendant before a criminal court. Through these developments, the boundaries between the traditional legal areas have become increasingly vague. This once more shows how environmental law is an area where all kinds of traditional boundaries seem to disappear.

§ 10. Concluding remarks

In this contribution I have tried to provide a brief impression of the way Belgian private law generally deals with problems of environmental pollution. Indeed, to a large extent environmental liability in Belgium today still relies very much on an application of the traditional principles of private law to environmental pollution. It is, however, noticeable that case law is helping victims in their battle for compensation for environmental damage by relaxing the formal requirements for compensation. This tendency is certainly seen in the requirement under the negligence rule that the victim has to prove that the injurer was at fault. This proof will seldom pose problems in those cases where a regulatory duty or standard has been violated. In those cases, Belgian case law automatically holds that the fault requirement is met. Moreover, in other cases where there has been no violation of a regulatory provision, legal doctrine holds that judges tend to accept easily that an operator acted wrongfully from the moment that serious environmental pollution occurred from his establishment. Also, as far as causation is concerned, the traditional "equivalence of causes" rule makes the scope for compensa-


144. So Faure, M. and Morens, P., i.e.
tion potentially very large. In addition, proof of this causal link can even be based on presumptions.

There are, however, also limitations. One problem is that tort liability based on negligence very much assumes that there is one individual victim who suffers personal damage. This leads to problems if the victim cannot be identified and the pollution has a more collective nature. For those cases, legislative intervention has been necessary. This has now mostly been dealt with through the introduction of a legal right of action for environmental groups and other actors who can seek an injunction if environmental statutes are violated.

To some extent, specific provisions have been made by introducing strict liability, such as for damage caused by nuclear waste, marine oil pollution and nuclear accidents. Also, nuisance law could, in some cases, help victims to get compensation for harm which exceeds the “normal” nuisance. Moreover, the typical feature of Belgian criminal procedure - that victims can join the public prosecutor and bring their claim directly against the defendant in the criminal court - , may often prove to be quite useful for victims of environmental pollution.

Although the application of the traditional principles of private law to environmental pollution could potentially deal with many cases of environmental damage, there remain various problems. One can for instance point to the fact that when there has been no violation of a regulatory provision, the judge would get involved in balancing the interests at stake to determine whether the defendant had acted in a negligent way. The outcome of this balancing process is still often highly uncertain in practice. In addition, traditional tort law could not deal with problems of collective damage and the introduction of strict liability did not take place in a very systematic way. There is no good theoretical explanation why strict liability has existed in some cases, but not in others. These shortcomings were not only to the detriment of the victim. We showed that some interpretations of case law of, for example, the liability of the custodian of a defective good under art. 1384 al. 1 of the civil code, lead to strict retrospective liability for damage caused by polluted sites, for the innocent possessor as well as for others whose guilt is more apparent.

For all of these and other reasons, the Interuniversity Commission for the Reform of Environmental Law in the Flemish region has proposed a new environmental liability regime which seems to be rather pragmatic and well balanced. Liability is in principle strict and attached to the licensee of a classified installation. There is, however, an exception for "normal pollution" which does not violate regulatory standards or any other tolerance limit. In addition, the new strict liability regime does not apply retrospectively. The Interuniversity Commission has also proposed a different regime for collective damage and provides for balanced solutions as far as the insolvency risk is concerned. Some of the proposals of the Interuniversity Commission have meanwhile
already been implemented - among others the regime concerning liability for soil pollution, which has been implemented in a Flemish soil pollution decree.

It is generally held that these proposals of the Interuniversity Commission, which are based on comparative analysis and on the latest international developments, provides for a balanced and pragmatic environmental liability regime. When these proposals are implemented, a new and different regime will be added to the existing private law rules. The proposals of the Commission indeed provide that their regime will not replace the existing legal framework for compensation for environmental pollution. Hence, the regime proposed by the Commission only provides victims with an additional legal framework they can use to get compensation for environmental damage. The only question that remains to be answered in practice is whether these academic proposals can resist the pressure of industrial lobbying when it comes to actual implementation at the political level.
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