Liability regimes for environmental damage in South African law

by

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Thesis Synopsis

This thesis investigates whether liability regimes for purposes of claiming for damage caused to the environment in South Africa are effective, and provides a general view of the relevant concepts, and identifies the challenges in succeeding in bringing a successful statutory or civil liability claim. It examines the current environmental legislative framework and identifies its inadequacy in facilitating common law compensation claims to remediate environmental damage, as well as to compensate victims who personally suffer loss, harm or damage caused by a polluter. This study evaluates the complications and possibility of success in enforcing these damage claims.

The thesis commences with an overview of the definitions of what the concepts “environment”, “ecology” and “natural resources” mean. In this context, it aims to provide clarity on what damage to the environment, as a common good, entails. Thereafter the fundamental right of persons to the environment, for purposes of determining *locus standi* and the scope and merits of a liability claim are discussed. It is also evaluates and determines the importance of protecting the environment with specific reference to its impact on social and economic development, and the way in which liability regimes, by acting as a deterrent, can further this aim. . The current legislative framework in South Africa lacks comprehensive liability rules to allow for a claim for damages to be lodged directly by an individual against the polluter. As stated an effective liability regime also acts as a deterrent to combat the problem of environmental damage, and could be facilitated in improved environmental governance structures.

The possibility of taking successful recourse by ways of a civil delictual liability claim is critically discussed to determine whether the current flexible principles of delict can be applied effectively in cases where environmental damage claims are instituted. Criminal liability forms only a limited part of the study as utilising criminal law principles can merely serve as deterrent for environmental crimes in South Africa, yet does not provide compensation as reparation.

The issue of the economic consequences relating to the various environmental liability regimes is also included in the study. Sound environmental liability regimes can serve the purpose of attracting and encouraging foreign direct investment, which is critical for economic and social development. The study further contains a brief *capita selecta* from the laws of other countries in order to tap from the experience of the other jurisdictions that have developed legal regimes for environmental governance. It aims to provide justifiable recommendations for future developments in this area of South Africa's national laws.

List of Abbreviations and Acronyms

Abbreviations	**Explanations**
CBD	Convention on Biological Diversity
CEDAW	Convention on the Elimination of All Discrimination Women
CAA	Clean Air Act
CDCJ	European Committee on Legal Cooperation
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act
CILSA	Comparative International Law of Southern Africa
CPA	Criminal Procedure Act
CWA	Clean Water Act
ECA	Environment Conservation Act
EC	European Commission
EPA	Environmental Protection Agency
FICA	Financial Intelligence Centre Act
GMO Act	Genetically Modified Organisms Act
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILA	International Law Association
JJS	Journal for Juridical Science
MHSA	Mine Health and Safety Act
MLRA	Marine Living Resources Act
MPRDA	Mineral Petroleum Resources Development Act
NCA	National Credit Act
NAMAQA	National Environmental Management: Air Quality Act
NEMA	National Environmental Management Act

NEMBA	National Environmental Management: Biodiversity Act
NHRA	National Heritage Resources Act
NNRA	National Nuclear Regulator Act
NWA	National Water Act
OECD	Organisation for Economic Cooperation and Development
OPA	Oil Pollution Act
PAIA	Promotion of Access to Information Act
PAJA	Promotion of Administrative Justice Act
PER/PELJ	Potchefstroomse Elektroniese Regsblad/Potchefstroom Electronic Law Journal
PRP	Potential Responsible Parties
SAJELP	South African Journal of Environmental Law and Policy
SALJ	South African Law Journal
SAMJ	South African Medical Journal
SA MERC LJ	South African Mercantile Law Journal
SAPR/PL	SA Publiekreg/Public Law
SC.ST.L	Scandinavian Studies in Law
SPA	Soil Protection Act
SPS Agreement	Sanitary and Phytosanitary Agreement
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
TXLR	Toxic Law Reporter
UDHR	Universal Declaration of Human Rights
UNEP	United Nations Environment Programme
UN ECLAC	United Nations Commission for Latin America and the Caribbean
UNFCCC	United Nations Framework Convention on Climate Change

UNCTAD	United Nations Conference on Trade and Development
VEJA	Vaal Environmental Justice Alliance

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CHAPTER 1

INTRODUCTION

1.1. Introduction

In the age of environmentalism,[1] the potential of a liability claim to recoup damage or harm caused to the environment has become an essential feature of discourse in our constitutional state. The increase in focus to introduce effective liability claims can be attributed to three main reasons: (i) to enable the state to claim payment from the polluter for purposes of reparation of the environment; (ii) to compensate victims for patrimonial damages or economic losses they suffer; and (iii) to act as a deterrent to prevent future polluting conduct. Environmental damage is harm caused to land, water, habitat, species and the atmosphere. The polluter's liability for damages to the environment is a multi-dimensional and complex issue on both national and international levels. The complexity of environmental liability furthermore arises from the fact that different sets of laws regulate the polluter's personal or individual liability to pay for pollution damage caused. For example, statutory law mostly aims to punish a polluter for his conduct and provide the state with funds to remediate the damage caused, whereas the law of delict recognises a damages claim for environmental damage, in so far as it relates to patrimonial damage caused to a person's property and non-patrimonial damages reflecting for example in the loss of aesthetic value.

Key Terms: Causation; Civil liability; Criminal liability; Damages; Ecological damage; Environment; Environmental damage; Environmental liability; Intent; Justification; Liability; Natural resources; Negligence; Polluter pays principle; Prevention principle; Statutory liability; Sustainable development; Wrongfulness.

[1] The era during which concern about and action aimed at protecting the environment has increased to the level that it permeates most of the actions by governments and world citizens. As a theory it advocates the preservation, restoration, or improvement of the natural environment and the control of pollution.

1.2 The Research in Context

Although environmental damage arises from development, in most instances, the primary focus of the study is not on a discussion of strategies to attain sustainable development, but on the challenges posed to succeed in bringing a liability claim against the polluter for damages caused to the environment. These damages offer the benefit that it can contribute to the repair of the environment to ensure a future sustainable development, in addition to the social justice component of compensating the victims for losses they as individuals have suffered.[2] Liability law is that part of law that regulates claiming compensation for damage or harm caused by one person to another person's property or, more challenging, to their interest in the environment as a common good.[3] Claims for compensation arise where, for example, a health hazard occurs or damage to the environment is occasioned by conduct of a person, whether a company or a natural person. The incidents of pollution damage mostly emerge from circumstances that are known or expected in the course of modern life, for example developmental activities such as mining, construction, deforestation, carriage of goods and oil or chemical spillages that occur on a regular basis.[4] The primary purpose of liability law is to compensate a victim for the loss he suffers. It furthermore aims to ensure that persistent conduct, which is harmful to the environment, is deterred.

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2 See in general Rusu *et al* (2011) 7 *Acta Universitatis Danubius Juridica* "Legal Liability in Environmental Law" 43; Glazewski (2014) "Environmental Law in South Africa" 1-8 (Loose leaf updated up to 23 January 2015) in which the authors concede that development is indispensable for states, but that development must be conducted within the parameters of environmental regulations. These authors also point out that there is an inherent conflict between socio-economic needs and development. Use of environmental resources without prudence can in fact lead to poverty, as there is a relationship between compromised or reduced ecosystems and poverty.

3 Bond and Dugard (2013) 12 *Law, Democracy and Development* "The Case of Johannesburg Water" 5-7; Killander M (2013) 17 *Law, Democracy and Development* "How International Human Rights Law Influences Domestic Law in Africa" 384-386 are of the opinion that human and environmental rights are not absolute. Human and environmental rights should be promoted with the understanding that there are other rights of equal value such as socio-economic rights. Liability for pollution damage would promote a middle ground for the protection of all of these rights.

4 See Chapter 4 of the National Development Plan: Vision 2030 (NDP) of the South African government, which serves as a blueprint for the government (160-162). The NDP generally encourages the exploration and exploitation of other economic avenues for purposes of economic development. For example, the development of shale gas in the Karoo region may have economic benefits, which - in the end - may also be outweighed by environmental problems. Shale gas has the potential to create economic opportunities that South Africa needs most. This type of gas may cause problems for communities in the Karoo Region in the long term. Environmental degradation is more likely to occur during the abstraction of gas.

Pollution damage should therefore be prevented by positive conduct where circumstances permit, as it is not in the interest of society in the long run.[5]

South Africa, like any other developing country can be vulnerable, in an environmental context, if nothing is done to consider the imposition of liability on polluters. These rules can help in fulfilling the important constitutional objectives of establishing an environment that is not harmful to health and well-being.[6] In our country, the human right to the environment is constitutionally entrenched as follows:

Section 24 of the Constitution[7] provides that:

> Everyone has the right to:
> (a) an environment that is not harmful to their health or well-being, and
>
> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
>
> (i) prevent pollution and ecological degradation,
>
> (ii) promote conservation, and
>
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

The language of section 24 of the Constitution anchors the perspective that liability for pollution damage is not constitutionally offensive.[8] Section 24 does not provide for

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5 See the early contribution of Van der Walt (1968) *CILSA* "Strict Liability in the South African Law of Delict" 52-54, Glazewski (2014) 1-8 and Scholtz (2005) 1 *TSAR* "The Anthropocentric Approach to Sustainable Development in the National Environmental Management Act and the Constitution of South Africa" 71 in relation to their evaluation of the state of the environment and how it could best be protected. They explicitly outline the extent to which environmental degradation to the environment and society has impacted on people and the ecosystems. Certainly some of these environmental flaws could be attributed to the post-apartheid policies.

6 Rusu *et al* (2011) 45 and Scholtz (2010) 10 *African Human Rights Law Journal* "Promotion of Environmental Security" 6-9 emphasises that the absence of mechanisms to protect the environment gives rise to its vulnerability.

7 The Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution). S 24 of the Constitution advocates the protection of the environment for the benefit of the present and future generations. At the centre of the Constitution is the creation of an environment that is not harmful to the health and well-being of the people.

8 In *Bareki v Gencor Ltd* 2006 (1) SA 432 (T) the defendant was unwilling to accept liability for costs of rehabilitation on the premise that NEMA commenced to be effective on the 29 January 1999, whereas the operations that had caused pollution started between 1981 and 1985. The court relied on the common law rule of construction that a statute should not have a retrospective effect. The court continued to argue that s 28(1) and (2) create strict liability if not absolute liability. See also Marumoagae C (2017) 20 *PER/PELJ* 'Liability to Pay Retirement Benefits when Contributions were not Paid to the Retirement Fund" 4-6.

liability in any specific way. It nevertheless provides for the development of 'reasonable legislative measures' with a view to preventing pollution damage. In *Nyathi v MEC for the Department of Health, Gauteng and Others*[9] the Constitutional Court set aside section 3 of the State Liability Act[10] as inconsistent with the Constitution as it sought to give the state immunity from liability.[11] In other words, the court takes liability as a measure to control unwarranted behaviour, including even the conduct of the state.

The obligation to promote and fulfil socio-economic rights and protect environmental rights rests primarily on the government. The promotion of these rights requires a balancing act, which in the circumstances also requires liability law, among others, to address the issue of the individual's right of redress for pollution damage.[12] It is a mandate of the government to ensure that economic development delivers benefits such as job creation and economic opportunities to citizens. Naturally, this puts pressure on the government that may give rise to focusing more on economic development programmes than on measures to protect the environment. This is a difficult phenomenon in most if not all developing states.

To do harm to the environment equals doing harm to people and other forms of life. According to the French 'Human beings have evolved within, depend on and are part of the world of nature.'[13] Scholtz echoes the same view as the author feels there is a relationship in terms of the 'interests of man and nature as quality encompasses quality of life for man, which must lead to quality of the ecosystem which humans form

9 2008 (5) SA 94 (CC).

10 Act 20 of 1957 as amended.

11 Immunity can be described as meaning an exemption from the normal application of the law. In the South African context of environmental legislation, such an exemption does not exist. It can only exist by default as liability for environmental pollution damage does not exist. The immunity of polluters, whether by default or otherwise, from liability for their acts is not justifiable in law.

12 Wilde (2002) 5-6 generally criticises the utilisation of natural resources in a manner that is not prudent and results in damage to the environment, which could be preventable at the time of the occurrence. Principle 1 of Rio Declaration states that 'Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.' The Rio Declaration places human beings above the environment as the guardians of the environment itself. Many academic authors also hold a view that humans are not above the environment but part of the environment.

13 French (2005) 10 and Scholtz (2005) 72. The fact that the substantial majority of the global population lives on a minority of the world's income and resources cannot be divorced from the environmental stresses that such disparities cause. The reality is that increased environmental risk disproportionately threatens the poorest communities who are seldom able and lack the resources to recoup their losses directly from the polluters.

part of.'[14] One could conclude that the above-mentioned authors seek to advance the view that the environment is as important as human life itself. The treatment of the natural environment with neglect would have negative consequences for all of humankind. The ability of the victim to institute liability claims for damages caused to the environment is crucial as a measure for protecting not only an individual, but also the entire society from persistent harm to ensure its restoration.

For the law of delict to come into play concerning liability claims brought against the polluter, in the first instance the court must determine whether the defendant's conduct was wrongful in that the polluting wrongdoer must infringe upon a protected interest (a subjective right) or fail to act where a duty to prevent harm occurs. The application of the general principles of delict is complicated where damage is caused to the environment in general that is not held in private property.[15] South African common law mainly addresses liability claims for damages caused to a person's patrimony such as his property or the non-patrimonial loss caused to another, yet as indicated in this thesis the environment is a much broader concept than the concept of property.

According to Neethling and Potgieter,[16] an act of pollution is delictually wrongful when it has detrimental consequences for the communal environment and to human health. Without consequence, delictual liability does not arise unless a protected interest exists that is infringed upon. For an action to arise there must be either harm to or infringement of a subjective right by the defendant or the breach of a duty to prevent loss by omission. The law of delict does not usually talk to the broader aspect of the communal environment but maintains its focus in most instances to individual aspects

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14 Scholtz (2005) 73 and Havenga (1995) 7 *SAJELP* "Liability for Environmental Damage" 187-188 are of the opinion that the protection of the interests of humans also requires that the same measure be applied in favour of the ecosystems on which humans depend. In that sense the imperative of sustainable development would have been complied with. The authors suggest that mere administrative measures are not adequate to prevent damage to the environment.

15 Neighbour law provides that where a nuisance is experienced as a result of the wrongful act of another person, the harm or loss must be compensated by the wrongdoer causing such damage. In *Steenkamp v Knysna Local Municipality and Another* (A20/11) [2011] ZAWCHC 522 the court held the respondents responsible for causing noise pollution that affected the appellant's comfort, convenience, peace and enjoyment of her property. In *Country Cloud Trading CC v MEC, Department of Infrastructure, Gauteng* 2015 1 SA 1 (CC) the court was of the view that liability should not arise where the plaintiff could not prove that the defendant's conduct in causing such a type of loss was wrongful, thus confirming that all five requirements for delictual liability, namely conduct, wrongfulness, fault, causation and damage remain important for civil damages claims in our law.

16 Neethling and Potgieter (2015) 60-62.

of a person's patrimony. Van der Walt confirms that the foundation of a delictual liability claim remains based on fault and is strict only in extraordinary situations which adds another layer of complexity in relation to a liability claim for environmental damage caused.[17] Other challenges are proving both factual and delictual causation and the allocation of losses where these were caused by multiple wrongdoers, as well as quantifying the losses to determine the amount of damages sought.

Environmental legislation that has been enacted over the years does not specifically address the exact scope or nature of civil liability claims by the individual victim against the polluter for damages caused to the environment. Section 2(4)(p) of NEMA broadly provides that 'the costs of remedying pollution, environmental degradation and consequent health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment.'[18] NEMA does not establish civil liability claims for private parties for harm caused to their environment. It merely functions as a cornerstone provision in support of civil liability claims although it does not directly address the merits or requirements for such a cause of action or create a statutory damages claim. It does not aim to regulate nor replace the general requirements that must be met for common law liability claims (for example, those for a claim in delict include wrongfulness, the presence of fault and causation that link the conduct to the damages arising). This thesis aims to investigate these issues, specifically the challenges posed to a plaintiff in meeting these requirements in order to succeed in claiming damages from a polluting defendant.

South African common law provides a general civil liability claim and does not address the issue of liability for the broader environment damage as a specific claim. Common law develops from the interpretation of law by courts, and as modern society develops at a fast pace, so should the law. For example, the developments surrounding damages caused by hydraulic fracturing and in the ocean economy may be necessary for society but are not legislated comprehensively at present. Industrial development

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17 Van der Walt JC (1968) 1 *CILSA* "Strict Liability in the South African Law of Delict" 52-54 and Boggenpoel ZT (2013) 16 *PER/PELJ* "Creating a Servitude to solve an Encroachment Dispute" 455/614 elaborate on the nature of rights that are protected in neighbour law.

18 S 2(4)(p) of NEMA.

of states has been a step forward in the evolution of humankind, yet industrialisation has also brought about serious environmental problems. For instance, climate change and global warming stem from the development agendas of states, which often did not consider the resulting detrimental environmental impacts of their developmental activities and the potential of ensuing liability claims.[19]

It is very important to note that - in addition to national legislation and international conventions - principles such as the international environmental management principles also inform and strengthen the delictual elements specifically of wrongfulness for omissions and the duty of care (the duty not to inflict harm upon others) that are at the core of our civil liability claims.

An improved liability regime to claim for damages caused to the environment is but one of the means by which responsible environmental conduct could be promoted for the betterment of society. It is argued further that liability law also protects the taxpayer from taking responsibility for damage caused by polluters, in addition to the benefit to human health and the environment. The taxpayer benefits from liability law because liability for pollution is directly imposed on the polluter as against society. It is for these reasons that this thesis also briefly addresses these principles.

Moving beyond our borders, the International Law Commission in its Principles of Allocation of Loss in the case of Transboundary Harm arising out of Hazardous

[19] Faure and Skogh (2003) 41-42; Kidd (2011) 12; Paterson (2010) 17 *SAJELP* "Co-managing South Africa's Conservation and Land reform Agendas: Evaluating Recent Initiatives to resolve the Unruly Interface Thrust Upon South Africa's Protected Areas" 98; Rusu *et al* (2011) 44 and Kitula (2006) 14 *Journal of Cleaner Production* "The Environmental and Socio-economic Impacts of Mining on Local Livelihoods in Tanzania: A Case Study of Geita District" 405 as they are of the opinion that the depletion of the natural resources gives rise to a number of environmental problems and may even lead to the extinction of a common resource. In *Amnesty International and Friends of the Earth International v Shell Petroleum Development Company* 2011 for example, the court in the Netherlands made a decision in favour of the plaintiffs. In this case, Shell - an oil company based in the Netherlands - had been operating in the Niger Delta region for decades. In the process of their operations, there were many oil spillages. These oil spillages resulted in complications for human health, agricultural sector and other forms of life. The court held Shell liable and required the company to compensate farmers in the region for the pollution damage it caused and to take liability for clean-up campaign of the areas that were affected by company activities. The main culprits in this regard include the US, China and India as these countries have shown tremendous economic development and growth albeit at the expense of the natural environment that all humankind is part of.

Activities[20] requires that states should provide domestic judicial and administrative bodies with the necessary jurisdiction and competence to assist with transboundary environmental damage. The state must ensure that those bodies have prompt, adequate and effective remedies available in the event of transboundary damage caused by hazardous activities located within their territory or otherwise under their jurisdictional control.[21]

Individual victims should also have access to remedies in the state of origin that are no less prompt, adequate and effective remedies in the event of transboundary damage caused by hazardous activities in their territory.[22] In accordance with this, the government must ensure that the law enables individual claims for damages in the event of environmental harm. The failure to do so, could lead to state liability. As stated above, legal instruments such as this furthermore strengthen the principles upon which private remedies are based. These international principles thus aim to contribute to the development of international law as well as the development of national laws.

As the World Commission on Environment and Development confirmed: “Economy is not just about the production of wealth, and ecology is not just about the protection of nature, they are both equally relevant for improving the lot of humankind.”[23] The government and its citizens therefore all have a responsibility to protect the environment.[24] A more effective civil liability regime that provides optimal indemnification for loss could be a good mechanism to reach this aim.

Although a broad environmental management legislative framework is in place, its current structure is not adequate to address all of South Africa\s environmental challenges without invoking the polluter’s personal liability as an instrument to deter pollution damage culprits. Knobel believes and advocates that when existing

20 Report (A/61/10) of 2006, as finally approved in A/69/468 of 6 December 2010.
21 Principle 6(1).
22 Principle 6(2).
23 World Commission on Environment and Development Report of 1987.
24 It is the responsibility of the government to protect the environment in terms of the law, but citizens also have the same obligation to conduct themselves in a manner that protects the environment. The protection of the environment should be a social contract that exists between the government and the citizens of the country. The government has to act as the public trustee for the environment on behalf of the citizens. See Glazewski (2005) 78-79, where the author’s viewpoint is that humans have a genetic urge to care for their environment.

legislation is inadequate to address existing environmental problems, it is important to address shortcomings in such a legislative framework itself, which this thesis aims to propose.[25]

A comprehensive environmental liability regime would entail both public and private law mechanisms that impose various forms of liability on the polluter to compensate for environmental damage or for the restoration of harm caused to the environment as well as compensation for natural persons.[26] A separate environmental liability statute that includes not only the duty to repair or restore environmental damage, but also the individual damages claims aiming recover damage suffered due to the environment does not exist in our country. [27] This necessitates that a victim relies on a civil delictual claim for damages.[28]

As stated above, South Africa's national environmental liability rules - in comparison to those in the US and the EU - are still in an early stage yet are gradually evolving. Soltau, in his critique of NEMA, does recognise, however, the progress made by the introduction of a number of national environmental laws (except for liability provisions) in relation to deterring damage to the environment. This progress is worthy of appreciation, as the introduction of these laws has made a tremendous difference to environmental governance in South Africa. The author further argues that NEMA would not be adequate to protect the environment if it addresses only a 'narrow' yet important area of law, namely criminal liability for damage to the environment.[29] This is hereby endorsed, that adding a more regulated civil liability regime would serve the interests of all citizens to a greater extent.

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25 Knobel (2013) 16 *PER/PELJ* 'Conservation of Eagles' 175/487.

26 Havenga (1995) 191 and Wilde (2002) 5-6 express the view that there has been a dramatic increase in public concern for environmental damage. The authors emphasise the view that environmental damage is not in the interest of humans who are in fact responsible for its pollution.

27 See Rusu *et al* (2011) 47 and Havenga (1995) 191. The pollution of the environment has the consequence that polluters have to bear the cost of compensation in that the costs incurred in restoring the environment have to be recouped from the polluters. This is a situation, which potential polluters would avoid when they conduct their activities, and has the potential to pollute the environment. The remedies available at common law are of importance for restoration of the environment and compensation for damage.

28 Tladi (2010) 18-19.

29 Soltau (1999) 6 *SAJELP* "The National Environmental Management Act and Liability for Environmental Damage" 33-34 critically states that traditional measures such as 'criminal sanctions and permitting regimes' cannot prevent the degradation of the environment.

With reference to these other jurisdictions, South Africa requires development on a far larger scale as it faces greater economic challenges, including underdevelopment and poverty.[30] What is required is clearly a balance between responsible development that has a positive impact on the population to reduce levels of poverty as soon as possible, yet that is not too rapid where the potential or likelihood - to cause irreparable harm or damage to the environment - exists.[31]

Mining activities, for example, provide excellent opportunities in terms of job creation and economic development. However, mining activities - at the same time - cause irreversible damage to South Africa's natural environment. Seepage of chemicals into soil and spillages of harmful substances into watercourses cause enormous harm to the environment.[32] Activities that damage the different elements of South Africa's environment and its inhabitants are wide-ranging,[33] which makes the creation and application of concrete specialised liability regimes complex and challenging, yet these are necessary to address the existing challenges.

A spillage of a harmful substance can damage the health and well-being of the people as well as plant life, aquatic life and animal life in general. For example, where there is a gradual or long-term spillage of oil or petroleum products into the ocean, a clean-up campaign may be undertaken, but the actual manifestation of the consequences of

30 See the discussion on poverty by Kuschke (2009) *Insurance against Damage Caused by Pollution* LLD Thesis (University of Pretoria) 2 and The Daily Dispatch: "Many forced to survive off others' trash" (26 April 2016) 4 as this poses threat to human health and the environment. Circumstances in which the poor have to use recycling as part of poverty alleviation create better conditions for the environment provided it is done in accordance with law.

31 See Wilde (2002)11 and Havenga (1995) who view environmental damage as constituting pure economic loss that can be recoverable in terms of South African law. In addition, s 28 of NEMA states that any person who causes the contamination is obliged to take the necessary steps to apply remedial measures. Failure to do so may result in the expropriation of whatever rights in land in order to carry out any rehabilitation or remedial action.

32 Freedman (1992) 11 and Millard D and Bascerango EG (2016) 19 *PER/PELJ* "Employers Statutory Vicarious Liability in terms of the Protection of Personal Information Act" 6-8 concede that adverse effects to human health, from hazardous substances, may result in acute or chronic conditions for the victims. This of course depends on whether the victim has had high-level exposure and ranges in severity from temporary illness to death. The 2000 Report prepared by the Council on Environmental Quality and the Department of State, as instructed by President Jimmy Carter in 1977, emphasised, *inter alia* that "environmental stresses are intensifying and will increasingly determine the quality of human life on our planet. These stresses are already severe enough to deny millions of people basic needs for food, shelter, health and jobs or any hope for betterment."

33 Glazewski (2005) 473, Feris L (2006) 9 *PER/PELJ* "Liability for Environmental Harm" 52/261 support the view that where there is irremediable harm to the environment, rehabilitation has to be conducted in order to minimise the impacts on the environment.

the harmful spillage may be experienced a number of years or even decades after the incident has occurred.[34] Industries are said to present a paradox in that the achievement of most human rights is - in a greater or lesser degree - dependent on development. The enjoyment of these rights is not absolute and can be restricted at the cost of pollution of the environment.[35] By their very nature, industries can potentially adversely affect the environment. Nonetheless, it is vital, at the same time, to consider their processes and further apply measures to prevent damage to the environment proactively.[36]

In *Bareki and Another v Gencor and Others*[37] one of the few judgments on the issue at hand, the defendant (Gencor) had caused pollution damage during the period that it was mining a specific area that fell within the jurisdiction of the plaintiff. The case of *Bareki* comes in the light of the background of mining which has always been the backbone of the economy of the country albeit at the expense of the environment and communities in many respects. Owing to mining, many areas are riddled with pollution

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34 Wilde (2002) 5-6 reiterates the view that there has been a dramatic increase in environmental damage in the 20th century, which raises concerns by members of the public. The exploitation of the ocean economy - such as the extraction of oil and minerals - is likely to introduce new forms of pollution as no comprehensive regulatory framework exists in relation to ocean governance. Although ocean economy is not a new concept in South Africa, the development of law in that field is limited as the reach of marine exploitation was also limited. The ocean economy refers to the exploitation of the marine environment beyond the traditional form of exploitation. The marine economy can be described as the economic activity which is dependent on the marine or coastal resources.

35 Ngcobo J stated in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation, Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) 'The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of other rights in the Bill of Rights, indeed, it is vital to life itself.' The court's observation in this case acknowledges the interrelationship between man and nature. The norms enshrined in the Bill of Rights are accorded to the natural environment.

36 According to Freedman (1992) 11 and Scholtz (2007) 32 *South African Yearbook of International Law* "The Common Interest of Humankind" 247-249 the attainment of environmental rights and its preservation cannot be achieved with dependence on state actors alone. A collectivist approach that involves governments and industries would be necessary in the interest of the environment and humankind.

37 *Bareki and Another v Gencor and Others* 2006 (1) SA 432 (T) Gencor, a mining company, had caused significant pollution in the mining area and the surrounding areas and left the area in dire conditions. The pollution and degradation of the environment presented a serious health risk to residents and occupiers of the neighbouring areas. The court had to examine whether the defendant was liable for pollution in circumstances where the defendant had caused damage years before the existence of the legislation. The court held the view that it would be unfair to impose liability on the party whose damage-causing act took place before the legislation. In other words, the question was whether the legislation (NEMA) had a retrospective effect. De Villiers J in pars 9 – 11 stated that if that was the case the legislature should have made it its intention clear. See also Neethling and Potgieter (2015) 35-36 and Van der Walt JC and Midgley JR (2016) Principles of Delict 39-41.

damage and remain as orphaned areas in South Africa to date. No attention was paid to these areas prior to the existence of the NEMA. Chief Pule Bareki, a traditional leader, challenged the defendant that was mining in his area of jurisdiction in terms of section 28 of NEMA. The cause of action was based thereon the mining generated harmful waste which posed a threat to human health of his community and the environment from which they support themselves. The chief and his community were inspired by the provisions of section 28 of NEMA that creates a broad duty of care about pollution that has been caused by anyone. That duty of care was put to test in the *Bareki* case where the court held that Gencor was the cause of the pollution and was found not to be liable for that pollution on the grounds that section 28 of NEMA did not apply retrospectively.[38] At common law, a statute does not apply retrospectively and de Villiers J relied on that principle in the judgment.[39] Although section 28 clearly defeats the rules of prescription, as it refers to current and previous incidents of pollution, in its coverage for duty of care the court did take in that context. . With respect, the court did not take a correct decision as it was in stark contrast to the self-explanatory nature of the provisions of section 28, and a different outcome could have been justified in view of public policy considerations as dealt with in subsequent chapters. This judgment gives effect to the preamble to the NEMA[40] that expressly provides that 'the State must respect, protect, promote and fulfil the social, economic and environmental rights of everyone and must strive to meet the basic needs of previously disadvantaged communities'.

South Africa has an abundance of orphaned factories and mines that pose a threat to members of communities and the environment in which these are located. It is clear the legislature took the phenomenon of historical pollution into account during the drafting of NEMA as it refers to the present and past causes of pollution damage. A court of law, in this instance, made an error in its interpretation of law as it considered the common law principle that law did not apply retrospectively. The law ought to place the principle of justice and fairness at the crux of its application. In *Bellairs v Hodnett*

38 Pars 9 – 11.

39 In *Kaknis v Absa Bank Limited and Another* (08/16) [2016] ZASCA 206 it was however clearly said that a statute operates only on facts that come into existence after its passing. See also *Cape Town Municipality v F Robb & Co Ltd* 1966 (4) SA 345 (C), *Shewan Tomes & Co Ltd v Commissioner of Customs and Excise* 1955 (4) 305 (A).

40 Act 107 of 1998.

and Another[41] it was held that there is only a presumption that a retrospective activity does not affect completed transactions. In *Robertson v City of Cape Town*[42] it was, however, stated that retrospective application of law contravenes the rule of law and the principle of legality. The latter are important aspects of our rules of law, yet it is supported that the provisions of section 28 do not fly in the face of these. Courts should be attentive to the fact that the liability provision on section 28 should regulate liability, together with common law provisions, that acknowledge claims based on past events.

NEMA was enacted in 1998 and the litigation that followed had to consider issues that had occurred a couple of decades before litigation.[43] Many mining houses would mine an area and leave without proper rehabilitation at the time. Equally unjustified would be to consider the extension of the reach of a piece of law to conduct that was not in existence when the law was passed by the lawmaker.[44].[45]

The protection of the natural environment and natural resources might even be dependent on a liability law that is biased towards the environment where the proliferation of pollution poses a greater threat to human health and the environment as opposed to a restriction on development would.[46] It is the researcher's point that

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41 1978 (1) SA 1109 (A).

42 2004 (5) SA 412 (C). The court further held that retrospective application also impairs the ability of those to whom it applies to regulate their conduct in accordance with such provisions. In *Bobroff and Partners Inc v De La Guerre, South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development* 2014 (3) SA 134 (CC) the Constitutional Court reaffirmed the position that the principle of legality which underlies that the Constitution requires all laws that are passed by the legislature comply with it.

43 The law permitted the kind of conduct for which Gencor was challenged and out of which liability would be imposed for a clean-up campaign based on the duty of care. The duty of care is an important principle within the framework of environmental management principles.

44 S 28(1A) of NEMA establishes an exception to the common law principle that legislation does not automatically apply retrospectively. In terms of this provision, polluters are now liable for damage that was caused prior to the commencement of NEMA. It is interesting to note that it remains uncertain whether the principle of retrospective application of law applies to the whole Act, or only to pollution restoration and related claims. The issue of its constitutionality may also be important for the purpose of certainty.

45 In *Pienaar Brothers (Pty) Ltd v Commissioner for South African Revenue Service and Another* 2017 (6) 435 (GP) the court held that law does not prevent the legislature to pass legislation to cure a specific gap in law, which would in this context include a gap in environmental damages liability as dealt with in this thesis. Specifically tailored liability rules that considering the unique challenges posed by environmental claims are important in an optimally developing countrySee Neethling and Potgieter (2015) 4, Van der Walt and Midgley (2016) 45 and Bergkamp (2001) 56 who concede that strict liability can be applied in such situations as fault-based liability which engenders more problems for plaintiffs in practice.

46 Diedrich (2011) 1; and Du Plessis and Kotzé (2007) 1 *Stell LR* "Absolving Historical Polluters from Liability*"* 161 are of the opinion that lack of enforcement of law in relation to environmental wrongdoing is a challenge in the context of law as a body of authoritative standards has a deterrent

increased liability for pollution has the potential to influence human behaviour towards the environment for the greater good of society.

1.3. Research Objective and Purpose of Study

The purpose of the study is to identify the parameters of a coherent framework for a liability regime in South Africa. Such a legislative framework would serve to analyse selected problematic legal aspects of liability claims for environmental damages with particular focus on the polluter's duty to indemnify its victims, and to propose some regulatory measures that will enable a claimant to overcome the challenges posed at this time in bringing such a claim successfully. In particular the study would seek to identify a liability regime that is effective for the indemnification of damage caused. Liability law is one of the means by which environmental damage can be both be prevented or remediated.[47] The basis of liability stems from the common law in a South African context that is not proactive in its approach to environmental protection, although the possibility of being held liable for payment of damages can act as a deterrent.[48]

To what extent does current legislation provide for liability in the event of damage to the environment? Section 28 of NEMA does create a duty of care, which implies that a person who causes harm to the environment may be held responsible for costs that are associated with that damage. The duty of care is not liability law, but a moral obligation to ensure protection of the environment.[49] There has been a dramatic increase in the awareness about the effects of pollution in recent times. This concern stems from the fact that negative environmental effects can now be experienced first-

effect on polluters. The knee-jerk reaction to environmental problems cannot be justified in relation to the harm or degradation of the environment as that leads to more problems in society. A lack of effective liability regimes has the implication that there are no consequences for parties that cause harm to the environment.

47 Bergkamp L (2016) 13 *European Company Law* "The Environmental Liability Directive and Liability of Parent Companies for Damage Caused by their Subsidiaries (Enterprise Liability)" 184-185 acknowledges the importance of being able to pursue civil claims against polluters as a private citizen, a position that does not exist in s 28 of NEMA. Parties can also conduct civil claims on a strict liability basis against the polluters.

48 Paterson A (2018) 21 *PER/PELJ* "Maintaining the Ecological Flow of Estuaries: A Critical Reflection on the Application and Interpretation of the Relevant Legal Framework through the Lens of the Klein River Estuary" 7-8.

49 Soltau (1999) 38-39 and Zitzke E (2015) 7 *Constitutional Court Review* "Constitutional Heedlessness and Over-excitement in the Common Law of Delict's Development" 261-262.

hand by most societies throughout the world.[50] Experiences often range from pollution and diseases that spread from industries and other sources whose activities lie within and often beyond the borders of a specific country or jurisdiction.[51] The creation of wealth, growing pollution and high levels of consumption create environmental risks that might be beyond the strength of the universal natural environment. Furthermore, events, studies and case law have shown the limitations of traditional approaches in liability law when pursuing environmental pollution claims.

Claims for damage done to the environment do not, for various reasons expanded on in this study, properly fit into the traditional legal concepts of civil liability law.[52] There are two important distinctions relating to damage to the environment that can be identified at the outset. There is damage to natural resources, which are not owned, that is regarded as damage to the collective environmental good, and then damage to natural resources, which are privately owned and regarded as falling within the realm of individual interest.

Traditional liability rules mainly focus on the protection of individual interests and do not encompass liability without fault which is in agreement with liability for pollution damage.[53] Liability without fault – in other words strict liability which is imposed on the polluter for environmental damage - is merely restrictively applied in South Africa.

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50 According to Glazewski (2005) 586, global climate change is a natural phenomenon and the increasing scientific opinion is that it is exacerbated by human activities that are damage-causing as regards the environment.

51 Wilde (2002) 5-6, Paterson (2018) 2-3 and *Amnesty International and Friends of the Earth International v Shell Development Agency*, the court in the Netherlands decided in favour of the plaintiffs who were complaining that oil spillages in the Niger Delta region were affecting their health and farming activities. See the detailed discussion by Du Plessis (2015) 18 *PER/PELJ* 1442 as the author agrees that agricultural and farming activities also pose a threat to the environment. Du Plessis further argues that the oil sector is not regulated by a separate legislation but is regulated by the Mineral Petroleum Resources Development Act 28 of 2002 (hereinafter the MPRDA).

52 Moseneke D (2012) 29 *SALJ* "Striking a balance between the will of the people and the supremacy of the Constitution" 11-12, Bonthuys E (2015) 132 *SALJ* "Developing the Common Law" 82-84 and Brans (2001) 8-9 put it that damage to the environment is an environmental law concept. South Africa\s common law does deal with damage to the environment in the context of delictual claims, but the law of delict is not always adequate to deal with complex issues of environmental damage and liability.

53 Brans (2001) 9, De Gama R (2017) 20 *PER/PELJ* "The Exclusion of Liability for Emotional Harm to Passengers in the Warsaw and Montreal Convention: Moving away from Floyd, Siddhu and Pienaar to the Stott Case" 3-5 and Du Plessis (2015) 18 *PER/PELJ* "The Constitutional Duties of the Local Government" 1846-1848 uphold that as much as there is no universally acceptable definition of 'environmental damage, it encompasses a spate of issues such as damage to the biodiversity, ecosystems, natural resources and the deterioration of natural life support systems.

Defining terms such as environmental damage and damage to natural resources or natural resource damage is therefore important to attempt to evaluate this distinction. In most instances, an attempt to provide a definitive definition or description of the environmental damage is near impossible as it has the potential to be very extensive, vague and broad, which compromises legal certainty.[54]

Liability for environmental damage should ideally provide for both preventive and punitive measures. As one of the BRICS countries, South Africa is on a course of massive infrastructural development, which calls for development of liability law in the light of persistent environmental damage. These developments include transport infrastructure, proposed plans for development of the ocean economy, hydraulic fracturing and improved road networks. Without the introduction of an efficient system of liability law, these have a potential to cause unprecedented degradation of the environment without the ability of the state and other persons to recoup losses and claim compensation for remediation measures. This study aims to highlight some problematic areas in South Africa's national liability regimes in order to facilitate future improvement in this area by the South African legislature and the courts.

1.4 Research Question

Crisply the question is: To what extent are the current liability regimes that South Africa has in place effective in order to adequately empower a victim who suffers a loss or harm due to environmental damage to recoup an amount of money as damages from the polluter? In this regard, it is crucial to consider the position of claims in common law for indemnification, the functionality of criminal fines and penalties and other remedies found in environmental legislation.

The current liability provisions, particularly those found in the Constitution and in the NEMA, emphasise the duty of care not to cause damage. This promotes the legal duty not to pollute, yet does not in itself create a direct statutory liability for payment of polluters for money to indemnify persons for the damage they caused to the

[54] See Fuggle and Rabie (2009) 4-5 and Brans (2001) 8-9 as these authors contend that the definition of environmental damage is not only broad, but also too divergent in most instances. The definition for environmental damage is not harmonised, as most international treaties do not define it.

environment. The NEMA mainly prescribes administrative measures that follow incidents of pollution. The provisions in section 28 of NEMA do not regulate nor create a direct liability of the polluter to pay monetary damages to his victims, although it recognises the polluter pays principle, which requires that polluters be held responsible for environmental damage they caused.[55]

1.5. Framework Analysis

Law as a normative discipline establishes rules on which society should depend for the regulation of its affairs. The study encompasses an interdisciplinary approach in that it combines principles of law and economics and trade law with reference to the consequences of liability for environmental damage. Furthermore, the theoretical foundation of the study is to follow an integrated approach. The issue of liability for environmental damage is a multi-dimensional issue involving a set of different spheres of laws and legal concepts. In common law the research questions are discussed in the context of delictual liability claims, statutory liability and criminal liability that involves questions of different spheres of law and policy.

This thesis cannot avoid being descriptive in nature, yet all attempts have been made not to discuss general principles of liability law extensively that do not relate directly to the topic. To assist the foreign reader, the inclusion of some concepts and general principles of South African law are unavoidable. The study further encompasses civil liability and foreign law in terms of the countries specified in the chapters below.

As a necessary introduction, Chapter 2 of the study focuses on the definitions of primary terms including the concepts of the 'environment' and 'environmental damage'. Definitions and descriptions of the 'environment', 'environmental damage' and 'ecological damage' are important as defining these concepts gives clarity to issues raised in the study. This includes the extent of the principle of the 'duty of care' that may be blurred with liability for damage to the environment. The duty of care, on

[55] Feris L and Kotzé LJ (2014) 17 *PER/PELJ* "Acid Mine Drainage in South Africa" 2105-2107, *Nkala and Others v Harmony Gold Mining Company Ltd and Others* 2016 (5) SA 240 (GJ) the court stated that damages suffered during employment period of the mineworker must be compensated by the mining companies for which they worked.

the one hand, is not a liability provision; it only creates a duty to protect the environment. Liability law, on the other hand, creates an opportunity to pursue claims for compensation in the event of an infringement. Where a person engages in an activity for his own interest, as a result of which harm is caused to other persons in the process, universal principles dictate that the wrongdoer must also bear the burdens that are attached to his activities.[56]

Statutory liability is part of this study as legislation plays a critical role in the management of South African environmental law, the creation of obligations, legal practice and judicial interpretations by South Africa's courts. Legislation will be considered in Chapter 3 only in view of issues pertaining to the *liability* of the polluter. It examines the extent and current status of statutory liability law for damages in the current South African context. National environmental laws do not codify, or extensively deal with, environmental liability. The study will investigate some of the weaknesses and strengths in South Africa's statutory law with regard to liability for environmental damage. Owing to the constitutional imperative to consider international law,[57] and the transboundary nature of pollution, international environmental law principles must be investigated and applied to the issues identified in this study. In view of this Chapter 3 also includes a brief *capita selecta* of international and foreign law that informs South African national liability law. International conventions, from which most of the environmental laws are derived, will be considered in the thesis as a foundation on which the duty of care of both the state and its citizens rest, for purposes of discussing a liability claim. These include, but are not limited to the polluter pays principle, the preventive principle and the principle of sustainable development.[58] Although environmental management principles are not legal rules, these are important in the broader context. The principles cannot all be covered in extensive critical detail in this study. Thus, it focuses only on the impact of

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56 Linscott (2014) 17 *PER/PELJ* "A Critical Analysis of the Majority Judgment in *F v Minister of Safety and Security"* 2012 (1) SA 536 (CC) 2919, Van der Walt (1968) 51 and Katzew and Mushiriwa (2012) 24 *South African Mercantile Law Journal* "Product Liability in the Wake of the Consumer Protection Act 68 of 2008" 1 are of the opinion that strict liability reduces the burden of proof on the part of the plaintiff or injured party, which can be supported.

57 See S 39(1) (a) of the Constitution on the Interpretation of the Bill of Rights.

58 The concept of sustainable development is based on three main elements: uniform economic growth, protection and preservation of the environment, and respect and improvement of social and human rights. Such an approach to development is called the integral or holistic approach.

these principles in informing the extent of wrongfulness for a civil liability claim for damages under our common law. These principles are constantly evolving to provide for a better environmental protection and serve as guidelines for decision-making on environmental issues that confronts our legislator. Therefore, these will be included in the examination of South African legislation in Chapter 3.

It is difficult to deal with the concept of environmental damage without placing strong emphasis on all of the basic general principles of the South African law of delict. The issue of civil law damages will thus also be dealt with extensively in the study in Chapter 4.[59] Liability for environmental damages appears to be a unique or *sui generis* type of liability for damage that challenges South Africa's flexible legal principles and norms.[60] Traditional civil liability rules remain based on the concept of fault liability.[61] The principle in the South African law of delict is that only a wrongful act, accompanied by fault on the part of the defendant that causes damage, can give rise to delictual liability. From the outset, it can be emphasised that all requirements for civil liability are problematic when claiming damages for harm caused to the environment. These include, for example, liability for omissions, the determination of wrongfulness,[62] the presence of fault, factual and legal causation as well as the quantification of damages. A broad range of challenges confronts the plaintiff when pursuing a civil damages claim.

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59 In South African case law very little is offered in the context of environmental damage and the liability for such damage. The *Bareki* case is important in its relevance to liability for damage to the environment and human health. The *Bareki* case was an opportunity to concretise South Africa's environmental principles in the context of South African environmental jurisprudence. The focus was on the retrospective application of NEMA yet, sadly, not much attention was paid to claims for environmental damage in the case.

60 Van der Walt (1968) 55 recognises that traditional liability law has limitations and cannot address some of the challenges regarding pollution. These issues pertaining to pollution and environmental damage are usually complex and difficult to solve in the context of common law. In *South African Transport and Allied Workers Union v Garvas and Others* 2013 (1) SA 83 (CC) the Constitutional Court accepted that strict liability could be invoked against the organisers of a protest from which acts of vandalism are perpetrated against the public, and cause harm to non-protesters. In *Country Cloud* case, the court considered the matter based on wrongfulness and pure economic loss. The court decided that the respondent was not liable for losses incurred by the stranger to the contract for the completion of a clinic in Soweto. The respondent alleged that it entered into the contract induced by material misrepresentations.

61 Van der Walt (1968) 51 agrees that fault is difficult to prove particularly in claims for environmental damage. Liability without fault, or strict liability, is recognised as a possibility. It should be noted that strict liability is not the same as vicarious liability, although the two are related in that vicarious liability is some form of strict liability.

62 Van der Walt (1968) 51& Kemp (1983) 8 *JJS* 'Wrongfulness' 51-53.

In both English and American law, for example, the traditional view that fault constitutes the only basis for civil liability has been replaced by the recognition of some specific areas of strict or no-fault liability which is also called risk liability. In the case of wrongful causation of damage, the absence of fault on the part of the perpetrator does not bring into operation the principle that damage necessarily rests where it falls. Usually, where damage is caused wrongfully, the wrongdoer is liable on the ground of increased risk.[63]

In *Cloete v Van Meyeren*[64] the plaintiff was bitten by the dogs that were owned by the defendant. The defendant argued that the dogs acted *contra naturum sui generis* as they were locked inside the yard and the gates were locked. The court found the defendant was liable because of *pauperian* liability. The *pauperian* liability arose from the Roman law as a liability that is occasioned as result of acts of four-legged animals that cause damage or losses to people or their animals. It represents some form of strict liability, a principle that is suitable for environmental damage cases. This case provides an analogy to liability damage caused to elements of the environment by direct conduct of persons, or by dangerous objects within their control, be it by use of their mining operation machinery, or their animals. As strict liability in this case is recognised, it can inform the development of our liability law to embrace a strict liability for environmental damages claims. Van der Walt emphasises that one of the most important developments, which has taken place in civil liability regimes, has been the creation of a field of liability without fault.[65] Yet this has not been introduced in South Africa as a general form of liability for all forms of environmental damage claims.

For the sake of comprehensiveness, Chapter 5 briefly examines the concept of criminal liability yet will not include a detailed discussion of all elements of criminal

63 Linscott (2014) 2020 and Van der Walt (1968) 63 do not rule out the possibility of deviation cases. Liability without fault and liability based on risk are interchangeable and mean the same thing in this context.

64 2019 (2) SA 490 (ECP). In *Cloete v Maritz* 2014 SAFLII [2014] ZAWCHC 108 the court showed reluctance in extending liability to a defendant who had breached an engagement with the plaintiff on the grounds that to do so would be in contravention to the spirit and purport of the constitutional values that now form part of South African common law.

65 Van der Walt (1968) 62 holds the view that fault liability could create unnecessary obstacles for the attainment of environmental justice in general and particularly in liability law.

liability.[66] Although this type of liability is penal in nature, the payment of fines for offences, and a duty to remediate once a person is found guilty of an offence, have the potential to provide payment by the offender that could be used to remediate the harm done. This does not, however, include directly indemnifying the loss suffered by the victims. The aim of the study remains centred on forms of liability for environmental damage and the way in which losses can be recouped.

Thereafter, Chapter 6 analyses liability regimes of a few other countries, which include the EU, the Netherlands, Belgium and the US. In view of the fact that international environmental law principles and concerns are universal, and that other countries have already developed more advanced legal principles and liability or compensation systems to accommodate claims for environmental damage, such analysis is informative to this study.

The investigation of liability regimes of the Netherlands and Belgium have the potential to provide guidance as these countries are more inclined to apply principles of Roman Dutch law which is also the South African system of common law. These countries have also seen the introduction of a slew of specialised laws to govern liability issues. The position in the United States of America plays an important role in this study as it creates a specialised fund-based solution in the form of the so-called Superfund, which serves the purpose of providing compensation for environmental damage in the US. These countries can all add value to the body of scholarship from which South Africa could gain valuable experience and knowledge in future.

Finally, Chapter 7 focuses briefly on the economic consequences of environmental liability regimes. Investors are risk averse as they mostly have many options at their disposal. A legal system is thus important to the investment fraternity to ensure that there is security for their investments. Lack of certainty about a legal regime of the country would pose threat to potential investors and discourage investment. The risks

66 Criminal liability is embodied in environmental legislation as one of the legal mechanism to deter pollution. The Department of Environmental Affairs recently convicted a Ukrainian vessel for dumping sewage on the South African waters. Although the case did not go to court, the Master and Owner of the vessel were held liable for R1.7 million fines and penalties as a result of that damage.
https://www.environment.gov.za/mediarelease/deawelcomescriminalsentenceofpollutingsouthafricanwaters last accessed 20 April 2019.

that investors always consider pertain to labour relations, political stability and economic certainty and liability laws. Owing to the extent of awareness about the effects of pollution on the environment, environmental liability is also regarded as a risk factor. This chapter addresses whether the environmental liability regime could serve as a disincentive for foreign investment.[67] This implies that there should be a balance between environmental liability law and the attraction of foreign investment, that is crucial for a developing country such as South Africa, as it is part of the broader development agenda of the state to eradicate poverty.[68]

Chapter 8 of the thesis focuses on the general conclusion and recommendations gathered from this study. These will summarise the issues raised in the thesis and propose how such solutions and outcomes may be implemented in the future.

1.6 Thesis Statement

My thesis statement is: South African environmental legislation could contribute to structure a more effective civil liability regime that enables victims to hold the polluter liable for payment of damages. I consider this statement with specific reference to (i) address issues arising from the current challenges in proving wrongfulness, (ii) the necessity of fault, (iii) multiple causation and (iv) the allocation of damages, in order to iron out some of the complexities that arise when the victim who suffers the loss brings a claim for damages against the polluter.

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67 For example, it is difficult to attract foreign investment where there is political instability, consistent labour problems, and threats of state involvement in the economy of the country (nationalisation). An enterprise which seeks to invest in a country where there is the likelihood, that liability may arise from the activities that the entity has been undertaking, may - in some instances - decide not to take such an investment risk.Kondo T (2017) 20 *PER/PELJ,* "A Comparison with Analysis of the SADC FIP before and after its Amendment" 3-4, Ronquest M (2008) 11 *PER/PELJ* "Socially Responsible Investment Law" 182/184-184/184 concur with the view that investment by foreign multinationals is undertaken with serious caution as any form of risk is taken seriously by investors. Such risks include liabilities that may emerge from pollution damage claims. Arguably, liability for damage should also extend to financiers, as they are indirectly responsible for pollution damage.

68 Benatar (2016) 106 *SAMJ* "The Poverty of the Concept of Poverty Eradication" 16-18, Van der Elst (2012) 8 *TD: The Journal for Transdisciplinary Research in Southern Africa* "The Effectiveness of the Millennium Development Goals (MDG) as Global Paradigm Shift for Poverty Eradication" 135-138 agree that poverty exists in its extreme forms particularly in Africa and other developing countries. Development initiatives and economic activities become an essential nucleus in situations such as South Africa where poverty levels are intolerably high.

1.7 The significance of the study

I acknowledge that although the area of the law of liability for environmental damage has received substantial attention in the courts and academic circles internationally, this topic has been somewhat neglected in South African law. In the first instance there appears to be a lack of appreciation of the potential and value of a delictual claim, as a relatively small number of judgments on liability for environmental damages have been reported. On the other hand, the complexities of a damages claim and challenges that a plaintiff must overcome might also deter victims from instituting civil liability claims against the wrongdoers.

There is a substantial knowledge gap on how to apply the general principles of delict to overcome these challenges. Little statutory reform for the facilitation of such damages claims has been enacted. I aim to address this knowledge gap in my thesis in the hope that it could contribute to future consideration of this issue. Apart from my thesis, there is no other comprehensive and current South African commentary on aspects of liability law for purposes of claiming environmental damages. This distinguishes my thesis from existing research.

This research is further relevant and necessary for the following reasons:
In the first instance, liability law is a complex branch of private law, and in the second the law of civil procedure and burdens of proof also pose obstacles for a plaintiff. Secondly, it is also evident that our general civil liability laws, although dealing with flexible principles, cannot always match the challenges posed by the unique nature of environmental damage claims. Our civil law is constantly developing as new grounds of liability are imposed in response to the growing demands of society. However, to wait for the courts to do so might delay the introduction of an effective liability regime for civil claims. Finally, statutory intervention to provide legal clarity on some of the aspects identified in this thesis as problematic might be a more suitable alternative in developing an effective civil environmental liability law, similar to the environmental tort law in other countries. To date no legislation deals specifically with

these civil law damages claims. I hope that my conclusions and recommendations will contribute towards the future development of the law in this context.

1.8 Methodology and approach

1.8.1 Literature and review

The research method is a desktop, in-depth literature study of the South African and other jurisdictions dealing with selected legal aspects of liability of polluters for causing damage to the environment. My study includes a review of primary and secondary sources of law.

Primary sources consulted are, in the main, the common law, judicial decisions, and legislative instruments. The relative importance of these sources depends on the legal system under review.

In addition to the primary sources, I also review secondary sources such as commentaries, treatises, reference works, textbooks, articles, case discussions, reports and electronic material drawn from various internet sites.

No empirical research was done for purposes of this study.

1.8.2 Legal Comparison

I have selected is the EU, the Netherlands, Belgium and the United States for purposes of legal comparison.

The investigation of liability regimes of the Netherlands and Belgium, in the context of overarching EU directives, have the potential to provide suitable guidance as these countries are more inclined to apply principles of Roman Dutch law which is also the South African system of common law. Although traditional comparative connecting factors may suggest other civil-law legal systems for comparison, I have chosen these as they have recently, adopted innovative and progressive legislation relevant to my study. Unlike South Africa, the laws of these countries are codified. They have seen

the introduction of a slew of specialised laws to govern liability issues. It follows that South African liability laws could follow suit and seek guidance from other countries where the issue of claiming for pollution damage has been addressed more progressively.

The position in the United States of America plays an important role in this study as it creates a specialised fund-based solution in the form of the so-called Superfund, which serves the purpose of providing compensation for environmental damage in the US. Whether this type of framework is an option in our law to ensure indemnification is taken into consideration.

1.9 Delimitation of Scope

Liability for pollution damage is a broad concept that encompasses a number of different spheres of law. Some of these areas of law are not under review in this thesis. Liability for environmental damage is a legal mechanism to hold polluters responsible for their pollution. It embodies a number of different fields which could not all be a subject of review in this thesis. One of these is administrative liability. This thesis aims to evaluate effective indemnification of the victims of pollution and does not address the liability of an administrative authority in the execution of its duties. An action by members of the public for compliance in the event of a breach of a statutory duty against the government is not incorporated in the evaluation.

The scope of liability that the study deals with is limited to the specified areas of environmental law. Climate change in general, for example, does not form part of the study. This does not mean that there will be no reference made to it in the study yet it is not discussed as a separate theme.

This study addresses insurance to a limited extent. The main purpose for insurance coverage is to protect the polluters against claims for pollution damage. The risks that are posed by industries require protection for entities involved to avoid unnecessary financial burdens owing to damage to the environment.

Claims based on breach of contract will not be included in the scope of this thesis. In brief, breach of contract occurs where a party to a contract fails to perform the obligations in terms of the contract. As this would require an intensive study of this branch of the law of obligations, for the sake of brevity it cannot be included.

The notion of the 'green economy' also does not form a distinctive part of the study. The green economy is regarded as one of the viable alternatives to polluting industries. It is defined as, according to the United Nations Environment Programme, a "system of economic activities that relate to the production, distribution and consumption of goods and services that result in improved human well-being and social equity, while reducing environmental risks and ecological sacrifices".[69] It aims for development with low-carbon emissions, resource efficiency and to reduce environmental damage, yet is not of primarily importance in the evaluation of liability regimes.[70] It is also interesting to note that the notion of green economy remains a space that has not been extensively or optimally explored in South Africa and other developing nations to date.[71]

The ocean economy, meaning the exploitation of the marine living and non-living resources, is not a distinct part of the study. The National Development Plan specifically emphasises the consideration of the ocean economy as another avenue for economic growth and job creation. The White Paper on National Transport Policy seeks to promote seaborne trade as it emphasises its role as a ready-made infrastructure for economic and social development.[72] These activities have the

69 UNEP (2011) "Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication - A Synthesis for Policy Makers" 1-2. It is believed that green economy is developmental and employment oriented which may be good for South Africa where unemployment, and poverty levels are high. Liability for damage to the environment would make sense when green economy comes to fruition.

70 Low-carbon activity implies that there is minimal output of greenhouse gas emissions. It is regarded as a more sustainable economic growth in accordance with the principle of sustainable development. The green economy is one of the strategic issues in the promotion of industrialisation and energy efficiency. The energy sector is responsible for the most greenhouse gas emissions as it depends on fossil fuels that are vastly used in developed and developing countries. Energy security, conversely, remains important for economic development. Emissions cannot be drastically curbed yet an attempt must be made to restrict extensive emissions and ensuing harm.

71 See Chapter 3 of the NDP 150; Du Plessis (ed) (2015) 214-216 is of the opinion that municipalities see the green economy as a strategy for creating employment opportunities. The green economy is generally understood as an alternative to mining activities for fossil fuels that cause considerable damage to the environment.

72 The White Paper on National Transport Policy of 1996 also states that economic growth in the context of marine environment must take the principle of sustainable development into account.

potential to cause pollution damage to the ocean and national coastal-based resources.[73] The responsible parties for marine pollution incidents are, in most cases, shipping and extractive industry companies. The *Exxon Valdez*[74] incident that took place in Prince William Sound, Alaska, represents one of the most disastrous human errors in shipping of oil and a game-changer in the marine environment. This oil spill incident gave rise to tough regulations in the US in the context of maritime governance. The latest international catastrophe was the massive oil spills caused in the Deepwater Horizon incident in the Gulf of Mexico.[75] When maritime pollution incidents occur, pollution claims can be instituted against the entities that have caused such harm. Although the international maritime legal regime applicable in the Valdez-case is different from our general national regimes, the decision made in that case is correct to hold Exxon Valdez liable for the damage caused. The Constitution in section 39 requires our courts to consider international laws in the development of our own law. We could take a page from this book, although it applies to maritime law, should also inform our civil liabilities for the remainder of the environment beyond marine resources.

The marine environment is a strictly regulated space in the national and international legal framework. Maritime claims arise when pollution incidents occur in the broader marine environment and the responsible parties are held liable for their pollution by numerous national and extensive international statutes and processes. A ship, for example, may be subjected to arrest for causing damage to the environment or other offences in accordance with very specific procedures that deviate from the normal

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See also Fouché (2014) 27 *Acta Criminologica* "Combating Threats to Security in Africa's Maritime Domain: Opportunities and Challenges" 116-118 who endorses the view that the maritime environment plays an important role in the development of economies.

73 Jordan B (2016) "Marine biodiversity plan will gaff fishing jobs" 17 April 2016 *Sunday Times* 8 raises the supremacy of economic interests over environmental interests in explicit terms. Two state agencies, namely the Department of Environmental Affairs and the Department of Mineral Resources, have shown to be at loggerheads over the declaration of marine-protected areas with these two departments seeking to pursue marine products as part of the expansion of ocean economy. The fishing industry also believes the declaration of protected areas may result in loss of jobs in the marine industry. The efforts to protect certain marine areas may sound hollow in the view of the plan of the Department of Mineral Resources to open up for mineral exploration as part of the agenda to create jobs for society that is plagued by extreme poverty.

74 *Exxon Shipping Co v Baker* 554 US 471 [2008 and *More Sodruzhestva* in that the respondents were held liable for damage they caused to the environment. The respondents had acted in contravention of the International Convention for the Prevention of Pollution from Ships to which South Africa is a signatory.

75 On 20 April 2012; www.oilandgasiq.com/DeepwaterHorizon (accessed 12 July 2016).

liability rules.[76] Maritime pollution remains a critical and sensitive topic environmental law and, owing to its international and transnational natures, liability in this context is deemed to be such a specialised topic that it requires its own extensive discussion that this thesis cannot provide.

[76] Mason (2003) 27 *Marine Policy* "Civil Liability for Oil Pollution Damage: Examining the Evolving Scope for Environmental Compensation in the International Regime" 1-3 and Hunt (2003) 27 *Marine Policy* "Economic Globalisation Impacts on Pacific Marine Resources" 2.5-2.6 acknowledge marine pollution, and the exploitation of oceans and issues of ocean governance.

CHAPTER 2

DEFINITIONS AND ENVIRONMENTAL MANAGEMENT PRINCIPLES

2.1. Introduction

It is common cause that the Constitution does not define the environment. It only places emphasis on the need for authorities to protect the environment. The definition of the environment is crucial in order to lay the grounds concerning liability for its damage. The environment is defined in a variety of ways depending on its context, and means different things to different people.

The definition of the environment has the potential to be broad and diverse and many factors – including, for example culture, values and economic circumstances - influence its meaning. The definition of the environment always takes a centre stage during litigation concerning environmental matters, specifically whenever environmental damage and ensuing liability are at issue. These descriptions will determine which statutory regulations and scope of liabilities apply and will furthermore inform the courts when assessing and quantifying the extent of damages for civil liability claims.

Owing to a lack of consistency in its description in national and international conventions and laws, it becomes difficult to define the word ‘environment.’ Its defined scope is inextricably linked to the concept of ‘damages’ and directly informs the assessment and quantification of damages for which liability ensues.

It may be deduced from the existing descriptions dealt with below, that the definition of the environment is a rather subjective concept opposed to an objective one. Principally, in my view, the description of the ‘environment’ may vary from very narrow to extremely broad. On one side of the spectrum, the definition of the ‘environment’ clearly has the potential to encompass all aspects of life yet, on the other, it can be

specifically reduced by statute or contract to a few or even single components of the natural environment such as air, water, land as well as flora and fauna where required. An examination of the definitions of the 'environment' as done below is nevertheless important with reference to liability claims as it simplifies the understanding of its relevance in merit of a damages claim for both the expert and non-professional alike.

What follows includes a selection from descriptions that serve to inform the extent, or limit, of a potential damages claim. The main issues are whether the 'environment' refers only to the natural environment or also to the man-made or so-called built environment; furthermore, whether human beings also form part of the 'environment.'

2.2. The Dictionary Meaning of the Environment

2.2.1 Black's Law Dictionary[77]

The 'environment' is defined as the 'totality of physical, economic, cultural, aesthetic and social circumstances and factors that surround and affect the desirability and value of property and which also affect the quality of peoples' lives'. This definition includes the most important components of the environment, including the value of property and not the property itself, as well as the quality of life that people live. The reference to people's quality of life implies that the environment is compatible with human quality of life and even survival. It is not limited only to specific objects or things. It is therefore broader than others listed below.

2.2.2. Oxford Concise English Dictionary[78]

The 'environment' is defined as 'the surroundings or conditions in which a person, animal, or plant lives or operates. The natural world, especially as affected by human activity.' The definition refers to surroundings or conditions and the natural

77 Black's Law Dictionary http://www.republicsg.info/Dictionaries/2004_Black%27s-Law-Dictionary-Edition-8.pdf last accessed 21 May 2014.

78 Oxford Concise English Dictionary https://global.oup.com/academic/product/concise-oxford-english-dictionary last accessed 21 May 2014.

environment in which, humans as guardians of the environment, live. These conditions also revolve around human activity yet do not expressly include the human person.

2.2.3. The Collins Thesaurus Dictionary

This dictionary defines the 'environment' as the 'atmosphere, background, conditions, context, domain, element, habitat, locale, medium, milieu, scene, setting, situation, surroundings and territory.'[79] This definition is simple but adequately covers the most critical components of the environment yet not the human living in it.

2.2.4. Longman Dictionary of the English Language[80]

The 'environment' is defined as 'the circumstances, objects, or conditions by which one is surrounded, the complex of climatic, soil and biological factors that act on an organism or ecological community; the social, physical and cultural conditions that influence the life of an individual or community'. The Longman Dictionary thus provides an all-encompassing description of the 'environment' that includes the life of the individual person.

2.3. Definition of the Environment at International Law

International conventions on the 'environment' constitute a considerable body of law. International conventions and international law are expressly recognised as part of South African law in terms of the Constitution.[81] It is important to refer to, and include, some of these international instruments in this thesis. For example, the Preamble to the Stockholm Declaration recognises that the 'environment' in the context of natural resources should be distinguished from the man-made environment, which includes - in particular - the living and working environment.[82] Due to this limitation this

79 Collins Thesaurus Dictionary the Ultimate Wordfinder (12 ed) 2011.

80 Longman Dictionary of the English Language https://www.amazon.com/Longman-Dictionary-English-Language last accessed 23 May 2014.

81 S 39 of the Constitution provides that 'when interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that under an open and democratic society that is based on human dignity, equality and freedom, (b) must consider international law and may consider foreign law.'

82 Declaration of the United Nations Conference on the Human Environment of 1972 (hereinafter the Stockholm Declaration) provides a set of principles that serve as guidelines in relation to the protection of the environment. The World Charter for Nature of 1982 does not only define the

description aims to place a narrower emphasis on only the natural environment which is in line with this thesis topic.

Article 3(c) of the Aarhus Convention is broader as it refers to a more extensive definition of the 'environment' as a 'state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment.'[83] This is a broader approach as it includes both the natural and the man-made environment, and includes human health which, by implication, includes the person.

Article 24 of the African Charter on Human and Peoples' Rights does not specifically describe the environment as it only states that 'all people shall have the right to a general satisfactory environment favourable to their development.'[84] The African Charter describes the environment in the context of an environmental right that is favourable to the development of the people. It does not describe the environment with its characteristics and components and therefore follows a broad approach. No indication is given as to who carries liability and how the losses are to be allocated. It fulfils the role of unpinning the duty of care (known as duty not to infringe on rights in SA law).

The Report from the International Law Commission ('ILC')[85] on Protection of the environment in relation to armed conflicts[86] also provides some relevant descriptions for this thesis as its purpose is, *inter alia*, to ensure prompt and adequate compensation to victims of transboundary environmental damage.[87]

Some of its principles and definitions that are relevant to the topic of this thesis are included in this chapter:

'environment', but also addresses the need to respect nature through principles which are applicable to all life forms, habitats, all areas of the Earth, ecosystems and organisms, and land, marine and atmospheric resources.

83 Article 3(c) of the Aarhus Convention of 1998.

84 Article 24 of the African Charter on Human and Peoples' Rights of 1981 (hereinafter the African Charter).

85 As adopted by the General Assembly resolutions 68/112 of 16 December 2013; 69/118 of 10 December 2014; 70/236 of 23 December 2015; 71/140 of 13 December 2016; 72/116 of 7 December 2017 and 73/265 of 22 December 2018.

86 Document A/CN.4/685 (2015).

87 Principle 3.

In Principle 2 on the use of terms: '(*b*) "environment" includes natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors, and the characteristic aspects of the landscape.'

It can in general from the discussion above be concluded that the 'environment' does not have a generally accepted finite description in national and international law. It is possible that the definition of the environment will be transformed over time by political processes to suit the agenda of a particular country or region and will be drafted as such into specific legal definitions in treaties among nation states.[88]

2.4. Definition of the Environment in Statutes

2.4.1. The Environment Conservation Act[89]

One of the important environmental statutes although in part repealed in 1999 was the Environment Conservation Act (ECA). The ECA is erroneously considered to be repealed *in toto*, however, certain provisions and notably sections 31A, 34 and 37 of ECA, remain in force. The Act therefore retains its relevance. The preamble to the ECA refers to the cultural heritage, human living conditions and the natural environment. In terms of section 1 of the ECA, the 'environment' means 'the aggregate of surrounding objects, conditions and influences that influence the life and habits of man or any other organism or collection of organisms.'[90] The ECA was not introduced during the constitutional dispensation in South Africa, but it remains important to provide background to our environmental legislation framework. Prior to the enactment of the ECA, environmental issues were mainly addressed through the common law principles.

This definition is extremely broad, and as one of the first definitions in our statutes attempted to cover even the conduct of persons ('habits of man') and an overarching

88 This thesis does not consider all possibilities due to constraints in length.
89 Environment Conservation Act 73 of 1989 (hereinafter the ECA).
90 S 1 of the ECA.

reference to conditions and influences on life. More modern legislation as examined below provides a far more limited and specific description.

2.4.2. The White Paper on Environmental Management Policy

The White Paper on Environmental Management Policy gives an extensive overview, in its description, of the 'environment'.[91] The White Paper on Environmental Management Policy[92] describes the word 'environment' comprehensively as referring to:

> The biosphere in which people and other organisms live. It consists of renewable and non-renewable natural resources such as air, water, land and all forms of life. Natural ecosystems and habitats and ecosystems, habitats and spatial surroundings modified or constructed by people, including urbanised areas, agricultural and rural landscapes, places of cultural significance and the qualities that contribute to their value. People are part of the environment and are at the centre of concerns for its sustainability. Culture, economic considerations, social systems, policies and value systems determine the interaction between people and natural ecosystems and habitats, use of natural resources and values and meanings that people attach to life forms, ecological systems, physical and cultural landscapes and places.

This definition - following the general definition provided in the ECA - is the first referring to individual components of the environment and is the most comprehensive as it encompasses almost everything, which, more often than not, is not included in most definitions found in subsequent legislative instruments that cover more specific or targeted environmental aspects. In the South African context, some of the elements that do not form part of the general definition of the environment do appear in other sectoral or specialised statutes.[93] The term 'environment' clearly comprises a mixture of different aspects, which are seldom all included in a single definition. This appears to cause some fragmentation in the statutory regulation.

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91 The White Paper on Environmental Management Policy (G 18894) for South Africa of 1998 10.
92 The White Paper on Environmental Management Policy of 1998 10.
93 Glazewski (2014-2015) 1-11 Sands P and Peel J (2012) 13.

2.4.3. The Definition in the Constitution

The primary legal provision in the context of environmental law in South Africa is found in section 24 of the Constitution.[94] Section 24 does not define the environment as it only refers to the environment in the context of a right to the environment in section 24(a) and its protection in section 24(b) of the Constitution. In accordance with section 24(b) of the Constitution, it also promotes the prevention of pollution and the conservation of the environment. Our Constitution- as a document of general application - does not define concepts such as the 'environment' and therefore it does not offer specific guidance to defining the concept.[95] Detailed definitions are found in other statutory instruments as examined below. Some are broad where the legislation is overarching, whereas others are more narrow or restrictive where the legislation is quite specific.

2.4.4. The Definition in NEMA

The primary definition of the environment, as embodied in NEMA, serves as the framework legislation for environmental governance in South Africa. Prior to the enactment of NEMA in late 1998, as stated above the legislation that regulated the South African environmental governance was the Environment Conservation Act. NEMA serves as the overarching framework legislation for the environmental management and protection in the country.[96] It is important to note that NEMA is directly derived from, and gives effect to, section 24 of the Constitution. Different conditions for different nation states make it difficult to adopt a universal approach with respect to the definition of the environment.[97] The definitions in NEMA pertaining to the environment are thus regarded as the basic authoritative definitions as these

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94 The fundamental right found in S 24 of the Constitution is the foundation of the protection of our right to a clean environment that is not harmful to our health and well-being, and to have the environment protected.

95 Kotzé LJ (2003) 6 *PER/PELJ* "Constitutional Court's Contribution to Sustainable Development in South Africa" 81/173-83/173.

96 NEMA, as a framework statute, contains the necessary principles for purposes of its implementation. These principles could even be more effective with the application of more extensive liability rules.

97 According to Fuggle and Rabie (2009) 1 'There is no general agreement on exactly what the concept environment encompasses. Curiously enough, its meaning is often taken for granted and many commentators - and even official publications - discuss environmental problems without attempting to define the environment.'

inform other statutes, which may expand thereon.[98] In other words, the definition, as provided in NEMA, is the one that enjoys overriding priority where conflict may exist on the definition or description of the environment found in other sources.

In terms of section 1 of NEMA, 'environment' means:

> The surroundings within which humans exist and that are made up of:
> (i) the land and water and atmosphere of the earth;
> (ii) micro-organisms, plant and animal life,
> (iii) any part or combination of (i) and (ii) and
> (iv) the interrelationships among and between them, and the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.

Recognising this definition of the environment confined to NEMA, as the overarching national framework legislation, is in the interest of consistency. Consistency is especially relevant for the implementation where a diverse range of legislation governs a similar topic as lack of unanimity may result in complications for the both the courts and public authorities in the execution of their respective duties.

As the overarching definition may require refinement where legislation serves a much more specialised purpose, specific Acts may – however - contain limited or refined descriptions. These are listed ranging from the oldest to the most recent to indicate the progression and developments of the concepts that relate to the general descriptions of the 'environment.'

2.4.5. Genetically Modified Organisms Act[99]

The definition of the 'environment', in terms of the GMO Act, uses the same description of the environment as initially adopted in the ECA. In terms of section 1(x) of the GMO Act, the environment is defined as 'the aggregate of surrounding objects, conditions and influences that influence the life and habits of man or any other organism or

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98 South Africa has a vast number of laws that regulate environmental management and protection. Our environmental law uses a fragmented approach as their own statutes regulate different components of the environment.

99 Genetically Modified Organisms Act (hereinafter the GMO Act).

organisms.'[100] Although the GMO Act preceded NEMA, it remains in force as sectoral legislation that focuses only on the regulation of the development, production, use and application of genetically modified organisms.

In view of the novel technologies relating to genetically modified organisms, the legislator appeared to prefer to return to the broad ECA definition in order to provide a "catch all" cover for this statute.

2.4.6. The National Forests Act

The word 'environment' is not specifically described in the National Forests Act[101] as this Act refers only to the 'ecosystem' as a 'system made up of a group of living organisms, the relationship between them and their physical environment.' Forestry forms an important component of the environment as it is made up of the natural environment and the man-made environment. The natural environment, on the one hand, relates to forestry and pertains to indigenous forestry, whereas the man-made part of forestry is made up of plantations.

One can level criticism against this limited definition as it defines only the 'ecosystem' and not the broader concept of the 'natural environment'. This Act clearly aims to regulate a very narrow and specialised aspect of a single element as part of the general concept of what the 'environment' entails.

2.4.7. National Environmental Management: Air Quality Act[102]

The NEMAQA does not define the environment except to state that the term 'environment' enjoys the definition assigned to it in terms of section 1 of NEMA.[103]

100 S 1(x) of the GMO Act.
101 National Forests Act 84 of 1998.
102 National Environmental Management: Air Quality Act 39 of 2004 (hereinafter the NAMAQA).
103 S 1 of NEMA.

It is clear that in using the overarching NEMA definition consistency is ensured, and does not limit the application of this Act that might have been restrictive in regulating of air quality and prevention of air pollution.

2.4.8. National Heritage Resources Act

The National Heritage Resources Act[104], like other environmental legislation, does not define environment as the natural environment but rather as a 'heritage resource'. Section 1(xvi) of the Act refers to heritage resource that means 'any place or object of cultural significance.'[105] The components of the heritage resource, which ordinarily constitute the environment, have an extensive scope including 'aesthetic, architectural, historical, scientific, social, spiritual, linguistic, indigenous knowledge systems or local knowledge or technological value or significance'. The heritage resources fall - to a greater extent - within the domain of arts and culture. However, in accordance with some of the broader definitions provided at the beginning of this chapter, these are part of the 'environment' as a holistic concept. As Albert Einstein once said that 'environment is everything that isn't me.'[106]

One can thus conclude that the word 'environment' means different things to different people and in different situations.

It becomes clear from the above that its interpretation cannot be approached narrowly. Where an Act expressly provides a specific definition, it is clear that the intention of the legislator is to limit the application of the legislation to a specific sector.

2.5. The Environment defined by Authors

Authors recognise that the definition or description of what the 'environment' entails is a complex issue, particularly when one also takes account of the principles of

104 National Heritage Resources Act 25 of 1999 (hereinafter the NHRA) is also an environmental legislation with a specific focus on heritage component of the environment.
105 S 1(xvi) of the NHRA.
106 http://www.brainyquote/albert.einstein.quotes (last accessed 15 November 2015).

sustainability and sustainable development. As indicated above, the environment remains central to the economic, cultural and social spheres of life.

Quite correctly, he deduces that the word 'environment' is not consistently defined in 'national and international law and the debate on its definition is ongoing'.[107] When the term 'environment' is defined, definitions diverge and often reflect diverse approaches. For example, most definitions tend to leave out certain elements of the environment for instance cultural heritage and the characteristic aspects of the landscape as mentioned in my conclusion on the statutory definitions above.[108] Brans confirms that a broad definition of the term environment encompasses natural resources. The novel characteristic aspects of the natural resources not yet mentioned in our statutes, that he identifies include landscape, timber, crude oil and property that he deems to form part of the greater cultural heritage. Natural resources are then defined as including living and non-living natural resources such as land, habitats, fish, wildlife, air, water, groundwater and ecosystems. Whether these resources are of commercial value or not is immaterial.[109]

Generally, it has become clear that the environment can include almost everything, from social climate to the biosphere. The environment even encompasses social issues that may include imbalances in patterns of production and consumption so resulting in unequal access to opportunities, resources and services.[110] The environment is thus a broad concept that cannot exclude social challenges such as

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107 Brans (2001) 134, Nel JG and Wessels JA (2010) 13 *PER/PELJ* "How to Use Voluntary, Self-Regulatory and Alternative Environmental Compliance Tools: Some Lessons Learnt" 49/189-51/189 precisely accept the perspective that the definition of the environment should be evolving as conditions change in the environmental landscape.

108 As described by Knobel (2013) 16 *PER/PELJ* "The Conservation Status of Eagles in South Africa" 162/487-163/487, Brans (2001) 3 the protection of nature is crucial as part of human welfare. For example, the situation of eagles in South Africa has been exacerbated by killings of a rare species for no apparent reason.

109 Brans (2001) 11, For another broad approach, see *Sea Front for All and Another v MEC Environmental and Development Planning Western Cape Government and Others* 2011 (3) SA 55 (WCC), where the court held that democracy is not only dependent on political democracy but also on the enjoyment of the environment by society. The court further held that "democracy refers to open, secure and well-developed public urban spaces where people should be able to mix with various groups and experience the benefits of urban environments". The issue in this case was the protection of the environment in the interest of the people and society rather than commercial interests as well as independence of the environmental impact assessment practitioner.

110 Nanda and Pring (2013) 31

poverty, disease, unemployment, crime and environmental injustice. The individual elements of the environment are important as these depict the environment as central to everything including the fundamental right to life itself.[111]

Fuggle and Rabie, on the other hand, adopt a sectoral approach to the definition of the 'environment' as the authors believe that such a definition should be inclusive of both 'a legal and scientific perspective'.[112] In this context, their approach encompasses the green environmental agenda.[113] This includes the biotic and abiotic elements of the environment.[114]

The definition of the 'environment' from the more green perspective is one that is proposed by Colby[115] as follows:

> The environment is the complex of biotic, climatic, soil and other conditions, which comprise the immediate habitat of an organism, the physical, chemical and biological surroundings of an organism at any time.

This description of the 'environment' consists of living and non-living ecosystems similar to the definition found in the South African White Paper on the Environmental Management Policy. Living ecosystems include humans, animals, plants and microorganisms, whereas non-living elements of ecosystems - such as water, land, soil, energy and light - form part of the environment.

On the other hand, the brown perspective argues that human beings are an integral and indivisible part of the earth system and that those social issues which affect them

111 Fogleman V (2005) Environmental Liabilities and Insurance (1 ed) 356.
112 Fuggle and Rabie (2009) 1-3 recognise the importance of reliance on scientific developments in their discussion as environmental concepts do change. Such changes are influenced by science to a greater degree.
113 According to Glazewski (2014-2015) (Loose leaf), 1-12 the categorisation of the green and brown resource utilisation is 'artificial and inter-related'.
114 Fuggle and Rabie (2009) 1-3 state that the biotic and abiotic elements imply the living and non-living organisms of the environment. For example, the living elements of the environment, *inter alia,* include humans, plants and animals and non-living elements of the environment, that include water, air, soil, climate and land.
115 Colby (1990) 22.

may not be separated from the environment.[116] As this is broader and offers more protection to victims of environmental damage, this perspective is preferred.

The description of the 'environment' as the natural environment refers to the environment that has not been influenced by humans. It is an environment in its natural and pure state. It may also refer to the environment that is more generally regarded as referring to renewable and non-renewable natural resources such as air, water, soil, plants and animals.[117] The built environment, for example, is not an environment in its natural state but is regarded as man-made environment. One would prefer regulation for the protection and liability for damages caused to both of these as optimal.

According to Sands and Peel, the term 'environment' encompasses the features and products of the natural world and those of human civilisation. In this definition, the environment is broad and includes nature, which is concerned with the features of the natural world.[118] They correctly point out that 'ecology', on the other hand, is not a synonym for the 'environment' but a science related to the environment and to nature that is concerned with animals and plants. It is also a branch of biology that deals with the relationship of living organisms to their surroundings, their habits and modes of life.[119]

Sands and Peel note that the concept of 'environment' has evolved over a period of time deriving influence from a diverse range of inputs including philosophy, religion, science and economics. This they recognise the broadening of the definitions over time. Legal definitions of the environment conventionally take dictionaries as their

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116 Fuggle and Rabie (2009) 2-3 and Nanda and Pring (2013) 109 state that ecosystem services are processes by which the natural environment produces resources that are useful to people and are akin to economic services. The 'brown' perspective refers to environmental issues relating to urban pollution, sanitation, water, electricity and waste removal.

117 Fuggle and Rabie (2009) 84 are of the opinion that the environment should not be narrowly defined as it involves a number of components that constitute it. These include the natural environment, spatial environment and social environment. The natural environment refers to the natural state of the environment which includes renewable and non-renewable energy. Spatial environment describes man-made and natural environment, for example suburb, town, city, mountains, wetlands and forests. Social environment refers to the social settings for example, family and society.

118 Sands & Peel (2012) 13.

119 Ecology is part of the natural environment with a specific focus on the science concerning plants and animals.

starting point, which simply define environment as the objects or region surrounding anything.[120] This is clearly too uncertain and too broad for purposes of a targeted regulation and discussion on damages claims for environmental harm.

In conclusion, Sands and Peel concede that the definitions of the 'environment' do vary extensively. The authors cite an example that early treaties tended to use the words 'flora' and 'fauna' for the description of the environment instead of the word 'environment', which is not included in subsequent definitions[121]

It appears to be a more scientific, traditional approach to the environment to categorise environmental issues into sectors. These sectors include the atmosphere, atmospheric disposition, soil and sediments, water quality, biology and humans. For example, a narrow definition would be more limited to natural resources such as air, water, flora and fauna as well as the interaction between these resources.

The legal definition of the term 'environment' and related concepts is important in the evaluation of environmental damage liability, where a court will have to determine which rights have been infringed and what the nature of the infringement is.
Furthermore, the definitions of the 'environment' generally expand the scope and evolution of the environmental law as a legal discipline.

In *Mpumalanga Tourism and Parks Agency v Barberton Mines Ltd*[122] and *Director, Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others*[123] Olivier JA stated that 'Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal approach and the administration of

120 Sands & Peel (2012) 13-14 and Brans (2001) 49 acknowledge that the construction of the definition of the environment may vary according to the specific political environment of the time in which it is defined.
121 See the discussion by Sands & Peel (2012) 14 and Dugard J and Alcaro A (2013) 29 *SAJHR* "Environmental and Socio-economic Rights" 17-18.
122 (216/2016) [2017] ZASCA 9.
123 1999(2) SA 709 (SCA).

claims for damage to address environmental concerns.'[124] In *BP Southern Africa (Pty) Ltd v MEC for Agriculture*[125] the court correctly held that 'this specific broad and inclusive definition of the environment is consistent with international law as contained in various international conventions and treaties. It incorporates all the specialist and older categories of pollution, conservation, health and similar concepts. In line with international law, the environment is a composite right that includes social, economic and cultural considerations in order to ultimately result in a balanced environment.' It is important to note for our law that the definition assumes particular significance in the efforts to establish general rules governing liability for damage to the environment.[126]

2.6. Definitions of Environmental, Ecological and Natural Resources Damage

2.6.1. Environmental Damage

The thesis specifically examines liability regimes for damages to compensate for, or remedy, damage caused to the environment. As stated in Chapter 1, the application of liability for damage does not include loss, harm or damage from natural incidents such as disasters caused by forces of nature. It has a focus on pollution damage that takes place in the course of industrial activity. The understanding is that pollution damage caused during engagement in industrial activity should be an anticipated occurrence on the part of the polluter for which they have to take responsibility.[127]

The broader the definition, the broader the scope of compensable damage.[128] 'Environmental damage' and ecological damage are not defined with consistency in

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124 Par 20.

125 2004 (5) SA 124 (W) paras 34-36.

126 Sands and Peel (2012) 13 and Fuggle and Rabie (2009) 89 are of the view that legal definitions of the environment reflect scientific categorisations and groupings as political acts that incorporate cultural and economic considerations.

127 Colby (1990) 15 avers that the need to protect the environment from damage does not imply that society has to return to 'pre-industrial, rural lifestyles and standards of living'. Economic activity remains pivotal to the progress of society.

128 Brans (2001) and Wilde (2002) 102-103 state that common law remedies seek to compensate for any loss sustained and rectify damage which has already occurred as a result of infringements. The scope of the definition is relevant to liability as it determines the extent of damage as well. This may not be the only criterion in the determination of environmental damage. This is furthermore achieved by means of the assessment and quantification for an award of damages.

the context of domestic laws. Ecological damage, pure ecological damage, impairment of the environment, pure environmental damage and damage to the environment, *per se,* are some of the terms used to refer to damage to the environment. Some academic authors make a distinction between damage to the environment and damage to natural environments.[129] It is therefore important to attempt to define environmental 'damage' as a holistic concept.

As there is no universally accepted definition of 'environmental damage', the term is generally broadly defined.[130] 'Environmental damage' encompasses damage to both owned and un-owned natural resources.[131] Damage to the environment includes not only damage to natural resources but also consequential losses, such as pure economic loss, clean-up costs and personal injury.[132] In the discussion below, some specific elements of damage are identified and analysed in the context of being claimable damages.

Article 1(9) of the Lugano Convention[133] states that one should take 'any reasonable measures aiming to reinstate or restore the damaged natural resources or, where reasonable, to introduce the *equivalent* of these resources into the environment.' The Convention does not give any criteria for restoration or economic valuation of ecological damage. Measures of restoration are given priority over other means of redress to ensure that restoration is the main aim as far as possible.

A more specific and expansive definition is, however, found in the Principle 2 of the ILC Report that provides as follows:

> '(*a*) "damage" means significant damage caused to persons, property or the environment; and includes:

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[129] Specifically Fuggle and Rabie (2009) 84 are of the opinion that the environment should not be narrowly defined as it involves a number of components that constitute it.

[130] According to Bergkamp (2001) 331 and Brans (2001) 18 'environmental damage is not a simple and uniform type of damage'.

[131] See Brans (2001) 12. In most instances, international treaties do not include a definition of the concept of 'environmental damage'.

[132] International treaties often cover environmental damage only to the extent that such damage constitutes property damage, economic loss and personal injury.

[133] Art 1(9) of the Lugano Convention of 1993.

(i) loss of life or personal injury;

(ii) loss of, or damage to, property, including property which forms part of the cultural heritage;

(iii) loss or damage by impairment of the environment;

(iv) the costs of reasonable measures of reinstatement of the property, or environment, including natural resources;

(v) the costs of reasonable response measures.'

In both of these instruments 'environmental damage' clearly does not only refer to damage to the 'environment' itself, but also damage to private property as well as other financial losses. One of the main problems thus remains the precise description in our own laws of the types of 'environmental damage' for which an amount of money can be recovered.[134] The term 'environmental damage', for example, often includes elements that are not part of the natural environment and are only included because the damage is caused by the environment. The issue of financial losses, as mentioned, above serves as an example. Damage or harm done to the environment does not necessarily fall within the scope of claims for damages in terms of the law of delict.

According to Loum 'environmental damage' refers to use values and non-use values. Use values are based on a direct interaction between a person or society and the natural environment. Use values can also be divided into consumptive use values and non-consumptive use values.[135] Consumptive-use values refer to resources that are consumed directly without being placed on the market, for example, meat, medicinal plants, and timber and firewood.[136]. Non-consumptive use values refer to the functions of the natural systems. The value of non-consumptive use values is not affected by usage.

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134 Environmental damage is a complex concept when attempting to define it precisely. The definition of the term 'environmental damage' is dependent on a number of factors a country may consider important in their national context.

135 Loum (2013) 40 *Ecology Law Quarterly* "Environmental Harm" 388-391.

136 Consumptive-use values also refer to goods that are locally consumed from one's surroundings and property, and not consumer goods that are bought from the market.

As previously mentioned, 'environmental damage' is defined differently in various legal systems. In most cases, the definition of the environment or the natural resources does not include goods, for example processed goods such as refined oil and steel. The definition of 'natural resources' should encompass all goods as they are also produced from the environment.[137] The following brief examples may serve that purpose: The EU Environmental Liability Directive defines 'environmental damage' as 'damage to protected species and natural habitats, water and land, if its contamination threatens human health.'[138]

The US definition of 'natural resources' is broader in scope and encompasses not only more commonly considered resources such as land, surface waters, wildlife and fish but also air, groundwater, drinking water supplies and any other resources.[139] It is, however, narrowed extensively as it is limited to government-owned resources. The US definition of 'damage' to the environment focuses on the costs incurred for the response actions associated with the inflicted harm in order to repair the damage.[140] The US definition of the damage to the environment is therefore very broad in scope. It encompasses costs for damages for 'injury to, destruction or loss of natural resources.'

Wilde captures a far simpler approach with reference to damage to the environment and liability. According to this approach, damage to the environment requires the reparation of the harm, which is defined by Wilde as the restoration of impaired environmental conditions through remediation measures or monetary

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137 WTO Report (2010) "Natural Resources: Definitions, Trade Patterns and Globalisation" 44-47 highlight the negative trade effects on the resource-exporting countries. This is the situation over and above the environmental degradation these importing countries suffer. It further goes on to state that resource-importing countries are at an advantage in terms of wealth-creation for their countries in that relationship.

138 European Union Environmental Liability Directive (2004/35/EC) (hereinafter EU Directive).

139 As put by De Chazournes *et al* 2013) 59. See also Bowman M and Boyle A (eds) (2002) Environmental Damage in International and Comparative Law: Problems of Definition and Valuation (1 ed) 3-6; the Oil Pollution Act of 1990 (OPA); the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (hereinafter the CERCLA); see also in this regard Blackmore A (2015) 20 *SAJELP* "The Relationship between NEMA and the Public Trust Doctrine" 87 in their examination of the description of the damage to the 'environment.'

140 Bowman and Boyle (2002) 6-8, Feris L (2006) 9 *PER/PELJ* "Compliance Notices-A New Tool in Environmental Compliance"59/118-61/118 and De Chazournes *et al* (2013) 59. This most probably relates to the fact that the US had decided to pursue a fund-based option for environmental clean-up and restoration.

compensation.[141] It is interesting to observe that compensation for damages, which consist of an element of impairment of the environment, does not appear to apply consistently to private property even if the property is of ecological significance, quality and value that exceeds the personal interest of the private owner.[142] This makes it easy to quantify when claiming for compensation for damage of the environment as the mere presence of restoration or remediation costs proves the presence of damage.

In the ILC Report Principle 7 on the development of specific international regimes, the provisions also indirectly link damage to the costs of response measures for remediation, and financial security measures to cover the damages as follows:

'1. Where, in respect of particular categories of hazardous activities, specific global, regional or bilateral agreements would provide effective arrangements concerning compensation, response measures and international and domestic remedies, all efforts should be made to conclude such specific agreements.

2. Such agreements should, as appropriate, include arrangements for industry and/or State funds to provide supplementary compensation in the event that the financial resources of the operator, including financial security measures, are insufficient to cover the damage suffered as a result of an incident. Any such funds may be designed to supplement or replace national industry-based funds.'

In some cases our courts have added their voices to defining harm to the general concept of the 'environment'. In *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd*[143] for example, the court noted that the fuel and petroleum products are hazardous and harmful to the environment where spillage occurs. The court went further to describe that "… [t]he proximity of fourteen filling stations within five kilometres of the site would clearly have some environmental impact.

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141 Soltau (1999) 33-34, Brans (2001) 11-12 and Wilde (2002) 12-13 agree that the monetary compensation for environmental damage implies that the polluter pays for remedial measures that have been applied for the restoration of the environment.

142 The focus of the study is on the liability for environmental damage. Liability for damage to the environment has to be compensated by the responsible parties. The parties responsible for environmental damage in fact do not compensate the environment but rather public authorities for their clean-up campaign. See Hinteregger (2008) 5 who holds the view that compensable damage comprises damage to the person and property damage but also includes loss or damage by impairment of the environment and the costs of preventive measures.

143 2006 (2) All SA 17 (SCA).

In addition it was observed that the development would have a significant impact on the scenic vista, degrade the existing visual character or quality of the site and its surroundings, create a new source of substantial light or glare, which would adversely affect day or night time views in the area or negatively impact on the surrounding communities' physiological health, as well as increase ambient noise levels."[144] All of these were thus an extension of a narrow description of the environment, recognising that it enjoys a broad application that must be protected. Failure to do so leads to administrative sanction, and should, in essence, also include individual civil redress.

The parties responsible for environmental damage usually compensate public authorities for their clean-up campaign only. Damage to property, in terms of the law, is calculated based on the diminution in market value of the property. Ecological values are not always fully reflected in the market value of property that is more focussed on patrimonial loss.[145] Yet claiming adequate compensation for damage to these ecological valuable resources causing loss of enjoyment or sentimental losses is unlikely. This is investigated fully in subsequent chapters of this study.

Complications may occur if only the cost of restoration of the property is used as a measure of damages. The ordinary measure of damages is likely to hinder obtaining full compensation in cases where damage is caused to property that consists of ecologically valuable natural resources. Property forming part of the cultural heritage, such as historical monuments, is excluded because these are regarded as goods that are of a different nature than natural resources. In principle these are already protected by law.[146]

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144 Par [21].

145 Brans (2001) 15. The intention of adequate compensation is to ensure that environment is restored to its pre-damage condition. Wilde (2011) 103 also agrees that in cases concerning the environmental damage, the costs of restoration may be out of proportion to the diminution in market value of the property which was caused by the harm. Compensation may not be an adequate measure in all circumstances. For example, the continuation of an activity that brings about damage to the environment and human health poses more problems. In such a situation, compensation is not a solution to the problem. The activity should rather cease.

146 S 34(1) of the NHRA provides that 'no person may alter or demolish any structure which is older than sixty years without a permit issued by the relevant provincial heritage resources authority.' S 37 of the Act states that 'public monuments and memorials must, without the need to publish a notice to this effect, be protected in the same manner as places which are entered in a heritage register referred to in s 30'. Many academic writers prefer to make a distinction between damage to the environment and damage to natural resources subject to property rights.

2.6.2 Ecological Damage

Ecological damage is most often defined as damage to the environment itself, that is, damage to parts of nature that have not been appropriated by individuals.[147] This damage affects the collective rather than individual interests. The collective interests in this regard actually spring from the fact that specific individuals do not own the damaged environment.[148] This type of environmental damage challenges traditional civil law because such damage does not fit into the existing rules of our common law. In *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance*[149] the court held that the world has become ecologically sensitive in the interest of nature and future generations, and not in the interests of the individual. Although the main issue was not on liability for damages, the case recognises that the ecology belongs to all members of society and to have rights to enjoy it and have it protected for future generations. This creates a duty to protect the general ecology, and failing which should lead to liability to repair it for society in general. This type of recognition underpins the potential class actions that may be brought for damages caused to communal environmental assets.

Traditional civil law is primarily focused on the protection of individual interests as opposed to the public or collective good. For that reason, it becomes difficult to recover damages for the harm done to un-owned natural resources in terms of South Africa's current legal dispensation.[150] Only damage caused to un-owned natural resources falls within the definition of ecological damage. Certain authors have extended this

147 Colby (1990) 4 and Woolley (2014) 2-3 adopt the view that there is no universally accepted definition of the ecological damage. The authors describe ecological damage as harm to the natural environment. According to them, ecological damage is simply damage caused to the ecosystem.

148 See Hinteregger (2008) 521 and Jing (2013) 9 *Jean Monnet Working Paper Series* "Towards a Compensation System for Ecological Damage in China: Lessons to be Learnt from the EU Environmental Liability Directive" 13 in their discussion make an example of the contamination of water to which everyone is entitled to its enjoyment as a typical example of an unappropriated good. The ecological damage caused to property that lacks specific ownership may give rise to complexity about claims for compensation. The scope to which ecological damage applies is very broad. The ecological damage implies natural resource damage in general. S 24 of the Constitution refers to the prevention of ecological degradation without defining it.

149 See *Company Secretary of ArcelorMittal South Africa v Vaal Environmental Justice Alliance* 2015 (1) All SA 261 (SCA) par 1 and Perez (2004) 159-161 raises the important issue of ecological damage which is caused by construction. Construction is an essential aspect of the civilised society, which requires infrastructure as part of social and economic development.

150 Brans (2001) 18 expresses the view that other types of damage to nature, for instance to particular valuable natural resources that are privately owned, should be excluded. The concept of what natural resource damage entails illustrates a deeper problem in liability law.

definition to encompass damage of a traditional type, such as pure economic loss, but are still related to the natural resources in question. This type of damage is thus only included if the damage is suffered because of the reduced use of the environment or the loss of un-owned natural resources.[151]

For instance, toxic waste that spills into inland waters often adversely affects the earning capacity of those dependent on recreational and tourist activities. The damages awarded to, for example, fishermen and those persons whose activities are related to that industry do not reflect the destruction or pollution. These constitute compensation purely for individual losses.[152] No obligation exists on the part of the affected parties to use the recovered amount of money to restore the environment. The restoration of the environment is essential for future sustainable development and provides ecological security.[153]

The legal status of the parts of the environment is not used as a criterion to define ecological damage. However, the lack of market value of natural resources is the criterion used to classify the different types of environmental damage. The advantage of this approach is that where the market value is decisive, many of the un-owned natural resources are included in its value.[154]

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151 In the *Fuel Retailers* case, the court emphasised the importance of ecological security as constituting a part of human environment and economic development. Ecological damage has implications for economic development as these are interrelated components of the environment, see para 42.

152 Hyun-Chul Cho (2009) 70 *Theological Studies* "Interconnectedness and Intrinsic Value as Ecological Principles: An Appropriation of Karl Rahner's Evolutionary Christology" 623 maintains that the reason for reckless exploitation of the natural resources is the anthropocentric attitude that society holds towards nature. The argument is that humans have unlimited needs that, in an attempt to fulfil these, can engender ecological damage. The anthropocentric orientation that society holds in relation to nature is the basis for ecological destruction. Environmental stresses that are caused on nature by human activity do not take into account that the ecology itself has an independent existence from human beings. Ecological damage poses a serious risk to human life as much as it does to nature itself.

153 See the comprehensive discussion on economic loss and ecological damage by Soltau (1999) 37, Havenga (1997) 196, Rogers (1997) 29 define ecological security as "the goal of stakeholders to create a condition where physical surroundings of a community, provide for the needs of its inhabitants without diminishing its natural stock". The definition recognises the risks or threats that the environment faces as a result of degradation. It also espouses the correct view that nature and humans are inseparable. It is also important to note that a single focus on the impact of ecological damage to humans does not do justice to the environment as a whole.

154 See Brans (2001) 18-19, Murdie and Urpelainen (2015) 63 *Political Studies* "Why Pick on US? Environmental INGOs and State Shaming as a Strategic Substitute" 358 concede ecological damage as a public ill and highlight the fact that the victims of such public ill are not the elite members of society.

For instance, many of the natural resources have no clear monetary value but, with the help of market and non-market valuation methods, the value of some of these resources can be assessed and calculated. The lack of a market value and the difficulties in valuing damages for injury to natural resources are important and are not the major problem confronting most claims.[155] As exact qualification of the damage is important for the claim and recovery of the loss. Methods for a more effective valuation of the unowned natural resources have to be developed to increase the recouping of losses as well as increase protection and preservation of the environment.[156]

The term 'ecological damage' can simply be defined as 'damage to nature or ecosystems'. The term 'ecosystem' can concisely be defined as 'including all natural resources forming part of the various non-living environments'.[157] The salient feature is not the legal status of parts of the environment but the importance of natural resources as part of an entire ecosystem and for the well-being of the people. Natural resources, subject to private property rights, are also included in this description. This thus encompasses a much broader scope than the term 'environmental damage'. This distinction is examined further below.

The terms 'pure ecological damage' and 'impairment of the environment' are generally used to describe damage that is done to those elements of the environment that have not been appropriated. These terms are used to point out that damage is done to the environment itself. For example, in Article 2(7) of the Lugano Convention a distinction

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155 Taylor (2011) 33-35 'Every species counts as having the same value in the sense that, regardless of what species a living thing belongs to, it is deemed to be *prima facie* deserving of equal concern and consideration. [Its good is] is worthy of being preserved and protected as an end in itself and for the sake of the entity whose good it is'.

156 Jing (2013) 13 and Wooley (2014) agree that the 'quantification of ecological damage' gives rise to more problems. Although there are various interpretations of the term 'environmental value', economists have primarily focused on monetary value. Economic value is not intrinsic quality. It occurs because of the interaction between a subject and an object. Environmental attributes have value only if these enter at least one individual's utility function. See United Nations Economic Commission for Latin America and the Caribbean (UN ECLAC) Report 2000 3.

157 See Fuggle and Rabie (2009) 189; Paterson A (2018) 21 *PER/PELJ* "Maintaining the Ecological Flows of Estuaries: A Critical Reflection on the Application and Interpretation of the Relevant Legal Framework through the Lens of the Klein River Estuary" 5-7; Hodas DR (2013) 16 *PER/PELJ* "Law, the Laws of Nature and Ecosystem Energy Services: A Case of Wilful Blindfulness" 70/214-72/214 who all agree that South Africa's ecological landscape has been fundamentally changed, much to the detriment of the values of sustainable development.

is made between impairment of the environment on the one hand, and damage to property, loss of life and personal injury, on the other hand.

'Pure ecological' damage and 'impairment of the environment' are regarded as synonymous for ecological damage. This type of damage can therefore be described as referring to damage to un-owned natural resources as well to privately owned natural resources insofar as these have an ecological value that exceeds the interests of the owner. Where this type of damage is the focus of, for example, legislation, the use of this broader and more comprehensive term could extend the scope of the provision.

2.6.3 Natural Resource Damage

US environmental legislation is dealt with in the chapter and addresses comparative studies in this thesis. For the purposes of explaining the concept of 'natural resource damage', a brief discussion follows with reference to the US law insofar as it relates to 'damage to natural resources'.

In the US for example, federal statutes such as the Comprehensive Environmental Response, Compensation and Liability Act[158] and Oil Pollution Act[159] give certain public authorities the right to recover damages for injury to 'natural resources'. These public authorities are not limited to sue for damage to un-owned 'natural resources' but these may also recover costs for damage to 'natural resources' that are managed by, held in trust, relating to or controlled by federal or state governments.

If there is a substantial degree of governmental involvement or control over private property, the public authorities are entitled to recover damages for damage caused to such 'natural resources'. However, purely privately owned property is excluded from the ambit of the 'natural resource damage' provisions in terms of the US environmental regulations in particular. The term 'natural resource damage' - as used in the US does

158 CERCLA.
159 OPA. See Fogleman (2005) 19.

- however, encompass more than mere damage to the natural resources themselves.[160]

The loss or impairment of specifically the use that originates from the harm to the 'natural resources' is the reason for recovering damages for injury to 'natural resources' with the purpose of restoring the natural resources to their pre-damage condition. The term 'ecological damage' and 'pure ecological damage' are primarily the concept of the European legal literature on this matter.

Ecological quality is vital where damage to privately owned property or 'natural resources' is likely to occur.[161] Sands and Peel hold the view that the environment - as a shared 'natural resource' - is vital for the well-being of society as whole.[162] The ecological quality of the environment has to be maintained as important components of it including trees, medicinal plants, and fuel. Food security is dependent on ecological resilience.

Environmental problems continue to manifest as these are related to human interference with the environment. The protection of the environment requires adequate efforts on the part of the authorities and the population to implement measures for the sake of present and future generations. Liability for pollution can serve as one of the measures that can be used to discourage polluters from the degradation of the 'environment'. It provides an immense benefit in that it effectively creates a deterrent to prevent further harm or damage being caused.

2.6.4 Compensation for Environmental Damage

Compensation for damage may become due because of the operation of statute in the public law realm or by a claim for delictual damages in the civil liability law realm, which

160 See Brans (2001) 21; and Bergkamp (2001) 333 who argue that 'environmental damage' is inherently subjective. The law does not, as a general rule, entirely accept subjective definitions of damage but resorts to more objective criteria.

161 The EU White Paper on Environmental Liability refers to the term 'biodiversity damage' instead of the term 'natural resource damage' or 'ecological damage.' See Sands and Peel (2012) 145.

162 See the discussion in general by Sands and Peel (2012) 145 and Philippopoulos-Mihaloppoulos (ed) (2011) 65-67 where the authors argue that the environment is not merely a physical space but an instrumental object that is 'determined by human activity and social values'.

will both be taken into consideration in this study. The issue of monetary compensation remains central to the issue of the reparation of environmental damage.[163]

In this regard the Report of the International Law Commission in Principle 4 states as follows:

'Prompt and adequate compensation

1. Each State should take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control.

2. These measures should include the imposition of liability on the operator or, where appropriate, other person or entity. Such liability should not require proof of fault. Any conditions, limitations or exceptions to such liability shall be consistent with draft principle 3.

3. These measures should also include the requirement on the operator or, where appropriate, other person or entity, to establish and maintain financial security such as insurance, bonds or other financial guarantees to cover claims of compensation.

4. In appropriate cases, these measures should include the requirement for the establishment of industry-wide funds at the national level.

5. In the event that the measures under the preceding paragraphs are insufficient to provide adequate compensation, the State of origin should also ensure that additional financial resources are made available.'

In Principle 6 the duty of states to maintain healthy resources to comply with remediation and the possibility of transnational liability claims is confirmed as follows:

'International and domestic remedies

1. States shall provide their domestic judicial and administrative bodies with the necessary jurisdiction and competence and ensure that these bodies have prompt, adequate

163 Van der Walt (1968) 51 endorses the view that liability for compensation - particularly for environmental damage - should not be dependent on the profitability of the activity of the polluter. liability has to have the aim of addressing the issue of damage that has been caused. The introduction, for example of the Merchant Shipping (International Oil Pollution Compensation Fund) Administration Act 36 of 2013 addresses some potential challenges in relation to the management of, and liability for, oil spills in South Africa.

and effective remedies available in the event of transboundary damage caused by hazardous activities located within their territory or otherwise under their jurisdiction or control.

2. Victims of transboundary damage should have access to remedies in the State of origin that are no less prompt, adequate and effective than those available to victims that suffer damage, from the same incident, within the territory of that State.

3. Paragraphs 1 and 2 are without prejudice to the right of the victims to seek remedies other than those available in the State of origin.

4. States may provide for recourse to international claims settlement procedures that are expeditious and involve minimal expenses.

5. States should guarantee appropriate access to information relevant for the pursuance of remedies, including claims for compensation.'

Principle 7 deals specifically with the development of specific international regimes:

> 1. Where, in respect of particular categories of hazardous activities, specific global, regional or bilateral agreements would provide effective arrangements concerning compensation, response measures and international and domestic remedies, all efforts should be made to conclude such specific agreements.
>
> 2. Such agreements should, as appropriate, include arrangements for industry and/or State funds to provide supplementary compensation in the event that the financial resources of the operator, including financial security measures, are insufficient to cover the damage suffered as a result of an incident. Any such funds may be designed to supplement or replace national industry-based funds.

Compensation for environmental damage is logically considered where a state organ has incurred costs for the restoration of the environment. The polluter takes the initiative to create risk of harm through their activity.[164] It is the polluter who derives an

[164] See in general Neethling and Potgieter (edited and translated by) Knobel JC (2010) 380.

economic benefit from an activity that causes harm to the environment. The polluter should therefore, in accordance with the universal risk or danger theory, be liable and accountable for damages.[165]. An employer, for instance, is responsible for labour accidents caused to employees without the necessity of fault being proven on his or her part. This is simply because he or she derives a financial profit from an economic activity that is the cause of the harm to an employee. As an analogy, a similar view should be held with respect to polluters.

2.7 Environmental Management Principles

Environmental management principles are the universal cornerstones of environmental governance. Some distinctive principles have now become part of, and inform, international customary law. A set of these environmental management principles is incorporated in the South African NEMA. It is important to highlight that these principles are thus derived from, and enforced by, relevant legislation. More investigative references to legislation - especially NEMA - cannot be avoided when dealing with environmental law principles and the role in liability claims for damages.

A principle is described as 'a fundamental or primary source of law that can be used to determine or guide a tribunal with regards to decision-making or outcome'.[166] These principles are discussed below primarily from the viewpoint of their recognition of the 'environment', what it entails as well as the recognition and enforcement of the duty not to cause damage to the 'environment'. Further references to these principles will again be made in the chapters on statutory and civil liability.

The distinctive principles include the polluter pays principle, the precautionary principle, the principle of sustainable development, the life cycle responsibility principle and the principle of environmental justice. In fact, environmental management principles concerning environmental pollution laws are flexible and are not as static as a discipline

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165 In accordance with the universal interest or profit theory. See in general Neethling and Potgieter (2010) 380 – 381.

166 Henderson (2001) 8 *SAJELP* "Some Thoughts on Distinctive Principles of South African Environmental Law" 141-143 correctly recognises that these principles do not have a force of law and are contrary to norms that do have authoritative effect.

of law, and apply to South African jurisprudence in various ways.[167]

The specific principles that are covered in this study do not represent all principles of environmental law as this thesis only covers those relevant to liability issues. It is very important to note that these principles inform and strengthen the elements of wrongfulness for omissions and the duty of care (duty not to inflict harm upon others) that are the core of our civil liability claims.

These principles continue to evolve as developments in science also do. It should be noted that some of these distinctive principles are not encompassed in NEMA as these did not exist at the time of its enactment. These remain significant even though these may not form part of the formal legislative framework.

2.7.1. The Polluter Pays Principle

The polluter pays principle is internationally recognised as a legal principle that founds the liability based on costs allocation in order to make good the harm one may have caused. It was not originally recognised as a legal principle as it is in fact an economic principle.[168] The polluter pays principle was originally adopted by the Organisation for Economic Cooperation and Development.[169] According to the recommendations of the OECD, the implementation of the polluter pays principle serves to discourage irrational exploitation of scarce 'natural resources'. The polluter pays principle was also incorporated into the United Nations Conference on Environment and Development.[170]

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167 Sands (2003) 869 holds the view that environmental law principles continue to develop as environmental problems continue to be experienced by societies.

168 Joseph (2014) 1 *Australian Journal of Environmental Law* "The Polluter Pays Principle and Land Remediation: A Comparison of the United Kingdom and Australian Approaches" 24-25.

169 Organisation for Economic Cooperation and Development (hereinafter OECD). The OECD is a unique forum where governments work together to address the economic, social and environmental challenges of globalisation. The OECD is also at the forefront of efforts to understand and to help governments respond to new developments and concerns, such as corporate governance, the information economy and the challenges of an ageing population. The Organisation provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies.

170 The United Nations Conference on Environment and Development of 1992 (hereafter the Rio Declaration). In terms of Principle 16 of the Rio Declaration 'national authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment'.

Section 2 of NEMA provides guidance with reference to decision-making by state organs that have a responsibility for environmental protection.[171] These distinctive environmental management principles - as referred to in section 2 of NEMA - are binding upon the state regarding actions that may significantly and adversely affect the environment.[172]

Section 2(3) of NEMA[173] stresses - as one of its important objectives - that 'development must be socially, environmentally and economically sustainable'.[174] In support of the above-mentioned provision, section 2(4)(p) of NEMA also states that 'the costs of remedying pollution, environmental degradation and consequent health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment.'[175] It thus functions as a cornerstone for civil liability claims.

At its core meaning, the polluter pays principle implies that the polluter should bear the costs of carrying out the pollution remediation, and pollution prevention and control measures. This vests the duty that by omission causes harm and an ensuing claim in South African law.

The polluter pays principle is therefore an important principle concerning the prevention and protection of the environment. The principle has originally derived from civil liability claims. That aim to prevent that 'damage rests where it falls', yet the principle in turn creates the duty of care not to cause harm to another required for a civil liability claim. The Draft International Covenant on Environment and Development, for example,

171 Scholtz (2005) 69 states that 'these principles guide the interpretation, administration and implementation of the Act, any other law concerned with the protection or management of the environment in terms of section 2(1)(e) of NEMA.'

172 Scholtz (2005) 69.

173 See S 2(3) of NEMA and *Harmony Gold Mining Co Ltd v Regional Director: Free State, Department of Water Affairs and Forestry* 2006 JDR (SCA) in which the polluter pays principle was applied. The landowner in this case was required to conduct anti-pollution measures in terms of s 19(3) of the NWA but, prior to such directive being implemented, the landowner sold the mine to another company. S 19(3) requires a competent authority to direct a polluter who fails to take measures to take measures about pollution damage.

174 Gaines (1991) 468-469 agrees that the polluter pays principle is the correct principle to be applied in the interest of sustainable development as well for the protection of future generations.

175 S 2(4)(p) of NEMA.

states that 'Parties shall apply the principle that the costs of preventing, controlling and reducing potential or actual harm to the 'environment' are to be borne by the originator'.[176]

It is remedy-specific as regards liability for pollution damage because it imposes payment whether of costs for restoration or repair, or for payment of damages suffered by the victim on the polluter for his contribution of the damage to the environment. In *Harmony Gold Mining Co Ltd v Regional Director: Free State Department of Water Affairs and Others*[177] the Supreme Court of Appeal rejected an argument that liability does not fall on the landowner where the landowner transfers the polluted land to another landholder. Harmony Mining Company had sold the land on which it mined before the new owner Pamodzi did, and on that basis, the latter was reluctant to undertake anti-pollution measures as directed by the Minister of Environmental Affairs. This judgment created an effective and valuable precedent as it disallows polluters to avoid liability after transferring assets that they polluted in the past, creating a retrospective liability that enhances the civil liability regime in our law.

The polluter pays principle has become an important instrument in the implementation of environmental liability law as, from it, the duty to pay compensation devolves.[178] The extension of the limited polluter pays principle, by section 28 of NEMA, emphasises the importance of the principle in environmental governance. The section that was added to NEMA allows a directive to be issued to any other person to whom the duty of care applies. It requires the person to cease operations and commence taking certain measures within a specified period. This is significant because it may target a person or persons who may not be the original cause of the harm or potential

176 Draft International Covenant on Environment and Development of 2010.

177 2014 (3) SA 149 (SCA). The polluter pays principle is but one of the ways in which operators in the position of Harmony is compelled to pay for measures taken after the pollution to the environment. In that context, the polluter pays principle would be promoting efficient resource utilisation, which is in the interest of environmental justice. The polluter pays principle is not a standalone principle and it is applied in conjunction with other administrative measures.

178 See the discussion by Scholtz (2005) 1, Brans (2001) 15 and Ashukem (2015) 130 on the polluter pays principle which the authors understand as forming an integral part of environmental liability rules. The authors argue that the polluter pays principle 'integrates environmental protection and economic activities by ensuring that the full environmental and social costs associated with pollution and environmental harm is borne by the polluter'.

harm to the environment thereby making them independently liable for failing to undertake reasonable preventative measures.

The wording of section 28 of NEMA is based specifically on section 2(4)(p) of the Act, and expressly targets a broader group of persons other than the actual polluter. This aims to internalise externalities. It integrates environmental protection and economic activities by ensuring that the full environmental and social costs associated with pollution and environmental harm are reflected in the ultimate market price for a good or service.[179] It is thus in essence an economic principle. The general objective of the principle is to impose costs caused by pollution on the polluter rather on society. The principle is aimed at the protection of the consumer and the taxpayer.[180] The reason for characterising the principle as an economic principle is that the implementation of the principle holds onerous cost implications for the polluter.

Competent public authorities implement the measures for the restoration and prevention of 'environmental damage'. The polluter pays principle also serves to promote the principle of sustainable development that is central to effective environmental governance. This objective of sustainable development, dealt with below, could only be achieved when environmental damage is prevented or kept to the bare minimum.[181]

The principle is regarded, however, as highly controversial in developing countries in particular where the burden of internalising environmental costs is conceived as being too high.[182] Firstly, the polluter pays principle does not define who the polluter is. That lack of definition may result in uncertainty where multiple parties are in involved in the product that causes pollution damage. For example, a tanker that carries harmful goods

179 Hunter *et al* (2011) 427 are of the view that the internalisation of costs as espoused by the polluter pays principle has the consequence of transferring the burden that could have been imposed on taxpayer or society to consumer goods or services 412.

180 Oosthuizen (1998) 356 states that the polluter pays principle takes the burden from the consumer to the polluter. The polluter must carry the cost of the polluting activity without the taxpayers' money.

181 Basse (2009) *Stockholm Institute for Scandinavian Law* "Environmental Liability: Modern Developments" 5-8 and Bergkamp (2001) 15 has the view that the common denominator for environmental management principles is sustainable development. The principle of sustainable development is premised on the notion that economic 'development must meet the needs of the present without compromising the ability of future generations to meet their own needs'.

182 Hunter *et a*l (2011) 427- 429.

may have an accident that results in the spillage of the harmful products. The question is who should be responsible for such spillage: could it be the tanker or the manufacturer of the product or the customer to whom the product would be delivered?

The internalisation of environmental costs is primarily carried by government, which may or may not succeed in claiming from the polluter at a later stage.[183] Developing countries have their unique problems that may impede the implementation of the principle as these struggle with lack of adequate resources, which could be a hindrance. The polluter pays principle has in the past been understood to mean mere internalisation of costs whereas a modern interpretation also enforces its role in the determination of liability issues.

The principle provides important guidance for the purposes of the harmonisation of standards, and for the formulation of domestic environmental laws and policies.[184] Most importantly, the polluter pays principle has also assumed a prominent position in most aspects of international environmental law and policy.[185] The polluter pays principle is regarded as being inclined to recognise strict liability for pollution damage.[186] The principle of absolute liability in this context means that liability can be invoked regardless of whether or not the person was intentional or negligent and

183 Luppi *et al* "Environmental Protection for Developing Countries: The Polluter Does Not Pay Principle" 5.

184 The discussion by Hunter *et al* (2001) 412, Bleeker A (2009) 18 *European Energy and Environmental Law Review* "Does the Polluter Pay? The Polluter Pays Principle in the Case Law of the European Court of Justice" 291-293, Du Plessis and Kotzé (2007) 1 *Stell LR* "Absolving Historical Polluters from Liability through Restrictive Judicial Interpretation: Some Thoughts on *Bareki No v Gencor Ltd"* 162 on the issue of pollution actually endorses the importance of the application of the polluter pays principle. Pollution is a negative environmental externality that originates from industrial or economic activity.

185 Gaines (1991) 26 *Texas International Law Journal* "The Polluter Pays Principle: From Economic Equity to Environmental Ethos" 466. The polluter pays principle is at the centre of the environmental law principles as it creates unwanted liabilities for polluters. Industries, with the application of the principle, take it on themselves to avoid pollution to escape liability.

186 Trehan and Mandal (1998) 68-71 and Luppi *et al* (2009) 2-5. The concept of absolute liability means liability without fault. Thus strict liability. The polluter pays principle is not in itself a measure of strict liability as the latter is a separate legal concept. It only encompasses the elements of strict liability. The polluter pays principle also imposes an obligation on the government to compensate individual persons who may be victims of pollution. This is the case where the polluter may be insolvent. The polluter pays principle can create state liability in favour of the victims of environmental damage. The application of the principle has been extended to accommodate a number of polluting activities that were not initially part of the polluter pays principle. That is an indication of the significance of the principle in environmental governance and regulation. This is dealt with under civil liability and specifically the requirement of fault in following chapters

makes him liable to compensate those who suffered on account of his inherently dangerous activities.[187]

The polluter pays principle has the potential to broaden the extent of liability claims. The element of wrongfulness is furthermore crucial in the expansion of civil liability to novel situations as environmental law is a dynamic discipline. The true value of the polluter pays principle lies in its beneficial effect in the interpretation of open-ended criteria such as wrongfulness and various other aspects of the law such as materiality and reasonableness.[188] As confirmed, environmental principles are not by themselves law but are of great importance as they contribute to the interpretation of the law.[189]

It is believed that the principle encompasses the component of deterrence for polluters.[190] The principle implies that it is for the polluter to meet the costs of pollution control and preventive measures, irrespective of whether these costs are incurred as a result of the imposition of some charge on pollution emission, or are debited through some other suitable economic mechanism.[191] The polluter should bear the expenses of preventing and controlling pollution to ensure that the environment is maintained in an acceptable state. It is thus, in reality, a form of economic instrument, which provides an incentive to encourage compliance with environmental obligations.[192]

The crucial role of this principle stems from the fact that it is designed to correct the reckless conduct of the industry, which is the main source of pollution of the environment. The polluter's behaviour is at the core of the principle. The invocation of

187 Trehan and Mandal (1998) 68-71. The polluter pays principle requires that the financial costs of preventing or remedying the damage caused by pollution should lie in the undertakings that cause the pollution or produce the goods that lead to pollution.

188 Sands (2003) 869. S 28 of NEMA creates an obligation for the polluter to take responsibility for the costs incurred when corrective measures are effected. See *Bareki* case, as stated above, where the issue concerned liability for historical pollution. The principle in fact serves as an environmental tax instrument in relation to pollution damage.

189 See Scholtz (2005) 69.

190 Brownlie (2008) 279 and Bergkamp (2001) 73 also agree that the polluter pays principle creates a good mechanism of environmental protection.

191 Hunter *et al* (2011) 428-429 and Bleeker (2009) 294.

192 The polluter pays principle is criticised by other authors for lack of flexibility. It is understood as part of command and control doctrine, which is different to market-based instruments that are regarded as more flexible by industries. Market-based instruments are not dependent on directives from the public authorities but are regulations that are steered at industry level. The polluter pays principle is aimed at the achievement of fairness and justice concerning the environmental damage.

the polluter pays principle depends on whether damage has been caused to the environment. Where damage has not been caused, the polluter pays doctrine cannot be invoked.[193]

It should be emphasised that the polluter pays principle is not a punitive measure. The cost implications associated with the polluter pays principle should influence the manner in which industrial activities are conducted. Theoretically, by making polluters pay for pollution, these people are bound to take into consideration the costs associated with their production activities. This encourages the more efficient use of resources overall while providing an incentive for polluters to find the lowest-cost methods for reducing emissions. Compelling polluters to bear the cost of their activities is also said to enhance economic efficiency. The polluter pays principle has also been seen as a form of environmental tax that provides incentive to polluters to change their behaviour.[194]

The principle may also be applied to justify the imposition of a statutory sanction or penalty for transgressions of rules, environmental offences or wrongful conduct by a polluter.[195] This offers the added benefit in that it influences the future conduct of potential polluters to aim for cost-avoidance in their activities.[196]

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193 Joseph (2014) 26 argues that an 'externality arises when the cost of resources such as water and air are not taken into account in the belief that they are not scarce and are freely available'. The polluter pays principle serves as a 'pollution abatement and control' mechanism. Compliance with environmental regulation is furthermore crucial for the effective application of the polluter pays principle.

194 See Joseph (2014) 24-25, Wooley (2014) 70-71 and Bergkamp (2016) 13 *European Company Law* "The Environmental Liability Directive" 184-185, who believe that a tax has both social and economic impact that can modify the behaviour of the polluters. It has to be taken into account that polluters are generally more concerned with profiteering interest than the environment itself. The environment is important in so far as it provides economic interests that can be mostly unlimited in scope. The modification of behaviour can only be engendered by imposition of a sanction that includes the polluter pays principle.

195 According to Sands (2003) 869 the polluter pays principle is intended to affect the behaviour of potential polluters in a positive manner. When they know that, their activities are going to attract liability they would make sure that they avoid such behaviour. In other words, there has to be a cutback in relation to their polluting activities.

196 Soltau (1999) 6 *SAJELP* "Liability for Environmental Damage" 38 and Bergkamp (2016) 186. In *Company Secretary of Arcelomittal South Africa v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA) the respondent wanted information on the activities of the company in terms of the Promotion of Access to Information Act,2 of 2000. The respondents also wanted access to the environmental master plan for the rehabilitation of the area in which the corporation operated. The right of access to information is a constitutional right that is crucial for the implementation of the polluter pays principle. The polluter pays principle is not only an interpretive instrument but also a tool of accountability.

The practical implications of the application of the principle lie thus in its allocation of economic obligations regarding environmentally damaging activities which affect particularly liability, the use of economic instruments, and the application of rules relating to competition and subsidy. Liability rules are one way in which costs can be internalised. The theory of cost-internalisation assumes that the price of an activity will increase in proportion to the activity's actual environmental impact at least to the extent the operator compensates such damage.[197] It is believed that cost-internalisation may cause market prices of products and services to reflect the full cost of their production, including environmental cost, which may result in decreased demand for such products or services.[198] However, there are exceptions to the circumstances in which the principle may be applied, which must be elaborated on.[199]

The polluter pays principle does not apply in every instance of pollution damage. There are situations in which the state may bear the cost of pollution. Where the polluter is unidentifiable, it is difficult to attribute liability to all potential polluters. In some instances, the polluters may be non-existent when a victim attempts to recover his losses in that the entity was dissolved or it could be insolvent. The principle can furthermore not always be implemented for transboundary pollution damage. These complications are discussed more specifically in the chapters that follow.

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197 Bergkamp (2001) 73-74 and Lindhout PE and Van der Broek B (2014) 10 *Utrecht Law Review* "The Polluter Pays Principle: Guidelines for Cost Recovery and Burdening Sharing in the Case Law of the European Court of Justice" 47-48 explain that the 'theory of internalisation assumes that the price of an activity will increase in proportion to that activity's actual environmental impact, at least to the extent such damage is, in fact, compensated by the operator'. The principle is aimed at cost recovery for costs that have already been incurred as well as measures for prevention of pollution damage.

198 See the discussion by Bergkamp (2001) 73-74 in which the author states that polluter pays principle is a guiding environmental law principle from which liability for damage to the environment arises.

199 Sands and Peel (2012) 228-229, Brownlie (2008) 279 and Attapatu (2007) 461 believe that the polluter pays principle should be applied with exceptions. The exception should be recognised where the act of damage to the environment is caused by a natural disaster. The principle is not supposed to be considered in a rigid sense in relation to liability arising from damage to the environment in such a situation. Where the nature of damage is novel and could not be anticipated at the time the activity was initiated, it would be important to consider that as an exception to the rule. The polluter pays principle can be applied at national level as it does not always apply in matters arising among states.

The polluter pays principle and the preventative principle constitute two complimentary aspects of a single reality.[200] Put at the service of prevention, the polluter pays principle should not be interpreted as allowing a polluter - who pays - to continue polluting with impunity. Indeed, the principle aims at correcting market failure and the costs of pollution should be reflected in the price of services and products. It should be borne by polluters and not the society. This would create an incentive for producers to place environmentally friendly products on the market.[201]

In summary, as originally propounded the polluter pays principle is not primarily a liability principle but rather a principle for the allocation of the costs of pollution control.[202] To have a clear understanding of the polluter pays principle and what it stands for as a matter of international law and policy, one must maintain the distinction between the assessment of liability for the abatement of specific harms, on the one hand, and the allocation of the costs of broad preventive measures on the other.[203] Based on some empirical evidence, authors such as De Sadeleer, Birnie and Korves are of the opinion that environment and trade could give rise to disputes particularly in the context of free trade that is, in turn regarded by some environmentalists as bad for the environment.[204] This argument is not analysed as relevant to the thesis statement, where the success of a damages claim against an individual party is examined, and not the overall or eventual effect of the polluter-pays principle in general on world trade and the environment.

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200 De Sadeleer (2012) 406 and Feris and Kotzé (2014) 2016.

201 De Sadeleer (2012) 406. Environmental pollution for which responsibility falls on public authorities becomes a responsibility of society. The polluter pays principle seeks to discourage that practice, as it is unfair to those who may not have caused harm to the environment. In *Vaal Environmental Justice Alliance,* the court was clear on the point that the operations of the company should be conducted in accordance with the law and that pollution should be prevented. The polluter pays principle is based on equity as its aim is not to lay burden on the taxpayer or society. It would not be just or equitable to impose recovery costs on society, which is not responsible for pollution in the first place. The polluter should not be burdened by costs for damage to the environment in excess of the extent of production it has in the factory. The objective of the polluter pays principle is not to exploit polluters or expose them to unnecessary costs.

202 Brownlie (2008) 280 and Bergkamp (2001) 73 both endorse the fact that the polluter pays principle is an economic concept, and not a legal concept.

203 Gaines (1991) 468-469 and Lindhout and Van der Broek (2014) 49 state that the principle of polluter liability was adopted as international law in the *Trail Smelter* arbitral ward, which compelled Canada to pay compensation for damages to the United States caused by a Canadian source of air pollution.

204 De Sadeleer (2012) 406 and Birnie *et al* (2009) 754 and Korves *et al* (2011) Is Free Trade Good or Bad for the Environment? New Empirical Evidence 1-3

The purpose of the polluter pays principle is to promote efficient resource use that confirms the fundamental economic nature of the principle.[205] The polluter pays principle has earned recognition as one the pillars of the environmental policies of most countries. It has been successfully invoked to address distortion of competition to prevent chronic pollution and finally to justify the adoption of fiscal measures or strict liability regimes.[206] Furthermore, according to this principle environmentally harmful goods should be more costly so that consumers prefer less-polluting goods.[207] The effect will be a more efficient and sustainable allocation of resources.

2.7.2 The Precautionary Principle

The precautionary principle was originally designed as a regulatory measure to handle scientific uncertainty and to enable risk regulation in spite of inconclusive scientific evidence.[208] The precautionary principle is a risk management mechanism that is used

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205 A similar viewpoint is reiterated by Gaines (1991) 468-469 and Lindhout and Van der Broek (2014) 48 that the polluter pays principle has its ideological roots in economics and not in law. The polluter may also bear the costs where there is non-compliance with permit and licences. The polluter pays principle is further aimed at the reduction of pollution and promotion of less-polluting measures for the industries. The polluter pays principle, in other words, contains command and control approach and self-regulation for operators in the industry at the same time. The incentive is that if an operator does not cause damage to the environment, there are no costs to be incurred. Where damage to the environment has occurred, the issue of costs may arise.

206 De Sadeleer (2012) 406 and Birnie *et al* (2009) 754 and Korves *et al* (2011) Is Free Trade Good or Bad for the Environment? New Empirical Evidence 1-3 are of the opinion that environment and trade could give rise to disputes particularly in the context of free trade that is regarded by environmentalists as bad for the environment. In general, trade is related to a variety of environmental risks. With free trade there is always an increase in the production of goods, their movement and the rate of spillage could be higher in the process of transportation. Free trade is good for enterprises and not for the environment.

207 Hunter *et al* (2011) 429-430, Trehan and Mandal (1998) *Student Advocate* "The Polluter Pays Principle" 69.

208 Scholtz (2002) 9 *SAJELP* 'The Precautionary Principle and International Trade: Conflict or Reconciliation" 164-165, Du Plessis I (2004) 34 *Africa Insight* "The Precautionary Principle as a Common sense Approach to Biotechnology Future" 98-99 Article 7 of the Draft International Covenant on Environment and Development of 1995 provides that precaution requires taking appropriate action to anticipate, prevent and monitor the risks of potentially serious or irreversible damage from human activities, even without scientific certainty. Article 5(3) of the World Trade Organisation *WTO) Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm date last accessed 23 February 2014, for example, states that in assessing the risk to animal or plant life or health - and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk - Members shall take into account as relevant economic factors, the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease, the costs of control or eradication in the territory of the importing Member and the relative cost-effectiveness of the alternative approaches to limiting risks. Fuggle and Rabie (2009) 282-283 hold the viewpoint that for any measure to comply with the SPS Agreement it must be necessary to protect human, animal, plant life or health and that scientific evidence must exist to maintain the measure.

to avoid harmful impacts on the 'environment'. This principle is an international legal principle that is recognised in most jurisdictions. Internationally, it is mostly invoked in connection with matters of trade that could affect the environment. It is a well-established principle of environmental law and public health law.[209] In other jurisdictions, the precautionary principle is regarded as a broad approach to guide environmental decision-making. Proceedings were, for example, brought before the International Court of Justice as a case formally named *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*)[210]. The dispute was between Argentina and Uruguay concerning the construction of pulp mills on the Uruguay River. As a diplomatic, economic, and public relations conflict between both parties, the dispute also affected tourism and transportation as well as the otherwise amicable relations between the two countries. The court recognised that environmental claims can be notoriously difficult to prove. Argentina argued that the precautionary approach of the 1975 Statute shifted the burden of proof to Uruguay, to demonstrate that the plant would *not* damage the environment; it also claimed that parties bear equal burdens of proof. The Court held that both bore a burden of proof. The applicant, has the burden to substantiate its claims, and that the respondent must provide information available to it to assist the Court. The ICJ characterized the present case as highlighting the importance of the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development. The conflict ended in 2010, with the establishment of a joint coordination of the activities in the river.

The precautionary principle has also been incorporated into South African law in various ways. Although section 24 of the Constitution does not make a specific reference to the precautionary principle,[211] it however does refer to the principle of sustainable

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209 Bosselmann (2009) 43-44, Barnard M (2012) 15 *PER/PELJ* "The Role of Sustainable Development Law" 208/569 endorse the view that precautionary approach to the environment is better than addressing consequences of environmental damage.

210 Case 2006/46.

211 S 24 of the Constitution. See the *Pulp Mills* judgment 4 where the Court has also fleshed out the definitions of sustainable development and equitable and reasonable use of shared transboundary watercourses by interpreting those terms in light of the facts of the case that could serve to inform similar cases in future. The ICJ characterized the present case as highlighting the importance of the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development.

development. Both the precautionary principle and the principle of sustainable development are silent on the liability for pollution damage. The precautionary principle is the contemporary instrument applied to attain sustainable development.[212] Section 2(4)(vii) of NEMA provides that a 'risk-averse and cautious approach, which takes into account the limits of current knowledge about the consequences of decisions and actions, be applied'.[213] The precautionary principle promotes this cautious approach to decision-making where issues may affect the 'environment'.

The precautionary principle plays an important role in decision-making particularly on matters that may affect the 'environment'. A decision that is based on precaution is in essence assumed sound and prudent and should aim at reducing the number of risks that may later manifest as latent problems. Liability law contains, as its objective, the precautionary approach to the environment as a duty if care to avoid the consequences of pollution damage.

The application of this principle has been accepted in many other jurisdictions. The earlier Bergen Ministerial Declaration on Principle of Sustainable Development[214] serves as an example. It states expressly that:

> In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

The second example of the precautionary principle is found in Principle 15 of the Rio Declaration on Environment and Development[215]:

> In order to protect the environment, the precautionary principle shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for

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213 S 2(4)(vii) of NEMA. According to Wooley (2014) 67-68, the difficult task for decision-makers is determining whether a particular situation raises issues of scientific uncertainty, which bring the precautionary principle into play, is decision-making. The precautionary principle should also provide guidance on the response that should be adopted in relation to 'unpredictable but potentially catastrophic threats of ecological harm.' See also Ashukem (2015) 129.

214 Bergen Ministerial Declaration of 1990.

215 Principle 15 of the Rio Declaration of 1990.

postponing cost-effective measures to prevent environmental degradation.

These two definitions of the precautionary principle, which at first glance sound similar, in fact differ. The Bergen Ministerial Declaration does not refer to economics, except in reference to sustainable development. Principle 15 of the Rio Declaration, however, promotes precaution, but only if the measures are cost-effective, which balances the need for the measure with its potential economic impact. These two definitions are consistent when it comes to what triggers precautionary action, as a 'threat of serious or irreversible harm'. The precautionary principle has the potential to form the basis of customary international law if it is consistently defined and applied in international tribunals.[216]

The decision makers always have to take decisions that have varied impacts on the environment. It is important therefore to make decisions that may have limited rather than excessive impact, or where there is obvious uncertainty about the impact. The precautionary principle aims to reduce adverse impact and must take into account the effects of decisions on all aspects of the environment - and the people in the environment - by pursuing the best environmentally practicable option.[217] It requires integration of environmental management plans and decision-making processes.

The principle promotes the exercising of a cautious approach, of responsibility and accountability in respect to the environment. Section 2 of NEMA gives effect to this as it also requires that non-renewable natural resources must be used responsibly and equitably and must take into account the consequences of the depletion of resources.[218] The precautionary principle adopts environmental ethics that suggest the promotion of

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216 The importance of customary international law is that it establishes binding obligations for states. See the United Nations University-Institute of Advanced Studies Report of 2005 5-6.

217 S 2 of NEMA. S 2(4)(vi) of NEMA further provides that the development, use and exploitation of renewable resources and the ecosystems of which they are part must not exceed the level beyond which their integrity is jeopardised.

218 S 2(4)(v) of NEMA. In terms of this section of NEMA, when it is uncertain (based on the information available to an evaluator) about whether or not the impact of a proposed development on the environment will be adverse, the evaluator must accept, as a matter of precaution, that the impact will be detrimental. It is a test to determine the acceptability of a proposed development and enables the evaluator to determine whether enough information is available to ensure that a reliable decision is made.

human needs should not be treated as superior to the environment itself.[219]

The environmental ethics that the precautionary principle espouses are also reflected in the wording of section 2(4)(c) of NEMA. It provides that environmental justice must be pursued so that adverse environmental impacts will not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons.[220]

As mentioned above, the precautionary principle is universally recognised as an important principle of international environmental law pertaining specifically to risk management in the context of international trade. For example, a country may ban or discriminate against use of a particular set of goods from other countries on the grounds that it may be harmful to human health and the environment.[221] The principle is explicitly outlined in Principle 15 of the Rio Declaration which states that 'where there are threats of serious or irreversible damage lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'[222]

The ambit of the precautionary principle is broad in scope as it requires the consideration of all possible options and even the choice to completely discontinue

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219 The United Nations Educational, Scientific and Cultural Organisation (UNESCO) (2005) The Precautionary Principle World Commission on the Ethics of Scientific Knowledge and Technology 7-8 and Du Plessis (2004) 97 raise the issue of the precautionary principle in relation to biotechnology and the related products which may put human health and the environment at extensive risk.

220 S 2(4)(c) of NEMA extends its ambit of protection of the environment by referring to the need to accommodate the 'disadvantaged and vulnerable' categories of people. Environmental justice primarily seeks to cushion the interests of the poor and the marginalised who may not be considered as key stakeholders in relation to decision-making processes. In *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) the community - that was the stakeholder in exploration rights - was not consulted or given an opportunity to participate in the decision-making which was going to affect their community.

221 Scholtz (2002) 166-167 and Glazewski (2005) 18 and Byrne A (2015) 4 *Transnational Environmental Law* "The 1979 Convention on Long Range Transboundary Air Pollution: Assessing Its Effectiveness as a Multilateral Environmental Regime after 35 Years" 39-40 agree that, unlike the polluter pays principle, it does not give rise to liability for damage to the environment. The precautionary principle does not apply where a threat to the environment is not present. The principle requires a proactive approach in relation to decision-making for the environment. Where an operator acts with precautionary approach, liability does not arise.

222 Principles 13 and 15 of the Rio Declaration make the statement to 'develop national laws that encompass liability and compensation for pollution damage and that the precautionary principle shall be widely applied by the states according to their capabilities' The precautionary principle promotes a prudent approach with regard to environmental damage.

actions to protect the environment. [223] This principle is therefore not based on the orientation of the fear of the unknown but is based on sound reasoning. For example, there must be a reason why a particular project should not go ahead. The potential harm that may arise from the activity of the project must be clear. There is no need to produce scientific evidence that the alleged potential harm had previously occurred. The reason is that the principle is preventive in nature.

Article 3(3) of the United Nations Framework Convention on Climate Change[224] requires the participating parties to take:

> '[p]recautionary measures to anticipate prevent or minimise the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors.'

Put in simple terms, the precautionary principle only mandates that uncertainty will not be used as an excuse for remaining inactive in view of a threat that is usually defined as the cause of serious and irreversible damage to the environment.[225] No universal standard exists for the definition of the precautionary principle. The definitions differ from one jurisdiction to another. These differences do not necessarily reflect varying degrees of defined content. These reflect differences in legal cultures. The principle is

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223 For example, S 2(c) of the Marine Living Resources Act 18 of 1998 (hereinafter the MLRA) encompasses the principle in that it espouses the application of precautionary approaches in the management and development of, for example, the marine living resources. The precautionary principle is a risk assessment instrument that is used to prevent potential hazardous consequences for the environment. In *Sea Front for All* the court considered the precautionary principle as it held that the functionary was supposed to consider the 'alternative options' including the option not to act in the circumstances. *Sea Front for All* case and Gibson (2009) 18 *African Security Review* "Maritime Safety and International Law in Africa" 60-62.

224 Article (3)(3) of the United Nations Framework Convention on Climate Change (hereinafter UN FCCC).

225 Mayer B (2018) 8 *Transnational Environmental Law* "The State of the Netherlands v Urgenda Foundation" 171-173, Faure and Peeters (2010) 20, Tladi (2010) 17-18 and *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) recognise that certain industrial activities have a permanent or irreversible impact on the environment. Such activities should only be given the go-ahead after thorough scrutiny. The court sets a good precedent for the independence of public institutions and their accountability in regard to their decisions that may have a negative impact on the environment, see paras 23-24.

regarded as part of international customary law and suggests precaution. The actual value of principles is not so much determined by its legal status but by its interpretation through the court processes and other decision-making bodies.[226]

At a domestic level, law-making structures - namely the legislature and courts - do not have difficulties in creating laws. At an international level, the process of law-making is highly complex. International law is created by a variety of factors, many of which are not clearly defined.[227] The basis of the precautionary principle lies within the old adages, 'look before you leap', and 'better safe than sorry'. In applying the same caution where serious or irreversible threats to human health or the environment are probable, decision-makers should act in accordance with good common sense. The precautionary principle encourages decision makers, where there are threats of serious or irreversible damage, not to use a lack of comprehensive scientific certainty as a reason for postponing cost-effective measures to prevent 'environmental degradation'.[228]

The precautionary principle emphasises the exercise of prudence and due care when taking decisions that may have a negative impacts on human health and the 'environment'.[229] Scientific uncertainty is a pervasive problem for decision makers in the health and environmental fields. The complexities involved in applying conventional methodologies to health and environmental problems mean that it may be impossible to estimate the likelihood and potential seriousness of the harm with the necessary accuracy.[230]

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226 Illes K (2007) 14 *SAJELP* "Environmental Over-reaction: The Implications of the Cartagena Protocol on Biosafety for the African Natural Environment and African Development" 159 and Bosselmann (2009) 44-45 notes that international environmental law principles are continuously evolving and mostly do not have a fixed definition.

227 Bosselmann (2009) 44-45. The precautionary principle is sometimes regarded as a controversial principle, particularly in trade where a state can use it to justify its protectionist behaviour in its territory. In other words, the precautionary principle can also be used as a technical barrier to trade.

228 Article 8(2) of the SPS Agreement states that the precautionary principle is a notion which supports taking protective action before there is complete scientific proof of a risk. That is, action should not be delayed simply because full scientific information is lacking.

229 Peel (2005) 1-3. See S 2(2) of NEMA as it states that 'development must place people and their needs at the forefront of its concern and serve their physical, psychological, developmental, cultural and social interests equitably'.

230 See Zander (2010) 10-11. See Article 8 of the SPS Agreement that also stipulates that in the field of food safety, plant and animal health protection, the need for precautionary actions in the face of scientific uncertainty has long been widely accepted. There may be instances when a sudden outbreak of a disease, for example, is suspected of being linked to imports where trade restrictions must be imposed immediately and further information about the source of the outbreak (as well as its extent) are being investigated.

The significance of the precautionary principle does not lie in its prescription for caution, but rather in its recognition of the need for cautious approach in circumstances where the lack of full scientific certainty affects both technical knowledge about, and public responses to, particular health and environmental threats.[231] Health and environmental decision-making are as much concerned with identifying potential harm as with the reality of remedying actual damage, and must rely on available scientific information as a basis for regulatory activity.[232] This is addressed in detail further below.

The proponents of the precautionary principle favour strong interpretations of the principle, who mandate stringent regulatory measures even in circumstances where the possibility of harm is limited. The strong preference for risk avoidance, which argues against society having to bear the burden of potentially dangerous activities, is translated into a call for proponents of development to bear the onus of producing scientific proof of the absence of harm before proceeding.[233] The debates around different societal risk attitudes sometimes reflect positions at the extreme and are unlikely to be reconcilable. In essence, these divergent views reproduce the range of different responses that exist in the broader society to the reality of limited knowledge of the world. These serve to highlight the extent to which such responses are dictated by values different groups place on health and the environment.[234]

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231 See the discussion by Peel (2005) 1-3,Ashukem (2015) 129, Barnard (2012) 213/569 and French D (2005) International Law and Policy of Sustainable Development 97-99 in which the authors argue that scientific certainty is ambiguous in that scientific certainty does not exist in any science. Lack of scientific certainty in the context of precautionary principle implies that due care should be taken when decisions are made to avoid harm to the environment that may also give rise to liability.

232 See Peel (2005) 1-3 who also correctly argues that the implication is that prevention is better than cure. Decision-makers often prefer to deal with the cause of the problem rather the problem itself.

233 Peel (2005) 2-4. Blackmore A (2015) 20 *SAJELP* "The Relationship between NEMA and Public Trust Doctrine" 111 acknowledge that suspicious attitudes have grown towards governmental and corporate assurances of environmental safety. More importantly, such suspicions are informed by the experience to which society is privy that polluters are not concerned about health of others and the environment. The authors believe that companies are more eager to make profit at all cost.

234 See Zander (2010) 12-14 and Rieu-Clarke A and Spray C (2013) 16 *PER/PELJ* "Ecosystem Services and International Water Law" 12/212 on issues that influence lay people's perceptions of risks. 'Firstly, cognitive limitations coupled with the anxieties of considering life as a gamble lead to uncertainties being denied, risks being distorted and statements of facts overestimated. Secondly, the perception of risks is often influenced by the familiarity with certain types of hazards. Thirdly, like experts, lay people tend to put emphasis on the frequency of death. Fourthly, it is difficult to change the perception of risk even when evidence is presented'.

Every economic activity creates some degree of risk for the environment.[235] This is particularly the case where there is an industrial activity. Recognised risks have to be accompanied by certain measures, such as liability rules, to minimise their effects. In an environmental context, this requires the application of liability rules to deter polluters from polluting the environment.[236] According to Bergkamp, there should be a distinction between acceptable and unacceptable risk and ensuing liability.[237] As stated previously, liability for environmentally risky activity is not absolute. If an activity is abnormally dangerous, the party engaging in it should, as a general rule, be held liable for negligence or intent. An activity is not regarded as dangerous if the state of knowledge at the time of the incident did not signal a substantial risk. This kind of risk, which is not abnormally dangerous, should not be subject to the exception of a strict liability.[238]

Sunstein identifies three basic tenets that most people use to frame their thinking of environmental risk and liability for pollution.[239] Environmental risk can be described as actual or potential threat of adverse effects to the 'natural environment' or exposure to peril. However, in most cases the issue of risk should not be considered more important than other options to attain economic development. Secondly, people tend to believe in the benevolence of nature in the sense that nature to them has no limits and is free for the taking. The belief or conviction that natural resources are meant for human consumption is a misdirected approach. 'Natural resources' are limited and therefore a precautionary approach is necessary to avoid damage to the environment and liability consequent upon its occurrence. Thirdly, people inherently believe in the possibility of zero risk which implies that the consequences of risk to the environment are either minimal or absent. The precautionary principle, as is the case with the prevention principle and indirectly the polluter pays principle, is based on the premise of risk avoidance.

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235 The objective of the precautionary principle is to minimise the possibility of risk. The possibility of environmental risks may be minimised where liability rules apply to environmental damage.

236 See comprehensive discussion by Bergkamp (2001) 277 and Kotzé L (2018) 8 *Transnational Environmental Law* "A Global Constitution for the Anthropocene" 15-16.

237 An acceptable risk is one that has an impact that can be mitigated in that it can be restored or minimised. The basis for an acceptable risk is that it is not possible to avoid environmental risk that poses a threat to the environment and human health.

238 Bergkamp (2001) 277.

239 Sunstein CR (2002) *Risk and Reason, Safety, Law and the Environment*.

Decision makers who are required to determine appropriate protective measures with regard to human health and the 'environment' should always grapple with the role that liability law has to play in the process. A directive to apply the precautionary principle in decision-making raises such issues and focuses attention on the potential for uncertainties to arise that might affect the reliability of available scientific information for the purposes of decision-making. One of the most significant challenges encountered by decision-makers is coming to terms with the concept of scientific uncertainty and its implications for the reliability of expert information used for health and environmental decision-making.

The occurrence of various disasters and growing concerns in society about health and environmental risks have heightened the awareness of the potential limitations of an exclusive reliance on science in health and environmental decision-making.[240] These include resource management, the authorisation of new technologies and the approval of new developments with health and environmental impacts. The diversity of circumstances - in which precaution is required - has necessitated a certain amount of flexibility both in the way the principle is formulated in different environments and in its manner of application. Decision makers considering the application of the precautionary principle have to take into account the questions relating to scientific uncertainty as well as understanding the dimensions and implications of the concept.[241]

Many questions on the application of the precautionary principle in practice are context dependent. The nature of scientific uncertainties, which are relevant in different situations, will often vary and such differences play a crucial role in structuring the appropriate decision-making processes that apply to the taking of precaution. For example, uncertainty arising when relevant scientific knowledge is lacking – owing to a paucity of research - raises different challenges for decision-makers as opposed to the

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240 See Jansen van Rijssen *et a*l (2015) 9-10, Peel (2005) 5-6 as they argue that the precautionary principle is also a risk assessment. The precautionary principle is an instrument from which the norms and standards of environmental assessment are derived. The strength of the precautionary principle is enhanced when the principle is enshrined in legislation.

241 Jansen van Rijssen *et al* (2015) 9, Peel (2005) 4-5, Glazewski (2005) 18 view the precautionary principle as a mechanism for the management of environmental threats from processes that have not been subjected to evaluation. The precautionary principle requires that caution be exercised to mitigate against potential impacts from such processes as stated above.

uncertainty manifested in disputes between scientific experts over the nature of potential health and environmental impacts.[242]

The EU, for instance, places restrictions on certain goods that are considered acceptable or even desirable in the US. For example, the EU imposes strict control measures on the approval and marketing of genetically modified organism (GMO) products, as well as mandatory labelling schemes to address the potential adverse effects on human health and the environment.[243] Likewise, some food products such as unpasteurised cheese, which are highly valued in EU countries, are equally highly regulated in the US for health purposes. Liability rules should have a broad coverage that includes foodstuffs that cause harm to human health as that is part of the environment.

A greater understanding of the precautionary principle may avoid confusing the precautionary principle with protectionism. The precautionary principle is related to a range of broader policies and approaches to deal with situations of incomplete or inconclusive scientific information in an era of rapid technological advances. The precautionary principle attempts to fill the gap between scientific uncertainty and risk regulations.[244]

Variations in the nature of a particular institutional context within which precaution is to be applied and the analysis of the implications of the precautionary principle for such processes are to be expected. However, such measures - which include trade restrictions on goods such as ozone depleting substances and genetically modified organisms - are also a cause for concern relative to potential protectionist use by creating barriers to trade.[245] These concerns stem from the application of the disciplines

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242 Du Plessis (2004) 34, Peel (2005) 6-7, Kotzé and Paterson (2009) 130 advocate that the precautionary principle should be used in all decision-making processes relating to the developmental and environmentally hazardous activities of the industry. The precautionary principle - although independent from the preventive principle - encompasses a preventive function. The risk-averse approach contained in the principle suggests that instead of going ahead with the project, where lack of certainty exists, the project should not continue.

243 See Kotzé and Paterson (2009) 130 as the authors are of the opinion that the precautionary principle is not designed to address environmental problems of individuals in society. Its reach is aimed at the broader interests of the population.

244 Verschuuren (ed) (2013) 260 and White R (ed) (2016) Transnational Environmental Crime 17.

245 Verschuuren (ed) (2013) 260, Revesz *et al* (2000) 361 recognise that the precautionary principle is mired in controversy as it lacks clarity regarding its exact meaning.

of the WTO, where trade liberalisation is regarded as encompassing not only border measures but delving into the arena of domestic health and environmental regulations.

The precautionary principle thus lies at the heart of environmental policymaking. It is also crucial for the objectives outlined in the principle of sustainable development as it promotes precaution in the event of scientific uncertainty. As a result, the precautionary principle is incorporated in multilateral environmental agreements. [246] The application of the precautionary principle clearly varies according to the particular circumstances. For some, the precautionary principle is recognised as an overreaching concept yet for others the principle is purely context specific. These considerations make it difficult to develop a generally applicable definition of the precautionary principle.[247]

2.7.3 The Preventive Principle

The preventive principle requires that environmental degradation should be prevented.[248] According to Kidd, this principle cannot be an absolute principle because pollution cannot be completely prevented as it is an inevitable side effect of human life.[249] The preventive principle allows action to be taken to protect the environment upon commencement of polluting activities thus at an early stage. The preventive principle is different to liability for damage to the environment because the main purpose is to prevent the harm to the environment. Liability law is aimed at establishing responsibility and accountability for those who have already caused damage to the environment.

The principle is not about repairing damage after it has occurred but to prevent the occurrence of damage from the outset. Prevention of environmental harm is cheaper

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246 Glazewski and Plit (2015) 26 *Stell LR* "Towards the Application of the Precautionary Principle in South African Law" 190-191 advance the view that socio-economic needs seem to take priority over the consideration of the precautionary principle with specific reference to the enactment of the Infrastructure Development Act 23 of 2014. The authors also consider the precautionary principle as the cornerstone of sustainable development.

247 Revesz *et a*l (2000) 375, UNU-IAS Report 3.

248 S 2(4)(a)(vii) of NEMA provides that the disturbance of ecosystems and loss of biological diversity are to be avoided or minimised and remedied.

249 See Kidd (2011) 10.

and, in principle, less environmentally dangerous than reaction to harm that has already occurred. Yet the reality remains that hindsight is easier than foresight as one learns from experiences from the past.

The preventive principle is the fundamental notion in law that regulates, for example, the generation, transportation, treatment, storage and disposal of hazardous waste. Article 6 of the Draft Covenant states that 'prevention of environmental harm is a duty and shall have priority over remedial measures. The cost of pollution prevention, control and harm reduction measures is to be borne by the originator'.[250] It promotes the prevention of damage to the environment and may, in some instances, be used for reduction or control of activities that may cause such damage.[251]

In the *Iron Rhine*[252] case the tribunal acknowledges that 'today, in international environmental law, a growing emphasis is being put on the duty of prevention' and that much of international environmental law has been formulated by reference to the impact that activities in one territory may have on the territory of another. It held that the principle of prevention is recognised as a principle of general international law that applies not only in autonomous activities but also in activities undertaken in the implementation of specific treaties between the parties.

The obligation to prevent pollution or damage to the environment also relates to procedural issues. For instance, the requirement to carry out environmental impact assessment originates solely from the principle of prevention. The need to carry out environmental impact assessments of certain proposed activities is based on the NEMA Regulations.[253]

The main objective of the preventive principle implies that where it is obvious that an activity will result in irreversible environmental damage, the option would be to avoid

250 Article 6 of the Draft Covenant on Environment and Development of 1995.
251 Sands (2003) 200.
252 *Iron Rhine Arbitration (Belgium v The Netherlands Award ICGJ* 373 (PCA 2005) 24th May 2005, Permanent Court of Arbitration. The Tribunal made a balanced decision that the Netherlands would be liable for the costs to the extent that those 'measures represented quantifiable benefits to the Netherlands.
253 NEMA Regulations of 2010. Decisions on precautionary principle are usually made within well-established legal and administrative frameworks for dealing with health and environmental issues.

it.[254] An extensive body of domestic environmental protection legislation supports the preventive principle. In other words, the preventive principle is also central to the principle of sustainable development. The two principles are inextricably linked.

The preventive principle may take a number of forms including the use of penalties and application of liability rules.[255] Costs incurred in taking preventive measures should be compensated. The measures that have been taken with a view to prevent or limit the environmental damage must be able to give rise to future liability. The costs of preventive measures are recoverable, even if it appears after the incident that the impact of the incident on the environment was minimal or negligible. The reason is that such costs are based on preventive measures, which may be applied even if the information available is not sufficient to justify such costs. This means that the preventive principle is also connected to the precautionary principle.

The preventive principle can also give rise to liability in that the costs incurred because of the initial investigation into the possibility of potential future damage can accrue to the person who causes the damage. In other words, the costs of assessing damage and liability are recoverable if it was reasonable to incur the costs under the circumstances. Other factors that can be considered pertain to the complexity of the case. If there may have been cheaper methods of dealing with the matter, it would not be justified to use expensive options to deal with the issue at hand. Losses must be mitigated.[256] The issue of mitigation of losses in civil damages claims is dealt with in chapter 4 below.

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254 See Sands (2003) 200-201. The principle of prevention applies even in circumstances where the incident or accident or spillage has already occurred. For example, if the damage is caused to wildlife that use the habitat for breeding and wintering, other forms of environment which are not directly affected may be harmed if preventive measures are not applied, as highlighted by Brans 219.

255 Sands (2003) 202 and the 1991 *Borcea* case, Rb, Rotterdam, 15 March 1991 (1192) 23 NYL 513 (Borcea I NJ 1992, 91 [1992] TMA/ELLR 27-30 in which a bulk carrier was involved in an accident as a result of which it lost a huge amount of oil. As a result of this accident, part of the coast of the Netherlands was polluted and many sea birds were polluted. The court held that the claimant was entitled to prevent or terminate an infringement of its own interests and was entitled to claim compensation for the damage it suffered because of the incident. The application of strict liability in regard to environmental damage makes sense for the conservation of the environment.

256 See the input by Brans (2001) 258-259 on this point. There is lack of case law on preventive measures in South Africa. One has to rely solely on the administrative measures that are provided in NEMA.

2.7.4 The Principle of Sustainable Development

It is a cardinal principle that every environmental principle, regulation and law is aimed at the protection of the environment.[257] Liability for environmental damage is not an exception as it seeks to protect the environment. Sustainable development appears to be more of a political, socio-economic, and even potentially moral objective, which may have certain normative consequences.[258] Its origins lie not so much in jurisprudence as in the argument, economic, environmental and social considerations which must be integrated if environmental protection and development are to be mutually supportive.[259] Sustainable development is an ideal as it provides for what "ought to be and not only what is" according to Verschuuren.[260] It put an ideal situation in place which has to be realised for the benefit of all in society.

At its core is the protection of the environment. Nevertheless, it is not contrary to liability for pollution damage. It forms the basis on which liability for damage to the environment is premised. Weeramantry J notes in the *Case Concerning the Gabcikovo-Nagymaros Project*[261] that:

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257 Sustainable development as the centrepiece of environmental law in general. Environmental law by its design has, at the main, the objective of protecting the environment. Sustainable development serves as a measure of control on how development and environmental decisions should be made. The integration of economic and social development as well as environmental considerations are paramount in the context of sustainable development. Sustainable development recognises quite explicitly that socio-economic development is an ever-growing demand, but it must be accommodated within the framework of the law and the interests of future generations. See also Feris L (2010) 13 *PER/PELJ* "The Role of Environmental Governance in the Sustainable Development of South Africa" 75/234, Kotzé (2003) 84/173, Barnard (2012) 210/569, Hodas (2013) 75/214 and Owusuyi IL (2015) 18 *PER/PELJ* "The Pursuit of Sustainable Development Through Cultural Law and Governance Frameworks" 2013-2014.

258 French (2005) 35, Verschuuren (2006) 6 *PER/PELJ* "Sustainable Development and the Nature of Environmental Legal Principles" 12/57.

259 Voigt (2009) 11, Barnard (2012) 208/569 and Lindhout and Van der Broek (2014) 48-49 hold the opinion that the origin of sustainable development cannot be exactly dated. The authors argue that the concept can be traced back to ancient times across civilisations. Societies would have found it difficult to survive without precautionary measures. Communities, for example, protected the indigenous forests as these provided a variety of environmental goods, including food and energy. Penalties would apply on non-compliance with those measures, which were not written at all. Those penalties also give rise to liability for those violations.

260 Verschuuren (2006) 14/57.

261 *Case Concerning the Gabcikovo-Nagymaros Project* (Hungary v Slovakia) Judgment of 25 September 1997 ICJ Reports https://www.icj-cij.org/en/case (date last accessed 25 August 2020). For early societies, stability rather than expansion was a prerequisite for survival.

'The concept of reconciling the needs of development with the protection of the environment is not new. Millennia ago these concerns were noted and their twin demands well reconciled in a manner so meaningful as to carry a message to our age.'

While its origins are grounded in the historical development of international law, it remains true that the implementation of effective international environmental rules is a central component of the legal implementation of sustainable development.[262] According to Voigt, while the idea of reconciling the needs of development with the protection of the environment is not new while the concept of sustainable development in its current understanding is certainly new. The author argues that by referring to the governance of early societies, one risks answers that are too simple and potentially misleading with reference to the complexity of problems humans have created from time immemorial.[263] NEMA contains a number of principles including the principle of sustainable development. The objective of the adoption of these principles is that these must provide guidance to relevant authorities in relation to decision-making that may have adverse effect on the environment. The application of these principles is essential for every project that is likely to impact on the environment.

Modern environmental law is based on the principle of sustainable development.[264] It expresses legal obligations to incorporate concern for the preservation of environmental and natural resources.[265] Liability rules are part of this concept and are

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262 French (2005) 36, Verschuuren J (2010) 13 *PER/PELJ* "The Dutch Crisis and Recovery Act" 8/189, Du Plessis A (2015) 18 *PER/PELJ* "The Brown Environmental Agenda and the Constitutional Duties of Local Government" 1848 reiterate the viewpoint that the legal implications of sustainable development are not restricted to international environmental law. The importance of sustainable development is that it is an integrationist principle and is based upon an emphasis on interconnectedness of different subject areas.

263 What Voigt (2009) 12-13 promotes is the fact that in international law the principle of sustainable development is a more recent development.

264 The primary purpose of environmental management principles is the achievement of the goal of sustainable development. Durante (1996) Presentation to the United Nations Commission on Sustainable Development on 23 April 1996 6-7 argues that the discourse on sustainable development dispels the notion that environmental security can be attained with a focus on economic growth. Economic growth should be influenced by the need to protect health and the environment.

265 The main thrust of sustainable development is intergenerational equity, which implies that the exploitation of natural resources by the present generation should take into account the interests of future generations. The intergenerational equity element of sustainable development has been criticised from an environmental and economic the viewpoint. Such criticism is often ideologically

triggered if there is harm to the environment. The duty on the polluter to cover the costs of protection and restoration of the environment is also an intrinsically part of the development of this principle.

The Stockholm Conference established a platform for negotiation of international agreements based on the principles of modern environmental law. At the same conference, new ideas for the simplification of liability rules were proposed in order to implement general principles of human rights and obligations towards nature, environment and future generations. The Stockholm Conference marked the beginning of a new approach to development as regards its socio-political implications. The necessity of development was expressed in Principle 8 of the Stockholm Declaration[266] as follows:

'Economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.'

Some years later, the United Nations World Commission on Environment and Development[267] defined sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. The acceptance of the principle of sustainable development implied a paradigmatic challenge to the political and juridical discussion of the perspectives of liability, responsibility and equity. Interestingly, the principle of sustainable development does not refer to liability for damage to the environment. Sustainable development is linked with economic development in terms of section 24 of the Constitution. That was highlighted in the case of *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga*[268] where the court stated that the environment could not be protected if development does not pay attention to

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founded and is not capable of being unified into one comprehensive response. See French (2005) 16-18.

266 Principle 8 of the Stockholm Declaration of 1972.

267 The United Nations World Commission on Environment and Development (Our Common Future) of 1987 (hereinafter the World Commission Report of 1987).

268 [2007] ZACC 13.

the costs of environmental destruction. The environmental authorities' failure to consider some of the environmental impacts their decision might have on certain components of the environment was bad and would not be in the interest of justice and sustainable development. In the context of this thesis, such circumstances should give rise to liability for damage to the environment. For example, water resources would have been affected by the decision to construct a filling station in the area.

The World Commission Report focused on threatening global and resource problems, which brought the concept of sustainable development into focus. Sustainable development as a concept therefore attempts to reconcile environmental protection and liability for pollution damage as it puts emphasis on protective measures. French contends the flawed idea that 'one can either have environmental protection or one can have development, usually in the form of economic growth, but one cannot have both' also strengthen the perspective on liability rules'.[269]

Sustainable development is ascribed a wider meaning than just a national goal. It is stated as an international goal and of great importance as a reasoning for 'the establishment of a new era of international cooperation based on the premise that every human being, those here and those who are to come, have a right to life and to a decent life'. The Report also emphasises that the concerns of environmental protection and economic development are not two separate issues. These were regarded as being inextricably linked to each other.[270]

The concept of sustainable development is an important part of international regime that caters for all forms of rights and legal instruments such as liability for pollution damage. Environmental degradation continuously happens in all parts of the world, while economic activity has become increasingly globalised through the medium of

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269 French (2005) 10-11 elaborates on a viewpoint that fragments of such an idea can be found in the history of both environmental and economic theory. In terms of environmental theory, its most obvious emanation was the limits to growth literature, which suggested that economic growth could not continue indefinitely but that the level and extent of human activity would ultimately be restricted by environmental restraints, such as the permanent loss of non-renewable natural resources.

270 The World Commission Report of 1987 stated that the idea of sustainable development has had far-reaching implications for international law. Sustainable development is explained in the Report as 'a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations.'

international trade. This pattern has motivated the international community to focus on the integration of economic, trade and environmental strategies so that these supplement and strengthen each other. This principle is probably the one that straddles national and international borders and jurisdictions the most.

Basse is of the opinion that if environmental and trade policies are to be effectively integrated, policy strategies need to take account of complex interdependencies and interrelationships between production processes, consumption and the global impact of production and consumption on the environmental media. There have been different approaches to environmental protection policies and the question of the introduction of liability rules. The demand for sustainable development expresses a need for alternative thinking when considering the concept of simple liability rules. These rules deal with damage that has already been caused, which can be quantified and assessed. The principle of sustainable development forces one to consider the future in the context of liability for pollution damage as well as developing other mechanisms.[271]

The liability rule, based on the principle of sustainable development, includes the obligations of present generations to act as trustees for future generations or humankind.[272] The principle of sustainable development contains two important principles, namely intergenerational equity and intra-generational equity. The premise in modern environmental law is that the obligation of the polluters to take care of the common natural resources for all time is added to the traditional concepts of responsibility and liability.

The liability for environmental damage is important for the long-term perspectives of distribution of benefits offered by the ecological environment. This is particularly relevant for the prevention and restoration of environmental damage caused by

271 See the discussion by Barnard (2012) 218/569.

272 The principle of sustainable development contains two important principles, namely intergenerational equity and intra-generational equity. Intergenerational equity addresses the notion of accommodating future generations and, as such, generations also have a right to live. The issue of intra-generational equity speaks to the prudent manner in which we should treat and use our natural resources.

pollution and over-utilisation of the natural resources.[273] One of the issues highlighted by the World Commission Report is that the developing states often over-exploit their natural resources owing to negative economic pressures and institutional deficiencies.[274]

French reiterates the argument that societies should not emphasise economic growth over environmental protection because of the benefits of increased development that is not in line with the principle of sustainable development.[275] This economic path is obviously flawed in that it ignores the potential for irreversible environmental damage.[276] The World Commission on Environment and Development rejected this approach as being negative and opted for a more balanced relationship between environment and development.[277]

According to the United Nations Human Development Report,[278] 'economic growth can be a powerful means of reducing poverty, but its benefits are not automatic'.[279] It is rational that governments would wish to reduce levels of poverty and disease and to increase levels of welfare, health care and education to the maximum extent possible.[280] It is also clear that development, as an instrument of transformation into a better life, is not guaranteed by economic growth alone.

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273 MLRA seeks to protect marine living resources by establishing quotas related to fishing. The purpose is to address the issue of over-exploitation of natural resources.

274 Rieu-Clarke and Spray (2013) 18/212, Lindhout and van der Broek (2014) 52 and the World Commission Report of 1987. South Africa falls into the category of developing states, which are always under political and economic pressure to reduce levels of poverty.

275 It is said that increased development comes with increased capacity and financial resources to fund environmental measures, based on the 'grow now and clean up later' argument.

276 French (2005) 11 states that the World Bank, in its 2003 World Development Report, states that the 'grow now and clean up later' approach risks ignoring today's generation, costs that often fall disproportionately on today's poor. Such an approach raises equitable as well as environmental concerns, which would suggest that the 'grow now and clean up later' theory could rarely be an appropriate model to reflect the balance required by sustainable development.

277 The 'grow now and clean up later' approach was further rejected on the grounds that it sought to undermine attempts to integrate environmental considerations within economic and developmental decision-making, which is arguably key to sustainable development.

278 The United Nations Development Programme, Human Development Report of 1997.

279 Development and economic growth are not synonymous. While it may be true that economic growth plays an important role in achieving development and eradicating poverty, that does not imply that development and economic growth should be regarded as conceptually the same. Durante (1996) 6-7 puts it thus, 'The discourse of sustainable development adds further legitimacy to the paradoxical notion that environmental protection can be addressed through economic growth.'

280 Poverty and inequality have a negative impact on the environment. Societies, which are exposed to poverty and inequality, have a tendency to lack values concerning environmental protection.

Political, institutional, structural and socio-cultural factors all have a part to play in development. Social development is inseparable from the cultural, ecological, economic, political and spiritual environment in which it takes place.[281] According to the Global Environmental Outlook published by the United Nations Environment Programme in 2002, because of the nature of environmental risk and the poor's inability to access appropriate remedial and or adaptive strategies, disproportionate damage may be caused to the world's poorest communities.[282]

The pursuit of sustainable development requires better coordination, cooperation and broader understanding of the concept of responsibility and management.[283] The polluter has to pay all the costs of protection, prevention and remedying of the damaged environment. Liability rules serve as a preventive measure in that the polluters, who know that they would be liable for the costs of remedying the environmental damage, could have a strong incentive to avoid causing such damage in the first place.

The exploitation of water, raw materials and fossil fuels is a consequence of a traditional approach to environmental regulation and management. Liability rules have a considerable impact on the enforcement of environmental law. The concept of liability can be used as a means to change behaviour of potential polluters in order to achieve the objective of sustainable development. Environmental law should shift from the requirements of a causation-based approach in environmental damage claims and increase the use of economic instruments to achieve sustainable development.

According to the World Commission on Environment and Development, "Poverty itself pollutes" and that environmental degradation has become an issue of survival in developing nations.

281 French (2005) 13-14. The World Summit on Sustainable Development held in Johannesburg in 2002 presented a new conceptualisation of sustainable development in its Implementation Plan as it endorses that: efforts will also promote the integration of three components of sustainable development, namely economic development, social development and environmental protection as interdependent and mutually reinforcing pillars. Poverty eradication, changing unsustainable patterns of production and consumption, and protecting as well as managing the natural resource base of economic and social development are over-arching objectives of, and essential requirements for, sustainable development.

282 The Global Environmental Outlook of the United Nations Environment Programme (UNEP) further holds that without a 'pro-poor approach, many of the fundamental causes of environmental degradation will not be resolved'.

283 As encouraged by Basse (2009) 6. NEMA environmental management principles promote the integration of environmental management plans and implementation of environmental programmes.

Causation as a requirement for a civil liability claim is discussed in detail in chapters 3 and 4.

Sustainable development underlies the previously discussed precautionary approach in environmental law.[284] It promotes an integrated approach to pollution-prevention and control in the context of environmental damage. Sustainable development is thus based on holistic rather than a discrete and segmented view of the environmental protection regime.[285]

By use of environmental liability rules, based on the precautionary principle as well as the polluter pays principle, there has to be non-allowance of the development risk defence. Such defence is connected to the so-called pollution exclusion clauses in relation to insurance cover.[286] Pertaining to liability the environmental principles are important instruments that can be used to achieve the objective of protecting the environment. Liability rules can work as a lever for the application of new instruments based on a market approach, which have the potential to induce methods for coping with new risks. In this context, liability can be complementary to other modern environmental instruments, such as emission control measures, environmental impact assessments, environmental auditing and economic instruments.[287]

The effectiveness of the liability regime depends on the defences available. There is no incentive based on traditional liability law to minimise pollution. The expansion of liability rules reflects the general legal reforms based on the principle of sustainable development and the other principles, particularly the precautionary principle and the polluter pays principle. The principle of sustainable development provides an incentive for the development of new legal rules, for example liability rules pertaining to environmental damage.

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284 Brans (2001) 39 is of the view that governments have no options but to apply measures as intervention to protect the natural resources.

285 Lugano Convention of 1993.

286 For an analysis of these clauses see Basse (2009) 8-9, Montmasson-Clair and Ryan (2014) 7 *Journal of Economic and Financial Sciences* "Lessons from South Africa's Renewable Energy Regulatory and Procurement Experience" 509-510.

287 Proposed by Basse (2009) 12.

Issues relating to environmental governance are inclined to give rise to controversies. Sustainable development is no exception in that regard. The international community recognises a categorisation based on levels of development of the nation states.[288] States are recognised based on the least developed, developing and the developed states. Developing states are states which aspire to attain economic development. These states face considerable challenges including a lack of resources, services and development. The developed states are the highly industrialised states with adequate resources. As a developing state South Africa is recognised as one of the world's five major emerging economies, together with Brazil, Russia, India, and China.[289]

The approach to sustainable development is, to a certain extent, influenced by levels of development that states have achieved. At the early stages of the introduction of the concept of development, the following issues would be raised. Some of the earlier approaches to sustainable development aimed at establishing norms for environmental protection and conservation that were ecology-oriented rather than utilisation-oriented. These also express an understanding of the relevance of environmental protection for socio-economic interests and the needs of the developing countries.[290] The World Commission Report attracted criticism from scholars as having diluted the focus on environmental protection when one simultaneously takes other interests into account. Those scholars involved in compiling the Report saw environmental degradation as the root cause of social and economic injustice.

Environmental health and protection were seen as prerequisites for just social and economic structures - the most controversial issues related to the development path for developing countries.[291] While developing countries would like to exercise their own development agendas freely, sustainable development would imply certain limitations with regard to the development ambitions.

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288 Burns M and Hattingh J (2007) 14 *SAJELP* "Locating Policy within the Taxonomy of Sustainable Development"1-3 and Uwah and Motsoeneng (2013) 12 *Interdisciplinary Journal* "Awareness of Sustainable Development at CUT" 91-92 believe that the approach to the principle of sustainable development depends on the circumstances of the country.

289 Known as the 'BRICS' countries.

290 Voigt (2009) 14-15.

291 See also Voigt (2009) 16.

The argument of the developing countries is that these have an obligation to meet essential needs of their populations. In order to achieve such essential needs of the people, these countries depend on full economic growth potential, which may be difficult to achieve if they follow environmental standards as set out by the principle of sustainable development to the letter.[292] Sustainable development was primarily perceived as imposing limitations on developed countries while developing countries are free to exercise their choice without similar interference as to which development models to follow. The problem is that developed countries are seen as the main culprits in unsustainable practices. The United Nations General Assembly[293] subsequently concurred with the World Commission in 1987 that:

> The critical objectives for environment and development must include preserving peace, reviving growth and changing its quality, remedying the problems of poverty and the satisfaction of human needs, addressing the problem of population growth and conserving and enhancing the resource base, reorienting technology and managing risk, and merging environment and economic decision-making.

Furthermore, Principle 4 of the Rio Declaration[294] is of importance. It affirms that in order to achieve sustainable development, environmental protection must constitute an integral part of the development process. The Preamble to the Agenda 21[295] provides another example of the significance of the principle of sustainable development as it declares that:

> Humanity stands at a defining moment in history. We are confronted with a perpetuation of disparities between and within nations, a worsening of poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystems on which we depend for our well-being. However, integration of environment and development concerns and greater attention to them will lead to the fulfilment of basic needs, improving living standards for all, better protected and managed ecosystems and a safer, more prosperous future. No nation can achieve this on its own; we together can, in a global partnership for sustainable development.

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292 See Voigt (2009) 16.
293 United Nations General Assembly Resolution GA Res. 42/187 of 11 December 1987.
294 Principle 4 of the Rio Declaration.
295 The United Nations Conference on Environment and Development of 1992 (Agenda 21).

The principle of sustainable development is thus an inclusive concept as it touches on all aspects of life. Voigt, however, cautions that 'when a concept is meant to cover everything; it is likely to say nothing'.[296] This criticism on sustainable development is unwarranted because it clearly is not a stand-alone concept. A number of principles have been established with a view to ensuring that the concept is effective and practicable as a global objective.[297]

The principle of sustainable development is now recognised in many jurisdictions.[298] Examples of such recognition include the changes made by the 1997 Treaty of Amsterdam to both the EC Treaty and Maastricht Treaty on the European Union. Article 2 of the Treaty establishing the European Union provides that:

> 'The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.'

The concept of sustainable development has been accepted and endorsed by the world community despite lack of consistent definition and of criticism levelled against the concept of sustainable development by scholars. The concept and principle of sustainable development is also recognised expressly in South Africa in terms of section 24 of the

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296 According to Voigt (2009) 18 criticism of the concept of sustainable development is based on the concept's indeterminacy and ambiguity. See McCloskey (1998) 9 *Duke Environmental Law and Policy Forum* "The Emperor has no Clothes: The Conundrum of Sustainable Development" refers to sustainable development as a fine phrase without meaning 153-155.

297 The International Law Association (ILA) established a committee on Legal Aspects of Sustainable Development, which completed its work in 2002. The result of that committee's work was the ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development. The ILA noted that sustainable development is now widely accepted as a global objective and that the concept has been recognised in international and national legal instruments.

298 For example, Article 110b of the Norwegian Constitution that provides that: "Every person has a right to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved. Natural resources should be made use on the basis of comprehensive long term considerations whereby this right will be safeguarded for future generations as well."

Constitution. Section 24(1) of the Constitution[299] provides that: everyone has a right to 'an environment that is not harmful to their health or well-being; and to have the environment protected for present and future generations.' This broadly speaking requires citizens to respect each other's rights to the environment, failing which, they omit to comply with their duties to do so. This has the potential to lead to a variety of liability claims, such as delictual, contractual or statutory. This section furthermore requires protection for present and future generations, in other words a duty to pursue a sustainable development, failing which, liability for an omission could be incurred.

2.8. Concluding Remarks

The definitions and descriptions available to date are clearly developing and adapting to changes in society and the world today. No single definition can be provided for the concepts in this chapter, and will depend on the jurisdiction, the facts and circumstances and the applicable laws in force during the time of recovery of damages.

Environmental management principles are a crucial component of environmental governance. These principles are relevant to the concept of infringement of rights and obligations and possible liability for pollution damage. These provide guidelines with regards to the application of liability rules. Principles are different to rules because these inform legal rules and do not have a direct application to legal conflicts, but directly influence the relevant public institutions in their decision-making functions. The exact legal status and limitations of the environmental management principles is not very clear although - according to Verschuuren - these continue to play an important role in international law.[300]

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299 S 24(1) of the Constitution and Article 5 of the Draft International Covenant on Environment and Development of 1995 (hereinafter the Draft Covenant) https://portals.iucn.org/library/sites/library/files/documents/eplp-031-rev3.pdf last accessed 23 February 2014, states that the freedom of action of each generation in regard to the environment is qualified by the needs of future generations. The ILA, in its seventh Report of 2002, expressed the view that 'the objective of sustainable development involves a comprehensive and integrated approach to economic, social, and political processes, which aims at the sustainable use of natural resources of the Earth and the protection of the environment on which nature and human life as well as social and economic development depend and which seeks to realise the right of all human beings to an adequate living standard on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from, with due regard to the needs and interests of future generations.' See also French (2005) 29-30.

300 Verschuuren (2006) 12/57.

Liability rules are derived from these principles as the principles are flexible in nature. For example, the polluter pays principle, as an economic principle, can serve the purpose of revenue collection with its liability element.[301] The liability element arises when the polluter has to pay for damage caused to the environment. Such revenue collection can be utilised for purposes of environmental expenditure financing.

For example, the polluter pays principle promotes efficient resource use and sustainability as it imposes costs of pollution on those who pollute the environment. Operators do not like to be burdened by costs that they can avoid or prevent. This is the case where polluters are aware of the potential liability they may face in the event of them causing pollution. It informs the duty of care and resulting obligations that could lead to liability where omissions to comply occur. The precautionary principle for example is not different to other principles including the principle of sustainable development. Owing to its broad application the principle of sustainable development is the primary principle and key driver in shaping and advancing environmental law. As such, the principle promotes the application of liability law as part of an effort to conserve and protect the environment.

The principle of sustainable development is crucial for the creation of novel methods of seeking to address the existing environmental problems. Sustainable development is open-ended and has the potential to be applied to address environmental developments. The dynamic nature of environmental challenges requires consistent change in the approach to law. Although all environmental principles, in some way or another, permit the development of new norms in the application of environmental law. Liability for pollution damage, although not a new or innovative solution, creates a logical sense in law owing to its aim to further the objective of the principle of sustainable development. The environmental management principles have all - in one way or another - been adopted into South African environmental legislation as part of the country's law.

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301 See the discussion by Henderson (1995) 1 *SAJELP* "Fiscal Incentives for Environmental Protection Conceptual Framework" 58, Mattheus C (2013) 8 *WTW & WWTW: Industry Insight* "Proactive Wastewater Reuse a Reality" 76 in relation to the 'change of mind-set' that is created by liability law.

On the surface, these principles serve different objectives but, in reality, these serve one purpose of creating and maintaining an environment that is not harmful to health and well-being. These principles are not adequate on their own as measures for the protection of the environment. It is logical to deduce that extensive and sound liability rules give substantial weight to the effectiveness of environmental management principles in practice.

CHAPTER 3

STATUTORY LIABILITY

3.1. Introduction

Section 24 of the Constitution is at the core of South African environmental legislation and is not concerned with liability for pollution damage. It is aimed at establishing norms within South African legislative framework, which will serve as a guide to solutions for environmental problems. It further creates new avenues for addressing existing and future or unknown challenges, including liability. It is not inconsistent with liability law that does not forbid the pursuit of claims against the polluters.[302] A set of statutes that regulates environmental management and addresses liability upon contravention of an environmental regulation is briefly discussed below in order of their enactment.

The ECA is repealed legislation but it is important to refer to it for the purpose of defining the environment. Section 21 of the Act empowered the Minister of Environmental Affairs and Tourism to identify activities that were regarded as detrimental to the environment.[303] Activities that had been identified as having a substantial impact on the environment would not be undertaken without environmental authorisation. In terms of section 21(1) of ECA, these activities included land use management, water use, agricultural processes and industrial activities.[304] Section 29 of the ECA generally provides for offences, penalties and consequences that could ensue consequent upon contravention of the provisions of the Act, including prosecution and criminal conviction.[305]

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302 S 24(b) of the Constitution.
303 S 21 of the ECA.
304 S 21(1) of the ECA. S 22(1) is also crucial with regard to the prohibition of the identified activities in s 21(1) of the Act as it emphasises that identified activities could only be undertaken by virtue of written authorisation.
305 Du Plessis A (2006) 9 *PER/PELJ* "Land Restitution Through the Lens of Environmental Law: Some Comments on the South African Vista" 11/261-13/261.

'Statutory liability' is liability or responsibility that is imposed by legislation on the polluter for violation of a legal provision. The liability or responsibility imposed by authorities gives rise to fines, compliance orders and potentially to claims to pursue compensation for damage caused by the polluter. Statutory liability is aimed at entrenching strict compliance with environmental laws. The basis for statutory liability is strict liability or liability without fault. Liability without fault is dealt with in chapter 4 of the study.

One of the most important anchors for environmental governance is NEMA that contains administrative measures. Administrative measures are control measures that are applied to contain impact of pollution damage. NEMA is not a liability law in a narrow or pure sense, yet some of its provisions ideally serve as a good basis for such liability law.

Statutory liability law provides for specific situations in a specific sphere of environmental governance, where liability for damage to the environment arises. In *Earthlife Africa (Cape Town) v Director-General Department of Environmental Affairs and Tourism and Another*[306] the applicants applied for the review of the defendant's decision and have it set aside in terms of the Promotion of Administrative Justice Act (hereinafter PAJA), on the grounds that they had not been given an opportunity to express their opinion on the construction of a nuclear reactor by Eskom. Liability claims for the payment of damages follows after the act of damage to the environment has been committed. Where there is possibility that damage may be caused to the environment, it is important for society to act proactively to prevent harm to the environment.

In a similar situation in *Escarpment Environment Protection Group and Another v Department of Water Affairs and Another*[307], the Water Tribunal held that "anyone who wishes to review an administrative action remains free to approach a court of law or

306 2006 (2) All SA 44 (C). For example, the construction of a nuclear reactor contains positives and negatives in that sufficient energy is needed for the country. The nuclear reactor has less impact on the environment and human health. It does not produce harmful greenhouse gases. The challenge with nuclear is that waste is harmful and may be difficult to manage. The transportation of radioactive waste also causes carbon dioxide emissions that may harm the environment and human health.

307 (WT25/11/2009) [2011] ZAWT 11.

an independent tribunal established for that purpose". The water tribunal stated that the applicant did not meet the criteria set out in section 148(1) of the NWA.[308] Section 148(1) provides for a process and conditions under which an appeal to the water tribunal could be entertained.

The concept of liability for environmental damage is a command and control measure in that it focuses on compliance with standards to achieve the required quality of the environment.[309] Liability regimes for environmental damage are also not an instrument to suppress economic development initiatives.[310] These are instruments to ensure that an equitable environmental situation is created for the benefit of society. A law that seeks to stall development initiatives, due to stringent liability regimes, would not be in the public interest. A clear set of liability laws will enable the victims of pollution to recover actual losses incurred without having to face the challenges that conventional liability laws pose.

The ability to effectively recover losses can introduce an environmental culture that has been envisaged by section 24 of the Constitution.[311] An environmental culture that respects human development and environmental rights needs to be further cemented by efficient legislative measures on refining liability regimes for environmental damage as these have the potential to deter deviant environmental behaviour in the industry.[312]

3.2. Right to the Environment in the Constitution

3.2.1 The Fundamental right to the environment

308 S 148(1) of NWA.

309 Nel and Wessels (2010) 49-52 highlight a crucial point as the authors argue that market-based enforcement instruments are not able to achieve the best results in most situations. Market-based instruments are rules and measures that are based on self-regulation by industries. As alternative enforcement instruments, market-based instruments play an important role with a liability instrument. Accordingly, many authors criticise command and control measures on the basis that industries should be allowed to establish their own ways to reduce pollution damage.

310 See *Bato Star* case above.

311 S 24 of the Constitution.

312 Bergkamp (2016) 185-186, Calzadilla PV and Kotzé LJ (2018) 7 *Transnational Environmental Law* "Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia" 398-400 strongly holds that where a legal framework that addresses industrial practices, environmental damage is inevitable. The authors further argue that deterrence could be utilised to control pollution damage. Liability for damage is vital for the prevention of pollution damage to the environment.

Whenever rights are established, there has to be a mechanism in law to protect those rights.[313] Liability for damage to the environment, whether statutory or delictual, is a legal mechanism to protect environmental rights as created by section 24 of the Constitution. Liability for damage to the environment can be used to promote, realise and fulfil environmental rights that are part of our fundamental or human rights.

Section 24 of the Constitution has set a foundational or '*Grundnorm'* on environmental rights in that fundamental human rights including the right to be protected from environmental damage. The language of section 24 of the Constitution clearly does not negate the necessity of liability for damage to the environment, although it does not refer to liability. Section 24 of the Constitution emphasises the protection of the environment. Liability law emphasises the right of the infringed individuals to claim compensation for harm that is caused to them.[314]

Although the primary intention of liability law is to pursue claims against the polluters, it is also aimed at the protection of the environment and human health. This protection is to the benefit and advantage of human development and the principle of sustainable development; an integral part of the right to health, food, water and the right to life including decent quality of life.[315] There is a direct relationship between environmental rights, human rights and environmental liability law. Central to environmental rights is

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313 Gellers (2012) *International Studies Association Convention, San Diego, CA* April 1-4 "Constitutional Environmental Rights: A Quantitative Analysis of Intra-Regional Influences" 2 describes the concept of environmental rights as 'a major legal and political innovation that seeks to address the complex relationship between people and their physical surroundings'. There is no uniformity in relation to the definition of the environmental right. Definition of an environmental right is complex in that it accommodates a number of different cultural interests and norms that constitute environmental right.

314 Ferreira-Snyman A (2014) 17 "Legal Challenges Relating to Commercial Use of Outer Space" 04/612-06/612 and Paterson A (2006) 9 *PER/PELJ* "Running the Money-Tree to ensure Sustainable Growth: Facilitating Sustainable Development through Market-Based Instruments" 89/118-91/118 have a different view with regard to liability as the authors think that market-based instruments provide a space for operators to control pollution damage.

315 Jeffords (2013) The State of Economic and Social Human Rights: A Global Overview Constitutional Environmental Human Rights: A Descriptive Analysis of 142 National Constitutions 3 & Cassel (2008) 6 *Northwestern Journal of International Human Rights* "Enforcing Environmental Human Rights: Selected Strategies of US NGOs" 104 contend that environmental human rights imply entitlement to clean air, water and soil for present and future generations. When people are exposed to air pollution through toxic fumes, they may suffer ill health; when water is contaminated, it results in sickness that even lead to death. Such an environment is harmful to health and well-being. This does not mean that the relationship between environmental rights and human rights is a simple one. Complex as that relationship may be, s 24 of the Constitution has the objective to address both of them simultaneously.

the protection of the constitutional rights to human health and human dignity that cannot be successfully defended without an effective environmental liability law.

The relationship between environmental rights and other human rights is the core element of section 24 of the Constitution. That relationship is critical to protect both the right to an environment and the other fundamental human rights as these have an anthropocentric approach concerning environmental governance.[316]

Paying for environmental damages is therefore a valuable deterrent, and thus forms part of the protection mechanisms of both human health, in general, and more specifically environmental interests at large. The current regime that is provided by section 28 of the NEMA does not refer to a situation where personal injury in the form of detriment to human health could be and what the specific claims for compensation thereof entail.[317]

The rationale behind liability for environmental damage is that environmental rights should be protected in the interest of the advancement of society. The advancement of society is not only dependent on economic development and human rights protection. The protection of the environment also advances both social and economic development. Environmental liability rules, like human rights law, share similar

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316 Boyle (2007) 18 *Fordham Environmental Law Review* "Human Rights or the Environment: A Reassessment" 1 and Fontanez-Torres (2011) 7 *McGill International Journal of Sustainable Development Law and Policy* "Equality and Environmental Protection: A Constitutional Approach in the Navarro Case" 103-106 explain that an anthropocentric approach is a framework within which the protection of humans is the central focus. For example, the right to life, the right to private life and the right to property also constitute the right to an unharmed environment. The protection of the environment also implies the protection of the rights of persons who live on particular environmental goods as a way of income generation.

317 See Calzadilla and Kotzé (2018) 401, *Bareki* case above and Du Plessis & Kotzé (2007) 1 *Stell LR* "Absolving Historical Polluters from Liability" 174-176. For specific claims see *Nkala and Others v Harmony Gold Mining Co Ltd and Others and Mankayi v Anglo Gold Ashanti, and Fuel Retailers Association v director-General Mpumalanga* cases. Civil society and community organisations like groundWork, Earthlife Africa, and the Centre for Environmental Rights (together the Life After Coal campaign), the Federation for a Sustainable Environment, the South Durban Community Environmental Alliance, and the Vaal Environmental Justice Alliance, have battled with big polluters and authorities for decades, arguing that the poor air quality in areas like the Mpumalanga Highveld, the Vaal Triangle, Limpopo Waterberg and South Durban constitute violations of the Constitutional right to an environment not harmful to health or wellbeing. The Department of Environmental Affairs concedes, in its own annual State of the Air reports from 2010 to date, that air pollution is a challenge and that air quality does not meet even South Africa's weak ambient air quality standards, but has, to date, denied that this constitutes a violation of human rights.

objectives that are aimed at creating better conditions for humankind and the environment in general.[318]

The United Nations Conference on the Human Environment stated that '[M]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits, a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.[319]' It can be concluded that the right to the environment is an all-inclusive right as it embraces other rights as part of the environmental rights realm. The right to the environment has by its nature both a bias towards human beings and their well-being as well as the environment itself.

The primary purpose of environmental liability is to protect the environment for the benefit of the people and their welfare.[320] Section 2(2) of NEMA provides that environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably.[321] Section 3 of NEMA further strengthens the view that development should serve the purpose of promoting the interests of the people.[322]

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318 Cullet (1995) 13 *Netherlands Quarterly of Human Rights* "Definition of an Environmental Right in Human Rights Context" 25. See also Kidd (2011) 20 in this regard.

319 Principle 1 of the Stockholm Declaration on the Human Environment of 1972 and Fontanez-Torres (2011) 105 and Boyle A (2011) 105 *Proceedings of the American Society of International Law* "International Law and Liability for Catastrophic Damage" 424-425 affirm that states have a responsibility to ensure that activities that take place within their territories promote the environmental ethos. Damage to the environment should be minimised for the benefit of all in society. Liability for damage to the environment is vital in the application of environmental protection measures. The need for compensation for damage caused to the environment and human health is critical in the application of a liability regime that considers fairness as important.

320 The basis of s 24 of the Constitution is that people should be at the heart of the environmental protection. The environment should be healthy for the benefit of the people. See also Cullet (1995) 26-29 and Du Plessis and Kotzé (2007) 176 as the authors reiterate that the 'right to a healthy or clean environment or an environment conducive to well-being and higher standards of living, all of which centre on the quality of life'. The right to an environment that is healthy and clean also refers to a decent environment that encompasses and is suitable to social and cultural needs of the people. A decent environment that encompasses higher standards of living includes an environment that is free from social ills such as poverty and diseases. Liability for damage also protects the notion of a decent and quality environment.

321 S 2(2) of NEMA.

322 See the related discussion by Du Plessis and Kotzé (2007) 176 and Fontanez-Torres (2011) 105-106.

These interests are served when development is not harmful to health of the people and the environment.[323]

Economic development, as a right of the people, should serve their interests and needs in an equitable manner. May and Daly put it that 'human rights and the environment are inextricably intertwined. Fundamental human rights to life and liberty cannot be achieved without adequate environmental conditions of clean water, air and land'.[324] One can justify the opinion that the successful attainment of most of the rights in the Constitution is largely dependent on the protection of environmental rights. A clean and healthy environment provides a space for the attainment of other rights that are enshrined in the Constitution.

i. The African Charter on Human and Peoples' Rights also recognises the similarity between the environmental rights and the rights of the people to development. Article 24 of the African Charter on Human and Peoples' Rights states that 'all peoples shall have the right to a general satisfactory environment favourable to their development'.[325] The African Charter acknowledges environmental rights as constituting the backbone of human rights. In simple terms, an infringement on the environment is also an infringement on human rights in general. The African Charter does not refer to liability for damage to the environment.[326]

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323 S 3 of NEMA states that development must be socially, environmentally and economically sustainable.

324 Goldstone R (2006) 13 *Human Rights Brief* "A South African Perspective on Social and Economic Development" 3-5, May & Daly (2009) 11 *Oregon Review of International Law* "Vindicating Fundamental Environmental Rights Worldwide" 367 hold the view that economic development should be fulfilled as a reflection of the enjoyment of freedom and democracy. In *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC) squatter dwellers built some makeshift homes on a private property. The owner of the land applied for their eviction with support of the local authorities. The court recommended that the government make an effort at trying to address socio-economic rights such as housing in conjunction with Human Rights Commission. In *Soobramoney v Minister of Health (KwaZulu-Natal*) 1997 (12) BCLR 1696 (CC) the applicant went to a public hospital for dialysis. The treatment was denied on the ground that the hospital was only able to treat a few patients at a time.

325 Article 24 of the African Charter on Human and Peoples' Rights of 1981 (hereinafter African Charter) recognises the interrelationship between environmental rights, human rights and the economic development of the people. An environment favourable to the development of the people should not be harmful to human health and the well-being of the people. Cullet (1995) 32 also recognises that 'the underlying philosophy of a right to environment points to humankind's dependence on the existence of life on earth'. An environment favourable to the development of the people is not contradicted by liability for environmental damage. See also Boyle (2007) 3-4 in this regard.

326 The African Charter does not elaborate regarding liability for damage. It can be argued that lack of focus on pollution damage is owing to low levels of industrialisation on the African continent. Africa

The human right to a clean and quality environment promotes the necessary balance for human rights and environmental protection. The Universal Declaration of Human Rights contains no specific reference to environmental rights or liability for damage to the environment.[327] Article 3 of the UDHR provides that everyone has a right to life, liberty and security of the person.[328] The right to life and security of the person is understood to imply an environmental right as the same cannot exist without adequate and quality environment.[329] The right to well-being does not only encompass the psychological and physical health but also refers to the intrinsic value inherent in the environment.[330] To promote the right to the environment requires a fair liability regime to enhance the enforcement of policies that protect and preserve the quality of the environment in the interest of the collective good for all in society.[331] Article 2 of the International Covenant on Economic, Social and Cultural Rights promotes compliance of state parties to fulfil the realisation of rights enshrined in the Covenant.[332]

has a number of extractive industries and that calls for a more proactive approach concerning environmental governance.

327 Universal Declaration of Human Rights of 1948 (hereinafter UDHR).

328 Article 3 of the UDHR also refers to the protection not only of the person but to the protection of the environment. According to May and Daly (2009) 382 environmental rights also refer to 'the non-human phenomena. Environmental rights have a potential to include all issues affecting the human conditions including rights to life, dignity, health, food, housing, education, work, culture, non-discrimination, peace and children's health as well as water, ground and air'. This definition of environmental right is broad and inclusive of all aspects of life that constitute the environment. The right to equality, for instance, also contains environmental rights and protection of the environment. When a factory is established in an area close to the residential townships of the poor, that is not only a violation of an environmental right but also a violation against equality.

329 See May and Daly (2009) 371-372.

330 See Glazewski (2005) 77 and Du Plessis (2011) 27 *South African Journal on Human Rights* "South Africa's Constitutional Environmental Right (Generously) Interpreted: What is in for Poverty?" 279 also agree that 'the nature and ambit of the environmental right relate to ss 27(1) and (2), which provide for a right of access to health-care services and sufficient food and water. Yet the scope of S 24 transcends the modalities of what is necessary for people's 'biological survival', including physical health. The scope of S 24 is all-embracing as it encompasses almost every right in the Constitution. Environment is not limited to natural resources only as it includes human needs in their broad form as well. The reach of S 24 is broad enough to include the eradication of poverty and inequality and the creation of material conditions in the interest of society.

331 Kidd (2011) 21 puts it that there are 'two kinds of environmental rights: the rights of humans to a safe and healthy environment and the rights that the environment itself must not to be degraded'. Kidd (2011) 21 further elaborates that environmental rights are group rights as opposed to some individual rights. Environmental rights are rights of the public at large and are classified as third generation rights. These rights create an obligation on the state to give effect to their realisation.

332 Article 2 of the International Covenant on Social, Economic and Cultural Rights of 1966 (hereinafter ICESCR).

The incorporation of the environmental right in the South African Constitution is the recognition that the environment plays an important role not only to nature, as it is commonly conceived, but also with reference to cultural, social and economic development. In *Bengwenyama* case,[333] the court did not refer to liability for pollution damage. The issue was mainly about the aspect of land ownership and mineral rights that lie at the heart of the current political and legal discourse. At issue in this case was the flouting of administrative remedies that were supposed to be applied by the Department of Mineral Resources and Energy to protect these aspects of the environment. For example, the process of consultation was flouted for the benefit of Genorah Resources without justification in law, and thus is an actionable omission where this causes harm, loss or damage. According to the court, the rule of law was also not taken into account in the process, which omission should lead to legal remediation.[334] Liability for omissions is again in this situation at the forefront of the issues as addressed in this study.

Rights are concrete and meaningful only if these enjoy the protection of the law.[335] According to Cullet 'all human rights represent universal claims necessary to grant every human being a decent life that are part of the core moral codes to all societies.'[336] The case of the Ogoni people in Nigeria is an example of the simultaneous violation of environmental rights, human rights and cultural rights.[337] The

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333 See *Bengwenyama* case para 75. In terms of s 17(1)(c) the Minister is required to grant a prospecting right if, among other requirements, the prospecting right will not result in unacceptable pollution, ecological degradation or damage to the environment. This places a duty of care on the Minister to ensure that damage does not occur.

334 Boyle (2011) 425, Minkler (ed) (2013) 3 and Cassel (2008) 104 contend that environmental human rights imply 'entitlement to clean air, water and soil for present and future generations. When people are exposed to air pollution through toxic fumes, they may suffer ill health and when water is contaminated, it results in sicknesses that even lead to death. An environment in such situation is harmful to health and well-being'. This does not mean that the relationship between environmental rights and human rights is a simple one. Complex as that relationship may be, S 24 of the Constitution has the objective to address both of them simultaneously.

335 The maxim "*cessante ratione legis cessat et lex ipsa*" has a relevant connotation as it means that the law is rendered redundant when the reason for its existence no longer exists.

336 Cullet (1995) 26.

337 The Ogoniland region in Nigeria is an example of how natural resources could be used in an unsustainable manner. Shell Oil Company had caused irreparable damage to the environment that threatened lives of many people in the region. The *Ogoniland* case also serves as a good example of the interrelationship between environmental rights and human rights. The violation of either of these rights results in the violation of another set of rights. The African Commission recognises the importance of economic development but also takes into account that such development should not be at the expense of the rights of the people especially the indigenous communities. See Coomans (2003) 52 *International and Comparative Law Quarterly* "The *Ogoniland* case Before the African Commission on Human and Peoples' Rights" 751.

African Commission on Human and People's Rights made a determination that the people had a right to dispose freely of their natural resources. The Commission further held that there had to be clean up of land and rivers damaged by oil operations and meaningful access to regulatory bodies. The state was also required to take reasonable measures to prevent pollution and ecological degradation.

Section 24 furthermore encompasses the right to fair distribution of natural and energy resources. The fair distribution of resources such as energy, water and other natural resources is key to environmental justice and the alleviation of poverty.[338] Section 24 should be regarded as setting a broad transformative agenda for the social, economic and cultural development of society.[339] All of these rights can only be realised when there are mechanisms to ensure these are sustainable.

Liability law can play a crucial role specifically in the achievement of society's transformative agenda. The transformative potential of section 24 is grounded on the fact that NEMA and other environmental laws were created to give effect to the requirements set by the Constitution. Section 24 does not only seek to transform the environmental setting from the past but also transforms the very heart of South African human rights jurisprudence. This is the case because of the interrelationship that exists in the provisions of the Constitution. Du Plessis and Kotzé correctly perceive section 24 of the Constitution as remedial and susceptible to the enactment of public interest legislation as it prescribes the obligations of the government to secure environmental protection.[340]

Any statute infringing on a constitutional right must meet the requirements of section 36, the limitations clause of the Constitution.[341] According to this section the rights in

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338 See the South African case of *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) where the court highlighted some of the inequalities that exist in relation to the right of access to water and other resources of importance in South African society.

339 See the detailed discussion by Du Plessis (2011) 281 in which the author reiterates the view that environmental rights can be used to achieve the objective of eradicating poverty and creating sustainable social development and other transformative objectives.

340 Du Plessis and Kotzé (2007) 176, Robinson and Prinsloo (2015) 18 *PER/PELJ* "The Right of the Child to Parental Care and Constitutional Damages for the Loss of Parental Care: Some Thoughts on *M v Minister of Police* and *Minister of Police v Mboweni*" 1671.

341 S 36 of the Constitution, as the limitation clause, emphasises the examination of the infringement of the rights that are alleged to have been violated. Should there be proof that a right in the Bill of Rights has been infringed; the court declares such infringement as unconstitutional. In *Carmichele*

the Bill of Rights may be limited only 'in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including: (a) the nature of the right, (b) the importance of the purpose of the limitation, (c) the nature and extent of the limitation, (d) the relation between the limitation and its purpose and (e) less restrictive means to achieve the purpose.'[342]

In view of this, only a law of general application may be enacted to limit the right to the environment. The limitation clause serves as a guide with reference to the fact that constitutional rights or any other rights in the Bill of Rights are not absolute. Dworkin's conception of the theory of right is underpinned by the understanding that rights are limited in the modern day Bill of Rights.[343] Liability law promotes environmental justice without tramping on the rights of others. This branch of law enhances the principle of balancing rights and responsibilities one has to the environment in society.

The issue of limitation of rights formed the basis of the decision of the court in the *Government of the Republic of South Africa v Basdeo*.[344] A claim for constitutional damages in this case arose from the murder of the member of the public, who was shot and killed by a member of South African Defence Force in a roadblock. The appellant disputed liability and sought justification on the premise that the killing was not intentional as the intention was to stop the car from fleeing away from the roadblock. It was contended that the death came about in pursuit of a lawful purpose. The determination of liability by the court was based on the negligent conduct of the member of the appellant.

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v Minister of Safety and Security 2001 (4) SA 938 (CC) the Constitutional Court held that the state had a duty to 'provide appropriate protection to everyone through laws and structures designed to afford such protection'. The rights whose implementation is the state and its organs - in terms of the case mentioned above = include the right to an environment that is conducive to health and well-being.

342 S 36 of the Constitution, *Public Servants Association obo Olufunmilayi Itunu Ubogu v Head of Department of Health, Gauteng and Others* [2017] ZACC 45 paras 56 and 68 and *Dladla v City of Johannesburg* 2018 (2) SA 327 (CC) para 20, the court said that constitutional rights may only be limited by a 'law of general application' in terms of s 36(1) of the Constitution.

343 Dworkin R (1977) Taking Rights Seriously (1 ed) 5-6.

344 1996 (1) SA 355 (A) and *Union Government (Minister of Railways) v Sykes* 1913 AD 156 in which the court was of the opinion that in appropriate circumstances, the burden to produce evidence on a particular aspect by the plaintiff may be shifted to the defendant.

In *Minister of Community Development v Koch*[345] the appellate court correctly stated that the appellants were liable as joint wrongdoers for the damage that was suffered by the respondent because of their activities near his business premises. The facts of the case are that the contractor obstructed access to the business of the respondent, resulting that the owner of the business having his cash sales drastically reduced owing to lack of access to it by members of the public. In this case damages were awarded for the failure to exercise care when executing statutory duties in providing road infrastructure. In this same vein, the authority's duties not to provide for a clean environment may also draw a claim for damages. Administrative liability is in itself not included in this thesis, however, a damages claim by an individual is considered briefly.

The position in *Johannesburg Municipality v African Realty Trust*[346] did not agree with the approach that a limitation of rights by the exercise of statutory duties leads to a damages claim, as the court raised the view that the exercise of statutory power that infringes on the rights of the subject may not necessarily give rise to a claim for compensation in all instances.[347]

Following section 24 of the Constitution a number of statutes have been enacted to fulfil these requirements and to transform South Africa's current statutory laws. NEMA, for example, seeks to create a society where environmental rights and justice becomes a cornerstone of environmental governance in South Africa. In other words, NEMA recognises that the right to adequate standard of living, the right to adequate health, the right to dignity and the right to life cannot be achieved without a sound and decent environment. A sound and decent environment is an environment that is suitable and favourable with reference to enjoyment of life, health and well-being of the people.[348]

345 1991 (3) SA 751 (A).
346 1927 AD 163.
347 Neethling and Potgieter (2015) 221, Robinson and Prinsloo (2015) 1671-1672 contend that where a loss or damage is occasioned by the conduct of another person, such loss may give rise to liability against the wrongdoer. Similarly, damage to the environment should result in claims by the victims of such damage.
348 See Cullet (1995) 26 and Boyle (2007) 20. See also Article 24 of the African Charter that emphasises the significance of an environment that is favourable to the development of the people.

Section 24 of the Constitution is transformative in nature. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others,*[349] the court held that the broad goals of transformation can be achieved in many ways, and that there was no one single formula for transformation. The case dealt with the allocation of fishing rights for which the applicant complained that the quota which was allocated to the empowerment company was too small. Transformation in the environmental governance sphere by statute should not exclude civil liability claims to ensure that the provisions of section 24 of the Constitution are realised. A right to an environment that is not harmful to health and well-being is a crucial mandate by the Constitution that should be honoured by all, failing which legal redress should not be limited without due cause, or else damage will just rest where it falls. This does not promote social justice and the improved well-bring of our citizens.

3.2.2 Categorisation and Equality of Rights

The rights to dignity, life and a clean and healthy environment are also crosscutting and are at the heart of the Bill of Rights. The fundamental right to life does not carry adequate weight when environmental rights are not protected and infringement of the latter has an influence on the lives of the people. For example, where poverty is prevalent the right to dignity and the right to life are infringed.[350] The conditions that are created by poverty are in stark contrast with the objective good of the Constitution, environmental governance principles and the ideal of sustainable development. When these rights are not afforded protection, constitutional rights stand to be violated as these are mutually integrated. These rights are interrelated and the dichotomy between these rights is difficult to achieve without reference to their similar objectives.

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349 2004 (4) SA 490 (CC). The court in this case further stated that 'due regard has to be had to the need to meet the transformative objective of the Act. However, the overriding consideration at this stage is the need to conserve marine living resources for both the present and future generations and ensure that fishing is ecologically sustainable.'

350 Poverty poses a threat to the environment and a threatened environment does not provide healthy living conditions for the people, property and the natural environment. The Office of the High Commissioner for Human Rights (2002) Human Rights, Poverty Reduction and Sustainable Development: Health, Food and Water 2-3 states that 'Poverty should not be seen only as a lack of income, but also as a deprivation of human rights and that unless the problems of poverty are addressed, there can be no sustainable development. It is equally accepted that sustainable development requires environmental protection and that environmental degradation leads directly or indirectly to violation of human rights.' See also the discussion by Du Plessis & Kotzé (2007) 172.

The categorisation of the environmental right - as a separate right from other procedural rights - is not workable in practice.[351]

For example, the right of access to water is infringed when water or water resources are polluted. The centrality of water in human environment, animal life and the environment in general cannot be gainsaid. Yet water pollution continues to be polluted with impunity in most instances with specific reference to mining industry. In *Mazibuko v City of Johannesburg*[352] the need for water security was highlighted as an important constitutional aspect. Liability regimes actually lean on the protection of particular legal interests such as environment and human health. Section 19 of the NWA contains the duty of care as it refers to administrative measures that must be taken by a range of persons who are responsible for water pollution. Where citizens were deprived of water in this case, causing damage to property, human health and their environment, claims for damages should have followed in order to promote social justice and be held accountable for the failure in compliance to respect socio-economic rights,

In *Lascon Properties (Pty) Ltd v Wadeville Investment (Pty) Ltd and Another*[353] the court held that any infringement of an absolute-term legislation intends to provide a civil remedy for damage caused by the breach of regulation. It would, however, in this case not consider strict liability as the principle of fault would be excluded in that manner. Thus, it can be concluded that a civil remedy that meets the burden of proving all requirements is possible and assumed in absolute-term regulatory instruments.

The relationship between liability law and environmental rights is premised on the realisation that the environment is important for the good of society. Rights do not exist in a vacuum. Rights themselves need to be protected. In order to protect and promote rights, measures such as liability law would be essential in the interest of society.

351 See the Ksentini Report of 1994 where the procedural rights and environmental rights are also recognised as integrated set of fundamental rights.
352 2010 (4) SA (CC) 1.
353 1997 (4) SA 57Ss8 (W).

According to Cullet, rights are integrated.[354] Liability law is not only deterrent as it is also preventive in nature.

The Vienna Declaration recognises[355] 'the indivisibility and equal priority of all rights, economic, social, cultural and civil and political rights that underscore that democracy, development and human rights are interdependent and mutually reinforcing'. The integration of environmental rights and other human rights into the principle of sustainable development should not downplay the recognition of these environmental rights as a distinct class of rights. That view was reinforced in *BP Southern Africa* case[356] when Claassen J held that 'by elevating the environment to a fundamental justiciable human right, South Africa has irreversibly embarked on a road, which will lead to the goal of attaining a protected environment by an integrated approach, which takes into consideration, *inter alia*, socio-economic concerns and principles.' An integrated approach should then by implication include compensation for reparation or damages suffered by the victims of the damage caused.

There are three types of environmental rights in law. Those environmental rights are procedural, substantive and solidarity rights. It is important to recognise the right to the environment as a fully-fledged right within the context of integrated approach to procedural rights.[357]

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354 Cullet (1995) 29 and Boyle (2007) 20 state that the distinction between environmental rights and other rights has been blurred by the introduction of the principle of sustainable development. The principle of sustainable development creates a composite set of rights that is indivisible. This approach of this can create a situation where economic growth takes precedence over environmental protection. It is Boyle's argument that there are circumstances in which environmental rights and the rights of specific persons may conflict with each other. Particular activities may hamper the use for instance of property, economic development or restrict the right of indigenous peoples to make use of their natural resources. In such cases, the owner of the property is entitled to compensation. See the *Bengwenyama* and *Fuel Retailers Association* cases in which Ngcobo J stated that 'unlimited development is detrimental to the environment, just as the destruction of the environment is to the development above. The economy is not just about the production of wealth, just as ecology is not just about the protection of nature and in the future environmental considerations should be afforded much greater weight in economic and development policy.' Environmental rights are as important as human rights and are not subordinate to any class of rights.

355 The Vienna Declaration of 1993 stresses the importance of social justice, which include fair distribution of wealth, public participation, respect for human rights and environmental and economic justice in society.

356 See *BP Southern Africa* case para 33.

357 Gellers (2012) 2-3 and Cassel (2008) 105-106 as well as Shelton (2008) 35 *Denver Journal of International Law and Policy* "Human Rights and the Environment: What Specific Environmental Rights Have Been Recognised" 130 agree with the view that 'procedural environmental rights refer to rights that promote the transparency, participation, and accountability which form the

3.2.3. Stakeholders and Public Participation

Procedural rights are those rights that are concerned with procedural aspects of law, such as public participation and consultation with stakeholders. In turn, procedural environmental rights focus on issues of transparency, participation and accountability.[358] Environmental democracy promotes transparency about decision-making on issues affecting the environment. Transparency means that citizens are aware of development programmes and the risks associated with such programmes that government embarks on. Citizens must be able to challenge them whenever their rights are at stake.[359] In the *Bengwenyama* case, the court indicated that such rights were ignored at the expense of the community.

Procedural rights, in terms of the Rio Declaration, include a broad subcategory of rights, namely the rights to freedom of association, access to information, public participation in decision-making and access to justice. These procedural rights are interrelated and interdependent as each of these functions in is sync with the other rights. Liability regimes for environmental damage could create an instrument for the thorough application of these rights. The liability regime strengthens the enforcement of rights as those who infringe such rights are held to account for their actions.

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cornerstones of environmental governance. Procedural environmental rights refer to opportunities and abilities of individuals to exercise their right to participate in the policy-making process relating to the environment. Substantive environmental rights refer to existing rights within the corpus of international human rights law that may be applied where environmental problems illustrate human rights concerns. Substantive environmental rights may be used to address environmental issues that affect human life including the right to life, the right to health, the right to adequate standard of living and the right to privacy'. Environmental rights are embedded within the existing human rights. They include the right to life, the right to health and the right to property that are violated in the event of environmental degradation.

358 Gellers (2012) 2.

359 Principle 10 of the Rio Declaration of 1992 states that "environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.' The Rio Declaration, although not binding, is also relevant and important with regard to environmental rights and environmental democracy. Geller (2012) 2-3 describes procedural rights as the "cornerstones of environmental governance".

The UN Convention on Access to Information, Public Participation in Decision-making and Access to Justice[360] requires that each state shall guarantee the rights of access to information, public participation and access to information and access to justice in accordance with the provisions of the Convention. The right to the environment without these environmental rights being in place is rather meaningless. These procedural rights actually constitute the core of environmental democracy. Access to information and public participation are pertinent to liability law as these empower society to act against wrongdoing.[361]

The right to know and have access to environmental information and public participation constitute an integral part of environmental democracy. For their effective participation, citizens must be empowered with regard to environmental decisions. Environmental democracy empowers citizens to assess and appreciate the degree to which harmful activities may have on the environment. An omission to provide information could be actionable and losses caused thereby recovered.

3.2.4 Substantive Rights

Substantive rights are premised on substantive law. Substantive law is different to procedural law which is concerned with procedure of law. In *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal*[362] the Constitutional Court found that the 'law of contract for example, should be infused with constitutional values such as *ubuntu* and human dignity'. Substantive rights are inclined towards the protection of rights and legitimate expectations. It is interesting to note that the court did not make its decision based on broader substantive legitimate expectations but rather on rationality review of the facts before it. The same approach should for the sake of consistency, be followed regarding the law of delict and ensuing civil claims.

In South Africa, there is array of environmental legislation, whose aim is to protect the human rights, economic interests and the environment. However, there is no specific

360 United Nations Convention on Access to Information, Public Participation in Decision-making and Access to Justice (Aarhus Convention) of 998. https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf last accessed 18 April 2014.

361 See the *Vaal Environmental Justice Alliance* case in which the court raised the importance of public participation and access to information as important in the promotion of environmental democracy.

362 2013 (4) SA 262 (CC) paras 17-20.

liability law dealing exclusively or specifically with conduct causing environmental damage. Liability for environmental damage is not aimed at retarding economic development and growth, but in reality seeks to promote the fundamental values of the Constitution.

3.2.5 Solidarity Rights in Environmental Law

The protection of human rights is by nature extra-territorial in its implementation. Solidarity promotes interstate relations with regard to the implementation of human rights.[363] States have a responsibility to promote human rights as sovereign states. Interstate procedures may be used to assert environmental rights. Environmental damage normally has far-reaching impacts on humans, which require redress in law.[364]

The African Charter describes solidarity rights as the right to development, the right to peace and the right to a healthy and ecologically balanced environment. Solidarity rights are not different from the concept of *ubuntu*.[365] *Ubuntu* is an ancient African term that does not only refer to humanity but to the compassionate feeling for others. The concept of *ubuntu* is part of the African philosophy that embodies the collective effort of the people in seeking to achieve the common good for all and refraining from doing harm to others.[366]

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363 Scholtz (2012) 37 *South African Yearbook of International Law* "The Reconciliation of Transnational Economic, Social and Cultural Human Rights via the Common Interest: Notes and Comments" 232-234 is of the opinion that human rights are a domestic issue when the states themselves seek to assert and implement them. In cases where states, however, fail to implement such rights, intervention measures at interstate level can be applied.

364 Article 11(1) of the International Covenant on Economic, Social and Cultural Rights of 1966 (hereinafter the ICESCR) emphasises the importance of international cooperation in the promotion of the adequate standard of living. Solidarity therefore brings into focus the spirit of equitable sharing of benefits and burdens in the interest of humanity and the environment.

365 Diedrich (2011) 1-3. The Preamble of the final Draft of the White Paper on South Africa's foreign policy of 2011 states that "South Africa is a multifaceted, multicultural country that embraces the concept of *ubuntu* as a way of defining who we are and how we relate to others. The philosophy of *ubuntu* means 'humanity' and is reflected in the idea that we affirm our humanity when we affirm the humanity of others" 4.

366 Mokgoro (1998) 1 *PER/PELJ* "Ubuntu and the Law" 20-23 and Baxter H (2010) 90 Boston Law Review "Dworkin's One System Conception of Law and Morality" 858-860 supports the view that *ubuntu* is not an easy concept to define because it is linked to the social life of the community. *Ubuntu* refers to the compassion and feeling that people have for each other and the general environment. The concept is crucial in respect to the reconciliation amongst the people and their societies whenever a conflict arises. It also refers to the value system of the African society that espouses equality and support for those at the lower end of society. The concept of *ubuntu*

The notion of *ubuntu* requires a communalistic approach to environmental and human rights. According to Slabbert[367] "no human exists on its own, other persons and their situations or requirements have to be taken into account." It is an inherent characteristic of humans to depend on one another. *Ubuntu* forms part of ethics and values that human beings respect and promote in society, for example, honesty, justice, security, peace and sharing of goods. Degradation of the environment and pollution damage pose a threat to these shared values premised on *ubuntu*. Ubuntu, with regard to the environment, implies that there has to be moral consciousness in relation to pollution damage without the enforcement of law. That moral virtue does not only apply to human situations as it also encompasses the environment in which humans live.[368]

Solidarity rights as one of the classes of environmental rights share similarities with the principle of *ubuntu*. For instance, solidarity rights also emphasise the collective effort to achieve a common objective.[369] In other words, solidarity rights promote the primacy of the collective good and commonality over the individual interests and are important to the attainment of environmental justice as that requires the collective rather individual effort to achieve.

Solidarity rights form part of the environmental democracy. Environmental democracy also requires collective efforts and mobilisation of the entire society when environmental rights are threatened by promoting participation of the people in decision-making on issues affecting them and their environment. Communication,

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encompasses the collective effort at solving problems that society and its people faces. The interdependence of the people is central to the philosophy of *ubuntu*. *Ubuntu* is not different to positive law whose purpose is the common good of the community.

367 Slabbert (2010) 13 *PER/PELJ* "Ethics, Justice and the Sale of Kidneys for Transplantation Purposes" 89/204-91/204.

368 In *Khabisi No and Another v Aquarrella Investment (Pty) Ltd Others* 2008 (4) SA 195 (T) the respondent failed to comply with compliance notices issued against them in terms of S 24 of NEMA. The respondents undertook development without environmental authorisation as required by the provisions of NEMA. The court further held that an unlawful administrative act is capable of producing valid consequences in so far as it remains unchallenged.

369 Winks (2011) 11 *African Human Rights Law Journal* "A Covenant of Compassion: African Humanism and the Rights of Solidarity in the African Charter on Human and Peoples Rights" 454 puts it that 'the recognition of solidarity rights in the African Charter is rooted in two reasons unique to the African worldview. One is historical, remembering that the African experience of human rights violations was largely of widespread; and systematic violations of the rights of entire people rather than specific individuals, through slavery, colonialism and apartheid'.

sharing information and giving proper account of actions are required for the protection of environmental rights. Liability for environmental damage promotes efforts for the enhancement of environmental justice as it introduces liability for damage to the environment and human environment.

For example, the issue of hydraulic fracturing is a cause for concern to environmentalists and environmental interest groups but it continues to flourish against the will of the people. It is in these situations liability for pollution damage is most needed to avoid pollution with impunity by companies. The violation of the rights of the people in the Delta Region in Nigeria is a good example as regards the issue of economic interests that override environmental interests. Incidents of environmental damage also take place in war zones.[370] Environmental terrorism is also another form of aggression that is caused to the environment by warring governments. Solidarity rights can be of assistance in such a situation as this causes extensive misery for the people and the environment that requires redress.[371]

The African Charter, as an international legal instrument, recognises that solidarity rights are cross-sectoral in their application. Persons who commit crimes against the environment should be punished for their deplorable conduct, and the international community should show their intolerance for this behaviour.[372]

In cases of war, the environment becomes a silent victim.[373] Persons who are exposed to harm in such situation may be entitled to receive compensation. Yet, as was the

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370 In Kuwait, the Iraq government decided to burn oil wells when these were under pressure from the US government in the Persian Gulf War. Setting oil wells on ablaze resulted in immeasurable catastrophic environmental damage in Kuwait that will take a long time to rehabilitate.

371 Seacor (1994) 10 *American University International Law Review* "Environmental Terrorism: Lessons from the Oil Fires of Kuwait" 482-484 Iraq had invaded Kuwait a country that is also in the Middle East. The reasons for such invasion were not only political but were also motivated by economic interests of the Iraqi government. Iraqi government wanted to seize control over Kuwait owing to its oil pricing, production and sales. Kuwait had refused to increase its oil prices in the world market when Iraq was faced with debt crisis.

372 Seacor (1994) 522 endorses the concept of *ubuntu* as a mechanism to advance environmental interests. The concept of *ubuntu* requires joint effort of society in solving problems such as pollution.

373 Mannion (2003) 4-5 states that war is detrimental to physical health and the well-being of the population. It also affects the rural and urban landscapes that in certain instances may remain in that condition for generations. It destroys heritage in which countries may have invested much to establish, for instance, the September 11 incident in US is such an example of destruction of human life and the environment. Using the environment as a weapon in military conflict is unethical

case in Kuwait. Ultimately, in most instances, no one takes responsibility for these man-made disasters. This is to the detriment of all. Solidarity rights and liability for damage to the environment can be used to impose punitive measures against perpetrators of these environmental crimes.[374]

3.3. Statutory Liability

3.3.1 Hazardous Substances Act[375]

Hazardous goods or substances create havoc when these spill or seep into soil or water. The spillage of these goods is mostly accidental and poses threat to human health owing to their toxicity and corrosiveness. The Hazardous Substances Act aims to regulate and control hazardous substances for the safety of human health and the environment during the transportation of such hazardous materials.[376] The Act is however not purely environmental in nature. It provides for the prohibition and control of the importation, manufacture, sale, use, operation, application, modification, disposal or dumping of such substances and products.[377]

Section 16 of the Hazardous Substances Act creates vicarious liability for an act or omission of an employee, mandatory or agent, which constitutes an offence in terms of the Act.[378] The employer, the mandatory or principal is liable for the acts of an employee who has acted within the course of the employment.[379] In *Control Chemicals v Safbank*

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and should be provided for in the international conventions that deal with consequences of the conflict such as the Kuwait conflict.

374 Seacor (1994) 522 also concedes that solidarity rights are the correct approach in the event of such massive damage to the environment as was the case in Kuwait.

375 Hazardous Substances Act 15 of 1973.

376 Ashukem JN (2015) 20 *SAJELP* "Trans-boundary Transportation of Dangerous Goods" 136-137.

377 Preamble to the Act.

378 S 16 of the Hazardous Substances Act. See also Ringwood (2016) 18 *ReSource* "Preventing Toxic Road Hazards" 8-9 who opines that poor handling of dangerous substances is responsible for spillages on the roads. See also Fogleman V (2005) 262 as the author elaborates on hazardous substances that are regulated by CERCLA. CERCLA imposes a duty on relevant persons to report incidents of spillage or release of such substances into the environment. Environmental legislation in the US also incorporates or contains hazardous substances in general to ensure that whenever such substances are released into the environment measures to control damage are in place.

379 In *Chartaprops 16 (Pty) Ltd v Silberman* 2009 (1) SA 265 (SCA) a hazardous substance was not removed by cleaners on the floor of a mall resulting in the injury of a member of the public. The liability of the appellant in this case did not arise from the scrutiny of the Hazardous Substances Act but on the principles of delictual liability.

Line Ltd and Others[380] an appellant was not held liable for dangerous substances that had caused fire damage to the ship that carried them, as the real cause of the fire could not be explained on balance of probabilities by experts during proceedings. The Act also prescribes a range of penalties, which are applicable to a person who is found guilty of an offence relating to hazardous substances.[381] However, these penalties are not paid to the injured party but are due to the state. It, in essence, does not impose a personal liability towards the injured parties or victims of spillage of dangerous goods. Although the Department of Environmental Affairs has authority to prohibit certain chemicals in South Africa, the Act is not specific on liability for damages to the environment, or whether any specific person may claim for them.[382] In *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd*[383] the court noted that the fuel and petroleum products are hazardous and harmful to the environment where spillage occurs. The court went further to describe that "… [t]he proximity of fourteen filling stations within five kilometres of the site would clearly have some environmental impact. In addition it was observed that the development would have a significant impact on the scenic vista, degrade the existing visual character or quality of the site and its surroundings, create a new source of substantial light or glare, which would adversely affect day or night time views in the area or negatively impact on the surrounding communities' physiological health, as well as increase ambient noise levels."[384] All of these were thus an extension of a narrow description of the environment, recognising that it enjoys a broad application that must be protected. Failure to do so leads to administrative sanction, and should, in essence, also include individual civil redress.

380 2000 (3) SA 357 (SCA). Liability for damage caused to the environment should be considered in the context of no-fault liability. The issue of no-fault liability was not raised in the case.
381 S 19 of the Hazardous Substances Act as mentioned above.
382 Du Plessis W (2015) 18 *PER/PELJ* "Hydraulic Fracturing in South Africa" 1444 and Kotzé LJ (2006) 9 *PER/PELJ* "Improving sustainable Environmental Governance" 75/261-77/261.
383 2006 (2) All SA 17 (SCA).
384 Par [21].

3.3.2. The Genetically Modified Organisms Act[385]

Section 1 of the GMO Act[386] provides that 'genetically modified organism means an organism, the genes or genetic material of which have been modified in a way that does not occur naturally through mating or natural recombination or both and genetic modification shall have a corresponding meaning'. The genetically modified organisms are at the core of food production that is facilitated through technology, which results in the production of crops that do not undergo the natural processes of growth.

The products that are produced as, or through, the use of genetically modified organisms have serious implications for food safety, the environment and most often, human health. [387] Genetically modified products are important to serve the needs of society. Population growth requires an increased food supply and higher production. Using genetically modified organisms has the potential to increase food security as the production levels are higher than the naturally produced agricultural products.[388] The Act does not address the issue of liability about genetically modified organisms that could be harmed by parties in the industry.[389]

Article 4 of the Cartagena Protocol on the Biosafety to the Convention on Biological Diversity[390] provides for the regulation of 'transboundary movement, transit, handling and use of living modified organisms that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account the risks to human health'. The genetically modified organisms are generally known to contain risks to the environment and human health. The Cartagena Protocol also regulates the movement of genetically modified organisms' products and places responsibility on the parties to

385 Genetically Modified Organisms Act 15 of 1997 (hereinafter the GMO Act).
386 S 1 of the GMO Act.
387 Nelson (2001) 3-6.
388 Nelson (2001) 81 believes that the use of biotechnology in the process of food production is 'a vital part of the equation for feeding the world in the 21st century to those who fear that the technology will harm people through unknown impacts on health and environment and undesirable shifts in income toward corporations at the expense of the poor'. Genetically modified products are in use in many countries, but the negative impacts on human health remain unknown and may be discovered after a long period of use.
389 Feris (2006) 57/261-59/261.
390 Article 4 of the Cartagena Protocol on the Biosafety to the Convention on Biological Diversity of 2000 (hereinafter the Cartagena Protocol).

apply measures to protect the environment and human health.[391] Genetically modified organisms are used for human and animal consumption in South Africa. These are exported to other countries for similar use. The transboundary movement of the GMOs is regulated in terms of the Cartagena Protocol in accordance with the international guidelines. Article 27 of the Protocol requires parties to consider international rules and procedures in the field of liability and redress for damage to the environment.[392] The Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal provides that a person who receives such hazardous waste must provide notification of a shipment of such waste and the importer must establish and maintain insurance, bonds or financial guarantees to cover their liabilities.[393]

3.3.3. The National Water Act[394]

Liability for pollution damage is important for the environment in general and water in particular. Owing to the centrality of water in South Africa's constitutional democracy as an important human rights deliverable, efforts should be made to ensure that water pollution is not taken lightly.[395] The right to water is a constitutional right in terms of section 27 of the Constitution.[396] The right of access to water as a constitutional right thus also enjoys constitutional protection.[397] The right to water is both a human right

391 Feris L (2006) 9 *PER/PELJ* "Risk Management and Liability for Environmental Harm Caused by GMOs: The South African Regulatory Framework" 51/261.

392 Article 27 of the Cartagena Protocol.

393 Chokst S (2001) 28 *Ecology Law Quarterly* "The Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal: 1999 Protocol on Liability" 514.

394 The National Water Act 36 of 1998 (hereinafter the NWA).

395 Kuokkanen T (2017) 20 *PER/PELJ* "Water Security and International Law" 2-4 refers to the importance of water security as a basic good for all.

396 S 27(1)(b) of the Constitution provides that everyone has the right to have access to sufficient food and water. Water is used for domestic purposes for example, washing, cooking and gardening. Water is also used, as a commercial resource, for instance industrial development and energy generation are dependent on water. Water is also used to transport domestic waste from household and industries. Water is central to the human development and economic development. Water can also be used as transport for example shipping and waterways.

397 Feris L and Kotzé LJ (2014) 17 *PER/PELJ*" The Regulation of Acid Mine Drainage in South Africa: Law and Governance Perspectives" 2105-2106 critically discusses the importance of water, which the mining houses pollute in many respect. The issue acid mine drainage to which the authors refer is one such example of extreme water pollution. The authors argue that the pollution of water with such magnitude is not a sustainable option in South Africa. This is in contrast to the water resource position of the country it falls into 'water stress' category. S 2 of the NWA provides that 'the purpose of this Act is to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account various factors'.

and an environmental right. The NWA has introduced a number of changes in respect to water governance. For example, the issue of ownership of water, which in the previous legislation allowed for private ownership as well as riparian ownership, have since ceased. This means that water is a public good and is in a way communal property.[398] Most importantly, water should be available and accessible to the public for consumption and other activities including commercial and domestic activities.

In *Mazibuko*, O'Regan J stated that 'water is life. Without it, nothing organic grows. Human beings need water to drink, to cook, to wash and to grow our food. Without it, we will die.'[399] The purpose of the enactment of the NWA was to give effect to this right to access to sufficient water in terms of section 27 of the Constitution.[400] The NWA requires that water must be accessible to all and not just to a few.[401] The accessibility of water is a constitutional mandate that has yet to be achieved subject to the availability of resources. Water has to be provided to citizens equally irrespective of class distinctions.[402]

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398 The right to dignity and the right to life are constitutional rights enshrined in ss 10 and 11 of the Constitution, but these rights are also linked to S 27 of the Constitution. The violation of the right in the Bill of Rights amounts to the violation of other rights in the Constitution as these rights are intertwined in practice.

399 *Mazibuko* case at para 1. According to Bulto (2011) 360-361 'water is the life blood of every living being. It is used for drinking, cooking, bathing, washing, waste disposal, irrigation, industry, power production, transportation, recreation and in cultural and religious practices.'

400 S 27 of the Constitution, see also Cousens (2015) 18 *PER/PELJ* "Avoiding Mazibuko: Water Security and Constitutional Rights in Southern African Case Law" 1163 and Gabru (2005) 8 *PER/PELJ* "Some Comments on Water Rights in South Africa" 2/150.

401 Gouws (2008) 257 and Francis (2006) 18 *Georgetown International Environmental Law Review* "Water Justice in South Africa: Natural Resources Policy at the Intersection of Human Rights, Economics and Political Power" 150-151 and Kotzé & Lubbe (2009) 51-52 refers to Garrett Hardin's theory 'the tragedy of the commons'. The commons are resources that are consumed by all inhabitants of the world. These are water, air and land. The understanding according to this theory is that the 'commons are always enough to sustain everyone as long as each only takes his share. The depletion of the commons starts when everyone starts to consume more than their share. To prevent the complete depletion of the commons, restrictions have to put in place for the use of the commons'. The relevance of the tragedy of the commons is important with regard to water governance as water pollution continues to pose a threat to water as a limited resource. S 19 of the NWA has a similar provision as S 28 of NEMA. S 19 of the NWA applies administrative measures with respect to water pollution. In the event of pollution, the state organ is able to recover its costs from the person responsible for water damage. According to Kotzé and Lubbe (2009) 53 administrative measures are flexible and less expensive than traditional mechanisms.

402 Feris and Kotzé (2014) 2107-2108 argue that fresh water is a scarce resource that should be developed and managed for the benefit of the general population. The notion of water pollution was raised in the *Vaal Environmental Justice Alliance* case at paras 8-9.

Section 19 of the NWA is an important provision for the protection of the water resources as it establishes a duty of care.[403] Section 19(1) of the Act provides that: an owner of land, a person in control of land or a person who occupies or uses the land on which-

(a) any activity or process is or was performed or undertaken; or

(b) any other situation exists, which causes, has caused or is likely to cause pollution of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.

(2) The measures referred to in subsection (1) may include measures to-

(a) Cease, modify or control any act or process causing the pollution;

(b) Comply with any prescribed waste standard or management practice;

(c) Contain or prevent the movement of pollutants;

(d) Eliminate any source of the pollution;

(e) Remedy the effects of the pollution; and

(f) Remedy the effects of any disturbance to the bed and banks of a watercourse.

Section 19(3) of the NWA was raised in the case of *Harmony Gold Mining Co Ltd v Regional Director: Free State, Department, Water Affairs and Forestry*[404]. Section 19(3) of the Act introduces measures that must be taken to prevent water pollution or prevention of pollution of water resources. The purpose of the directive was dewatering of the mining areas in Klerksdorp, Orkney, Stilfontein and Hartbeesfontein. The main concern of Harmony Gold Mining Co Ltd was that the flow of water from these mines would endanger their mining operations as these were operating in the downstream.[405]

The NWA gives effect to the polluter pays principle in an extensive way, yet the polluter only pays for remediation and prevention measures. The Act introduces a broad range of measures for effective water governance yet does not address liability towards the

403 The duty of care in S 19 of the NWA arises when the defendant or the polluter causes harm to the water resources. No liability may arise when such duty of care is not owed to the plaintiff.

404 (2006) SCA 65 (RSA).

405 The concerns raised in the Harmony case are not so different from those that communities in the Karoo and Durban have in regard to the introduction of the hydraulic fracturing which it is believed this would have negative effect on the scarce water resources in those areas.

injured person. Section 19(5) states that a catchment management agency may recover all costs incurred because of it acting under subsection 4, jointly and severally from the following persons:

(a) any person who is or was responsible for, or directly or indirectly contributed to pollution or potential pollution;

(b) the owner of the land at the time the pollution or the potential pollution occurred or that owner's successor-in-title;

(c) The person in control of the land or any person who has or had a right to use the land at the time when-

  (i) The activity or process is or was performed or undertaken or;

  (ii) The situation came about;

(d) Any person who negligently failed to prevent-

  (i) The activity or process being performed or undertaken, or

  (ii) The situation from coming about.

In terms of section 6, the catchment management agency may recover costs under section 19(5), claim proportionally from any person who might have benefited from the measures undertaken under section 19(4) to the extent of such benefit. Liability - as far as section 19 of the NWA is concerned - relates to the recovery of administrative, labour and overhead costs incurred by an organ of state during clean-up process. The court also held the view that these farmers should be refunded by the government, strengthening the argument that failure to provide essential services to the human environment attracts compensation claims.[406]

South Africa is in an arid territory that experiences shortage of adequate water. Liability regimes for damage to water can serve as a deterrent and minimise harm to the environment in this indirect way.[407] Clear and certain liability rules for damage to -

406 *Agri Eastern Cape and Others v MEC for the Department of Roads and Public Works and Others* 2017 (3) SA 383 (ECG) raises a crucial point regarding compensation of the farming communities for costs incurred for repairs of road networks. The roads were repaired without the involvement, of the department concerned, by the farming communities at their own costs.

407 Soyapi W (2016) 19 *PER/PELJ* Water Security and the Right to Water in Southern Africa: An Overview" 5-7, Welch (2005) 58, Fogleman V (2014) 4 *Env.Liability* "Temporal Provisions of the Environmental Liability Directive: The Start Date, Direct Effect and Retrospectivity" 139-140 argue that water is a constitutional right in most countries in Southern Africa. In the same vein, Southern Africa suffers from high water pollution levels owing to a number of commercial and industrial activities.

especially national water resources - require the application of more focussed domestic legislation.[408]

From the legislation referred to above, it is clear that an appropriate liability regime is important to ensure that polluters are held liable for their actions.[409] The current legislative framework does not provide adequate measures with regard to liability and relies on penalties and fines as punitive measures. This did not encourage active remediation of the environmental damage caused when contravening provisions of these statutes. The first development in South African laws that directly addresses liability came with the enactment and amendment of NEMA as discussed below. There is no liability provision that could be identified during the study that is relevant to the theme of this study as most legislation use penalties as a form of punishment.[410]

3.3.4. The National Environmental Management Act (NEMA)

NEMA is the overarching legislation with reference to environmental governance that affects a number of spheres including land-use management, spatial development as well as socio-economic development.[411] As the framework environmental legislation, and because all legislation as concerns environmental governance, is derived from it, its objectives are to promote the integration of the principles of environmental management as set out in section 2 of the Act. These principles furthermore create the framework within which environmental rights and issues pertaining to their infringement can be articulated and realised. In *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd*[412] Howie P stated that 'NEMA's

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408 Du Plessis (2015) 18 *PER/PELJ* "Regulation of Hydraulic Fracturing in South Africa: A Project Life Cycle Approach? 1444-1446 and Stein (2005) 2169-2170, Honkonen T (2016) 19 *PER/PELJ* "Water Security and Climate Change" 5-7 and Soyaphi (2016) 23.

409 See Kuokkanen T (2017) 6-8 who emphasises the importance of water security and compliance with international standards with reference to quality of water that is provided to communities under safe conditions. Water safety and quality is crucial for the human health and the environment.

410 See ss 28 and 30 of NEMA and S 19 of the NWA which contain similar administrative procedures that are aimed at imposing penalties for environmental damage that is caused by operators. These measures do not constitute liability law in the strict sense nor do these establish preventive measures.

411 Blackmore (2015) 87-89, Kotzé LJ (2004) 7 *PER/PELJ* "The Application of Just Administrative Action in the South African Environmental Governance Sphere: An Analysis of Some Contemporary Thoughts and Recent Jurisprudence"58/204-59/2014state that public bodies apply administrative action as part of their functions concerning environmental law enforcement.

412 In *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd* 2006 (2) All SA 17 (SCA) the court further held that 'at the heart of these principles is the principle of

injunction is that the interpretation of any law concerned with the protection and management of the environment must be guided by its principles'. The principles in NEMA do not provide any specificity concerning liability claims for environmental damage, yet the duty of care and the duty to prevent damage are ingrained in its aims, and strengthened by its recognition of the international environmental management principles.

Section 2 of NEMA provides for the polluter pays principle, the precautionary principle, preventive principle and the principle of sustainable development. These principles are the supporting elements of the sustainable development objective and the conduct required by persons to attain it. Of these environmental management principles, the polluter pays principle creates a direct liability for polluters who cause pollution damage.[413]

As far as an express liability regime is concerned, it is section 28 of NEMA that creates measures to require payment of compensation from polluters and other persons (other than the polluter) who cause damage to the environment. The compensation for services the state agency may have rendered - to either prevent harm to the environment or remediate harm - is already caused to the environment.[414] This provision forms the foundation of statutory and civil liability claims as the duty of care and the duty to carry the costs of remediation are clearly reflected in its wording. Clearly, the duty of care cannot be adequately achieved without administrative action and sound environmental governance.

sustainable development, which requires organs of state to evaluate the social, economic and environmental impacts of activities'. The respondents in this case constructed a filling station without authorisation, which was a requirement in terms of the ECA.

413 The polluter pays principle is not a pure liability principle but, as argued above, is an economic principle that requires a person who causes pollution must bear the costs for such pollution. The precautionary principle and the preventive principle do not impose any form of liability on polluters.

414 In the *Bareki* case, the pollution damage had already been caused a couple of years before the litigation took place. See also Boyle (2016) 424-425 as the author reaffirms that damage to the environment should rather be avoided, as it is not in the interest of humankind.

Section 28(1)[415] provides that:

'every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.'

This section 28(1) imposes a legal duty on everyone who causes damage to the environment to address pollution damage as an obligation.[416] The reasonable measures that are required of everyone are not defined in detail in the Act. If a polluter claims to have taken such measures, it would be difficult for the relevant authority to challenge it.[417] It lists the persons on whom liability is imposed as regards to reasonable measures to be undertaken. 'They include an owner of land or premises, a person in control of land or premises or a person who has a right to use the land or premises on which on which the polluting activity is performed.'[418]

Section 28(7) of NEMA is important as it concerns the recovery of costs for measures undertaken by the competent authority as it provides that:

The Director-General or provincial head of department may recover all costs incurred because of it acting under subsection (7) from any or all of the following persons-

(a) any person who is or was responsible for, or directly or indirectly contributed to

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415 S 28(1) of NEMA, Fogleman V (2015) 1 *EnvtlPolyL* "Landowners' liability for remediating contaminated land in the EU: EU or National Law Part I? National Law" 6-7 asserts that the remediation of pollution damage and liability of the damage are measures that are restricted to operators in terms of the Environmental Liability Directive (ELD) of the EU. Alternatively, the landowner may be held liable.

416 S 28(1) of NEMA.

417 See *Bareki* case, Soltau (1998) 44-46 and Feris (2006) 64/261-67/261.

418 S 28(2) creates a wide net concerning the duty of care and is an all-encompassing provision with reference to 'reasonable measures' to be undertaken. As much as reasonable measures are not defined in the Act, S 28(3) provides the measures required in terms of S 28(1) may include measures to:
(a) investigate, assess and evaluate the impact on the environment;
(b) inform and educate employees about the environmental risks of their work and the manner in which their tasks must be performed in order to avoid causing significant pollution or degradation of the environment;
(c) cease, modify or control any act, activity or process causing the pollution or degradation;
(d) contain or prevent the movement of pollutants or the causant of degradation;
(e) eliminate any source of the pollution or degradation; or
(e) remedy the effects of the pollution or degradation.

pollution or potential pollution;

(b) the owner of the land at the time when the pollution or degradation or the potential for pollution or degradation occurred or that owner's successor in title;

(c) the person in control of the land or any person who has or had a right to use the land at the time when-

(i) the activity or the process is or was performed or undertaken, or;

(ii) the situation came about: or

(d) any person who negligently failed to prevent-

(i) the activity or the process being performed or undertaken or;

(ii) the situation from coming about: Provided that such person failed to take the measures required of him or her under s 28(1) of the Act.

Section 28(2) of NEMA is primarily focused on administrative measures and not on civil liability. Administrative measures consist of a broad range of actions that include investigative, preventive, remediatory and compensatory actions required by public authorities from the polluter or other person identified in the Act as the person responsible for the damage.[419] The administrative measures in section 28 of NEMA are used to recover costs incurred to repair or clean-up damage caused to the environment, yet the pressing question remains whether a person suffering, for example, private property damage could invoke the Act to claim damages or another form of satisfaction. *

De Villiers J made it clear in the *Bareki* decision that individuals do not enjoy competence to take measures against polluters in their private capacities. This statement forms the crux of the problems relating to the potential of individual claims for compensation that this thesis investigates.

This provision can, in the first instance, be used to recover costs incurred by the preventive actions of the public authorities. A state organ that has incurred costs on the clean-up campaign, which can involve high costs as expertise is always necessary when such a campaign is conducted, conducts the recovery of costs. Administrative

[419] Public authorities tend to use their resources to remedy environmental damage caused by polluters and have to claim their costs from the responsible parties.

measures do, however - not in the strict sense of the word - constitute a form of liability law for purposes of recovering damages.

Administrative measures are of a narrow scope in comparison to broader liability rules. Administrative measures, in other words, are in fact penalties that are imposed on the polluter by a public authority.[420] According to Fourie, the non-monetary enforcement actions, administrative measures and notices of non-compliance have an insignificant impact on polluters.[421]

Section 28 of NEMA does not serve to eradicate the lacuna in statutory liability law. The gap is caused by the fact that section 28 is not a liability provision *per se*. Section 28 creates administrative measures for remediation and compensation for environmental damage or pollution and has not adopted command and control measures as an instrument to compel responsible environmental behaviour in the strict sense. [422]

A duty of care is a duty to take reasonable care to avoid acts or omissions that are likely to cause harm to the environment. The principle of duty of care is a broad principle of good practice that risks – which give rise to damage to the environment - must be avoided.[423] The duty of care does not imply liability. Although NEMA does not define reasonable care, it is common knowledge that it implies some degree of caution that is expected from a normal and rational person.

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420 Fourie (2009) 16 *SAJELP* "How Civil and Administrative Penalties Can Change the Face of Environmental Compliance in South Africa" 94-96 also correctly argues that it would not be possible to prosecute on each and every environmental offence, as that would create an unbearable burden for the criminal justice system. The author further states that it is important to incentivise compliance with environmental legislation by affirming past decisions on the complying entities.

421 Fourie (2009) 94-95 further puts it that 'South African industry - being far less compliant with environmental legislation than its US counterparts as well as less familiar with and prepared for significant fines - will be likely to take more drastic action in response to fines and points out a weak enforcement and compliance in relation to environmental offences. The author attributes some of the weaknesses to lack of training of the relevant officials who have a duty to pursue the offenders.

422 http://en.m.wikipedia.org/wiki/Commandandcontrolregulation last accessed 4 November 2014.

423 In *Fish Hoek Primary School v GW* 2009 JOL 24624 (SCA) the court held that liability for school fees is 'broadly based on the common law duty to maintain' which can serve as an analogy to the duty to maintain the environment. It was further stated that it is also based on a variety of other legal principles.

The conduct required for liability in South African law is that a duty rests upon persons not to cause harm to others or to the environment. This creates a problem as the legislation has introduced terminology that, although it refers to a foreign concept, should probably be interpreted in the context of South African law rather than by accepting that a foreign doctrine has been introduced. In view of this, the duty not to cause harm to the environment is dealt with based on this assumption.

This duty of care is a crosscutting principle that is universally applicable where there is an obligation or duty on a person towards others. It is not restricted to a specific area of law and applies in a broad range of circumstances. The duty depends on the environment in which it is applied. Whether a duty exists depends on the nature of the damage that has been caused by the conduct of the defendant.[424]

The exact scope of what constitutes a duty of care is generally immeasurable. There is no measure for duty of care as it is based on the expectations that the responsible party shall comply with it in general circumstances. The duty of care also refers to 'reasonable measures' which are not defined in NEMA. Section 28(3) of NEMA[425] provides that these may include - but are not limited to - assessing the impact of activities, eliminating the source of pollution, containing pollution or remedying the effects of pollution. Glazewski recognises that the administrative measures, as provided for, may not be adequate to address environmental pollution redress.[426] It can be accepted that, in general, a person must take reasonable care. There are instances where a duty of care, for instance, cannot give rise to liability, for example, where the damage has been caused by a natural disaster.[427] It applies only where the defendant has failed to do what would be considered reasonable in the circumstances relative to the resources and abilities of the person concerned. The principle of the duty of care requires a certain level of skills, judgment and diligence within an

424 Robinson and Prinsloo (2015) 1674.
425 S 28(3) of NEMA.
426 Glazewski (2005) 79-81 and Stevens (2017) 4-6 argue that the duty of care does not have any specific test. It is dependent on the party who has a duty of care on how best to comply with it. Vinti C (2016) 19 PER/PELJ "The Conundrum of Antidumping Duties" 5-7 regards the duty of care as an ethical duty on every person on who such duty of care is expected.
427 See Louw AM (2018) 21 *PER/PELJ* "The Duty of Fair Dealing in the Common Law Contract of Employment" 4-5, Jaffey (1992) 4-5 as the authors state that the duty of care holds water when it is enforceable. .

enterprise. There can be no general standard of reasonable care endowed on everyone as it depends on case-to-case basis.

Ngcobo J in *Fuel Retailers Association* [428] stated that:

> "…[s]ustainable development does not require the cessation of socio-economic development but seeks to regulate the manner in which it takes place. It recognises that socio-economic development invariably brings risk of environmental damage as it puts pressure on environmental resources."

The court further held that NEMA requires that 'a risk averse and cautious approach be applied by decision-makers'. In other words, the duty of care has to be applied in cases which also concern authorisation where there could be adverse impact on the environment. The statutory duty of care is crucial as it creates legal obligations for polluters and authorities alike.[429] This type of general duty of care is not only embodied in the NEMA but also in section 19 of the NWA.[430] From these legal obligations that create rights and duties, remedies of victims for failures to comply should for the sake of justice be recognised. It is the effectiveness of remedies that this thesis aims to examine and analyse.

Both NEMA and the NWA make provision for penalties for infringement and pollution of the environment that include payment of fines, rehabilitation costs, punitive costs and prosecution costs including jail terms.[431] Failure to adhere to the obligation, by failing to take reasonable steps not to cause harm to the environment, results in the obligation to make good the damage. Although the statutory duty of care does not on its own lead to delictual liability, it does create a duty not to act wrongfully. A breach of such a duty could have delictual consequences in accordance with South African common law as discussed below.

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428 *Fuel Retailers Association* at paras 81-92, Bulto (2011) 11 *African Human Rights Law Journal* "The Human Right in the Corpus and Jurisprudence of the African Human Rights System" 344-347.

429 See the *Bareki* and *Bato Star* cases above.

430 S 19 of the NWA promotes a duty of care not *ipso facto* liability for pollution incidents in relation to water. The *Stilfontein Gold Mining* case serves a classic example in that regard. See para 14.4-14.6.

431 Anderson (2005) *Sustainable Business Practice Yearbook* "Extended Producer Responsibility: End of life scenarios for drums and containers" 22.

A breach would have taken place if the range of persons mentioned in section 28 of NEMA, who are mandated to take reasonable care of the environment, fail to do so. These persons include a broad range of persons as it is unlimited and literally includes everyone, including enterprises, which can be juristic persons or natural persons trading as sole proprietors. It can also include other stakeholders who have an interest in the activities of a polluter.

The duty to protect the environment lies with every person including companies, their boards of directors, their employees, and all other parties who are directly or indirectly responsible for the degradation of the environment. This also includes environmental authorities where they fail to protect the environment concerning their decision-making. Financiers of polluters could – owing to the broad target of section 28 – incur liability where they could have taken control measures to limit the harmful activities of their clients. Although one step removed from involvement, their liability depends on their ability to exercise control.

Section 28(1A)(1) applies to a 'significant pollution or degradation' that:

(a) occurred before the commencement of this Act;
(b) arises or is likely to arise at a different time from the actual activity that caused the contamination; or
(c) Arises through an act or activity of a person that results in a change to pre-existing contamination.[432]

The section raises an important element of liability for environmental damage namely the retroactive application of this extensive liability. It appears that the liability that section 28 raises is for 'significant' pollution or degradation of the environment. Pollution is defined in the Act as any change in the environment caused by- (i) substances; (ii) radioactive or other waves; or (iii) noise, odours, dust or heat.

[432] S 28(1A) of NEMA. Environmental degradation is caused by a combination of an already very large and increasing human population, continually increasing economic growth and the application of resource depleting as well as polluting technology. The United Nations International Strategy for Disaster Reduction defines environmental degradation as "the reduction of the capacity of the environment to meet social and ecological objectives and needs." See (http://en.wikipedia.org) last accessed 27 April 2014.

In the opinion of the researcher, section 28 of NEMA does not define the principles of liability for environmental damage adequately as it appears in fact to be primarily an administrative enforcement mechanism. Administrative mechanisms create less tension with industry unlike court proceedings that are adversarial in nature. In terms of section 28 of NEMA, the state has to take reasonable measures to minimise the effects of pollution and must take measures to recover the costs from the polluter who had caused damage to the environment.[433]

The main thrust of this study is liability for damage to the environment. The focus is on measures that can be used to recoup losses and claim damages, thus how and to which extent one to be hold persons liable for the failure one's duty not to pollute. Upon investigation, such mechanisms - as these currently stand - appear to be inadequate to address environmental pollution.

In most instances, there is lack of compliance with specific statutory rules of environmental safety. Section 28 attempts to address a wide range of these situations by imposing sanctions such as recovery of costs.[434] The impact of harmful substances on the environment and human health may, in some cases, not be properly estimated or quantified, which fails to provide full indemnification or compensation for the damage caused. NEMA does not provide clarity as regards liability claims. Lack of procedural and substantive context was one of the challenges that the court faced with reference to section 28 of NEMA. Nevertheless, this section contains joint and several liability as part of the statutory remedies available to the aggrieved parties.[435]

Civil liability remains mainly within the domain of common law, which does not - on its own merit - guarantee adequate alternative solutions. The protection of the environment thus largely depends on the quality of laws that a country has and the enforcement of those laws.[436]

433 S 28 of NEMA.
434 S 28 of NEMA.
435 Kuschke (2009) 281.
436 Bergkamp (2001) 2-12.

In addition to section 28, it is vital to pay attention to section 30 on incidents and the duties that rest upon persons in the event of such an occurrence. Section 30 of NEMA deals with emergency incidents insofar as these may cause harm to the environment.[437] Emergency incidents are caused by natural and human-induced factors. Emergency incidents also give rise to duty of care relating to incidents that may cause damage to the environment and human health. Section 30 imposes obligations on a range of responsible persons to report incidents to relevant and competent authorities.[438]

Liability arises from the duty of care that is imposed on the responsible persons in relation to the reporting of the incident to the relevant and competent authorities. In certain situations, South African common law does impose a duty of care on responsible persons. For example, a police officer is expected to act positively to prevent harm to the members of the public.[439]

Section 30 defines an emergency incident as 'an unexpected, sudden and uncontrolled release of a hazardous substance, including from a major emission, fire or explosion that causes, has caused or may cause significant harm to the environment, human life or property.' The objective of section 30 is to control adverse consequences that may arise as a result of an incident. The National Environmental Management Laws Second Amendment Act has introduced section 30A that has introduced a new "dimension in relation to the concept of emergency incidents.[440] Section 30A introduces the concept of 'emergency situations'. These situations are defined as circumstances that have suddenly arisen which pose 'an imminent and serious threat to the environment, human life or property, including a disaster as defined in section 1 of the Disaster Management Act.'[441]

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437 S 30 of NEMA is similar in its description of emergency incidents as s 20 of the NWA. The NWA describes an emergency incident as an incident that includes any accident in which a substance-
(a) pollutes or has the potential to pollute a water resource, or
(b) has or is likely to have a detrimental effect on a water resource.

438 Relevant and competent authorities include the South African Police Service, local and provincial authorities, the Department of Environmental Affairs and fire protection services.

439 Stevens (2017) 20 *PER/PELJ* "The Nature of Duty of Care" 5-6 and Neethling and Potgieter (2015) 53-55.

440 S 30A of the National Environmental Management Laws Second Amendment Act 30 of 2013.

441 S 1 of the Disaster Management Act 51 of 2002 (hereinafter the DMA).

3.3.5 National Heritage Resources Act

The National Heritage Resources Act[442] is regarded as part of the environmental legislation. The National Heritage Resources Act requires that sites which have been declared as heritage sites be conserved and protected in terms of the legislation.[443] In *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape*[444] it was held that the 'overarching objective of the Act is the identification, protection, preservation and management of heritage resources for posterity. This objective also finds resonance in section 24(b) of the Constitution.' The NHRA describes a heritage resource as meaning any place or object of cultural significance.[445] This Act does not have a specific provision in respect to the liability for damage caused to heritage resources. Section 45 of the NHRA,[446] however, empowers the heritage resources authority to serve on the owner of the heritage site an order to repair or maintain such site to the satisfaction of the heritage resources authority.[447] In situations where the owner of the site does not have the means or resources to effect repairs, the heritage resources authority can affect such repairs at its own cost and claim from the owner of the site. This provision does clearly state what the position would be where the owner does not have the financial capacity to reimburse the authority or where damages are suffered in addition to the repair costs. Costs for reparations or restitution to previous condition might not be the only loss suffered.

It is concluded that a costs-only approach would limit the recouping of the full losses suffered, and that a civil claim should be allowed to supplement this statutory cost reimbursement provision.

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442 National Heritage Resources Act 25 of 1999 (hereinafter the NHRA).

443 See S 13(2)(a)(i) of the NHRA and *Gees v Provincial Minister of Cultural Affairs and Sport, Western Cape and Others* 2017 (1) SA 1 (SCA). The issue in this case was that the appellant had applied for demolition of a property that was older than 60 years. In terms of the National Heritage Resources Act, it is within the power of the agency to permit or refuse such an application. The application was refused by the relevant agency. The basis of the application was that the authority attached conditions under which such a heritage structure could be demolished.

444 2008 (3) SA 160 (SCA).

445 S 2 of the NHRA.

446 S 45 of the NHRA.

447 Heritage resources are equally important as protected areas in terms of the Protected Areas Act. Liability for damage to the environment should encompass the heritage resources as part of the environment.

3.3.6 National Nuclear Regulator Act

The National Nuclear Regulator Act[448] establishes a juristic person that is known as the National Nuclear Regulator. The Regulator is the competent authority with reference to the management and transportation of radioactive material.[449] Section 20(1) of the NNRA states that no person may site, construct, operate, decontaminate, decommission a nuclear installation except under the authority of a nuclear installation licence.[450] The NNRA creates a clear focus in connection with nuclear safety in accordance with its mandate. This has become especially relevant in view of South Africa's renewable energy policies and the expansion of its nuclear energy program.

Notably, section 30 of the NNRA provides for strict liability for nuclear damage.[451] The holder of a licence has a duty of care in the control and management of nuclear material in his or her possession in terms of the licence. In terms of section 1(xv) of the NNRA nuclear damage means-

(a) any injury or the death or any sickness or disease of a person; or

(b) Other damage, including any damage to or any loss of use of property or damage to the environment, which arises out of, or is attributable to, the ionizing radiation associated with a nuclear installation, nuclear vessel or action.

Nuclear energy, as an alternative option for energy supply, has created a lot of interest in society yet nuclear accidents are also difficult to manage or control in the event of a disaster.[452] A greater environmental security threat is posed by nuclear waste disposal;

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448 National Nuclear Regulator Act 47 of 1999 (hereinafter NNRA).

449 Glazewski (2005) 501.

450 S 20(1) of the NNRA.

451 S 30(1) of the NNRA provides that - subject to subsections 2, 3, 5 and 6 - only a holder of a nuclear installation licence is, whether or not there is intent or negligence on the part of the holder, liable for all nuclear damage caused by or resulting from the relevant nuclear installation during the holder's period of responsibility-

(a) By anything being present or which is done at or in the nuclear installation or by any radioactive material or material contaminated with radioactivity which has been discharged or released, in any form, from the nuclear installation; or

(b) By any radioactive material or material contaminated with radioactivity, which is subject to the nuclear installation licence, to any other place in the Republic or in the territorial waters of the Republic from or to any place in or outside the Republic.

452 Snodgrass and Potts (2011) 4 *Africa Insight* 'Environmental Protection" 143-146. The recent incident in Japan clearly demonstrates the extent to which nuclear accidents cause damage to the environment and human health. Although the incident did not result in the deaths of people in the affected areas, it resulted in the evacuation of a large number of people.

the effect of radiation on human beings and the environment are controversial and unclear.

Environmental terrorism is another threat that a country with nuclear energy has to face where terrorist groups deliberately cause a leakage of the nuclear energy into the environment.[453] This can cause immense harm to human health and the environment. At this moment, no liability regimes - other than the strict liability discussed above - apply in this industry. In view of this, a different route is taken in that the NNRA provides for financial security that has to be made available by the holder of a licence.

The NNRA requires the Minister of Energy, in consultation with the Minister of Finance, to determine the level at which such financial security can be provided in respect of each specific category of installation based on the potential consequences of a nuclear accident.[454] The holder of a licence is required to submit proof of financial security on an annual basis, to the Minister, to ensure that - in the event of a nuclear accident - the holder would be able to meet the compensation for claims when liability arises. It is the Minister's prerogative to increase or decrease the financial guarantee or security. It remains unclear whether a victim of nuclear damage can claim from the proceeds or whether it aims to provide funds only to the authorities to ensure compliance of statutory remediation duties.

3.3.7 Nuclear Energy Act

Nuclear energy is an important commodity that is used for energy supply. The Nuclear Energy Act[455] regulates the nuclear energy industry in South Africa. A huge chunk of South African energy is generated from coal that causes a lot of pollution. [456]

Nuclear energy is an alternative yet risk-associated commodity. Owing to the risk connected to nuclear energy, control of the nuclear-related material is important in the

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453 The potential for terrorist attacks is at present a reality in the context of human security, environmental security and politics.
454 S 29(1) of the Act.
455 Nuclear Energy Act 46 of 1999.
456 Long and Patel (2011) 93 *South African Geographical Journal* A "New Theory for an Age-old Problem: Ecological Modernisation and the Production of Nuclear Energy in South Africa" 92-93 and Institute of Security Studies (2010) Nuclear Energy Rethink 2.

interest of public safety and the environment. Those issues were raised in *Earthlife Africa Johannesburg and Another v Minister of Energy and Others*[457] the Minister of Energy had decided to make determinations - in terms of section 34(1)(a) and (b) of the Energy Regulator Act - that the country required more energy in the form of nuclear energy. The department had entered into an intergovernmental agreement with the Russian Federation without environmental consideration and public interest. The Nuclear Energy Act does not provide for liability for damage caused during the use of nuclear material. It however provides for the prohibition for disposal of radioactive waste without authorisation.[458] The Act does not refer to any consequences for infringement regarding the environment.

3.3.8 Mineral and Petroleum Resources Development Act[459]

Mining in South Africa has been important economic activity for more than a century and has proven to be particularly harmful to the environment.[460] Historically, the focus then was on extracting minerals for gain, and long-term damage caused to the environment was not really an issue. Some of these damages have proven to cause irreversible harm to the environment.

The Mineral and Petroleum Resources Development Act is important legislation in the regulation of the mining environment and is based on section 24 of the Constitution as well as NEMA. The MPRDA provides for a variety of mining rights and regulates the exercising of these rights.[461] According to Glazewski, 'a distinctive feature of the Act is the emphasis on sustainable development and environmental protection'.[462]

The Act takes into account the extent to which mining can generate high environmental risks in that extensive rehabilitation is now a requirement that mining companies have to comply with. Mining tampers with aesthetic features of the environment in a

457 2017 (5) SA 227 (WCC).
458 S 56 of the Nuclear Energy Act.
459 The MPRDA as indicated in fn 16 above.
460 For instance, mining causes pollution to fresh water and contaminates streams as well as oceans. In addition to the pollution of water resources, mining also leads to overexploitation of water resources. http://www.safedrinkingwaterfoundation last accessed 9 January 2015.
461 The rights that MPRDA provides for are based on environmental management principles, which require the protection of the environment as a priority of the decision-making process.
462 Glazewski (2005) 466.

significant way by causing the destruction of vegetation, polluting topsoil, affecting water quality and quantity of both ground and surface water. Furthermore, human safety hazards can result from mining activities.[463] In the *Bengwenyama* case the court held that failure to undertake public participation process resulted in the violation of rights of the members of the community.

The MPRDA has created an environmental management programme that is a mechanism through which environmental protection can be attained by effective mining environmental governance. To obtain mining and exploration rights an applicant has to undergo rigorous scrutiny based on certain set criteria. Extensive environmental Impact assessments[464] must be undertaken. The compliance with the submission of an environmental management plan is a key criterion to obtain mining rights.[465]

Section 41(1) of the MPRDA[466] also requires that financial guarantees for rehabilitation that must be procured and provided by the applicant. These serve the function of compensation instruments to remedy future harm for the restoration of the environment at the cessation of the mining activities. As with the nuclear liability discussed above, it is uncertain whether victims of pollution can exercise a direct claim against the proceeds of these securities.

The financial guarantee is based on the polluter pays principle which advocates that those who cause harm to the environment must bear the cost for such damage. These measures appear not to replace stricter statutory liability regime adequately as infringements continue unabated in the mining sector, even though protecting human health, safety and the environment should be paramount with regard to mining activity.[467] In practice, this is not the case as the focus tends to remain on profits at the

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463 Glazewski (2005) 457 and Humby (2013) 130 SALJ "The Environmental Management Programme: Legislative Design, Administrative Practice and Environmental Activism" 63 confirm that the mining activity should include geology, climate, topography, soil, animal life, vegetation, surface water, groundwater, air quality and noise.

464 Hereinafter referred to as 'EIA'.

465 Humby (2013) 63.

466 S 41(1) of MPRDA.

467 Mining threatens the existence of water resources without which society cannot survive. The absence of freshwater is a health hazard and is in contravention with the principle of sustainable development. The incidence of water contamination, in terms of the *Federation* case, is a typical example of such health hazards.

expense of human health and the environment.

The impacts of the mining activity on the environment should also be monitored, throughout the lifespan of the project, in terms of the law.[468] In fact, the applicant is required to make a thorough assessment of the environment in which the mining activity is to take place before the mining itself begins. Changes in legislation have had a positive effect - in connection with continuity of these infringements in the mining sector - to a limited extent. To overcome some of these challenges, liability for damage to the environment would be a necessary measure. Liability for damage to the environment includes damage to water resources that are essential for the well-being of society.

3.3.9 National Environmental Management Protected Areas Act

Protected areas are geographically defined which are designated in order to achieve a specific conservation objective. Protected areas encompass nature reserves, wilderness reserves, national parks and heritage sites.[469] In *Magaliesburg Protection Association v MEC of Agriculture and Others,*[470] the issue was ex *post facto* environmental authorisation in a protected environment in the Magaliesburg area. The appellant had considered it improper for the developer to acquire authorisation after the construction had been completed contrary to section 24G of the NEMA. *Ex post facto* authorisations undermine the adherence to environmental ethos as what ought to have been done. Where this would cause damage a later application should not be granted. These protected areas are environmentally significant and sensitive ecologically. In *Gongqose and Others v Minister of Agriculture, Forestry and Fisheries and Others*[471] the appellants were criminally charged with unlawful access to a marine protected area. They were members of, and indigenous to, the community. The court decided that they had rights of access to this specific environment in terms of customary law. The

468 Humby (2013) 65.

469 Gherardi *et al* (2009) 64. Nature reserves, community-based areas, national parks and wilderness areas are the mainstay of the country's biodiversity conservation. Protected areas do not only serve the purpose of conservation of nature and biodiversity but also serve to provide food, medicines and other related benefits to humankind see http://www.iucn.org last accessed 14 January 2015.

470 2013 (3) All SA 416 (SCA). One of the highlights of the *Magaliesburg* case is that the appellant sought to make an example in the community by securing an order that the structures which had been constructed had to be demolished. The court objected to this.

471 2018 (5) SA 104 (SCA).

community had for a very long time been fishing without licenses and any environmental harm in the form of fishing would not have criminal consequences. Declining to prosecute could have been attributed to a number of factors, one being the lack of knowledge of the state in dealing with environmental prosecutions. It can be assumed that the same principle would apply to civil claims as the harvesting of fish was a recognised as a lawful activity in view of the customary law. The possibility of proving the extent of, and claiming monetary damages would be near impossible.

Niemela argues that the neglect of the urban landscape by environmentalists and ecologists has resulted in a situation where "wilderness or the pristine has been valued over human-dominated landscapes".[472] Protected areas are at the core of eco-tourism, which brings economic benefits to the countries without destruction to the environment. The protected areas have the potential to make a significant economic contribution to the alleviation of poverty and by addressing of other social needs that are not based on traditional norms of economic development. NEMPAA does not provide for any specific liability regime for damage caused to protected areas and thus falls under the measures as set out in NEMA.

3.3.10 National Environmental Management: Biodiversity Act[473]

'Biological diversity' or 'biodiversity' is defined as the variability among living organisms from all sources including, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which these are part. Biodiversity includes diversity within species, between species and of ecosystems in terms of section 1 of the NEMBA.[474]

Biodiversity is part of the culture of society and therefore deserves protection from excessive exploitation. In terms of Article 3 of the CBD, states have the sovereign right to exploit their own genetic resources pursuant to their own environmental policies.[475] Protection of biodiversity becomes even more crucial in a society such as South Africa

472 Niemela (2011) 1 adopts the view that because of the value attached to protected areas 'people are treated as the problem and the solution is to remove them from natural sites in order to protect or preserve them'. See also Van der Linde (2010) 295.
473 National Environmental Management: Biodiversity Act 10 of 2004 (hereinafter NEMBA).
474 S 1 of NEMBA derives its definition of the biodiversity from the Convention on Biological Diversity of 1992 (hereinafter the CBD).
475 Article 3 of the CBD.

when it is faced with serious crimes, for example, rhinos that are poached on a daily basis by individuals who need rhino horns for their own needs without concern for their protection, well-being and sustainability.[476] In *Boswell v Member for the Executive Council for Economic Development, Tourism and Environmental Affairs (KwaZulu-Natal} and Others*[477] the applicant sought to translocate an African elephant to Dubai for a circus. To do this, an application was lodged with the MEC and Ezemvelo, a state organ responsible for the protection of biodiversity. The permit for such a translocation was refused as the animal was seen as part and parcel of the environment that must be protected, which was exercised by administrative process.

Biological and genetic resources are also important as part of South Africa's traditional knowledge and intellectual property. The protection of the genetic resources also includes the protection of South African traditional knowledge to which the indigenous communities and society in general have rights. Liability for damage would alleviate the problems associated with destructive exploitation of these resources, yet NEMBA does not provide for any specific liability regime. Moreover, damages claims will have to be brought in terms of the law of delict as there is no such provision within this Act.

3.3.11 National Environmental Management: Integrated Coastal Management Act[478]

The ICM Act is one of the statutes that deal with environmental pollution specifically at coastal level. The ICM Act is a piece of legislation relating to coastal management. In

476 South African is one of the countries that are rich with biological and genetic resources. Some of these resources are situated in indigenous communities that have not been part of the benefits associated with the commercialisation of these resources. The CBD promotes access and the benefit-sharing in relation to these resources within the context of sustainable development. On 27 July 2012 E Molewa, the Minister of Environmental Affairs, had this to say in relation to genetic resources: "Historically, a lack of bio-prospecting policy framework and legislation, both at national and international level, had permitted an almost unconstrained access to South African indigenous biological resources and traditional knowledge, with biological and genetic resources being harvested, sometimes in destructively excessively quantities, and being exported for research and development at institutions abroad for innovative value addition, and off-shore financial benefit. Consequently, traditional knowledge holders and providers of indigenous biological resources were not benefitting from the use of our indigenous biological resources and the associated traditional knowledge" see the Statement by the Department of Environmental affairs, on Bio-prospecting permits and guidelines (27 July 2012).

477 (3792/16P) [2017] ZAKZPHC 18.

478 National Environmental Management: Integrated Coastal Management Act 24 of 2008 (hereinafter ICM Act).

terms of section 2(c) of the ICM Act the purpose of the Act is to 'preserve, protect, extend and enhance the status of coastal public property as being held in trust by the state on behalf of all South Africans, including future generations.'[479]

The recent case of *Gongqose* case[480] attention was paid to the customary rights of the indigenous communities with reference to protected marine areas. The issue of access to marine resources arose out of the activities that involved the members of the community who were found to be fishing in protected marine area without permit or licences as required by law.

The ICM Act does not deal with liability for damage to the coastal environment. Section 80 of the ICM Act imposes fines and penalties where there is a violation of the Act. The sentences that a court may impose include imprisonment and community service depending on the category of the offence. The ICM Act does not define pollution, as is the case with NEMA, but links to its overarching definitions.

3.3.12 National Radioactive Waste Disposal Institute Act[481]

A huge risk in respect to nuclear is that of waste, which it is not controlled and properly monitored. The National Radioactive Waste Disposal Institute Act seeks focus on the disposal mechanisms for all classes of radioactive waste. The purpose of the Act is to promote health and environmental safety with regard to the radioactive waste disposal.[482] The National Radioactive Waste Disposal Institute Act does not refer to liability for harm caused to the environment and human health that can be caused by radioactive waste. Moreover, the Act is not specific about whether the issue relating to liability for environmental damage is assigned to NEMA as with some of the other statutes on nuclear materials as discussed above do.

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479 S 2(c) of the ICM Act.

480 It seems clear that customary rights of indigenous communities and their rights of access to protected areas within their communities were not taken into account during the drafting of NEMA and subsidiary legislation. The matter was dealt with in the *Gongqose* case.

481 National Radioactive Waste Disposal Institute Act 53 of 2008.

482 S 5 of the National Radioactive Waste Disposal Institute Act.

3.3.13 National Environmental Management: Waste Act[483]

Waste originates from human and industrial activities[484] and, as an unavoidable by-product, can be described as unwanted materials including waste in the form of a renewable resource before it is recycled. In *Recycling and Economic Development Initiative of South Africa v The Minister of Environmental Affairs*[485] the Minister of Environmental Affairs applied for liquidation of two solvent companies on the grounds that these did not disclose that the directors of Recycling and Economic Development Initiative of South Africa (Redisa) and Kusaga Taka Consulting (Pty) Ltd (KT) were serving on both of their boards. Redisa is a waste tyre management entity that was established to manage waste tyres, which poses a threat to the environment in the country. The administration of these businesses is deemed to be of high importance and thus strict measures are enforced where any irregularities are concerned. Waste in a narrow sense is unwanted material which has reached the full term of its life cycle with regard to its usefulness, whereas waste is also classified as a renewable resource when it can, after being discarded as waste, be used for other purposes for example, the waste tyre.[486]

At regional level, the African Charter does not specifically address the issue of waste generation and management in Africa.[487] It is specifically the Bamako Convention that addresses the issue of waste generation as an environmental problem.[488] Article 3 of

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483 National Environmental Management: Waste Act 59 of 2008 (hereinafter the Waste Act).

484 Human activities that give rise to waste related to the domestic usage of materials, for example plastic bags, washing and wastewater. Industry generates waste through effluents, spillages and other materials and this is called the industrial waste.

485 2019 (3) SA 251 (SCA).

486 Oelofse and Godfrey L (2008) 104 *South African Journal of Science* "Moving Beyond the Age of Waste" 242. A by-product is defined in terms of s 1 of the National Environmental Management: Waste Act 59 of 2008 (hereinafter Waste Act) as "a substance that is produced as part of a process that is primarily intended to produce another substance or product and that has the characteristics of an equivalent virgin product or material".

487 See the discussion by Viljoen (2001) 1 *African Human Rights Law Journal* "Africa's Contribution to the development of International Human Rights and Humanitarian Law" 20-22.

488 The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa of 1991 to which South Africa is not a signatory nor has it ratified the Convention. According to S 231(1) of the Constitution, the negotiating and signing of all international agreements is the responsibility of the national executive. S 231(2) further states that an international agreement binds the Republic only after the National Assembly and the National Council of Provinces have approved it. S 231(3) provides for an exception in that an agreement of a technical, administrative and executive nature binds the Republic without ratification or accession entered into by the national executive.

the Bamako Convention requires waste generators to submit reports on the wastes generated by them. It imposes a strict and unlimited liability for harm caused by hazardous wastes.[489] This form of liability without fault creates extensive liabilities and an onerous duty to prevent damage caused by waste mismanagement. This type of open-ended strict liability would clearly discourage and prevent polluters from causing damage to the environment as enterprises would act more responsibly knowing that their actions would result in extensive costs and losses. The Bamako Convention also imposes a ban on importation of hazardous waste into Africa. The Convention aligns well with liability for pollution damage.

The White Paper on Integrated Pollution and Waste Management Policy[490], as a subsidiary policy of NEMA, subscribes to the latter's vision and goals. National legislation such as the Waste Act is issued in accordance with its policy provisions and serves as the primary statute that regulates issues on waste in South Africa.

Section 2 of the Waste Act encompasses a broad range of issues pertaining to waste management and the environment to comply with the Constitution. The Waste Act does not, however, contain specific provisions on liabilities for damage to the environment which has been generated from waste materials. Waste tends to generate pollution that is harmful to health and the environment, yet pollution is not defined in the Waste Act[491] as it merely refers to the definition of 'pollution' in terms of NEMA. It stipulates a number of duties that identify potential contraventions of the Act. In other words, the liability regime for damage caused by waste or contamination from waste remains encompassed in section 28 of NEMA, which also contains more of an administrative measure than a liability rule. These approaches do, however, entrench a statutory duty

489 Article 3 of the Bamako Convention.
490 White Paper on Integrated Pollution and Waste Management Policy of 2000 (GG No 20978 of 2000).
491 S 16(1) of the Waste Act provides that a holder of waste must, within the holder's power, take all reasonable measures-
(a) to avoid the generation of waste and where such generation cannot be avoided, to minimise the toxicity and amounts of waste that are generated;
(b) To reduce, reuse, recycle and recover waste;
(c) Where waste must be disposed of, ensure that the waste is treated and disposed of in an environmentally sound manner;
(d) Manage the waste in such a manner that it does not endanger health, or the environment or cause nuisance through noise, odour or visual impacts;
(e) Prevent any employee or any person under his or her supervision from contravening this Act.

not to cause damage, which informs the duty for a civil liability claim (as addressed in the chapters below).

3.3.14 Right of Access to Information

The right of access to information is one of the pillars of the constitutional democracy. This right is at the core of the principle of accountability by public and private bodies. The right of access to information is crucial for the promotion of environmental rights as well as human rights in South Africa's constitutional democracy, and a failure to comply could affect a person's rights to the extent that it may lead to liability. Furthermore, a party needs information to pursue a claim to recover loss successfully. The right to information is discussed in this context. Environmental legislation is effective when citizens themselves have access to environmental information and are empowered to participate in environmental decision-making.[492]

The right of access to information is a more complex issue than it seems *prima facie*. The Constitution promotes access to information as part of the open, transparent and democratic society. The legislative framework within which access to information is practised is complex and contradictory by design. Section 5 of the Promotion of Access to Information Act overrides all legislation that seeks to restrict or prohibit disclosure of a record, which is materially inconsistent with the object of the Act.[493] The right of access to information may be refused on certain grounds. One of the grounds for refusal is premised on the access to commercial information of third parties.

As an illustration, in the case of *BHP Billiton PLC Inc v De Lange,*[494] the information sought by Media 24 was in the possession of Eskom, a public body. As a result, the

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492 United Nations Commission for Europe (2006) Your Right to a Healthy Environment: A Simple Guide to the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 2 puts it that public participation by citizens is crucial as part of environmental democracy and promotion of sustainable ways of economic development 2-3.

493 S 5 of the Promotion of Access to Information Act 2 of 2000 (hereinafter PAIA). PAIA is national legislation enacted in line with S 32 of the Constitution. S 32(1)(a) of the Constitution provides that everyone has a right of access to any information held by the state and any information held by another person that is required for the exercise or protection of any rights.

494 2013 (3) SA 571 (SCA).

requester was not required to give reasons for asking for such information. The matter pertained to the two contracts Eskom had with the appellant for supply of electricity. Eskom had found itself in a situation where it was incurring losses allegedly owing to the abovementioned contracts. The public in general had an interest in the matter as Eskom had difficulty in supplying electricity consistently at the time. The court dismissed the appeal despite the alleged existence of commercial and confidential information involving third parties that had contracts with Eskom.

Section 46 of PAIA provides for the mandatory disclosure of information in the public interest. The mandatory grounds of disclosure of information apply to environmental risks, records that would give evidence to illegal acts and where public safety could be compromised. The provisions of the Protection of Information Act 84 of 1982[495] are important as far as the principles outlined in section 32 of the Constitution are concerned. This section of the Constitution entrenches a culture of the protection of environmental rights and other constitutional rights. The promotion of right of access to information further empowers society in terms of PAIA. The right of access to information is an important instrument to enable an enforcement of constitutional rights, including environmental rights.

Public bodies and institutions may be manipulated to hide information that is in the public interest. Commercial information relating to contracts that involve third parties - other than the institution that is being challenged - has the potential to infringe on the right to access information freely.

Environmental damage takes place within the framework of commercial activity and contracts. It remains to be seen whether commercial interests would supersede public interest. In *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others,*[496] it was held that section 8 of the Promotion of Justice Act allows a court to set aside an irrational decision that could result in an environmental injustice. The issue of

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495 Protection of Information Act 84 of 1982 is, on the one hand, concerned with the protection of national security while the provisions of PAIA are focused on the principles of transparency, access and accountability, on the other hand.

496 *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* 2017 (2) All SA 519 (GP) raises an important point in South African environmental law with reference to climate change policy which is being developed by government.

nuclear deals that involve state parties could fall under commercial information and be top secret. In addition, this information could be classified as national security issue to hide information that is in the public interest. This information would be required for a party suffering loss to exercise its rights to remedial action.

The right of access to information is described as the "oxygen of knowledge and underpins and supports other fundamental human rights" by Richter.[497] The right to access information plays an important role in the protection of human rights and is a trendsetter because the position in South Africa's past has been the opposite. Access to information promotes accountability and transparency in the exercise of public power and plays a crucial role in the promotion of principles of good governance.[498] The right of access to information also encompasses access to information held by private bodies that is also vital for the protection of environmental rights.

Private bodies are important key players in the economic spheres of the country and hold massive power in decision-making, which may affect the environment. These bodies could not be left to their own devices as to the right of access to information at their disposal and the protection of the environment. As a rule, public interest should always override commercial and private interests. The Public Disclosures Act[499] promotes disclosure of information by some or all employees about their employers for unlawful or irregular activities. Sadly, the disclosure of information by whistle blowers does not guarantee that such information could be disclosed for public consumption in terms of section 46 of PAIA.

Private entities in the industry could be holders of information that may be classified as commercial information. If the commercial information may give rise to transactions or contracts that could cause harm to the environment, this should be disclosed for the benefit of the public. In addition, this information should be subjected to scrutiny where

497 Richter (2005) 9 *Law, Democracy and Development* "Affirmation to Realisation of the Right of Access to Information: Some Issues on the Implementation of PAIA" 219 and Labuschagne (2017) 49 *Acta Academia* "Patronage, state capture and oligopolistic monopoly in South Africa: The slide from a weak to a dysfunctional state" 52-55 are quite negative about the period of darkness in which South Africa finds itself as the authors refer to the culture of lack of accountability and transparency which has entrenched in the South African government.

498 Klaaren (2006) 2006 *AJ* "Three Waves of Administrative Justice in South Africa" 373.

499 Public Disclosures Act 26 of 2000 (hereinafter the PDA).

it relates to principles of environmental governance. In *Institute for Democracy in South Africa and Others v African National Congress and Others*[500] Griesel J stated that: 'section 32 is not capable of serving as an independent legal basis or cause of action for enforcement of rights of access to information in circumstances such as the present, where no challenge is directed at the validity or constitutionality of any of the provisions of PAIA.'

The Institute for Democracy in South Africa approached the court to obtain access to records of private donations given to respondent political parties during the period January 2003 to May 2004.The applicants launched the application in the interests of all South African citizens after attempts to use PAIA. The issue that confronted the court was the classification of the respondents as either private or public bodies in relation to authorisations for a coal plant.[501] PAIA is an important instrument in the implementation and enforcement of environmental rights[502] as the enforcement of a liability regime would largely depend on access to information for a basis of a claim. It is thus clearly necessary for the proper exercise of rights to remedies.

Private bodies are not subjected to the same standard of scrutiny as public bodies are, yet private bodies are required to provide access to records where there is a need to protect specific rights. The right of access to information also promotes free flow of information, which is critical in a democratic and constitutional state such as South Africa. Access to information is also vital in uprooting the culture of environmental corruption and secrecy in the process of environmental management decisions.[503] In a democratic society, citizens should have access to information and public authorities should facilitate the right of access to such information to enable the enforcement of

500 2005 (5) SA 39 (C).
501 See the *Earthlife* case about the authorisation of coal powered station.
502 See *Company Secretary Arcelomittal (Pty) Ltd v Vaal Environmental Justice Alliance* case.
503 It is unfair for public authorities to deny citizens the right to participate in decision-making in relation to matters that affect their environment. Information in the hands of private bodies that is of a confidential commercial nature. The state may refuse to release information in relation to security, international relations or even access to cabinet records is also unacceptable in terms of PAIA. The grounds on which access to information may be denied is broad and include situations where the safety of individuals or members of the public may be in danger. These grounds create a situation where damage to the environment could occur as a result of them. For example, if an entity is of the view that the information to which they deny access is confidential and commercial that would be difficult to challenge. Commercial interests should not override environmental rights.

environmental rights.[504]

Lack of access to environmental information is a violation of human rights and South Africa's constitutional values. The right of access to information constitutes an integral part of the rule of law imperative that was raised by Moseneke DCJ in *Masethla v President of the Republic of South Africa and Another*[505]. The right of access to information also promotes the principle of administrative justice that is also crucial in the environmental protection stratagem, and in my opinion clearly will not only assist in the success of liability claims but ensure a viable and successful damages award.[506]

3.4. Concluding Remarks

The statutory framework, concerning the environment, attests to the fact that there is a commitment on the part of the government to address environmental problems. Environmental problems are linked to economic development and growth that is necessary for human development. This type of development does not only imply freedoms that people enjoy but also economic opportunities to which they have access. Economic opportunities have a positive bearing on the well-being of the people. Human development is not only about productive and creative lifestyles but also about a healthy and clean environment.

The legislative environment - as articulated in this chapter - indicates that there is a need for further development of environmental governance in South Africa and statutory liability provisions. It is common cause that some of the legislation may be outdated as these were enacted long before NEMA came into operation. Such legislation may not be in harmony with the current constitutional rights that include environmental rights.

At the core of environmental democracy is the principle of sustainable development. This development is an ideal that may only be achieved when legislative framework is

504 See article 2 of the Aarhus Convention.
505 2008 (1) SA 566 (CC) at paras 45-48.
506 Administrative measures in South Africa in relation to environmental liability are applied in terms of environmental legislation. Such administrative measures include the application of penalties.

not watertight. The bedrock of any legislative framework is sustainable development. The remedies for environmental pollution are not self-evident. In the absence of the few express legislative provisions on liability without fault, the only provisions that offer some form of relief are sections 28 and 30 of NEMA. Even though these provisions create a statutory duty of care, specific liability rules, that effectively do hold the polluter liable, are lacking. This necessitates falling back on a civil damages claim based on delict.

Environmental management principles are also crucial as these generate efficient outcomes in the interpretation of legal instruments. The distinctive principles also minimise inefficiencies that can arise in the implementation of legal rules and are aimed at the facilitation of new methodologies in addressing issues of pollution damage in society.

Liability rules, whether statutory or civil, serve the purpose of steering environmental behaviour towards voluntary compliance. Voluntary compliance implies that entities may comply with liability rules because failure to do so may give rise to consequences. These rules in general foist a standard of care on potential polluters who have to comply with them to avoid losses. Persons who escape liability are only those who apply due care.

Liability rules would be an additional weapon in the arsenal that is aimed at reducing polluting activities where enterprises and polluters voluntarily police their conduct without being forced to do. The reduction in pollution levels is influenced by understanding that the protection of the environment is cost efficient. Even though these laws create a statutory duty of care specific liability rules, that effectively do hold the polluter liable and compensate the victim directly, are - in most cases - lacking. This necessitates that a claimant who suffers the loss has no choice but to fall back on a civil damages claim based on delict.

CHAPTER 4

CIVIL LIABILITY

4.1. Introduction

Civil liability law is concerned with payment of compensation for damages to those who have been wronged. It is one of the vital components of the liability regimes that South African law recognises. Liability for damage to the environment is premised on the relationship between human beings and the environment. The objective of liability for pollution damage is to ensure that the environment is protected primarily from human activities.

Liability for pollution is also aimed at deterring specific behaviours that are risky for the environment.[507] Civil liability law is part of traditional liability regime that does not really find expression in environmental damage law. The relevance of the civil law about the environmental liability is premised on pollution damage that can be caused not only to the environment but also to natural persons.[508]

Environmental protection is a subject of concern to all of society. The effects of environmental pollution are clearly identifiable and felt by most communities. It is against this background that environmental liability rules become crucial in a country such as South Africa that subscribes to the notion of sustainable development.[509]

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507 Ramshidi et al (2018) 6 *Journal of Research in Ecology* "Civil Liability and Environmental Liability" 1350.

508 Neethling and Potgieter (2015) 51.

509 Kidd M (2010) 13 *PER/PELJ* "Public Interest Environmental Litigation: Recent Cases Raise Possible Obstacles" 27/189-29/189, Rautenbach C (2017) 20 *PER/PELJ* "Oral Litigation in South Africa: An Evidential Nightmare" 1-4, Du Plessis W (2011) 14 *PER/PELJ* "African Indigenous Land Rights in a Private Ownership Paradigm" 45/261-47/261 refer to the environment as constituting part of the commons, which the authors describe as a 'common pool of resources'. The idea that environmental challenges are an 'elitist subject' is no longer the case among communities. It is common cause that mechanisms to deal with pollution damage were also not appropriately prioritised and developed. Environmental challenges have taken a central position on the agendas of many societies, environmental interest groups and governments. It is this context that liability law becomes important. See the significant input by Basse (2009) 31-34 where the author emphasises that there have been several approaches in relation to environmental protection policy

A proactive approach to enforce environmental rights and ensure that money becomes available to remediate the environment, is essential. Such a proactive approach should encompass a specific effective liability regime to hold the polluter personally liable for the environmental damage he caused. It is clear that for South Africa to attain its environmental goals, a liability regime would be assist in pursuing this national goal. Such a liability regime should be stringent and place a burden on polluters, without undermining the goals of sustainable development.[510]

The issue of liability pertaining to pollution of or harm to the environment is thus a critical area as environmental liability regimes, except for the responsibility to reimburse for the costs of remediation, are scarce. Very few environmental statutes, including NEMA, address the issue of how, towards whom and for what the polluter must be held responsible. The law pertaining to 'environmental torts' - as referred to in other jurisdictions - has not been adequately addressed to date and developed by the courts in terms of South African common law.[511]

A damage claimable under common law in South Africa falls within the ambit of private law that finds resonance with the rights and duties of the individual as well as the relationships between persons. Damage includes more than harm for which compensation is recoverable in the law of delict.[512] These include, for example, breach of contractual obligations and delictual acts.[513] Private law would apply in the case of a violation of environmental rights, and specifically in the context of a nuisance claim

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and the introduction of liability based on principles of equity and distribution. Interestingly, despite criticism that is always directed at liability for damage to the environment, it remains dominant in many jurisdictions.

510 See S 2(4)(p) of NEMA.

511 Soltau (1999) 48-50, Sabovich and Hearne (2009) 24 *TXLR* "Diminished Property Value" 2 hold a comparable view in that the authors describe the term "diminution" as denoting a decrease in value or quality caused by actual contamination of the property or environmental asset. Property is also understood as a valuable asset. Contamination of the plaintiff's property is also a prerequisite for the recovery of diminution damages. The specific concept of diminution of damages in South Africa is not a common issue in legal practice as the concept is incorporated easily into the general principles of the South African law of damages.

512 Neethling and Potgieter (2015) 222.

513 See *Road Accident Fund v Krawa* 2012 (2) SA 346 (ECG), *Fose v Minister of Safety and Security* 1997 (SA) 786 (CC), *Dendy v University of the Witwatersrand, Johannesburg* 2005 (5) SA 357 (W) and Neethling and Potgieter (2015) 222.

or remedy under neighbour law that reflect a narrow yet suitable scope of its application.

Damage to the environment as a public good, on the other hand, falls generally within the public law. Class actions by citizens for damage to communal or public goods are the exception. For example, the *Vaal Environmental Justice Alliance* (VEJA) case is a good example in that regard as VEJA acted in the interest of the public for an environment that concerns all of society. VEJA did this as a public good. This area of lawsuits is gaining traction as public consciousness and awareness of the rights in the Bill of Rights is flourishing in society.

The scope of application of public law is wide and includes prosecutions for environmental crimes for breach of statutory duty. The legal mechanisms that can be applied in the context of public law, to hold polluters liable for pollution damage, vary depending on the nature of the violation.[514] It is incumbent upon the courts to consider and determine appropriate and equitable remedies in such situations. The courts enjoy common law powers as well as statutory powers to impose liability on polluters for damage that is caused to the environment.[515]

Damage claims for harm to privately owned land mostly belongs to the domain of private law. A matter on damage caused by cattle to privately owned land was heard in *Zondi v MEC for Traditional and Local Government Affairs, KwaZulu-Natal*[516]. In this case, the applicant and her late husband had resided on the farm for a number of years during which they had acquired some cattle. The landowner decided to remove the cattle for impoundment as they caused damage to his land. Ngcobo J correctly held that the basis of removal of the livestock was not trespassing of the livestock but rather discrimination on the ground of race and landlessness. No claim was possible for loss or damage caused to the environment itself.

As seen in the previous chapter, although some statutes create penalties under supervisory law for offences, such as the withdrawal of permits and payment of fines,

514 Price A (2015) *AJ* "State Liability and Accountability" 314-315.
515 Neethling and Potgieter (2015) 222.
516 2005 (3) SA 589 (CC).

criminal liability or a liability towards the State for clean-up costs, these do not provide for the reimbursement of the damages caused to persons or their property. The damage to property in an environmental sense has the potential to cause substantial detrimental consequences to property values.[517] The value of the property that has been subjected to contamination may drop sharply, resulting in loss that has to be sustained by the owner of the property.[518] For this reason, a claimant has to look to the law of delict to claim compensation for damages suffered in such a case.

In the ordinary course of events, damage would manifest most often as the diminution of the utility or quality of an environmental asset because of environmental damage.[519] In the context of patrimonial interests, the reduction is generally measured by a monetary standard. In the case of diminution of environmental interest, there is only a reduction in quality that is expressed in real or natural terms. Damage must have been caused by an event committed by a commission or omission and excluding a natural event, for example, oil spillage or water pollution.

Civil liability for environmental damage is triggered only when damage has occurred within the ambit of, and meeting the requirements set by, the law of delict. For this to occur, the five requirements for delictual liability must be proven on a balance of probabilities, namely (i) conduct by way of an act or omission to act, (ii) wrongfulness,

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517 In *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) para 24 the government sought to establish a transit camp in Leeuwkop to accommodate Alexandra residents who were flood victims. The residents who had properties in the area took the matter to court challenging the government on the ground that they were not consulted on the project. They further alleged that the transit camp would be established in violation of specific environmental legislation and also contended that the decision taken by government infringed their constitutional right to just administrative action as well as to certain environmental rights. The residents also contended that the establishment of the camp on the land would constitute nuisance in respect of their properties. It is acknowledged that the threat of harm to the properties would in the broad sense constitute environmental harm.

518 See Sabovich and Hearne (2009) 24 'Diminished Property Value' 1-3 correctly state that contamination of property can result in the loss of value for the owner who may have to sell at a relatively low price as a result of diminution in value. The definition of damage does not reveal how the reduction is established, because this is performed through the test or measure of damage.

519 Visser and Potgieter (2005) 7 *LAWSA* "Damages" 20-28. The reduction in value or quality is measured by a monetary standard while, in the case of personality interest, there is mainly a reduction in quality, which is expressed in real or natural terms. Lansink (2012) Case Study Diminution in Value: Wind Turbine Analysis 3 concerns a loss in value to a property caused by obsolescence. Obsolescence is an impairment of desirability and usefulness caused by new inventions, changes in design, improved processes for production or external factors that make a property less desirable and valuable for continued use http://docs.wind-watch.org/wind-turbines-diminution-in-value-melancthon (last accessed 28 June 2014.)

(iii) fault (intent or negligence – unless a strict liability regime prevails), (iv) factual and legal causation and (v) that damage, harm or loss was suffered that could be quantified.

According to Neethling and Potgieter, 'a delict is the act of a person, which in a wrongful and in a culpable way causes harm to another'.[520] The doctrine of vicarious liability also originates in the common law of delict. In terms of this doctrine, a conduct or act of another person can be imputed to the corporate entity provided there is authorisation for the conduct to be undertaken by the entity.[521] Vicarious liability is different to direct liability as was illustrated in the case of *Pienaar v Brown*[522] in which the distinction between these concepts was raised. In this thesis, liability of a person is addressed, irrespective where it originates from, whether directly or by vicarious means.

It must be emphasised that a plaintiff must prove all requirements must be present for a person to be held liable for his conduct, with the exception of strict liability where fault is not required. These requirements do not have to be examined and evaluated in this specific sequence, although it has in the past been the case. South Africa's courts have become more lenient in cases where, for example, a clear absence of required fault would negate the entire claim and is thus pleaded first. In such a case, the court would not force a plaintiff to continue to prove wrongfulness or causation as it would be irrelevant in any case.

Only damage or loss, which has been caused in a certain manner, qualifies as 'damage' for the purposes of a civil claim.[523] For example, diminution in value can arise where a vehicle has been damaged. A claim for diminution in value can accrue even

520 Neethling and Potgieter (2015) 7.

521 The entity is held vicariously liable if it had knowledge or not in relation to the acts of its employees. The promotion of furtherance of the interests of the entity is adequate for purposes of vicarious liability.

522 2010 (6) SA 365 (SCA).

523 Visser and Potgieter (2010) 27-28 argue that for damage to qualify as damage, it must have been done to property that is owned by a person. This excludes therefore damage to the environment in general in the context of the civil law of delict. Whether the right of society to a pristine environment is not ownership *per se* it could justify a civil claim as is analysed in this study.

if the vehicle itself has been satisfactorily repaired.[524] This leads to so-called 'stigma damages' where property cannot be sold easily or for a good price. When damage has been done to the environment or property, remediation measures do not necessarily bring it back to the same standard or quality that it was before damage.[525] This implies that the value of the damaged environment or property cannot be fully restored to its pre-damage condition. Full indemnification is thus not always a reality.

4.2. The Conduct

Liability for damage is the product of a conduct or an act. It could as well be arising from failure to act or it could as well arise from certain actions that are considered to be out of step with the law.[526] Conduct may be defined as a voluntary human act or omission for the purposes of the law of delict.[527] In order to commit an environmental delict, the polluter must have caused damage or harm to the environment by means of an act or conduct.[528] It is often possible to identify the culprit for damages where the activity that has caused the environmental damage could be associated with a specific activity of the polluter, for example where there is nuclear waste that poses harm to the community

524 A claim can be made for loss about the value of the vehicle as a result of it having been subjected to repairs. This is particularly the position in English law for example, in *Payton v Brooks* [1974] RTR 169, where it was held that a claim could be brought for diminution caused by a vehicle having been repaired. The court, however, held that the claimant was not able to recover loss in relation to diminution as he had not proven the extent of the loss.

525 Complete remediation measures cannot often be achieved to restore the environment or property to its original condition prior to the damage being inflicted on it. Remediation mostly only restores it to an acceptable standard.

526 In *Public Protector v South African Reserve Bank* (CCT 107/18) [2019] ZACC 29 the public protector was investigating the lifeboat agreement between the South African Reserve Bank and Bankorp that was subsequently taken over by Absa Bank Limited. The focus of that investigation was whether the loan extended to Bankorp was improper or not. In the process of investigation, the Public Protector held meetings with institutions that were not supposed to form part of her findings. The Reserve Bank took the matter on review. It was in the review proceedings that the court found the public protector to have acted in "grossly unreasonable manner". The High Court imposed hefty fees on the Public Protector that she had to pay personally and that was confirmed by the Constitutional Court. It is common cause that the Public Protector was acting in her capacity as a functionary of that office, but the intention to impose liability on her seeks to give a message even for future incumbents to act carefully and within the confines of the law.

527 See Joubert *et al* (2005) 3 who perceive delict as some form of unlawful conduct but that falls short of being a crime or breach of contract, both of which are addressed further below in this study. A delictual claim gives rise to compensation when the wrongdoer has been found to be liable for a particular damage. The conduct must be regarded as wrongful, as the absence of wrongfulness gives rise to justification of the conduct or act.

528 According to Havenga (1995) 192 in some instances, it may be difficult to determine the exact polluter particularly where the pollution emanates from more than one source. This was the case in *Federation* case as stated above. This will remain a question of causation rather than purely based on the presence of conduct.

and only one nuclear plant in the neighbouring area is engaged in that activity. Where pollution emanates from more than one source, it is important to identify the polluter(s) who may have caused the damage to the environment, and allocate the losses relating to pollution damage among them. However where pollution is being caused by mining in the Witwatersrand area where many mines were operational for decades, it is not so simple.[529]

The law of delict is primarily concerned with the responsibility for the detrimental consequences of wrongful conduct and the payment of a sum of money as compensation.[530] Generally, some form of conduct on the part of a person is a fundamental criterion for delictual liability to arise.[531] No claim for compensation accrues where a delictual act has, for example, been caused by animals or forces of nature *(vis maio*r).[532] In *Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd*[533] it was stated that negligent conduct giving rise to damages is not actionable *per se*. It is only actionable if the law also recognises it as wrongful. Negligent conduct manifesting itself in the form of either a positive act causing physical damage to the environment, property or person of another is deemed to be prima *facie* wrongful, unless a justification for that conduct exists. With regard to infringement of rights,

529 See *Harmony Gold Mining Co Ltd v Regional Director: Free State Department of Water Affairs and Others* and the *Federation* case where the task of identifying the polluter could be difficult. The circumstances could vary as regards the nature of incidents of pollution but the effect is the same. The rights of the affected persons or communities could be infringed without a clear legal recourse in such situations,

530 Loubser and Reid (2012) 1 *TSAR* “Product Liability in South Africa” 223 and Slabbert and Edeling 2012 268/569-269/569.

531 In the words of Van der Walt and Midgley (1997) 51-52, the conduct of companies is propelled by human-beings who act as ‘brains behind their operations’. Companies have to take responsibility for their polluting activities owing to the fact directors or officials act on their behalf.

532 See the detailed discussion by Joubert *et al* (2005) 8 *LAWSA* “Delict” 78-79. The prejudiced person may claim damages from the owner of the domestic animal, which has caused damage. Fault on the part of the owner is not a requirement for liability in such cases. The requirement is that the defendant was the owner of the animal at the time when damage was inflicted. The animal must be a domestic animal and the animal must act *contra naturam sui generis* when inflicting the harm. The animal must have caused the harm spontaneously and is not considered to have acted spontaneously if it has reacted to external stimuli. Neethling and Potgieter (2015) 27-29 state that only an act of a human being in contrast to that of an animal is accepted as conduct. When a human uses an animal as an instrument in the commission of a delict, a human act is still present in such circumstances. The will be analogous to the case where a human being uses nuclear fusion or fission, for example, which leads to ensuing environmental harm. The fact that a basic force of nature is being abused in the hands of a person, leads to the liability of the person.

533 2006 (3) SA 138 (SCA). Payment of compensation in respect of claims for damage to the environment is essential for the fulfilment of the right in S 24 of the Constitution, which promotes a harmless environment in our society.

wrongful conduct is one that is invalid *ab initio* in terms of administrative law. Where a legal duty exists to act (which is similar to a 'duty of care' in other jurisdictions), and a person omits to do so, his omission may be wrongful and may be actionable, provided all other requirements for delictual liability are met.[534] This indicates the fact that our flexible criteria as opposed to those found in UK tort law for example, can accommodate a variety of harmful scenarios. All general requirements for delictual liability must be met, unless for example, liability is strict.

For the purposes of liability, a juristic person acts through natural persons who serve as its organs. A juristic person may be held delictually liable for its environmental-pollution activities that are committed by its officials.[535] The material issue in such circumstances is whether the conduct of the officials who act as the 'brain behind the entity' is attributable to a juristic person. An act performed by or at the command or permission of a director or official of the juristic person, in the exercise of his or her duties or functions in advancing or attempting to advance the interests of the juristic person, is deemed to have been performed by such juristic person.[536]

For example, a juristic person that causes environmental damage has to be held liable for damages. This is the position despite the fact that the entity itself depends on its directors and officials for decision-making. According to Neethling and Potgieter, the conduct must be performed by an official or employee for whose conduct that juristic person must assume liability for pollution.[537]

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534 It is difficult, in principle as well as in practice, to distinguish between positive conduct and conduct by way of omission. This is particularly the case in a continuous course of conduct in response to a series of situations requiring precautionary adjustments.

535 In *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited and Others,* it was stated that a company being an artificial legal entity could function only through human agencies. At any point in time, that human agency lies ultimately in the hands of the board of the company's directors, unless divested by the board to another individual. See also the discussion by Loubser and Reid (2012) 223 in this regard.

536 It is common because that liability for damage to the environment falls on the legal corporation where a person who works for that entity causes damage in terms of the vicarious liability regime. Differently liability for damage to the environment can also result in personal responsibility for these persons.

537 See the general discussion by Neethling and Potgieter (2015) 30-33 in this regard, as the authors reiterate that a legal person can be held vicariously liable for the acts of its employees or officials. Vicarious liability exists where there is a relationship between two parties such as employer and an employee or principal agent. In *Wessels v Hall and Pickles (Coastal) (Pty) Ltd* 1985 (4) SA 153 (C) it was held that the circumstances at the time of the defendant's preceding voluntary conduct must have been such that a reasonable person would have foreseen the possibility of harm to another and would have taken precautions against it.

In some cases, legislation provides expressly for directors, members or stakeholders of or in a company to be held jointly and severally liable for the harm that is caused to the environment.[538] In the absence of such a statutory provision, delictual liability will be determined according to the general principles of the South African law of delict where the test is based on effective control of the entity. Whether the conduct of the human being can be attributed to the juristic person will depend on whether the requirements for vicarious liability have been met. Whether the conduct of the polluter is voluntary, depends primarily on the motive at the time of the commissioning of the alleged environmental infringement.[539]

For legal purposes, the conduct of the wrongdoer is voluntary only if it was subject to control by the actor's will and at the time of the occurrence of the pollution damage. The control by the defendant's will implies that the possibility exists of the presence of fault in the form of either intent or negligence for its harmful environmental conduct. Control does not necessarily imply a capacity to direct one's actions responsibly. It is sufficient if one has the minimal capacity to control, in the sense of being able to decline to commit a particular act or to choose and execute another course of action.[540]

In terms of NEMA the duty to prevent pollution is extremely broad and lies with every person who causes such damage to the environment, which means that the individual person acting in his capacity as an employee of a juristic person can also be held personally liable, and not just draw liability for his employer or the juristic entity he is an official or a representative of.[541]

Furthermore, the MPRDA[542] in particular, provides that irrespective of the Companies

538 The Companies Act 71 of 2008 s 77(2).

539 Neethling and Potgieter (2015) 34-35 reiterate that human action only constitutes conduct if it is performed voluntarily, that is if it is susceptible to control by the will of the person involved. Voluntariness implies that the person in question has sufficient ability to control his or her muscular movements. In the context of environmental liability, voluntary conduct is vital as far as the nature of the pollution incident is concerned or may fall within the scope of being accidental occurrence or natural disaster. Essentially, industries normally act consciously and voluntarily.

540 According to Van der Walt and Midgley (2016) 61-62 a wrongdoer may escape delictual liability because either he or she lacks accountability or fault is absent. None of these traits apply to issues of liability for environmental damage as legal entities are created in terms of the law and their accountability is not affected by human factors such as status or intoxication. See Joubert *et al* (2005) 78 as the authors reiterate the view that "for purpose of liability a juristic person acts through natural persons who serve as its organs".

541 S 28 of NEMA.

542 MPRDA as analysed in Chapter 3 above.

Act[543] or Close Corporations Act[544], the directors of a company or members of a close corporation are jointly and severally liable for any 'unacceptable negative impact on the environment, including damage, degradation or pollution advertently or inadvertently caused by the company or close corporation which they represent or represented' in that specific industry. Section 28 of NEMA also establishes a duty of care that empowers relevant authorities to give directives to polluters to remedy pollution at their own cost. Section 28 further requires that a person who has caused pollution damage, to take measures to prevent harm to the environment. It further creates personal liability for persons who fail to comply with the provision relating to duty of care. Where shareholders of a company or members of a close corporation are aware of polluting activities by that entity and do not take steps that were within their powers to take to prevent the damage, personal liability may even accrue to them. NEMA also introduced a joint and several liability provisions. This would be irrespective of, for example, market share or other general factors used to determine multiple causation.[545] Market share is significant as it regards responsibility for harm to the environment particularly where the cause of harm is known and there are multiple potential polluters.[546]

The law of delict lacks specificity in relation to complex environmental problems, yet its principles and requirements appear to be flexible enough to accommodate clear-cut cases. The law of delict contains traditional liability law that may pose a challenge in application to environmental damage. A distinct feature of specific environmental liability law is that it expects that legal corporations, who benefit from their actions that pollute the environment, should always find it difficult to escape from liability. This flows directly from the environmental law principles discussed in the preceding chapters, such as the polluter pays and the prevention principles. The logic is that an enterprise which is engaged in business - that has potential to cause harm to the environment - should take steps to prevent such harm in applying the law of delict, one should attempt to adhere to the goal of these environmental principles and find for, rather than against, liability. Manifestly, the basis of that argument is that at the heart of any environmental

543 Companies Act 71 of 2008.
544 Close Corporations Act 69 of 1984 as amended. Although the new Companies Act of 2008 has repealed this Act, it will remain in force where past pollution events would in terms of section 28 of NEMA have to be heard, or where the new act does not provide for a specific historic scenario.
545 See Du Plessis W (2017) 20 *PER/PELJ* "Book Review the Liberal Actor in a Realist World" 4-6.
546 *Federation for Sustainable Environment and Others v The Minister of Water Affairs* (356/12)) [2012] ZAGPHC 170.

legislation is that sustainable development should be an achievable goal.

4.2.1. Commissions

The fundamental requirement for delictual liability is a positive conduct by a human being or juristic entity. The nature of commission is determined according to the particular context in which environmental damage occurs and where liability for environmental damage arises.[547] Failing to act is also a factor taken into consideration when determining negligence for purposes of meeting the fault requirement in the South African law of delict. In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*[548] Harms JA summarised the situation concisely by stating that:

'[W]hen we say that a particular omission or conduct causing pure economic loss is wrongful we mean that public or legal policy considerations require that such conduct, if negligent, is actionable, that legal liability for the resulting damages should follow. Conversely, when we say that negligent conduct causing pure economic loss or consisting of an omission is not wrongful, we intend to convey that public or legal policy considerations determine that there should be no liability, that the potential defendant should not be subjected to a claim for damages, his or her negligence notwithstanding.'

The line between commission and omission is complex and clearly a very thin one. The commission consists of the positive conduct of a person whereas an omission consists of the failure by a person to act who in fact has a legal duty to act positively in terms of the law. The fact that liability for omissions is generally more restricted than liability for positive actions or commissions is another distinguishing factor in respect of the two concepts in South African common law. In *Regal v African Superslate*[549] Steyn CJ stated that a neighbour owes a duty to another neighbour to ensure that the property of another neighbour is protected from harm that comes from the former's property. It was further held that omission could be established by prior conduct of the defendant. The court invigorates the principle of neighbour law in this instance. Liability for damage to the environment could in some instances find expression in neighbour law. Policy

547 Neethling and Potgieter (2015) 30, *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA).

548 *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA). See also *Transnet* case above in relation to negligence as outlined by the Supreme Court of Appeal.

549 1963 (1) SA 102 (A), *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) and *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 6 SA 13 (SCA).

considerations come into play in relation to, for example, the issue of environmental damage caused as a result of omission and whether strict liability is apt in the circumstances.

For reasons of public policy, the law is reluctant to assume too readily the existence of a legal duty to act in all circumstances. In instances involving omissions, the law does not generally demand altruistic behaviour, yet the law of delict presents the potential to play a valuable role of a social regulator where environmental rights are being infringed upon.[550] Whether a duty to act exists or not will be interpreted by also taking into consideration the statutory duty to act as set out by section 28 of NEMA.

4.2.2. Omissions

Omission can be described as legally deficient negative conduct.[551] For an application to succeed against the defendant, an omission must be wrongful. All elements of delictual liability must exist before a person can be held liable for omission. Liability may arise from an omission where a person has failed to comply with a duty of care towards another and to whom such a duty is owed in terms of the law. For example, a person who creates an environmental risk which poses harm to other people owing to the discharge of harmful substances to the environment. A typical example is oil spillage into a river and the person to whom such a duty is imposed fails to conduct a clean-up campaign and creates a risk for the environment.[552] An omission or failure to take certain measures in the course of some activity is therefore not necessarily - on

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550 In *Minister of Safety and Security and Another v F and Others* 2011 (3) SA 487 (SCA) para 72 Mogoeng J held that when a member of the public relies on the trust of a policeman for protection so the failure of the police officer to protect a member of the public is inseparable from an act of commission.

551 See Neethling and Potgieter (2015) 87-90, Van der Bijl C (2018) 21 *PER/PELJ* "Parental Criminal Responsibility for the Misconduct of Their Children: A Consideration" 4-5, *Minister of Water Affairs and Forestry and Others v Durr and Others* 2006 (6) SA 587 (SCA) para 10 and Van der Walt and Midgley (2016) 92. Failure to comply with a duty to care is regarded as an omission in our law. For example, a parent has a responsibility to take care of their children as failure to do so may give rise to an omission. The duty of care is not liability law. It depends on the person who is expected to comply with it. Nevertheless, failure to comply may give rise to consequences. In most instances, the person on whom such duty to care applies is required to compensate the victim. In *Minister of Justice and Constitutional Development v X* 2015 (1) SA 25 (SCA) para 13, the court held that the omission would give rise to liability where a legal duty to act exists, not merely a moral duty to act.

552 In *Tergniet and Toekoms Action Group v Outeniqua Kreosootpale (Pty) Ltd and Others* 2010 (5) SA 367 (WCC) it was said that S 13 (1) of the Atmospheric Prevention Pollution Act 45 of 1965 specifically requires - as a precondition to the granting of such permission - that the Chief Officer must be satisfied 'that the escape into the atmosphere of gases produced by the said process is not or is not likely to give rise to a danger to the health of man'.

its own - recognised as some form of actionable conduct but may well indicate that the action was negligently performed. On the other hand, an intentional discharge of harmful substances does not constitute an omission but a positive conduct or commission.[553]

In *Cape Town Municipality v Bakkerud*[554] the court held that the legal convictions of society might place a legal duty on the municipality to repair streets and ensure that there is a warning against dangers posed to road users against such risks. The failure to take precautionary measures may result in liability on the person to whom a duty to act was owed and the person, who is injured as a result of that deficiency, should be compensated for harm that is caused to him. The same principles are then applicable where a failure to act, such as was the case above, causes environmental harm and could cause a liability claim to vest.

Liability is often not founded on mere omission. Liability may often ensue from commission as well as omission. In *SAR v Estate Saunders*[555] the court held that the defendants were liable based on the grounds that there was prior conduct on the part of the defendants, which imposed on them the duty to ensure that they take precautionary measures to prevent harm. Where a person acts negligently in the form of omission the person has to take responsibility for the consequences of such omission. If an operator fails to take steps to prevent environmental damage, the operator must be held responsible for such damage. In the *Carmichele v Minister of Safety and Security*[556] O'Regan J put forward the opinion that the distinction between a commission and an omission might be artificial. The question is whether, on the facts and circumstances, a legal duty exists to act as well as whether failure to act would

553 In *Hattingh v Roux and Others* 2011 (5) SA 135 para 14 and Neethling J and Potgieter JM (2018) 43 *JJS* "Foreseeability: Wrongfulness and Negligence in Delict"146-147 the court held that 'the wrongfulness of the omission depends on the existence of a legal duty to act without negligence and the breach thereof by the defendant. It is unnecessary to rely on conduct in the form of a positive act which has caused physical harm to employ the concept of breach of a legal duty or duty of care.' In *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) the concept of omission was raised in regard to the failure of a police officers to make an intervention where a person was brutally assaulted by another police officer. There is a duty on the police officer to act in defence of the members of the public where an attack or harm is likely to occur or occurs. Such a failure gives rise to liability against the state.

554 2000 (3) SA 1049 (SCA), Neethling and Potgieter (2013) 2013 *Annual Survey of South African Law* 'The Law of Delict' 794 and Kleyn D and Zitzke E (2018) 24 Fundamina *a Journal of Legal History* "The Omissions in *Oppelt*" 60-62.

555 1931 AD 276.

556 2001 (4) SA 938 (CC).

cause harm to another person or to the environment. In *Hattingh v Roux and Others*[557] the court stated that the legal duty applied where the basis of complaint is premised on omission.

The determination of liability on the premise of omission requires a balancing act. For example, the damage to the environment may occur in circumstances where the people who know about it do not make the effort to report it to the relevant authorities as required by NEMA. The reasons for failure to do so may vary in that the persons concerned may not be aware of the legal duty to report. In *Halliwell v Johannesburg Municipality*[558] the court held the municipality liable for omission when it failed to maintain cobblestones that were on the public road, which resulted in the injury of the appellant whilst on horseback on the public road. Similar premises will govern liability for environmental harm caused by omission.

The case of *Jacobs v Transnet t/a Metrorail* serves as an example in the context of liability for pollution damage caused by companies.[559] The Supreme Court of Appeal quoted the following from judgment in the case of *Herschel v Mrupe*[560] that was heard in the Appellate Division: 'Once it is established that a reasonable man would have foreseen the possibility of harm, the question arises whether he would have taken measures to prevent the occurrence of the foreseeable harm.' The answer depends on the circumstances of each case. The law appears to be more lenient on holding a defendant liable for his omission than for an outright commission. There are four basic considerations in each case which influence the reaction of the reasonable man in a situation posing a foreseeable risk of harm to others:

(i) the degree or extent of the risk created by the actor's conduct;
(ii) the gravity of the possible consequences if the risk of harm materialises;

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557 See *Hattingh* case para 14.
558 1912 AD 659.
559 In *Jacobs v Transnet t/a Metrorail* 2015 (1) SA 139 (SCA) 113 the appellant was injured in a collision between a truck and a train. The appellant contended that Transnet had acted negligently by requiring a high speed in the area of the accident. The court held that 'the low level of protection at the crossing under consideration presented a substantial risk of very serious harm being caused in the event of collision' see para 10. The court concluded that the respondents had failed to implement reasonable preventive measures to avoid accidents on a level crossing and were held liable for the damages caused by the accident. Where negligent conduct is attributable to a juristic person such as Transnet, it furthermore appears that the standard of reasonableness that the court applies may not be similar to that of the conduct of an individual.
560 1954 (3) SA 464 (A).

(iii) the utility of the actor's conduct, and

(iv) the burden of eliminating the risk of harm.

Entities such as Transnet have decision-making structures that are utilised for the purposes of preventing incidents that result in such an extensive loss or damage to the environment and must comply strictly with these procedures to avoid being held liable.

A mining company or factory would, for example, shoulder a heavier burden to prevent losses as opposed to what one would place on an individual polluter such as a farmer whose fertilisers wash from his agricultural fields during heavy rain to cause harm to neighbours. The agricultural sector is one of the areas of priority in terms of the NDP. Its prioritisation has the potential of adding an additional burden to the existing challenges that exist in relation to commercial farming.[561] Food security is dependent on agricultural production that should not be compromised, yet commercial farming activities are utilising chemically produced items that could easily contribute to a diverse range of environmental losses that should attract liability.

4.3. Wrongfulness

4.3.1 Infringement of subjective right

The court in the case of *Country Cloud v MEC, Department of Infrastructure, Gauteng*[562] stated that 'wrongfulness typically acts as a 'brake' on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability.[563]' An infringement of a subjective right is the main concern of the principle of

561 See *Mazibuko v City of Johannesburg* case in which O'Regan J highlights the degree of imbalances about access to sufficient water, which the judge argues is skewed towards commercial farming that causes harm to the environment.

562 *Country Cloud Trading CC v MEC, Department of Infrastructure, Gauteng* 2015 1 SA 1 (CC).

563 *Country Cloud* case and Van der Walt JC (1970) 3 *CILSA* "A Few Thoughts on the Basis of Delictual Liability" 4-6, Robinson and Prinsloo (2015) 1671 and Kleyn and Zitzke (2018) 65-67 argue that wrongfulness is a measure of control in relation to liability for pollution damage and furthermore there is always a need to restrict the conduct of a human being by imposing principles of law. A conduct that causes harm to the environment alone is not sufficient without wrongfulness about delictual liability. Wrongfulness is an important element when it comes to delictual liability in South African law. See also *President of South Africa and Others v Reinecke* (2014 (3) SA 205 (SCA) paras 18-20 and Labuschagne P (2018) 21 *PER/PELJ* "Violence in Sport" 5-6. In *MEC for*

wrongfulness. The holder of a subjective right has a right to an object that must be protected against harm.[564] The right to the environment is the right that is afforded for the protection of the environment in terms of section 24 of the Constitution. The environment itself is a thing or object, not a legal subject – in other words a human being.[565] In the context of common law, the environment does not have a right on its own as it is not a bearer of rights.[566] The holder of the right has a right that is enforceable against other legal subjects. There is a relationship between the holder of the right and other legal object.[567] This relationship provides the holder of the right with the ability to use, enjoy and alienate the object of his right.

In *Roberts and Another v MEC, Department of Police, Roads and Transport, Free State Province*[568] the plaintiff collided with a kudu bull on a provincial road. The road was surrounded by vegetation that obscured the view of the driver. The case of the plaintiffs rested on wrongfulness in that the defendant failed to cut vegetation that grew on the sides of the road which resulted in them colliding with the aforementioned animal. According to the court, negligent conduct based on omission is not regarded as *prima facie* wrongful. 'It's wrongfulness depends on the existence of a legal duty. The imposition of this legal duty is a matter of judicial determination, involving criteria of public and legal policy consistent with constitutional norms.' The defendant was held liable for wrongful and negligent conduct based on the facts and the legal duty to act in this case.

Public Works, Roads and Transport v Botha (20811/2014) [2016] ZASCA 20 the court held the department liable on the basis of negligence.

564 Neethling and Potgieter (2015) 51.

565 Neethling and Potgieter (2015) 51, *Hawker v Life Offices Association of South Africa* 1987 (3) SA 777 (C), *Bredenkamp v Standard Bank* 2010 (4) SA 468 SCA and Robinson JA (2012) 15 *PER/PELJ* "The Relevance of a Contextualisation of the State-Individual Relationship for Child Victims of Armed Conflict" 152/569-155/569 acknowledge that 'subjective rights are similar to private subjective rights that are regarded as subject's legally protected claims to a certain legal object'. The environment does not have the capacity to enforce any right.

566 See the opinions expressed by Neethling and Potgieter (2015) 37-38, Havenga (1995) 193 *SA Merc LJ* 7 "Liability for Damage" 192 and Joubert *et al* (2005) 83 which posit that an act which causes harm to another is in itself insufficient to give rise to delictual liability unless it was caused in a wrongful manner. The determination of wrongfulness involves a dual approach in that a legally recognised interest must have been violated and that violation has occurred in a legally reprehensible manner. The point was made clearly in *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 (6) SA 125 (CC) paras 25-26. The issue emanated from the arbitrary revocation of a liquor licence that was granted to Shoprite by the Eastern Cape Liquor Board.

567 Neethling and Potgieter (2015) 51.

568 (1447/2017) [2019] ZAFSHC 3.

Before recognition is afforded to the environment as a legal object, it must meet two requirements. The first is that there must be a value in the legal object. The legal object is an environment the value of which is awkward to prove, but it must in principle not be harmful to health or well-being in terms of section 24 of the Constitution.

The conduct of the defendant is the second requirement, which must be present for delictual liability to arise.[569] A dual test for wrongfulness is applied whenever a potential delictual liability claim arises. A claim may arise against the polluter where pollution damage is found to have been caused by it. Firstly, where a person infringes the subjective right of another, it is assumed to be wrongful. In the second instance, where there is a breach of a legal duty, such as a statutory duty or one that exists based on the legal convictions of the community, failure to comply with the legal duty is considered wrongful.[570]

At the heart of the first enquiry lies the question on whether the environment has a right that is being infringed upon as an object. This is called the doctrine of subjective rights. The discussions in Chapters 2 and 3 were aimed at explaining the nature and extent of the rights that persons have to the environment as provided for in terms of section 24 of the Constitution and legislation. It is based on the infringement of these rights that a potential damages claim may be launched. Whether such a protectable right exists depends on the factors discussed in the following chapters.[571] Wrongfulness, as a measure of control, does not create a barrier for an environmental pollution damage claimant.

Wrongfulness in the context of South Africa's constitutional norms, which courts have to consider in their evaluation of cases, makes sense as a principle the law of delict. Wrongfulness may not be in keeping with liability for damage to the environment in so

569 Neethling and Potgieter (2015) 51.

570 Neethling and Potgieter (2015) 52-54, Paizes (2008) 125 *SALJ* "Making sense of wrongfulness"371-374. See also *Minister of Safety and Security v Scott* 2014 (6) SA 1 (SCA) in which the Supreme Court of Appeal stated that the police officers who wrongfully arrested the defendant did not know of the potential loss that could be caused by such wrongful arrest and were therefore not held liable.

571 See detailed discussion in Neethling and Potgieter (2015) 34-36, *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC), *Heroldt v Wills* 2013 (2) SA 530 (GSJ) and *Paixao v Road Accident Fund* (2012 (6) SA 377 (SCA).

far as the plaintiff would have to prove it. Pollution damage is mainly generated by industry whereby activities are, by their nature, not unlawful which is what wrongfulness implies. The duty to prove wrongfulness may cause challenges in that context.

4.3.2 Accountability and duty to prevent damage

At the root of the second part of the test to determine wrongfulness lies the duties created by statute and the legal convictions of society. This is an objective test. The question is whether society condemns a particular conduct, such as pollution, or damage that is caused to the environment as improper and not in the public interest.[572] Wrongfulness, in the circumstances, entails balancing the interests that the defendant promoted and those rights, which he or she has actually infringed, in the form of damage to the environment which have to lead to liability for the polluter.

From legislation it becomes apparent that all persons have a right to the environment that is healthy and clean. Society expects all persons to respect and protect that environment. The centrality of the legal convictions of the community in the determination of wrongfulness is aimed at achieving justice in respect to human health and the environment at all times. In addition, in this context specifically, environmental justice as examined in Chapters 2 and 3.[573] *Prima facie* infringement does not imply wrongfulness without due consideration of the rights of persons and the legal convictions of the community as a criterion for determination of wrongfulness. The term ‘wrongfulness’ is used in civil law while unlawfulness is used in criminal law. In essence these have the same meaning. When it is proved, wrongfulness may result in environmental liability for the defendant.

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572 See in general Havenga (1995) 193 and Neethling and Potgieter (2015) 32, Labuschagne (2018) 7-8 where the value of the test for wrongfulness is recognised as it is open-ended, and can thus accommodate a variety of claims. Wrongfulness as one of the important characteristics of delictual liability is also crucial for liability for environmental damage. Nevertheless, the requirement for fault could also create problems about liability for pollution damage.

573 Neethling and Potgieter (2015) 46-47. See *Durr* case para 17 and *Robertson* case para 40.

It is thus important in the law of delict to establish whether the wrongdoer's conduct is blameworthy in the eyes of society.[574] On the other hand, accountability is the ability to know the difference between what is right and wrong, and one must be able to act in accordance with that consciousness. This specifically affects the presence of fault, namely intent or negligence, which is discussed as a separate requirement below. A person who lacks the ability to draw a distinction between what is right and wrong cannot be held culpable to take responsibility for his actions. The application of the *boni mores* test constitutes a basic norm concerning the determination of wrongfulness. The *boni mores* is, in essence, the legal convictions of the community. These convictions remain flexible and remain well suited to be applied especially in novel and borderline cases.[575]

Joubert *et al* also agree with the idea that 'the bases of the law of delict provide elastic and adaptable principles of liability for application to novel situations' such as would be the case for new risks that cause environmental damage and where compensation would be required.[576] On the other hand, the authors recognise that the elasticity of general principles can be frustrated by the conservative approach of the courts regarding liability claims for damage to the environment. The court, in the *Nkala* case highlighted some novel situations that are occasioned by the constitutional values to which South Africa - as a constitutional democracy - actually subscribes.[577] The basis of the case was the certification of a single class action arising from two distinct classes, namely that of a silicosis class and a tuberculosis class for claims caused by injuries owing to environmental pollution in the gold mining industry.[578] Damages were

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574 *Judd v Nelson Mandela Bay Municipality* (CA 149/2010) [2011] ZAECPEHC 4 para 65, *Adams v Shoprite Checkers (Pty) Ltd* (2754/09) [2012] ZAECPEHC 3. In both cases the plaintiffs had sustained injuries albeit in different circumstances. The first raises an important point in relation to culpability as it held that the incident was reasonably foreseeable, as the municipality did not follow procedures to prevent harm to individual persons. In the *Adams* case, the plaintiff had sustained serious injuries in the workplace and instituted action for damages against the defendant. The court said that the 'plaintiff is entitled to a loss suffered' because of injuries. The approach in every case is that the *boni mores* test is used as a yardstick in determining whether the defendant is liable.

575 Neethling and Potgieter (2015) 36-37 and Van der Walt and Midgley (2016) 45.

576 Joubert *et al* (2005) 39, Boezaart T (2015) 26 *Stell L R* "Wrongful Life: The Constitutional Court paved the Way for Law Reform" 399-401.

577 *Nkala* judgment was handed down by a High Court whose decision may be appealed by the affected companies. It still represents a departure from the previous practices of the mining industry in relation to liability of the parties for harm caused by their practices in the mining industry.

578 In *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA) the Supreme Court of Appeal laid down seven requirements that should guide a court in making allowing class actions. These are as follows:

(i) The existence of a class identifiable by objective criteria;

awarded in 2019 to the amount of R 5 billion to be distributed between the members of the class.[579]

Silicosis is, simply put, an occupational lung disease that mineworkers contract in the process of working underground in gold mines. The disease is contracted through the inhalation of dust particles during extraction of gold and other related activities and is an incurable condition that is manifested - after many years - the lungs. This kind of disease has resulted in the death of many mineworkers in the gold mining industry. On the other hand, tuberculosis is an infectious condition that affects the lungs. It is an occupational disease but is also a communicable disease contracted due to and through social conditions.[580] Wrongfulness is determined in part by the application of rules and in part by the exercise of judicial discretion. In other words, it is necessary to apply a flexible approach as a way of determining wrongfulness to establish liability for pollution damage.[581]

(ii) A cause of action raising a triable issue;
(iii) That the right to relief depends upon the determination of facts, or law or both common to all members of the class;
(iv) That the relief sought or damages claimed, flow from the cause of action and ascertainable and capable of determination;
(v) That where the claim is for damages there is an appropriate procedure for allocating damages to the members of the class;
(vi) That the proposed representative is suitable to be permitted to conduct the action and represent the class, and
(vii) Whether given the composition of the class and the nature of the proposed action, a class action is the most appropriate means of determining the claims of class members.

579 Case number (44060/18) [2019] ZAGPJHC 260 (26 July 2019).

580 Hermanus MA (2007) 107 *The Journal of the Southern African Institute of Mining and Metallurgy* "Occupational Health and Safety in Mining-Status, New Developments and Concerns" 533 criticises the lack of data on the injuries that are sustained during mining activities. Accountability for mining fatalities is restricted to serious accidents while the bulk of cases of occupational injuries remains unaccounted for. These mining conditions affect public health, the environment and the quality of life. It is interesting to note that most of these occupational health factors hardly give rise to liability.

581 See Neethling and Potgieter (2015) 41-43, Joubert *et al* (2005) 38-39, *Mashongwa v Passenger Rail Agency of South Africa (PRASA)* 2016 (3) SA 528 (CC) para 14, the Constitutional Court stated that 'an enquiry into wrongfulness focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable'. The plaintiff was thrown out of the moving train by criminals and instituted action against PRASA with reference to requirements for delictual liability. The issue of wrongfulness is determined in the context of whether the plaintiff's rights have been infringed. The process of such determination must take into account whether the interest allegedly infringed was objectively justifiable in the circumstances. The basis of this approach is that there has to be a legal duty on the part of the defendant in relation to the interest of the defendant, which may be imposed by statute, or operation of law.

Some rules create rebuttable presumptions as to wrongfulness, such as the rule that it is *prima facie* wrongful for a person to cause harm to the 'environment' or another person by positive conduct. Although wrongfulness and damage are two separate requirements for delictual liability, these stand in a particular relationship to each other. As an illustration of the flexibility of wrongfulness, it is not wrongful - for instance - to cause harm by conduct that it justified.[582] Compensation for damage caused to the environment is based on the economic principle of fairness in that it should not be society that bears the cost incurred as a result of pollution while the polluter enjoys the benefits derived from polluting activities.[583] Yet, in pursuing development, causing damage to the environment may be justified by a variety of factors that then negate delictual liability for the harm done to the environment.

4.3.3. Grounds of Justification

Grounds of justification refer to special circumstances in which conduct that appears to be wrongful is regarded as justifiable in law. The premise is that there is no violation of a norm in the legal sense, and conduct is thus regarded as wrongful where there is an unjustified infringement of an interest or right of a person.[584] Grounds of

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582 See the discussion by Fagan (2005) 90, Kemp (1983) 53. As an analogy the case of *Satawu v Garvas* 2013 (1) SA 83 (CC) creates an interesting test for polluters as they may understand that their actions may result in damage to the environment and should be evaluated on a stricter merit. Satawu had organised a protest march, which degenerated into riot and damage to property. Owing to the damage to property, the victims for losses incurred during the march sued the trade union. The trade union denied liability for damage caused during the protest and advanced the view that S 11(2) of the Regulation of Gatherings Act on the right to assembly - as provided for by S 17 of the Constitution - should stand. S 11(2) of the Regulation of Gatherings Act provides that: it shall be a defence to a claim against a person or organisation contemplated in ss (1) if such a person or organisation proves:

(a) That he or it did not permit or connive at the act or omission which caused the damage in question; and
(b) That the act or omission in question did not fall within the scope of the objectives of the gathering or demonstration in question and was not reasonably foreseeable, and
(c) That he or it took all reasonable steps within his or its power to prevent the act or omission in question: Provided that proof that he or it forbade an act of the kind in question shall not by itself be regarded as sufficient proof that he or it took all reasonable steps to prevent the act in question.

The court held that the primary responsibility of planning, implementation, supervision and execution of the gathering is the primary responsibility of the union.

583 Air pollution for example, may cause damage to human health and the environment. Externalities have a negative impact on consumers as they have to carry the burden of environmental consequences not caused by them. 'Those who suffer from external costs do so involuntarily, whereas those who enjoy external benefits do so at no cost.' en.m.wikipedia.org/wiki/External last accessed 20 September 2014.

584 In *Van Duivenboden* case, the court observed in its description of the concept of wrongfulness that 'a plaintiff is not required to establish the causal link with certainty but only to establish that the

justification, according to Neethling and Potgieter are 'nothing more than the practical expressions of the *contra bonos mores*.[585]' The principle of the legal convictions of the community forms the basis of the grounds of justification and therefore policy considerations underpin its existence.[586] The grounds of justification do not apply with regard to bodily integrity, life and honour. The exception to this proposition is the circumstance in which a person acts out of private defence. A person who acts in private defence can inflict harm on another person in self-defence or the defence of another person. Private defence is a ground of justification. Grounds of justification are aimed at ensuring a balance between the actor's conduct and the violation of a legally recognised norm.[587]

Grounds of justification such as defence, consent and necessity underpin the legal convictions of the community. Grounds of justification are dynamic and normative as the legal convictions of the community are also not static.[588] For example, the legal convictions of the community are influenced and shaped by the provisions in the Bill of Rights. In terms of section 8(3) of the Constitution, the rights in the Bill of Rights must be applied in conjunction with common law development in mind. In *Mthembu v*

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wrongful conduct was probably the cause of the loss.' A similar viewpoint was expressed in the case of *Oppelt v Head: Health, Department of Provincial Administration: Western Cape* 2016 (1) SA 325 (CC) where the Constitutional Court held that wrongfulness depends on the judicial determination of all the elements of delictual liability. The issue in this case arises from a failure of the health-care facility to attend to the patient immediately. The appellant, rugby player who was injured on the field of play and had his spinal cord extremely damaged instituted legal action against the Department of Health in the Western Cape. One of the grounds of this litigation is S 27(3) of the Constitution, which states that no one should be refused access to emergency medical treatment and the negligence of the department or its employees. See also Neethling and Potgieter (2015) 87.

585 See Neethling and Potgieter (2015) 87-90, *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 28-29 and *Minister of Public Works and Others v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) para 41-42 in which the court held that a contract which undermines values in the Constitution is contrary to public policy.

586 Neethling and Potgieter (2015) 90, Loubser *et al* (eds) (2017) The Law of Delict (2 ed) 162-164, *Roberts* case above at para 81-82 correctly assert that an attack on the police officer who legitimately attempts to arrest a suspect, who has committed an offence, has no justification in law. The conduct of the police officer is lawful in such situations. 'If one defends himself against an attack from another person that is a ground of justification' in South African law.

587 See Bhana and Meerkotter (2015) 132 *SALJ* "The Impact of the Constitution on the Common Law of Contract" 495-499, Van der Bijl (2012) *De Jure* "Criminal liability and policy considerations in the context of high speed pursuits" 446, Neethling and Potgieter (2015) 87 and *Kyalami* case where the court emphasised the balancing of two different interests in the form of the right of access to adequate housing and environmental right. The need for housing development is essential to meet the constitutional obligation of access to adequate housing and other socio-economic rights.

588 Ebrahim S (2018) 21 *PER/PELJ* "Reviewing the Suitability of Affirmative Action and the Inherent Requirements of the Jobs as Grounds of Justification to Equal Pay Claims in Terms of the Employment Equity Act 55 of 1998" 2-4.

Neon Claude Lights[589] the company conducted an evaluation of its employees for the purposes of reward based on merit. The court held that a discrimination premised on the productivity of the employee is a ground of justification.[590] The court regarded productivity as 'fair and objective factor' that can thus be accredited as a ground of justification that removes the element of wrongfulness where conduct causes harm to another or to the environment.

It remains unclear if causing harm to the environment, in circumstances where there was authorisation for a project, could give rise to a ground of justification. In *Sea Front for All* case[591] the court withdrew the decision of the MEC in the review application against the MEC's decision who authorised the construction and development of an open space for a hotel and retail centre against the interests and wishes of the community.

'Necessity exists when the defendant is placed in such a position by a superior force that he is unable to protect his legally recognised interests only by reasonably violating the interests of an innocent person.' For example, a party would be regarded as acting out of necessity if he enters the property of someone and makes a firebreak to prevent a small fire ignited within that property from destroying more adjacent land. In other words, the person acts lawfully by burning part of the accessed property in an attempt to prevent further harm.[592] Necessity excludes wrongfulness. Harm to the environment may occur because of necessity. For example, a harmful product may be released to the environment to protect human life. Fuel tankers carry hazardous products that pose a threat to human health and the environment.

Necessity is objectively determined by taking into account the circumstances that gave rise to it and the consequences arising from it. Necessity may arise from a number of factors including an act of defence against an attack. An act of defence must be reasonable with regard to the attack. There should be proportionality between the

589 1992 13 ILJ 422 (IC).
590 In the current constitutional dispensation, this would be called 'fair discrimination.'
591 2011 (3) SA 55 (WCC), *Loureiro v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) para 53, Du Plessis (2017) 20 *PER/PELJ* "Responsible Mining" 2-3 the view held is that wrongfulness inquiry should focus on the harm-causing conduct in the context of the legal convictions of the community that should be in line with our constitutional imperatives.
592 Neethling and Potgieter (2015) 94-96 and Loubser *et al* (2017 171-172.

means used by the person acting in defence and must not be out of proportion to the attack. If the defence means used to ward off the attack is excessive, it becomes an attack in law. There is a difference between acting out of necessity and private defence.

Necessity implies that there are situations, which require that steps be taken for the protection of a legally recognised interest. The requirement for necessity is that a necessity must exist or must be imminent. The circumstances giving rise to necessity may be occasioned by human action, animals or forces of nature.[593] A neighbour or any person may take responsibility to care for a child, who is left without supervision, at his own expense. The act of necessity should be aimed at preventing the harmful incident to the person whose legal interest is at risk. Putative necessity does not constitute necessity in law and is the use of force to repel a real or potential threat to himself or another person. Where a threat is a belief or a simple imagination there is no justification in law.[594]

There are two elements that constitute consent, namely consent to injury and consent to the risk of injury. The principle of consent finds expression in the maxim *volenti non fit iniuria*, which implies that a person who is willing cannot be injured.[595] Consent must be given freely and voluntarily. Where a person is coerced to consent, permission is absent. The capacity to consider properly and give consent must also exist, for example, a minor child may not be in a position to give consent for medical treatment.[596]

Voluntary assumption of risk is a defence that the defendant can raise with reference to claiming for damages where the plaintiff voluntarily and knowingly participated in an activity to which harm or injury is inherent.[597] The wrongdoer may find escape from

593 Neethling and Potgieter (2015) 99.
594 See *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (1) SACR 431 (SCA) where the defendant shot and killed his girlfriend in fear of a purported intruder.
595 Neethling and Potgieter (2015) 129-131.
596 The exception in relation to consent applies in terms of the Choice of Termination of Pregnancy Act 92 of 1996, which allows a minor from the age of 12 years to terminate a pregnancy without parental consent.
597 In *Lampert v Hefer* 1955 (2) SA 507 (A) the court held that the plaintiff should have appreciated the risk of the possibility of an accident as the driver of the motor cycle was intoxicated. The plaintiff knew of the fact of intoxication when he joined the deceased on the journey. The plaintiff had

liability owing to the willingness of the injured person (plaintiff) to accept the harm by virtue of his voluntary participation. The harm inflicted should not be against public policy. For example, a sport participant willingly takes the risk that his participation in sporting activity may result in the exposure to injuries from fellow players. In the normal course of events, such injuries in sport should not be intentionally inflicted in terms of the legal convictions of society. Malicious intent to injure is not acceptable in sport as society views it as *contra bonos mores*.[598]

The voluntary assumption of risk is also an important ground of justification in the context of *volenti non fit injuria*. It is a ground of justification that is similar to private defence and necessity. The voluntary assumption of risk is based on the principle that a player in sport consents to the possibility of injury during participation in the sport. In *Roux v Hattingh*[599] the court held that there was a clear motive to cause bodily harm to another player. The accused had broken the neck of the other player during the game. The situation, where harm is deliberately caused, tends to attract serious sanctions by courts.

A statutory authority is the power that is drawn from the legislation. It is mostly exercised by state officials. A person does not act wrongfully if he performs an act while exercising a statutory authority. A harmful conduct authorised by statute is regarded as lawful provided it is reasonable. A statute limits the rights of the prejudiced person by authorising an infringement of a legally protected interest or right. For example, someone who is imprisoned for a criminal offence loses most of his freedoms because of the imprisonment. Imprisonment limits the rights of a person but it is a lawful act to subject a convicted person to custodial sentence by the state.

(a) To determine whether there is intention on the part of the legislature to authorise the infringement of the interests, the courts apply the following guidelines:
    (i) if the infringement is directed;
    (ii) if the statute is not directed but permissive, and if the statute makes no provision for the payment of damages, there is a presumption that the

sought to claim damages from the estate of the deceased when he sustained injuries because of the accident.

598 Labuschagne P (2018) 6-7, Pienaar L (2016) 19 *PER/PELJ* "Investigating Reasons behind Increase in Medical Negligence Claims" 6-8 and *M v M* 2017 (3) SA 371 (SCA).

599 2012 (6) SA 428 (SCA).

infringement is not authorised;

(iii) the presumption referred to in (ii) above falls away if the authority is entrusted to a public body acting in the public interest;

(iv) if the authorised act is circumscribed and localised, there is a presumption that the infringement is authorised;

(v) if the authorisation is permissive and general, not localised and does not necessarily entail an infringement of private interests, the only possible inference is that the legislature did not intend that private interests should be infringed.

(c) To determine whether the permitted act fell within the boundaries of authorisation, the following are taken into account-

(i) It must have been possible for the defendant to exercise the powers without infringing the interests of the plaintiff;

(ii) The defendant's conduct must have been reasonable.[600]

4. 4. Fault

Fault is regarded in South African law of delict as a blameworthy or reprehensible state of mind.[601] Fault is the third criterion for delictual liability and must be proven to exist whenever a wrongful act is committed. It is present if there is blameworthiness that can be attached to the defendant in the context of either intention or negligence of the wrongdoer.[602] The principle of fault is grounded on the autonomy of persons that they

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600 Neethling and Potgieter (2015) 114, *Johannesburg Municipality v African Realty Trust and Simon's Town Municipality v Dews and Another* 1993 (1) SA 191 (AD) para 12 the court clearly asserted its position in line with the guidelines stated above as it said 'Conduct which would otherwise give rise to delictual liability may be justified and rendered lawful by the fact that it consists of the exercise of a statutory power.' In the *Judd* case, the decision made it clear that in the absence of wrongfulness, there is no basis on which fault should even be considered pertaining to delictual liability.

601 Neethling and Potgieter (2015) 129-131 and Van der Walt and Midgley (2016) 96 also reason that fault has a subjective element because it is also concerned with a person's disposition or attitude. In *Minister of Safety and Security v Mohofe* 2007 (4) SA 215 (SCA) para 9-11 the court approached the issue of negligence by stating that a policeman should 'reasonably foresee' the possibility of his action resulting in harm to others. The police officer saw three men who were armed fleeing from a shop and instructed them to stop. One of them fired a shot at him that missed him and fatally wounding a member of the public.

602 See the discussion by Havenga (1995) 193 about intention. 'Intention is a state of mind in which a person's will is directed at causing a consequence in the knowledge that it is wrongful.' A person intends a consequence if they foresee that will happen if the given series of acts or omissions continue. A person acts with intention, as well, if they desire it to happen. A person who plans and

have a general capacity to choose among alternative courses of behaviour and respect for their autonomy means that they can be held liable based on their choices for pollution damage.[603]

A person is held to intend for a consequence to happen when that consequence is a virtually certainty of his or her action and he or she knew it to be a virtually certain consequence.[604] In the context of delictual liability, no general distinction is drawn between delicts that require intent as opposed to delicts that require negligence. Intention is seldom encountered in the courts as the relevant form of fault simply because negligence is always regarded as sufficient in such circumstances. Neethling and Potgieter also agree with the view that it is not possible for intention and negligence to be present at the same time.[605] Proving, on balance of probabilities, the presence of any one of these forms is sufficient to meet the requirement of faulty conduct. The only exception to this rule is where a form of strict liability – where fault is not required – is recognised by South African law, either due to statute or for cases, is recognised in common law.

4.4.1 Intent

Intent is a crucial factor in the determination of legal causation. In *Director of Public Prosecutions, Gauteng Division, Pretoria v Moabi*[606] Molemela AJA held that in cases

executes a crime for example, is considered dangerous to the public than a person who acts spontaneously,

603 Ashworth (995) 152-157 advocates for the principle that if a person causes the damage, the person should not be allowed to take advantage of any defence or partial defence to liability if the relevant conditions were brought about by his or her own fault. For example, a person who drinks excessively to stoke up courage to commit an act should not be allowed to raise intoxication as a defence because it arose from prior fault.

604 According to Ashworth (1995) 182-184 once it has been established that a person is responsible for the act, omission and commission, it must also be shown that he fulfilled the fault requirements for the fault. It should not be assumed that there is a single fault requirement for every act that results in damage.

605 Neethling and Potgieter (2015) 129-131 and Loubser *et al* (2017) 99-102 may not necessarily be raising a good argument in their assertion that intention and negligence may not be present simultaneously. In a situation where there are multiple parties that can cause damage to the environment. For example in the *Harmony Gold Mining Company* case - as stated below - it is possible. A company has an intention to cause damage to the environment if it deliberately does so, knowing that it would be unidentifiable as the source of pollution because there are many in the area involved in similar activities. The act of causing harm to the environment may also be regarded as negligent by failing to conform to the expected standard.

606 In *Director of Public Prosecutions, Gauteng Division, Pretoria v Moabi* 2017 (2) SA 384 (SCA) the Supreme Court of Appeal rejected the view of the High Court which said it could not impose life imprisonment because the defendant had no intention to cause grievous bodily harm when he

involving grievous bodily harm, the intention to cause harm is irrelevant. In general terms, the requirement of intent is regarded as having the same intensity as that of knowledge except that knowledge relates to circumstances forming part of the definition of the environmental offence and intention relates to the consequences of the act.[607]

Intent is a legally reprehensible state of mind that encompasses the direction of the will to the achievement of a particular objective.[608] Intent is subjective in nature. It can only be present where the objective is carried out in a wrongful manner. A person acts with intent to produce a consequence, such as inflicting harm on the environment. Such a harm is not accidental but deliberate. If the person has the purpose of causing pollution damage or the person knows to a substantial certainty that the pollution damage will ensue from his or her conduct that is understood as wrongful.

According to Van der Walt and Midgley, intent thus denotes a manifestation of the will.[609] Intent does not require or presuppose the existence of an improper, bad or wicked motive. Motive and intent are not synonymous in the legal sense of the word. Motive is the actuating impulse preceding the mental state of intent. A medical doctor, who, in violation of a regulation, disposes of medical waste or any toxic or harmful substances on an open veld or on a nearby river, to avoid incurring expenses for proper disposal, acts with intent to inflict harm on the public and the environment.

The same principle, as mentioned above, applies to a factory that disposes of harmful waste in an area where such waste could cause harm to human health and the environment. An intentional conduct is a deviation from what is expected of a person in terms of the law in circumstances where a person is required or expected to act for the protection of the environment. Van der Walt and Midgley concede that since consciousness of wrongfulness is an element of intent, ignorance of the conduct or a

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assaulted a victim whom he also raped. The High Court had said that 'we are not satisfied that the element of intentll exists. Hence, there was assault but not intention to do grievous bodily harm. '

607 See Ashworth (1995) 184. One can intend a result whether or not it actually occurs. In other words, if the intention fails to come to fruition, it may be considered as the intention. Nevertheless, that does not apply to knowledge.

608 Van der Walt and Midgley (2016) 227, Ahmed (2014) 1519.

609 Van der Walt and Midgley (2016) 334.

mistaken belief in the lawfulness of the conduct may exclude intent on the part of the defendant polluter.[610]

A mistake would naturally exclude intent in the context of criminal liability, where the benefit of doubt principle applies. A mistake would be difficult to raise as a defence against a civil liability claim for environmental pollution. The general rule is that entities are managed by skilled personnel who have adequate expertise and knowledge. In most instances environmental damage would be caused by an entity that knows its obligation in regard to protection of the environment.[611] A mistake committed by an employee of a company is invariably committed by the company in terms of vicarious liability.

The principle of vicarious liability is based on the notion that if an employee commits a delict within the scope and course of his or her employment, the acts that are committed by him or her are attributed to the employer. South African case law - as developed by the Supreme Court of Appeal - has a different approach to the subject of vicarious liability.[612]
Intent is different from recklessness because, on a subjective basis, there is foresight but there is no desire to produce the consequences. The approach of South African law is that environmental liability should arise with respect to the conduct of persons who are sufficiently aware of what they are doing and the consequences it might produce. This means that a person is said to have chosen certain behaviour and its consequences when he or she is aware of the outcome of that behaviour.

The damage to the environment can be caused with or without intent. It could be accidental, for example where there is an accidental spillage of dangerous substances. It could as well be intentional in circumstances where an operator dumps

610 See Van der Walt & Midgley (2016) 335, *Cape Empowerment Trust v Fisher Hoffman Sithole* 2013 (5) SA 183 (SCA) para 24*, International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) emphasise the issue of wrongfulness as a measure of control with reference to liability.

611 See *Bareki* case above.

612 An employee who commits fraud in course of employment does not advance the interests of the employer. The employer, in such instances, cannot be held vicariously liable for the acts of the employee. In *Minister of Safety and Security v Morudu and Others* 2016 (1) SACR 68 (SCA) para 4 the court held that an employer is only liable for acts of the employee that are committed within the scope and course of his employment. In this instance, the employee drove an unmarked police vehicle and shot a person, he knew had a relationship with his wife, using his private firearm.

a dangerous substance in the middle of the night. South Africa is also a coastal state with a number of harbours through which goods pass which are destined for other countries in the continent.[613] Where a carrier causes a spillage that may put the welfare of the people and the environment at risk, the temptation to evade such liability and simply disappear into a neighbouring country is tempting. These are situations that NEMA does not provide for so it may be difficult to enforce penalties for parties in other countries.[614]

The principle of duty of care, with reference to the protection of the environment, calls for commitment for both the operators and relevant authorities to ensure the safety of the environment. The issue of orphaned damage arises from intentional conduct for which no one is prepared to account. For the purpose of enforcement of penalties, the competent authority would have to prove intent to cause harm to the environment.

4.4.2 Negligence

Negligence can be defined as the conduct that falls below the standard that has been established by law for the protection of others against unreasonable risk of harm.[615] Negligence can also be described as breach of a duty where due care was supposed to be exercised by a reasonable person but was not. Neethling and Potgieter describe negligence as an 'attitude or conduct of carelessness, thoughtlessness or

613 As explained by Greenfields *et al* (2015) 18 *PER/PELJ* "Standard of Care in Sport" 2185-2186 that the standard of care required to avoid injury to players is maintained in the interest of the sporting communities. The authors highlight the fact that intent is also crucial for sporting sector in relation to the sector's regulations. It is not possible, in every circumstance, to identify an operator who is responsible for damage to the environment.

614 Fogleman V (2010) 2 *Env.Liability* "The European Court of Justice Rules on the Environmental Liability Directive" 41-42, Neethling and Potgieter (2015) 208 as of the opinion that a causal link exists between the harmful conduct of the operator and the intent should be established. In the absence of such a causal link, it would be difficult to obtain conviction for environmental offences.

615 Pienaar L (2016) 19 PER/PELJ "Investigating the Reasons Behind the Increase in Medical Negligence Claims" 2-4 explains that the increase in medical negligence claims has resulted in high premiums for insurance for medical practitioners and their patients as doctors now have to conduct more tests to avoid exposing themselves to the risk of claims by patients. When the polluters pay more for environmental damage, they are likely to be more cautious to avoid unnecessary incidents of pollution. In cases of negligence a person is blamed for attitude or conduct of carelessness, thoughtlessness or imprudence because by giving insufficient attention to his or her actions he or she failed to adhere to the standard of care legally required or expected of him or her.

imprudence'.[616] For example, the defendant acts negligently if he or she has departed from the conduct that is expected of a reasonable prudent person acting under similar circumstances.

The issue of negligent conduct was raised in *Messina Associated Carriers v Kleinhaus*[617] in which the court held that the owner of the vehicle is liable for its negligent driving by an authorised driver. In *Van Vuuren v eThekwini Municipality* the Supreme Court of Appeal held the municipality liable for negligence because it did not take precautionary measures to ensure safety of children in the beach.[618] In order to establish negligence as a cause of action in terms of the law of delict, a plaintiff must prove that the defendant had a duty to the plaintiff and the defendant has breached that duty by failing to conform to the required standard of conduct.[619] The defendant has a duty to disprove the presence of negligence concerning the matter from which the case arises.[620] The criterion adopted by the law - to establish whether a person has acted carelessly and thus negligently - is the objective standard of the reasonable person. The defendant is negligent if the reasonable person in his position would have acted differently and according to the courts the reasonable person would have acted differently if the unlawful causing of damage was reasonably foreseeable and preventable. The defendant's negligent conduct must be the cause of the harm to the plaintiff and the plaintiff must have been harmed or damaged.

616 Neethling and Potgieter (2015) 137, Visser and Potgieter (2012) 125, Loubser *et al* (2017) 136. In *Premier, Western Cape v Fair Cape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA) the court held that the test for reasonableness goes not only to negligence but also to determine the boundaries of negligence.

617 2001 (3) SA 868 (SCA).

618 2018 (1) SA 189 (SCA).

619 Carstens (2013) *Obiter* "Judicial Recognition of the Application of the Maxim *Res Ipsa Loquitur* to a Case of Medical Negligence: *Ntsele v MEC for Health, Gauteng Provincial Government*" (Case Number: 2009/52392 GSJ dated October 2012) 351-353 and *Mohofe* case as stated above.

620 The principle in relation to case of negligence is not similar in all cases involving negligence. For example, in matters arising from medical negligence, negligence is regarded as such where the occurrence from which allegation arises does not ordinarily happen in medical practice without negligence. In relation to pollution damage, negligence may arise from the ordinary occurrence of a spillage or leakage of a harmful substance.

The test for negligence in the current South African law of delict is clearly articulated in the case of *Kruger v Coetzee*[621] where the court stated that - for the purposes of liability - *culpa* arises if:

(a) A *diligens paterfamilias* in the position of the defendant-

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss, and

(ii) would take reasonable steps to guard against such occurrences; and

(b) The defendant has failed to take such steps.

The test for negligence has been described in a more condensed manner by the courts without reference to foreseeability and preventability of damage. In *Buthelezi v Ndaba*[622] the court held that the determination of negligence ultimately rests with the courts, which are not generous in their determination of negligence. The level of care required by the courts is equal to the optimal level of care; the defendant would naturally take to avoid liability for damage to the environment.

To apply a rule of negligence, the court has to determine the degree of care in the particular circumstances and decide whether the defendants complied with that degree of care.[623] For example, if the defendant's factory pollutes a stream because of which the residents - who live downstream - suffer from ailments directly linked to that polluting activity the defendant would have failed to apply the degree of care required or expected of him or her in the circumstances. In the context of environmental liability the defendant should be held liable.[624]

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621 1966 (2) SA 428 (A), *Eskom Holdings v Hendricks* 2005 (5) SA 503 (SCA) para 8 the court said that a reasonable person in the position of Eskom should have foreseen the possibility of children being injured on climbing on their powerlines.

622 In *Buthelezi v Ndaba* 2013 (5) SA 437 (SCA) at para 14 the court held that the medical practitioner could not have been negligent in conducting a hysterectomy operation on the respondent. The basis of the opinion of the court was that if the practitioner had made an error that could be made by any 'reasonably competent medical practitioner, it would not amount to negligence'. Situations arise in relation to damage to the environment in which it is difficult to find negligence against the polluter. At the same time, a situation may occur where negligence may be found against the polluter.

623 Carstens (2013) 354-355 argues that the degree of care required in terms of the 'reasonable man test' may not be applied dogmatically by courts of law. See also the case of *Transnet v Jacobs* as stated above. The reasonable man test is based on the level of reasoning as an ordinary man may have in the particular circumstances.

624 See Hinteregger (2008) 5 in this regard. The defendant should bear the full cost of his or her risky behaviour or activity in the circumstances. The defendant in this scenario had the option to prevent pollution but did not do so to avoid liability.

If the defendant applies a precautionary measure and the standard of care expected of him to prevent the occurrence of such incidents, he would not be held liable for environmental pollution. The possibility of avoiding environmental pollution is the best alternative particularly where the possibility of damage is foreseeable and therefore preventable. In other words, by failing to apply the required degree of care, the defendant acts negligently in terms of the law of delict and should take responsibility for his or her act.

For instance, in *Fisher Hoffman v Sithole*[625] the court held the view that the plaintiff had made itself vulnerable with regard to risk. The plaintiff had acted negligently as it did not extricate itself from the transaction which put it at a contractual disadvantage. In terms of strict liability, the defendant is liable for the damage he or she has caused through his or her conduct regardless of whether the defendant was negligent. In *Jones v Santam Bpk*[626] it was stated that:

> A person is guilty of culpa if his conduct falls short of that of the standard of the *diligens paterfamilias,* a standard that is always objective and which varies only about the exigencies arising in any particular circumstances. It is a standard, which is the same for everybody under the same circumstances.

In contrast the defence of contributory negligence is concerned with the role of the plaintiff in the events leading up to, and causing harm, in order to determine whether the plaintiff must bear responsibility for environmental damage. This is dealt with below under apportionment of damages.

For example, the impossibility of identifying a single occurrence, the wrongdoer or the place of origin of pollution that may have caused the environmental damage or where the manifestation of the environmental damage becomes apparent long after the damage-causing event has occurred. Where it manifests in many different places and

625 *Fisher Hoffman Sithole* case.
626 1965 (2) SA 542 (A).

in many different guises, and even in different countries beyond the jurisdiction of South African law, it could create serious problems for liability regimes.[627]

The forms and descriptions of statutory liability serve to inform the extent of the cautious conduct required when participating in environmental damage-causing activities. In terms of Article 3 of the Declaration on the Right to Development states have the primary responsibility to create conditions favourable to the realisation of the right to development.[628] Failure to do so could constitute negligence. The creation of the conditions favourable to development does not imply that states have to expose their populations to dangerous situations in the name of development. The right to development also means that the states have a responsibility to protect human health, animal life, plant life and the environment.

The transportation of goods in whichever mode is, for example, regulated by law. The aim for this is to ensure that maximum safety of human health and the environment is maintained. The reasons for a lack of such observance could be attributed to negligence in most instances. In some instances, it would even be recognised as an intentionally created situation.

In *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd*[629] the appellant was the supplier of food products to the defendant who was running a chain of restaurant outlets in South Africa and internationally. The appellant sued the defendant for breach of contract when the latter could not pay amounts due to the appellant. The defendant could not be able to honour its terms of contract because the appellant had also failed to supply the right products. It was alleged that Hirsch had been supplying a prohibited foodstuff to the defendant. The foodstuff that was supplied contained a contaminant and was not supposed to be consumed by humans as it had a Sudan 1 dye. The court held that the law did not only prohibit the delivery of foodstuffs that contain a prohibited substance but it was also an offence for one to do so.[630] Where these regulations are

627 Bergkamp (2001) 2-6, *Harmony Gold Mining Company* where the companies had mining activities in the same vicinity of Klerksdorp that resulted in them experiencing environmental pollution related problems from some of the mining enterprises.
628 Article 3 of the Declaration on the Right to Development.
629 2011 (4) SA 276 (SCA).
630 See *Hirsch* case para 22. S 2 of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 provides that:

not properly observed by the polluters, liability law could be invoked for the protection of human health and the environment and the recovery of losses.

Section 28 of NEMA seeks to address a wide range of these situations as it imposes liability on the polluter to pay for the costs of remedial measures.[631] This could clearly indicate that a failure to comply with the general conduct required by all persons (as NEMA's expansive provisions state) would at the least, constitute negligence for the purposes of litigation. South Africa must, in its civil liability regimes, be guided by the current suite of environmental statutes.

Other jurisdictions have moved beyond this point and have addressed issues in targeted legislation. The European Union has, for example taken a step towards addressing problems pertaining to environmental liability by introducing a directive aimed at addressing liability in this regard.[632]

In addition to the overarching duty of care that NEMA requires from all persons, irrespective of fault, *not to cause* damage to the environment it specifically - in section 28(7) - limits the *duty to prevent* such damages only to the negligent conduct of the party omitting to do so. The Act states that any person who negligently failed to prevent the activity or process being performed or undertaken, or the situation from coming about, would incur liability for costs. This makes the burden of proof more onerous where a party institutes a civil damages claim owing to another's omission to prevent harm whereas any positive conduct of causing damage appears not to require fault in terms of the statute. This leads to the discussion below on strict liability in accordance with NEMA.

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(1) subject to the provisions of subsection (2) and section 6, any person shall be guilty of an offence-
(a) if he sells, manufactures or imports for sale, any foodstuff, cosmetic or disinfectant-
(i) which contains or has been treated with a prohibited substance, or
(ii) which contains a particular substance in a greater measure than that permitted by regulation; or
(iii) which does not comply with any standard of composition, strength, purity or quality prescribed by regulation for or in respect of any of its other attributes; or
(iv) the sale of which is prohibited by regulation.

631 S 28 of NEMA.

632 Glazewski (2005) 105-106, Visser and Potgieter (2012) 123, Hinteregger (2008) 4-5.

4.4.3 Strict Liability

Strict liability cannot be a panacea for every environmental or social ill that the country experiences. In fact, it remains uncertain whether a strict or risk liability regime could serve to reduce environmental pollution. Strict liability is liability without the presence or proof of fault that has its origins either in common law or in legislation. It is a deviation from general fault-based civil liability, assumes that the wrongdoer understands the risk of activity from which pollution may arise and does not require the presence of fault (whether intent or negligence).

Section 28(1) of NEMA introduces liability for all persons who may be involved in a polluting activity that gives rise to damage to the environment, without any reference to the absence or presence of fault *per se*.[633] Kidd is one of the authors who think that a strict liability regime may not give rise to logical outcomes. The author makes an example of a tenant or a petrol attendant at a garage who may be held liable for oil or gas pollution in the context of section 28 of NEMA.[634] Kidd raises an important point that section 28 of NEMA would apply irrespective of the ability of the person to meet the requirement of the duty of care required for negligence.[635] The list of the class of persons, who may be liable, is so broadly described that it carries the potential to include all persons associated with that particular environment, inclusive of persons who have no financial capacity or means to meet claims of that may accrue from their activities or negligence.

In South African courts, De Villiers J recognised the presence of strict liability as either absolute or risk liability in the *Bareki* judgment.[636] Both at the national and international

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633 Glazewski (2005) 151, Blackmore (2015) 89-90 and Scott WE (1979) 12 *CILSA* "The Theory of Risk Liability and its Application to Vicarious Liability" 47-49 are of the opinion that although strict liability is not viewed in a positive light, it remains an instrument that can be applied to resolve environmental problems. Strict liability is generally construed as the promotion of command and control of regulation.

634 The person in occupation of the land, to which S 28 refers, may include a tenant or any other person who may even lack the means to restore the environment or compensate the competent authority for their expenses during restoration.

635 Kidd M (2002) 15 *SACJ* "The use of Strict Liability in the Prosecution of Environmental Crimes" 24-26, Van der Walt (1968) 50-52, Kelly-Louw M (2016) 49 *CILSA* "The Doctrine of Strict Compliance in the Context of Demand Guarantees" 87-89.

636 Van der Walt (1997) 49, Van der Walt (1968) 89-90 and Neethling and Potgieter (2015) 231 hold a similar viewpoint that one of the most important developments - which has taken place in the delictual sphere - has been the creation of liability without fault in addition to traditional liability

level, existing environmental liability regimes include a mix of fault-based and strict liability rules. While fault liability is the rule, strict liability is imposed only as the exception with respect to certain specific and well-circumscribed activities in the environmental arena. However, some of the academic authors support the fact that strict liability should well become the predominant rule relating to compensation for environmental damage.[637] Since strict liability is regarded as then the exception, additional justification is a requirement for the application of a strict liability regime.

While fault-liability is generally accepted on the ground that certain conduct could have failed to comply with a certain standard of reasonable care, strict liability requires an affirmative vindication. This is the case because fault provides a strong moral and economic justification for shifting losses from an injured party to the party who has caused the environmental damage. In the case of strict liability, this justification is not available in the complete absence of the fault requirement. As a result, strict liability is restricted to clear and specific situations.[638]

Strict liability, nevertheless, remains a powerful potential instrument for change where levels of compliance are not convincing. Environmental legislation in many jurisdictions does not apply the concept of fault and, in South Africa, section 28 of NEMA contains this doctrine.[639]

Extensive measures on strict liability are, for example, also introduced by statute in the form of the Nuclear Regulator Act 47 of 1999, in section 30. The holder of nuclear installation licence for nuclear damage 30 is, whether or not there is intent or negligence

based on the presence of fault. See Loubser (2010) 361 who also agrees with the view that strict liability places the injured party in a better position as to liability for environmental pollution. The risk that could be posed to the environment may be controlled for the reason of seeking to avoid liability when damage is caused to the environment. The reason for the prevalence of orphan damage to the environment is precisely that polluters would, at all cost, try to avoid liability.

637 Murungi J and Kotzé LJ (2005) 38 *CILSA* "Environmental Liability under the Terminal Operators Convention: A South African Perspective" 49-50 and in this context also Pauw P (1978) (11) *CILSA* "The Liability of Parents for Loss caused by their Children" 305-308 and Van der Bijl C (2018) 2-4.

638 See Bergkamp (2001) 3-5, Nothling Slabbert *et al* (2011) 44 *CILSA* "The Application of the Consumer Protection Act" 170 and Hinteregger (2008) 4-5. These authors endorse the notion that the law of delict has a focus on fault-based liability that, in cases of environmental damage, could serve as an obstacle. The focus of environmental liability rules is inclined towards the principle of sustainable development.

639 Glazewski (2005) 119, Van der Walt (1968) 51 and Snyman PCA (1980) 13 *CILSA* "Product Liability in modern Dutch law" 178-180.

on the part of the holder, liable for all nuclear damage caused by or resulting from the relevant nuclear installation during the holder's period of responsibility—the nuclear installation, to any other place in the Republic or in the territorial waters of the Republic from or to any place in or outside the Republic. (2) The liability for nuclear damage by any holder of a nuclear installation licence is limited, for each nuclear accident, to the amounts determined in terms of section 29(2. (5) Nothing in this section precludes a person from claiming a benefit in terms of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993), but such person may not benefit both in terms of this Act and the Compensation for Occupational Injuries and Diseases Act, 1993. (6) The holder of a nuclear installation licence is not liable to any person for any nuclear damage— (a) to the extent to which such nuclear damage is attributable to the presence of that person or any property of that person at or in the nuclear installation or on the site in respect of which the nuclear installation licence has been granted, without the permission of the holder of that licence or of a person acting on behalf of that holder; or 32 5 10 15 20 25 30 35 40 45 50 55 (b) if that person intentionally caused, or intentionally contributed to, such damage. (7) The holder of a nuclear installation licence retains any contractual right of recourse or contribution which the holder has against any person in respect of any nuclear damage for which that holder is liable in terms of subsection (1). (8) Any person who, without a nuclear installation licence, carries out an action for which such a licence is required, is, whether or not there is intent or negligence on the part of that person, liable for all nuclear damage. (9) Nothing in this section affects any right, which any person has in terms of any contract of employment, to benefits more favourable than those to which that person may be entitled in terms of this section.

It is specifically the Bamako Convention that addresses the issue of waste generation as an environmental problem.[640] Article 3 of the Bamako Convention requires waste generators to submit reports on the wastes generated by them. It imposes a strict and

640 The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa of 1991 to which South Africa is not a signatory nor has it ratified the Convention. According to S 231(1) of the Constitution, the negotiating and signing of all international agreements is the responsibility of the national executive. S 231(2) further states that an international agreement binds the Republic only after the National Assembly and the National Council of Provinces have approved it. S 231(3) provides for an exception in that an agreement of a technical, administrative and executive nature binds the Republic without ratification or accession entered into by the national executive.

unlimited liability for harm caused by hazardous wastes.[641] This form of liability without fault creates extensive liabilities and an onerous duty to prevent damage caused by waste mismanagement. This type of open-ended strict liability would clearly discourage and prevent polluters from causing damage to the environment as enterprises would act more responsibly knowing that their actions would result in extensive costs and losses. The Bamako Convention also imposes a ban on importation of hazardous waste into Africa. The Convention aligns well with liability for pollution damage.

The White Paper on Integrated Pollution and Waste Management Policy[642], as a subsidiary policy of NEMA, subscribes to the latter's vision and goals. National legislation such as the Waste Act is issued in accordance with its policy provisions and serves as the primary statute that regulates issues on waste in South Africa.

Specific strict liability rules can also be based on theories of increased environmental risk and risk spreading.[643] Recent strict liability theories focus mainly on cost internalisation, which requires that the social costs of any activity be charged to that activity so that the private costs of conducting that activity reflect the cost imposed on society.[644]

There have been several international initiatives to introduce strict liability regimes to act as a deterring factor in ensuring the protection of natural resources during development.[645] The Lugano Convention, for example, implements a regime for strict liability that - in principle - covers all types of damage caused by dangerous activities.[646] As far as remedies are concerned, the Convention provides that in the

641 Article 3 of the Bamako Convention.
642 White Paper on Integrated Pollution and Waste Management Policy of 2000 (GG No 20978 of 2000).
643 Bergkamp (2001) 3-6 and Mukheiber A (2015) 132 *SALJ* "Limitless Liability - Tokoloshe or Real Danger? Country Cloud Trading CC v MEC, Department of Infrastructure Development" 24-25.
644 Bergkamp (2001) 3-6 believes that the polluter pays principle is the cornerstone of sustainable development. The polluter pays principle takes the burden of environmental liability from the taxpayer to the polluter.
645 See the discussion by Brans (2001) 39, Spitso M (1997) 30 *CILSA* "Exemptions from liability under section 247 of the Companies Act" 60-63 and Basse (2009) 8 on the proliferation of activities that degrade the environment in recent years.
646 Article 7 of the Lugano Convention of 1993 stresses the importance of strict liability. It also provides for a few exemptions from liability. For example, damage arising from carriage that is already covered by other international instruments. The Convention further highlights that it is easy for insurance to provide cover for activities that are known to be dangerous. What insurers do not want

case of damage or impairment of the environment, compensation will be limited to measures of partial restoration. The Lugano Convention covers traditional damage as well as ecological damage to natural resources by dangerous activities that would affect biological diversity. The Convention deals with damages but in a rather unspecified way by using the term "reasonable costs of restoration" which does not include all forms of damages in the broader sense. Furthermore, it also restricts claims to only the "reasonable" costs, thereby creating a more onerous burden of proof for the claimant.

Strict liability, as recognised in South Africa as part of the law, has its roots in both Roman and English law.[647] According to Van der Walt, the influence of Roman law on Anglo-American law was insignificant. The principle of fault could not find its way into those systems via Roman law in the way it did in South African law.[648] English law adopts the principle of liability without fault with specific reference to 'situations it considers to be inherently dangerous activities'. It is the same position with regard to American law as it also recognises liability without fault or negligence.[649]

As mentioned in the introduction to this chapter, strict liability is both a common law and statutory concept. For example, one may take the view that the extensive liability created in section 28 of NEMA is based on the concept of strict liability. The relevant subsections of section 28 state as follows: (7) Should a person fail to comply, or inadequately comply, with a directive under subsection (4), the Director-General or provincial head of department may take reasonable measures to remedy the situation or apply to a competent court for appropriate relief."

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is uncertainty about the potential of an extremely extensive scope of liability for activities they have to cover.

647 Van der Walt and Midgley (2005) 22-23 and Gutuza T (2014) 47 *CILSA* "The headquarter company structure in the Southern African context: A South African tax law perspective" 189 also express the view that the proof also raises an irrefutable presumption of intention, that intention is not required at all or it does not really matter. In *Pakendorf v De Flamingh* 1982 (3) SA 146 (A) the Appellate Division held that the press is strictly liable. The principle applies to other media such as the radio and television.

648 See Van der Walt (1968) 51-52, Dillon NDC (1986) 19 *CILSA* "The financial consequences of divorce: s 7(3) of the Divorce Act 1979: a comparative study" 273 and *Eskom Holdings Ltd v Halstead-Cleak* 2017 (1) SA 333 (SCA) and Kelly-Louw (2016) 86-87 in which the argument is that strict liability should provide for exceptions as strict standard of compliance is not possible in all cases.

649 Van der Walt (1997) 49.

Subject to subsection (9), the Director-General of the department responsible for mineral resources or the provincial Head of Department may recover costs for reasonable remedial measures to be undertaken under subsection (7), even before such measures are taken and all costs incurred as a result of acting under subsection (7), from any or all of the following persons:

(a) “Any person who is or was responsible for, or who directly or indirectly contributed to, the pollution or degradation or the potential pollution or degradation;

(b) The landowner at the time when the pollution or degradation or the potential for pollution or degradation occurred, or that owner's successor in title;

(c) The person in control of the land or any person who has or had a right to use the land at the time when-

(i) The activity or process is or was performed or undertaken or;

(ii) The situation came about;

(d) Any person who negligently failed to prevent-

(i) The activity or process being performed or undertaken, or

(ii) The situation from coming about.

This applies if such person failed to take the measures required of him or her under subsection (1). It is clear that this liability aims to fall to the shoulders of any person present or actively linked to the activities on the land in question.

To facilitate a total reimbursement, the statute provides that if more than one person is liable under subsection (8), the liability must be apportioned among the persons concerned according to the degree to which each was responsible for the harm to the environment resulting from their respective failures to take the measures required under subsections (1) and (4).

When investigating section 28(8) it appears as if persons listed under (a), (b) and (c) can be held responsible without meeting the requirement of fault, whereas persons classified under (d) can only be held liable for their negligent conduct. This can be justified because persons identified in paragraph (d) are one step removed from the activity or premises and thus are not directly in control thereof. For enforcement of remedies against them, a more onerous burden of proof is required, namely that they should at the least act negligently.

This has not yet been tested by the South African courts in the context of liability claims. It is, however, an extremely important point that affects the possibility of holding various persons, who are not owners in the narrow sense, liable in accordance with the statutory framework. The custodianships of land that belongs to certain communities are one reality that could create the liability of the community at large for damage caused.[650]

An important case to note is *Minister of Water and Environmental Affairs v Really Useful Investments No 219 (Pty) Ltd*[651] where Navsa J considered the significance of sections 28 and 36 of NEMA as provisions that address the issue of an environmental duty that must be imposed on those who cause pollution, and who must pay 'compensation in the event of expropriation for environmental purposes'. Useful Investments instituted a legal action against the Minister of Water and Environmental Affairs on the basis that their properties had suffered diminution in value owing to a directive issued by the City of Cape Town for the preservation and protection of the environment.

Feris refers to this duty of care, in terms of section 28, as a 'command and control mechanism' that is aimed on imposing sanctions for the polluters. Irrespective of the benefits of this measure, Feris further argues the fact that environmental legislation - specifically in the context of liability in terms of section 28 of NEMA - does not promote self-regulation for the industry as one of the flaws in the Act.[652] What this judgment does, however do, is to recognise the potential of a claim for damages. This is, irrespective of the challenges posed by the requirements for such a claim, a basic confirmation that more attention should be given to these types of claims by the state,

650 S 17(a) of the MPRDA was one of the key provisions the Constitutional Court had to deal with in the *Bengwenyama* judgment. Of significance in the matter was the *custodianship* of the land, which the court said belonged to the community concerned. The right to the equitable allocation of natural resources and socio-economic justice were paramount in the proceedings. The *Bengwenyama* judgment did not address the section 28 provisions directly yet it has the potential to recognise the link a custodian of land has through the recognition of the duty of care to the extent that this has the potential of liability in accordance with section 28 in future cases.

651 2017 (1) SA 505 (SCA) paras 14-15, Reinsma M (1977) 10 *CILSA* "The professional liability of the legal practitioner under Dutch law" 194-196 and Alheit K (2006) 39 *CILSA* "Delictual liability arising from the use of defective software: Comparative notes on the positions of parties in English law and South African law" 268-270.

652 Feris LA (2006) 9 *PER/PELJ* "Compliance Notices: A New Tool in Environmental Enforcement" 53/118, Kidd (2011) 149 and Franzoni LA (2017) 19 *American Law and Economics Review* "Liability law under scientific uncertainty" 327-329 argue that people are averse to risk and uncertainty. The need to take care and measures is increased where strict liability is applied.

to enable plaintiffs to succeed.

When imposed by legislation, the benefits of strict liability are that it may deter polluters from causing environmental pollution. Some authors hold the view that strict liability may not achieve such desirable results for various reasons. The criticism is because command and control does not help to secure the full cooperation of the industry. Unlimited strict liability has a potential to create complications for industries in that it could prevent the insurance industry from giving sufficient coverage for pollution-related risks.[653] Unlimited liability would impose excessive costs on the industries in general and therefore indirectly retard development. The introduction of liability caps could serve to balance the interests of the industry against the interests of citizens. The creation of liability caps, on the other hand, implies that claiming full compensation for environmental pollution damage may not be accomplished and only objectives beyond full compensation of harm may be attained.[654]

Capping strict liability would thus cause a situation that, instead of full reparation, compensation would be proportionate only to the financial capabilities of the industries involved in the hazardous activities. It is possible to accomplish full compensation if central industry funds are created and the government assumes a residual liability to better balance the industrial and citizens' interests. This, however, would require proactive conduct by government as well as the burden of the creation and administration of relevant funds. Strict liability with a fund option therefore would not mean that industries have to be burdened with unlimited or indeterminate liability.

Faure and Peeters[655] advocate the opposing view that the establishment of liability according to the extent of the harm can act as a safety net for hazardous activities.

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653 Faure and Peeters (2011) 36-37, *Van der Westhuizen v Burger* 2018 (2) SA 87 (SCA) para 7-11, Van der Bijl (2018) 4-6 emphasise that liability caps vary in amounts and are subject to periodical review. Limits are an important feature of any liability regime and can make implementation possible. The European Centre for Tort and Insurance Law Report of 2000 4 states that caps are not necessary to increase insurability since insurers could put themselves a financial limit on liability. Caps may lead to under-deterrence, under-compensation and violate the polluter pays principle.

654 De Gama (2017) 5, Faure and Peeters (2011) 37 and *Country Cloud Trading* case para 30-31.

655 Faure and Peeters (2011) 37 accept the view that environmental policy is created in the context of market failure that requires regulatory framework. The government has a responsibility to protect citizens and the environment and cannot leave environmental protection to the free market as that

The layers of liability do contribute to the effective allocation of risk burdens. Operators and their insurers may be incapable of covering the full amount of damage caused by certain hazardous activities which may benefit from supplementary liability that is extended to other parties benefitting from that activity, even if they had no direct participation in the incident causing the damage.

In practice, strict liability is more effectively enforceable if it is created in the form of a statute as the extent of the strict liability is created with more certainty when it is introduced by legislation.[656] As an analogy, the Consumer Protection Act is another statute that introduced some strict liability for products and services in limited circumstances and is seen as very important for the protection of consumer rights.[657]

The application of the Act is broad in scope in that it involves every transaction occurring within the Republic with reference to exchange of goods or services unless specifically exempted. The Act introduced strict product liability for goods that are sold to customers with defects that have the potential to cause serious injury or death. Section 61 of the Act provides for strict liability for damage caused by goods supplied by the producer, importer, distributor or retailer.[658] Section 61 of the Consumer Protection Act applies to damage caused by goods whether that damage is caused to the environment.

The CPA also creates an extensive form of vicarious liability and furthermore provides for joint and several liability. It allows a consumer who suffers harm to institute a claim for damages for defective goods against a number of role players in the manufacturing, distribution and trading process. The provision applies even where there is no direct contractual relationship between the manufacturer and consumer of goods.[659] The Act

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may not produce the intended environmental objectives. Caps on liability are an attempt to avoid putting excessive pressure on industry that itself should not left to its own devices.

656 Mupangavanhu Y (2014) 17 *PER/PELJ* "Exemption clauses and the Consumer Protection Act 68 of 2008: An assessment of Naidoo v Birchwood Hotel 2012 (6) SA 170 (GS)" 1169 and *Kruger v Coetzee* case above and *Naidoo v Birchwood Hotel* (2012) 6 SA 170 (GSJ) para 24-26.

657 The Consumer Protection Act 68 of 2008 promotes fairness and justice in the treatment of consumers.

658 S 61 of the Consumer Protection Act.

659 Bregman R (2014) "Product Liability in terms of s 61 of the Consumer Protection Act, 2008" https://www.linkedin.com/pulse/20140821201438-65492543-product-liability-in-terms-of-section-61-the-consumer-protection-act-2008 last accessed 12 June 2018.

and this specific section is broad enough to include products or services that cause environmental damage that eventually leads to injuries or death in humans.[660]

The Act does not, however, apply to goods or services that are supplied or promoted to the state,[661] and is limited to consumer protection only (which does not include all juristic persons), and only where the goods or services are supplied in the normal course of business'.[662]

4.4.4 Apportionment of Fault

There are instances in which it is a difficult to identify the polluter. There are also many circumstances from which the difficulty to identify the polluter arises. For example, where environmental damage is partly caused by an activity of a wrongdoer, and the owner of the property is partly at fault, the damages recoverable can be reduced proportionately. A situation where the defendant, who raises a defence that he or she is partly responsible for the damage, can give rise to complication.

For example, a person who is alleged to have polluted water in a municipal area raises a defence that the municipality is partly responsible by failing to renew their water infrastructure. A claim in respect of that damage will not be defeated by reason of the fault of the plaintiff but the damages recoverable in respect thereof will be reduced by the court to such an extent as the court may deem just and equitable having regard to the degree to which both the defendant and the plaintiff were at fault for their contribution to the damage.[663] In terms of section 1 (3) of the Apportionment of Damages Act[664] fault includes any act or omission which would, but for the provisions of this section, have given rise to the defence of contributory negligence.

660 See Franzoni (2017) 329-330, Mupangavanhu (2014) 1171 and Stoop PN (2015) 15 *PER/PELJ* "The Consumer Protection Act 68 of 2008 and Procedural Fairness in Consumer Contracts" 1095-1096.
661 S 5(2)(a) of the Consumer Protection Act.
662 S 5(2)(b) of the Consumer Protection Act.
663 Van der Walt and Midgley (2016) 332-333.
664 S 1(3) of the Apportionment of Damages Act.

Section 1 of the Act[665] relates to cases where a plaintiff has suffered harm partly because of his or her own fault and partly because of the fault of the defendant. The principle requires a comparative evaluation of the parties' respective degrees of fault and a proportionate reduction of the damages recoverable by the plaintiff.[666] In *Road Accident Fund v Guedes*[667] Zulman JA stated that the court exercises a wide discretion with regard to the assessment of the quantum of damages. In cases of environmental pollution, this tends to generate further problems as to the identity of the actual polluters.

This is particularly the case where parties, who might have contributed to environmental damage, are involved. It becomes difficult to measure the extent to which a particular polluter could have contributed to the environmental degradation. In *Federation* case, the issue of contributory fault by mining companies, who had caused the contamination of water, was not taken into consideration by the court.[668]

4.5. Causation

The inquiry into factual causation is generally determined by applying the 'but for test' or *sine qua non* test yet the final question of liability, the allocation of divisible harm and the onus of proof, are issues that require an investigation of public policy involving

665 S1 of the Act does not clearly address the issue of apportionment of damages where a party contends that it was authorised to engage in an activity that has culminated in environmental damage. In such cases, it is not clear whether society should be regarded as having contributed to environmental pollution by virtue of the party having been authorised to engage in polluting activity.

666 S 1(b) of the Act also provides that damage will, for the purpose of paragraph (a), be regarded as having been caused by a person's fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.

667 In *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) the court further held that 'actuarial computation is a useful basis for establishing the quantum of damages'. Mhlantla JA further reiterated in *Road Accident Fund v Zulu* and Others [2011] ZASCA 223 para 10 that 'it has to be borne in mind that an enquiry into damages for loss of earning capacity is of its nature speculative. The court below had to determine issues on predictions based on facts'.

668 In *Federation* case, four companies were conducting mining activities in the area because of which water was contaminated owing to their mining activities. In cases such as *Federation* case, it is difficult to know a party who may have acted with negligence to cause water pollution or environmental damage. South African law is not adequately developed in relation to liability for damage where wrongdoers are not easily identifiable.

legal causation. The existence of a factual link between the defendant's act and the harm suffered by the plaintiff is not enough to establish a legally sound connection.[669]

The issue of a second causation, namely legal causation, always creates the necessary barriers with regard to legal liability in the interest of justice and fairness. Neethling and Potgieter - as well as Fagan - endorse the view that a wrongdoer should not be held liable without limitation in the chain of harmful consequences which may have been caused by his conduct.[670] The difficulty that a plaintiff normally faces, about causation, is to meet the all the criteria for factual causation followed by proving legal causation as well.

A two-stage process is therefore followed to determine whether the conduct of the defendant may give rise to liability for the damage caused to the environment. The first part of the two-stage process is the establishment of a factual link and the detrimental consequences on the environment, which is normally a straightforward process in practice. The second part of the two-stage process is a complex one as it poses a challenge for the courts because it pertains to the imputation of legal liability to the conduct of the polluter. This implies that there is the potential for a variety of tests for causation.[671] As put by Neethling and Potgieter:

> 'In terms of the flexible approach, the theories of legal causation are at the service of the imputable question and not *vice versa*. This means that the theories should be regarded as pointers or criteria

669 See *MC v JC* 2016 (2) SA 227 (GP), *Portwood v Svamvur* 1970 (4) SA 8 (RAD). *S v Tembani* 2007 (2) All SA 373 (SCA) in which the appellant inflicted a wound, which without treatment, would be fatal to the victim but resulting death caused by gross negligence of the substandard medical care at hospital. The question to be determined was whether the accused could escape legal liability for the murder of the deceased because of gross negligence of the medical personnel at the hospital in the treatment of the victim interfered in the causal chain of events. Cameron J stated 'the fact that others may fail to intervene to save the injured person, does not, while the wound remains mortal, diminish the moral culpability of the perpetrator, and should not in my view diminish his legal culpability. That is so even, where those others fail culpably in breach of a duty they independently owe to the victim. It would offend justice to allow such an assailant to escape the consequences of his conduct because of the subsequent failings of others, who owe no duty to him, whose interventions he has no right to demand, and on whose proficiency he has no entitlement to rely. Their failings in relation to the victim cannot diminish the burden of moral and legal guilt he must bear.'

670 Neethling and Potgieter (2015) 187, Fagan (2013) 115.

671 See the cases of *Smit v Abrahams, Holmedene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A), *Transnet Limited t/a Transnet Freight Rail v SA Metal and Machinery Co (Pty) Limited* (A 439/2013) [2014] ZAWCCHC 114 and *Marais v Commercial General Agency Limited* 1922 TPD 440.

> reflecting legal policy and legal convictions as to when damage should be imputed to a person. Damage is imputable when, depending on the circumstances, it is a direct consequence of the conduct, or reasonably foreseeable, or if it is in an adequate relationship to the conduct or for a combination of such reasons, or simply for reasons of legal policy.'[672]

According to this theory, a consequence is imputed to the wrongdoer if the consequence is adequately connected to the conduct of the polluter.[673] This would be the case if, according to human experience, in the normal course of events the act has the tendency to bring about that type of consequence.[674]

4.5.1 Factual causation

Factual causation concerns a particular kind of connection between two sets of facts. It refers to a sequence of events that yields a particular outcome arising from those events. For the plaintiff to succeed in his action, proof and sequence of events become the determining factors for the plaintiff.[675] Delictual liability requires a causal link between wrongful and culpable conduct, on the one hand, and the loss suffered on the other hand.[676] Causation is one of the most complex requirements in the law of delict. It is specifically challenging in the field of environmental torts[677] or in South

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672 See Neethling and Potgieter (2015) 196, Ahmed (2014) 1518-1519, Dyani N and Mhango MO (2010) 13 *PER/PELJ* "How could the Pension Fund Adjudicator get so wrong? A Critique of Smith versus Eskom Pension and Provident Fund" 164/2014-166/204 and Le Roux-Kemp A and Burger E (2014) 17 *PER/PELJ* "Shaken Baby Syndrome: A South African Medico-Legal Perspective" 1289-1291

673 Joubert *et al* (2005) 235 and Loubser *et at* (2017) 70-73 reiterate that the factual nexus is existent with regard to the defendant's act and the detrimental consequences on the plaintiff.

674 See the discussion of Mukheiber (2015) 26-28, *City of Tshwane Metropolitan Municipality v Nambiti Technologies (Pty) Ltd* 2016 (1) All SA 332 (SCA) and Neethling and Potgieter (2015) 198-201 on the issue of factual causation. See also Nothling Slabbert *et al* (2011) 173-175 on the point that the 'but for test' is a crucial step towards proof of environmental liability.

675 See Fagan (2013) 109, *Haweka Youth Camp v Bryne* 2010 (6) SA (SCA), *Administrateur Transvaal v Van der Merwe* 1994 (4) SA 347 (A), *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) and *Cape Town Municipality v Butters* 1996 (1) SA 473 (C) as regards the description of factual causation.

676 As put by Van der Walt & Midgley (2016) 63, *Minister of Finance v Gore* 2007 (1) SA 111 (SCA), *Minister of Police v Skosana* 1977 (1) SA 31 (A), S v Van As 1967 (4) SA 594 (A), Fagan (2013) 111-113 and Neethling and Potgieter (2015) 183-184 an essential element of delictual liability is the existence of a causal nexus between the defendant's conduct and the detrimental consequences sustained by the plaintiff. The recognition of causation as a legal requirement originates from the Roman law texts on the problem of an interruption in the chain of causation.

677 Terminology used in some other jurisdictions such as in English law.

Africa's mixed legal system for civil liability claims for payment of environmental damages.[678] In *Hirsch,*[679] the court held that the application of the *conditio sine qua non* test requires an investigation to determine whether there is an indispensable and essential action, condition or ingredient of factual causation.[680]

This is normally referred to as the chain of causation. It is the event, and then the result of an event, that must be demonstrated in the light of the proven relevant facts to succeed with a liability claim.[681] If the event does not occur or is ignored, the enquiry entails whether the result would still have occurred. Should this be the case, there is no factual link and factual causation is absent. Where there is an intervening circumstance or *novus actus interveniens,* for example, the defendant may not be held liable for environmental damage as the factual chain of events was interrupted. Where pollution, that occurs as a result of the conduct of one polluter, it may be onerous to hold that polluter liable. In *Tyco International (Pty) Ltd v Golden Mile Trading 547 CC,*[682] the parties that were responsible for the incident were found to be liable for the incident in equal measure by the court.

In the *Lee* case, the Supreme Court of Appeal articulated factual causation in the following order: (1) a person who performed negligent conduct can be delictually liable for harm suffered by another person only if the negligent conduct was the only cause of harm, (2) negligent conduct was a factual cause of harm if and only if, but for the

678 Causation is the relationship between the cause and event where the effect is regarded as the consequence of the first. In other words, causation is also a relationship between a set of factors and a phenomenon. Anything that affects an effect is a factor of the effect. The element of harm is always at the centre because it is the cornerstone of the law of delict. Once the element of harm is identified, it is possible to the nature of the enquiry to determine whether other elements have to be proven.

679 *Hirsch* case para 15-17. Brotrade was a distributor of foodstuffs supplied by Hirsch, and the recall of the foodstuffs that was contaminated resulted in them suffering financial loss. The court held that Hirsch was liable for such loss as suffered by Brotrade. See *Jacobs v Transnet* and *Chartaprops 16 (Pty) Ltd v Silberman* 2009 (1) All SA 197 (SCA) in which the Supreme Court of Appeal expressly held the defendants liable for negligence. See also Malan K (2015) 18 *PER/PELJ* "Deliberating the Rule of Law and Constitutional Supremacy from the Perspective of Factual Dimension of Law" 1208.

680 See *AB and Another v Minister of Social Development* 2016 (2) SA 27 (GP), *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (1) All SA 346 (SCA), First National Bank of SA v Rosenblum 2001 (4) SA 189 (SCA) and *Van der Westhuizen v Burger* 2018 (2) SA 87 (SCA).

681 Neethling and Potgieter (2015) 175, Gutuza (2014) 197-198 and the *Lee* case above express the view that there is no single and general criterion for causation which is applicable in all instances. For example, in *Mashongwa* the Constitutional Court made it clear that the liability for PRASA arose from the fact that it had a public duty to provide safe transport to the public.

682 (949/2013) [2016] ZASCA 44.

negligent conduct, the harm would not have occurred, (3) a court is justified in concluding that a defendant's negligent conduct was a factual cause of that harm, and (4) a plaintiff has proved that a defendant's negligent conduct probably was a factual cause of the plaintiff's harm, if and only if the plaintiff has proved that "but for the negligent conduct the harm probably would not have occurred". In the same matter, the Constitutional Court adopted a different approach, as it did not agree with 2 and 4 above.

Although this appears to be a simple exercise, it most often - in environmental pollution cases - may pose challenges with the main being the potential of multiple causation and cumulative causation.[683] For example, where more than one incident results in damage to the environment, all of the incidents are regarded as contributing causes to the ensuing environmental damage.[684] Multiple causation is a form of causation from the approach that a single cause is unlikely to be the sole cause of the problem. In this instance more than one actor or event causes the loss and the contribution of each of them - to the damages - must be determined. For cumulative causation, events or incidents are staggered in that one flows upon the other, each of them aggravating the situation or increasing the losses.[685] A test for factual causation solely depends on the facts of each case and cannot always entail a yardstick of a general nature that can be applicable to all environmental complexes.

In cases where civil liability for damage is divisible, parties can be held proportionally or, even in some cases, jointly and severally liable. Where it is indivisible, the parties could be held jointly, or jointly and severally liable. In the *Bentley* case[686] the court held

683 For multiple causation, S 28 of NEMA provides a statutory solution that is dealt with further below in this chapter.

684 See Van der Walt and Midgley (2016) 201, *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) and Van der Bijl (2018) 4-6 in their critical analysis of the responsibility imposed on others including parents to control those in their care who could pose danger to other persons. The view is further advanced that causation should be applied to attain a certain standard of justice.

685 In *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) the court held that the defendant could not be held liable for what had not been proved in court as evidence.

686 *Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar* 2010 (5) SA 499 (SCA), *Bentley* case and *Hirsch v Chickenland* as stated above. In *Lee* case above the applicant instituted a delictual claim against the Minister of Correctional Services on the grounds that poor prison management had resulted in him having been infection with TB. The High Court applied the "but for test" to determine factual causation and held the minister liable. The Constitutional Court held that "there was thus nothing in our law that prevented the High Court from approaching the question of causation simply by asking whether the factual conditions of Mr Lee's incarceration were a more probable cause of his tuberculosis, than that which would have been the case had he not been

that the 'enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether - upon such a hypothesis – the plaintiff's loss would have ensued or not. If it would, in any event, have ensued then the wrongful conduct was not the cause of the plaintiff's loss'. In instances in which damage is caused to the environment, a lack of causal link would, for example, be present in the event of a natural disaster causing the loss.

With regard to pollution damage, the success in proving a causal link depends on the timelines. In an instance, where even negligent conduct is proven after a long period it may be difficult to find the polluter or prove factual causation to impose liability for such damage.

The introduction of section 28 of NEMA has changed the common law position by introducing specific statutory measures on factual causation and the apportionment of losses. It appears that even putative causation for future damages is addressed as follows:

Section 28(1) states that every person who causes, has caused *or may cause*[687] significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment. Subsequently section 28(2)(a) refers to any activity or process is or was performed or undertaken; or (b) any other situation exists, which causes, has caused *or is likely to cause*[688] significant pollution or degradation of the environment.

The factual link is further regulated by section 28(8) in that the Director-General or provincial head of department may recover all costs incurred from *any or all*[689] of the

incarcerated in those conditions. That is what the High Court did and there was no reason, based on our law, to interfere with that finding" see para 55.

687 Own emphasis.

688 Own emphasis.

689 Own emphasis.

persons listed in NEMA.[690] In allocating the loss, section 28(9) states expressly that the Director-General or provincial head of department may recover costs proportionally from any other person who benefited from the measures undertaken under section 28(7). In order to limit extensive liability, section 28(10) stipulates that costs claimed under subsections (6), (8) and (9) 'must be reasonable and may include, without being limited to labour, administrative and overhead costs.'

Section 28(11) further refines this proportional allocation by stating that if 'more than one person is liable under subsection (8), the liability must be apportioned among the persons concerned according to the degree to which each was responsible for the harm to the environment resulting from their respective failures to take the measures required' under the Act. Although this provision in the statute is clearly worded, it remains the duty of the court to apportion damages proportionally in accordance with degrees of factual causation in each case, taking into consideration the facts and circumstances. The responsibility of the persons as well as a proportion of the benefits a person has gained where applicable in terms of this Act will have to be considered.

4.5.2 Legal causation

Legal causation is the relationship that is expressed in the harm and its consequence for which the defendant should be held liable. Legal causation, in other words, is the result of the occurrence from which the defendant should not be exonerated. A factual link between the event and the harm must first be established, following which the question remains whether the defendant should be held liable for such damage. According to Van der Walt and Midgley, as a matter of policy persons are not called upon to make good all the harm that could be attributed to their wrongful conduct by

690 28(8) (a) any person who is or was responsible for, or who directly or indirectly contributed to, the pollution or degradation or the potential pollution or degradation; (b) the owner of the land at the time when the pollution or degradation or the potential for pollution or degradation occurred or that owner's successor in title; (c) the person in control of the land or any person who has or had a right to use the land at the time when— (i) the activity or the process is or was performed or undertaken: or (ii) the situation came about: or 10 (d) any person who negligently failed to prevent— (i) the activity or the process being performed or undertaken: or (ii) the situation from coming about: Provided that such person failed to take the measures required of him or her under subsection (1).

factual causation because the burden would be excessive in such instances.[691] As a matter of policy, a sufficiently close connection should exist before the persons are held liable to compensate others for acts they have committed.

This entails the enquiry whether there is a sufficient link to the loss for the legal liability to arise,[692] meaning that the loss must not be too remote. The courts usually take a flexible approach based on general policy considerations in determining whether legal causation is present to a sufficient degree to justify holding the actor, whose conduct caused the damage, liable.

The purpose of legal causation is to fix the outer limit of liability by determining whether a factual link between conduct and consequence should be recognised in law.[693] Liability without limits would result in indeterminate liability and that would have detrimental effect socially and economically.[694] In order to counter this, both factual and legal causation are required.

In *Smit v Abrahams,*[695] the link between factual causation and legal causation was considered for the determination of compensation payable by the defendant. Botha J held that legal causation is determined by the existence of close connection and that

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691 Van der Walt & Midgley (2005) 168, Malan (2015) 1207 and Snyman (1980) 182 are correct in the context of environmental liability as it is not always possible to seek compensation for some of the minor environmental incidents. It is in cases where there is significant degradation to the environment that the party - who has caused it - has to be held liable for the damage.

692 According to Neethling and Potgieter (2015) 174 and Fagan A (2013) 5 *Constitutional Court Review* "Causation in the Constitutional Court: Lee v Minister of Correctional Services" 108 'our courts have accepted that the *conditio sine qua non* approach is not the only way to determine factual causation. For them the *conditio sine qua non* is the simplest and most intelligible way to construe or explain the existence of a causal link.'

693 See Van der Walt & Midgley (2016) 168, *Minister of Safety and Security v Hamilton*) paras 32-35 and Knobel JC (2105) 18 *PER/PELJ* "The bald and golden eagle protection act, species-based legal protection and the danger of misidentification" 2608-2610.

694 See *Bareki* and *Mukheiber v Raath* 1999 (3) SA 1065 (SCA), *Hattingh v Roux* 2012 (6) SA 428 SCA cases in which the court raised the issue of indeterminate liability and causation as crucial issues with regard to public policy considerations. In *Country Cloud Trading*, para 16 and 25, the court held that causation, as a matter of public policy consideration, is a mechanism of control where indeterminate liability may eventuate.

695 *Smit v Abrahams* 1994(4) SA 1(A.) the appellant had caused damage to the vehicle of the defendant. The defendant was using the pick-up truck for his business. In the absence of the pick-up truck he hired another vehicle to assist in his business. It was the expenses incurred during a period of three months that the appellant disputed as being unreasonable and that he should not have been responsible for such expenses. Abrahams had claimed payment for the market value of the pick-up truck and payment for the rental, which the defendant had paid for the use of another vehicle he had hired in order to conduct his business.

must take into account the issue of policy considerations and the limits of reasonableness and fairness.

To establish legal causation, the courts apply a flexible test based on reasonableness, fairness and justice, policy and normative considerations. In *Fourway Haulage SA v SA National Roads Agency*[696] the court stated that:

> 'Considerations of fairness and equity must inevitably depend on the view of the individual judge. In considering the appropriate approach to wrongfulness, I said that any yardstick, which renders the outcome of a dispute dependent on the idiosyncratic view of individual judges, is unacceptable. The same principle must, in my view, apply with reference to remoteness. That is why I believe we should resist the temptation of a response that remoteness depends on what the judge regards as fair, reasonable and just in all the circumstances of that particular case. Though it presents itself as a criterion of general validity, it is, in reality, no criterion at all.'

The question of legal causation is thus essentially one of limiting the boundaries of legal liability. The law of delict requires that a person who infringes the rights of another that he must make good for such infringement, yet also recognises that there should be limitations on rights of the wronged persons as well. According to Van der Walt and Midgley[697], although a factual link exists between the conduct and the harmful consequences, courts must strike a proper and equitable balance between the interests of the wrongdoer and of the innocent victim. In essence, therefore the question of legal causation is not a logical concept concerned with causation but a moral reaction involving a value judgment as well as applying common sense which

696 2009 (2) SA 150 (SCA), *Groenewald v Groenewald* 1998 (2) SA 1106 (SCA) and *Sibisi v Martin* 2014 (6) SA 533 (SCA) highlight the mootness of the legal action where negligence is not established.

697 See (2016) 168, as well as Kelly-Louw (2016) 92, Stoop (2015) 1095, Fagan (2013) 108, Ahmed (2014) 1517 and Robinson R (2018) 21 *PER/PELJ* "The Legal Nature of the Embryo: Legal Subject or Legal Order?" 5-7.

is aimed assessing whether the result can fairly be said to be imputable to the defendant by a court of law.

There are two different viewpoints on legal causation from a historical perspective. The first one states that a defendant should never be held liable for consequences that no reasonable person could have foreseen would flow from his or her conduct.[698] The second one is based on the conviction that an innocent victim of a delict should be allowed to recover damage flowing from all the direct consequences of the wrongdoer's conduct. A person for instance, who is victim of environmental damage, should be able to claim damages for costs incurred owing to environmental damage that requires reparation. This would flow from the consequence of the conduct of the person who might have caused such damage to the environment.

These views as stated above culminated in the formulation of the direct consequences theory. According to this theory, a wrongdoer is liable for all the consequences of his or her negligent conduct with regard to environmental infringements.[699] This theory is not generally used as the primary general test for imputation of harm, although courts sometimes refer to it in combination with reasonable foreseeability.

According to Van der Walt and Midgley, direct consequences are those that follow in sequence from the effect of the defendant acting upon existing conditions and forces already in operation at the time, without the intervention of any external forces, which come into operation after an environmental infringement has been committed. It does not matter whether such consequences were probable or improbable, foreseeable or unforeseeable. In an attempt to restrict the limits of liability, in accordance with the direct consequences test, courts attempt to limit liability to the direct physical consequences of wrongful conduct.[700]

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698 A person who takes a lethal weapon to be used against another should foresee the possibility that his or her actions may lead to the harm of that person or property. In the context of environmental liability, for example, a person who manufactures goods, which may cause harm to others, should foresee the possibility of causing harm to other people. See *Hirsch* case as stated above.

699 See the general perspective of Visser and Potgieter (2015) 311-312, Griffiths A (2018) 20 "Broadening the Legal Academy, the Study of Customary Law: The Case for Social-Scientific and Anthropological Perspectives" 7-8, Labuschagne (2018) 4-7.

700 See (2016) 206. There is for example a view that the direct consequences doctrine finds its application in personal injury cases where a wrongdoer is held liable for any harm flowing from the

In the past, different theories for legal causation were formulated and applied by the courts, including the theories of adequate causation, direct consequences, fault and reasonable foreseeability. The approach of the courts to legal causation has become flexible over time and is specifically informed by public policy primarily measured according to constitutional norms and values.[701]

Proving legal causation is not always a necessary step in proving the elements for delictual liability. There are even instances where environmental harm is caused and the environmental harm falls clearly within the limits of the wrongdoer's liability after testing for factual causation, that it would be unnecessary to examine legal causation at all.[702]

4.5.3 Cumulative Causation

At its foundation, cumulative causation implies an ongoing activity that is defined by non-random and evolutionary processes. Cumulative causation involves the state-of-the-art technology already in use and the rejection of the part of the old technology. Cumulative causation is concerned with the increase in, for example, the diseases and pollution incidents that cause harm cumulatively.

Chemicals, for instance, do not all have an immediate effect on the human health or the environment. Environmental problems are cumulative in nature as these develop over time. A crystal example in this regard is the silicosis condition that has cumulative

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plaintiff's physical condition, however unforeseeable, as expressed by stating that the wrongdoer must take his victim as he finds him.

701 See Neethling and Potgieter (2015) 222, Visser and Potgieter (2012) 307-309 *Lee* case above, Cassim R (2016) 19 *PER*/*PELJ* "Deliquent Directors under the Companies Act 71 of 2008: *Gihwala v Grancy Property Limited*" 2016 ZASCA 35" 5-6, *Absa Bank Ltd v Leech* 2001 (4) SA 132 (SCA), *Klokow v Sullivan* 2006 (1) SA 259 (SCA), *Yarona Healthcare Network v Medshield* (1108/2016) [2017] ZASCA 116, *Rahim v Minister of Justice* 1964 (4) SA 630 (A) and Van der Walt and Midgley (2016) 60-64 as these sources also endorse the view that the purpose of damages is to compensate a person for harm suffered by the plaintiff. The objective is not to grant profit to the plaintiff from the defendant's wrongdoing. The intention is to do justice to the parties and the damaged property or the environment. This view is based on public policy considerations that it would be contrary to public morals to do so.

702 This appears to be the aim of S 28 of NEMA in that it limits the extent of true factual causation and the necessity of legal causation.

effect on the human body and the environment in general. Cumulative causation is mostly used in medical terminology as the changes in the condition of the patient.

Cumulative causation refers to existence of the increase of causes that give rise to liability. More than one mine may dump toxic chemicals into a water stream. Especially in the Witwatersrand, where mines are in close proximity to each other, more than one culprit could have caused ground and groundwater pollution over many years. The challenging question remains who was first, whether other contributions can be seen as a new intervening cause, and the proportionality of contributing to the eventual damages caused.[703]

In the absence of clear legislation such as that found in section 28 of NEMA, it is not clear in – South Africa's general law of delict - whether defendants can always be held liable on a proportional basis for incidents to which they have contributed or be absolved from liability at all owing to the multiplicity of incidents. In *Country Cloud,* Nkabinde J dealt with the issue of multiple causes as the judge stated that causation remains premised on policy considerations.[704]

A further complication in multiplicity – which is not dealt with satisfactorily by South African legislation - would be in a situation where damage to the environment is caused by various unidentified polluters over time. In this case the identity of the exact polluters is impossible to find in situations which complicates proportionality.[705] Kidd argues that the application of section 28 of NEMA is cumbersome yet it has a wide reach with reference to liability to address specifically some complications plaintiffs may encounter.

Cumulative causation can be described as a situation where there is a cumulative increase of the causative factors that lead to the harm of a person or a thing or the

703 See the discussion on NEMA s28 above

704 See *Country Cloud Trading* case and Pienaar JM (2017) 20 *PER/PELJ* "The Battle of the Bakgatla-Ba-Kgafela Community: Access to and Control of Communal Land" 7-10.

705 See the *Federation* case, Du Plessis A (2017) 21 *Law, Democracy and Development* "The Readiness of South African Law and Policy for the Pursuit of Sustainable Development Goal 11" 243. In the *Federation* case, the compensation by polluters based on proportionality was not considered by the court.

environment.[706] In these cases although not all occurring at the same time, the factors can all contribute to the final outcome, and be apportioned in accordance with section 28 of NEMA as discussed above.

Events or actions that cause damage to the environment can often be cumulative in nature, for example where environmental degradation is caused by spillage of hazardous chemicals by numerous farmers, over many decades, such as agricultural chemicals and pesticides from fields that compromise groundwater quality.

A case in point on a problem that is currently being seen in South African courts is found in the *Nkala* decision where mineworkers contracted silicosis during their periods of employment on the mines. When a mineworker contracts silicosis, it is likely that TB and related conditions will set in as a new condition, which is a complicating factor. [707]

Environmental problems present as a challenge for which a number of propositions are necessary. The right to the environment is a constitutionally protected and unalienable right. Owing to the importance of progress in the realisation of an environment that is not harmful to health and well-being, liability for polluters is equally significant. There are many theories on the issue of environmental damage that are proffered as solutions to existing problems. Section 28 of NEMA is a cogent provision as regards the protection of the environment in South Africa. The relevance of section 28 - as a legal mechanism to address environmental pollution - is undeniable. Cumulative and multiple causation also brings to the fore some challenges that may

706 See in general Carstens PA (2006) 19 *SACJ* "Medical Negligence as a Causative Factor in South African Criminal Law: *Novus Actus Interveniens* or Mere Misadventure" 192-195, Fogleman 2015 6-9 and Stubbs MD (2011) 4 *Constitutional Court Review* "Three-Level Games: Thoughts on Glenister, Scaw and International Law" 141-142

707 *Michael and Another v Linksfield Park Clinic (Pty) Ltd* 2002 (1) All SA 384 (A); also Van der Bijl (2018) 10-12 and Bosch S (2014) 17 *PER/PELJ* "The International Humanitarian Law notion of Direct Participation in Hostilities-A Review of the ICRC Interpretive Guide and Subsequent Debate" 1003-1004. The circumstances around the case seem to point to the fact that cumulative causation can be outcome of a set of complications. Complications take place where one condition gives rise to other causative factors. The case of *Oppelt* above is a good point of general reference as the expert evidence was presented as follows in the description of a spinal cord injury: 'once the spinal cord is injured by an indirect mechanism such as described above, a relentless physiological process occurs. There is an inflammatory process, which further injures the spinal cord. This is referred to as secondary injury. It further damages the cells and thus the spinal cord function.'

not be foreseeable in some instances. The requirement to prove fault is one of the obstacles that the law of delict can create in legal proceedings.

The basis of such allocation should ideally be market share allocation or joint and several liability.[708] Market share allocation is an economic principle which states that losses incurred as result of harmful effects should be shared among operators involved in that particular area or industry.[709] The US law, which has been highlighted below, is an example in terms of market allocation and in conjunction with strict liability appears to be an effective solution to environmental pollution. Section 28 of NEMA does not only introduce strict liability for positive conduct but also contains criminal and vicarious liability. In the *Bareki* case, De Villiers J expressed reservations on the type of liability imposed by section 28(1) of NEMA. According to this judgment, section 28(1) of NEMA does not only impose strict liability but an absolute liability.[710] This appears to be the case for positive conduct but, where omissions are concerned, the Act still requires negligence.

4.5.4 Vicarious Liability and Lender Liability

Vicarious liability is part of South African common law. Vicarious liability in the subject of employment requires the existence of an employment relationship, the commission of a delict and the commission of a delict must be committed within the scope of employment. Vicarious liability and lender liability have a close connection as both are based on a form of strict liability. Lender liability is a recent development in South African law.

South Africa does not have a common legislative framework that is relevant to lender liability governance. Lending by financiers is seen as purely an affair that involves

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708 Fogleman (2015) Environmental Liability: Land Owners' Liability for remediating contaminated land in the EU: EU or National Law? Part II: National Law 2-3, Kuschke (2009) 282-284.

709 Pennington M (2001) 6 *New Political Economy* "Environmental Markets v Environmental Deliberation: A Hayekian Critique of Green Political Economy" 173 criticises the intervention of the state in the environmental decision-making on the premise that environmental decision-making should be left to the choice of the markets.

710 S 28(1) of NEMA was critically analysed as De Villiers J further raised concerns relating to the burden, which the provision could impose on an owner of the land who could not even be aware that his land was polluted and would find himself responsible for the damage to which he was not party at all.

private parties and is based on a contractual and mutual relationship between the parties that is at arm's length. There is rationality in relation to the independence of the parties to the lending contract. The lender and the customer have to observe their respective roles with regard to the contractual transaction. Financiers are important economic players that offer a great contribution to the betterment of socio-economic conditions of states.[711] These important private players, namely the financiers and developers or operators, often finance projects that carry the potential to harm the environment.[712] The main question that arises is whether Section 28 of NEMA is broad enough to cover the involvement of lenders or financiers to the extent that they too carry a potential liability due to their involvement.

Financing plays a crucial role in commercial contracts. Developmental finance is sought and sourced through financial institutions that are the backbone of major economies in the world.[713] Developmental-related projects are a mandate of governments who mostly conduct or lead development in their states. Governments prefer to outsource their projects to private entities to carry out certain activities on their behalf. These projects include construction, sanitation and other services. The provision of these services requires contractors to obtain funding which is found in the private sector as discussed above.[714] The general policy in South Africa, with regard to the provision of financing or capital for development, is that the financiers (primarily the banks) are the mainstream players.[715] Financiers are not the direct polluters as

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711 Financiers provide access to financial resources without which it is impossible to do business in most cases. Society needs these vital institutions for its advancement; there must nevertheless be a balance between their interests and those of societies in which they exist.

712 Richardson (2002) 12 *Duke Environmental Law and Policy Forum* "Mandating Environmental Liability Insurance" 293.

713 Qu (2010) 3 *Journal of Politics and Law* 'Lenders Liability of Commercial Banks in Tort: Focusing on American Law,' Zambao (2010) 47 *University of Miami international and Comparative Law Review* "Brazil's Launch of Lender Environmental Liability as a Tool to Manage Environmental Impacts" 51 also endorse the opinion that the increase and spread of environmental damage necessitates the increase in the scope of liability for environmental damage. Financiers should be held responsible for environmental degradation that they may have funded. Lenders in this context are regarded as indirect polluters in terms of joint and several liability regardless of whether there is a foreclosure or not.

714 Zambao (2010) 51-52 correctly argues that 'credit is an essential prerequisite to the realisation of large initiatives'.

715 A bank is described in terms of s 1 of the Banks Act 94 of 1990 as meaning 'a public company registered as a bank in terms of this Act'. The Banks Act further describes the 'banking group which means a group of two or more persons, whether natural or juristic persons that are predominantly engaged in financial activities and one or more of which is a bank and-
(a) Each of which persons is an associate, as defined in section 37(7), of any one of the others; or

they provide financing for the advancement of the projects.[716]The question around financing as project drivers is whether lenders should be held responsible for environmental pollution. Lenders are the direct beneficiaries in developmental activities which they finance. Profit-making may contribute towards environmental degradation and if profits are made at the expense of the environment, the principle of sustainable development may not be achieved if these financiers do not assume that they might contribute and must assume liability for the recovery of losses.

Internationally, the question has also arisen about whether a financier, merely by virtue of financing a project or upon foreclosure where a claim is laid on a property provided as security, may also be held liable for causing environmental contamination or harm.[717] In *United States v Fleet Factors Corp*[718] the court held that the degree of management participation by the lender was sufficient to trigger lender liability. The court further held that a lender under CERCLA liability could incur liability without being an operator of a facility. It appears as if the test of control once again plays a role as it does with the liability of officers of juristic persons.

The direct risk for financiers arises in circumstances where the financed party renders fully or partially the control over certain portion of its resources, for example land or property to financiers. Lender liability does not come into being merely on the basis of

(b) Which persons are interconnected that should one of them experience financial difficulties, another one or all of them would likely be adversely affected, irrespective of whether any of those persons is domiciled in the same country as any of the others

716 Bouma *et al* (2001) Sustainable Banking: Greening of Finance Greenleaf Publishing 29 reason that 'banks are relatively clean as a sector'. Of course, banks for instance use a lot of paper, which results in waste. The waste originating from banks is not massive compared to other industries. The issue pertaining to the financial sector in general and lenders in particular is the form of liability that may be imposed on them for their contribution to pollution with respect to lending. Lending itself is not an environmental offence but it may give rise to liability for pollution caused by operators whose operations have been financed by the lender.

717 The issue was brought up as early as in the 1990s. See the book by Larsson (1999) 442 and Rich (2013) 177-178 in which the authors argue that 'environmental lender liability' is a cause for concern for risks in the context of economic consequences for financiers who are not part of the day-to-day management of the entities that require the aforesaid financing. The authors further hold that financiers should be seekers of solutions as regards to the protection of the environment and governance. Financiers have to fulfil their fiduciary duty towards the protection of the environment. Financiers should promote monitoring and supervision for projects for which they have extended loans. By exercising monitoring and evaluation, financiers promote integrity and ethics that are critical for their image.

718 In *United States v Fleet Factors Corp* 901 F.2d 1550 (11th Cir 1990) the court correctly asserted that the existence of a capacity to influence the corporation's treatment of hazardous waste was sufficient.

a loan by a financier to a customer.[719] An understanding of the underlying issues as regards the protection of the environment, is therefore an important consideration for financiers.

The purpose of the study is to investigate South Africa's national liability regime for pollution damage by considering developments elsewhere that might inform jurisprudential development. In that regard, there are countries in the developed world that have developed policies and legislation for environmental liability. For example, the US environmental liability endorses lender liability. CERCLA contains strict liability rules that impose liability for corporations, successor corporations and parent corporations.[720]

This exemption depends on the extent or degree of participation in the management or control of the polluter. Holding financiers liable may contribute as they are then forced to play an oversight role during their lending contracts with developers. Financiers should therefore apply measures that do not expose them to environmental risks and monitor as well as supervise some of the activities that are undertaken by corporations who borrow money from them. In addition, these measures should indirectly serve as watchdogs who deter activities that lead to environmental pollution.

Financiers do not have to be operators or developers to play an oversight role. A duty of care is required and this duty is created by the environmental principles as well as by extensive NEMA legislation. The application precautionary measures put financiers in a good position to safeguard their interests and to prevent damages to the benefit

719 Bouma *et al* (2001) 24, Huggard (2014) 559 *European Journal of Risk Regulation* "Environmental Liability Directive: A Commentary by Lucas Bergkamp and Barbara Goldsmith" (eds) 408-409 and Del Duca (2011) 41 *Environmental Law Reporter News and Analysis* "Management of Environmental Liabilities in Business Transactions" 10419-10420 stress that the banking industry does not consider itself as having a contribution to the pollution. The sources regard themselves as an environmentally friendly sector and do not consider their industry as having a direct bearing on society as well as the environment. In an era of globalisation, the involvement of banks in efforts for promoting sustainable development is crucial. Banks as financiers hold massive power in society and are international players in their industry.

720 According to Pitchford (1995) 1172-1173 and Murphy (1986) 41 *The Business Lawyer* "The Impact of Superfund and Other Environmental Statutes on Commercial Lending and Investment Activities" 1133-1135 lender liability may not be a solution to environmental ills that society experiences today. The authors argue that liability for lenders increases accident frequency because the levels of precaution decrease on the part of the operators. In addition, the authors hold that reduction in liability results in a reduced number of environmental accidents because the precaution taken is higher.

of society. The exercise of oversight responsibility should apply depending on the size of the project, the possibility of harm to the environment and the amount involved as a loan.[721]

In most instances, liability for damage caused to the environment lies with the developer. Imputing liability for damage to the environment only to the developer does not give rise to fairness and justice. The financier is not always, at the same time, a passive party to the agreement of such nature and size. The lenders play a crucial role in terms of influencing decisions of the customer that may include positive influence for the protection of the environment. There is a close link between the project being undertaken and the resources that the lender provides to undertake the project.[722] The liability for damage to the environment should be a shared responsibility based on equity and justice. It is important to note that the lending contract between the developer and the financier falls within the domain of private law. However, the consequences flowing from that private law agreement become a public issue as these polluting activities do not affect only the contracting parties but society as a whole.

It is not clear whether the banks or lenders as financiers have a general responsibility to their financing to customers beyond ensuring that the requested information to justify and secure financing has been provided by the customers. South Africa's banking legislation is not specifically geared to provide information on these issues to potential clients, or to maintain information on the client's situation and position pertaining to environmental liability. In terms of the Financial Intelligence Centre Act, banks or financial institutions are recognised as accountable institutions.[723]

The main objective of this Act is to combat money-laundering activities, organised crime and terrorism-related activities. In terms of FICA, these accountable institutions have a duty to report any 'suspicious activities' or 'unusual transactions' to relevant authorities.[724] This Act does not place a mandatory disclosure duty upon these

721 According to Garner and Pusha III (2014) 38 *American Bankruptcy Institute Journal* "The West Virginia Chemical Spill and Environmental Liabilities in a Post-Apex World" 2 the intention of the environmental lender liability is to ensure the taxpayers are not liable.

722 Murphy (1986) 1133-1135.

723 S 29 of the Financial Intelligence Centre Act 38 of 2001 (hereafter FICA).

724 Financial institutions, in terms of the Financial Institutions Act 27 of 1993, encompass a wide range of financial service providers including banks and insurance companies up to the level of a burial

financiers. The duty to report does therefore not extend to the reporting of prejudicial or abusive environmental behaviour.[725] The duties that FICA creates do thus not have a direct link with environmental protection.

In terms of the general contractual relationship between the parties, the lender has a contractual obligation to exercise skill and reasonable care towards the customer.[726] In terms of section 80 of the National Credit Act (NCA) lenders are prohibited from lending to their customers in a reckless manner.[727] Section 81 of the NCA prevents a lender from entering into an agreement without first assessing the customer's appreciation and understanding of the nature of risks involved in a lending contract.[728]

Environmental liability may lead to the insolvency of the lender where the lending party conducts its business recklessly. Lenders need to take strong measures to ensure that the environment is not damaged in instances where these lend money to customers to avoid risk of liability. It is important to distinguish this indirect liability from direct liability. The latter will be incurred if, for example, there is a foreclosure. In this case the bank would now own, manage or control the property that may be in dispute owing to liability.[729] In such a case, liability should follow the normal requirements. Financiers

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society. Some of these financial institutions except banks do not provide lending as a service to their customers.

725 In terms of S 1(1) an accountable institution means a person referred to in Schedule 1 of FICA. Schedule 1 of FICA lists a broad category of persons who are regarded as accountable institutions. Schedule 1(6) states that such category of accountable institutions includes 'a person who carries on the business of a bank as defined in the Banks Act.'

726 Ramdhin (2013) 3 *TSAR* "The Law Relating to Bankers' References in South Africa" 523. Lenders have their own lending practices developed to suit their needs in the market. These practices are aimed at risk avoidance. The risk avoidance should not leave out environmental risk. Environmental risk should constitute a core risk that lenders have to take into account in their decision-making.

727 S 80 of the NCA puts stringent measures as part of the assessment of the ability of the consumer to meet his or her obligations on the loan. The lender is not supposed to extend credit to a consumer who may not afford to repay the loan.

728 S 81 of the NCA. Omar and Gant (2015) 40-41 argue that the principle of environmental lender liability also extends to financiers. Where the court has made a ruling that a particular lending agreement was imprudent, the financier should lose any benefit or advantage that accrued from the transaction. The lending decisions that a court rules as imprudent or reckless should be considered as wilful behaviour that gives rise to environmental liability. The same principle that applies to reckless lending in the NCA should be extended to lending transactions, which give rise to environmental pollution.

729 Direct liability for environmental damage means that the defendant is liable without fault. There is also evidence in cases of foreclosure that the defendant has participated in the management or control of the entity. Direct liability should apply where the financier was aware of the risky and harmful nature of the activity for which financing is being sought.

can be held liable for breach of the legal duty to prevent harm, also (incorrectly) referred to as a 'duty of care.'[730]

Although the main objective of FICA is to combat money laundering, organised crime and terrorism-related activities, it could be argued that the capital used to harm the environment could also, through analogy, be seen as a harmful practice. The duty to report may prove to provide a vehicle for the Department of Environmental Affairs, or environmental agencies charged with the protection of the environment, to obtain information that could be used for the protection of the environment.

As stated above the Consumer Protection Act is another statute that is important for the protection of consumer rights.[731] The application of the Act is so broad in scope in that it involves every transaction occurring within the Republic with reference to exchange of goods or services unless specifically exempted. The Act encompasses product liability for goods or services with defects as well as vicarious liability for this type of default. The Act does not, however, apply to goods or services that are supplied or promoted to the state.[732]

The scope of the Act is wide enough to encompass damage to the environment. The Consumer Protection Act should apply to lender liability as it applies to goods and services that can cause damage to the environment. The Banks Act[733] also does not refer to liability for environmental damage that has been caused by an entity funded by a bank in South Africa.

Now activities, which are regarded as suspicious or unusual transactions in terms of the Act, seem to refer financial transactions. Unusual or suspicious activities do not expressly encompass actions that cause damage to the environment. Lenders are an important source of funding or financing of developmental-related activities. Where the borrowers use the resources at their disposal to commit a crime, for example, the point

730 The concept 'duty of care' is from English law and does not form part of South African common law. It is however often used to refer to the legal duty not to cause harm that is required to prove the element of wrongfulness.
731 The Consumer Protection Act 68 of 2008 promotes fairness and justice in the treatment of consumers.
732 S 61 of the Consumer Protection Act.
733 Banks Act 94 of 1990.

is whether the lenders may, even though they are at arm's length, be held jointly and severally liable as part of the commission of the environmental crime. If lenders as financiers fail to honour their obligations, they may be held responsible for their failure or negligence. As it is in the best interest of society, one could advocate that the same rule of accountability should apply to environmental damage. The discussion below only focuses on activities that are financed and that have a potential to cause harm to the environment.

Larsson and Bouma *et al*[734] have contended that financing should attract liability where the risks attendant to the transaction may give rise to deepening insolvency. As an analogy, one may concede that the same should apply where financing risks damage to the environment.[735] The lending decision of the lender should be taken cautiously considering environmental interests. The next paragraph focuses on the indirect liability of financiers.

Financiers indirectly contribute to the damage to the environment as projects continue because of their financing. Without financing, there cannot be smooth progress in respect to development. It would be impractical to deny financiers the ability to finance developmental-related projects as economic activity would come to a halt.[736] The financial strength of companies is grounded on the fact that these entities have access to funding from the financial institutions.[737]

Lending contains a risk that requires serious consideration with respects to the protection of the environment as the duty to protect it is so general and comprehensive. Environmental risks should be embedded in commercial contracts so that decisions

734 Larsson (1999) 443-444, Bouma *et al* (2001) 24-25 also argue that there is a change in terms of perceptions that the banking industry has held in the past. There is consciousness and awareness that the environment contains risks and opportunities.

735 Omar and Gant (2015) 1 *TSAR* "Lender Liability and Fault for Deepening Insolvency: A Comparative Analysis" 39-40, Burns (1998) 236-237 and Del Duca P (2011) 41 *Environmental Law Reporter News and Analysis* "Management of Environmental Liabilities in Business Transactions" 10419 concede that 'environmental liability risks are omnipresent in transactions'.

736 Latham (2009) 39 *Envtl.L* "Environmental Liabilities and the Federal Laws: A Proposal for Improved Disclosure of Climate Change-Related Risks" 649 and Del Duca (2011) 10419 advocate the view that environmental liability should not be seen as an obstacle to economic development. Financiers are important players in society and they therefore form the backbone of economic development.

737 Omar and Gant (2015) 1-2, Pitchford (1995) 85 *American Economic Association* "How Liable Should a Lender Be? The Case of Judgment-Proof Firms and Environmental Risk" 1172-1173. The relationship between the financier and the customer is mutually.

are taken with specific environmental considerations.[738] Both the lender and the customer may face the unintended consequence of insolvency because of lending and liability for damage to the environment. Financiers have a myriad of customers, the majority of which do not cause harm to the environment in their different trades. Society is not concerned about those financiers whose lending practices do not pose a threat to the environment.

The overall protection of the environment requires a multi-stakeholder and inclusive approach. From the wording used in section 28 of NEMA, it is clear that this is the intention of the legislator. The role of the financiers with regard to the protection of the environment is important in that context. The role of financiers may be more indirect in some cases, such as where the financier has not needed any security for lending to the customer, and it is an outright simple loan, or where there is no participation or control over the property or activity by ways of which pollution occurs.

Financiers should be seen as undermining environmental law where their lending decisions result in environmental degradation. Financial institutions have developed safeguards in their lending decisions. Such safeguards do not normally incorporate environmental risks into their lending decisions.[739] Financial institutions, to protect their loans to customers, apply the safeguards. Such model of financing has the potential to undermine the ideal of sustainable development.

A lending decision should integrate environmental risks to avoid unnecessary exposure to liability. This type of decision should take into consideration that environmental neglect is not a solution. Failure to monitor the use of funding, where the monitoring and supervision was part of the conditions of the agreement, should give rise to liability for the lender. Lender liability should also extend to loans provided to suppliers of goods where those goods cause damage to the environment.[740]

738 Lenders cater for other risks with respect to lending. Such other risks would include insolvency of the borrower or death of the borrower who is a natural person.

739 Rich (2013) 3-4 and Larsson (1999) 445-446 comprehensively discuss the extent to which financial institutions, and banks in particular, neglect the environmental impacts of their decisions.

740 Omar and Gant (2015) 42 and Burns (1998) 236-237.

Optimally for the lender, the lender's liability should be built into their contracts with their customers, and any liability that the lender ultimately carries, is transferred to the account of the polluting client. The escape of lenders from liability puts them at a manifest advantage with regard to other parties who may have benefited from the same transaction.[741] Failing to recognise this will allow lenders to escape liability for conduct that encourages negligent or wilful behaviour towards pollution. Lenders should avoid lending decisions that have a detrimental impact on the environment if they are subjected to the same treatment as the customers they finance or lend to. The lending decisions would be more prudent, in line with environmental considerations, grounded on the principles of sustainability and seek to avoid costs associated with environmental damage.

The lender, by virtue of its position as not being directly involved in the polluting activity, may be able to defend itself against liability if is not party to the conduct or activity from which damage to the environment flows. It may also argue that it has nothing to do with damage to the environment as it only funded the project. Lenders have a tendency to consider profits as paramount to everything. That approach is not prudent as regards the promotion of environmental management principles including the principle of sustainable development.

The lender, in terms of the contractual relationship, has a fiduciary obligation to provide financial resources within the legal parameters. In turn, the customer has a contractual obligation to comply with the terms and conditions of the agreement. The customer must not act in breach of the contract.

In conclusion, Section 28 of NEMA targets a broad ambit of persons who can be held liable for environmental damage.[742] In addition to the polluter, these persons primarily include the owner of the land or premises, or the person in control of the land or premises. It furthermore encompasses all kinds of persons including officers of juristic persons and lenders who can be associated with a particular land, property or

741 Kidd (2009) 15, Burns (1998) 237 and Proctor (2010) 281 concede that losses which flow from environmental damage may be massive. It may be unfair and inequitable to attribute such losses to the customer as a primary contractor when other beneficiaries are allowed to escape from liability.

742 S 28 of NEMA.

premises. There is, however, no specific reference to financier or lender liability in the amended wording of NEMA.

Activities that involve lenders under the pretext of only lending are not justified in the current situation where environmental pollution and climate change are realities in industry.[743] Liability for lenders should only arise where there is justification for it and, furthermore, be the last resort where the damage to the environment has been caused. It cannot be seen as the only solution to existing environmental problems, and is not synonymous with the polluter pays principle, however in the context creates a vicarious liability that aims to meet the environmental principles analysed in previous sections. It is important to take stock of the part lenders and financiers play in facilitating the creation of pollution damage for which they must also carry the duty to protect the environment.[744]

4.6 Damages

The primary objective of a delictual claim for damages is to ensure that the person who has suffered harm or injury is compensated. Joubert *et al* emphasise that the harm is a prerequisite for liability and that, without harm, no liability arises in terms of the law of delict.[745] The definition of damage simply implies that only harm in the form of legally recognised patrimonial and personality interests, including environmental damages, qualifies for compensation as damages can be compensated for.[746] The reference to legally recognised interests implies those interests that are protected from harm.[747] **

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743 See the discussion by Rich (2013) 67-69 who is of the opinion that the World Bank itself poses a threat to the environment through its financing of development projects in developing countries. The financing of these development projects is undertaken without consideration of the environment as the bank believes that a precautionary approach to development would lead to a paralysis of its development and financing agenda.

744 O'Donovan (2005) 344-347.

745 Neethling and Potgieter (2015) 221, Joubert *et al* (2005) 53 also reiterate the perspective of Van der Walt and Midgley (2016) 236, Chitimira (2016) 20 *Law, Democracy & Law* "Confronting selected difficulties associated with the enforcement of *res juricata* in South Africa with reference to *Samancor v Rham* Equipment (532/13) [2014] ZASCA 66" 215-217 that it is not every harm that is actionable as some harms are not recognised in law.

746 Boberg (1984) 476. For example, the diminution in value of property is a legally recognised right and is protected in terms of the law. Property damage claims can be instituted against a person who causes contamination to another person's property. See the case of *The Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC).

747 World Bank Report Nr 62803 of 1 January 2011.

For example, property and the environment are protected from damage in terms of the law. The descriptions and definitions as discussed in Chapter 2 of this thesis inform this section of the study. The forms of environmental damage, ecological damage and natural resource damage provide the scope for a damages claim. Environmental damage is used interchangeably with the term 'pollution damage' in this discussion below. The word environmental damage is primarily used to indicate an alteration in a given environment or an interference that is legally significant.[748] A harm caused to the environment by persons who are expressly authorised in terms of the law to do so does not necessarily attract liability in the form of damages. Yet, subsequent actions may trigger liability, for example the construction of a quarry, which is used for construction-related purposes. The disturbance is not regarded as damage to the environment upon its operation but it will be considered as damages should the required rehabilitation not be conducted after disuse.

4.6.1. The Compensatory Function in Delict

Damages is the monetary equivalent of damage that is awarded to a person with the purpose of eliminating any possible patrimonial or non-patrimonial damage.[749] The law requires that in the event of damage to property or the environment, the party responsible for such damage must pay compensation for such damage.

The nature of compensation to the wronged party is also different depending on the circumstances. Where the rights of a natural person are infringed upon, compensation can be made to him as the plaintiff and victim directly. In cases where wrongdoing has been caused to the environment, the relevant state institution, for example the Department of Environmental Affairs, can be compensated for expenses these could have been incurred during environmental rectification.[750]

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748 See Kidd (2011) 57 and Larsson (1999) 158.

749 Neethling and Potgieter (2015) 221.

750 Blackmore (2015) 95, Kidd M (2003) 10 *SAJELP* "Some Thoughts on Statutory Directives Addressing Environmental Damage in South Africa" 202-203, Kilian CG and Snyman van Deventer E (2017) 20 *PER/PELJ* "Claiming Damages where Dividends remain Unpaid: A Contribution towards a More Balanced Approach in South Africa" 2-3 reiterate a similar viewpoint as the authors believe that natural resources should be protected from commercial abuse as 'natural resources, irrespective of their ownership, are considered as part of an inalienable public trust of which the

This can be in terms of a statutory liability or by way of a civil damages claim instituted by the state. The aim of such a claim is the expectation that the state will utilise the funds to remedy the environment and undo the damage for which it was payable. The same expectation exists where fines or penalties are levied by the state. Compensation funds such as those that exist in the mining industry, serve the same purpose. Where, however, a person suffers direct harm or loss owing to the damage to the environment, he may institute a civil claim against the polluter.

The environment does not carry a monetary value in precise terms. The economic value of the environment is invisible and is a complex paradigm. As a result, the benefits that society enjoys from nature include water, air and the natural resources including minerals at no cost to inhabitants of society. The environment in that sense has value both socially and economically. The economic value of the environment is anthropocentric in nature. It stresses issues that have a potential to bring benefits to humankind.[751]

In *Oslo Land Co Ltd v The Union Government*[752] the definition of damage given by the Appellate Division was vague as it did not state what loss to the environment actually meant. Physical damage to property should not be confused with damage in the sense

government is the public trustee on behalf of every citizen'. The authors consider S 28 of NEMA as being problematic with regard to implementation by officials and lso raise difficulties as regards to the S 28 provision, which enjoins persons who have nothing to do with a pollution damage incident to take equal responsibility in the same manner as those who have caused it. Blackmore 95-96 specifically does not support this particular provision as the author argues that the state as the public trustee should take responsibility where a polluter cannot be identified. When such a polluter is ultimately found the state should be compensated.

751 Kidd (2011) 1-4, Prokofieva *et al EFI Technical Report* (2011) 50 "Monetary Values of Environmental Externalities" 9 and *Minister of Water and Environmental Affairs v Kloof Conservancy* 2016 (1) All SA 676 (SCA) para 19-20: The court warned that the management of natural resources requires the exercise of due care in the public interest and the environment.

752 In *Oslo Land Co Ltd v The Union Government* 1938 AD 584, *Rudman* case para 8 and Visser and Potgieter (2012) 4 a view that 'a cause of action accrues when all the facts have happened which are material to be proven to entitle the plaintiff to succeed is held. When once some damage has resulted from the wrongful act, or even if it is probable that damage will result, time begins to run and the plaintiff must begin to bring his action within three years for all his damage once and for all. For example, where the wrongful act has ceased and it is not repeated and damage has resulted, the cause of action is complete and time begins to run even though damage may result thereafter or may be recurring'. There are many legal principles, which are applied in order to establish whether damage has been sustained and what the extent thereof is how the damage must be translated into money and how the amount must be adjusted.

of loss.[753] Damage to the environment, as a result of a particular event, does not always lead to loss in the sense of patrimonial loss, yet it can result in pure economic loss which may give rise to environmental liability claims.

For instance, loss such as inconvenience, disappointment or stigma damages does not, as a rule, attract compensation.[754] Where one builds a house with a beachfront view and expects a pristine beach, the disappointment of seeing a polluted site is a difficult situation to contend with.[755] In *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs and Development Planning*, the MEC had refused to authorise the Knysna-Wilderness-Plettenberg Bay Regional Structure Plan (RSP), which sought to change properties that were designated for recreational use to township development.[756] In *Camps Bay Ratepayers and Residents Association v Harrison*[757] the respondent was alleged to have contravened municipal regulations by building a three-storey house in

753 Visser and Potgieter (2012) 14 and McGregor (2009) 388, Van der Walt and Midgley (2016) 87.

754 In *Kyalam*i judgment the issue of environmental stigma was not specifically raised in the proceedings, yet the litigation was underpinned by the perception that the placement of the people from Alexandra, a nearby township that is characterised by extreme poverty, would decrease the quality and value of properties and would create an environmental hazard for the people of Kyalami. There is a settled perception in South Africa in general that decrease in property value may occur where there is a settlement of poor households close to upmarket suburbs. S 3(b) of the Spatial Planning and Land Use Management Act 16 of 2013 provides that its objective is to 'ensure that the system of spatial planning and land use management promotes social and economic inclusion.'

755 According to Visser and Potgieter (2012) 31-32, Neethling and Potgieter (2015) 222 there is a relationship between patrimony and personality interest and both of them constitute damage. Environmental damage can also attract the same sanctions applicable to delictual actions. In addition, environmental damage is a broad concept as was dealt with in Chapter 2. See also *Rudman v Road Accident Fund* (2003) (2) SA 234 (SCA) para 4-6, where the court adopted the view that plaintiff had not proved that the loss of his earning capacity had caused harm to his private estate. The appellant in this case was a chief executive officer of a farming company that suffered loss because of his disabilities owing to an accident.

756 In *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs and Development Planning* 2012 (3) SA 441 (WCC) the MEC's refusal to approve the proposed development was informed by the fact that the development was grounded on the apartheid spatial development planning which was underpinned by racial segregation. The court agreed that the RSP was an old plan, which did not consider the current policy of non-racialism as it was instituted in the early 1980s. See also the discussion by Van Wyk J (2012) 15 *PER/PELJ* "Planning in All Its (Dis) guises: Spheres of Government, Functional Areas and Authority" 289/638-291/638 and Kidd M (2013) "Environment" in Currie I and De Waal J The Bill of Rights Handbook (6 ed) 517 which states the idea that author does not consider the environment as a mere object, but adopts what the author calls a 'biocentric approach' to environmental rights. See also Kidd M (2004) 121 *SALJ* "The View I Behold on a Shiny Day: *Paola v Jeeva* No: Notes" 556, Grant B and Whitear-Nel N (2015) 27 *SA Merc LJ* "Proving Damages under the Common and Labour Law Cases: A Discussion of *South African Football Association v Mangope* (2013) 34 ILJ 311" 352-355 affirm the view that damages can be claimed for a damage that is caused to a party in the context of the common law. Similarly, the law of neighbours in the context of common law is also crucial to address environmental challenges.

757 *Camps Bay Ratepayers and Residents Association v Harrison* 2011 (4) SA 42 (CC) is a confirmation that environmental concerns have a reach across many sectors of society including human settlement.

contravention of the title deed restriction. Moreover, the property concerned would be intrusive and render the nearby property less attractive.

Damage is in essence restricted to the diminution or reduction in the quality of interests, which has been brought about by a damage caused to the environment.[758] For example, when there is a spillage of a toxic or harmful substance in the environment, diminution or reduction of quality of the environment takes place. Such reduction in quality in the environment may give rise to a civil liability claim to recover the loss where the source of such damage is identifiable, and the other elements for delictual damages have been fulfilled.[759]

Reduction in the quality of interests that is caused by wear and tear over time or that is due to natural events or occurrences, do not constitute damage.[760] Equally, damage to the environment caused by a *vis major* or *casus fortuitous* does not give rise to legal liability. Where natural forces cause damage to the environment, the compensation for costs related to such damage should be borne by the taxpayer, or the person who is unable to claim successfully from another. In that situation the doctrine that 'damage rests where it falls', unless a legal obligation to make good those damages can be proven to exist, applies.

A plaintiff's duty to mitigate is derived from the general proposition that a plaintiff cannot recover from the defendant, damages which he himself could have avoided by taking reasonable steps. A plaintiff's duty to mitigate is therefore rooted in the law of damages and is principally concerned with the reasonableness of the plaintiff's conduct after the event that may have caused harm to the environment.[761] If a plaintiff

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758 Visser and Potgieter (2012) 31-32 and S*cheibert v Allen* unreported (694/2015) [2016 ZASCA126: the court held that where the plaintiff claims there is diminution in the value of the property, the plaintiff must show by way of evidence the difference between the purchase price and the market value, which in this instance was higher than the purchase price, where the party institutes damages for diminution in value of the property, the defendant is required to pay compensation to the plaintiff if the latter succeeds in litigation.

759 See *Lee* judgment in which Nkabinde J highlighted the importance of the recognition of the rights of a prisoner to claim damages in the event of an infringement of his rights.

760 See Kidd (2004) 557 and Mclean JK and Carrick PJ (2007) 14 *SAJELP* "Environmental Management Rehabilitation under the Minerals and Petroleum Resources Development Act: A Biodiversity Outlook" 191-192.

761 In *Harmony Gold Mining Co Ltd v Regional Director: Free State, Department of Water Affairs, Forestry, and Another* [2006] SCA 65 (RSA) the appellant Harmony Gold Mining Co Ltd was one of five mining companies with mines in the Klerksdorp, Orkney, Stilfontein and Hartebeesfontein

does not take reasonable steps to mitigate the degree of environmental damage, his or her claim for compensation subsequent to the event to which he or she would otherwise be entitled, would be reduced by the amount attributable to that failure. [762]

The statutory apportionment of damages is part of South African law. In its earlier formation the doctrine of apportionment of damages was aimed at the compensation of the party whose interest was injured. The Apportionment of Damages Act and the common law of delict govern the apportionment of damages.[763] It was initially regulated in terms of the common law doctrine that was called the last opportunity rule. In terms of this rule, the party who had the last opportunity to exercise due care had to be compensated by the negligent party.

The last opportunity rule would always be applied to determine liability for the defendant. The Apportionment of Damages Act applies the principle of contributory fault. In terms of section 1(1)(a) of the Act,[764] where the plaintiff suffers damage to which he has contributed - albeit partly - and a portion of the same damage is partly caused the defendant, a claim by the plaintiff may not fail due to his contribution to the fault. The evaluation of the degree of contribution to the existence of problem is a

in the North-West Province. Each mine had various shafts, which were linked underground. The area had been mined for a number of years and the mining had created a labyrinth of horizontal tunnels through which groundwater can pass downstream from the north to the southern mines. When the water came into contact with mined-out reefs, it became polluted. Harmony Gold Mining Company and other mining companies would have been recipients of the polluted water as their mines were in the downstream of the mining shafts.

762 Libby (2007) 3 http://www.dolden.com/content/files/1247530177141-contributory-negligence-june-2007.pdf last accessed 21 July 2014. According to Joubert *et a*l 41 the 'law of delict is concerned with the allocation of losses incidental to man's activities and its purpose is to adjust those losses by affording compensation for injuries which one person sustained as a result of another's conduct. *Crown Chickens* case added a qualification in this regard as it stated that 'the question in each case is whether the conduct that caused the harm was a reasonable response to the situation that presented itself.'

763 See Steynberg (2011) 14 *PER/PELJ* "Fair Mathematics in Assessing Delitual Damages 5/226-7/226. In *Hendricks v President Insurance Co* Ltd 1993 (3) SA 158 (C): the court held that "the principle applicable to the assessment of damages has as its ratio the policy that the wrongdoer should not escape liability merely because the damage(s) he caused cannot be quantified readily or accurately. The underlying premise upon which the principle rests is that the victim has, in fact, suffered damage(s) and that the wrongdoer is liable to pay compensation or a solatium'. The Apportionment of Damages Act contains principles that can be applied to address some of the environmental complex situations. The apportionment of damages would provide a good response to incidents where polluters are unknown. Because the environment was not a priority at the time of its enactment, it would require adjustment to meet such environmental concerns. It does not apply to contractual claims.

764 S 1(1)(a) of the Apportionment of Damages Act.

matter that is dependent on the court. Contributory fault may take many forms as long the intent on the part of the plaintiff can be established[765].

Section 1(3) of the Apportionment of Damages Act provides that the Act does not specifically give a definition of fault but section 1(3) provides that 'fault' includes any act or omission which would, but for the provisions of this section, have given rise to the defence of contributory negligence. In cases of pollution damage, a party can be held responsible for environmental liability in accordance with the contribution to such negligence or intent.[766]

The principles that have been established by judicial evaluations are applicable to environmental damage cases, yet it is interesting to note that environmental cases have not yet been brought before the courts. As a result, there is lack of environmental jurisprudence in terms of the determination by the courts of law on the extent of damages and on mitigation factors. The principle of the duty of care binds everyone who finds himself in circumstances where there is relationship between the person and the harm to the environment in terms of S 28 of NEMA, and what the 'environment' entails depends on its interpretation, gleaned from statute or in general terms.

4.6.2. Damage as Patrimonial and Non-Patrimonial Loss

Damage is a comprehensive concept with pecuniary and non-pecuniary loss as its mutually exclusive components.[767] Patrimonial and non-patrimonial loss has a common factor. This common factor pertains to diminution in the utility or quality of legally protected interests from which legal rights arise. Patrimonial loss is limited to pecuniary loss that is associated with physical injury to a person or property.

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765 Ahmed A (2014) 17 *PER/PELJ* "Contributory Intent as a Defence limiting Delictual Liability" 1517-1518, Van der Walt and Midgley (2016) 333, Steynberg L (2011) 14 *PER/PELJ* "Distinguishing Private Law and Social Security Law in Deducting Social Grants from Claims for Loss of Support" 260/351 262/351, Kidd (2010) 29/189-30/189.

766 In *Zysset v Santam Ltd*[766] the court held that in relation to damages two conflicting principles should be considered, one of which is that the plaintiff should not receive double compensation. The other one is that the wrongdoer or his insurer should not avoid liability based on the generosity of a third party. The court further held that considerations of fairness, reasonableness and public policy should be taken into account in such matters.

767 See the general discussion by Visser and Potgieter (2012) 32-33, Neethling and Potgieter (2015) 225, Steynberg (2011) 3/226. Where damage is caused to the property of a person by a storm, earthquake and naturally occurring conditions, nobody can be held responsible for that type of damage. Pollution damage can be caused by human activity. It can be a natural deterioration for which nobody is responsible. Such damage should be shouldered by the taxpayer.

Some damages are not easily measurable in money, yet an assessment and quantification must be done to compensate the victim with some form of value in an attempt to make good the harm or loss he suffers.[768] In the case of non-patrimonial loss in an environmental context (such as a spoilt view or bad odour), the affected interests do not have a direct monetary value and cannot be expressed in the context of money. The primary meaning of environmental damage to the natural environment is often a reduction in quality of that particular environmental asset or property.[769] This implies that monetary compensation does not necessarily achieve the objective of placing the environment in the position it would have been in had the damage caused to the environment not occurred.[770] There is no generally or universally accepted definition of a person's patrimony.[771]

According to Black's Law Dictionary, the word "patrimony" refers to any kind of property. It is not necessarily restricted to property of individuals in the narrow sense, and patrimonial rights therefore encompass the right to an environment that is healthy.[772] In terms of the juridical concept of patrimony, patrimony therefore consists of all patrimonial rights, including expectations to acquire patrimonial rights and all legally enforceable obligations with a monetary value. Physical damage refers to injury to the object of a real right, and the diminution of someone's patrimony.[773]

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768 See Visser and Potgieter (2012) 28, *Scheibert v Allen* case where diminution in value of the property was considered by the court. Mrs Allen, in this case, had bought a property in Cape Town that contained a flatlet which - unbeknown to her – had not been approved by the municipality at the time it was built by the previous owner who sold it to her. She claimed damages for losses suffered by the sale price which was higher owing to the extension.

769 Visser and Potgieter (2012) 9 state that damages in delict are divided into patrimonial damages which include medical costs, loss of income and the cost of repairs and non-patrimonial damages which include pain and suffering, disfigurement, loss of amenities and injury to personality and pure economic loss, which is not connected to any injury or damage to property or environment.

770 The purpose of assessing damage is to identify the magnitude of the impact on the environmental resources and services. The assessment allows an opportunity to restore the environment after an incident has occurred. The assessment also assists in arriving at the proper quantification of the damage of an environmental asset. See the discussion in Visser and Potgieter (2012) 29.

771 Njotini (2017) 138-140 and Neethling and Potgieter (2015) 224-225 argue that patrimonial interests include negative benefits such as patrimonial debts and expectations. Although patrimonial debts carry negative implications, patrimonial expectations are also recognised in the law of delict as legally protected interests.

772 Patrimony in the context of the environment represents the collective good of humankind. It is not restricted to individual property rights.

773 See detailed discussion by Van der Walt and Midgley (2016) 31, Njotini (2017) 137 and Chitimira (2016) 217 as to patrimonial loss. Patrimony refers to the totality of the property rights of a person, viewed as forming a legal whole, that is a body of properties which are joined together by the idea that they belong to the same legal person. The concept of patrimony is the corollary of the notion of legal personality. Patrimony encompasses all property without distinction and this includes liabilities as part of the universality of law.

Patrimony is also regarded as a factual and economic concept in the sense of everything a person possesses which has a monetary value. The monetary value of such rights is mostly determined by the market value of the object in question as well as any limitation on such rights.[774]

In *Wright and Another v Cockin and Another* the applicants and respondents were owners of neighbouring farms. The applicants suffered damages because of certain cows contracting a disease that was believed to be emanating from the blue wildebeest. The court held that 'a landowner has an intrinsic right to the reasonable enjoyment of his property. If his neighbour through his positive actions unjustifiably interferes with that right thereby causing him physical or patrimonial harm then his actions are wrongful'.[775]

In as much as the environment may not have monetary value, environmental interests have to be protected in the interest of sustainable development.[776] The monetary value of the patrimonial right is determined by the market value of the object, yet also taking into consideration the legitimate limitation on such rights. In *Botha v Road Accident Fund* [777]the court had to identify concepts of patrimonial loss. The first one is a positive element of a person's patrimony. This refers to all patrimonial rights a person has such as real rights, immaterial property rights and personal rights. The monetary value of such rights is determined by the market of the object in question. The second element is negative element of a person's patrimony, for example a debt one incurs. A person's

774 See the discussion by Neethling and Potgieter (2015) 220 and Van der Walt and Midgley (2016) 340-341 as the authors' approach is that environmental valuation is the process of putting monetary values on the environmental goods and services, many of which have no easily observed market prices. Environmental goods and services include scenic views, coral reefs, mountain vistas and biodiversity. Environmental goods and services also include many indirect processes, such as watersheds and water supply, forests and ecosystems. According to Dixon JA Environmental Valuation: Challenges and Practices 2008 4-5 environmental valuation reflects people and society's values and these values are partial and imperfect.

775 See *Wright and Another v Cockin and Another* 2004 (4) SA 207 (E) and *Minister of Safety and Security v Augustine* 2017 SACR 332 (SCA) where the police entered a household and subjected the occupants to extreme abuse in search for persons who had been suspected of robbery. The court found the state liable for damages as it had subjected the aforesaid occupants to trauma.

776 Visser and Potgieter (2012) 13, Njotini (2017) *De Jure* "Examining the objects of property rights" 136-138.

777 2015 (2) SA 108 (GP) para 29.

patrimony is reduced by the creation, acceleration or increase of a monetary debt or liability.[778]

Environmental rights that are provided by the Constitution deserve to be legally protected in the same way as all other patrimonial rights are.[779] The environment as a patrimony for society may not have definable monetary value as movable assets, yet the recognition of claims for its clean-up and remediation indicate that it does carry a quantifiable value.

Damage to the environment may also be referred to as 'physical damage' and is sometimes more complex than damage to other forms of property such as movable goods and residential properties. The assessment and quantification of damage to the latter is a more straightforward issue while damage to the environment is not. It is not always possible, for instance, to identify the causes of the incidence of environmental damage because it involves intricate social and ecological issues. Damage to the environment or property has the effect of reducing the value of the affected thing. For example, the value of the damaged vehicle can be diminished by virtue of the fact that it was damaged, regardless of the fact that it was later repaired. Damage to the environment generates the same problem.

Where there has been a clean-up, yet the property could suffer from the reputation or stigma of its previous contamination or pollution, the value of the land is diminished in a manner that is extremely difficult to quantify. It is in most instances difficult to restore the environment to a pristine pre-damage condition. The concept of damage therefore involves more than harm for which compensation is recoverable for satisfaction that may be awarded in respect of some forms of damage.[780]

778 Neethling and Potgieter (2015) 203 and Kidd (2011) 62-65.

779 Neethling and Potgieter (2015) 224, Loubser *et al* (2017) 57, Visser and Potgieter (2012) 87-89 endorse the view that patrimony includes all the rights which, vest in a person irrespective of the way in which such rights are classified. In other words, this could include ownership, earning capacity, debts incurred, contractual duties, expectation of an inheritance, future contractual benefit, and the right to maintenance, loss of profit and expenses.

780 Visser and Potgieter (2012) 28-30 argue that the diminution in value of property is not a difficult issue to carry out. Property values in general are commonly known and there is always a continuous process of evaluating them. They do not, however, attend to the question on the evaluation of common property such as fields, water and air.

In diminution cases, the issue of whether there has been a loss at all and the quantum of that loss are often intertwined.[781] The principle of restitution entitles the claimant to be placed in the position he or she would have been in, had the delict not been committed. However, in practice the controversy arises when attempts are made to establish whether there has been a loss or not and the issue of the quantum of that loss regarding pollution damage could be at play.[782]

The quality, intensity and extent of the effects of a damaging-causing event on the environment vary according to the circumstances. It depends, for example, on the sensitivity and quality of the environment,[783] the environmental assets' capacity to recover, the time it may take to recover and the partial or total loss of the environmental asset or services. This means that the issue of prospective losses also plays a role as losses suffered in future are not easily quantifiable when the initial claim is brought.

These uses could pertain to loss of production, storage, access roads or services, all of which have negative impacts on the environment as loss of vital space.[784] Damages should at best include property damage, pure economic loss, clean-up costs and natural resource damages, including compensation for reduced aesthetic value of the environment.[785]

781 www.newlawjournal.co.uk/nlj last accessed 28 June 2014.

782 This is also a challenge concerning the damage to the environmental assets where the loss can be difficult to prove in certain cases. NEMA does not address the issue of the diminution of an environmental asset. It is difficult to provide an absolute scale in relation to quality of an environmental asset. However, if there are exact figures for an environmental variable and parameters as established by standard-setting instruments, the task of making a proper estimate is possible.

783 The damage that occurs on the coastal environment and damage that occurs in an agricultural area in the inland has different impacts. The actual socio-economic impacts of losses of coastal property, habitat and infrastructure can be massive and costly to restore. The coast is a more sensitive area than an inland area.

784 The natural environment's recovery in the short, medium and long term will normally be brought about by its own systems of ecological evolution. For example, water can go through of process of self-purification, assimilation and transformation of chemicals and pollutants in the biogeochemical cycles and the atmosphere's reactions. Human activities that cause damage to the environment have a long-term impact on the environment.

785 Neethling and Potgieter (2015) 15-18, In *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D), Rautenbach (2017) 5-6 and *Hirsch* case: it was held that the fact that the patrimonial loss suffered did not result from physical injury to the corporeal property or person of the plaintiff, but was purely economic, is not a bar to the *Aquilian* action.

Common law principles apply to environmental delicts although these may not have been adequately developed. Statutory rules and principles could govern or influence the extent of delictual damage claims arising from damage to the environment. In *Fose* case[786] the court held that 'the South African law of delict is flexible, and under section 35 of the Interim Constitution[787], should be developed by the Courts with due regard to the spirit, purport and objects of chapter 3'. Ackerman J further stated that substantial delictual damages would be a powerful vindication of the plaintiff's rights, requiring no further vindication by way of an additional award of constitutional damages.

The law affords protection to a huge number of rights at common law. In *Media24 Limited and Others v SA Taxi Securitisation (Pty) Ltd and Others*[788] the court held that reputation is not a personality right but an integral part of the corporation's patrimony. Damage done to the reputation could therefore constitute patrimonial loss for which compensation could be claimed under the *actio legis aquiliae* and not the *actio iniuriarum*.[789] Pure economic loss, which is unrelated to physical harm to a plaintiff's person or property, is also classified as patrimonial loss. In the context of a claim for compensation for environmental damage, relevant organs of the government can incur expenses in an attempt to remedy the situation. In terms of the current legislative framework, those responsible for pollution damage should pay claims for compensation that may accrue because of damage to the environment. These expenses serve as an effective valuation of the damages incurred for purposes of loss recovery.

Public authorities have an obligation to recover costs incurred as a result of damage to the environment to protect society from unnecessary financial burden being

786 See *Fose* on fn 170 above.

787 S 35 of the Interim Constitution of the Republic of South Africa, Act 200 of 1993 in *Mokone v Tassos Properties CC* [2017] ZACC 25 where there is a deficiency in common law that necessitates its development, it does not have to be done in terms of S 39(2) of the Constitution because S 173 of the Constitution also provides for the development of common law.

788 2011 (5) SA 329 (SCA).

789 *Actio legis Aquiliae* is a remedy in the law of delict for patrimonial loss. It does not apply to non-patrimonial loss, which is concerned with bodily injuries that a person may have suffered. Actio injuriarum is concerned with pain and suffering such as bodily injuries. See also *Administrator, Natal v Edward* 1990 (3) SA 769 (A) where the court agreed that 'physical or psychiatric injury caused by emotional shock also qualifies as bodily injury'.

imposed on it. The polluter pays principle discussed in chapter 2, and the statutes discussed in chapter 3, deal with the reality that the polluter or an associated person who must bear the costs of pollution whether patrimonial, prospective, pure economic or non-patrimonial.

4.6.3. Relationship between Damage and Wrongfulness

Wrongfulness and damage are two separate elements of a delict. In terms of the law of delict, an act is wrongful if it has a harmful consequence. The legislation both national and international on liability for environmental harm caused informs the test on the presence of wrongfulness. A person may trespass on a property of another person without causing damage to such property. Such conduct is not wrongful in terms of the law of delict.[790] A situation may arise where damage is caused without any wrongful act. Damage for example of a house by lightning may give rise to the owner of the property having to claim from an insurer. Where one breaks the windscreen of one's own vehicle, the principle of the law of delict is that a person cannot cause harm to his own interest. The custom of referring to patrimonial loss as damage which flows from the wrongdoer's unlawful and culpable conduct does not mean that wrongfulness qualifies damage.[791] Harm occasioned by an act of a person out of necessity does not constitute damage. A harm occasioned by necessity does not meet the requirements of the law of delict.

4.6.4. Pure Economic Loss

Pure economic loss consists of loss that does not result from damage to property. Pure economic loss may also refer to financial loss that flows from the damage to property or impairment of personality.[792] The incidence of liability for economic loss

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790 Neethling and Potgieter (2015) 226.

791 Neethling and Potgieter (2015) 226.

792 South African courts are always reluctant to impose economic loss as an instrument of liability for reasons of public policy. In *Le Roux* case, the Constitutional Court held that wrongfulness, in the context of delictual liability, is determined by considerations of legal and public policy. The general view is that the economic effects of harmful conduct can cause more problems in economic terms. For that reason, the economic effects have to be subjected to control see Loubser and Midgley (2010) 224. In *Administrateur, Natal v Trust Bank van Africa Bpk* 1979 (3) SA 824 (A) the court held that the instrument of control to prevent the possibility of limitless liability is the delictual

sustained through damage to property, in which the plaintiff has no proprietary interest, is an area of law in which there have been controversies.

In *Telematrix*[793] Harms JA explained pure economic loss as 'loss that does not arise directly from damage to the plaintiff's person or property but rather in consequence of the negligent act itself, such as a loss of profit, being put to extra expenses or the diminution in the value of property'. Pure economic loss is not founded on the physical injury to the plaintiff. In terms of pure economic loss, damage that has been caused is always in pure financial terms. For example, if a person sustains injury in an accident, the loss sustained in such a situation is not pure economic loss; it is physical damage to the person of the plaintiff.[794] Liability for damage caused to the environment is based primarily on the physical damage to the environment or property not on pure economic loss. There could be instances where liability for environmental damage would be based on pure economic loss where the nature of the harm is not directed to individual persons.[795] Pure economic loss is not based on the concept of physical damage, as would be the case relating to accident situations. For example, if a local authority loses archives because of a negligent worker and a person who was writing a book utilising the services of such archives, such person would have suffered pure economic loss since none of his or her property had been damaged.[796] This provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies. South Africa can adopt solutions gleaned from the experiences of and approaches taken by for example the World Bank; OECD; UNEP and the ILC.

element of wrongfulness. See also *Van Jaarsveld* case above in relation to discussion of financial loss.

793 *Telematrix* case above.

794 McManus and Russell (1998) 55. In the *Steenkamp* case the Supreme Court of Appeal held that 'public policy considerations precluded a disappointed tenderer from recovering delictual damages that were purely economic in nature' see par 14. See also *Hirsch* (par 42) where the court held the appellant had a duty to withdraw the contaminated product from the market. The fact that Chickenland and Brotrade did withdraw the product does not exonerate Hirsch from liability. The appellant in *Hirsch* case was held liable for pure economic loss.

795 See *Hirsch* case and the *Minister of Safety and Security v Scott* above.

796 In *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) the court emphasised that 'evolution of our law with regard to delictual liability for pure economic loss started with the decision of the Appellate Division in *Trust Bank* case above. Prior to *Trust Bank* case, *Aquilian* liability was limited, as a general rule, to loss resulting from physical injury to the person or property of the defendant'. However, in *Trust Bank*, it was extended to liability for pure economic loss. See Van der Walt & Midgley (2016) 93.

The general rule is that the law sets its face against allowing recovery of pure economic loss in most instances. The reason for this approach is founded on public and policy considerations. The approach of the courts is that if claims for pure economic loss would be allowed that would spur a multiplicity of claims against the defendant parties.[797] In *Caltex Oil Ltd v The Willemstad*[798] the court considered circumstances in which a wrongdoer would not be able to compensate plaintiffs because of lack of proportionality between the negligent act of the defendant and the excessive losses incurred by the plaintiffs. The court held that 'to require the wrongdoer to compensate all those who had suffered pecuniary loss would impose upon him a burden out of all proportion to his wrong'.

Our courts are always reluctant to grant compensation on the premise of pure economic loss.[799] The reasons for such reluctance are that pure economic loss has a potential for indeterminate liability. Indeterminate liability has a potential to impose intolerable burdens on the industry. In cases of pure economic loss, according to Faure, the private losses of the victim often exceed the social losses.[800]

Faure believes that in order to provide actors with the correct incentives to prevent losses, damages should be based on the social losses caused by the actors. The extent of the pure economic loss is determined by the amount the excess resource could have yielded. The value of the environment is not determined in economic and financial terms. Pure economic loss, however, is applicable in situations of

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797 McManus and Russell (1998) 55-56. According to Cordozo CJ, 'recovery of economic loss in the absence of physical damage or personal injury would expose defendants to liability in an indeterminate amount for an indeterminate time to an indeterminate class'. See Spier *et al* (1996) 8-9 reiterating the view that economic loss flowing from physical damage to the plaintiff's person or property caused by negligence is fully recoverable, whereas pure economic harm is not actionable in the absence of some special relationship between the plaintiff and defendant.

798 *Caltex Oil Ltd v Willemstad* [1976] 136 CLR 529. See also the case of *Weller v The Foot and Mouth Disease Research Institute* [1966] 1 QB 569 where there was an escape of the foot and mouth virus from the defendant's premises. Cattle on neighbouring land were affected. They could not be sent to market for auction. The auctioneers at the market lost money as a consequence of which they lost their commission. The court held that they had simply suffered pure economic loss and they could not recover damages.

799 See *Minister of Safety and Security v Scott* above.

800 Faure (2009) 168 also expresses the view that private losses might be offset by private gains elsewhere so that there is no loss of wealth but rather a redistribution of wealth. If, for example, firm A cannot produce because a power cable was negligently damaged, firm B might be able to produce and sell more products, which are substitutes for the products of firm A. The author further argues that in law and economics literature this is regarded as an important reason not to compensate pure economic loss.

environmental damage and is recoverable in South African law. There is no universally accepted definition of pure economic loss. A simple reason could be that a number of jurisdictions neither recognise the legal category nor distinguish it as an autonomous form of damage.[801] Soltau[802] agrees with this perspective as, according to the author, pure economic loss could be categorised as follows:

(i) Loss suffered by a plaintiff when he or she does not suffer any physical injury to person or property;
(ii) Pure financial loss, such as clean-up expenses, are recoverable if they are consequential to actual physical damage to property, and
(iii) Preventive measures.

Pure economic loss refers to the financial harm arising out of wrongful interference with plaintiff's contractual relations or with his or her non-contractual prospective gain. Pure economic loss is distinct from the financial loss arising out of injury to plaintiff's person or property.[803] Pure economic loss does not result directly from property damage or personal injury. For example, anglers may suffer reduced catches because of sea pollution. This is the case in particular in a situation where loss of revenue to anglers could be caused by an oil spill. Owing to the destruction of fish stocks, tourist operators and related sectors could also experience a slump in revenue because of the incident.

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801 Bussani and Palmer (2005) 5-8 reiterate the view that pure economic loss is loss without antecedent harm to plaintiff's person or property. The term "pure economic loss" according to the authors plays a central role, for if there is economic loss that is connected to the slightest damage to a person or property of the plaintiff provided that all conditions of liability are met, then the latter is called consequential economic loss and the damages in that case can be recovered. Consequential economic loss is recoverable because it presupposes the existence of physical injuries, whereas pure economic loss strikes the victim's wallet. Consequential economic loss only describes a relationship of cause and effect within the plaintiff's patrimony. There is a fundamental distinction between pure economic loss and consequential economic loss. Pure economic loss as stated above occurs independently of any physical damage to the person or property of the victim. In certain circumstances, recovery for pure economic loss is restricted. Consequential economic loss is a pecuniary loss and is the consequence of injury or damage. Taken in the aggregate, consequential economic loss and pure economic loss are not different in principle, but distinguishable only by the circumstances in which they originate and the technical limits which have been imposed on their recoverability, see also Smith (1984) 58 in this regard.

802 See the discussion by Soltau (1999) 37, Neethling and Potgieter (2015) 268.

803 Rizzo (1982) 11 *The Journal of Legal Studies* "A Theory of Economic Loss in the Law of Torts" 281.

Brand JA quoted Grosskopf AJA in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd*[804] in which he said that 'South African law unlike English law approaches the matter of delictual liability in a more cautious way and does not extend the scope of the Aquilian action to new situations unless there are positive policy considerations which favour such an extension'. In the case the court held that a delictual liability would not be available to a plaintiff where the negligence relied upon arises from a breach of a contractual relationship.

Most often, the courts have indicated that delictual liability for pure economic loss can be entertained albeit in a restrictive manner. For example, delictual liability for pure economic loss was allowed in *Hirsch v Chickenland* for breach of a contractual relationship arising from the non-contracting third parties.[805] Liability for pure economic loss can also serve as a surrogate for contractual liability. For instance, if an employer has to continue to pay wages for a worker who has been injured and is temporarily out of work as a result. The employer in such a situation suffers pure economic loss as the employer acts as the insurer of the risk of the employee. Broadly speaking, pure economic loss arises out of the interdependence of relationships and interests of the modern world and such relationships are multidimensional in nature[806]. Pure economic

804 In *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) Brand JA (at para 28) had reservations about the application of pure economic loss as the judge stated 'imposition of delictual liability on the defendant would as a general principle render contracting parties liable in delict for harm suffered by strangers which flows from the repudiation of their contracts. The realisation that this is immediately raises a feature which is generally regarded as a stronger pointer away from the imposition of delictual liability, namely that of indeterminate liability'. The Chief Justice of the US Cordozo CJ describes pure economic loss 'as liability in an indeterminate amount, for an indeterminate time, to an indeterminate class'.

805 *Hirsch v Chickenland* above see also *Country Cloud* where the court held there was no room for the imposition of delictual liability on the defendant for loss suffered by Country Cloud. The court further held that if such a situation would be allowed to prevail, it would mean that as a general principle contracting parties could be rendered liable for harm suffered by strangers, flowing from repudiation of contracts and that would engender the position of indeterminate liability. Courts seem to follow a flexible approach in relation to liability for pure economic loss depending on public policy considerations.

806 In *AB Ventures Ltd v Siemens Ltd* 2011 (4) SA 614 (SCA), the court held that the appellant had failed to avail itself of contractual protection and therefore could not recover the losses from the respondent under the law of delict. "By its own contractual act it took upon itself the risk of liability arising from delay and expenses that might be caused by the default of other contractors" para 22. In *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 387 the court stated that 'infringement of a subjective right is not to be regarded as the only criterion for wrongfulness'. In *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) the court held that the causation of pure economic loss is not *prima facie* wrongful. It further stated that wrongfulness is a function of public and legal policy considerations.

loss applies to a variety of legal situations in the law of delict including liability for environmental damage.

4.6.4 Prospective Loss

Future or prospective damages are defined as patrimonial or non-patrimonial damages, which with a sufficient degree of probability or reasonable possibility, materialise only after the date of assessment of damage resulting from an earlier damage-causing event.[807] Problems about damage to the environment do not disappear immediately after a restoration or remediation measures have been executed. Liability may arise a long period after the actual damage to the environment has occurred.[808] This is referred to as long-tail liability, which poses challenges for liability claims and insurance for liabilities alike.

In assessing or quantifying delictual damages or compensation after a damage-causing event, the aim is to give to the injured party the fullest possible compensation by placing him or her in the same financial position he or she was in prior to the damage-causing-event.[809] Prospective patrimonial loss involves the non-realisation or delay of future profit or income as well as the possibility or acceleration of future expenses, and may occur because of breach of contract, delict or all the other sources of claims for damages.[810]

Damage remains relative to time. [811] This fact makes it possible to subdivide damage into damage before the accrual of a cause of action, damage from the moment of

807 See Visser and Potgieter (2012) 129, Neethling and Potgieter (2015) 204.

808 See *Bareki* case in relation to historical pollution. The claim for personal injury is based on the assessment conducted on a person. The court may give an award based on the assessment for future prospective loss depending on the circumstances of the person. The approach in relation to environmental damage is different in that environmental legislation provides for remediation measures to be undertaken and compensation to be claimed after remediation has been performed.

809 Visser and Potgieter (2012) 3, Kidd (2011) 145 consider assessment in the context of damage to a human being and not to property and the environment. Glazewski (2005) 229 on the contrary states that environmental assessments are a tool to facilitate sound, integrated decision-making in which environmental considerations are explicitly and systematically taken into account in the planning and development process. Environmental assessments are an analysis tool for likely environmental consequences of a proposed development activity. The environmental assessment regime in its current framework does not specifically address the issue of prospective damage.

810 See Visser and Potgieter (2012)129.

811 McGregor (2009) 388-390.

liability to the commencement of the action, damage from commencement up to the time of judgment, damage up to the stage of an appeal and damage beyond that date.[812] Damage is, in most instances, progressive depending on the circumstances that lead to such damage to the environment. Damage that takes a long period before it is remediated is likely to cause more harm to the environment owing to the time factor and factors relevant to its nature. For example, if the product that causes damage to the environment is highly toxic in the long term, it is likely to develop towards increased harmfulness and expand the extent of damaging effect.

Prospective damage is concisely damage that has not been sustained at the initial time of manifestation of the cause or possibility of origin and the assessment of damage.[813] Environmental damages that arise in a different space and time and even after remediation measures have been taken can create a challenging problem and complicate subsequent liability claims. The definition of prospective loss emphasises the time element and does not refer to current expectation, whereas damage as a result of such frustration is usually referred to as *lucrum cessans*. Damage in the form of *lucrum cessans* is relevant in the context of pollution damage. The concept of *lucrum cessans* refers to damage that manifests itself after the settlement. It is in a way part of the doctrine of prospective loss.[814] As a result of such environmental damage, losses are incurred by responsible state organs when remedying the damage, which have to be recovered from the polluter or any responsible person.

The actual damage manifestation is not always a past fact but can be a future state or condition. For example, damage that is caused to the environment may expand over time to result in conditions that were not noticed at an initial stage. The impact of the damage, in the form of disease that is inflicted on human health at a later stage but that is directly linked to existence of past pollution, can pose a problem. The reduction in quality of the environment may further be compounded by an increase in the diminution of the environment that occurs in the future. It must, of course, be a reasonable possibility that prospective damage may take place in the polluting event.

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812 Visser and Potgieter (2012) 129 and McGregor (2009) 391.
813 See Visser & Potgieter (2012) 129, *Oppelt* case *supr*a.
814 Van der Walt and Midgley (2016) 203, Neethling and Potgieter (2015) 187 and *Lochner v MEC for Health and Social Development* (2012/25934) ZAGPPHC 388 para 28-29.

Prospective loss rests on two elements; it has a prospective dimension as well as a present dimension.[815] This implies that prospective loss is not merely something that will happen in future if one looks into the future from the moment of assessment of damage since it may also be regarded as the present impairment of an expectation of something in the future.[816] According to Van Der Walt, damage cannot be ascertained before it has manifested itself and that judgment in respect of that damage should only be given when it actually occurs.[817]

In accordance with the once-and-for-all rule, a single wrongful act gives rise to a single cause of action for all the damage, past and future, that it causes. This means that a plaintiff cannot claim compensation piecemeal for his or her various losses, as these occur, as he or she must sue finally for the remainder of his or her damage. He or she must not seek redress only for the harm he or she has already suffered but also for the harm that he or she expects to suffer in the future.[818] More often than not, this is why it is so difficult to claim prospectively for environmental damages where long-tail liability ensues. The assessment of damage and damages for loss of profit may be just as difficult and speculative. It is difficult to evaluate future events in the context of factual causation, patrimonial loss and remoteness of damage.[819]

Prospective loss is regarded as damage that has not yet manifested itself. With regard to environmental damage, the occurrence and manifestation could be separate in terms of time and space. In *Van Jaarsveld* v *Bridges* Harms JA stated that one has to distinguish between claims for prospective losses and those for actual losses. Prospective losses are not easily capable of ascertainment as these are remote, speculative, and therefore not proper for adoption as a legal measure of damages

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815 Prospective damage is a loss, which has not been sustained and ascertained at the time of assessment of damage.

816 According to Visser and Potgieter (2012) 130 prospective patrimony is represented in the present patrimony in the form of an expectation. Similarly, there is a present expectation as to prospective personality interest.

817 Visser and Potgieter (2012) 136.

818 Boberg (1984) 476 and Van der Walt and Midgley (2016) 225.

819 Van der Walt and Midgley (2016) 151 and see the discussion by Visser and Potgieter (2012) 136.

suffered.[820] For instance, when a hazardous substance spills on the land, the consequences of the spillage may be manifested many years after the occurrence of the incident. For example, when oil contaminates water, the outcomes could be dangerous to persons who may use that water but the effect may not be drastic in terms of experience by the affected persons. Oil damage is capable of lasting for decades and may ultimately cause serious environmental degradation. Pollution from oil spills could have serious impacts on marine, coastal environments as well as human health.[821]

Environmental degradation also gives rise to additional economic and social problems, for example, the deterioration of human health, the burdens this puts on health-care resources and the loss of earning capacity for those who may become ill in the long term.[822] This means that consequential damages can be immense and immeasurable. The protection of the environment is the primary protection of the right to human health, which the Constitution requires in terms of section 24.[823] It is interesting to note

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820 2010 (4) All SA 389 (SCA) at par 9-10. Harms JA in dismissing the delictual claims for prospective loss in *Jaarsveld* case further held that 'I do not believe that courts should involve themselves with speculation on such a grand scale by permitting claims for prospective losses'.

821 According to Mariano and La Rovere (2001) 1-3 oil plays a vast and vital role in society today. Oil represents much more than just one of the main energy sources used by humanity. Besides being an energy source, petroleum products serve as feedstock for several consumer goods and have become part of the world economy. On the other hand, the oil industry represents a major potential hazard on the environment. It may have an impact at different levels, for example on the air, water, soil and consequently on all living beings on the planet. The most widespread and dangerous consequence of the oil and gas industry activities is pollution. Pollution is associated with all activities throughout all stages of oil and gas production, from exploration to refining and transportation http://www.eolss.net/Eolss-sampleAllChapter.aspx last accessed 2 July 2014.

822 See discussion by Tshoose (2014) 47 *CILSA" Placing* the Right to Occupational Health and Safety within a Human Rights Framework: Trends and Challenges for South Africa" 278-280 *Nkala decision* on the right to adequate health as a fundamental right and the liability of the employers in the workplace. Small-scale industries and informal sector also have a contribution as these are not properly regulated in the strict context in which large industries are regulated. For example, the health problems those residents in e-Malahleni and Middelburg are facing owing to the air pollution in the area. Such health problems include silicosis, tuberculosis, cancers and heart-related conditions that can be prevented where industry is held to account for their polluting activities. These diseases ultimately affect communities in general if occupational health and safety are not prioritised in terms of legislative framework. See also Dugard and Alcaro (2013) 22 as the authors maintain that the proximity of poor households to industrial areas exposes them to a variety of diseases including asthma and cancer-related diseases. More importantly, industries do not consider themselves as being responsible for such unfavourable conditions that are caused by their activities. It is activities of this nature as mentioned above that give rise to liability for harm to both human health and the environment.

823 Durojaye (2013) 17 *Law, Democracy & Development* "The Approaches of the African Commission to the Right to Health under the African Charter" 394-396 and Swanepoel (2011) 14 *PER/PELJ* "Human Rights and Medical Law" 1-3 advocate the right to health as being at the heart of the welfare and well-being of humankind. Furthermore, the authors also support the fact that the right

that human behaviour is instinctively poised to cause harm to the environment and excessively exploit environmental goods for selfish reasons to benefit the individual and improve his quality of life. Human behaviour is therefore an important component for either the benefit of the environment or its degradation.[824]

In *General Accident Ins Co SA Ltd v Summers etc.*[825] it was held that there was a difference between the moment when damage occurs and the instant when the obligation to pay damages arises as opposed to the moment for the determination of the content of such obligation arise. This is the position with respect to loss of earning capacity because of injuries. A plaintiff does not claim damages for future loss of earnings but for loss of earning capacity. Earning capacity is part of a person's *universitas* and reduction in earning capacity amounts to patrimonial loss.[826] The difficulty lies not in recognising earning capacity as an asset in a person's estate but in calculating its monetary value.

In *Coetzee v SAR & H*[827] the court stated that the cases go only to the extent that if a person sues for accrued damages, he must also claim prospective damages or forfeit them.[828] Prospective damages may be awarded as ancillary to accrued damages but these have no separate and independent force as a ground for action. To make out a cause of action, a plaintiff must plead that the wrongful conduct caused damage or, if appropriate, that it will cause prospective damage even if only on a contingency basis and he or she must quantify the amount of the loss. It must be said that the plaintiff must positively allege the prospective harm even if, on the facts, it can be foreseen only with a relatively low degree of probability at the time of the issue of summons.

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to quality health is also an environmental right. There is a clear relationship between a clean environment and the health-care systems as human health depends on quality environment.

824 Olivier (2002) 9 *SAJELP* "Enforcement of International Environmental Law" 151 and Bix (2005) 50 *The American Journal of Jurisprudence* "Raz, Authority and Conceptual Analysis" 311.

825 1987 (3) SA 577 (A).

826 See Van der Walt & Midgley (2016) 223.

827 1933 CPD 565.

828 In *Coetzee v SAR & H* case, the judge went on to state that 'I know of no case which goes so far as to say that a person, who has as yet sustained no damage, can sue for damages which may possibly be sustained in the future.'

In *Evins v Shield Insurance Co Ltd*[829] the court held that claims constitute a single cause of action, which their success depends upon proof of the same material facts. Although legal practice has experienced problems in quantifying prospective loss, attempts have not been made to develop a theory on this type of damage for environmental pollution. Prospective loss alone does not constitute a cause of action because it is not regarded as actual damage.

Boberg holds a different view on this issue in that a plaintiff should be able to institute an action based merely on prospective loss because such loss is included in the concept of damage.[830]Van der Walt and Midgley argue that damage cannot be assessed unless it has materialised and that it is impossible to make a meaningful evaluation of all the consequences which may flow from a damage-causing event.[831] The authors therefore propose a system in terms of which a plaintiff claims only for damage already sustained and later for further damage when it manifests.

There is some merit in that proposal in terms of the Road Accident Fund Act[832], which applies the same principle to third party claims. The plaintiff, in terms of the Road Accident Fund Act, may be compensated when she or he actually incurs medical expenses and prospective loss of income or support may be paid in instalments. However, it would be impractical to postpone judgment on all prospective loss until it has manifested itself. Prospective loss that involves damage to the environment may raise important questions as loss would be difficult to quantify prior to the actual loss.

If a party claims damages for loss already sustained because of a damage-causing event, he or she is obliged to claim compensation for all future losses which may flow from such an event.[833] If a party claims for loss already sustained and further loss develops unexpectedly in the future, he or she has no remedy. *Mankayi v Anglo Gold Ashanti Ltd* case[834] raises an important point concerning damage and liability in South

829 1980 (2) SA 814 (A).
830 See Boberg (1984) 475-476. See also Visser & Potgieter (2012) 137 and Steynberg (2007) 10 *PER/PELJ* "Re-partnering as a Contingency Deduction in Claims for Loss of Support: Comparing South African and Australian Law" 129/159.
831 Van der Walt & Midgley (2016) 226-227 and Joubert *et a*l (2005) 55.
832 Road Accident Fund Act 56 of 1996.
833 See Visser & Potgieter (2012) 138.
834 In *Mankayi v Anglo Gold Ashanti Ltd 2011 (3) SA 237 (CC)* Mr Mankayi had been working underground for a number of years. He was, as result, as exposed to harmful dusts and gases,

African law. The plaintiff in this case instituted a claim against a former employer who had already discharged him from employment after his illness, which related to the environment in which he worked. The basis of success of his claim was that the employer had a legal duty at both common law and statute to provide a safe and healthy environment for its workforce. In addition, in failing to do so, the employer could incur liability.

The evaluation of a damage-causing event is of importance as to the determination of any possibility of future environmental damage originating from a past incident. A damage-causing event may not only cause immediate harm to the environment but may have consequences that appear in the long term. This view has been expressed in the *Nkala* case above regarding the period during which specifically silicosis may present in the body of a human being.[835] The plaintiff's claim is compensated in the form of prospective loss when damage was done to a natural person.

The injury caused to a natural person can be monitored and evaluated from time to time. This is not impossible with regard to the harm to the environment although the time factor can also create another set of additional problems particularly when it comes to litigation.[836] There is generally no empirical knowledge on future events and in an estimation of environmental damage. The impact of the damage to the environment is complex and the court's assessment would often depend on speculation.[837] In the assessment of prospective loss, the courts take note of circumstances, which would reduce such speculation and the associated uncertainty.[838] The more accurate the award, the fairer it is to the parties.

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which, according to him caused serious lung and air tract diseases. Mr Mankayi's work was classified as risk work, his illness were compensable and was awarded compensation in the sum of R16320 in terms of mining law, that is, Occupational Diseases in Mines and Works Act 78 of 1973. Mr Mankayi claimed no prospective loss when he claimed in terms of the mining law. In fact, that law did not permit of future claims but the Constitutional Court came with an exception to that rule.

835 See *Nkala* case above para 15.

836 See Visser and Potgieter (2012) 139.

837 In cases of environmental damage, the approach is different in that the issue of prospective loss has not been raised in case law as is normally the case with regard to personal injuries. However, in the event of environmental damage because of which environmental clean-up is undertaken, the party responsible for such damage is responsible for costs of such a clean-up campaign.

838 Van der Walt and Midgley (2016) 225. See *Van Jaarsveld* case above.

When damage has been caused to the environment the state can only claim damage after restoration of the environment has been done. This will be the case where the wrongdoer did not make an effort to voluntarily undertake remedial measures.[839] The plaintiff must prove a real likelihood of some prospective loss occurring, a causal link between the conduct and the harm on a balance of probabilities, even though the chances of loss occurring are slight.[840] Once the link is established, the court has to assess the likelihood of the risk eventuating. Allowance is then made for the contingency that the loss might not occur.

The extent of the adjustment depends on what the court considers fair in the circumstances and the result does not depend on the balance of probabilities.[841] The present value of the loss is obtained by applying the general principles applicable to prospective loss. In exceptional circumstances, where there is no evidence upon which such an assessment can be made, courts will make an arbitrary award according to what they deem fair and reasonable.[842] The plaintiff has to produce evidence upon which such an award should be based. Where harm is capable of exact monetary quantification, a plaintiff must produce sufficient evidence upon which an accurate assessment can be made.

Courts normally rely on actuarial calculations but the calculations must also be tested against the general equities of the case.[843] The court would normally decide firstly on the value of the damage, the degree of such damage and adjust the amount to make provision for relevant factors and contingencies that may affect the claim.[844] An award usually depends upon the facts of each particular case and it is normally an arbitrary

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839 In *United States v Parsons* (1991, CA 11 Ga) 936 F2d 526, Envt Rep Cas 1678, ELR 21316 the government instituted a legal action under CERCLA to recover the costs of removing hazardous substances from a farm on which they had been dumped. The court held that the defendant was 'strictly liable for actual costs plus punitive damages equal to three times the response costs of the government.'

840 See Van der Walt & Midgley (2016) 225.

841 Van der Walt & Midgley (2016) 225.

842 Van der Walt & Midgley (2016) 223.

843 Actuarial calculations are based on life expectancy of natural persons. As for environmental damage, such calculations do not apply. See the detailed discussion by Fick and Van der Merwe (2015) 18 *PER/PELJ* "RAF v Sweatman (162/2014) [2015] ZASCA 22 (20 March 2015) A Simple Illustration of the SCA's Statutory Misinterpretation of Section 17 (4) (c) of the Road Accident Fund Act 56 of 1998" 2804-2806 which is critical of inconsistent interpretations made by the courts pertaining to calculation of damages.

844 Steynberg (2011) 14 *PER/PELJ* "Delictual Damages" 4.

award. The measure of proof is based on the preponderance of probabilities. This implies that should there be proof that the possibility of the loss is more likely than not. A court is not able to make an arbitrary award in the absence of evidence.[845] Where the damages cannot be computed exactly, a court may exercise its own discretion in the matter at hand provided that it has a factual basis upon which to do so.[846]

As a rule, damages are assessed as at the date of the alleged conduct. In other words, an assessment has to start on the date on which the damage took place. However, in assessing damages for prospective loss, courts are entitled to take into account known facts which arise subsequent to the delict and which would assist the court in determining the award with a greater degree of certainty.[847]

Trial courts are responsible for assessing damages but, in appropriate instances, where the interests of justice so dictate an appellate tribunal - such as the Supreme Court of Appeal - will make such a determination. However, on appeal, a court may not interfere with the trial court's determination unless the trial court misdirected itself in material respects. Where cases are distinguishable, the awards will always be different.[848] The changing value of currency should be borne in mind when determination has to be made.[849] In some instances, the period between decisions of the courts, on which future decisions are likely to be based, is long. The value of money should be considered in the analysis and evaluation of the present circumstances of the plaintiff.

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845 Van der Walt and Midgley (2016) 235.

846 See the detailed discussion in *RAF v Zulu* where the court applied its discretion to the determination of the amount to be awarded. This is a common practice where the appeal court has the view that the trial court may have misdirected itself with regard to its award or where the award may be considered unfair.

847 Van der Walt and Midgley (2016) 235. See the case of *Hendricks* above where the court held that 'the principle applicable to the assessment of damages has as its *ratio* the policy that the wrongdoer should not escape liability merely because the damage he caused cannot be quantified readily or accurately. The underlying premise upon which the principle rests is that the victim has, in fact, suffered damages and that the wrongdoer is liable to pay compensation or a *solatium*. In the context of damage to the environment, liability would arise in a situation where the competent authority has already incurred expenses in effecting remedial measures. In such situations, the quantification would normally be accurate.

848 See the case of the *RAF v Zulu* above where Mhlantla J said that the award made by the trial court reflected a disparity to the amount which the Supreme Court of Appeal would have awarded see para 18.

849 Van der Walt and Midgley (2016) 237.

4.7 Prescription of Claims

Prescription is concerned with the acquisition of a right, or the prescription of a right or claim through the expiration of time. The lapse of right to claim by prescription serves to ensure that there is finality as to legal issues in dispute.[850] The rationale for prescription is not only the finality of legal disputes but also the promotion of legal certainty and the prevention of multiple as well as repeated actions on the same facts.[851]

The Prescription Act 68 of 1969 as well as the common law governs prescription law in South Africa.[852] When damage has been caused to the environment, the plaintiff who wants to claim damages has three years to institute his delictual claim. This issue was raised in *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd*[853] where an admission of a part of liability could be sufficient to interrupt the running of prescription. The question of prescription may arise with reference to when the debt becomes due, the period when the plaintiff became aware or should reasonably have become aware that a claim vests. In *Fisher v Natal Rubber Compounders (Pty) Ltd,*[854] the court arrived at the conclusion that the claim had prescribed because the applicant did not prosecute the claim to finality. The cause of action, claim and the identity of the defendant should be known or should reasonably have been known to the plaintiff.

Environmental damage may be complex in its impact and far-reaching in most instances, affecting the manifestation of the loss and the quantum of the claim.

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850 Naylor (2005) 9 Acta *Juridica* "Removing the Prescription Blindfold in Cases of Childhood Sexual Abuse" 227-228. In *Gunase v Anirudh* 2012 (2) SA 398 (SCA) the plaintiff negligently acted by failing to follow up on her claim when she was aware that the defendant had closed the legal practice.

851 See in general Naylor (2005) 228, *eThekwini Municipality v Mounthaven (Pty) Ltd* (1068/2016) [2017] ZASCA 129, *Investec Bank Ltd v Erf 436 Elandspoort (Pty) Ltd* (1029/2016) [2017] ZASCA 128 and *Du Preez v Pretorius* (949/2016) [2017] ZASCA 153. Prescription law serves as a control mechanism over matters that should not be a subject of litigation and those that should be a subject of litigation. At the same, the court stated where there was settlement negotiation the running of prescription could not be interrupted by virtue of an acknowledgment of debt.

852 Prescription Act 68 of 1968. S 12 of the Act provides that prescription begins to run as soon as debt becomes due except if the debtor wilfully prevents knowledge of the existence of the debt, or the creditor has no knowledge and could not acquire knowledge by exercising reasonable care.

853 2017 (6) SA 55 (SCA).

854 (20640/14) [2016] ZASCA 33 *Silhoutte Investments Ltd v Virgin Hotels Group Ltd* 2009 (4) SA 617 (SCA) and *Off-Beat Holiday Club v Sanbonani Holiday Spa* (20231/2014) [2016] ZASCA 62. The circumstances, under which a prescription would apply could vary depending on the merits of the claim in dispute.

Environmental damage creates a *sui generis* situation as it is different to other claims for compensation.[855] Environmental law cases have the potential to create novel situations about the prescription. The impact of pollution may not, in every case, have readily manifested and that can make litigation to arise at a very late period with regard to prescription.

There may be problems that are premised on the ownership of the property and challenges in determining the identity of the polluter(s) and their contribution to the damage. For instance, the wrongdoer could have disappeared and not be found to institute a claim for compensation against him. All of the above reasons could militate against a successful claim for compensation for environmental liability. The wrongdoer could have ceased to exist (where a mining company has been closed down years before the damage manifests) when the plaintiff discovers the need to institute legal action.

Where circumstances, that preclude the plaintiff from instituting action, could be attributed to the conduct of the polluter prescription law should give an allowance to the plaintiff in that the court may apply the flexible approach. Courts are always reluctant to dismiss a claim when the defendant causes the condition resulting in inaction.

The prescription of claims is not only an issue of time expiration but other practical factors come into play when the matter is before a court of law. The case of *Van Zijl,* stated above, serves as an example in that regard. In recent times, the courts have adopted a flexible approach with regard to prescription law. The flexible approach concerning prescription should not be understood as an instrument of creating difficulties and legal uncertainty. The flexible approach has to be understood in the context of a constitutional state that has an obligation to promote and fulfil the

855 In *Society of Lloyd's v Price* [2006] SCA 87 (RSA) at para 16 the issue raised in the proceedings was whether a judgment made by the English court could be recognised in South Africa. It was held by the court that prescription in South African law extinguishes a right. This, according to the court, meant that 'prescription in South Africa is characterised or classified as a matter of substantive law and is not simply procedural as was the case under the old Prescription Act 18 of 1943'. The judgment in the matter had been made six years before the proceedings in England. According to South African law, the matter would have prescribed after three years.

fundamental rights of its citizens, which include the right to an environment.[856] Section 24 of the Constitution creates an obligation for the state to protect the environment not only in the interest of society but also in the interest of the environment itself.

For example, where a polluter that has caused harm to the environment is not identified or found for reasons not attributable to the plaintiff or where a taxpayer who makes negligent misrepresentation, fraud or non-disclosure of material facts about his or her tax affairs the South African Revenue Service is able to invoke that as the reason why prescription could not apply.[857] This issue has to be factored into prescription equation when litigation is instituted. The law has to balance the interests of justice and equity relating to prescription. [858]

In *Van Zijl v Hoogenhout*[859] the plaintiff was subjected to sexual abuse by the defendant during her childhood. Owing to the nature of the infringements involved, the court had to consider that the victim was not in a position to deal with that kind of abuse in her childhood even up to adulthood. In other words, there were circumstances that precluded the victim from instituting a delictual action against the defendant. Such circumstances are regarded as a superior force which is a condition that makes it impossible for the plaintiff to take action against the defendant. For example, it could be regarded as a superior force where it is impossible to identify the polluter at the time of the incident, in other words when such polluter has caused damage to the environment.[860]

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856 S 24 of the Constitution.

857 See s 99 of the Tax Administration Act 28 of 2011. Where the polluter creates a circumstance, which makes impossible to deal with liability for damage to the environment, the prescription should remain open in such a case. S 28 of NEMA creates the perspective that prescription may not apply to liability for pollution damage. That position is supported by the fact the Act refers to incidents of pollution that may have happened a long time ago as being the responsibility of the polluter concerned.

858 S 13 of the Act states that completion of the prescription can be delayed after an impediment ceases to exist. The impediments are minority, insanity, curatorship, superior force, debtor outside Republic and marriage.

859 2005 (2) SA 93 (SCA).

860 An action could be instituted on the identification of the polluter where such a superior force or impediment existed. The prescription period is waived to accommodate such difficult situations as mentioned above.

The process of prescription has the effect of extinguishing liability after the lapse of a specified period. In *RAF v Mdeyide*[861] the defendant had lodged his claim with the RAF three years and three days after the date of collision. The RAF opposed the claim on the basis that it had already prescribed when it was filed. Different prescription periods exist with regard to liabilities in South African law depending on the circumstances of the plaintiff. In terms of the Prescription Act,[862] it is possible to acquire rights or be released from obligations simply by the passing of time. In that, fashion prescription provides certainty in the legal sense.

The law provides that creditors should have a certain amount of time in which to claim debts owed to them.[863] Problems concerning prescription arise in situations where legal action commences a long period after the original events have occurred. Courts have developed creative interpretations in line with constitutional values in this regard.[864] When a plaintiff delays in instituting a claim for a long time after the cause of action has arisen, the defendant may argue that the claim has prescribed.

In *Nonkwali v RAF*[865] Maya J stated that a 'plaintiff who claimed compensation for damages sustained as a result of wrongful and negligent driving, had but a single, indivisible cause of action and that the various items constituting the claim were thus not separate claims or separate causes of action'. The period of prescription is not similar for all types of claims that arise. Periods range from three to 30 years depending on the nature of claim that may accrue. Extinctive prescription will intervene over different periods in respect of different rights as set out in the Act.[866]

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861 2011 (2) SA 26 (CC).
862 Prescription Act 68 of 1969.
863 Scott *et al* (2009) 115-116.
864 See *Van Zijl* case above.
865 In *Nonkwali v RAF* 2009 (4) SA 333 (SCA) the appellant had lodged a claim with the RAF for bodily injuries sustained in a collision. She later added a claim for head injury as a result of the same accident. The defendant submitted a special plea of prescription and also stated that it should have been a separate claim with which the Supreme Court of Appeal did not agree.
866 See Scott *et al* (2009) 116 as the authors categorise prescription periods as follows:
(i) that any other debt or claim has a prescription period of three years,
(ii) a debt arising from a bill of exchange, negotiable instruments and notarial contract prescription period is six years,
(iii) a debt owed to the state as a loan, or sale or lease of land to the debtor by the state, it is fifteen years and
(iv) A debt secured by a mortgage bond, judgment debt, taxes, mineral royalties or profits payable to the state.

In *Van Zijl v Hoogenhout*[867] the court held that prescription penalised unreasonable inaction not inability to act. In this case, a woman claimed that her uncle from the age of six had sexually abused her until she reached the age of fifteen. The abuse lasted from 1958 to 1967. The abuse caused long-term physical, psychological and emotional damage. Although she reached majority in 1973 she instituted the action against the alleged abuser only in 1999. Sir John Salmond defines prescription as the effect of the lapse of time in creating and destroying rights.[868] The effect of prescription may be acquisitive or extinctive. Extinctive prescription may be classified as perfect, where its effect is to destroy a right. This type of prescription may be imperfect where only a right of action is destroyed, leaving a right in existence but unenforceable.[869]

In *Trutner and Another v Deysel*[870] the court held that the plaintiff had acquired knowledge ascertaining the wrongful act only in 2000 and that his claim had not prescribed. The plaintiff in this case had a series of medical operations resulting in the removal of one of his eyes. He sought expert opinion, which took him more time. The defendant argued that the claim had prescribed but the court decided in favour of the plaintiff.

Prescription is not based on fixation, as it depends on the circumstances of the particular case. The prescription period may be extended for a period on the occurrence of certain events. In the normal course of events, lapse of time may operate to defeat claims because the period has lapsed. For example, in *Gunase v Anirudh*[871] the respondent instituted a claim against the appellant. The respondent had sustained physical injuries in an accident and was hospitalised for a period of one year. The respondent allegedly instructed the appellant, an attorney at the time, to

867 In *Van Zijl v Hoogenhout* [2004] 4 All SA 427 (SCA) the evidence showed that she had not been aware, until 1997, that it was her abuser who was responsible for her assault. She only became aware of the fact that she had been sexually abused when she watched a television programme that was dealing with child sexual abuse and was further advised by a friend who had done psychology.

868 Salmond J W (1891) 85.

869 Extinctive prescription refers to the lapsing of the claim by extinction of time and prescription is a title by authority of law deriving its force from use and time, see Scott *et al* (2009) 116. Prescription applies in relation to use of property, for example, where a person has been using propertyh for a period of thirty years. That property's title should be transferred to the person who has been in use for an uninterrupted period of thirty years.

870 2006 (4) SA 168 (SCA).

871 See *Gunase v Anirudh* above.

lodge a third party claim with the RAF. The appellant later closed the legal practice and while the respondent was aware of the closure of the office nothing was done about the claim at that point. The respondent was later advised to take her claim to another law firm that in fact advised her of the prescription in connection with RAF. She later instituted action against the appellant, yet the Supreme Court of Appeal held that the action against the appellant had prescribed.

For example, if the debtor expressly acknowledges liability for the debt prescription starts to run from the date of that acknowledgement. A debtor may acknowledge the debt or admission of liability by making part payments to his or her creditors. The debtor's act of acknowledgement of debt is deemed as a waiver of the defence available to the defendant with reference to the period of prescription.

A claim for environmental pollution, for instance, may arise many years after the incident of pollution or damage to the environment has occurred. In such situations prescription cannot be invoked to avoid liability particularly where there are impediments that are attributable to the defendant.[872] The purpose of the prescription is to ensure, based on public policy, that the possibility of indeterminate liability is eliminated and that there must be closure in lawsuits.[873]

4.8 Concluding Remarks

Civil liability for damages caused by damage done to the environment may not be clear in South African common law which has not, in all instances, developed to keep up with the developments in environmental law. In recent years, environmental law has been focused on by most jurisdictions as the effects of climate change have been affecting the environment in more predominant ways. The development of the common law, in the fields of environmental law as well as liability law, would have been difficult to coordinate as the environmental law is a fragmented field with different

872 If, for example, there is a manifestation of the effects of pollution on human health (a long time after the entity that caused it had ceased to operate) claims against the company may be lodged. Such situations are complex for both the courts and claimants as it takes time to identify the cause of a particular disease, for example cancer and other related diseases. See the case of *M Deysel v Dr R Truter and another* as stated above

873 Bu (2013) 20.

sectors that is heavily regulated by statute. South African law of delict, which is more relevant to the protection of the environment, is not adequately suited to address most of the complexities originating from environmental governance.[874]

The principle of the duty of care not to harm the environment and then to prevent harm from occurring, escalating and not to benefit from any damaging activity has been adopted by NEMA. The principle of the duty of care entails that a person who has a legal obligation to perform with a reasonable standard of care can incur liability in the event of failure to do so. The duty of care is a legal duty in terms of the law of delict. In the *Fisher Hoffman Sithole* case, the court held that the duty of care also lay with the defendant to apply a reasonable standard of care in the transition in dispute as the plaintiff had an opportunity to do so.[875]

South African common law application - in cases involving environmental offences - has not been properly evidenced in our courts as successful so far. Owing to the complex nature of matters relating to environmental law, plaintiffs and the state have been reluctant to invoke common law or delictual damages claims in such cases. There has been a fundamental enhancement in terms of the development of the law of delict because of the introduction of the Constitution, which is the supreme law of the country. The principles of the law of delict have largely been developed through the interpretation of the courts to accommodate the modern constitutional values. Where a delictual principle is in conflict or inconsistent with the Constitution, it is invalid to the extent of that inconsistency.

Common law remedies as part of the law of delict are important as a tool to address some of the environmental law-related problems. However, some of the elements of the law of delict, for instance fault as indicated above, may create obstacles in the

874 Stevens (2017) 20 *PER/PELJ* "The Legal Nature of the Duty of Care and Skill: Contract or Delict?" 2-4 and Robinson and Prinsloo (2015) 1672 support the view that the duty of care should also take into account, the qualifications, experience and knowledge of the person. A person cannot simply be in breach of the duty of care by the mere fact that he is a director of a company when he does not even attend or participate in its meetings.

875 See *Fisher Hoffman Sithole* case at para 28-30 where the Supreme Court of Appeal stated that the plaintiff was the author of their misfortune and cannot therefore require liability to be imposed on the defendant.

matter of liability for pollution damage. The main issues appear to be meeting the requirements of fault and causation which are extensively dealt with in this chapter.

CHAPTER 5

CRIMINAL LIABILITY

5.1. Introduction

Criminal liability is pertinent to the application of liability or punishment for damage to the environment. Offences are punished by withdrawal of permits or licenses, the payment of fines and/or a jail sentence. In essence this is aimed at deterrence rather than remediation. Legislation however does allow the state to use resources gained from such prosecutions to remediate the damage caused. The fines do not sadly, land up in the hands of the victims as compensation for those who suffer a loss due to the damage caused to the environment. It does provide the state with funds that could be allocated for restoration projects. For this reason, criminal liability is included in this study.

The criminal justice system aims to ensure that prosecution for those who act in breach of the law are subjected to legal scrutiny.[876] The administration of the criminal justice system in South Africa is the mandate of the National Prosecuting Authority of South Africa (the NPA), which is established in terms of the Constitution.

[876] McCaffrey SC (1983) 11 *Ecology Law Quarterly* "The Work of the International Law Commission" 189-193 elaborates on the necessity to find solution to the challenge of environmental pollution. The author goes further to explain that environmental pollution has extraterritorial ramifications in that what happens in one state can also be found in another. The argument is that an upstream state may pollute water to which a downstream state may be a recipient. The question in such situations is whether the state that is responsible for pollution can be found liable for damage caused to another state. In *Trail Smelter* case, it was confirmed that the state that had caused damage should pay compensation for such damage. Criminal liability does not serve the same purpose as the imposition of penalties and fines. Criminal liability for damage to the environment has custodial implication for the accused. For example, in *Els v The State* (1241/2016) [2017] ZASCA 117 a sentence for the prison term and fine were both imposed by the court for possession of rhino horns without a permit. The poaching of rhino horns in South Africa is a prevalent activity for which stiff sentences are necessary but the Supreme Court of Appeal decided to reduce the sentence that was imposed by the trial court, which may not serve the purpose of deterrence for poachers.

Section 179(2) of the Constitution[877] gives authority to the NPA to institute criminal proceedings against offenders on behalf of the state.[878] In *S v Ndlovu and Others*[879] the accused was found in possession of the rhino horns. The court held them liable for the offence of poaching rhinos and it imposed them a jail term. The punishment of imprisonment sends a message that is loud and clear. As stated above, criminal liability makes sense for the sake of the environment, animal life and society for those that are prepared to act in breach of law to satisfy their selfish needs.

The prosecution of crimes is one of the central ethos of a constitutional democracy. High levels of crime render democracy and freedoms insignificant as citizens do not enjoy their civil liberties in the midst of crime.[880] Constitutional democracy remains hollow without the protection of human rights, freedoms, security, rule of law and sustainable development.

The decision to institute prosecution includes prosecution for environmental crimes. The prosecution of environmental crimes in South Africa has, to date, not attracted much interest from the NPA. There are many reasons for this state of affairs. The main thrust of prosecuting authority has always been and remains the prosecution for conventional crimes. It is noted that some of the environmental crimes would require adequate exposure of the prosecutors to environmental law as a unique and specialised discipline. The institution of prosecution against polluters is part of the realisation and fulfilment of human rights, specifically in this context the right to the environment. It is important that prosecutions are undertaken against all persons who contravene the law where the conduct constitutes an offence that is recognised in law as a criminal offence. In South African law, criminal liability is based on four elements, namely;

(i) an act (*actus reus*),

(ii) unlawfulness;

(iii) causation and;

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877 S 179(2) of the Constitution.

878 Du Toit (2015) 1 *South African Journal of Criminal Justice* “Criminal Procedure” 85-87.

879 2019 (2) All SA 820 (ECG).

880 In *Savoi v The National Director of Public Prosecutions* 2014 (5) SA 317 (CC) para 12, the role of prosecution is examined in detail. Prosecution is pivotal to the criminal justice system of any state. It is particularly significant in a young democracy such as South Africa. Developing countries have diverse challenges including environmental pollution problems as much as criminal issues.

(iv) Intent or negligence.[881]

In *S v Thebus*[882] Moseneke J stated that 'in a consequence crime, a causal *nexus* between the conduct of an accused person and the criminal consequence is the prerequisite for criminal liability.'[883] Although the main focus of the study is on liability for damage that is caused to the environment, criminal liability is pertinent to deter polluters from commissioning environmental crimes and promoting the protection of the environment.[884] For example, the spillage of harmful substance into the environment may not be a crime, but the death resulting from that spillage may be.[885]

The aim of criminal liability is to provide a remedy for the injustice that may be caused by polluters in society. Society is in fact the main victim of the pollution of the communal environment. A person is criminally liable when he is held liable, by a court of law, for a criminal offence. The traditional definitional elements for criminal liability is that it is a human being that is capable of committing an unlawful conduct. Yet juristic persons are also capable of performing criminal acts and should be held accountable for their acts, particularly with regard to environmental offences.[886] The law recognises the humanisation of companies for the purposes of imposing criminal liability.

881 In *Mzwempi v State* (2011) SACR 237 (ECM) the court confirmed that prosecution should not be instituted without evidence.

882 In *S v Thebus (CC)* 2003 (2) SACR 319 (CC) the requirement of causation as one of the key elements for criminal liability was abolished.

883 Burchell (2015) 3-5, Snyman (2008) 29-30, Ally D (2012) 15 *PER/PELJ* "Determining the effect (the social costs) of Exclusion under the South African Exclusionary Rule: Should factual guilt tilt the scales in favour of the admission of unconstitutionally obtained evidence" 477/638 http://legal-dictionary.thefreedictionary.com last accessed 22 April 2015.

884 Cohen MA (1992) 82 *Journal of Criminal Law and Criminology* "Environmental Crime and Punishment" 1058-1062 argues that the fundamental goal of criminal law is the deterrence of individuals from 'undertaking activities that society deems wrong'. The author further highlights the fact that has to be kept within certain parameters to avoid over-deterrence, which may be problematic for society.

885 Snyman (2008) 451 and Farisani (2012) 1 *Speculum Juris* "Corporate Criminal Liability for Deaths, Injuries and Illnesses: Is South Africa's Mining Sector Ready for Change" 39. See also *S v Eadie* 2002 (1) SACR 663 (SCA) para 8 and *S V Ramdas* 2017 (1) SACR 30 (KZD) para 4-5 in which the courts pointed out that conduct - in which a person engages intentionally - could give rise to criminal liability. In these cases, the accused had assaulted the deceased to death and sought to deny criminal liability on the ground that he lacked criminal capacity owing to excessive alcohol intake. The decisions of the courts vary in relation to their approach to criminal liability because, in the *Ramdas* case the accused was found to lack criminal capacity owing to alcoholic amnesia on the part of the accused person.

886 See the detailed discussion by Jordaan (2003) 2003 *AJ* "New perspectives on the criminal liability of corporate bodies: general principles of criminal liability and specific offences"48-49 and Van der Bijl (2012) *De Jure* "Criminal Liability and policy considerations in the context of high speed pursuits"440.

Humanisation does not entail, however, that companies can be subjected to the same conditions as a human being. Companies cannot serve jail terms that natural persons serve for their criminal acts.

In the event of the commission of an environmental crime, the state has to prove that an employee of the corporate entity committed an offence, and the culpability of the employee of the corporate entity must be proved. The origin of this type of liability is the doctrine of vicarious liability. The doctrine of vicarious liability also originates from the common law of delict. In terms of this doctrine, conduct or act of another person can be imputed to the corporate entity provided there is authorisation for the conduct by the entity.[887] Vicarious liability is different from direct liability as was illustrated in the case of *Pienaar v Brown*[888] in which the distinction between these concepts was raised.

Direct liability arises from the acts that have been directly committed by the corporate entity. Direct liability also implies the imposition of liability without necessarily finding fault with the party that has committed an offence. Furthermore, direct liability entails that an entity can be held accountable without vicarious liability being imputed to an employee or agent of the company. Where, for example, the board of directors takes a certain decision that gives rise to criminal liability, that kind of liability is not vicarious in nature.

Courts consider a variety of sanctions to apply as punishment relating to the conduct of corporate entities. This variety encompasses sanctions such as fines and penalties. The South African legal system is not adequately developed with regard to sanctions for environmental crimes. Naming and shaming of the brand of the company, that has caused harm to human health and the environment, is also one of the options available to administrative bodies over and above the court processes. For example, the

887 The entity is held vicariously liable whether it had knowledge or not in relation to the acts of its employees. The promotion of furtherance of the interests of the entity is adequate for the purposes of vicarious liability.

888 2010 (6) SA 365 (SCA).

companies which were the source of the listeriosis in South Africa were well publicised by authorities owing to them being named and shamed in the media.[889]

5.2. Statutory Criminal Liability

The objective of criminal liability is to impose a legal burden on persons who have acted in breach of law in the context of criminal justice. A corporate entity is held liable for the crimes of its directors or employees. In *S v Joseph Mtshumayeli (Pty) Ltd*, it was held that the corporation, which was a bus owner, was liable for the negligence of its employee.[890] The employee of the company had handed the bus, of which he was a driver, to a passenger who caused an accident thereafter. Section 332 (1) of the CPA provides for the imposition of criminal liability on corporations in such situations. The law recognises that companies do not have human attributes such as a brain and hands. Corporations acquire these attributes through their organs such as a board of directors and management.

Section 332 of the EPA is crucial for the advancement of the environmental agenda in the context of criminal liability in particular. Nevertheless, an important component of the section, which is section 332 (5)[891], was declared unconstitutional in *S v Coetzee*.[892] The Constitutional Court held the view that it flouted upon the constitutional right to be presumed 'innocent until proven guilty'. The right to a presumption of innocence until proven guilty by a court of law is protected specifically by section 35 of the Constitution.[893] Section 332 of the EPA is incorporated into section 34 of the NEMA with the aim of prosecuting polluters for environmental crimes.

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889 https://www.timeslive.co.za/.../2018-03-29-class-action-lawsuit-goes-ahead-for-listeria-victims last accessed 29 March 2018.

890 1971 (1) SA 35 (RA).

891 S 332 (5) of the CPA provides 'that where an offence has been committed whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person, who was at the time of the commission of the offence, a director or servant of the corporate body, shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence, and that he could not have prevented it, and shall be liable to prosecution therefore, either jointly with corporation or apart therefrom, and shall on conviction be personally liable to punishment therefore.'

892 1997 (1) SACR 379.

893 S 35 of the Constitution combines the right to presumption of innocence with the right to fair trial. The right to fair trial encompasses the right to be presumed innocent until proven guilty. The right to fair trial is an extension of the right to human dignity and equality before the law. In *S v Moringer* 1992 (4) SA 452 (W) the court was faced with the difficulty that S 332 (5) reverses that the onus of proof against the accused.

In many other environmental statutes transgressions of the Act is recognised as a criminal offence, and fines and imprisonment are prescribed. Sections 91 and 92 of the Mine Health and Safety Act[894] for example provide for criminal liability for the contravention of the Act and foist penalties including imprisonment upon contravention.

The general rule is that the rules applicable to criminal procedure are also considered as norms with regard to prosecution for environmental damage. Section 332 of the CPA provides for the prosecution and criminal liability of corporate entities, their directors and officers.[895] At common law, directors owe a fiduciary duty towards the company. Failure to observe that fiduciary duty may result in civil or criminal liability for the directors. The implication of fiduciary duty is that directors must act in good faith.[896]

The principles of criminal liability for environmental damage are vital with respect to preventing damage. One of the first principles of criminal liability is *actus reus*[897] which is the conduct of the accused that must be an act of commission or omission. In some instances, an obligation may arise from a failure of the accused to act positively. For example, a police officer who does not protect a victim of crime which is committed in his presence fails in his duty to protect members of the public. The conduct of the accused person must be voluntary for liability to arise. The *actus reus* is the external element that is used in court to determine the nature of the crime. The second principle of criminal liability is the *mens rea*. A criminal act is comprised of mental and physical

894 Mine Health and Safety Act 29 of 1996 (hereinafter the MHSA).

895 S 332 of the CPA also provides for criminal liability of the directors of the company as individuals. See also Jordaan (2003) 48-49 and Farisani (2012) 38-39 as the authors believe that corporate entities are criminally liable for their acts on a derivative basis as natural persons manage them.

896 Borg-Jorgensen and Van der Linde (2011) 456, Ahmed (2014) 131 *SALJ* "Contributory Intent as a Defence excluding Delictual Liability" 88-89 and Burchell (2015) 448-449.

897 Kalima (2009) 21 *SA Merc LJ* "Corporate Criminal Liability in Environmental Prosecution: Options for Malawi" 344 contends that a corporation cannot have a *mens rea* which is a key requirement in relation to the commission of a crime. A corporation does not have a guilty mind in relation to offences in general. A corporate body is not capable of having a *mens rea* as an artificial entity. The approach in relation to criminal liability matters should be based on the concept of vicarious liability. An act of a natural person working for the corporation is attributable to the corporation if it is committed in the course and scope of employment.

act. The *mens rea* is the mental element of the criminal offence. The principle of *mens rea* speaks to the guilty mind of the defendant.

It is important to note that not all environmental offences attract criminal liability. The purpose of criminal liability is not to generate difficulties for corporations. This would be the case if other legal measures pertaining to environmental liability would be disregarded. In principle, law should facilitate social life and economic advancement and should not be seen as an obstacle due to lack of clarity.

Common law and criminal law are still applicable to environmental pollution cases. The purpose of liability mechanisms with regard to environmental damage is to protect the environment and give polluters a reason to make more careful decisions relating to the environmental governance.[898] Criminal liability applies to natural persons and the legal persons.[899]

The liability rules serve as deterrent with regard to liability that may be imposed on polluters. It is in circumstances where corporate officials are likely to face custodial sentences where they can avoid engaging in criminal activity. Uhlmann notes that 'the possibility of being given a fine or financial penalty is not a real deterrent for corporate criminals'.[900] The approach of the corporate entities with regard to financial penalties, is that they make it part of the overall cost of doing business. In *Westbrook Insurance*

898 According to Glazewski (2005) 18 and Uhlmann (2013) 72 *Maryland Law Review* "Deferred Prosecution and the Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability" 1295 the implementation of environmental laws is undertaken in various ways. Firstly, a broad distinction is made between administrative and judicial measures to implement environmental laws. Under judicial measures, criminal sanctions and civil sanctions, judicial review and interdicts are described. Judicial measures are applied by the domestic courts of the country but specific judicial tribunals can be established to deal with specific resources for example a water tribunal.

899 There is a difference between a natural and a legal person. A natural person is a human being and a legal person is a creature of law that could be called a company or corporation and corporate entity. In the famous American case of *Dartmouth College v Woodward* 17 US (4 Wheat 518 636, 4 L Ed 629 635 (1819) Marshall CJ stated that 'A corporation is an artificial being, invisible, intangible and existing only in the contemplation of law. Being a mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence'.

900 Uhlmann (2013) 1299 and Burchell (2003) *AJ* "A provocative response to subjectivity in the criminal law: general principles of criminal liability and specific offences" 23-24 promote compliance with environmental regulation without invoking criminal laws.

(Pty) Ltd v eThekwini Municipality[901] the court held officials of the municipality personally liable for costs of tender that was wrongly conducted.

They charge the cost of penalties and fines to the customers to reduce the effect of future fines. Operators have a poor environmental record as a lack of environmental management plans and programmes could lead to disastrous consequences for the environment. There is a regular trend of environmental violations, which implies that environmental protection is not paramount to most entities. As indicated in the preceding chapter. The law on corporate liability is not established yet in South Africa as extensively as is the case in the United States. The same approach of prosecuting corporate criminals in South Africa would bear fruit with respect to criminal liability for environmental damage.

The way in which law deals with liability for environmental damage is twofold. The companies become liable for the acts of their employees who are acting in the scope of their employment. The law is also able to focus individuals who are officials of the corporate entities. These individuals can be prosecuted and be subjected to incarceration for their offences when prosecution against them is successful. Liability for damage to the environment can also take the form of both civil and criminal liability.

The track record of prosecution of corporate entities for environmental damage in South Africa has not been a good one. Non-criminal alternatives are always considered concerning environmental offences. The effect of non-prosecution is that there are no consequences for the violation of the environment. Prosecution is only invoked when companies do not comply with environmental legislation. Prosecution has a positive effect in that it is conducted in public courts and could change the behavioural patterns of the affected company.

Criminal liability is pertinent to the deterrence of environmental damage. It serves a deterring purpose when prosecutions are undertaken against polluters. Non-prosecution of corporate entities does not serve the purpose of reducing

901 (8221/2016) [2016] ZAKZDHC 46 serves as a good example in relation to liability that is imposed for pollution damage.

environmental damage. Prosecution of corporate entities has many implications for the companies that are subjected to prosecution. For example, a corporate entity that is prosecuted may face a reputational risk and may lose business because of its association with criminal activity. It would be in that context that companies would seek to avoid public prosecution for their environmental conduct.

Companies that do business or have contracts with it may also run out of business when a corporate entity with which they do business is under prosecution. Prosecution of corporate crimes has an impact on the corporate image of the company. The integrity of the company may be seriously compromised when it is under prosecution for a criminal activity.

The main thrust of this chapter is about criminal liability for pollution damage. Companies are unable to serve custodial sentences but individuals who serve as directors or officials of the company can serve jail terms.[902] This is the position in the US where employees of a company can serve jail terms for decisions made as officials which result in harm to human life and the environment. The issue of economic consequences for environmental liability is dealt with in chapter 6 below.

Criminal liability may give rise to unintended consequences in that corporate bodies may be more risk averse with their investments.[903] This may retard economic development, which is desperately needed in most developing nations. The attitude of corporate entities may be to withdraw their investments where there is a high legal risk of criminal liability. The purpose of criminal liability is to create measures to prevent environmental damage.

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902 It is not only the company under prosecution that is threatened by prosecution but entities that are linked to it because they have contracts and the individuals who benefit from their services. An entity that is under prosecution can find itself out of business as other entities may not want to be associated with it to avoid a reputational risk. New developments in relation to criminal liability for pollution are beginning to emerge. According to Broughton (2017) "Enviroserv officials in the dock over big stink" (17 August 2017 News24) 10 the waste management company, Enviroserv Management Company is alleged to have acted in contravention of the Air Quality Act by causing a toxic smell in the area of Hillcrest in Durban. The company was responsible for the management of a landfill site. The possibility of pressing criminal charges against officials of the company for pollution damage is quite encouraging in relation to the development of law in the field of criminal liability for environmental offences.

903 Trusca (2011) 62 *Revista Academiei Fortelor Terestre* "Criminal Liability in Environmental Law" 190 concedes that 'criminal liability is the most severe form of legal liability.'

The intention of criminal liability is not to create scarcity for business. South Africa has an obligation to put adequate measures to ensure that environmental damage does not occur. Where this type of damage occurs there has to a measure to make sure it does not reoccur.[904] As such, these companies may also find it difficult to attract human resource to drive their investment plans because of fear of criminal reprisals should they be held criminally liable for their actions.[905] The normal approach is that directors of companies are not personally liable for the violations committed by the companies.[906]

A society such as South Africa whose fundamental values are based on human rights has an obligation to ensure that people and the environment enjoy adequate protection. The protection of the rights of the people to a healthy and clean environment is a fundamental right in terms of the Constitution. Companies have a responsibility to develop best practices as far as the protection of the environment is concerned. The protection of the environment entails the protection of society in general. Criminal liability for damage to the environment enforces the human right to a healthful environment.

At the centre of criminal liability is the right to a healthy environment, a right that is protected by law. Criminal liability is part of the mechanisms that are used to address the issue of pollution damage. For example, restorative justice is one of the mechanisms that are more user friendly than the prosecutorial system. Restorative justice is a system of justice that allows both the polluter and the victim - together with the community - to find a solution to the cause of harm.[907]

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904 Liu (2013) 28 *The International Journal of Marine and Coastal Law* "Criminal Liability for Vessel-Source Pollution in China: Law and Practice" 518.

905 Farisani (2012) 41-43, Ali (2009) 41 concedes that 'one thing however, is certain, that is the truism that much of our lives today are constantly affected by companies. We depend on companies for jobs, for food, transport and shelter.' Companies should not be threatened by implementation of environmental legislation. They in fact should comply with environmental law provisions in their own interest.

906 Pinto and Evans (2013) 67 and Fuggle and Rabie (2009) 249-251.

907 Fuggle and Rabie (2009) 249-250 point out that the criminal sanction is the most widely prescribed sanction for the implementation of environmental legal and administrative provisions. The authors make the important distinction between the application of the criminal penalty as a primary or independent sanction and its application as a subsidiary or supporting sanction. The application of the criminal sanction as a primary sanction means that the environmentally harmful activity is

In South African company law, the directors can be held liable for their acts that cause damage to the environment. The directors do not enjoy the same position as shareholders as to their protection from prosecution. Shareholders are not involved in the daily operations of the company.[908] In fact shareholders do not run companies and it would be difficult to subject them to prosecution for offences committed by the companies.

According to Kidd, 'most serious environmental harm today is caused by corporate entities'.[909] Criminal liability for corporate entities is crucial in the environmental sphere in the promotion of the right to an environment that is not harmful to health and well-being. The escalation of damage to the environment because of pollution is prevalent. The reason for such escalation in environmental damage is that offenders are not regularly prosecuted.

When offenders know there will be consequences for their actions, they adopt new ways of treating the environment. Criminal liability for damage to the environment may be criticised for certain reasons. The criticism is based on the grounds that the criminal prosecution of companies for corporate misconduct should be treated in terms of civil law. It is also because corporate entities are not able to form criminal intent, which is crucial in the matter of criminal misconduct.[910]

The aim of criminal liability are persons and corporations that commit environmental crimes. In other words, it is persons who cause harm to the environment and others

outlawed directly, while a subsidiary sanction occurs where reliance is based on administrative measures, such as a permit requirement.

908 Van der Linde (2008) 20 *SA Merc LJ* "The Personal Liability of Directors for Corporate Fault- An Exploration" 439 notes that 'directors can incur civil liability for their role in corporate faults and defaults under the Companies Act, under specific legislation in the areas of environmental law, tax law and security law, and also in terms of general delictual principles. Criminal liability can arise under the Companies Act, where it is commonly used to encourage directors to ensure that their companies comply with formalities, under various statutes, and through the application of the common law principles of accessory criminal liability'. Accessory criminal liability can be described as liability for facilitation in the commission of environmental crimes.

909 Kidd (2003) 18 *SAPR/PL* "Liability of Corporate Officers for Environmental Offences" 277.

910 Pieth and Ivory (2011) 65 argue that corporations do not act own their own. Companies as juristic persons depend on the acts of natural persons who represent the corporations. Corporations should be held liable when a natural person has acted to benefit the corporation or when they act within the scope of their actual employment.

who commit crimes in general. This does not mean that principles of criminal law cannot be utilised to address environmental pollution. Environmental law applies the same legal principles that are applied to other legal disciplines.

5.3. Criminal capacity of corporate entities

Companies are independent juristic persons who have a right to sue and be sued. Companies are separate from their directors and shareholders who may be natural persons. Shareholders generally enjoy the protection of limited liability for the acts of its directors. This protection is important with regard to corporate ownership and transactions in which companies engage. In certain circumstances, a court of law may make a determination for the piercing of the corporate veil.

The court may pierce the corporate veil on its own initiative without being prompted to do so by any interested party. In *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd*[911] the court held that under the 'common law, the corporate personality of a company may be disregarded even if the company had been legitimately established and operated but was subsequently misused in a certain instance to perpetrate a fraud or for a dishonest or improper purpose and that is not necessary for the company to have been conceived and founded in deceit before its corporate personality may be disregarded'.

The concept of corporate entities and their establishment is a complex issue today. Corporate entities may not be established with a deceptive intention in mind but the practice may give rise to a different situation.[912] Corporate entities may be utilised in the furtherance of interests that are contrary to the law. The existence of these entities makes it easy to conduct unlawful activities where subsidiary companies are involved.

911 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) and Van der Bijl (2012) 440-441 elaborates that harms caused by police in the execution of their duties are problematic in the context of criminal liability. For example, where police cause accidents in the carrying out of law enforcement activities. Pedestrians and other road users become victims in the process in instances of high-speed driving that exposes members of the public to danger.

912 Cassim (2014) 26 *SA Merc LJ* "Piercing the Veil under Section 20 (9) of the Companies Act 71 of 2008: A New Direction" 310.

Subsidiary companies may be used to avoid liability for damage to the environment in certain instances. This is the position that section 20 (9) of the Companies Act seeks to defeat, namely the avoidance of liability by corporate entities. Criminal liability for damage caused to the environment is crucial for the promotion of environmental management principles that are espoused in section 2 of NEMA.

In some instances, the natural persons in charge of the company's operations may be held personally liable for the acts that are purportedly committed by the company. The doctrine of the piercing of the corporate veil is a remedy that exists in both common law and statutory law.[913] It is only in exceptional circumstances where courts allow the application of the doctrine of the corporate veil. The doctrine of the corporate veil is not a liability rule. It would nevertheless be relevant to liability for damage to the environment where a company seeks to hide behind its separate personality to avoid liability.

The prosecution of companies for environmental offences has not always been given the necessary attention by courts. Prosecution of corporate entities for environmental violations has not been a common practice in South Africa. In most instances, companies always enter into plea agreements to avoid prosecution in public courts. As a result, there is a lack of case law with regard to criminal prosecution for environmental offences. It is clear that criminal law has not been used to tackle the enormous environmental problems. This does not mean that criminal law cannot be effectively used in situations where violations are committed by polluters.

Criminal law can play a valuable and complimentary role in the quest to achieve the goal of sustainable development and environmental protection. South African criminal law is aimed at dealing with individual human behaviour and not with corporate entities to a greater degree.[914] In the context of criminal liability, not only should the corporate

913 Cassim (2014) 310-20 notes that the piercing of the corporate veil under the common law is a remedy of the last resort. It is not an alternative remedy. The piercing of the corporate veil is a drastic or exceptional measure that should be used sparingly. In *Cape Pacific* case above the court held that piercing the corporate veil is not a remedy of last resort. This position seems to be cemented by S 20 (9) of the Companies Act which places the piercing of the corporate veil at the discretion of the court.

914 The fact that the primary focus of the criminal justice system is on human conduct does mean that companies are above prosecution. The prosecutorial under-reach or lack of enforcement does not mean that companies are not prosecutable. S 20 (9) of the Companies Act also applies where any

entity be held liable for environmental infringements but also the directors of the entities should be as well.**915** Criminal law has its distinctive part to play in promoting a compliant environmental behaviour among corporate entities. The criminal law doctrine can play a significant role in creating deterrence for environmental infringements. A corporate body may be held vicariously liable for environmental crimes that are committed by its officials even though it had reasonable precautions in place to prevent the possibility of such environmental pollution.[916] A corporate body is not entitled to raise a defence that it had applied due diligence with a view to preventing pollution.[917] The protection of the environment is important as it also implies the protection of human rights.[918]

Criminal liability law also seeks to protect the environment by imposing criminal sanctions against the polluters. In terms of the CPA, the courts have limited options regarding a sanction that can be imposed on a corporate body for a criminal offence. Courts can only impose fines for offences of juristic persons as juristic persons cannot serve jail terms.[919] Du Toit notes that:

> 'In any prosecution against a corporate body, a director or servant of the corporate body must be cited as the offender in his representative capacity. The court must deal with the representative as if he was the

of the rights in the Bill of Rights is infringed and when an obligation or liability arises concerning the environmental damage. Vercher (1990) 10 *Northwestern Journal of International Law and Business* "The Use of Criminal Law for the Protection of the Environment in Europe: Council of Europe Resolution" (77) 28 44 states that 'the relationship between criminal and the environmental law may be described as a system for protecting the environment by means of penal sanctions'. This relationship exists with certain limitations in that environmental law is 'essentially virgin law' that has been developing in recent times. The difficulty in that kind of relationship is that criminal law 'must be adapted to an area of law which lacks the necessary stability to produce reliable and effective results'.

915 Kidd (2003) 278 and Borg-Jorgensen and Van der Linde (2003) 3 *TSAR* "Corporate Criminal Liability" 456. See also Karels (2017) *Obiter* "Financial liability and child offenders in South Africa" 74-76 for general discussion of the principles of criminal liability.

916 S 332 (5) of the CPA. The bottom line is that liability for damage to the environment should be strict so that it deters potential offenders. Deterrence for environmental crimes is also a controversial issue in that academic authors do not regard it as effective as a measure of prevention.

917 A corporate body that seeks to raise a defence that it had applied all precautionary measures and due diligence to avoid an environmental liability would be imposing a burden on the taxpayer.

918 Corporate entities hold a lot of power in society. This puts them in an advantageous position with reference to their environmental offences. When faced with public prosecution companies suffer in terms of their corporate image and they always want to avoid that situation.

919 Farisani (2012) 42, Du Toit (2012) 2 *SACJ* "Corporate Offender in South Africa" 236-237. Persons who are found guilty of criminal offences are normally subjected to prison term. A juristic person is unable to serve a jail term, as is the case with human beings.

> person accused of having committed the offence in question. Upon conviction, the court may not impose upon this individual, in his representative capacity, any punishment other than a fine. This is the case even if the relevant law makes provision for the imposition of a fine in respect of the offence in question.'[920]

Where a company is associated with criminal behaviour, the Companies Act provides for punitive measures.[921] For example, a court may order a solvent company to be wound up as a punitive sanction in certain instances. In terms of s 81(e)(i) of the Companies Act, a shareholder may apply with the leave of the court for an order to wind up the company on the grounds that the directors, prescribed officers or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal.[922]

The basis for such an action is that the corporate body must have acted in an unlawful manner. Such an order may only be made by a court where the Intellectual Property Commission applies to court for the winding up of the company on the grounds that the company has acted fraudulently or illegally. The order can be granted where the Commission issued a compliance notice for the fraudulent conduct and the company concerned has failed to comply with the notice.

The Companies Act regulates the commercial activities of the companies. It is not clear whether a company that causes environmental pollution can be ordered to wind up its activities. The Companies Act does not refer to the conduct of companies relating to environmental damage. The Companies Act should also address the question of liability for environmental damage as companies conduct their activities on the environment. Companies are the very ones that cause damage to the environment.

920 Du Toit (2012) 235.
921 The Companies Act of 2008.
922 S 81 (e) (i) of the Companies Act.

NEMA is the key legislation with reference to the regulation of environmental issues in South Africa. NEMA contains provisions that promote prosecution for environmental offences. For example, section 33 (1) of NEMA[923] provides that any person may-

(a) In the public interest or
(b) In the interest of the protection of the environment, institute and conduct a prosecution in respect of any breach or threatened breach of any duty, other than a public duty resting on an organ of state, in any national or provincial legislation or municipal bylaw or any regulation, licence, permission or authorisation issued in terms of such legislation, where that duty is concerned with the protection of the environment and the breach of that duty is an offence.[924]

South African law regards the environment as a public trust issue to be conserved and protected for the benefit of, and on behalf of, all people of the Republic. Consequently, if the environment is damaged, the law makes provision for holding such people liable through imposition of criminal liability.[925] Damage to the environment poses a health risk and a security threat to the country. The violation of the environment gives rise to the infringement of section 24 of the Constitution, which contains provisions for the protection of the environment.[926]

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923 S 33 (1) of NEMA encourages private prosecution in the interest of the protection of the environment. Private prosecution is a criminal proceeding conducted by a private individual. The distinction between private prosecution and public prosecution is that in public prosecutions the criminal proceedings are initiated by the state.

924 S 34 (1) of NEMA states that whenever any person is convicted of an offence under any provision listed in Schedule 3 and it appears that such person has by that offence caused loss or damage to any organ of state in rehabilitating the environment or preventing damage to the environment, the court may in the same proceedings at the written request of the Minister or other organ of state or other person concerned, and in the presence of the convicted person, inquire summarily and without pleadings into the amount of the loss or damage so caused.

925 The imposition of fines as a punitive measure would not be adequate concerning damage to the environment. It is when individuals such as directors are criminally liable that they would take environmental violations seriously. See Kidd (2003) 277-278 who notes that there are four instances in which controlling officers of a corporation can be held criminally liable for environmental damage. 'The officer may be liable as a principal to the offence, where the officer commits the unlawful act personally. This may arise in circumstances where the officer has influence and control over an activity and fails to take reasonable steps to prevent the occurrence of the offence.' The director or servant of the corporate body may be held liable if he or she is party to the commission of an offence. The director may also be party to a conspiracy as regards an environmental crime and may be held liable for it. The common law provides that a director may be held liable for damage caused to the environment by another director if the director has participated in the commission of the same offence.

926 S 24 of the Constitution.

In terms of section 28 of NEMA, polluters may - in addition to criminal liability - be required to take specified measures to remedy the damage caused to the environment. Polluters may also be required to compensate the state and other third parties for expenses incurred as a consequence of the infringement in terms of NEMA.[927]

The state is now in a position to hold polluters liable for historic pollution and to convict both corporate entities and their executives in their personal capacity for negligently failing to prevent harm to the environment.[928] NEMA imposes a general duty of care on all persons to take reasonable measures to avoid, minimise and rectify any significant harm to the environment.[929]

The primary purpose of liability is to create conditions where decision-making is more cautious on environmental issues and decision-making processes. Corporations give environmental concerns less attention when they know that there are no consequences for the damage caused to the environment. Criminal liability for damage caused to the environment would provide a punitive sanction for polluters. In the US, corporations can be held criminally liable for wrongful acts. The reach of criminal liability in the US is wide enough to deal with corporate crimes.

When a corporation is held criminally liable for wrongful acts in the US, it has a responsibility to pay fines and penalties. In other words, when a company is found criminally liable, it is not subjected to custodial terms as it is the case with human

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927 S 28 of NEMA provides for general duty of care.

928 See the *Bareki* case in which the court held that Gencor should not be held liable for historical pollution.

929 In terms of s 28 (14) of NEMA it is an offence to fail to comply with a directive to address actual or potential pollution or degradation. As a result, a person convicted of s 28(14) offences is liable to a specified significant amount of money or imprisonment. S 31N of NEMA provides that:

(1) a person who fails to comply with a compliance notice commits an offence,

(2) if a person fails to comply with a compliance notice, the environmental management inspector must report the non-compliance to the Minister or MEC, as the case may be, and the Minister or MEC may:

(a) revoke or vary the relevant permit, authorisation or other instrument which is the subject of the compliance notice,

(b) take any necessary steps and recover the costs of doing so from the person who failed to comply.

(3) A person convicted of an offence in terms of subsection (1) is liable to a fine not exceeding five million rand or to imprisonment for a period not exceeding 10 years or to both fine and such imprisonment.

beings in relation to custodial sentences.[930]Companies have criminal capacity to commit environmental crimes. Corporations do not have the benefit of relying on age or other restrictions as it may be the case with natural persons who must appreciate the difference between wrong and right at a particular age.[931] Corporations can only escape liability for damage to the environment when a *vis maior* can be proven, that includes the natural disasters and accidents and other events that are not man-made or within the control of the polluter. Corporate bodies are, however, controlled by people who do have knowledge and expertise to appreciate the difference between right and wrong. Companies therefore have the criminal capacity to commit offences as the directors and employees make their decisions.[932] Corporations that are not always willing to take responsibility for their environmental infringements thus primarily cause environmental crimes in industries. In view of this, legislation creates the offences and prescribes the punishment for the entity and of the human beings like directors of companies involved in the damage-causing conduct.

Criminal liability for environmental damage should serve as a powerful deterring instrument to benefit environmental management in an attempt to prevent damage from being caused to the environment. Such a liability creates an atmosphere that polluters would prefer to avoid. A corporate body would opt to avoid being drawn into litigation where the nature of the transgression is a criminal offence. Corporate bodies develop brand names that require protection for business purposes and reputational harm would be a dangerous reality that could cause negative publicity that a corporation would wish to avoid.**[933]**

The management of liability for environmental damage is a complex issue for most governments. Liability for environmental damage is also a contentious issue for various reasons. As indicated in chapter 8 of this study, economic and industrial

930 The imposition of fines for criminal offences could address pollution damage in that companies are not always willing to their financial position for what they could prevent.

931 Skelton (2013) 3 *SACJ* Proposal for the Review of the Minimum Age of Criminal Responsibility 257-258. Companies do not have age because they are not born but are made. They are also not subject to development processes that human beings undergo.

932 See s 7(1) of the Child Justice Act that for example provides that a child who commits an offence while under the age of 10 years does not have criminal capacity and cannot be prosecuted for that offence.

933 The prosecution of corporate bodies would not assist in protecting their corporate image and brand name as prosecution may result in damage to the brand's reputation.

realities have the potential to cloud the importance of liability regimes to claim for monetary damages from already cash-strapped corporations.[934] At the core of liability for damage to the environment remains the right to a healthy environment that should be deemed just as important, if not more, than economic concerns. The right to a healthy environment - as set out in the Constitution - requires the government to take every step to address environmental pollution problems,[935] and remains the bedrock of environmental law and governance. This right requires that no effort should be spared for the protection of the environment. Case law pertaining to criminal liability for environmental damage in South African law and practice is scant.

5.4 Criminal Law and the Rule of Law

Criminal liability and environmental law fall under public law. The rule of law is a principle that is based on accessible, transparent and independent system of law that are central to good governance. The rule of law advocates the principle of equality before the law and the benefit of the law. It is a reflection of a normal and functional society. It implies that all persons are equal before the law.

In terms of the rule of law, there is no organ of state which enjoys unlimited power. The organs of state have to apply the predictable and well-established principles of law whenever a legal dispute about environmental damage arises. The rule of law creates a balance with respect to the application of the legal principles with a focus on fairness and justice, and criminal liability is drawn from the very same principle of the rule of law.

The rule of law recognises the fact that no person can be punished for a crime without invoking the principles of natural justice. The principle of the natural justice advocates that a person has the right to be heard and encompasses the right to a fair trial. The rule of law requires that state organs act within the prescript of the law and should impose liability on persons only within the limits set by law. In terms of environmental

934 Stricter environmental regulations have the potential to discourage foreign direct investment as corporations may regard such regulations as posing a risk for their investments.
935 Criminal liability is one of the important measures for the protection of environment from damage.

crimes, the limits are set by the body of environmental legislation as discussed in the following chapters and below.

The rule of law is linked to other values in the Constitution such as the right to equality, human dignity and the right to life, all of which also apply where the right to the environment is invoked.[936] The preamble to the Constitution is based on the rule of law as it states that the Constitution must be 'the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by'.[937] The rule of law is a pivotal instrument in a constitutional, democratic and constitutional order. Crimes committed against the environment are in fact crimes against humanity.[938]

NEMA criminalises environmental offences to a limited extent. The provisions of NEMA that criminalise certain environmental incidents have not been backed up by decisive action of enforcement. Although it is difficult to establish intent on the part of a corporate entity about environmental crimes, it is clear that some entities intentionally commit environmental crimes with the knowledge that there will be no consequences for their acts or omissions. The rule of law creates the necessary balance so that the interests of society are not over-emphasised over the interests of corporate entities. Kidd contends that lack of capacity results in problems with regard to implementation of environmental legislation. In other words, there are limited resources and enforcement strategies to combat environmental offences.[939] Payment of a fine or penalty appears to be the norm for sanctioning serious corporate misconduct, which approach is not adequate.

Criminal liability is not a 'one-size-fits-all' solution. Criminal liability for environmental offences has to be combined with other legal strategies to promote compliance with environmental legislation. Section 28 (14) of NEMA[940] also provides for the crimes relating to damage to the environment. Section 28 (14) states that:

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936 Roederer C and Moellendorf (2007) 648.
937 Preamble to the Constitution.
938 See Kidd (2010) 1 *IUCN Academy of Environmental Law* "Important Environmental Developments in South Africa during 2009" 1.
939 Kidd (2010) 4 holds the view that lack of capacity could give rise to implementation problems.
940 S 28 (14) of NEMA.

> '… [u]nlawfully and intentionally or negligently committing any act or omission which causes or is likely to cause significant pollution or degradation of the environment. Unlawfully and intentionally or negligently committing any act or omission which detrimentally affects or is likely to detrimentally affect the environment in a significant manner or refusal to comply with a directive issued under section 28 (14). Penalty for these offences is a fine of one million rand (1 million) or a one-year imprisonment.'

The sanctions imposed on companies for offences committed against the environment are important for future enforcement purposes, and a lenient sentence against the offenders gives the impression that the law is not effective. The primary sanction in South African criminal law as regards corporate misconduct is a financial penalty. This is particularly the position in cases of environmental crimes.[941] Corporate entities that commit environmental offences would ignore the laws they regard as deficient.[942] That would not be in line with the principle of criminal law to create frameworks that defeat, or at least reduce, criminal conduct in society. Polluters should not be given special treatment as regards the infringement they inflict on the environment and should be treated as any ordinary offenders in the context of criminal law. In South Africa, even serious incidents of pollution have not been referred to courts for criminal prosecution.

5.5 International Legal Framework on Criminal Liability

Corporate misconduct is an international phenomenon. In most instances, it is not only national companies that cause damage to the environment but multinational companies may also be the biggest culprits of corporate misconduct. Multinationals take advantage of the weaknesses that exist in governance structures of various states to avoid liability for their acts. It is a fact that a major part of the environmental crimes is committed within the framework of legal persons, while practice reveals

941 Pieth and Ivory (2011) 41 understand the financial penalty as the most appropriate sanction for corporate offenders. Financial penalties may not yield the intended result in every case for damage to the environment.

942 Pinto and Evans (2013) 4.

serious difficulties in prosecuting natural persons acting on behalf of these legal persons.[943]

The issue of multinationals is dealt with in chapter 8 of this study. It is against that background that the United Nations has taken steps to address some of the problems relating to criminal liability. [944] The Council of Europe Convention on the Protection of the Environment, through Criminal Law, provides that each state must enact laws to ensure compliance with corporate liability.[945] Article 9 of the Convention deals specifically with the liability of legal persons.[946]

In Belgian law, legal persons are regarded as being criminally liable for offences that are intrinsically connected with the achievement of their purpose or the defence of their interests. The offence needs to be committed in the furtherance of the interest of the corporate entity.[947] An employee of the corporation must have acted to promote the interests of the corporation in causing damage to the environment. By implication where the employee is not deemed to have acted within the realm of his or her mandate of the corporation, such a person incurs personal liability for the criminal conduct.

In addition, the Council of Europe Criminal Law Convention on Corruption[948] provides for the liability of persons who hold top positions in corporations. Persons who hold these positions have decision-making powers and are those who represent the corporate entities or exercise control over them. It appears that it is these persons who instigate the commission of the offences.

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943 Hall (2015) *Exploring the Green Crime: Introducing the Legal, Social and Criminological Contexts of Environmental Harm* 211.

944 Mattar (2012) 66 *The Journal of International Affairs* 'Corporate Criminal Liability: Article 10 of the Convention against Transnational Organised Crime.'

945 Council of Europe Convention on the Protection of the Environment through Criminal Law of 1996.

946 Article 9 of the Convention on the Protection of the Environment through Criminal Law of 1998.

947 Pieth and Ivory (2011) 35 contend that there has to be a relationship between the offence and the person who acts on behalf of the company. The person who acts on behalf of the company may seek to promote personal interests for which the company should not be held liable in such circumstances. When the person was acting in furtherance of the company's interests the company should be liable for its act.

948 Criminal Law Convention on Corruption of the Council of Europe of 1999.

Criminal law is an important instrument with regard to the protection of the environment yet should not, as a recourse, be regarded as the last resort for the protection of the environment.[949] In the United Kingdom, for example, the use of criminal law to pursue and protect the environment is really seen as the last resort and only pursued if all other remedies have been exhausted. Hughes recognises that what keeps the levels of prosecution low for environmental pollution is poor enforcement and lack of organisation by relevant organs of state.[950] In most jurisdictions, criminal law has not been used for the protection of the environment. Some states prefer to use civil and administrative measures to address environmental problems.[951]

5.6 Liability for Directors and Officers in South Africa

South African law does not have a distinct statute that deals with criminal liability for directors based on their conduct. This is dealt with in the overarching Companies Act as discussed below.

Directors are persons who have a responsibility to steer the company in a strategic direction. There are two sets of directors: executive and non-executive directors. Executive directors are persons who exercise management functions over the company. Non-executive directors are those persons who constitute the board. The entire board of directors are not necessarily involved in the daily operations of the company.[952]

The directors of a company must, at all material times, act in the best interest of the company. The extent to which pollution damage is caused to the environment calls for

949 Vercher (1990) 447-448.

950 Poor enforcement and lack of organisation is also a challenge in South African environmental law. The criminal justice system in South Africa has many challenges including backlogs that result in delays in cases that have been referred to courts for criminal prosecution.

951 An example of poor enforcement is that of the rhinos which have been poached for their horns, where prosecution has yielded minimal results. Without consistent prosecution of those involved in the poaching practice and harsh punishment, rhinos are faced with the reality of extinction.

952 Stevens (2017) 1-3 and Botha (2015) 18 *PER/PELJ* Responsibilities of Companies Towards Employees" 3-4 aver that a director should be held liable for breach of the duty of care for damage caused to the environment in terms of S 77 of the Companies Act. Employees of companies are important stakeholders although employees in general cannot be held responsible for the acts of the company. Persons who provide strategic leadership at management level are ultimately held responsible.

clear measures in this area of law. The new Companies Act deals with the regulatory framework of companies and the personal liability of directors in their daily transactions. The directors are also regulated by the principles of governance. Section 214 of the Act, however, states that the director of company should be held criminally liability for criminal conduct.[953] In terms of section 162 of the Act, a director may be declared a 'delinquent director' if he abuses his position as a director.

In general, the criminal justice system in South Africa has not paid much attention to environmental crimes that are committed by companies. It is noted that South African law allows for a personal liability claim against a director for damages if a company causes damage to the environment. Personal liability claims may also arise from an instance of losses to a company because of the conduct of the directors or officers of a company. Liability may also arise in instances of negligence on the part of a director or officer.[954]

5.5 Concluding Remarks

The prevalence of polluting activities by industries requires practical measures. Such measures should include criminal liability for activities that cause harm to the environment. The breach of environmental laws should be seen as a serious violation of human rights. Environmental crimes should be regarded in such a serious light as to equate it with specific crime such as murder or fraud in South African law.

The importance of criminal liability lies in the notion of deterrence. The primary objective of criminal liability is to prevent the would-be polluters causing pollution because of the fear of the legal consequences. The consequences that lie at the heart of punishment that is meted out to polluters are one of the main objectives of liability law.

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953 Farisani (2012) 2-4 and De Gama (2017) 3-6. Criminal liability for directors is more logical in the light of recent developments in South Africa where state-owned enterprises have been captured to siphon funds from them for the politically connected individuals, see Wolf (2017) 20 *PER/PELJ* "Remedial Action of the 'State of Capture Report' in Perspective" 2-5.

954 For example, a company may acquire a bad debt through an agreement that is entered into by a company at the instance of a director. If the agreement was concluded in a negligent manner and may harm the interests of the company, the director may be held personally liable.

Environmental legislation in South Africa provides for criminal liability for a number of offences.[955] The prosecution for environmental offences remains a tricky challenge. A breach of environmental legislation or policy cannot in every instance call for prosecution. Offences that are regarded as less harmful to the environment are normally ignored. It is when serious environmental transgressions occur that prosecution should be considered. In a South African context, prosecution for environmental infringements would be essential as without it the impression that the environment is just as important as human life would diminish. The enforcement of criminal law provisions, as enshrined in NEMA, would give an impetus to the drive for environmental protection

[955] The offences include non-compliance with legislation, for example, the MPRDA and NWA.

CHAPTER 6

ECONOMIC CONSEQUENCES OF ENVIRONMENTAL LIABILITY

6.1. Introduction

The International Monetary Fund defines foreign direct investment as referring to 'investment made to acquire lasting or long-term interest, in enterprises operating outside of the home country, by an investor'.[956] An investor makes an investment in a foreign economy. The country in which the investor makes an investment is called the host country.

Foreign direct investment has occupied a central space with regard to the promotion of economic expansion in the international community.[957] Foreign direct investment is the main source of capital particularly with reference to the economic development of emerging economies. Foreign investment provides the much-needed access to capital resources for developing countries which have a vast array of social challenges pertaining to services that they have to render to their populations.

First generation rights cannot be achieved without adequate access to capital provided by government. These rights include the right to life, dignity and the right to equality. The attainment of these rights is dependent on the state that has a will to protect them by providing economic opportunities for citizens. The rights to economic and social development, healthy environment and the right to natural resources are third generation rights.

The third generation rights are as important as the first generation rights as the one cannot be achieved without the other. The attainment of the first generation rights requires optimal utilisation of resources. Such resources include the use of natural

956 The International Monetary Fund (hereinafter the IMF).
957 Sauvant *et al* (eds) (2010) 3-4.

resources that are crucial for the development of a country. However, their exploitation has to be done with circumspection and caution.

Foreign direct investment should be viewed in the context of it being part of the solution to social and economic challenges. Corporate citizens do not operate in vacuum; they operate within the space of human rights in society. Foreign investment is not supposed to be regarded as part of the problems that society experiences,[958] and brings economic opportunities to the citizens of the recipient country. Corporate entities should take responsibility for their actions particularly with regard to environmental damage.[959]

In addition, foreign investment is able to attract domestic investment. Lack of economic growth leads to lack of opportunities for the population, which creates instability. Foreign direct investment is an extension of globalisation as it integrates economies for the benefit of societies. The National Development Plan, that endorses the extension of opportunities in the area of foreign direct investment as part of South Africa's development strategy, remains paramount.[960]

The National Development Plan broadly pays attention to every aspect of economic and human development including the environment. In terms of the National Development Plan, the establishment of an 'investment climate is crucial, as are the

958 See the discussion by Jagers *et al* (2014) 1 *American Journal of International Law* "The Future of Corporate Liability" 36-38 on human and environmental rights violations by multinational corporations. For example, the Niger Delta pollution damage somehow exposes the reality around foreign investment. Shell, a petroleum firm, was found to have caused environmental damage in Nigeria and they sought to deny liability for this. Multinational corporations tend to have a focus on making profits at the expense of the environment and human rights. Predominantly, corporations are shielded by governments as has been the case in Nigeria.

959 Kinley (2008) 35 argues that there is a 'problem of human rights abuse In *Agri SA v Minister of Minerals and Energy*[959] a situation of uncertainty was created relating to the right to property by the MPRDA. This Act had introduced a new regime in regime to ownership of mineral rights, and the understanding was that such a regime would deprive the farming sector of their rights, in terms of the older order, by corporations'. Human rights abuse is the antithesis of what multinationals are supposed to do as regards human and environmental rights.

960 Barnard (2012) 15 PER/PELJ "The Role of International Sustainable Development Law Principles" 208/569 and the National Development Plan: Vision 2030 (Our Future) of South Africa is the South African government's development blueprint that outlines the integration of the economy of the country and that of the Continent of Africa.

right incentive structures'.[961] Kinley notes that the issue of human rights abuses are not an important issue with corporations. Corporations are concerned with human rights only in so far their corporate image may be negatively affected.[962]

Foreign corporations, as part of their social responsibility, should protect environmental rights, health care, education and economic development in societies in which they operate. These are the benefits and advantages that the recipient country should enjoy with reference to foreign investment, and which largely depend on whether the host country has adequate infrastructure. Such infrastructure should, *inter alia,* include factors such the level of skills and quality of education that the country has at its disposal as well as proper use of environmental and other resources.

A country such as South Africa is grappling with a number of problems that may, to a certain extent, pose a threat to investors. Foreign investors always take into account the policy framework of the country in which they intend to invest. The land reform and labour law policies, for example, may also give rise to uncertainty about foreign investment as such issues are always taken into account by foreign investors. These are issues that a developing country has to solve without sacrificing its sovereignty, where the government abandons its policy to accommodate foreign investment at the expense of its population.[963]

Countries in transition tend to experience a number of economic challenges. As a result of these, policies may be compromised to attain immediate outcomes that may work against them in the long term. There can be no justification for a government to put the environment and its citizens at risk for the sake of investment. A balance must be struck. The possibility of nationalisation of certain sectors of the economy - for example, mines and financial institutions - can be regarded as a significant risk to

961 The National Development Plan 94-97 clearly states that for poverty to be drastically reduced, foreign investment is one of the crucial factors. Foreign investment has to be encouraged as part of integration of the South African economy into the 'global economic landscape'.

962 Kinley (2008) 39 and Kiss *et al* (2003) 6.

963 According to Scholtz (2007) 248-250 sovereignty is regarded by nation states as a way of preserving their autonomy, which may not be in the interest of the environment.

foreign investors. Environmental issues are not *per se* regarded as a significant factor with regard to bilateral agreements.[964]

More often than not environmental issues are not regarded as a source of discouragement for foreign investment.[965] Foreign direct investment is attracted only when there is compliance with the conditions of the bilateral treaties to which their home governments are party. Foreign investors have the power to influence policy objectives of the host governments in a manner that may not take into account the environmental interests of the host country. Bilateral investment agreements actually create a distinct legal regime for the protection of their own interests in the host country.[966] Foreign direct investment comes with a number of benefits and advantages to the host country. Such benefits depend on the existence of infrastructure and technological development of the host country.

The host government, however, has an obligation to make sure the environment is conducive to foreign direct investment. Foreign investors prefer a situation where there is stability, and the obligation to create an enabling environment in terms of the policy framework lies with the host country.

Foreign direct investment should promote sustainable development which permits an environment that is conducive to investment. Principle 8 of the Stockholm Declaration states that 'economic and social development is essential for ensuring a favourable and working environment for man, and for creating conditions on earth that are

964 Some of the challenges with regard to foreign direct investment are based on perceptions that may not be wished away in certain circumstances.

965 Peterson (2007) 4 states that where environmental issues are regarded by host governments as an issue, corporations would always claim to have adequate measures in terms of their own policies to protect the environment.

966 In Texaco/Chevron Lawsuit (re Ecuador) in 1993, a group of Ecuadorian citizens and a group of Peruvian citizens living downstream from the Oriente region filed a class action lawsuit against Texaco in US Federal Court. The primary complaint was that Texaco's oil operations polluted the rainforests and rivers in Ecuador and Peru resulting in environmental damage to the health of the citizens who lived in that region. The court stated that Ecuador court would be an appropriate venue for prosecution of such claims. In 2003 a class action lawsuit was brought against Texaco in Ecuador for severe contamination of the land in areas where Texaco conducted its activities. An independent expert recommended to the court that Texaco should pay $7-16 billion in compensation for the pollution. Later in the same year, the expert increased the estimate of damages to $27 billion. Chevron lobbied the US government to end trade preferences with Ecuador over the lawsuit. The judgments handed down by the Ecuadorian courts were not complied with by Chevron, which instead conducted a cross-lawsuit in the US court against the enforcement of the judgments of Ecuadorian courts.

necessary for the improvement of the quality of life.'[967] The principle of sustainable development is in line with foreign direct investment is so far as the protection of human and environmental rights is concerned. Foreign investment promotes economic growth, which in turn promotes the improvement of the quality of life of the population and social development.

Foreign direct investment in developing countries has its inherent problems. Some developing countries - especially those that fall under the category of the least-developed countries - do not have adequate resources to take care of their economic and social needs. Certain developing countries depend on donations to fund state programmes. Such countries, because of a lack of resources, find it easy to allow corporate entities to conduct themselves in arbitrarily to protect their own national interests.[968] Such investments make it feasible for the government to realise its economic obligations and development goals. In terms of sections 26 and 27 of the Constitution the state has an obligation to ensure that the population has access to socio-economic rights.[969] Foreign direct investment has the potential to assist in the realisation of these rights, as outlined in sections 26 and 27 of the Constitution, as individual corporate entities. The realisation of socio-economic rights requires the participation of private actors like corporate entities yet activities must remain within the parameters of balancing it with other rights, such as protecting the environment

6.2. Trade and the Environment

Trade can be described as an exchange of goods or commodities between different entities or individuals. The involvement of states in trade is primarily confined to the

967 Article 8 of the Declaration of the United Nations Conference on the Human Environment (hereinafter the Stockholm Declaration) of 1972.

968 Investment treaties are not entered into transparently and, in practice, developing countries find themselves in awkward positions in most instances. Shelton (2014) 13 and Scholtz (2007) 248-250 argue that environmental and human rights are not only enforced by governments but may also be observed and enforced by individual non-state actors. The authors further state that the 'focus regarding human rights is on the responsibilities of the state as a duty holder but certain international instruments impose the same obligations on the individuals and groups'. This implies that corporate entities equally have a duty to uphold human rights in their practices. For example, in terms of the United Nations Convention on the Prevention and Punishment of the Crime of in the Genocide of 1948, individuals may be held accountable for the crime of genocide. Corporate entities are regarded as active participants in human rights abuses when they supply the military or the police with either material things like food or other resources.

969 Ss 26 and 27 of the Constitution.

facilitation and provision of an enabling environment for trade. Trade is the key driver of economic and social development, yet trade practices should promote a sustainable environment as its indispensable component.[970]

One of the main considerations of investors in their investment decisions in a country is political and economic stability. Also of primary importance to foreign investors is legislative framework that allows them to make a return on their investment. There could be many factors with regard the above circumstances, but the focus of the study is on the consequences of environmental liability on foreign direct investment.[971]

Trade practices that do not take into account the importance of the environment are more likely to cause harm than good and are equally harmful to the honouring of human rights. Human rights, environmental rights and economic development are inextricably linked and inseparable. Foreign direct investment, as a tool of trade, should be approached with the attitude that environmental protection remains of paramount importance, and that liability for damage to the environment should be understood to support this.

Environmental protection also protects trade and economic development. The relationship between trade, the environment and economic development is vital in respect to sustainable development. Trade that promotes sustainable development invariably implies that natural resources should not be overexploited in the interest of the environment itself and future generations. Trade practices that do not promote environmental protection ignore the importance of the fundamental right to the environment. Voigt concedes that 'with the introduction of the concept of sustainable development, economic development, the environment, and human rights were supposed to be treated in an integrated manner.'[972]

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970 Glazewski (2005) 476-478.

971 Thompson (2005) 2 *African Renaissance* "Opportunities and Challenges for Africa and the United States" 23-25 argues that China has pursued its 'strategic interests in Africa'. China has invested in countries that are considered in the West as having a high political risk. Thompson also notes that China uses the space, created by conflict that multinational companies avoid, to operate without competition. China is an exception as most governments do not encourage corporations to invest in unstable political and economic environments.

972 Voigt (2009) 15 and Kinley (2008) 131-132 echo the same view about human rights. Their argument is that corporations frequently infringe on human rights or that they are complicit in human rights abuses. The involvement or participation of corporations in human rights abuses

Liability for environmental damage gives rise to the protection of a plethora of other rights in the Constitution. The realisation of such rights is assisted by the existence of foreign direct investment. The Bill of Rights requires a cautious approach to environmental governance. Upholding environmental rights by both the public and private sectors is crucial to avoid incidents of environmental pollution that affects these rights and subsequently retards investments.

Liability for damage to the environment promotes compliance with environmental legislation. Trade practices that fail to comply with set environmental principles and norms and that are detrimental to the environment should be sanctioned in the same way as when human rights are violated. It is important to note that environmental protection should not be seen as an impediment to social and economic development.

The understanding in the developing countries is that environmental protection in the form of sustainable development is used to delay developmental activity in their countries. Developing countries argue that they are the ones faced with more demands for economic development. The need for trade is even greater for developing countries and the awareness about the dangers of environmentally degrading development is prominent.

The need for development has to be balanced with the norms of sustainable environment. There is no evidence that countries that are weak in environmental protection have a high trade performance. Countries that do have a high regard for environmental management principles are likely to be more attractive to foreign direct investment. Of importance as regards foreign direct investment is the existence of infrastructure. Liability for damage to the environment can be used as an instrument to revolutionise industries, as these would benefit from an environment that is healthy and sustainable.

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should also be understood in the context of environmental damage. When corporations cause pollution damage, they may not be regarded as having violated human rights. Damage caused to the environment may have an effect on not only the environment but also human health. Infringements on the environment are infringements on the human rights as well. Corporations have a duty to protect the environment and that is tantamount to protection of life and human dignity.

6.3. Use of Double Standards by Governments

Governments go out of their way to accommodate foreign investment. It is well documented that governments, particularly in the developing world, are faced with serious economic challenges. Owing to the complexity of the economic and social problems that are experienced in societies, governments in the developing world find themselves in a compromised situation. Foreign investment is championed by multinationals that have access to large amounts of capital. As capital holders multinationals have an influence not only on their boardrooms but also on their influence extends to the very issues of governance of the host countries in which they operate.[973]

Foreign investors are aware of the extent of desperation for foreign investment in the developing countries and they use that desperation to their advantage. For example, they may require to be exempted from taxation for a certain period. The exemption would apply in exchange for job creation and other developmental activities that come with the presence of the investors.

This approach stems from the understanding that foreign investors come as rescue operations in a country that has a political and economic problems. This is particularly the case in Africa where governments battle with basic issues of service delivery such as job creation and water supply. In practice, this approach by foreign investors may lead to the worst results for governments especially in poor countries. It is not difficult for a developing country that in fact generates insignificant revenue from its population, to make concessions on the effects of the activities on the environment, and the enforcement of liability regimes against the polluters. Where governments apply double standards on issues of governance, they equally have the power to compromise environmental standards.

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973 Bilchitz (2013) 4 *Journal of South African Law* "Human Rights Accountability in Domestic Courts: Does the *Kiobel* Case increase the Governance Gap?" 794.

The reasons for flight of capital from certain states vary from one company to the other. These may include poor provision of services to the population, which may create political instability.[974] For that reason, liability for environmental damage may not be the only reason for a lack of foreign investment. The interests of foreign investors reign supreme in their mind-set in that they are capable of finding risk even where risk may be too minimal to be regarded as risk. The host governments do not compromise the interests of the foreign investors.

The host governments may, in most instances, seek to allay foreign investors' concerns about their liabilities for pollution. Such efforts may not bode well if the perception is that the legislative framework - as regards environmental governance - is not favourable to foreign investment.[975] Foreign investors may be reluctant to invest in a country in which environmental liability rules for pollution are ambiguous and unfavourable to them. There is conclusive evidence that foreign direct investment could be stymied by investors' fears about liability for pollution and other issues that may negatively affect their interests.

Multinationals also use their influence to seek intervention from their home governments to protect their interests. In other words, foreign investment can be used to settle political problems in the host state. For example, in Zimbabwe most multinationals withdrew their investments when the government in that country started a change of land ownership policy without compensation. The land policy in Zimbabwe resulted in sanctions that left the country even poorer than it was before the change of policy. Multinationals form part of the environment in which they operate in a broad sense.[976]

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974 The extent to which the labour rights are entrenched in South Africa could be an obstacle to foreign investment. Multinationals are not keen on an environment where labour rights are regarded as crucial. The entrenchment of labour rights implies that the demand for increased wages is high. Multinationals tend to avoid markets where there are demands for higher wages.

975 Auer *et al* (2001) 10 *The Journal of Environment and Development "*Environmental Liability and Foreign Direct Investment in Central and Eastern Europe" 6-7, Thompson (2005) 24-25 concede that environmental laws and regulations are essential ingredients of economic growth. Foreign investment provides countries with capital, new technologies, modern production techniques, new products, management skills, employment opportunities and an entry into world markets.

976 Gotzman (2008) 1 *Queensland Law Student Review* Legal "Personality of the Corporation and International Criminal Law: Globalisation, Corporate Human Rights Abuses and the Rome Statute" 38 states that 'criminal liability of corporations has been recognised in domestic civil and common law legal systems based on the jurisprudential understanding that the corporate entity is a legal person who is consequently subject to criminal liability'. The International Criminal Court has a

More often than not corporations commit acts that should attract criminal liability with impunity. These acts are not merely corporate misconduct that would require a fine. Some of these acts are gross violations of human rights for which natural persons would be criminally charged.[977] The International Criminal Court does not seem to have paid attention to this type of dilemma. The Court's jurisdiction is restricted to the wrongs of natural persons. This restriction gives rise to injustice in an economic sense in that corporations would consider their investment destinations with fairness when they know that the playing field is level.[978]

The United Nations Conference on Trade and Development assists in the promotion of key issues on foreign direct investment. UNCTAD is the part of the United Nations Secretariat dealing with trade, investment, and development issues. The organization's goals are to maximize the trade, investment and development opportunities of developing countries and assist them in their efforts to integrate into the world economy on an equitable basis.[979] The primary objective of UNCTAD is to formulate policies relating to all aspects of development including trade, aid, transport, finance and technology. The conference ordinarily meets once in four years; the permanent secretariat is in Geneva.

Reports generated at the Conferences specifically assist developing countries in attracting and benefiting from the foreign direct investment by building their

responsibility to make sure that the corporations that violate human rights are brought before it for their crimes. Countries that have a record of human rights abuses and exploitation have also been attractive to foreign investment. In such countries, these companies make profits that they could not make in their home countries at the expense of human rights. In addition, they become part of the trade practices that are legally prohibited in their home countries for the sake of profiteering. Multinationals collude with host governments in such situations to deny rights that they could not preclude workers from in their home countries.

977 According to Chirwa DM (2006) 10 *Law, Democracy and Development*, "The Horizontal Application of Constitutional Rights in a Comparative Perspective" 21, 'human rights apply in the public sphere but not in the private sphere'. Multinational corporations have no obligation to observe human rights in international law as non-state actors.

978 See the detailed discussion by Gotzman (2008) 38-39 and Kinley (2008) 135-136.

979 The United Nations General Assembly in 1964 established UNCTAD and it reports to the UN General Assembly and United Nations Economic and Social Council. In this regard see also https://unctad.org/en/Pages/aboutus.aspx (last accessed on 24 November 2019).

capacities.[980] They enhance their international competitiveness on the world stage and raise awareness about public policy issues such as the protection of the environment. This means that our concept of what the extent of the legal duty to act is concerned, these policies assist in providing a duty of care. The UNCTAD reports play an important role in ensuring that developing countries and investors are aware of the mechanisms available to them to resolve investment disputes.

The obligation to accord fair and equitable treatment towards foreign investment always forms part of international investment agreements. Claimants always invoke the principle of fair and equitable treatment when investment disputes arise. The principle of fair and equitable treatment is an equivalent of the principle of natural justice. A state is always expected to act consistently, transparently, reasonably, and without ambiguity in relation to issues that may affect foreign investment. The host state's conduct must not be inconsistent with the spirit and purport of investment agreement.

The issue of criminal liability has been dealt with in chapter 5 of this study. The exclusion of the jurisdiction of the International Criminal Court in the corporate conduct of the multinationals, by the Rome Statute, creates a complex situation. It could be argued that the acts of corporations are the acts of their directors and officials. If sanctioning mechanisms existed at international level, multinationals would avoid situations where they become part of the infringement of human and environmental rights. That approach would cascade to an environment where trade is based on fairness and equity.[981] The exclusion of multinational corporations from the ambit of the International Criminal Court is an unnecessary complication for both human and environmental rights. The main thrust of this study is on liability for damage to the environment.

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980 See for example specifically on the effect of environmental liability on sustainable development, and the duty of care, the United Nations Conference on Trade and Development (hereinafter UNCTAD) Report of 2012.

981 See Hunter *et al* (2007) 1343-1344 in the analysis of the mandate of the WTO. The WTO as a multilateral organisation with a mandate to regulate trade also does not have authority to deal with political and economic choices of the state parties.

The issue of double standards that governments apply in relation to bilateral treaties is an issue to which there is no specific solution at international level. One of the challenges in relation to the pursuit of the multinationals is that state-based enforcement mechanisms are limited for their successful prosecution of their corporate conduct. Gotzman puts it correctly that 'states have a tendency to pursue short-term national interests rather than global human values'. Corporations have occupied a central position in relation to power dynamics owing to a decline of state power. These entities have an influence on critical values that society has to uphold.[982] Liability for environmental damage shifts the focus of the government from short-term paradigm to sustainability.

One of the mainstays of the South African economy is natural resources particularly minerals. Reliance on these natural resources means that the principle of sustainable development must be religiously adhered to in the interest of future generations. The present generation owes it to the future generations to ensure that resources from which the country presently benefits are prudently used. In the absence of these environmental values, society has to face serious problems in the future. This does not mean that there is a guarantee that the natural resources on which South Africa relies will still be in the market as commodity goods in the future.

Adherence to the principle of sustainable development does not imply that economic development must be adjourned. Economic development entails a number of issues which include the provision of health-care services, job creation, quality education and technological development that are indispensable. Economic, social and environmental needs are intrinsically linked in the context of environmental law. The relationship of these needs has to be catered for in policy.

Liability for damage to the environment should take centre stage to achieve sustainable development and the rule of law. This liability should be seen as an

982 See the discussion by Gotzman (2008) 40-41, Young (1992) Sustainable Investment and Resource Use UNESCO and Parthenon Publishing Group 7-8 Hunter *et al* (2007) 1343 and Gerhing and Segger (2005) 27 which emphasises the role that civil society has to play with regard to the protection of environmental values and sustainable resource use. In other words, some of the issues that are not dealt with at governmental level can still be addressed through the courts of public opinion. The incidents of environmental pollution that have affected lives of people in Nigeria are an example, relating to participation of the people in an effort to fight against pollution.

attempt to protect economic and social development as opposed to hampering it. Environmental liability should be understood as promoting corporate liability that is crucial for achieving a sound and sustainable environment.

Furthermore, the World Summit on Sustainable Development Plan of Implementation called on states to:

Facilitate greater flows of foreign direct investment to support sustainable development activities, including the development of infrastructure of developing countries, and enhance the benefits that developing countries can draw from foreign investment, with particular actions to:

(a) Create the necessary domestic and international conditions to facilitate significant increases in flows of foreign direct investment to developing countries,
(b) Encourage foreign direct investment in developing countries and countries with economies in transition through export credits that could be instrumental to sustainable development.[983]

Clearly, an entity that conducts business activity in the country has a responsibility for its polluting activity.[984] Actually, the polluter pays principle states that the polluter should be held liable for its polluting activities. Strict and retroactive liability is advantageous in that it forces investors to shoulder all clean-up costs and associated liabilities, relieving government and taxpayers from such potentially costly burdens.[985]

Where laws in relation to environmental damage are regarded as inflexible, investors may decide to avoid such countries. This is particularly the case where investors have the concern of being burdened with past or historical pollution.[986] In recent times, firms have had to face litigation in relation to their past pollution.[987] In some instances, the

983 World Summit on Sustainable Development (WSSD) Plan of Implementation of 2002.
984 See the case of *Bareki* as stated where the company Gencor was sued for past pollution.
985 Auer *et al* (2001) 9-10.
986 See the *Asbestos* case.
987 See the case of *Amnesty International and the Friends of the Earth v Shell Development Company* where Shell was sued for oil pollution in the Niger Delta region in Nigeria. Shell was ordered to pay a large amount of money for clean-up campaign in the Niger Delta region.

effects of pollution do not become apparent immediately as these manifest themselves after a long period. The manifestation of environmental impacts after a long time also creates more problems because, in some cases, the firm that could have been responsible for such pollution may have become insolvent or even non-existent.

In South Africa for example, a landowner who buys contaminated land could be liable for such contamination as the titleholder of the land.[988] Prospective investors should under normal circumstances avoid situations where they take responsibility for pollution that was not caused by them. They can do that by conducting environmental audits which would give the potential investor an opportunity to assess the extent of the environmental risk and cost.

Without contradiction, it is prudent for foreign investors to invest in a country that has a legislative framework that seeks to prevent pollution rather than looking to clean-up later. For example, Germany has an environmental liability legislation that has not had a negative effect on the industry.[989] Regardless of the downsides of the foreign direct investment, governments are always eager to allay domestic capital constraints with a view to generating jobs and modernising industries to give their countries access to international markets through global trade networks.

Sands concedes that foreign direct investment is now the largest source of external finance for developing countries.[990] These countries grapple with a number of challenges over and above issues of social and economic development. Governance and a lack of strong institutions to support democracy remain a problem particularly in the African context. The objective of increasing foreign investment in areas of environmental need is reflected in mechanisms established under various agreements. Those agreements include the Clean Development Mechanism established by the 1997 Kyoto Protocol including the various environmental

988 See s 19 of the NWA.

989 Bartsch (1997) *The Kiel Institute for the World Economy* "Economic Consequences of the German Environmental Liability Act- Capital Market Response for the Chemical Industry" 3 states that the environmental liability legislation introduces strict liability for environmental damage.

990 See Sands (2003) 1056 who argues that developing countries are the target for foreign direct investment for a variety of reasons. One of the reasons is that these provide incentives for foreign direct investments.

agreements promoting transfer of technology.[991] Most governments understand that sluggish pace of inflows of foreign investment into a country creates unfavourable economic circumstances.[992] Unfavourable economic conditions create instability in a country and are not responsive to issues of poverty and other social ills. Governments are always willing to accommodate investors sometimes at the expense of the protection of the environment.[993] Governments are not always concerned about the gravity of the environmental problems and their impacts in relation to foreign direct investment. Their main concern is to alleviate the challenge of poverty and diseases. Investment implies engagement in a certain economic activity that is disruptive to the environment.[994]

Enterprises with limited access to capital are always wary of rules that force them to set aside resources to cover future claims instead of making productive investments. A situation where these liability rules do not exist is also recipe for more environmental problems. Liability in such situations tends to be shouldered by the taxpayers.

In addition to certainty, there should be consistency in the application of environmental liability rules. According to Auer *et al* efforts to nurture good environmental citizenship among firms are undermined when environmental rules and standards frequently change.[995]

991 According to Sands (2003) 1057 among the international mechanisms available to encourage foreign direct investment, the first comprises investment treaties, which seek to protect foreign investments against certain governmental acts, in particular expropriation and unfair treatment. The second comprises arrangements, domestic and international laws which seek to provide guarantees against the acts prohibited by investment treaties.

992 Foreign investors have excessive power that they use to influence decisions in their favour.

993 See Auer *et al* (2001) 10 and Thompson (2005) 24 who believe that the pursuit of economic and strategic interests by investors undermines environmental and human rights values.

994 Merrill and Schizer (2013) 98 *Minnesota Law Review* "The Shale Oil and Gas Revolution, Hydraulic Fracturing and Water Contamination: A Regulatory Strategy" 148 agree that fracturing for example, is one of the activities that are disruptive to the environment. Hydraulic fracturing may cause air pollution. It may as well cause tremors and earthquakes. Mining also has proven to be harmful to the environment as it leaves irreparable damage to the environment.

995 Auer (2001) *et al* 9-10. In South Africa when a company applies for mining permit, there are a number of requirements to be complied with by the regulatory authority and the applicant. In terms of S 39 of the MPRDA, an applicant has to conduct an environmental impact assessment and submit an environmental management programme for approval.

6.4. Concluding Remarks

It appears that foreign direct investment is an attractive option for developing countries, which have a deficit in social and economic development. Foreign investment is the integration of economies that is spearheaded by multinational corporations who are the major players in relation to the promotion of economic growth and social development.

The foreign investment is vital in a country such as South Africa with extreme forms of poverty and very low human development index. The human development index is the measurement that is used to determine the standard of living, per capita income, levels of education and skills. Economic opportunities that accompany foreign direct investment come as a rescue option to desperate societies that need job opportunities. Foreign investment is an integral part of the agenda of the world to promote social justice by generating employment and economic development in all societies. Technological and skills transfer are important for developing economies as they face with limitations in many areas of their economies.

The environment is an important aspect of any kind of investment. It is common knowledge that multinationals that are at the forefront in foreign investment command resources and power. These resources give them an advantage over domestic corporations. In most instances, the developing countries do not have the muscle to challenge them in the event of deviation. However, there is no evidence in South African case law that points to such a deviation yet.

The main theme in this chapter is the investigation of whether a strict environmental liability regime could discourage investment. Foreign direct investors consider a broad range of factors before they invest in a country, and strict liability regimes are but one of them. Environmental laws cannot alone serve as a barrier to foreign investment. A developed environmental management and liability system could instead encourage foreign investment.

CHAPTER 7

COMPARATIVE STUDY

7.1 Introduction

The countries that have been chosen as part of the evaluation of their environmental liability regimes are developed countries. By virtue of them being developed countries, they have in a way gone through some of the current challenges that South Africa is going through at the moment. The right to the environment has been placed at the top of the agenda for most of these countries. The increase in pollution damage has resulted in a new paradigm around the concept of the protection of the environment and its management. One of the mechanisms that have, in the recent past, been considered by countries is the expansion of liability regimes for environmental damage which the under-mentioned countries have successfully implemented.

South Africa is still a relatively young country that must continue to develop its laws for the protection of the environment and its population. The experiences in the Netherlands, Belgium and the US can be relevant as an attempt at finding solutions to some of South Africa's problems in the area of environmental liability law. For the sake of brevity and practicality, it is not possible to provide a comprehensive analysis of all the laws in each of the countries, only unique developments and aspects that can inform South Africa's current position will be included in this thesis. This chapter contains only a *capita selecta* of some informative aspects of this jurisdiction.

The South African law provides an interface between the application of domestic law, international law and foreign law in section 39 of the Constitution.[996] In this context, it is important to take note of the relevance of section 39(1) of the Constitution which provides that, when interpreting the Bill of Rights, the court, tribunal or forum-

[996] S 39 of the Constitution.

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom,
(b) must consider international law; and
(c) may consider foreign law.

Section 39(2) of the Constitution further points out that every court or tribunal must in, its interpretation of legislation or the development of common law and customary law, promote the object, and purport and spirit of the Bill of Rights. In *S v Makwanyane*[997] the importance of section 35 of the Interim Constitution,[998] which is the equivalent of section 39 in the final Constitution, was highlighted as an instrument that may assist the court in its interpretation of international law. The provisions of section 39 serve as a justification for the consideration of liability regimes of other countries as stated above.

These countries have over time developed advanced liability regimes necessitated by the level of industrial activities found in developed or so-called 'first world' countries. It would be therefore be appropriate to draw lessons from their experiences. It seems that the weaknesses which are found in the common law in relation to the protection of the environment are universal in nature as most jurisdictions prefer statutory measures to introduce liability regimes for pollution damages.

The damage to the environmental is increasingly complex in nature as industries draw from the technology and other methodologies for their operations. In addition, ambitions among nations to fulfil developmental needs of societies at a political level exist. The complexity in the industry therefore requires legislative measures including liability regimes to manage and streamline the incidents of environmental damage consistently. The discussion below offers a limited view of the complexities that exist internationally.

997 *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC).
998 S 35 of the Interim Constitution.

7.2 Environmental Law in the European Union

The EU Environmental Liability Directive is one of the important pieces of environmental legislation in the EU.[999] The Environmental Liability Directive has played a crucial role in the context of the policy coordination and harmonisation of environmental liability laws in the member countries of the EU. Environmental legislation in the EU is premised on the reality that the EU approach to environmental governance should be integrated and founded on the principle of cooperation.[1000]

The EU is a pioneer in relation to the development of environmental liability law.[1001] The EU has, in the recent past, introduced measures that are aimed at creating liability for polluters in the region, which includes the adoption of the three grand environmental principles, namely the polluter pays principle, the precautionary principle and the preventive principle. These principles have been dealt with extensively in chapter 3 above.

7.3 The Liability Regime in the Netherlands

The Netherlands has the obligation to adopt EU legislation at national level for implementation as a member state of the EU. Developed nations have their own peculiar circumstances in relation to pollution and economic conditions. These circumstances include the quality of life that citizens live and enjoy which influence the environmental conditions of that particular country. Environmental protection, however, is important in both the developed and developing countries. The Netherlands is one of the key states of the European Union, which serves as the

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999 The EU Environmental Liability Directive 2004/35 (hereinafter the ELD) introduces strict liability for environmental pollution within the EU member states.

1000 Scott (2004) 15 *European Journal of International Law* International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO 137-138.

1001 Lugt (1999) 48 and Cassotta (2012) 92 note that Netherlands subscribes to the idea that international law enjoys priority over the national laws and also applies directly in the Dutch legal system. In terms of Article 91 (1) of the Dutch Constitution, international treaties require the approval of the Dutch parliament. International treaties have priority over the domestic law where there is a conflict between the Netherlands law and international treaties.

supervisory legislative body for their member states.[1002] The state of the Netherlands as a developed nation state respects human rights that include environmental rights.[1003] The Netherlands recognises that, as one of the highly industrialised countries in Europe, the effect of industrialisation is that levels of pollution can also be high, confronting the government with the problems relating to clean-up, liability and deterrence.

Subsequent to an investigation into massive land contamination and soil contamination in the Netherlands, the government of the Kingdom of the Netherlands decided to strengthen their environmental protection programmes.[1004] In the past the government had always relied on civil damages claims to recover costs that would be incurred during clean-up campaigns of contaminated sites by the government.[1005]

That approach for the recovery of costs, by way of civil liability claims appeared, to no longer be adequate to address existing environmental challenges at the time. The issue of the recovery of costs for clean-ups had reached a *cul-de-sac* in relation to the fast expansion of legal development in the sphere of environmental management. The polluters had found escape routes in relation to their liability owing to flaws in common law and the unique nature of pollution damage claims.[1006] The state, over time, realised that it had to develop stricter mechanisms to ensure that its environmental

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1002 Member states in the EU have an obligation to observe and implement the regulatory standards that are set by the EU parliament. The Dutch law allows and encourages private entities to conduct clean-up campaign on their own. That privatisation of clean-up projects makes it possible for the government to avoid confrontation with the industry where there is compliance with the law. The state has authority to issue remediation order to both polluters and the property owners whose land is found with contamination.

1003 Oomen (2014) 3 and Boyle (2014) *UNEP* "Human Rights and the Environment" 1-2.

1004 De Graaf and Jans (2007) 24 *Pace Environmental Law Review* "Liability of Public Authorities in cases of Non-enforcement of Environmental Standards" 377 discuss the issue of lack of enforcement and liability rules concerning the environmental standards in the Netherlands prior to the incident of *River Rine*.the

1005 Brans (2001) 243, Ebbesson and Okowa (2009) 197 note that in order for liability to arise in tort law unlawful conduct, fault and causal connection must be established. The unlawfulness is also important as a way of determining whether damages can be claimed in tort law. Unlawfulness is an act that is committed in contravention of a statutory duty or another person's right. The act or conduct must be imputable to someone else. Prior to the introduction of stricter liability rules, even the disposal of hazardous substances on the land was not regarded as posing risk to the environment. In fact, the disposal of hazardous substances on the land was regarded as a normal waste management practice

1006 Betlem and Faure (1998) 10 *Georgetown International Environmental Law Review* "Environmental Toxic Torts in Europe: Some Trends in Recovery of Soil Clean-up Costs and Damages for Personal Injury in the Netherlands, Belgium, England and Germany" 857.

protection objectives could be achieved. The Constitution of the Kingdom of the Netherlands 'imposes a general duty on the government to ensure the habitability of the land including the general infrastructure and especially the vital sea-defences and the protection and improvement of the environment'.[1007]

Historically, the Netherlands has been one of the countries that developed their specific environmental policies and laws earlier than others did. An example is the Nuisance Act of 1875[1008], and the Soil Protection Act[1009] from the previous century. The SPA was one of the first laws to introduce statutory liability rules for polluters in the Netherlands. The Act deals specifically with the recovery of costs from the parties whose activities have caused soil pollution. In terms of article 75 of the SPA, the polluter is liable to the state if negligence is established.[1010] The basis for liability is therefore statutory liability yet maintaining the possibility of a non-contractual civil liability in terms of the Dutch Civil Code.[1011]

Polluters have specific responsibility for the land that is contaminated on their sites. The general law that regulates environmental protection in the Netherlands is the Environmental Management Act (*Wet miilieubeheer*). The Act takes the environment as a common heritage for the state and the citizens of the country. In that context, the Act creates an obligation for both the state and citizens to take reasonable measures to prevent pollution damage.[1012]

Such responsibility includes the duty to report the discovery of the incidents of contamination to relevant authorities. There is also the obligation to investigate incidents of contamination and to take remedial actions in relation to such incidents.

1007 Article 21 of the Constitution of the Kingdom of the Netherlands.
1008 The Nuisance Act of 1875.
1009 The Soil Protection Act of 1994 (hereinafter the SPA) establishes standards to ensure that polluters are held liable for clean-up costs with reference to contamination.
1010 Article 75 of the SPA.
1011 The Dutch Civil Code of 1992.
1012 The process of litigation for the recovery of costs is itself costly for the state authorities in most cases. The cooperation of the industry and state authorities limits the possibility of such litigation expenses.

Article 13 of the SPA provides that the duty to report encompasses serious, and what may not be considered serious, incidents of pollution.[1013] These incidents are accompanied by the obligation to conduct clean-up activities of those contaminated sites. Environmental legislation provides for heavy sanctions including fines and imprisonment for the breach of environmental laws in terms of the Economic Offences Act.[1014]

The polluter is liable for costs of recovery where there is breach of the rule regulating recovery of costs by the state in terms of the previous legislative dispensation. In that case, the basis of liability is the notion of non-contractual liability as stipulated in the Dutch Civil Code. Liability could also be triggered when there is a breach of a written convention. The breach of convention remains controversial in practice. Liability for soil pollution can also be invoked on the ground of fault, law or common opinion.

The liability regime in the Netherlands is an important law in relation to liability for pollution. The Netherlands is one of the first states in the developed world to develop laws and regulations aimed at environmental protection. Conveniently, at that time the rest of Europe was also beginning to realise that drastic measures were necessary to ensure the protection of the environment and human life and implemented the required directives and legislation.[1015]

The Netherlands has adopted strict liability in relation to environmental damage. The position of strict liability seems to be in line with the position of the European Union in terms of environmental liability. It is interesting to note that environmental insurance is also compulsory in relation to certain activities that cause deleterious environmental damage in the Netherlands.[1016]

1013 Article 13 of the SPA. The determination of seriousness of incidents of pollution is based on the transgression of a regulatory standard. Such determination includes the investigation or evaluation of whether the concentration of substances involved could constitute a human health or environmental risk. The functional property of the soil that is subject of contamination is also considered important with regard to human beings, plants or animals that may be affected by contamination.

1014 Economic Offences Act of 1950.

1015 See the detailed discussion by Sands and Galizzi (eds) (2006) 6-7 on the common approach to European development of environmental law and economic growth.

1016 See the Environmental Control Act of 1979 and the SPA.

The Dutch Civil Code[1017] is one of the statutes that regulate environmental management in the Netherlands. In terms of the Dutch Civil Code, damage to the environment may give rise to liability. The Code provides for administrative, criminal and civil liability in relation to the damage to the environment. The liability that arises in terms of the Civil Code does not require fault.

Penalties are used as part of the corrective measures in relation to administrative liability. The Code regards the release of hazardous substances as dangerous to the environment and health. The Civil Code regulates activities that are regarded as posing danger to the environment, which include the transportation of dangerous materials on roads and railways that pose danger to the environment.

The Environmental Management Act emphasises the integration of social, environmental and economic factors in planning and implementation.[1018] The advantage of the integration of planning and implementation of social, environmental and economic factors is that stakeholders are encouraged to participate and to form part of the environmental strategies for the benefit of society.

Paramount to any environmental law remains the issue of sustainable development. For example, the recent case in the Netherlands in relation to climate change attests to that perspective. The *Urgenda Foundation v The State of the Netherlands*[1019] case adds value in relation to the achievement of the goal of sustainable development and the development of environmental law in the EU as a whole. The *Urgenda Foundation* filed for litigation in relation to the targets set by the Netherlands as a developed state for the reduction of greenhouse gas emissions. The court held that Netherlands as a developed country had an obligation to reduce emissions for greenhouse gases at a much higher level than it had set. The Dutch government is the first country in the developed world on which the duty to reduce emissions has been imposed by a court

1017 See the discussion by Hinteregger (2008) 191 in the examination of strict liability in terms of Article 6: 174 (1) BW of the Dutch Civil Code of 1992. Article 6: 174 (1) of the Civil Code which imposes liability on the owner of a construction entity or landowner where such construction activity is regarded as constituting danger to human health and the environment.

1018 Young (1992) 19-21 also endorses the centrality of economic efficiency, environmental integrity and equity theory as constituting the backbone of environmentalism. The author regards environmental failures as having the potential to lead to the collective failure of society as a whole.

1019 *Urgenda Foundation v The State of the Netherlands* [2015] Case C/09/456689/HA ZA 13-1396.

of law. The legal position outlined by the Dutch court holds weight in relation to the stance that has been taken by the Organisation for Economic Cooperation and Development[1020] member states pertaining to public financing of the coal-fired power plants.[1021] The OECD countries have made a commitment to scale back support for subsidies for fossil fuel energy projects as these projects are responsible for greenhouse gas emissions across the globe. The movement towards a clean environment has the ability to achieve yield good results for all if the policy-makers at domestic level back such commitments. The OECD countries are industrialised states with the highest levels of pollution and are at the forefront of development.[1022]

The developments in the regulation of climate change liabilities and solutions in the Western countries, including the Netherlands, inspire confidence that there is acknowledgment for current environmental crises in some of the more developed countries. The balance between economic development needs and environmental integrity is an attainable goal if there is a political will in addition to agreements. South Africa should be encouraged to follow suit.

The judicial relief extended to the public and environmental interest groups makes environmental rights even more enforceable. The participation of citizens and non-governmental organisations has had an impact on the realisation of environmental rights in the Netherlands.[1023] Participation is an important foundation of environmental democracy. Environmental rights issues are not only contested in the courts of law but require society in general to find solutions to environmental problems at source. The right of access to information facilitates the right of public participation.[1024] Too little of this type of participation is seen in our country.

1020 The Organisation for Economic Cooperation and Development (hereinafter the OECD) is made up by the richest states in Europe.

1021 Justin Sink and Alex Nussbaum (New York) Pretoria News Business Report "OECD deal is setback for coal industry" (Nations to cut public finance) dated 19 November 2015 21.

1022 See Iles (2007) 160, Revesz *et al* 369, Schiller (2011*) AJ* "Legal Pluralism: The Investor's View" 272.

1023 Scholtz (2007) 251-253 endorses the role of NGOs as "conscience keepers" and non-state actors as crucial for the preservation of the natural environment.

1024 Oliver (2013) 36 *Fordham International Law Journal* Access to Information and to Justice in EU Environmental Law: The Aarhus Convention 1433-1434.

It is apparent therefore that the role of non-governmental organisations to enforce environmental rights is dependent on the existence of such a free democratic space. Their participation creates a public awareness of the risks society faces from the degradation of the environment. They also draw the attention of the relevant state actors to the plight of environmental degradation and have the ability to influence the policy direction of the government. Citizens in EU countries are more active than those in developing nations which should stimulate this aspect in our country, with an increased involvement by our government as is required in terms of the International Law Commission report referred to earlier.

Environmental management policies, without the active participation of the public, become dormant over time. The law in the Netherlands gives environmental organisations that have a status of a corporate body a mandate to pursue persons who act in breach of environmental rights.[1025] This is an important remedy available to environmental interest groups. *Locus standi in judicio* is also crucial for the enforcement of environmental rights by non-state actors.

Litigation is a difficult issue where parties who act in the public can be challenged based on lack of *locus standi* which means that parties can litigate in their own interest or in the public interest without judicial restrictions.[1026] In Dutch Civil Law, a party has standing if it is a natural person or legal person yet the party must have an interest in the litigation, which gives rise to personal advantage.

The Netherlands, like all EU member states, remains a sovereign state with an independent legislative framework designed according to its domestic needs. The Prime Minister does the transposition of the EU law into Netherlands through the Instructions for Regulation. The Instructions for Regulation are not on their own legally binding. Those instructions serve as guidelines for the transposition and implementation of the EU law in the Netherlands.

[1025] See Article 3 (305a) of the Dutch Civil Code.
[1026] Van Rhee (2014) 03 *Locus Standi* in Dutch Civil Litigation in Comparative Perspective 6-7.

The relevant government departments to which the EU legislation applies are the ones that must produce a draft for submission to the executive for transposition of such a law. In terms of Article 94 of the Dutch Constitution, legal provisions that are inconsistent with self-executing provisions of treaties to which the Dutch government is party are not applicable.[1027] Self-executing provisions do not have to be transposed into national law as these enjoy priority over such laws in any event.

7.4 The Belgian Environmental Legislative Framework

Belgium, as one of the countries that fall within the jurisdiction of the EU, also has a developed legal order pertaining to pollution damage liability. The EU generally enjoys cooperation of the most states in the transposition and implementation of EU legislation in Europe. The Belgian government, in the late 1970s, decided to institute an investigation into a liability regime without fault. An Interuniversity Commission conducted such investigation under the auspices of the extensive studies.

The purpose of the Commission was to explore options of developing liability for damage to the environment and the development of environmental law in general. The Commission made crucial proposals for the amendment to liability regimes where liability for environmental damage in Belgium is concerned. The government subsequently enacted a statutory liability law that resulted in the introduction of a strict liability for many industries in that country.

The incorporation of the environmental right in the Constitution in Belgium is compared to that of other EU countries which is a recent development. The environmental right in the Constitution enjoys a broad coverage. Article 23 of the Belgian Constitution[1028] provides that:

‘Everyone has a right to lead a life in conformity with human dignity. To this end, the laws, decrees and guarantees, taking into account corresponding obligations, economic, social and cultural rights, and determine the conditions for exercising them.

1027 Article 94 of the Dutch Constitution.
1028 Art 23 of the Belgian Constitution as amended on 25 April 2007 (hereinafter the Belgian Constitution).

These rights include among others: (...)2) the right to social security, to health care and to social, medical, and legal aid, to the enjoyment and protection of a healthy environment(...)

The rights in Article 23 of the Belgian Constitution are all encompassing as these include the right to work and free choice of employment.[1029] The right to work must be interpreted and applied within the framework of employment policies aimed at ensuring stable and high levels of employment. The rights in article 23 include, for example, the right to information, consultation and collective bargaining. Of importance in article 23 is the right to the enjoyment and the protection of a healthy environment. The reach of article 23 of the Belgian Constitution is broader than section 24 of the South African Constitution as it encompasses a set of issues that are not part of section 24 of the South African Constitution.[1030]

Belgium follows a regional approach as it consists of three major regions namely the Flanders, Walloon and Brussels Metropolitan Regions. Each region is responsible for the regulation of environmental management.[1031] The regions enjoy legislative competence that is not different to that of the federal government in terms of implementing environmental law. Regional authorities are a crucial component of the federal state in relation to enforcement of legislation in Belgium. The federal government has the overall authority over the communities and the regions. The regions utilise decrees and ordinances to regulate matters within their competencies.

The Belgian Civil Code[1032] is one of the oldest laws for environmental governance in the country. Liability for environmental damage is not a new concept as it has its roots in Article 1382 of the Belgian Civil Code that provides in general that anyone who causes damage to another person should be responsible for compensation.[1033] The flaw in the liability in terms of the Civil Code is based on fault or negligence that

1029 Art 23 of the Belgian Constitution.
1030 S 24 of the Constitution.
1031 See the discussion by Kotzé and Paterson (eds) (2009) 86-87, Lugt (1999) 49 and Cassotta (2012) 93 in their critical analysis of the application of the EU Environmental Directives in Belgium. The EU law is the primary law in Belgium as the state has an obligation to transpose its laws for domestic application.
1032 The Belgian Civil Code of 1804.
1033 Article 1382 of the Belgian Civil Code.

increases the plaintiff's burden of proof and creates the obstacles, which are addressed in this thesis in the following chapters. The requirements for liability in terms of the above-mentioned law is that the plaintiff must prove that he or she suffered damage, that the person who caused damage was at fault and there should be a nexus between the fault and the ensuing damage.[1034]

In terms of the Civil Code, the person who has caused harm must have violated a general duty of care, which prohibits a particular behaviour. The general criterion that is applied is whether is a reasonable man in the position of the injurer has violated a duty of care as a result of which damage was caused.

The reasonable man test requires the examination of the state of mind of the person who has caused the harm, and the law requires that various interests be taken into account. The interests of the polluter should be weighed in the context of the economic activity in which it is involved against the rights of other persons to a healthy environment who are victims of the damage caused.[1035]

It is also important to consider the preventive measures that might have been taken or should have been taken by the polluter. For example, the polluter could have attempted to reduce the harm to the environment by investing in abatement technologies. The costs in the implementation of such measures, in the form of mitigation of damage, should also be taken into account in order to balance the conflicting interests.[1036]

The violation of the general duty of care is not the only requirement as the violation of a regulatory norm is also adequate to trigger liability. The regulatory standards are aimed at defining negligence. The breach of a regulatory norm gives the victim the power in relation to litigation.

1034 Faure (1999) 198-199 pub.maastrichtuniversity.nl/02e488b8-2ef8-4f9b-a290-6afc3e12e09b last accessed 12 March 2015.
1035 Faure (1999) 199-200, Oliver (2013) 1434.
1036 Faure (1999) 199-200, Beunen *et al* (2009) 19 *Environmental Policy and Governance* "Implementation and Integration of EU Environmental Directives: Experiences from The Netherlands" 58.

It is important to note that the victim does not have to prove fault where there has been breach of a regulatory norm. The violation of a regulatory standard constitutes a strict liability and may be a criminal offence.[1037]

The victim should prove that he has been personally harmed by the damage.[1038] Environmental pollution normally harms collective interests and not necessarily individual interests. The application of fault liability becomes difficult in circumstances where the focus is on individual harm than the collective harm. More often than not the victims' claims are denied by courts on the ground that the victims could not prove actual damage.

As indicated above, the environmental policy in Belgium is the competence of the regions and federal government. The federal government is central in the implementation of the federal legislation and regional legislation as it holds the centre of governance. The federal government also has to ensure that there is compliance with the EU legislative framework in the regions. As an example, the Act of 15 April 1994 on the Protection of the Population and of the Environment against Hazards arising from Ionising Radiation and on the Federal Agency for Nuclear Control was introduced as federal legislation.[1039]

Regional administrations also have a wide range of competencies in environmental governance. These deal with comprehensive environmental plans and policies including the issue of socio-economic conditions that are implemented in their regions. For example, in the Flanders region polluters have an obligation to clean up which is imposed in terms of the Soil Clean-up Decree at the instruction of the regional government.[1040] The obligation to clean up depends on whether the contamination is

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1037 Faure (1999) 200-201, Herman (2005) 3 *CDCJ* "A Comparative Study of the Legal and Factual Situation in Member States of the Council of Europe" 25-26. The breach of a criminal law automatically leads to fault on the part of the polluter in terms of the Belgian Criminal Code. A conviction by a criminal court gives rise to claims for compensation by the victims in terms of article 1382 of the Civil Code. In such situations, the requirement to prove a wrongful behaviour by the plaintiff falls away.

1038 The Civil Code requires full compensation where an individual has been a victim of environmental damage.

1039 Act 15 April 1994 on the Protection of the Population and the Environment against Hazards arising from Ionising Radiation and the Federal Agency for Nuclear Control.

1040 The Flemish Soil Clean-up Statute of 29 October 1995.

a historical one or new contamination. Incidents of new contamination have to be addressed immediately.

The statute affects the transfer of land or property that may have been contaminated. Persons to whom such land or property is transferred have to receive a clearance certificate in terms of which contamination of such land is allocated to relevant parties. These policies applied in the three regions are harmonised with existing EU legislation.

The Belgian law recognises that all possible causes that lead to an environmental incident are regarded as equal. The *conditio sine qua non* of the harm is legally recognised in Belgium. The *conditio sine qua non* means that the harm would not have occurred without a specific wrongful conduct on the part of the defendant. The main determination for causation in Belgium is factual causation which is determined with the *conditio sine qua non* test.[1041] A lack of causation leads to the absence of liability on the part of the wrongdoer.

In Belgian law, liability can arise in *solidum.* For example, causation can be imputed to parents of the minor child where a minor child could be vicariously responsible for wrongful conduct. The *conditio sine qua non* also implies that there is liability for the defendant party even if there is a contribution to the incident by other factors, which are not related to the defendant.[1042]

Environmental impacts are dynamic and ever changing. When granting a licence and setting conditions, the administrative authority is not able to take into account potential harms, which may later be manifested because of the activity. The licenced activity may cause harm to other parties for which the conditions of licensing did not provide. The engagement in an activity, which may be licenced, does not exempt the polluter

1041 Rogers and Van Boom (2004) 49, in *Minister of Police v Skosana* 1977 (1) SA 31(A) the court had to recognise the presence of the *conditio sine qua non*.

1042 The Belgian law promotes the theory of equivalence of conditions, which implies that the defendant can be held liable even if there is no direct link as regards factual causation. A breach of a regulatory standard is taken to be the factual cause of the environmental damage when it satisfies the “but for test”. In Belgium even if the environmental damage would have occurred in any event, the breach of the duty of care will be considered as the cause of the damage if there is a contributing factor by the defendant.

from liability in terms of the Belgian law. Administrative authorities issue environmental permits. The courts are not involved in the process of granting licences to companies.

The implementation of environmental regulations in Belgium is primarily the competence of the regional governments. The regional governments implement regulations that originate from the EU Directives as indicated above. These regulations are, to a greater degree, harmonised. The implementation strategy falls within the competence of the regional governments. The authority of issuing licences for activities lies with the regions. The operation of an industrial activity without the required permit is an offence.[1043] The non-compliance with the conditions for the permit, obstruction of and failure to comply with the instructions of the environmental inspectors constitutes a criminal offence.

Article 3 of the Brussels Clean-up Statute imposes liability on the identified polluters for contamination.[1044] The primary purpose of the Statute is to reduce levels of contamination. Orphan pollution is a problem in such situations as the identity of the polluter cannot easily be found.[1045] The Brussels authorities also enjoy competence over the issuing of permit and licences for activity by operators.

A decision made by the Brussels Environmental Agency in relation to a permit is appealable in the Brussels Capital Region. The Environmental Appeal Board is responsible for such appeals in that particular region.[1046] The appeal takes place when the permit is refused. The Environmental Appeal Board has the power to modify the conditions of the permit. It can also review the decisions that have been made by the agency to modify, suspend or withdraw the permit.[1047]

1043 Kotzé and Paterson (2009) 103-105, Lavrysen (2009) *EU Forum of Judges for the Environment* "The Implementation of the IPPC-Directive in Belgium" 3.

1044 Article (3) (16) (19) Brussels Clean-up Statute of the 20th January 2005.

1045 Orphaned contamination is attributed to the operator of the land or the person who has title to the property. Orphaned contamination is a bad legacy from an environmental perspective. The mining sector as well as other industrial players makes immeasurable contribution towards the existence of bad legacy. South Africa has a number of old mines that are abandoned. These old mines degenerate into acid mine drainage that exposes communities close to them to health hazards.

1046 The Environmental Appeal Board is an Environmental Administrative Court in which a judge presides over environmental offences.

1047 Kotzé and Paterson (2009) 87-88 and Lavrysen (2009) 2-3.

The primary regulatory legislation on waste in the Walloon Region is Walloon Statute of 27 June 1996. The Walloon Region enjoys competence over different spheres of environmental legislation. The Walloon Water Code of the 27 May 2004 regulates water governance in the region. The Water Code is intended to prevent water contamination and the dumping of hazardous waste on water resources.

The regional authorities exercise their powers in relation to environmental protection in harmony with the EU legislative framework and international standards. As a measure of environmental protection, for example, a clean-up operation has to be conducted by the operator or polluter in the Walloon Region. This is in terms of the polluter pays principle, which is applicable in Belgium as part of the EU. The Walloon Region's approach to land contamination is not different to the NWA of South Africa.[1048] The general approach to environmental liability in the Walloon Region is similar to other regions. The three regions in fact implement the EU legislation in their respective regions.

7.5 United States of America

The US is one of the developed countries with a sophisticated and vast body of laws for environmental governance[1049] and its environmental legislation covers a broad spectrum of the environment in its diversity. Liability for pollution damage is at the centre of the US environmental legislation. Circumstances in the US and South Africa are of course very different in many areas of law and life.

US environmental legislation is considered as innovative in view of the fund approach that aims to address explicitly some of the complexities of environmental governance on the effect of the environment by hazardous materials. The US environmental legislation consists of a variety of statutes and regulations that are implemented on a federal level and then by the different states in unique statutory measures. Like all other environmental governance systems, the US has developed over a long period.

[1048] S19 of NWA categorises persons who are liable for pollution damage. This categorisation encompasses landowners, lessees, persons who have title to the land or property.
[1049] Fogleman V (2005) 253, Government Institutes (2002) 2 Environmental Statutes ABS Consulting 1059-1063.

With the advent of industrial revolution, American society began to experience some effects of environmental pollution on its population that required the introduction of policies and laws to protect the environment and led to the emergence of a whole body of environmental laws, which emphasise liability for pollution and compensation where necessary.

The study does not seek to imply that developed nations and the developing nations share similar legislative frameworks. In fact, they are miles apart. However, the developed nations have a pool of experiences and exposure from which some lessons could be learned particularly in relation to liability law.

The US elected to follow a fund-based approach that is different from the EU and other Southern African countries. Although not necessarily a model that is meant to be effective for every country, the possibility of such a fund-based approach cannot be ignored.

The Comprehensive Environmental Response, Compensation and Liability Act[1050] provides a Federal 'Superfund' to clean up uncontrolled or abandoned hazardous waste sites as well as accidents, spills and other emergency releases of pollutants. CERCLA as a liability law has a specific focus on hazardous substances.[1051] A hazardous substance, excluding oil, is defined as:

(a) any substance designated pursuant to section 1321 (b) (2) (A) of title 33;
(b) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title;
(c) any hazardous waste having the characteristics identified under or listed pursuant to section 3001of the Solid Waste Disposal Act[1052], but not including

1050 CERCLA gives powers to the Environmental Protection Agency (hereinafter EPA) to pursue those parties that are responsible for release of hazardous wastes or substances to the environment. Where potentially responsible parties cannot be, identified the EPA takes the responsibility to clean up such areas as orphan sites. Orphan sites are those sites that cannot be identified with specific polluters.

1051 See the discussion by Larsson (1999) 411 in which the author notes that CERCLA is not a media-specific liability law but has the objective of dealing with the clean-up of hazardous substances. The hazardous substances for which CERCLA is intended excludes petroleum-related substances.

1052 S 3001 of the Solid Waste Disposal Act of 1965.

any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress.

CERCLA was conceived from some disastrous circumstances that occurred in the US over a number of decades ago, which gave rise to a need to construct legislation that would be comprehensive in seeking to address environmental liability. CERCLA is a liability statute with a broad ambit and scope. It was enacted at a time when the costs of clean-up campaigns were high and there was proliferation of polluted sites. This situation had to be rescued to safeguard human life and the natural environment. The dumping of industrial waste was a common feature of the industry in the US and was not accounted for by industries.

The introduction of CERCLA as a federal statute made a massive difference in the American industry in relation to prevention of pollution damage. CERCLA is specialised environmental legislation that applies specifically to the contamination through hazardous substances excluding oil.[1053]

In terms of CERCLA, liability for clean-up campaigns of contaminated sites is imposed on a variety of parties. Some of the parties who may find themselves liable for clean-ups are not directly parties to incidents of pollution or contamination. They include present and past owners of the contaminated sites and the persons who contributed or who might have transported the contaminants to such sites.[1054] CERCLA imposes liability on a number of persons who are known as 'potentially responsible parties'.[1055] PRP is an inclusive term as it also refers to persons who may not have participated

[1053] Fogleman (2005) 253 and Larsson (1999) 556 Murphy (1986) 1136 and Del Duca (2011) 10422 point out that the risk that exists relates to the purchase of a corporation that has liabilities that may not even be known to it particularly where the company has been in existence for a long period of time.

[1054] Sigman H (2010) 53 *Journal of Law and Economic*s "Environmental Liability and Redevelopment of Old Industrial Land" 3-5 understands environmental liability as a barrier and a threat to development on the grounds that it imposes liability for polluters to compensate for clean-up campaigns. The viewpoint which the author argues is that liability for environmental damage may itself create lack of economic advancement and growth.

[1055] Potentially responsible parties (hereinafter PRPs) specifically encompass four categories of persons. These include:
(i) Persons who own or operate a contaminated site;
(ii) Persons who owned or operated a contaminated site when a hazardous substance was disposed on it;
(iii) Persons who arranged for the disposal of a hazardous substance, and
(iv) Persons who transported a hazardous substance to a site chosen by them.

directly in the polluting activity.

A financial institution, for example, which lends financial resources to its customer and takes over its property which may be contaminated property is a PRP and may be held liable for pollution in terms of CERCLA provisions. For example, a party who might have caused environmental damage could have passed on, if a legal person has been dissolved or insolvent. In such cases, CERCLA ropes in a range of other parties who are not directly responsible for pollution damage to make good the losses incurred.

The legislation has a specific focus on the remediation of pollution incidents especially those related to historical pollution and hazardous materials. The scope of the liability in the legislation is extensively broad to encompass historical and future incidents of pollution.[1056] It is not within the scope of the legislation to provide monetary damages for personal injury or private property damage as CERCLA liability covers the cost of remediation and monetary damages for harm caused to the natural resources that are owned by government.

In terms of the legislation, parties are regarded as being liable regardless of whether their behaviour was negligent under the US common law system.[1057] The common law in the US also provides for environmental protection and liability. Environmental threats are consistently evolving and requires a dynamic approach in terms of environmental governance for which the legislation provides.[1058] The legislation recognises the nature and extent to which available information on environmental risks may be uncertain. Financiers may find it difficult to anticipate some of the environmental risks given limitations in terms of the available information.[1059] The

[1056] Feess (1999) 231-232 and Ashford and Caldart (2008) 749 endorse the view that shareholders and managers of firms that have become insolvent are also held liable for environmental pollution in terms of CERCLA. The negligence rule about lenders is important particularly where there is 'possibility of extending liability to third parties'.

[1057] Ashford and Caldart (2008) 750.

[1058] S 104 (a) of CERCLA gives powers to the president to take response action when there is a threat or a threat of the release of certain substances into the environment. The same authority of response action entrusted to the president is delegated to the Environmental Protection Agency.

[1059] Feess (1999) 232 argues that the information available may be imperfect making it impossible to know some of the inherent problems pertaining to a particular project. Financiers have developed competencies with reference to designing of appropriate contracts, which may not be adequate

risks on the part of businesses, associated with environmental liability, are not aimed at harming businesses. These measures are aimed at protecting human health and the environment.

CERCLA is not explicitly clear in relation to whether liability that it creates for various persons should be joint and several. In practice, however, it seems to permit the joint and several liability on a case-by-case basis. The application of joint and several liability does not imply that the parties who might have made less significant contribution to pollution would escape liability under the statute.[1060]

The Environmental Protection Agency is able to bring actions for contribution against potential responsible parties where they have been identified. The responsible parties may then institute action against other potential responsible parties to recoup their losses based on the proportion of their clean-up costs they may have incurred. Liability in such a contribution action is several and is not joint and several.

The approach of CERCLA on liability claims is unique in that it is timeless as the liability for pollution does not prescribe. This means that long-tail liability is a real possibility for parties who have long since left the site. The timelessness with regard to liability is also crucial for liability.

The damage that may be caused during life cycle of a project may not be manifest at an early stage of the project. The buyer of the land that has been contaminated may, for example, find itself liable for pollution that was caused by the predecessors or previous occupiers. In the same vein, the person who had sold contaminated land or site may not escape liability simply on the basis of proof of sale of the property to somebody else. The broadness and scope of the law makes it difficult for persons to buy property that is on sale without considering potential liability claims in future. This makes the law effective as it would now serve the purpose of effective deterrence.

owing to new potential environmental problems. For companies to avoid liability in terms of the CERCLA it is crucial to apply precautionary measures and monitoring mechanisms.

1060 Fogleman (2005) 254 notes that the potential responsible parties may be required to pay a share of clean-up costs that is higher than what it considers its proportionate share if other potentially responsible parties have already settled with the government concerning proportionate liability.

Deterrence helps in terms of behavioural modification as decisions have to be taken in a rational manner by the parties. Sellers of land or sites and potential buyers may have information about the level of contamination and the nature of the required clean-up measure. In such situations due diligence is essential to avoid or minimise risk. Another detrimental possibility is that the land prices in such situations may drop on the ground so that potential buyers may find it risky to be liable for past pollution. It is believed that the liability associated with the prospective property would stifle growth in the property market.[1061]

As stated above, the risk in the subject of liability for damage to the environment is unquantifiable upfront. The quantification of the costs only becomes apparent and finally manifests itself when the clean-up campaign has been affected. Costs that are associated with compliance with CERCLA also pose a challenge in their own way. Those costs include the costs of setting up pollution-control structures. The liability mechanisms that have been created by CERCLA do not leave a gap for manipulation out of liability. The law as it stands is not more sympathetic to industry needs than the protection of the environment. In other words, there is a balance between environmental interests and social aspects that have a bearing on the environment.[1062]

In terms of the legislation, environmental liability is not discharged by virtue of bankruptcy or insolvency of the liable parties. The wide range of persons that take responsibility for environmental damage does not leave a space for such a discharge from liability. In the event of insolvency or bankruptcy, the persons who take over, or to whom the property falls, also take on the liability for environmental damage. As part of their protection measures, corporate entities have to develop explicit plans and environmental management programmes to prevent environmental hazards. Most importantly, in the US context to acquire insurance policies to protect their businesses is also a good protective mechanism against insolvency.

Environmental liability has the potential to pose a threat to the financial standing and viability of companies when they fail to comply with stringent environmental regulations.

1061 Fogleman (2005) 254.

1062 Fogleman (2005) 256 reaffirms that, although CERCLA does not refer to strict liability, in practice it is inclined towards strict liability. Furthermore, liability is unlimited with regard to pollution.

It can lead to the insolvency of the company where environmental risks have not been considered. Insurance is one of the most important industries in connection with the protection against environmental liability. The complexity of liability for environmental damage has given rise to the need for insurance policies to be used as barriers against enormous risks and for which a person must budget.

In addition to CERCLA, the US has a host of other legislative measures which are relevant to environmental governance. Such legislation includes the Clean Air Act[1063], the Clean Water Act[1064] and the Oil Pollution Act.[1065] These are not dealt with in detail as they each create a separate liability regime based on the specific industry and the purpose of the statutory measures.

CERCLA creates an obligation for the buyer of land to investigate thoroughly prior to purchasing a piece of land. This form inquiry is called due diligence, which is a process where a party makes investigations to avoid a risk. Due diligence puts the party who seeks to buy a property, that may be in a contaminated state, at an advantage about his decision to continue with the sale of the property.

Due diligence is mechanism that is used to reduce pressure on the state in terms of engaging in unnecessary costs for environmental damage. The pressure instead is placed on the parties involved in the transaction of property sale to determine the risks associated with environmental damage that can run into billions of rand or dollars. This threshold can be higher, for example, when the potential risks involve serious or irreversible harm to the environment or lower when there is merely a threat to the environment.

In any event, the precautionary principle aims to safeguard against potential risks, which have not yet been explored by scientific research and analysis. Decision makers may seek to identify whether threats of harm arise and the extent of uncertainty about them.

1063 The Clean Air Act of 1970 (hereinafter CAA) is one of the important pieces of environmental legislation in the US. It has played a major role as a federal legislation in air pollution control. The Act regulates emissions from both stationary and mobile sources.

1064 The main objective of the Clean Water Act of (hereinafter CWA) is the protection of the integrity of the US water resources.

1065 The OPA.

The task of assessing whether uncertainty is a relevant factor for decision-making may be unreliable. Due diligence is an assessment of the situation of the property with a view to avoiding liability attached to the property.[1066]

The burden of proving causation is minimal or non-existent in terms of CERCLA. This bypasses a problematic requirement that exists in South Africa\s current law – namely proving factual and legal causation. The reason for placing a low burden of proving causation is to avoid a situation where onus is put on the relevant authorities to establish a link between each PRP and the release of hazardous substance. The degree of causation is dependent on the class of the PRP. [1067] Liability for PRPs is related to the proof of ownership of the site and is not related to the actual involvement with the release of the hazardous substance.

It is also important to note that PRPs are parties that merely have a relationship with the activity that has caused damage to the environment. In terms of contributions, however, causation remains a requirement. In *Acushnet Co v Coaters Inc*[1068] the court rejected the precedent that parties could be held liable without proof that they had caused environmental pollution. The court held that in terms of CERCLA a plaintiff 'must demonstrate, as part of its *prima facie* liability case, a causal connection between an individual defendant's waste and the clean-up costs'.

Some court decisions regarding causation and liability for passive migration of hazardous substances during ownership of land have sought to limit the extensive liability in terms of the CERCLA provisions. In *Aviall Services Inc, v Cooper Indus Inc*[1069] the plaintiff sought a contribution from Cooper Industries Inc for costs incurred

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1066 As an example, on 18 September 2015 the Environmental Protection Agency issued a notice of violation of the Clean Air Act to the Volkswagen Group. The VW had used a deceit device to manipulate emissions-control during laboratory testing which was not fitted into their diesel engines. The contravention of the provisions of the Clean Air Act resulted in the VW Group having to part with billions of dollars as a restoration measure. Volkswagen was caught in relating to the emissions tests that were conducted with a view to establishing their compliance with environmental standards. VW admitted to having contravened the US air pollution law for using "deceit device software" for their cars. The conduct of the VW Group was intentional and caused extensive pollution across the globe.

1067 See Fogleman (2005) 256-257.

1068 937 F.Supp.988 (D. Mass. 1996) (Coaters I), 948 F. Supp.128 (D. Mass. 1996) (Coaters II), and 972. F. Supp.41 (D. Mass. 1997) (Coaters III).

1069 *Aviall Services, Inc v Cooper Industries Inc* 263 F. 3d 134 (5th Cir. 2001).

during the clean-up of hazardous substances at three industrial facilities that were previously owned by the defendant. The court held that Aviall could not 'assert a contribution claim unless it was subject to a prior or pending CERCLA action' by government. This means that contribution can only be claimed once remediation has taken place.

OPA was adopted after the *Exxon Valdez* incident, which caused massive oil discharge and damage into the marine environment.[1070] The OPA is another comprehensive environmental legislation in the US. The object of the Act is to deal with the issue of oil related discharges or releases into the environment.[1071] In terms of the OPA, liability for discharges or release of oil is imposed on the operator or facility from which such a release emanates. The scope of the OPA allows very limited defence with regard to discharges of oil into the environment.[1072]

The oil pollution liability is focused on removal and remedial costs with reference to compensation. Environmental damage or loss in general is not covered by the Act other than that created by oil-related pollution. The exclusion of environmental damage, other than the one caused by oil, is a sound defence for operators. Liability is limited in most cases to contributory negligence, except where there is a preponderance of evidence that there was a wilful conduct on the part of the responsible party. The standard of liability in terms of OPA is joint and several. The relationship between the discharge into the environment and the source of pollution damage is crucial as a determining factor relative to the allocation of liability. The Act is not retrospective in operation as it applies to incidents that occurred only after its

1070 Larsson (1999) 414-415, Fogleman (2005) 196 and Latham (2009) 680-682. The *Exxon Valdez* incident caused extensive environmental damage in the US history. Massive environmental clean-ups were pursued at the highest cost to the state and the responsible party. The *Exxon Valdez* case quite a number of issues pertinent to this study. For example, the court had to consider the chilling effect punitive damages would have on the shipping industry where hefty fines and penalties are imposed on the shipping company. The argument advanced by Exxon Valdez was that the plaintiffs must consider balancing economic interests, namely that the industry should not be ruined as against excessive penalty regime which seeks to send a message to the public for purposes of deterrence.

1071 Larsson (1999) 412.

1072 The operator has a responsibility as a responsible party to prove that the release or discharge into the environment was caused by an act of God or other acts attributable to other factors that are not man-made. The object of the OPA is to ensure that either catastrophic oil spills are prevented or the effect of spillage is minimised by a quick response to it.

enactment. OPA creates an obligation for the responsible parties to maintain evidence of financial responsibility to cover the costs of clean-up campaign.[1073]

Section 1002 of the OPA provides that each responsible party for a vessel or facility from which oil is discharged or which poses a substantial threat of discharge of oil into or upon navigable waters is liable for the removal costs and damages that result from such incident.[1074] The US is the main consumer of oil products in the world market. It is therefore not surprising that they have the busiest navigable waters for transportation of such products. The incidents of oil pollution are common in the US as a result of the provision of such services. The OPA is an important statute in the context of the prevention of oil pollution and the liability for its infringement.

7.6 Concluding Remarks

It is worth noting that the purpose and circumstances under which legislation is developed often differ from country to country. It is particularly important when such states bear different classifications such as the developed and the developing countries. Developed countries such as the Netherlands and Belgium have a different legal history and legislative arrangements.

The Netherlands, for instance, is an example of the inadequacy of civil liability for matters relating to environmental damage. Civil law has limitations as it focuses on negligence or nuisance as triggers for liability. The experience has taught the lesson that civil law does not assist them adequately to address pollution. Legal systems are dynamic because these exist as far as they serve the purpose of their enactment. Policy considerations always demand the adaptation to new circumstances in which a country may find itself. The essential of introduction of the Nuisance Act, for example,

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1073 See Ashford and Caldart (2008) 784, Fogleman (2005) 257 and Larsson (1999) 419 emphasise that planning and preparedness is one of the features of OPA for oil spills. It is important to note that one of the salient features of OPA is the OPA Fund, which is aimed at absorbing the costs of removal for oil pollution.

1074 S 1002 of the OPA.

was an attempt to address environmental problems in the Netherlands.[1075] It is clear that land contamination, which was regarded as posing threat to the environment, also gave rise to the introduction of the SPA which was one of the reasons for legislative turn-around.

The primary objective of the SPA is to provide guidance pertaining to the management of industrial activities. The rules as regards the prevention of soil contamination are clear. It requires that permits for industrial activities must be obtained before such activities are performed. The SPA also introduces strict liability for land polluters as that poses danger to human health and the environment. [1076] The Environmental Management Act also introduces measures such as criminal and administrative measures against persons who cause harm to the environment.

The legislative framework, with reference to environmental governance in Belgium, bears similarities with the Netherlands legislation. The Belgian environmental legislation is harmonised with EU legislation. Both of these countries no longer use fault with regard to liability for pollution damage. The Environmental Liability Directive applies in Belgium as the country forms part of the EU parliament. The legislative framework of these countries is similar. Both of these countries draw their legislation from the EU parliament, which is their common source of law.

The Belgian environmental liability regime is the product of the Inter-University Commission. The Commission was tasked with the mandate to investigate the possibility of the state adopting strict liability for environmental pollution.

On the other side of the world, the scope of the US environmental legislation is wide and captures every potential polluter. The category of persons to whom the legislation, in terms of CERCLA applies, is expansive. A liability regime for environmental pollution is an important instrument for environmental protection.

1075 The issue of recovery of costs appears to be similar to the approach of S 28 of NEMA. The purpose of the Nuisance Act was to impose on polluters an element of liability through the recovery of costs whenever public authorities had conducted clean-up campaigns.

1076 The Circular on Soil Remediation of 2009 serves as a regulatory mechanism of the SPA. It provides remediation mechanisms for soil pollution as well as the criteria of determining the extent of pollution.

The extent of liability that is imposed on companies can even result in the insolvency of companies. Liability for damage caused to the environment is important for both the developed countries and developing countries such South Africa. The examples set out above - in the *capita selecta* pertaining to liability regimes in the Netherlands, Belgium and the US - should be enticing concepts for South Africa. Civil liability for environmental pollution would not be adequate without statutory provisions to protect the environment. A specific liability law would add value to the current legislative mechanisms that do not provide for liability in cases of pollution damage.

CHAPTER 8

Conclusions and Recommendations

Liability for environmental damage is a pertinent concept in the context of the protection of the environment. The fulfilment of the right in section 24 of the Constitution requires different approaches including the establishment of liability rules.[1077] Administrative measures as espoused by NEMA are inadequate to address pollution problems in South African society as stated above. Various environmental laws currently in existence do not address the question of liability for environmental damage in any specific or direct manner.

Liability rules may not suit every circumstance of pollution damage yet these can make a positive impact on the prevention of pollution which promotes the right to an environment that is not harmful to health and is secured by section 24 of the Constitution. The implementation of section 24 of the Constitution remains complex and requires careful consideration in its legal implementation and development.

The right to a clean and healthy environment remains hollow without significant development in the environmental governance structures and procedures. Environmental damage undermines the very foundations of a constitutional state, and environmental security is in the best interest of society that must find solutions to its socio-economic challenges. The fundamental rights in the Bill of Rights are interrelated as each right has to be attained in concert with other rights. The environment carries both the burden for economic development and the protection of society.

Damage to the environment gives rise to a multiplicity of problems in society. Such problems range from human health ailments and other environmental-specific problems. It must be noted that environment is the key driver for life in general. The damage to the environment creates an albatross for society in general. For example, a spillage of chemicals or hazardous substances can cause harm to human health

[1077] S 24 of the Constitution.

and can cause access to water to be difficult for humans, animals and the natural environment or functioning ecosystems. Environmental damage is extensively described in the previous chapters as including broad concepts such as damage to the ecosystems and ecological settings.

It is important that the law does not lose sight of social problems that include, for example, the issue of poverty and stunted foreign investments as well as lack of economic growth.

One of the reasons for the continuity of this conduct is that industries are able to get away from their acts with impunity. Liability that is imposed on the polluters through the application of the law would create respect for the environment. Law should not create a vacuum with regard to environmental damage and liability for such damage. The law should explicitly address concerns that are identifiable in society as gaps in law establish perpetual problems for the environment. Other jurisdictions have developed statutory mechanisms to address liability for damage to the environment.

There are various ways in which industries can be made to comply with the law. The common law - in the form of the law of delict - does not provide adequate measures in terms of the problems arising from environmental damage. Industry is not a voluntary participant regarding their compliance with environmental regulations. South African common law has shortcomings with reference to the challenge of claiming for pollution damage based on delict.

Common law recognises infringement on the common environment in the context of the law of nuisance. The issue of nuisance or neighbour law are distinct from the principles that modern environmental law provides. The scope that the law of nuisance and neighbour law provide as a solution to environmental problems is very narrow by comparison. For example, one of the shortcomings relating to the law of nuisance is that it does not provide specific measures to address industrial pollution damage. The law of nuisance addresses the issues of infringement in relation to property that is owned. The law of nuisance does not address the issue of the natural environment.

Common law does not provide proper guidelines as a measure of environmental protection in all situations. The norms that have been developed in the sphere of common law are not specific to the unique nature of current environmental damage problems. The ambit of the common law in the context of environmental problems appears not to be adequate to provide solutions in all instances.

The damage to the environment affects the collective good of society and requires measures within the broad framework of the environmental law. Environmental law is intended to fulfil a public purpose, which does not exist in the common law. Environmental values are not exclusive but encompass a spectrum of issues in which society has an interest. Public interest includes issues that the principle of sustainable development also encompasses which are underpinned by the protection of natural resources. Such protection has to take into account the needs of the present without compromising the needs of future generations.

The current statutory framework on environmental governance needs improvement. NEMA, for instance, provides a wide coverage of some issues that are critical for environmental management in South Africa. NEMA has introduced a framework within which environmental rights can be exercised and provides guidelines for environmental management and governance. NEMA was not intended to provide a one-size-fits-all approach in relation to a liability regime for environmental pollution. Section 24 of the Constitution from which NEMA is derived provides a developmental approach with regard to environmental protection. In *Lascon Properties (Pty) Ltd v Wadeville Investment (Pty) Ltd and Another* the court held that any infringement of an absolute-term legislation intends to provide a civil remedy for damage caused by the breach of regulation. It would, however, in this case not consider strict liability as the principle of fault would be excluded in that manner. Thus, it can be concluded that a civil remedy that meets the burden of proving all requirements is possible and assumed in absolute-term regulatory instruments. The challenges posed herein could be resolved where statute provides some relief on addressing or specifying the content of the elements of especially wrongfulness, fault and causation for environmental damages claims.

NEMA has created a space for the deepening of environmental ethics in the South African context. The entrenchment of environmental rights and ethics could not be cemented by virtue of introduction of only a few statutes that address specific media of the environment. A statutory liability framework or regime for pollution damage claims is an issue that urgently needs focused regulatory attention within the South African legal framework. The prevalence of polluting incidents is a challenge for society that needs to be addressed effectively. Liability for damages is clearly not the only solution to the issue of addressing the risks of pollution. It is but one of the ways in which pollution damage can be addressed and can be developed to play an increasing role in the deterrence, prevention and remediation of damage. Regulation of damages claims require some examination and targeted regulation in future.

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