

Who is Subject to Liability Pursuant to Section 55 of the Pollution Act?

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1 Survey and Presentation of the Problem

1.1 *The System of Strict Liability for Pollution*

The anti-pollution campaign and the protection of environmental values are vital issues in our time, and the proverb “A stitch in time saves nine” is just as appropriate here as elsewhere. Anti-pollution measures are given high priority and have in Norway been the subject of legislation primarily in the form of the Pollution Act of 13 March 1981, No. 6. The main purpose of the Act is to prevent pollution, especially by means of measures prescribed by public law, concession conditions, etc. But even though such measures receive priority, damage will, nonetheless, be caused by pollution. Such damage creates a need for covering the costs of restoration and for other financial compensation. Liability for damages was provided for by the Act of 16 June 1989, No. 67 by giving the Pollution Act its own rules in chapter 8 (sections 53 to 64), with strict liability established by section 55.¹ Such liability is based on the general causer-of-damage principle in the law of damages: the polluter shall pay. But there are also other rules for damages on which liability for damage caused by pollution can be based, and a certain coordination of the liability rules in this area is therefore necessary. The rules as to who shall pay, i.e. who is subject to liability pursuant to section 55 and pertinent rules are rather complicated. It is these rules that form the subject of this article.

The point of departure for the application of the liability rules is that a case of “pollution damage” has occurred, which is defined as “damage, inconvenience

¹ Preparatory works: NOU 1982:19 *Generelle lovregler om erstatning for forurensningskade* (General statutory rules concerning compensation for pollution damage. The Aasland committee, hereinafter called: the legislative committee); Proposition to the Odelsting No. 33 (1988-89), hereinafter called the proposition; Recommendation to the Odelsting No. 85 (1988-89).

or loss caused by pollution (cf. section 6)”, cf. section 53 of the Pollution Act.² Thus the liability rules are hereby linked to the definition in section 6, which is contained in the public law part of the Act. The public law campaign against pollution and the more private-law-orientated liability for damage shall thus pursue the same object. The system is that the Act links liability for damages to a specific cause, “pollution”, as it is defined in section 6, first paragraph, which reads as follows:

“In this Act pollution means:

- 1) the introduction of solids, liquids or gas into the air water or the soil,
- 2) noise and vibrations,
- 3) light and other radiation in so far as the pollution authority so decides.
- 4) any effect on the temperature which is or may be harmful to or inconvenient for the environment.

Pollution is also deemed to be anything that may result in previous pollution causing increased damage or inconvenience, or that in conjunction with any environmental effect mentioned in items 1 to 4 is or may be harmful to or inconvenient for the environment.”

The system is that all pollution pursuant to section 6 is illegal, as appears from section 7. This applies in relation to both the public law rules in the Act and the liability rules in chapter 8. But the Act authorizes exceptions, cf. section 7, first paragraph, which states:

“No person shall have, do or initiate anything that may entail any risk of pollution unless it is lawful pursuant to section 8 or 9, or is permitted by a decision made in accordance with section 11.”

Thus there are three types of exception. Exceptions pursuant to section 8 apply to ordinary pollution caused by fishing and agriculture etc., from houses and warehouses etc., and from “temporary construction work”. The second type consists of exceptions under regulations made pursuant to section 9, which authorizes regulations concerning fixed limits for permitted pollution. The third type is pollution that occurs pursuant to special permission authorized by section 11.

The exceptions pursuant to sections 8, 9 and 11 are of a public law nature and do not exclude damages, but they are, nonetheless, an important part of the damages rules. The system is that if the pollution is illegal and does not come under one of these exceptions, strict liability pursuant to chapter 8 is incurred. But even if the pollution is “permitted”, i.e. lawful or permissible pursuant to the exception rules, the injured party may have a claim for damages pursuant to chapter 8. The decisive factor according to section 56, first paragraph, is whether “the pollution is unreasonable or unnecessary” in terms of the Neighbouring

² Section 53 of the Pollution Act contains special rules, for instance, to the effect that light and other radiation may be regarded as pollution, cf. section 6, first paragraph, item 3. Also special rules to the effect that damage caused by refuse is covered by chapter 8, cf. section 27.

Properties Act,³ section 2, second to fourth paragraphs. In this case any damage caused by any pollution that exceeds this tolerance limit may be the subject of a claim for damages pursuant to the damages rules in chapter 8. In the case of unpermitted pollution full damages without any reduction for a tolerance limit may be claimed.⁴

1.2 Special Liability Pursuant to Chapter 8 of the Pollution Act

The special rules in chapter 8 of the Pollution Act are on some points more favourable to the injured party than the damages rules otherwise applicable as regards liability. One example is that in the case of unpermitted pollution, damages may be claimed for damage to rights of common exercised outside industrial activity, pursuant to specific rules in section 58, cf. section 57. Another example is the rule in section 59 concerning the reversal of the burden of proof in the case of evidence of factual causal connection, in so far as this rule of evidence is more favourable to the injured party than the ordinary rules.

Section 55 of the Pollution Act introduces two special forms of grounds for liability.

One of these is strict liability. In this instance there are two types of persons who are subject to liability: the owner of real property, objects, installations or enterprises which cause damage by pollution is liable, but only if he himself operates, uses or is in possession of the property etc. A person who is not the owner but who actually operates etc. will be liable for pollution damage caused by the property etc. in question. The rule is set out in section 55, first paragraph:

“The owner of real property, objects, installations, or enterprises which cause damage by pollution is liable pursuant to this chapter irrespective of any fault on his part if the said owner also operates, uses or is in possession of the property etc. Otherwise such liability will rest only on the person who actually operates, uses or is in possession of the property etc.”

The other special form of liability is set out in section 55, second paragraph. It is a subjective liability imposed on the person who “indirectly ... has contributed” to pollution damage by supplying goods or services, exercising control or supervision, “or in a similar manner”. The degree of fault required corresponds to that required for establishing an employer's vicarious liability pursuant to the Damages Act,⁵ section 2-1, and otherwise corresponds mainly to the non-statutory fault rule. The rule reads as follows:

“Any person who indirectly by supplying goods or services, exercising control or supervision or in a similar manner has contributed to pollution damage is liable

³ Lov om rettshøve mellom grannar 16 June, No. 15. (The Act relating to legal relations between neighbours).

⁴ The rules concerning this are rather complicated. For further information see especially Sigrid Eskeland: *Ansvar for skade ved forurensing som er tillatt, forurl § 56*, (Liability for damage in the case of permitted pollution, section 56 of the Pollution Act), *Det juridiske fakultetets skriftserie* nr. 66, University of Bergen 1997.

⁵ Lov om skadeerstatning 13 juni 1969 nr. 26.

only if he has acted intentionally or negligently. In assessing fault consideration shall be given to whether such requirements as the injured party may reasonably make in regard to the activity or service have been disregarded.”

1.3 Relationship to Other Damages Rules

Who is subject to liability pursuant to section 55 of the Pollution Act may also depend on how this provision stands in relation to other damages rules.

The legislative committee proposed that the rules concerning the relationship to other liability rules should be collected in a separate section. The proposal was formulated in section 56 and read thus:

“The provisions of this chapter shall apply in so far as special rules are not prescribed by other legislation. Nor shall these provisions impose any restriction on any liability to pay compensation resulting from compensation rules otherwise applicable or incurred by any person through a contract.”

The system seems to be that the rules in chapter 8 should give way to special statutory rules and also should not restrict any liability imposed by damages rules otherwise applicable. But the Ministry was of the opinion that such a legislative technique “might be likely to lead to a lack of clarity as to which rules were applicable”. The Ministry was of the opinion that “the legislative proposal should be based on the principle that the liability rules contained in the Act itself should be exhaustive, *unless it is otherwise expressly stated*”, so that the relationship to other rules can “expressly appear from the provisions when the occasion arises”, p. 99 of the proposition. The rules concerning the relationship to other liability rules were therefore inserted in three places in the Act, namely in section 53, first paragraph, and in section 55, first and second paragraphs.

Section 53 of the Pollution Act is the first section in chapter 8, and its first paragraph reads as follows: “This chapter concerns the duty to pay compensation for damage caused by pollution, in so far as the question of liability is not specially regulated by other legislation or by contract.”⁶

Pursuant to section 55, first paragraph, of the Pollution Act the owner of the enterprise etc. that causes pollution does not incur strict liability if he does not himself operate or use the property etc. in question. In this case the person who operates the enterprise etc. is solely liable “in so far as the damage is not due to circumstances for which the owner is also responsible pursuant to damages rules otherwise applicable”.

Section 55, second paragraph, contains the contributory damage rule in the form of the first and second sentences quoted in section 2 above. This is followed by a third sentence: “This provision does not, however, impose any restriction on the liability resulting from damages rules otherwise applicable.”

This legislative technique does not seem to be particularly successful either. The rules concerning the relationship to other damages rules are in part rather complicated. We shall take a closer look at them in part II.

⁶ The contract alternative will not be discussed in this work.

2 Further Comments on the Relationship to Other Damages Rules

2.1 *The Background to the Reservation in Section 53, First Paragraph*

a) The reservation in section 53 has a kind of general and predominant character derived from both its form and its placing: “This chapter concerns the duty to pay compensation for damage caused by pollution, in so far as the question of liability is not specially regulated by other legislation...” It is therefore important to know what sort of liability rules or set of rules is in question. Further clarification must be achieved on the basis of an interpretation of the reservation in section 53, first paragraph. The set of rules that may be relevant is primarily the rules concerning liability for pollution in the Petroleum Act,⁷ the Maritime Act,⁸ and the Nuclear Energy Act,⁹ and also the statutory rules concerning strict liability for damages elsewhere, especially the Aviation Act,¹⁰ the Motor Vehicle Liability Act,¹¹ the Neighbouring Properties Act and the Product Liability Act.¹² Non-statutory rules may perhaps also be included.

The starting point for the interpretation is “the principle that the liability rules contained in the Act itself shall be exhaustive”, cf. p. 99 of the proposition and part I, section 3 above. This principle may be formulated thus that it is *the protection of the injured party against damage caused by pollution* that is exhaustively regulated in chapter 8. But then in terms of section 53, first paragraph, it is stated that this applies “in so far as the question of liability is not specially regulated by other legislation”. This may mean that the other rules *take the place of* the rules in chapter 8. But it may also mean that the rules in chapter 8 *do not prevent* the injured party from claiming damages for pollution damage on other grounds of liability. In both cases he may allege liability that is specially regulated in other legislation, as far as such special rules apply. But according to the principle stated concerning protection of the injured party, the legal position of the said party shall not be weaker than that conferred by chapter 8. The result of this is that chapter 8 *supplements* the set of special rules in question with rules concerning matters that the set of special rules does not itself regulate. This supplementary system is illustrated by the legislative committee's comments on, for instance, pp. 248-249, and also by what the Ministry states on p. 99 (and p. 104):

“On the other hand, the Pollution Act must as far as it is appropriate *supplement* such special liability rules in other Acts, where rules corresponding to those in the Pollution Act are not to be found. For instance, section 58 of the draft bill might be given supplemental application with regard to *who* may allege liability.”

⁷ Lov om petroleumsvirksomhet 29. november 1996 nr. 72.

⁸ Lov om sjøfarten (sjøloven) 24. juni 1994 nr. 39.

⁹ Lov om atomenergivirksomhet 12. mai 1972 nr. 28.

¹⁰ Lov om luftfart (luftfartsloven) 11. juni 1993 nr. 101.

¹¹ Lov om ansvar for skade som motorvogner gjer (Bilansvarslova) 3. februar 1961.

¹² Lov om produktansvar 23. desember 1988 nr. 104.

The result will thus be that when the injured party bases his claim on a special rule or a set of special rules as stated in section 53, first paragraph, and this set of special rules does not contain a rule such as, for example, section 58 of the Pollution Act concerning damage to rights of common, then section 58 will be treated as a rule in the set of special rules. For instance, the special rules in chapter 10 of the Maritime Act concerning oil pollution from ships may take the place of chapter 8 of the Pollution Act, but in such a way that chapter 8 may supplement the special rules.¹³

What sort of set of rules is in question here is a rather complicated problem. The legislative committee had in mind a distinction between two categories of special rules, a distinction between a set of rules in which “the special rules are mandatory”, and a set of rules that is not. The “mandatory” rules should *take the place of* the rules in chapter 8, but should also be supplemented by those rules. This applied, for instance, to the pollution rules in the Maritime Act. But the “non-mandatory” set of rules could both be supplemented by the rules in chapter 8 and applied on a par with those rules. The injured party could *choose*. The Neighbouring Properties Act was used as an example of this latter category, p. 249, cf. p. 234. The same was the case with statutory rules concerning product liability, pp. 237-238, which was then the subject of a proposal in NOU 1980:29.

The Ministry does not use the term “mandatory” rules. The Ministry mentions the Petroleum Act, the Maritime Act, the Aviation Act, the Motor Vehicle Liability Act (hereinafter called the MVL Act) and the Nuclear Energy Act as special rules pursuant to section 53, first paragraph. The Ministry rejected the legislative committee's view that the Product Liability Act might also be relevant in this instance. Chapter 8 could not supplement the Product Liability Act, but product liability could supplement, i.e. be additional to, the contributory damage rule in section 55, second paragraph, cf. the proposition p. 101. The Ministry does not mention the Neighbouring Properties Act in this connection.

2.2 Further Comments on Different Sets of Rules

Against the above background at least two questions arise: What sort of set of rules shall pursuant to section 53, first paragraph, *take the place of* the liability rules in section 55, first paragraph? And what sort of set of rules can *be on a par* with the latter rules so that the injured party may *choose* if the occasion arises?

In its special comments on section 53, first paragraph, on p. 104, the Ministry states, *inter alia*:

“With further reference to the exception whereby ‘the question of liability’ is regulated by other legislation, this primarily covers special regulations of *the grounds* for compensation and who is subject to liability in connection with pollution damage, see, for example, section 39 of the Petroleum Act. To the degree that over and above this rules are prescribed concerning *the*

¹³ Thor Falkanger discusses the relationship between the pollution rules in the Maritime Act and the rules in section 55 of the Pollution Act comprehensively in his article “Sjøtransportøren og den norske forurensningsloven” (The Maritime Carrier and the Norwegian Pollution Act) in *Festskrift til Kurt Grönfors* 1991, pp. 147-168.

implementation of the actual compensation proceedings, the circle of injured parties protected, the right to sue etc., these special rules take precedence.”

The term “question of liability” thus primarily refers to special rules concerning liability for damage caused by pollution. It applies to section 39 of the Petroleum Act, to which the Ministry refers, now the Petroleum Act 1996, section 7-3 (chapter 7) concerning pollution damage in the course of petroleum extraction, and also the rules in the Maritime Act, section 191 (chapter 10) concerning oil pollution from ships, and the rules in the Nuclear Energy Act, section 20 (chapter 3). One of the characteristics of these rules is that they denote who is subject to liability, that the liability is channelled towards the said subject, and that they are rules that assure payment. Such channelling means that in addition to prescribing who is subject to liability, *the Act relieves others* who could have been subject to liability for the same damage. For instance, the Maritime Act, section 191, imposes liability on the owner of the ship, and in section 193 relieves the “shipping line”, “the charterer”, and certain others. Such special rules concerning *freedom from liability* take precedence over more general liability rules; for instance, the exemption of “the shipping line” and “the charterer” also takes precedence over section 55 of the Pollution Act in relation to oil-pollution damage caused by the ship. Thus it is for those who are *relieved* of liability that the set of special rules *takes the place of* section 55.

As regards the Aviation Act, the owner of an aircraft is strictly liable and is obliged to insure against damage to third parties, pursuant to specific rules in chapter 11 (sections 11-1 and 11-2). Pursuant to the Aviation Act 1960, section 153, a user was also strictly liable but this has been altered, see Proposition to the Odelsting No. 84, 1992-93, p. 22. The owner is liable, but in this instance there are no special rules that provide grounds for relieving others of liability for damages for the same damage. The user of an aircraft may thus be liable pursuant to section 55 of the Pollution Act, and the owner's liability pursuant to section 11-1 may thus be supplemented by the rules in chapter 8 of the Pollution Act, which regulates matters that the Aviation Act does not regulate.

Pursuant to the MVL Act the traffic insurer is subject to strict liability. This form of special rule will also be covered by section 53, first paragraph, of the Pollution Act so that the traffic insurer's liability may be supplemented by the rules in chapter 8, for instance by section 58 concerning damage rights of common, cf. above Part II, section 1. But the MVL Act provides no grounds either for relieving others of any liability they may have for the same damage pursuant to other liability rules, cf. section 11 of the said Act. At any rate neither the owner nor a user is relieved of liability by section 55. Pursuant to section 9 of the MVL Act *maximum limits* are set for the traffic insurer's liability. The Pollution Act did not interfere with those limits, cf. pp. 99 and 104 of the proposition. But the owner or user of the motor vehicle may as aforesaid incur liability pursuant to section 55, first paragraph, of the Pollution Act, and this may also apply to that part of the damage that exceeds the maximum limit, cf. p. 100 of the proposition.

The Neighbouring Properties Act, section 9, cf. sections 2 to 5, and the Product Liability Act also have special statutory rules concerning the grounds of liability. But as in the case of the Aviation Act and the MVL Act there are no

special rules concerning pollution damage. These sets of special rules will also be covered by section 53, first paragraph, and will be supplemented by the rules in chapter 8.¹⁴

For ordinary damages rules of a more general nature, there can hardly be any suggestion of the question of liability being “specially regulated” and coming under section 53, first paragraph. Thus an employer's vicarious liability pursuant to the Damages Act, section 2-1, or the Maritime Act, section 151, will not be affected.¹⁵

The same will be the case with *non-statutory* law, as far as there are no “special” grounds for liability. But must it not be regulated by formal law? The legislative committee used the term “legislation” in the corresponding legislative text to include non-statutory law as well, see p. 248. But the Ministry seems to restrict this by emphasizing that it must be “specially regulated by other *legislation* ... (here italicized)”, and by speaking of non-statutory law only in relation to section 55, cf. pp. 99 to 100 of the proposition. Nevertheless special rules as to liability should not be excluded from the scope of section 53, first paragraph, because they are non-statutory.¹⁶

2.3 Conclusion Concerning Section 53, First Paragraph

a) The conclusion must consequently be that sets of special rules that contain *channelling rules*, such as chapter 7 of the Petroleum Act, chapter 10 of the Maritime Act and chapter 3 of the Nuclear Energy Act are in a special position. In the event of the channelling rules *relieving* certain persons of liability, the persons so relieve will also be free from liability pursuant to chapter 8 of the Pollution Act for the same damage. Thus for such persons the set of special rules that relieves them will *take the place of* the rules in chapter 8 of the Pollution Act. But as regards the injured party's claim against channelized persons subject to liability, for instance against the shipowner pursuant to chapter 10 of the Maritime Act, chapter 8 of the Pollution Act may be a supplement with rules concerning matters that the Maritime Act does not regulate.

b) Moreover the wording of the first sentence of section 53, that “the question of liability ... is specially regulated by other legislation”, should not be interpreted too narrowly. The term “specially regulated” applies not only to special rules concerning liability for pollution, but also to special general grounds for liability based on a statute, e.g. motor vehicle liability and neighbours' liability. But parts of ordinary damages rules of a general nature are not covered, e.g. statutory rules concerning an employer's vicarious liability. Nor

¹⁴ As mentioned above in Part II, section 1, the Ministry was of the opinion that chapter 8 could not supplement the Product Liability Act. But it accords best with the principles and considerations on which section 53, first paragraph, is based to follow the legislative committee here. There does not seem to be anything to prevent a person who is subject to liability pursuant to the Product Liability Act in relation to pollution damage from also being subject to liability pursuant to section 55, first paragraph, in relation to the same damage.

¹⁵ To the same effect see also Falkanger, *op.cit.* p. 161

¹⁶ Likewise Falkanger, *op.cit.* p. 160: “Non-statutory rules will according to the circumstances also have to be regarded as special legislation (e.g. the rules concerning strict liability when a ship runs into a dock because of a technical failure ...)”.

should the term “legislation” be interpreted too narrowly. Special non-statutory grounds for liability may also be relevant.

c) Section 53, first paragraph, of the Pollution Act does not impinge on the question of liability that is specially regulated by other legislation, e.g. motor vehicle liability or neighbours' liability. A person who incurs pollution damage may therefore put forward such grounds for liability independently of section 53, first paragraph, but in such a way that chapter 8 of the Pollution Act can supplement this set of rules, cf. Part II section 2 above. The injured party is thus free to apply such sets of special rules.

The question whether the injured party loses his claim pursuant to chapter 8 by basing a claim on the other set of rules must be answered negatively. In certain cases he has no claim pursuant to chapter 8. The injured party has no claim pursuant to chapter 8 against a person subject to liability who is relieved thereof pursuant to particular channelling rules as mentioned under *litra a* above. Nor has the injured party a claim pursuant to chapter 8 of the Pollution Act against a traffic insurer, because the latter cannot be regarded as an owner, user or contributor pursuant to section 55; the injured party must limit himself to a claim under the MVL Act possibly supplemented by the rules in chapter 8. Beyond such cases there can hardly be grounds for section 53, first paragraph, itself relieving anyone from claims pursuant to chapter 8, in view of the principle and considerations on which section 53, first paragraph, is based, cf. sections 1 and 2 above.

Except for the cases in which the injured party in this way cannot advance a claim pursuant to chapter 8, he will retain his right to a claim pursuant to chapter 8. A person who is subject to liability pursuant to both the set of special rules and section 55 is liable under both sets of rules. The injured party will thus be able to *choose* the set of rules to be applied. Normally such a right to choose will be of no interest in itself. But if the person liable has liability insurance or other payment insurance under one set of rules but not under the other, it may be important for the injured party to have a right to choose.

2.4 Special Comments on the Reservations in Section 55, First and Second Paragraphs

a) In section 55, first paragraph, the Act introduces partly an owner liability and partly an operator liability, as further specified in Part III, 1-3 below. But the owner may on specific conditions be relieved of liability, and in this case it is only the operator who incurs strict liability for pollution pursuant to section 55. The operator is therefore left “alone” with the liability for pollution damage “in so far as the damage is not due to circumstances for which the owner is also responsible pursuant to damages rules otherwise applicable”.

This reservation means that the owner's freedom from liability has not affected any liability he must incur pursuant to other damages rules, which may be both special rules such as those referred to by section 53, first paragraph, and other damages rules both statutory and non-statutory.

b) In the first and second sentences of section 55, second paragraph, of the Pollution Act there is as aforesaid a special rule for a person who “indirectly ... has contributed to pollution damage”. Then comes the third sentence: “This

provision does not, however, impose any restriction on the liability resulting from damages rules otherwise applicable.” This means that the contributory damage rule in the first and second sentences does not prevent liability for damages pursuant to sets of rules extraneous to the Pollution Act, see pp. 99-101 of the proposition. Neither the requirement that he must have “contributed”, that the contribution must be “indirect”, or the requirement that there must have been some fault on his part, has any relevance to his liability pursuant to other damages rules.

Otherwise the contributory damage rule is significant in two respects. It may function as an exception from strict liability in section 55, first paragraph. Even if the contributor does himself fulfil the conditions for liability pursuant to the first paragraph, he will be free from strict liability if he only “indirectly ... has contributed”, see further comments in Part III, 4. The contributory damage rule also has the effect that if the person concerned has contributed in the manner stated in section 55, second paragraph, his liability will extend to all the legal effects set out in chapter 8.

c) Common to the exemption rule in section 55, first paragraph, and the contributory damage rule in section 55, second paragraph, is the question whether other damages rules can be supplemented by chapter 8. If an owner is free from liability pursuant to section 55, first paragraph, but liable pursuant to the Neighbouring Properties Act, his liability as a neighbour may be supplemented by chapter 8. And when a vehicle contributes to pollution damage, the traffic insurer's liability may be supplemented by chapter 8. Such supplementation results from the system in section 53, first paragraph, cf. Part II sections 1 to 3 above. But will the owner's liability be supplemented by the rules in chapter 8 -- e.g. in the event of his becoming liable for damage to rights of common pursuant to section 58 -- also if his liability is based on non-statutory strict grounds? Or in the event that a private person by an individual act wilfully opens an oil-tap so that oil flows out and causes pollution, can also his liability be supplemented by chapter 8? Initially the answer must probably be negative, since the regulation in section 53, first paragraph, applies to special rules not to general rules. A negative answer also corresponds to the Ministry's view as regards the Product Liability Act, see Part II section 1 above. But in view of the purpose of chapter 8, to afford the injured party strong protection against pollution damage, the supplementation rule should apply in such cases too.

3 Imposition of Liability Pursuant to Section 55

3.1 Background to and Problems Concerning the Imposition of Liability Pursuant to Section 55, First Paragraph

Section 55, first paragraph, of the Pollution Act, which introduces strict liability for pollution, also prescribes certain rules for the imposition of such liability. These imposition rules may appear to be difficult, but the question of imposition is also difficult, as regards both legislation and clarification. Characteristically legislative regulation of the imposition question proved to be too difficult for the legislative committee, see p. 120 and p. 250. The proposal for section 57, first

paragraph, read as follows: “Any person who is liable for pollution damage ...” The committee was of the opinion that it is for the courts to decide the question of who is to be subject to liability.

In the consultation process both the Attorney-General and the Norwegian Bar Association were of the opinion that the legislative text might be unnecessarily obscure on this point, see p. 66 of the proposition, and Erling *Selvig* criticized the committee's recommendation on this point in an article:¹⁷

“A serious weakness of the new bill is, in my opinion, that it makes no attempt to provide *who* shall be liable for pollution. The main view in the *travaux préparatoires* is that such liability rests on the person *who operates or manages the activity* from which the pollution is derived. This has not, however, been expressed in the legislative text, nor is it a criterion that of itself provides clear answers. For instance, if petrol and other oil products are distributed in tankers by road or rail, it is not clear whether such activity is attributable to the oil company or the transporter.”

The Ministry took the criticism seriously and discussed the imposition question quite thoroughly, pp. 64 to 68 and 107 to 108 of the proposition. The result was the provision set out in section 55, first paragraph, where the first sentence imposes liability on the owner of the enterprise etc. when he himself also operates, uses or is in possession of it. But the second sentence relieves the owner of liability if it is not he but another person who operates, uses or is in possession of the enterprise that causes the pollution. In this case the latter person alone is subject to strict liability for the pollution. So far this appears to be reasonably clear - the owner in this case is not subject to strict liability pursuant to the first sentence of section 55. But this does not solve the question raised by *Selvig* as to whether “such activity is attributable to the oil company or the transporter”. If the oil company owns the oil product and itself operates the distribution process, the company is subject to owner liability pursuant to the first sentence. And if the transporter owns the means of transport¹⁸ and himself operates the transport business, he also fulfils the liability conditions pursuant to the first sentence. Both are thus subject to strict liability for pollution pursuant to section 55. And as long as both are severally liable for the same damage, joint and several liability will be incurred pursuant to section 5-3 of the Damages Act.

On the latter point *Thor Falkanger* arrived at another solution. Only *one* of the owners will be liable; one is to be chosen instead of the other:¹⁹

“The interpretation of section 55 is not entirely simple -either generally or in relation to shipping. The *travaux préparatoires* at least provide grounds for a general, comprehensive characterization: It is a question of *operator liability*, see

¹⁷ Erling Selvig, *Miljøskadeansvar i Norge* (Liability for environmental damage in Norway), *Jussens Venner* 1984 p. 97.

¹⁸ If the means of transport is a motor vehicle according to the MVL Act, the motor vehicle liability will take the place of liability pursuant to chapter 8 of the Pollution Act as far as the motor vehicle liability extends. But for damage exceeding the liability limit in section 9 of the MVL Act the vehicle owner or the transporter will be responsible pursuant to section 55, cf. Part II, 2-3 above.

¹⁹ Op.cit. p. 156.

especially Proposition to the Odelsting No. 33 (1989-90, pp. 66 f.). ... Moreover it is important to point out that the rules in the first paragraph entail a *channelization* of the strict liability: One person (the operator) shall incur such liability.”

He is thus of the opinion that “the rules in the first paragraph entail a *channelization* of the strict liability” also between owners each of whom fulfils the conditions for liability pursuant to the first sentence. He then applies this channelization rule to, inter alia, Selvig’s example “that when as in the example a choice is to be made between the transporter and the oil company, the result must be that the transporter shall be deemed to be ‘the person liable’” , p. 157. The reason is that the predominant factor in the case of pollution will be the connection with the transporter.

For my part I cannot see that section 55 authorizes a channelization between several owners each of whom fulfils the conditions in the first sentence. I shall discuss this point in greater detail below.

3.2 *The Proposition*

The proposition discusses the question whether liability should be channelled onto the owner of the enterprise etc. that causes the pollution, or onto the person who operates the enterprise even if the latter is not the owner, p. 66. On the one hand it is emphasized that “an unambiguous channelling of liability will have clear advantages for the effective application of the law. Such a solution will provide a clear answer to the question who shall pay for the damage, thereby precluding uncertainty and disputes concerning the question of liability”. This will also have a stronger preventative effect, since the call for prevention is unambiguously addressed. Not the least of its effects would be to prevent double insurance “to some degree”. On the other hand, the imposition of liability in relation to the law of damages should be in harmony with the imposition of liability pursuant to the administrative rules. The Ministry points out that pursuant to section 76 of the Pollution Act “the person liable” is obliged to cover the costs incurred by another person for measures taken in connection with pollution; in this instance the established interpretation is that the owner of the enterprise that causes the pollution must pay. It would be “an artificial breach of the system laid down in the Act” if the owner was the person liable in this respect, whereas liability pursuant to chapter 8 should rest only on the operator when the latter is not the owner. It would also “be a breach of the general causer-of-damage principle that otherwise is so firmly established in the Norwegian law of damages” if the liability should be channelled “past some natural links in the chain of liability“. Such channelization seems to be most natural where compulsory insurance is simultaneously established. Further discussion of the payment question then follows:

“Finally it can be said that a channelling of liability to a specific person may entail a reduced chance of payment for the injured party. The weight of this argument will, of course, depend on the insurance coverage possessed by the person liable. In the absence of any statutory insurance obligation, it must, however, be of great practical importance that pollution damage occurs in cases

where the person who has directly caused the pollution lacks or has only defective insurance coverage. If the damage done in such cases can also actually be attributed to the preceding link (e.g. an owner who has hired out the production equipment or property), it will be unfortunate for the effective application of the law if the channelling of liability prevents the imposition of liability where it is legally appropriate.”

Then followed the summing up and conclusion:

“The Ministry has consequently come to the conclusion that the material solution of the question of liability must in the main accord with what the Committee has proposed. Nevertheless it has been concluded that the legislative text must to a stronger degree than has been proposed by the Committee state who is subject to liability in the different types of situation. The Ministry is therefore in favour of a statutory provision that imposes *owner liability* in cases where the owner is also the person who manages the enterprise that causes pollution. Furthermore, the Act should contain a provision concerning *operator liability* in cases where the enterprise that causes the pollution is managed by a person other than the owner. Such operator liability should be ascribed to the operator alone, unless an owner liability can result from rules extraneous to the Act, including non-statutory rules, cf. the express provision to this effect in section 55, first paragraph, of the bill. In this case liability may be ascribed to both of them. In this way the Ministry assumes that the different considerations discussed above will be sufficiently harmonized. Not least importance is attached to the fact that the legislative text directly states who is to be subject to liability in the different situations to a greater degree than the Committee’s formulation does. The significance of some of the objections put forward during the consultation process and advanced by Selvig above is thereby reduced. Reference is made to section 55 of the bill concerning the detailed formulation. “

Thus *owner liability* is established pursuant to the *first sentence* of the first paragraph of section 55. In this instance a double connection is stipulated. The person concerned must have a proprietary connection with the property or object etc. that causes the pollution while simultaneously having a necessary connection with its damage potential by operating, using it etc.

The system established by the *second sentence* is that the person who owns the real property, object etc. that causes the pollution but who does not himself operate it etc. is *free from liability*, i.e. he is not subject to strict liability pursuant to the first sentence of section 55. The second sentence thus *authorizes the exemption of the owner* in such cases. If the property etc. causes pollution in such cases, it is the person who in fact operates, uses or is in possession of the property etc. who is solely liable pursuant to section 55, first paragraph. His liability is called “*operator liability*” in the proposition. This sole liability does not prevent the owner too from incurring liability “pursuant to damages rules otherwise applicable”, cf. Part II, 4a, above.

A non-owner is also connected with the property etc. He is connected through a hiring agreement or some other means of disposition. At the same time through actual operation etc. he has a necessary connection with its damage potential.

Both an owner pursuant to the first sentence and a non-owner pursuant to the second sentence must thus be connected with both the property etc. and the operation etc.²⁰

3.3 *Further Comments on the Imposition Question in the First Paragraph*

For both an owner and a non-owner it is a condition pursuant to section 55, first paragraph, that he “operates, uses or is in possession of the property etc.” This corresponds in the main to what the legislative committee laid down in the *travaux préparatoires* and that Selvig thought should appear in the legislative text.²¹ Selvig also looked for channelling rules, and the Act does introduce a form of channelization by relieving from liability an owner who does not himself operate etc. This is, according to the quotation in Part III, section 2, above, “e.g. an owner who has hired out production equipment or property”. To exempt such an owner who thus lacks or has only a weak connection with the damage potential is no great step in the direction of channelization.²² But by including the conditions concerning operation etc. in the legislative text and by relieving such an owner of liability, the legislator met at any rate some of the criticism, cf. also the quotation in section 2 above.

This is in my opinion what emerged from the channelization discussion in the proposition. Exemption from liability has not been introduced for anyone except the stated category of owners. It is important to emphasize that the exemption of one such owner cannot prevent *two or more owners who operate* an enterprise etc., all of whom are involved in the causation of damage and who collectively cause pollution damage from being severally liable pursuant to the *first sentence*. Likewise *two or more hirers who operate* etc. may be liable for one and the same damage pursuant to the second sentence. If two or more are involved, so that their respective operations etc. represent collective causes of the damage in question, each of them will be severally liable unless his contribution is so inconsiderable that it may be ignored, as the ordinary causation rules in the law of damages so state.

Neither the legislative text nor the preparatory works provide grounds for exempting any person who incurs owner liability pursuant to the first sentence, by choosing one person instead of another on a discretionary basis.

²⁰ For neighbours' liability too a double connection is stipulated, i.e. a requirement for a connection both to the property on the part of the person causing the damage and to the damage potential involved, see further Nils Nygaard *Ansvarsplacering etter grannelova §9* (Imposition of liability pursuant to section 9 of the Neighbouring Properties Act), *Jussens Venner* 1991, pp. 175 ff.

²¹ Some of the expressions used by the legislative committee are: “the person who is responsible for the actual enterprise that causes the pollution”, “the person who *operates* the enterprise that causes the pollution”, “the person who is immediately responsible for the pollution”, pp. 56-57. Cf. the quotation from Selvig in section 1 above, “that such liability rests on the person who operates or manages the activity from which the pollution is derived”.

²² Also pursuant to section 9 of the Neighbouring Properties Act such an owner is as a general rule free from liability, cf. Nygaard, op.cit.; Thor Falkanger, *Tingsrett* (Property Law) 1993, pp. 312-313.

In this way one has thus largely returned to the legislative committee's system. The Ministry too states "that the material solution of the question of liability must in the main accord with what the Committee has proposed", cf. the quotation in section 2 above. And the legislative committee is of the opinion that there is nothing to prevent "that for instance, two enterprises together may be wholly or partly liable, that liability may be imposed on a building proprietor and a contractor together, or only on the building proprietor or only on the contractor as the case may be", p. 250.

Pursuant to section 55, first paragraph, the owner's function or the hirer's function may relate to different objects. A person may be the owner of everything "real property, objects, installations or enterprises", or the object may be spread between different hands in a cooperative. If the person concerned is the owner or hirer of the real property, it must thus be his operation, use or possession of the said property that causes or contributes to the pollution. Likewise if he owns or hires the chattel or object that causes or contributes to the pollution. Etc. Two or more persons in such owner or hirer positions can thus fulfil the conditions for liability for one and the same pollution damage, for instance, the oil company and the transporter in Part III, section 1, above, or the landowner who carries on building work and the contractor who owns and operates building or construction equipment. If the State carries on road-building on its own land with the help of a contractor who himself owns construction equipment and the contractor's equipment and method of operation during the carrying out of the task create noise that results in pollution damage, both the State and the contractor fulfil the conditions for owner liability pursuant to the first sentence: the State because it is the owner and operator of the road construction or building work that creates the noise, and the contractor because he is the owner and operator of the machinery that creates the noise.

When two or more owners or non-owners each fulfil the conditions in section 55, first paragraph, in relation to the same damage, they are jointly and severally liable pursuant to section 5-3 of the Damages Act.²³

3.4 Further Comments on Who is Subject to Liability Under the Contributory Damage Rule in Section 55. Second Paragraph

The person subject to liability pursuant to the contributory damage rule in section 55, second paragraph, is the person who "indirectly ... has contributed" to the pollution damage by "supplying goods or services, exercising control or in a similar manner". The intention is that such a contributor shall not incur strict liability pursuant to section 55, first paragraph, but that he shall at the same time be liable pursuant to chapter 8, cf. inter alia the legislative committee's proposal pp. 55 to 57, where it also illustrates the contributory damage condition.

Examples of contribution to damage are as follows: an engineering firm that commits a planning error which results in pollution from a paper-mill, or a

²³ Reference to joint and several liability is "for informational purposes" also included in section 59, second paragraph: "Persons who cause pollutions which severally or jointly are sufficient to cause pollution damage are jointly and severally liable pursuant to section 5-3 of the Damages Act, cf. the proposition p. 111.

supplier of navigational equipment who has misadjusted an instrument so that a ship with a dangerous cargo runs aground; a car-repair shop that installs a defective part so that a tanker overturns and pollutes drinking water; or Det Norske Veritas controlling an installation and overlooking dangerous elements in it so that it in turn causes pollution. Public authorities may also incur liability for contributing to damage. For instance, there is no reason to distinguish between Det Norske Veritas as a private body and the Norwegian Shipping Control as a state agency in relation to a failure to control which contributes to pollution. Thus public authorities may incur contributory damage liability for human error in the performance of service work. Moreover public authorities may contribute to damage through unlawful decisions or lack of supervision etc., e.g. in cases where the municipality may be liable for not having stopped unlawful sewage.

Contribution to damage as a condition of liability for damage causation is a rare legal element in the law of damages. Such contribution is not specifically stated to be a part of the grounds for liability. The term used is joint causes. Each of these joint causes is treated as equal when they each fulfil the conditions for causal connection, and if the persons behind such causes each fulfil the conditions for liability, they will be jointly and severally liable pursuant to section 5-3 of the Damages Act. What is here stated about joint causes will also apply to contribution to damage pursuant to section 55, second paragraph. The contributor's act must in this instance be combined with a causal factor that entails strict liability pursuant to section 55, second paragraph.²⁴ The question is what *additional* element must be found in the concept "contributed". Probably the contribution concept must at any rate contain a requirement that the contribution is a necessary link in the chain of causation leading to the pollution covered by section 55, first paragraph. It must therefore be a condition that the pollution would have been prevented or avoided if the person concerned had acted otherwise, i.e. acted in accordance with "the requirements that the injured party may reasonably make in regard to the activity or service", cf. section 55, second paragraph, i.e. the activity or service that comprises the supplying of goods etc. viewed in relation to the risk of pollution.

In addition, the contribution to the damage must be made in an "indirect" manner. This too is a difficult criterion. In relation to the contributory damage rule the point seems to be that the contribution is more of a background factor. According to pp. 56-57 of the legislative committee's proposal the contributor is "the person who in the background has in some way or other contributed to the pollution", "the person who has only made a secondary contribution". The phrase "made a secondary contribution to pollution damage" was also included in the proposal for the legislative text. The Ministry replaced the term "secondary" with "indirect", without thereby intending any real change, pp. 107-109 of the proposition.

The examples used in the preparatory works indicate that indirect contribution is primarily related to providing material for the activity etc. which

²⁴ Or as the case may be contributes to the pollution that leads to strict liability pursuant to special rules which pursuant to section 53, first paragraph, replaced the strict liability pursuant to section 55, first paragraph, cf. Part II, 2-3 above.

pollutes, arranging, preparatory and current control and supervision and the like. On the other hand, a sub-contractor who takes part in the activity itself, the operation or construction can scarcely be regarded as a contributor. He might himself be strictly liable pursuant to section 55, first paragraph, if he owns or hires his operational equipment.²⁵

²⁵ Cf. the question of the contractor's liability pursuant to section 9 of the Neighbouring Properties Act, Nygaard *op. cit.*