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# Injuries From Wood Preservatives

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**ABSTRACT.** This paper gives an account of the dangers to human health arising from PCP and lindane based wood preservatives, how the issue arose in Germany, and how those injured by wood preservatives took the initiative to organize themselves in order to defend their interests against the chemical industry. The latter played down the risks, and in so doing benefitted from the German public authorities' sustained reluctance to tackle the problem of a possible link between injuries and the hazardous wood preservatives. Press and media played a key role in the process of creating public awareness of the risks resulting from wood preservatives.

Lawyers have become involved in helping to pinpoint responsibility: Have consumers been used as guinea pigs for the chemical industry, and has the chemical industry really done all it can to prevent people from being endangered and injured? Some twenty actions have been brought before the courts, actions which have been accompanied by a growing public awareness. Legal and judicial solutions are not yet in sight. The jurisprudence is far from settled. The paper aims at describing and analyzing the strategies of the injured and the counter attacks of industry, at elaborating the role of the judiciary in a field where legal arguments are inseparably linked to political decisions, and finally at setting out the cornerstones of the legal debate. It might well be that the solution will be found on the political floor. The German civil courts do not seem to be willing to take over the responsibility and to condemn the German chemical industry for compensation. The solution might derive from the Frankfurt public prosecutor engagement which has been invoked by several thousand injured people. The public prosecutor has now accused those responsible in the chemical industry, thereby possibly preparing the ground for a joint commitment of the industry and the German government, for which the Thalidomide catastrophe might serve as a precedent.

### HOW THE STORY BEGAN

In December 1982, an article on wood preservatives was published in the German magazine "Stern" (Spill, 1982). It laid blame on these preparations for causing illness among people who had used them widely for protective and decorative purposes in their homes. Two basic chemical substances used in wood preservatives were heavily criticised in the seventies: Pentachlorophenol (PCP) as a fungicide and lindane as an insecticide. Even more significantly, wood preservatives were said to contain dibenzofurane and dioxine including the poison TCDD that was involved in the Seveso disaster. Elvira Spill's article directed the public's attention to the widespread use of hazardous wood preservatives.

During the seventies the chemical industry had begun a campaign in which it promoted the use of wood preservatives as a means of bringing “nature into the home.” Do-it-yourself workers felt attracted by the new chemicals which were said to protect wood, were easy to handle, and were offered for sale in numerous colours. Up to a hundred kilogrammes were used in one home. After a certain time lapse — not directly after the application — those members of the families who mainly stayed at home, i.e., housewives and children, began to suffer from headaches, permanent sleepiness, lack of concentration; in short, they suffered from a general indisposition. Sometimes people felt so weak and ill that they ceased to enjoy life. A phenomenon, experienced by all people injured by wood preservatives, was the feeling of general well-being while absent from home and the recurrence of the symptoms on return. It took some time before the families concerned were able to accept that the house which they had restored with so much personal and financial engagement was causing their illness. This might explain why the issue arose only during the eighties.

*The Competent Authorities: Carte Blanche to the Chemical Industry*

The sad fate of thousands — no one knows the exact figure — of injured people who have lost not only their health but also their homes is but one side of the coin. The other shows the endeavours of the industry to play down the risk and to use, in particular, the German Bundesgesundheitsamt (Federal Health Bureau) as an alibi for not having taken action. In 1977, the Bundesgesundheitsamt was pushed into action by one of the main producers of wood preservatives to set up an ad hoc commission which should investigate the possibility of a link between PCP in wood preservatives and personal injuries. The chemical industry needed an official statement from the competent German authority as it felt somewhat troubled by a fatal accident involving a child who was poisoned due to the application of PCP based wood preservatives, by the effects of the Seveso accident in 1976 which made the general public aware of the risks stemming from chemicals (specifically dioxine), and, lastly, by the Institut für Bautechnik (Institute for Building Technology) ban of indoor use of PCP based wood preservatives. The ad hoc Commission composed of experts and of representatives from the chemical

industry summed up the results of its inquiry in 1979 in the following statement, since then endlessly cited and quoted by the chemical industry:

After a critical review of the result of the investigation, the ad hoc commission concluded that there is no evidence so far for a causal link between the active ingredient PCP and the complaints reported by people who have used wood preservatives in their homes.

This conclusion is in agreement with the findings of the existing literature in toxicology and industrial medicine at home and abroad.

This statement came close to a “carte blanche” for the chemical industry, but cannot explain why the industry decided to stop the production of PCP based wood preservatives as early as 1978. As far as lindane is concerned, the situation is less spectacular. The Bundesgesundheitsamt still upholds the idea that lindane is not proven dangerous to human health and safety. Since 1982, however, the chemical industry has no longer offered lindane based wood preservatives for sale. An investigation begun in 1987 by the Nordrhein-Westfalen authorities, which aims at the analysis of possible injuries caused by wood preservatives, confirms the view of the Bundesgesundheitsamt.

Both the official investigations have been heavily criticised for failing to respect common scientific standards in epidemiological research. The detrimental effects of wood preservatives on human health have been discussed in a non-public hearing of the Committee on Nature, Environmental Protection, and Nuclear Safety of the Bundestag, the parliament, in March 1989.<sup>1</sup>

### *The Legislator — Ten Years Too Late?*

Ten years after the initial discussion of risks to human health and safety inherent in PCP, the issue reached the legislative machinery. In 1987, the German government proposed a ban on the production and import of PCP,<sup>2</sup> a decision which has not yet come into effect due to the objections of the EC Commission which is under pressure from the French chemical giant Rhone-Poulenc (Spill, 1987), the main European producer of PCP.<sup>3</sup> Whatever the result of the negotiations on the EEC level, for all those who have been injured and who suffer due to the application of PCP and lindane based wood preservatives, the regulatory initiative comes far too late.

*Compensation for People Injured by Wood Preservatives, or How the Burdens of the Seventies Are Distributed*

The scene is now set. It already shows that a courageous journalist was needed to bring to light not only the sad fate of thousands of injured people but also the inactivity of the competent supervisory authorities and the chemical industry's general attitude of denying any responsibility. The societal handling of the risks inherent in wood preservatives has, so far, been typical for our "risk society" (Beck, 1986). It is less typical, however, that people injured by a product get together and succeed in building up countervailing power against the problematic alliance of industry and the competent authorities.

THE INTERESSENGEMEINSCHAFT DER HOLZSCHUTZMITTEL-  
GESCHÄDIGTEN (THE WOOD PRESERVATIVE VICTIMS GROUP) –  
FROM SELF-ORGANISATION TO PUBLIC INTEREST GROUP

In response to Elvira Spill's article in the magazine "Stern", one of the readers proposed a meeting in order to examine what could be done by those concerned by the application of wood preservatives in order to look after their interests in an effective way. In May 1983, the Interessengemeinschaft der Holzschutzmittel-Geschädigten (in the following, the Gemeinschaft) was set up as an organisation of "wood preservative injured" people with the overall goal of mutual help. Members were invited to collect data on risks of chronic and acute injuries resulting from wood preservatives, to provide help with the recognition of the causes, and to provide consultancy on all medical, toxicological, legal, and tax matters, as well as to assist in finding appropriate measures of rehabilitation. The organisation gained importance beyond self-help, and step by step it underwent a process of transformation from a self-help organisation to a public interest group (Jüth, 1988).

Legally speaking, under German law the Gemeinschaft is a registered non-profit association. Three persons form the executive board, enjoying equal status and rights. All over the Federal Republic, there are 30 so-called contact centres, not formally incorporated into the Gemeinschaft. They are responsible for all regional activities. There are no well-defined by-laws describing the activities and

distributing the powers among those involved. The annual meeting gives members a formal unity with all those who consider themselves associated with the *Gemeinschaft*. The *Gemeinschaft* is very much based on the motivation and engagement of people injured by wood preservatives. It should be made clear that there are only some ten people in the *Gemeinschaft*, one couple in particular, who are the motivating force behind the whole movement.

### *Data Collection*

The ambitious objectives of the *Gemeinschaft* were achieved by means of information collected by the non-paid members of the *Gemeinschaft* themselves. They gathered all available information on wood preservatives, e.g., from public libraries, from experts, and from interviews with physicians. Today the *Gemeinschaft* has the best publicly accessible collection of data related to wood preservatives. Public health services, even experts, make more and more use of the data base which was computerized recently.

### *Processing Inquiries*

Since its foundation in 1983, the *Gemeinschaft* has responded to inquiries from more than 50,000 people who have suffered from the effects of wood preservatives. The *Gemeinschaft* may be contacted per telephone all day long, and during the entire week, Saturday and Sunday included. Numerous letters have to be answered, sometimes more than one hundred a day. The inquiries cover a wide range of subjects. Some ask for advice, but turn out to be mostly in need of a person who will listen to their story. Some seek concrete information on particular subjects, while others need help in interpreting data about the contamination of their homes with PCP and lindane. Yet others require advice on actions to be taken with respect to their contaminated homes, or about rehabilitation measures.

Most of the inquiries, however, concern the physical well-being of injured people. For years the *Gemeinschaft* was the only organisation which was ready to take seriously the complaints of the injured. To people who had tramped from doctor to doctor and had been confronted by professionals who regarded the complaints as — at the very least — exaggerated, hysterical, and neurotic, the *Gemeinschaft* has provided invaluable help by putting the injured back on their feet

again and by supplying a forum where they can confront and accept their illness. As a result, the Gemeinschaft has obtained the most comprehensive collection of medical reports. Physicians and experts who do not share the official position of the Bundesgesundheitsamt have encouraged the Gemeinschaft to start an investigation in order to standardize the medical reports and to make them available for scientific purposes. The data collected in the course of this inquiry will be far superior to the information normally available to such an investigation. They allow random testing on the basis of hundreds of medical reports, an opportunity which does not exist in clinical investigations. The people injured from wood preservatives thereby come to play an ambiguous role: Firstly they served as diagnostic guinea pigs for arrogant physicians, now they are about to become the subjects of elaborate scientific research.

### *Organizing Conferences*

The Gemeinschaft began its work by organizing meetings with the explicit objective of providing information about the risks resulting from the application of wood preservatives. These events were meant to broaden the basis of the Gemeinschaft and to make the public aware of the existence of problems which require a solution. However, as the expertise of the Gemeinschaft grew, it recognized the lack of well-evidenced data. Conferences with expert participants have been organised on (a) the difficulties of measuring the amounts of PCP and lindane in contaminated air and wood, in order to enhance the development of common standards of the methods of analysis, and to improve presentation and assessment of the results of the analysis, (b) on the still-existing diagnostic difficulties, in order to make physicians aware of the symptoms of wood preservative injuries, and (c) on the injured's opportunities to get compensation for personal harm and for damages to their contaminated homes. The very last meeting in 1988 brought together a number of lawyers, involved in lawsuits, and a number of victims.

### *Activating the Press and the Media*

The Gemeinschaft needs the constant support of press and media for its work. It does not have the money to pay a press and public relations officer. But it has developed considerable skill in feeding

press and media with “new” information about scientific research on the effects of wood preservatives, about the meetings and conferences held, and about progress or set-backs in litigation. All in all the *Gemeinschaft* has collected copies of more than 12 hours of television programmes on wood preservatives and hundreds or even thousands of articles and press releases in newspapers, magazines, and journals. Over the years the coverage has been broadened considerably and even print media and television channels are now willing to make reports on wood preservatives which are said to operate in favour of the chemical industry.

### *Lobbying*

The *Gemeinschaft* had no difficulty in discovering the important role of lobbying. Once it reached a certain level of skill and knowledge its collaborators approached politicians in order to have the issue put on the agenda. It had to learn that personal contacts are the best means by which to promote the interests of the people injured from wood preservatives. Close connections with individual members of parliament were used to initiate public hearings which provided a forum for the *Gemeinschaft* to present the issue. Today the *Gemeinschaft* is usually invited to all public hearings in the Federal and the *Länder* Parliaments. It participates in all conferences organized by official institutions. Whenever official conferences or hearings are planned without the participation of the *Gemeinschaft*, it suffices to draw public attention to this fact to achieve the desired access.

Lobbying seems to be more difficult in relation to the main antagonists — the Bundesgesundheitsamt and the chemical industry. There is still no official contact between the *Gemeinschaft* and the Bundesgesundheitsamt. The reluctance might well date back to the *Gemeinschaft*'s heavy criticism of the Bundesgesundheitsamt's passivity. The same is more or less true with regard to the chemical industry. For years the latter has attempted to discriminate against the work of the *Gemeinschaft*. In 1988, however, two representatives of the association of the chemical industry attended the *Gemeinschaft*'s annual meeting with the result that the attacks have disappeared from the media. Whether this event can be understood as the beginning of a dialogue between the *Gemeinschaft* and industry remains to be seen.

### *Networking*

The *Gemeinschaft* cooperates with the *Verbraucherinitiative* (Consumer Initiative), a member-based organisation of consumers which is somewhat in competition with the official German consumer association (AGV). The *Verbraucherinitiative* assists the *Gemeinschaft* in organizing meetings with lawyers and its publications serve as a forum for the *Gemeinschaft* to disseminate new information and to report on incidents. The *Gemeinschaft* is also in close contact with another group of people who suffers from contamination — the *Interessengemeinschaft der Formaldehydgeschädigten*. Although the toxic and medical problems are not identical, people injured by formaldehyde meet the same difficulties in pursuing their interests.

Another field of activity concerns the establishment of a network of experts. The different meetings and conferences with physicians, engineers, and lawyers have led to a close network of all those engaged in the defense of the interests of the people injured from wood preservatives. This is true for all those involved in the scientific effort to prove a relationship between the application of wood preservatives and the illnesses. It is likewise true for all professional circles concerned with measuring and assessing the extent of contamination, in the air, in the fabric of the house, and in the blood of the injured, and not least for lawyers and legal scholars who have become involved in the issue. Today, a whole network of individuals and organisations is in the process of being formed around the *Gemeinschaft*. Initiated by the *Gemeinschaft*, expert groups offer cooperation possibilities which are quite unique in the FRG.

### PRODUCT LIABILITY ACTIONS — STRATEGIES OF THE PARTIES

The collaboration of lawyers initiated by the *Gemeinschaft* has led to a unification of legal strategies on behalf of the victims of wood preservatives, and this despite the facts that pending litigation is spread to some twenty different courts all over the Federal Republic and that numerous law firms are involved. (According to German civil procedure, claimants have to bring the action in the judicial district where they reside and where lawyers are officially admitted.) Documents are exchanged among the lawyers, judgements circulated, reports given on recent trends in case law. Cooperation centres on

product liability cases, while contractual complaints play a smaller role. Litigation between landlords and tenants has, however, reached a certain level of importance (Micklitz, 1989).

The density of the network puts the claimants — the people injured by wood preservatives — and the defendants from the chemical industry on an equal footing. There is less of a problem for the industry to develop a common approach in all litigation, as for the most part two firms only are involved. The proceedings against the DESOWAG BAYER GmbH and SOLVEY AG — initiated by the Zapke family, the most active of the injured — significantly influenced current litigation. Here we see the two main parties to the conflict on the hazardous effects of indoor application of wood preservatives: on the claimant's side the key individuals within the *Gemeinschaft*, on the defendant's side the two main producers of PCP and lindane based wood preservatives. For both sides, this lawsuit serves as a test case for all other pending litigation as well as for those injured people who are still awaiting the best moment to initiate their legal proceedings against the chemical industry. The case has attracted considerable public awareness and is closely watched by the press and mass media.

### *The Claimants' Strategy of Attack*

German product liability law traditionally distinguishes four categories of defects for which the producers may be liable: design defects, instruction defects, fabrication defects, and development defects (Reich, 1986). A fifth category, which is sometimes seen by legal doctrine as an integral part of instruction defects, concerns the obligation of the manufacturer to monitor his products once they have been brought into circulation (post-market control duty). The claimants rely on design and instruction defects and refer to an infringement of the duty to monitor the wood preservatives. Development defects are not covered by the fault based German tort law. Fabrication defects are excluded by both opponents.

The claimants concentrate their efforts on proving the existence of design defects. They criticize the two main German producers for having recommended indoor application of PCP and lindane based wood preservatives although they should have known that such use of PCP and lindane constituted a health and safety hazard to the inhabitants. (It is a paradox that indoor application of fungicides

containing PCP is meaningless, since in-house infestation with fungus is said to be extremely rare.) One of the decisive problems the claimants face is the necessity to prove that the alleged risks to human health have been or should have been known to the chemical industry long before the disputed wood preservatives were put onto the market. It has been necessary to dig into libraries world wide in order to prove that the risks of PCP and lindane were described already in the fifties in publicly accessible medical journals (Dohmeier, 1988).

Secondly, the claimants base their claim for compensation on the existence of instruction defects. The two producers are charged with failure to give sufficient warning of the considerable risks involved in the application of PCP and lindane based wood preservatives. The producers are reproached for extensively advertising the application of wood preservatives without issuing appropriate warnings. In fact, containers put into circulation during the early seventies bore the following label only:

Attention! For application only according to the instructions for use. Misuse causes injuries! Do not store together with food and fodder. See the instruction sheet for supplementary information about hygiene precautions.

The claimants criticize the producers for not having given much more specific warnings on the possible risks to health when applying the wood preservatives indoors.

The third string of arguments concerns a violation of the manufacturers' duty to monitor PCP and lindane based wood preservatives on the market. When the manufacturers revised the warnings in the late seventies, they did not take appropriate action on product recall with regard to those who had already applied PCP and lindane based wood preservatives in the early seventies.

### *The Causation Issue*

The assumed existence of a design or instruction defect or a violation of the duty to monitor the wood preservatives leads to the most difficult but also most important legal question of the lawsuit: Did the PCP and lindane based wood preservatives containing dibenzofurane and dioxine *cause* the injuries? Here, the claimants have to argue against the official statements of the Bundesgesundheitsamt. They have to refute two scientific studies denying a

possible interrelationship between wood preservatives and personal injuries, one from the Bundesgesundheitsamt and the other commissioned by the Minister of Labour in Nordrhein-Westfalen. They attempt to do so by referral to the authority of the evidence collected by the Gemeinschaft. More specifically, this is done in two steps. Firstly, reference is made to studies by physicians or toxicologists which are said to have proven the causal link although these findings are not yet officially recognized. It is worth noting that the currently debated findings have been extended by a single physician who, without any external funding, has come up with new discoveries on the basis of computer tomography of the brain (Fabig, 1988). Secondly, causation requires that the injured people have been exposed to the contamination. Besides the physicians, engineers are called upon to measure the indoor contamination and to evaluate the results of the measurements. In both cases, the claimants benefit from the internal network set up by the Gemeinschaft.

### *The Defendants' Counter-Strategies*

The producers and their lawyers try to refute the accusations by concentrating on the situation during the early seventies. According to the defendants, the risks to human health caused by PCP and lindane based wood preservatives became a subject of concern in 1977 when evidence of a possible link was presented at a medical conference in Wiesbaden, FRG. The defendants reject any charge by the claimants that the risks were already known long before that conference, viz., in the fifties. They make extensive use of the statement issued by the Bundesgesundheitsamt which denies the existence of a causal link between PCP based wood preservatives and injuries resulting from their indoor application. They emphasize that, even today, a causal link has not been proven to exist and that the Bundesgesundheitsamt still upholds the position it took in 1979.

The consequences of this line of reasoning are evident: Design defects, if any, cannot be said to have existed before 1977. The claimants are said to have ignored the fact that wood preservatives are hazardous chemicals as such. Following the arguments of the claimants, one would have to draw the conclusion that wood preservatives suffer from a design defect simply because they are dangerous. The existence of instruction defects is likewise rejected due to the scarcity, before 1977, of knowledge about possible risks.

The defendants believe that they have done all they could to keep the do-it-yourself workers abreast of possible risks resulting from the indoor application of PCP and lindane based wood preservatives. According to them one should not forget that the do-it-yourself workers were aware of the fact that wood preservatives are dangerous *prima facie* and that it remains for them to take the appropriate steps to obtain the necessary additional information. The producers for their part have altered the instructions for use several times since the initial launching, in favour of the consumer and to the detriment of the chemical industry.

The defendants likewise refute any idea that the claimed injuries are connected with the application of wood preservatives. They refer to the existence of PCP and lindane in other household products. They even introduce the assumption that the claimants are all "bluffing." The same line of argument is used for the alleged violation of the claimants' property. Hearsay evidence, however, indicates that responsible members of the chemical industry, who have themselves applied PCP and lindane based wood preservatives in their homes, have ripped off the contaminated parts!

It goes without saying that the chemical industry rejects a causal link between the possible defect and the alleged injuries. They require the claimants to display all information in their possession which may prove that they have fallen ill as a result of the application of wood preservatives. The statement of the Bundesgesundheitsamt serves as a protective shield against the claimants' efforts to prove causation.

#### LEGAL ISSUES AT STAKE

##### *Do the Judges Escape Their Responsibility?*

We have to admit that our analysis is based on some twenty judgements only and that the case law is not yet well-established (Micklitz, 1989).<sup>4</sup> We might assume, however, that the twenty judgements which are at our disposal form the core of the judicial treatment of claims for compensation by people injured by wood preservatives. Thus, although the results cannot claim to be representative, it is still worthwhile to analyze the judges' attitudes towards the injured.

When going through the judgements, it is amazing to see that, with only two exceptions from 1969 and 1977, the judges more or less

explicitly follow the legal argumentation and the statement of facts as presented by the defendants. The two judgements running counter to the overall tendency are quite special. The first, handed down in 1969,<sup>5</sup> concerned spectacular *external* injuries that the claimants had suffered as a result of applying wood preservatives. The second from 1977,<sup>6</sup> might be understood as the first case in which the problem of PCP and lindane based wood preservatives became the issue of the litigation. Here the Landgericht München, in 1977, granted compensation to the claimants for injuries and damage resulting from indoor application of wood preservatives. The case was decided at a time when the public's attention had not yet focussed on problems of the application of wood preservatives, i.e., the overall and far-reaching economic consequences of thousands of injuries from wood preservatives were not yet at stake. The Court of Appeal in Munich has now set aside the foregoing judgement using the same arguments that dominate all the other cases.<sup>7</sup> It seems fair to make the assumption — to be proven — that there is a common judicial approach to the problem of claims for compensation from injured people although there might be some divergencies here and there.

The judges are confronted with the problem of whether they are empowered to decide on the described side effects that wood preservatives have on health, and whether the court is the appropriate democratic forum for such decision-making. To put it another way: Are the courts empowered to decide on the "old sins" of the chemical industry? The judges involved face the legal problem that compensation can probably not be awarded without a further extension of present German product liability law. Until now, the burden of proving that the chemical industry was aware of risks of using PCP and lindane already in the early seventies and probably even in the sixties, the assertion upon which the alleged existence of design and instruction defects rests, is imposed, in general, on the *claimants*. The lawsuits and the history of the Gemeinschaft have made clear the kind of difficulties the injured encounter in disclosing the necessary facts. It cannot be excluded that all the research papers that the Gemeinschaft has found are available also in the files of the sued producers. So far, the judges have not demonstrated any willingness to reverse the burden of proof or even to impose on the manufacturers the duty to submit all the information in their possession related to the risks of PCP and lindane. On the contrary, they follow the argumentation of the defendants and base their judgements

on the fact that at least in 1977, the risks were unknown to the manufacturers, and perhaps even later than that.

Legal problems would also arise if the courts were to discuss the possibility of a violation of post market control duties in product liability cases concerning people injured from wood preservatives. It might well be that the monitoring duties will play a key role in the first case to be taken before the German Supreme Court in the course of this year. The Supreme Court has recently shown its general preparedness to further develop the post market control duties of manufacturers.<sup>8</sup> But the litigations in case cannot be put in the same category of damages as the claims of the people injured from wood preservatives. The highly debated judgements of the Supreme Court in the post market control field concern individual cases, and the effects of the decisions do not go beyond the narrow context of the particular cases.

### *Causation*

Last but not least, the judges are faced with the problem of causation. They have to decide whether the PCP and lindane based wood preservatives have caused the alleged personal injuries. As a reversal of the burden of proof would lead to a strict causal liability, and is therefore rejected by German courts, the judges will have to enter into the battle of experts on the grounds that they are willing to accept the (possible) existence of design or instruction defects. In a 1986 test case, the Landgericht Köln rejected the possibility that a design or instruction defect might exist.<sup>9</sup> The Court of Appeal, however, recognized its possible existence, which means that the judges are becoming familiar with the idea that PCP and lindane based wood preservatives put onto the market in the early seventies might suffer from a design or an instruction defect.<sup>10</sup> One can now assume that the legal debate will focus on the problem of causation. That is why the Bundesgesundheitsamt will move more and more into the public limelight. Legally the courts are not bound to the statements of the Bundesgesundheitsamt.<sup>11</sup> The courts might define a higher level of product liability than the Bundesgesundheitsamt. They cannot do so, however, without taking a stance with respect to the different opinions of experts on the effects of the wood preservatives on human health. It is at this point that the judges hesitate to accept their social and political responsibility.

*Can the Public Prosecutor Take Over the Claims for Compensation of People Injured by the Wood Preservative?*

The Gemeinschaft has not entrusted the whole responsibility of solving the problems of the injured to the civil courts. It has encouraged its members to bring a criminal charge of bodily injury against the manufacturers of the wood preservatives. More than six thousand penal charges have been filed with the public prosecutor of Frankfurt. In December 1987, the Zapke family requested the Cologne Court of Appeal to suspend further proceedings and to wait for the results of the judicial inquiry undertaken by the public prosecutor in Frankfurt. This step might be understood as a change in strategy. The Gemeinschaft then considered, and still seems to believe, that the civil courts are unwilling to decide on causation, thereby running the risk of implicitly criticizing the Bundesgesundheitsamt, without the impact of a judicial inquiry which proves causation. Beside strategic deliberations one should however not forget the economic burdens imposed on the Gemeinschaft and the Zapke family in the proceedings. The first instance has already cost DM 113,000, a sum which was finally covered by a fund established in the interest of the Zapke family and subscribed to by all sympathizers. Suspending the test case and shifting the inquiries on causation to the public prosecution means that the very costly investigations of the causal relation between wood preservatives and damages have to be covered by the state, more specifically by the Land Hessen.

The Cologne Court of Appeal sustained the request for suspension and quite a number of courts of different instances followed suit with one major exception (Micklitz, 1989). The Court of Appeal in Munich, which had been engaged for twelve years in litigation by a couple injured from wood preservatives, refused to suspend the case and dismissed the claim for compensation.<sup>12</sup> The personal consequences of the judgement will occupy the Gemeinschaft, and a call for solidarity will probably be sent out soon. The couple has to raise DM 250,000 to pay the costs of the first two instances. The legal and strategic consequences are less obvious. The Munich Court of Appeal has based its decision on the missing causation between the alleged injuries and the PCP and lindane based wood preservatives. It has not erected any hurdles to the legal assessment of the case in question. The claimants, however, have withdrawn their appeal against the judgement of the Court of Appeal of Munich. The

defendant, a well-known German enterprise (Sadolins), is said to have paid several tens of thousands of German marks to the former claimants in order to impede a final decision of the German Supreme Court.

It lies now in the hands of the public prosecutor whether to bring an indictment of bodily injury against the responsible executives in the chemical industry, or to dismiss the case. In response to a letter of the Court of Appeal in Cologne, the public prosecutor has announced his intent to bring a charge of bodily injury within the following months. In June 1989, indeed the public prosecutor has accused those responsible in the chemical industry under German law the Court has to decide on the opening of a process, but it is now conceivable that one of the biggest criminal proceedings against the chemical industry that the nation has ever seen will take place very soon.

For the moment it is impossible to predict the result of such criminal proceedings. If they take place, the Gemeinschaft and their lawyers have to define their role. They have to consider the extent to which it is useful and necessary to participate in the proceedings by way of a private prosecutor (*Nebenkläger*) and they have to decide whether it is necessary that someone follows the debate and takes down all relevant statements and pieces of information that are not included in the official records. The injured will have to wait for another couple of years. It might well be that the German government becomes involved in the development of a political solution. The Thalidomide catastrophe could serve as a precedent. In that case the responsible executives were not condemned, but the decision to abstain from criminal proceedings formed the basis for a political compromise in which the incriminated enterprise and the German government each agreed to make available DM 100,000,000 for the compensation of the victims (Böhm, 1973; Derleder & Winter, 1976).<sup>13</sup> People injured by wood preservatives are numerous and DM 200,000,000 would certainly not cover the damage.

However the solution will turn out, whether or not the Supreme Court will assume liability of the producers, whether or not the criminal court will come to the conclusion that the manufacturers are liable for the injuries or not, and whether or not a political solution will be found, people injured by wood preservatives will always have a strong argument. It is an argument which perhaps will not suffice

for obtaining compensation claims, but it could well entail far-reaching social and political consequences in the long run. It is simply the argument that they get better after leaving their contaminated houses. One might well question the values of a society in which the feelings and perceptions of its citizens are socially accepted only after they have been corroborated by scientific evidence.

## NOTES

<sup>1</sup> Hilfe für Chemikaliengeschiedigte, BT-Drucksache 11/628, Anhörung vom 8.3.1989.

<sup>2</sup> See Bundestag Drucksache 11/3599 of 30.11.1988.

<sup>3</sup> Vorschlag für eine Richtlinie des Rates zur 9. Änderung der Richtlinie 76/769 zur Angleichung der Rechts- und Verwaltungsvorschriften der Mitgliedstaaten für Beschränkungen des Inverkehrbringens und der Verwendung gewisser gefährlicher Stoffe und Zubereitungen (PCP), COM (88), 190 final; Council doc. No. 5858/88.

<sup>4</sup> See the publication of quite a number of judgements in VuR 3/88, 151–169; 6/88, 333–345; 1/89, 42–43.

<sup>5</sup> OLG Koblenz, 14.7.1969, VuR 3/1988, 152–155.

<sup>6</sup> LG München II, 21.12.1977, VuR 3/1988, 155–158.

<sup>7</sup> The judgement will be published in VuR 4/1989, forthcoming.

<sup>8</sup> BGH, 7.6.1988, BB 1988, 1624 = NJW 1988, 2611 m. Anm. Reinelt = JZ 1988 m. Anm. Giessen = VuR 6/1988, 345ff m. Anm. Brüggemeier.

<sup>9</sup> LG Köln, 17.12.1986, VuR 3/1987, 168 ff m. Anm. Micklitz.

<sup>10</sup> OLG Köln, 15.12.1987, VuR 2/88, 109.

<sup>11</sup> BGH, 7.10. 1986, NJW 1987, 372ff.

<sup>12</sup> See references in Note 8.

<sup>13</sup> LG Aachen JZ 1971, 507ff and OLG Köln 10.12.1986, VuR 1987, 274ff m. Anm. Derleder on the still existing insufficiencies of the solution.

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#### ZUSAMMENFASSUNG

*Gesundheitliche Schäden durch Holzschutzmittel*. Der Bericht gibt einen Überblick über die gesundheitlichen Risiken, die aus dem Einsatz von PCP- und Lindan-haltigen Holzschutzmitteln resultieren, darüber, wie die Problematik in der Bundesrepublik bekannt wurde und wie die Betroffenen sich organisiert haben, um ihre Interessen gegen die Chemische Industrie durchzusetzen. Letztere spielen die Gesundheitsrisiken noch heute herunter und verstecken sich hinter weichen Stellungnahmen deutscher Aufsichtsbehörden über den nicht klar erwiesenen Ursachenzusammenhang. Presse und Massenmedien übernahmen eine Schlüsselrolle in der Aufdeckung der unter Verschluß gehaltenen Gesundheitsgefahren. Juristen engagierten sich, um die Verantwortlichkeiten klarzustellen: sind die Verbraucher jahrelang als Versuchskaninchen der Chemischen Industrie benutzt worden und hat letztere wirklich alles getan, um die Menschen vor möglichen Gefahren für ihre Gesundheit zu schützen? Gut zwanzig Schadensersatzklagen sind vor deutschen Gerichten anhängig. Die Presse und die Medien verfolgen die Auseinandersetzungen mit großer Aufmerksamkeit. Eine rechtliche oder gerichtliche Lösung des Problems ist in weiter Ferne. Gesicherte Rechtsprechung gibt es nicht.

Das Ziel des Papieres ist es, die Strategien der Kläger und die Gegenstrategien der Beklagten herauszuarbeiten, sowie die Position der Justiz in einem Bereich zu erfassen, wo rechtliche Argumente untrennbar mit politischen Entscheidungen verknüpft sind. Schließlich gilt es, die Hauptstreitpunkte der rechtlichen Auseinandersetzungen zu benennen. Es ist gut möglich, daß das Problem der gesundheitlichen Risiken von Holzschutzmitteln letztlich nicht von den Gerichten gelöst werden kann. Denn die Zivilgerichte schrecken davor zurück, klare Positionen zu beziehen und die Chemische Industrie zu Schadensersatz zu verurteilen. Sie ziehen sich hinter einer wissenschaftlich angeblich nicht voll erwiesenen Kausalkette zurück und delegieren die Verantwortung an die Sachverständigen. So mag das anlaufende Strafverfahren gegen die Verantwortlichen der Chemischen Industrie den Boden bereiten für eine politische Lösung, für die die Bewältigung der Contergan-Katastrophe als Vorbild dienen könnte.

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