Rewilding in Germany

Third Party Liability

Fishing boats at a jetty on the shores of the Latzigsee, Vorpommern-Greifswald, Mecklenburg-Western Pomerania, Germany.
Florian Möllers / Rewilding Europe

Core topics

- General legal rules around third party liability and how it can be excluded or mitigated
- The principle of "enter at your own risk", especially in forests and open landscapes
- Liability for construction or maintenance defects
- Liability for people under the care of the landowner of land manager
- Liability for damage caused in areas closed to public access
- Liability for damage caused by employees or contractors

Key takeaways

1. As landowners or land managers, practitioners should regularly assess risk and, if possible, have comprehensive third-party insurance in place.
2. Practitioners may have to compensate someone if they are injured or suffer property damage on the land of the practitioner's project.
3. Practitioners are not generally liable for risks that are typical in forests and open landscapes.
4. Liability depends on three things: the nature of the danger, how careful the injured person was, and whether preventive measures were taken.
5. Practitioners need to be especially vigilant when having people on the land under their care or under the care of someone they hired.

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1. Practical steps to limit potential civil liability

Practitioners, as landowners or land managers, need to be aware of the rules which apply where damage or injuries are caused to third parties visiting their land. This note sets out an overview of the different situations that can trigger liability and how to mitigate the risk.

The main rules on civil liabilities in Germany stem from the German Civil Code[1], specific laws (such as the German Forest Act[2] or the German Nature Conversation Act[3]) and a considerable number of court decisions which deal with civil liability questions in forests and nature areas.

Practitioners should take several practical steps to reduce the risk of liability arising. These steps can also help to remove or reduce the direct financial impact of being required to pay compensation / damages, where liability may arise.

Act diligently to prevent or mitigate any known dangers: seek detailed legal advice regarding the specific project to be implemented.

- Undertake and maintain up-to-date, detailed risk assessments in relation to all aspects of the project.
- If available for the area and the project, get third-party insurance. Practitioners should make sure that they engage with the insurer about the risks involved in the project and follow all requirements.
- Make explicitly clear, via signs or other notifications at key entrances to the land, especially on well-known paths used by hikers, bikers and others, whether specific dangers exist in the rewilding project and why.
- As a rule, forests and open landscapes, even if privately owned, are generally accessible to the public.[4] Only in certain circumstances - and generally only with approval by or at least prior notification to the responsible public authority - can public access to an area for a project be restricted.
- If the project is not open to the public, make explicitly clear (by using signs / other notifications) that anyone entering the property without authorisation will do so at their own risk. Please be aware that specific rules apply to forests and open landscapes.
- When in doubt, or when faced with a liability claim, seek legal advice.

2. What are the general requirements of civil liability?

Third party liability may arise when the actions or omissions of a person cause injury to, or damage the property of, a third party. Generalising, there are six elements to meet to establish civil liability:

- **Fact or conduct**: a voluntary act or omission by the liable person.
- **Violation of legal interests of another person**: the act or omission infringes an interest of another person which is protected under the regime of the German Civil Code (e.g. life, physical integrity, health, freedom, or property); or the act breaches a legal provision intended to protect the interests of another person.
- **Causal link**: the act or omission by the liable person must have caused the violation of a legal interest of the injured person. The causal link must be established as a matter of fact as well as in terms of foreseeability, i.e., such conduct would normally cause such damage. Causation may be interrupted by an intervening event, in which case liability may not arise.
- **Unlawfulness**: the act must be unlawful, i.e. the person cannot justify their behaviour. Please refer to section 3 for a general overview of unlawful acts.
- **Intention or negligence of faulty behaviour**: intention implies willingness and awareness of one's harmful actions. Negligence arises even when there is no intention to cause harm and implies a failure to duly consider the possible consequences of one's actions or a failure to exercise ordinary diligence. Recklessness as to the impact of one's actions or a particular serious failure to exercise ordinary diligence may constitute gross negligence. Laws, regulations, orders, or instructions may alter legal standards when it comes to faulty behaviour.
- **Damage**: the injured person must have suffered loss or damage. Damage can be material or non-material, depending on whether the damage is assessable in monetary terms. Examples of material damage may be damage to property, hospital bills, loss of profit, etc. An example of non-material damage may be pain and suffering.

3. Are there any factors that exclude or mitigate liability?

There are situations where the general rules do not apply, and practitioners may not be liable even if their actions cause damage or injury and they were negligent. Below, practitioners can find a general overview of the situations where several circumstances in the German Civil Code exclude or mitigate civil liability.

3.1 General grounds for exclusion of liability for unlawful acts

The situations where an unlawful act will be considered lawful, thereby removing liability, are:

- When acting in self-defence or situations of distress, where the practitioner aims to protect property or life of others. The specific circumstances of such situations will always have to be considered to assess if liability arises.
- Consent of the injured party. Courts will take into consideration whether the injured party has knowingly consented to a dangerous activity, e.g. on a guided tour that includes rock climbing or other more dangerous

- activities. In such cases, courts will weigh the actions of the person guiding the tour and their duty towards the people in the guided tour, against the informed consent of the injured party.

3.2 Grounds for exclusion or mitigation of liability due to another's culpable act or omission

A culpable act or omission of the injured party may contribute to their own injuries, therefore excluding or reducing liability to third parties (contributory negligence).[5]

Someone who is hiking, cycling or walking through a specific area is required to behave reasonably objectively for the situation they are in and, in particular, to act responsibly to avoid damages or injuries.

The following examples show how the injured party may contribute to their own injuries, thereby excluding or mitigating the liability of the practitioner, even if the practitioner has acted negligently to cause the damage or injury:

- The damage or injury happens because of excessive speed through the forest, such as a mountain biker who speeds down a path at high speed and falls because of a fallen tree on the path;
- A hiker wanders at night without a light and falls into an excavation, which is not properly marked, sign-posted or fenced off; and
- A group of people violate no-camping rules and are injured by falling trees branches whilst making camp due to prior forestry work not being completed and sign-posted.

Example 1

An unauthorised person enters a part of the land that is not subject to public access and falls into a hidden mining shaft where there is no warning sign of the danger and seriously injures themselves.

As a rule, if an area is not subject to public access and this is clearly stated (either through fencing or signposting), the landowner / land manager will not be liable towards anyone who enters the land unauthorised and is injured. However, if serious dangers occur on the land, the landowner / land manager may still be obliged to take sufficient precautions, e.g. by using a sign to warn of the dangers or fencing them off. Therefore, in this example, the landowner / land manager may still be liable towards the unauthorised person.

Roosting trees and a breeding location for great cormorant on the Oder River, Anklamer Stadtbruch, Germany.
Staffan Widstrand / Rewilding Europe

4. Specialities of civil liability in forests and open landscapes

The German Forest Act and the German Nature Conversation Act include specific provisions applicable to forests and open landscapes, which modify the general liability system. However, they do not constitute a special regime, but an exemption from the general regime of civil liability, and do not provide any basis for claims.

The legal definition of forests under German law is very broad and includes numerous areas. These include not only forested areas but also any associated or connected land, regardless of the presence of trees or plants, such as areas where trees have been damaged or felled.[6]

Open landscapes (*freie Landschaft*) are open natural spaces outside closed settlement areas.[7] Both concepts need to be separated from the German concept of "outskirts" in construction planning law.

The public can access both forests and open landscapes, regardless of private or public ownership. However, access is limited to recreational purposes.[8] Although one may enter a forest freely by foot, riding a bike or a horse is only allowed on roads and paths. As for open landscapes, visitors are only permitted to access them using roads, paths or unused land.

There are some exceptions to public access, such as closure of land for imperative reasons[9], which may not be fully fenced, and which make access possible but with greater risk. For more information on public access, see *Rewilding in Germany: Public Access and Restrictions*.

The general rule for excluding the liability of landowners / land managers, in relation to injuries or damages that occur in forests or open landscapes, is that third parties "*enter at their own risk*".[10]

German law clearly states that particular dangers which are "*typical to a forest*" are risks accepted by the third party entering a forest, and not the responsibility of the landowners / land managers.[11] The same applies to open landscapes: the landowner / land manager is not liable for dangers that typically arise in nature.

As a result, for both forests and open landscapes, landowners are, in principle, not liable for typical dangers arising from nature.

The following sections focus on forests and the dangers *typical (and not typical) to forests*. Generally, the same principles apply to open landscapes.

4.1 What are dangers typical to forests?

The principle of no liability covers only typical forest dangers. *Dangers typical to forests* are those which commonly result from nature itself as well as those related to forest-typical human activities (e.g. forest management). In both cases, those typical forest dangers usually do not create landowner / manager liability.

Examples of typical forest dangers which result from nature itself include:

- Falling branches or trees;
- Fallen dead plants and trees in the forest or in paths;
- Steep areas and slopes;
- Lose stones or avalanches;
- Lakes and wet areas; or
- Sharp natural objects such as thorns or sharp stones.

Typical forest dangers that relate to human activities may result from:

- General forestry work such as maintenance of paths or trees;

- Collecting wood or managing the forest, for example, by reforestation with a special focus on the function of the forest; or
- Walking in the forest as a visitor for recreational purposes or slow driving through a forest road by the forest maintenance team.

It is important to note that, in these latter cases, there is a degree of uncertainty whether a court would consider a specific danger related to human management activities as typical or atypical. Practitioners should seek legal advice.

Example 2

A family enters grazing woodland recently rewilded for a recreational walk on forest paths and a member of the family sprains an ankle whilst walking and tripping over a tree root.

According to the definitions of forest and open landscape, it seems safe to consider the rewilded grazing woodland a forest, therefore the special provisions of the German Forest Act modify the general regime of liability.

Therefore, the family enters the area at their own risk. As a tree root is considered a danger which is common to find in nature, thus a *danger typical to a forest*, the owner or manager of the rewilded area is not liable for the injury.

Please note that whether or not the tree root is deep inside of the forest or on an often-used forest path is not relevant. *Dangers typical to a forest* do not trigger liability for the landowner.

However, exceptions may arise when there is an intentional or reckless exposure to third parties by the landowner / land manager. This would be the case if the landowner / manager deliberately or with gross negligence (e.g. by ongoing forestry work on the path the family took) hid the tree root from sight and failed to warn visitors about the dangers.

4.2 What are the most common cases of dangers **NOT** typical to forests?

Unlike the typical dangers which occur in forests, forests may still pose risks that are considered *not typical to forests.*

These are human-led actions that may cause injuries and damage to people visiting these areas and which are not expected in such areas. The courts will determine whether the landowner / manager acted with negligence, with recklessness, or intentionally caused these atypical risks. In addition, courts would need to judge the nature of the danger, i.e. if the injury or damage was caused by a typical danger or not.

Examples of such dangers not typical to forests may include:

- Using wires or other materials which are not visible or poorly visible and are placed in unexpected areas;
- Building efforts such as earth-moving works including excavations that are not sign-posted or fenced off;
- Dangerous quarry areas or mining areas (new or old) which are not sign-posted or fenced off; or
- Cutting down trees without safety measures in areas which are typically used by third parties, e.g. close to forest paths.

Similar to cases of general liability, it is important that practitioners take the appropriate measures to ensure that the *dangers not typical to forests* are reduced. This is especially important for dangers coming from (i) ongoing works, e.g. fencing an area for the strict protection of especially vulnerable plant species; or (ii) less visible dangers, e.g. an old, deactivated mine with deep and long channels where it is easy for a person to fall in.

Because liability is not automatically excluded, these cases highlight the importance of regular and

detailed risk assessments. Such a precautionary approach may be the difference between being liable or not for any potential damage. This means that if practitioners act under their duty of care (*Verkehrssicherungspflicht*[12]) and take all necessary measures to prevent any potential damage, it is unlikely that any incident will trigger liability for the practitioner.

Example 3

Landowner A needs to cut down some non-native trees in the area they are rewilding as they compete with native trees in the forest they are restoring. To isolate the area, Landowner A fences out the area with barbed wire and decides not to signpost the existence of the wire crossing the designated path. A hiker passes by in that designated area. Distracted and not alerted to the danger by any signs, he cuts himself on the wire, causing injuries on both legs.

Landowner A created a danger *not typical to a forest* by fencing it with barbed wire. This is relevant because Landowner A did not take any measure to prevent such danger, e.g. by using a more adequate fencing material, by signposting the existence of the wire or by closing of the affected path entirely. As such, Landowner A may be liable for the injuries suffered by the hiker.

Although Landowner A's work relates to forest management measures, it does not exclude him from any liability per se because a landowner needs to ensure that visitors can still use the forest. Especially when cutting down trees, it is likely and foreseeable that people walking by might get injured if the dangers are not adequately managed.

If Landowner A had taken all necessary measures to prevent visitors from getting closer to the intervention site and getting hurt by the wire, Landowner A would most likely not be held liable.

The type of materials used for fencing out areas during forest management activities is important. One common practice is to use a bright visible tape (normally of the colour yellow or orange) and to fix it at about 1-meter height.

Note that the liability regime within forest management is not fixed but depends on several circumstances that a court may also take into consideration. Cutting down non-native trees whilst rewilding an area is positive for land management but clearly imposes a risk to others. These combined circumstances make it difficult to anticipate how a court would ultimately decide on a liability issue. It is therefore recommended to adopt prudent safety measures as standard practice.

Imagine now that Landowner A took all precautions to prevent any accidents, but the hiker ignored them and was injured during tree felling. Because of the noise generated by the tree felling tools Landowner A did not notice the hiker approaching and when one branch of a falling tree hit the hiker, Landowner A did not hear the painful scream and continued feeling the tree.

This case may fall in the general regime of liability. As the landowner took all precautionary steps to prevent dangers and it was not reasonable to expect the landowner to realise that the hiker was passing by or even injured, it seems unlikely that the landowner will be held liable. But even if they were found liable, the contributory negligence (see section 3.2) of the hiker will also need to be considered when assessing damages.

Please note that regardless of whether felling trees falls under forest management, if reckless or intentional behaviour leads to the injury of a third party, such as continuing to cut the tree when it is clearly visible that a hiker has entered the area and might be injured by a falling tree, the landowner could be considered liable.

Example 4

Whilst spending the day visiting a rewilded open landscape area, a climber falls and is seriously injured whilst rock climbing.

As a rule, landowners owe no general duty of care (*Verkehrssicherungspflicht*) towards rock climbers who access their land. Rock climbing in the outdoors is an activity that falls under typical dangers of a forest or of nature. Therefore, the principle of no liability applies here: the climber took the risk of accessing the area and the landowner is not liable for the climber's injuries that result from dangers typical to forests or nature.

However, in extraordinary circumstances, it could be argued that the landowner has a duty of care when there are circumstances known to the landowner (e.g. excavations work happening near the climbing wall) which make activities like rock climbing very unsafe due to the instability of the area. If the landowner knew this and the climber's injuries directly resulted from those actions, the landowner might be liable.

If the landowner promotes rock climbing in the area or organises a tour including this activity, and an injury occurs during that tour, they may be liable. This may be a case of contractual liability where a court would assess the contractual basis first. If a landowner uses the same contract for all participants of the tour and regularly offers the tour, they cannot exclude liability for injuries, regardless of whether the tour is paid for. Without a contract (written or oral), liability remains very limited, though not entirely excluded. Here, the assessment would depend on the classification of the agreement between the parties.

4.3 Are there any *dangers typical to forests* so great that they trigger liability if known to the landowner?

There may be cases where the risk is so great that even though it is *a danger typical to forests,* liability may not be excluded. The reason for this exception is the special gravity of the dangers –sometimes called "mega dangers" (*Megagefahren*) – that some situations may cause.

For example, severe storms causing trees to fall are natural occurrences in forests. Nevertheless, the grave danger they pose may impose an obligation on the forest owner or manager to prevent such risks.[13] Liability may be established from the moment the landowner or land manager know about the potential risk. So, if after a storm, the landowner / manager is aware of significantly damaged trees near a frequently used path, they should take the necessary measures to prevent any damages. Failing to do so may trigger liability and the obligation to pay compensation if a third party suffers any damage or injury.

Also, whilst neither the courts nor the law impose a general obligation on the owner or manager of the forest to regularly check the area for potential risks, they may still be required to carry out targeted checks after a "mega danger" event such as a severe storm. So, if after such a "mega danger" event they learn about it on the news or by other means, they should carefully check the area to prevent any potential cause for liability.[14]

Example 5

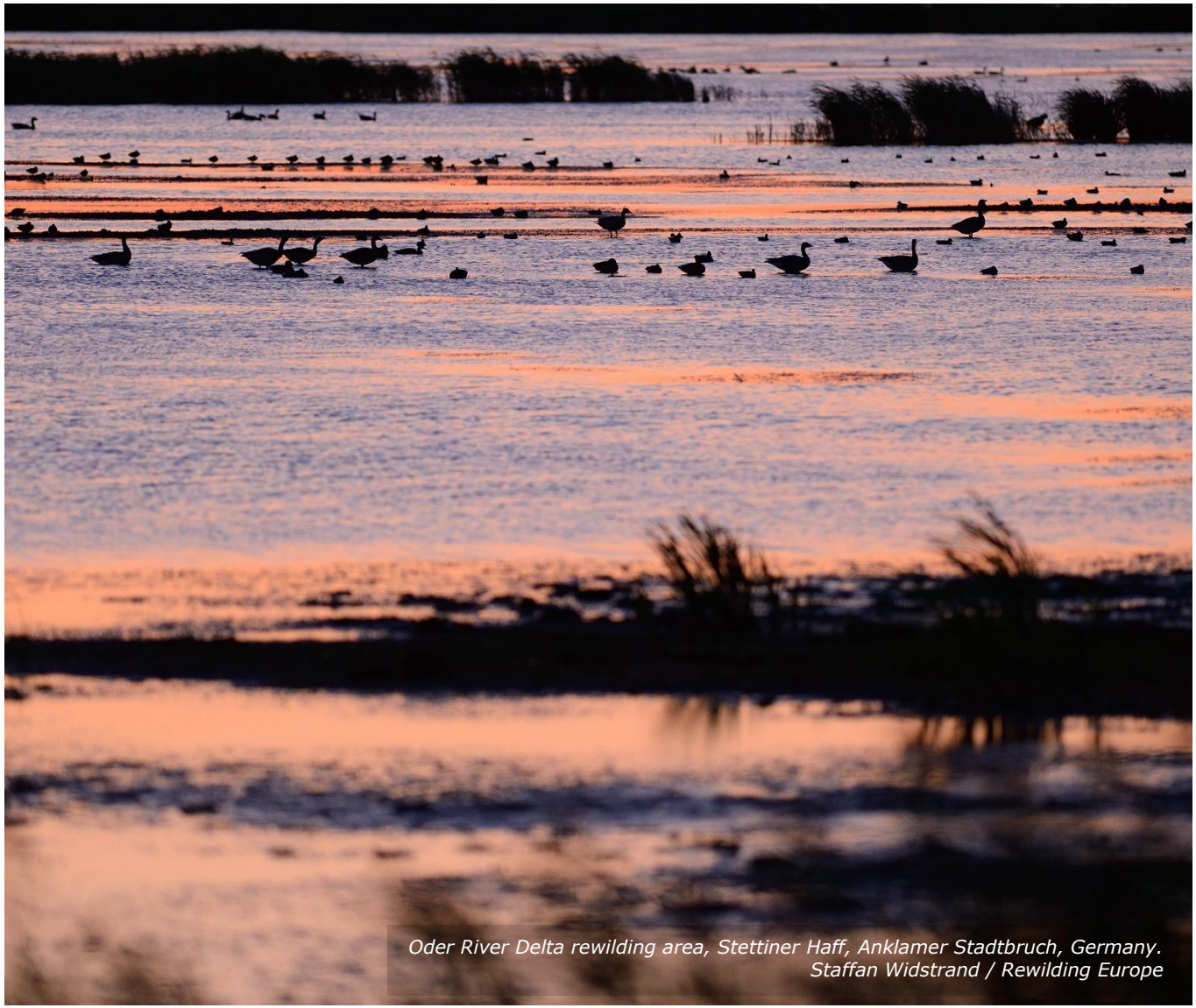
Landowner B owns a rewilding landscape with a commercial forest that they intend to fell soon. Before that, a severe storm greatly damaged the landscape, felling some trees in designated paths that the public can use. Landowner B was aware of the severity of the storm and because of safety reasons, Landowner B could only visit the area several days after the storm passed, when authorities cleared them to go. Landowner B was not aware that during that morning, a biker went to the area and got injured by a collapsing tree branch next to the path where the biker was riding.

As Landowner B knew about the dangers following the storm, the injury of the biker may, exceptionally, lead to a successful damages claim being brought against Landowner B.

Note that, generally, no duty to clear the path exists because it is considered a *danger typical to forests.* However, in exceptional situations, such a duty might arise, e.g. if an acute danger exists on the path and the landowner has knowledge about it, either through notification or prior awareness. For these exceptional cases, liability for injuries or damage may fall on the landowner.

Landowners may be required to inspect their land after an extraordinary event, such as major storms reported in newspapers and to check for acute dangers to third parties that could arise from potentially severe damage to the area.

If neither Landowner B nor the biker were allowed to enter the area because of an order from the local authorities the biker would have entered the area recklessly and at his or her own risk and thus, Landowner B would not be held liable if they inspected the area soon after it was cleared.



Oder River Delta rewilding area, Stettiner Haff, Anklamer Stadtbruch, Germany. Staffan Widstrand / Rewilding Europe

5. What is the liability for damage caused by man-made structures if there's a construction or maintenance defect?

Whether in a forest, open landscapes, or elsewhere, the owner or possessor of a building or other structure (e.g. bridges, walls, sheds) that collapses may be liable for any damage caused by such collapse, unless they can prove that the damage was not caused by faulty maintenance or a construction defect but by actions from third parties.[15]

Property owners have a duty of care (*Verkehrssicherungspflicht*) and supervision over their buildings and other structures. Therefore, they are presumed liable for any damage caused by a construction or maintenance defect. Liability may be established even if there are no visible signs that the building had any construction or maintenance defect and was nearing collapse.

If the man-made structures are in forests or open landscapes, e.g. a bird lookout, it is understood that the presence of these structures poses a danger not typical to forests, thus landowners / land managers have a duty of care towards third parties that may be injured by any construction or maintenance defect.

Practitioners should actively seek information on local building regulations and technical rules to avoid liability for construction and maintenance defects. Liability is presumed even with negligence, so it is important to show that all steps were taken to ensure that risk of collapse is minimised to the extent possible.

Example 6

Landowner C builds a lookout for bird watching in their landscape. The lookout has a construction defect which is not visible or obvious. One day, the lookout collapses and injures a passerby.

As the fault is presumed, Landowner C will be liable, unless Landowner C can prove that he has taken all technical measures required and necessary to avoid the risk of collapse, which may include regular inspections or signposting at the lookout to warn of the defect.

Example 7

The same scenario as Example 6 but the injured person was vandalising the lookout, trying to bring down one wall. These actions contributed to the collapse of the lookout.

This case differs because the injured party willingly contributed to the damage they suffered (see above section 3.2). A court would likely balance the duty of care of Landowner C against the actions of the injured person.

Considering that the injured person was deliberately trying to severely damage the lookout, it is likely that a court would not consider Landowner C liable, thus excluding the landowner from paying any compensation for the damage caused to the injured person.

Where there are man-made structures which cause damage but there is no defect in construction or maintenance, liability is determined according to the general rule of civil liability.

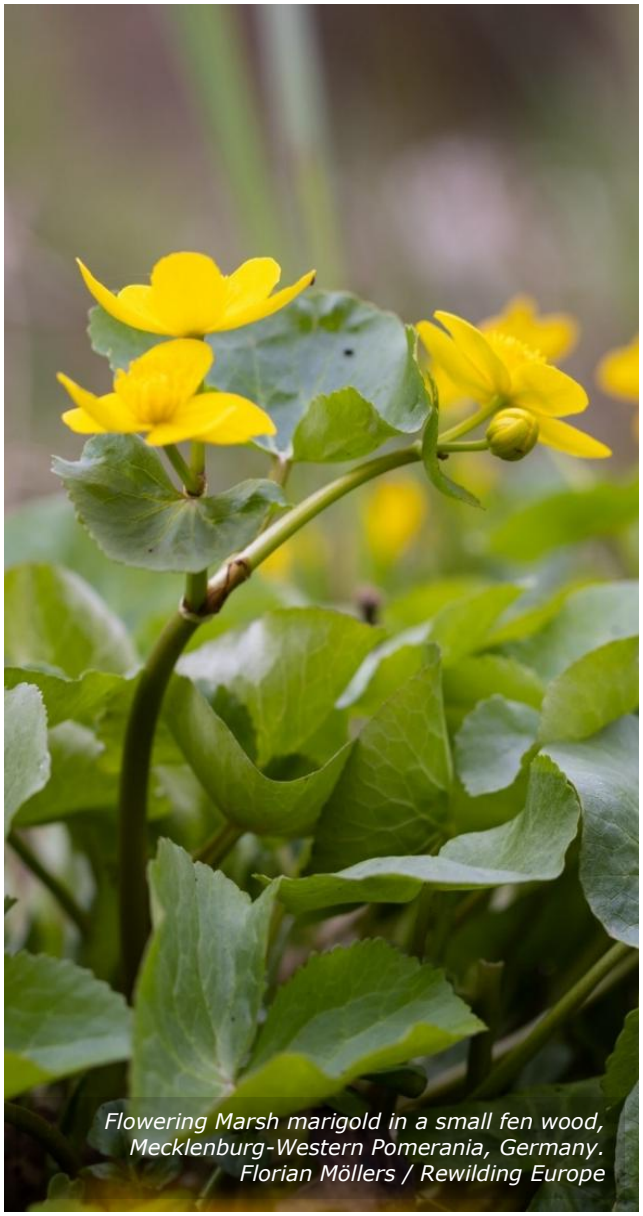
Example 8

A visitor enters Landowner D's land. Whilst there, the visitor trips over a hidden drainage grate and breaks their leg.

As the drainage grate is not a *typical danger in an open landscape* and there is no collapse of a man-made structure due to construction or maintenance defect, this situation would fall under the general rule of liability (see above section 2). Therefore, Landowner D may be liable if the broken leg can be causally linked to a faulty or negligent action or omission from Landowner D. The liability of Landowner D will depend on whether appropriate signs have been posted of the danger of the hidden drainage grate.

If no warning signs were posted, a court would assess the likelihood of seeing the hidden drainage grate. However, if the grate was hidden and difficult to spot, then Landowner D may be held liable for the injury.

If damage to structures and buildings is caused by adverse weather conditions at the time of the collapse, liability may be excluded if the landowner / land manager otherwise did not act negligently, e.g. the landowner/land manager had previously inspected and adequately maintained the structures and buildings. If such inspections were of a mandatory nature, failing to do them is considered a faulty action and it also triggers liability. It is important that practitioners stay informed in the aftermath of adverse climate events and ensure that they act prudently to minimise risks.



Flowering Marsh marigold in a small fen wood, Mecklenburg-Western Pomerania, Germany. Florian Möllers / Rewilding Europe

6. What is the liability for damage caused to people under the care of the landowner / land manager?

The landowner or land manager may engage in guided tours or may invite third parties to visit the rewilded area. In this context, if practitioners invite people to the land or offer guided tours, they should know that they may be liable for injuries and damage caused to the visitors. For instance, a landowner who takes their visitors on a guided tour through a forest affected by a recent storm may be liable for injuries caused by fallen branches as it can be considered that the landowner did not diligently predict that people were at a higher risk of injury.

Practitioners may even be responsible for any faulty or negligent act or omission of persons to whom they contract out the fulfilment of their obligations.[16] For more information of liability under third party contracts for actions by employees or contractors, see section 8 below.

In addition, even *dangers that are typical to a forest* may lead to liability on the part of the landowner / land manager in a guided tour, if the persons being led in the tour rely on the expertise of the landowner / land manager for the guided tour.

In contrast, where visitors take an unguided tour (e.g. following directions independently), such signposts or marked paths generally do not increase the landowner's or land manager's responsibilities towards the visitors. If the visit takes place in a forest or open landscape, following signs or marked paths normally does not exclude any of *the dangers typical to these areas*. It is considered that visitors go at their own risk and the landowner is not liable for any injury or damage.

However, if the landowner grants access that goes beyond the general right of public access or provides functional facilities for visitors, he might owe a duty of care (*Verkehrssicherungspflicht*) to visitors making use of this, which might increase the risk of liability.

Example 9

Landowner E invites people onto the land for a guided tour and one of them decides to swing on a tree branch, causing it to snap and they suffer injuries.

Landowner E will not be liable for the damage if the decision to swing on the tree was their own. However, if the person swung from the tree branch after asking Landowner E about safety and receiving assurance that it was safe, Landowner E could be held liable for injuries.

Courts could also consider contributory negligence by the visiting person, even if the Landowner E said the activity was safe to perform.

On another day, Landowner E invites another group for another guided tour. During the guided tour, a tree branch falls onto one visitor causing him injuries.

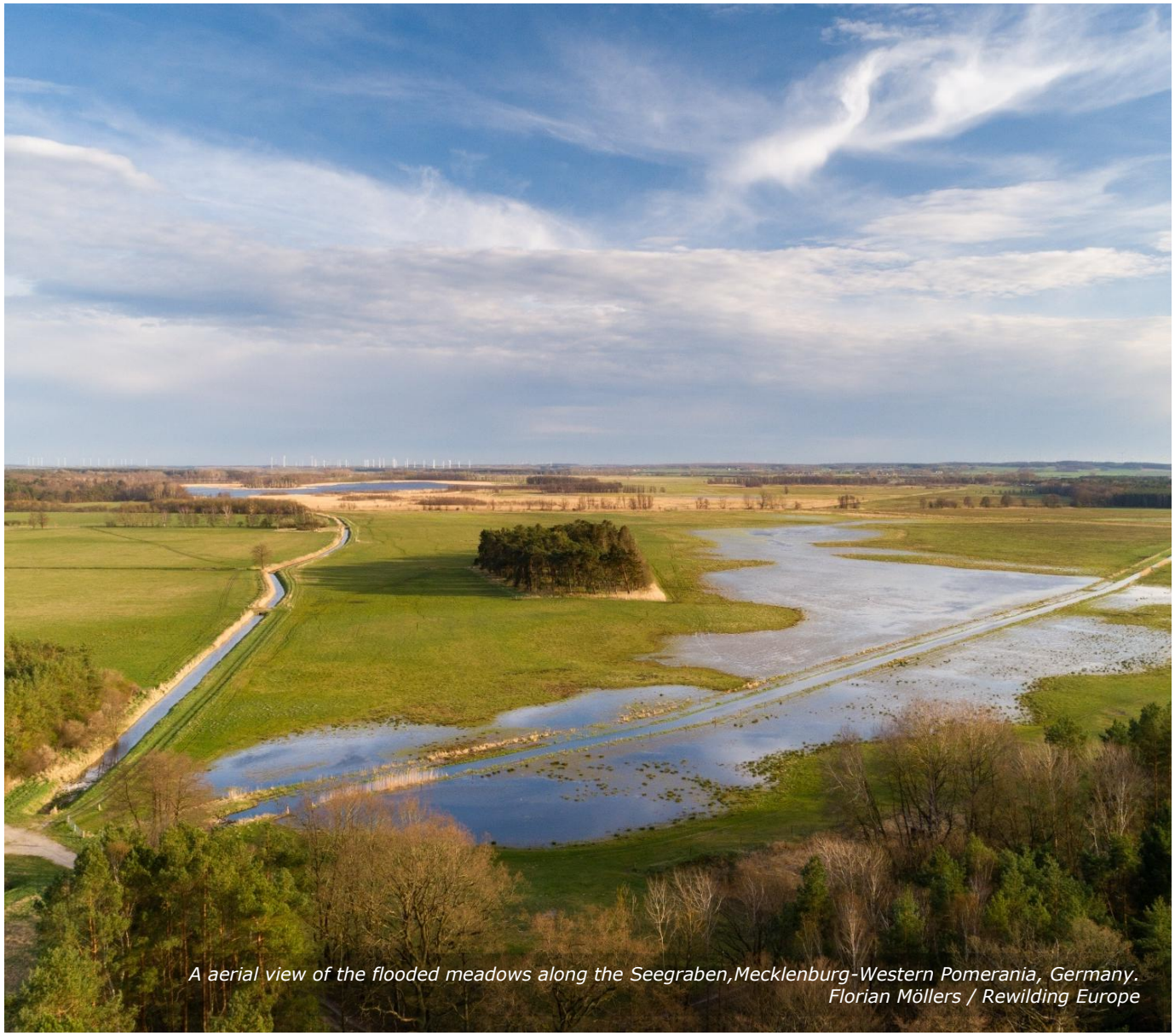
Landowner E's liability depends on whether there was negligence on their part. If Landowner E took the group through an area where it was unlikely for branches to fall and Landowner E acted diligently to prevent any risks, then Landowner E would not likely be held accountable as fallen branches are typical risks of forests.

The situation could be different if, for instance, Landowner E knew that the originally agreed path had been affected by recent droughts and trees would be particularly vulnerable, posing a heightened risk. Here, because Landowner E acted negligently, they may be liable for the damage.

Example 10

Landowner F invites some potential investors to their land which they plan to restore as grassland and woodland for natural grazing. Whilst Landowner F is showing the property to the investors, they pass by a stall owned by Landowner F that used to be used to provide shelter to animals. A construction defect in the stall causes it to collapse on one visitor, causing injury.

Landowner F is likely to be liable because the stall which collapsed because of a construction defect causing injuries is the property of Landowner F. Landowner F could only escape liability if they could prove that they took all measures to prevent any damage to occur or if they prove that the damage could not have been avoided. Courts will also look at whether Landowner F failed to act diligently, i.e. they knew about the construction defect but made no attempt to repair it and failed to undertake subsequent maintenance check-ups.



A aerial view of the flooded meadows along the Seegraben,Mecklenburg-Western Pomerania, Germany. Florian Möllers / Rewilding Europe

7. What is the liability of the landowner or land manager if the land is close to public roads?

Practitioners need to be aware that there are special legal rules to follow when the property is close to public roads. To avoid liability for damage caused by trees and other typical risks of forests, landowners or land managers have a duty to regularly inspect the trees at the edge of public roads.

It should be noted that public roads are those designated as such by the competent German authorities.[17] For instance, forest paths or forest roads are not considered public roads just because bikers or even cars use them. Only those designated by the competent authorities as such are deemed as public roads.

If practitioners have their land close to in-use public railroad tracks or in-use public water ways, they have the same obligation to regularly inspect the typical risks of forests areas and take actions to mitigate said risks.

8. What is the liability of the landowner or land manager for damage caused by their employees or contractors?

Practitioners may employ staff or may contract services to third parties. In such cases, practitioners can also contract the duty of care (*Verkehrssicherungspflicht*) and what it may entail to the third party, e.g. regular inspections of areas of the land, such as areas next to public roads, paths used by hikers and the general forest area. It is recommended to include clauses in employment agreements or services agreements in which both parties agree to specific land management activities and respective duties. By doing so, the party taking over service responsibilities also takes over liability towards third parties but also towards the landowner.However, the transference of the duty of care to employees or to contractors does not mean that practitioners cease to be liable for damage caused by employees or contractors. Regarding civil liability to third parties, practitioners may be liable for the damage caused by their employees or some other person they employ to perform a task if they have not exercised the required care when selecting or supervising the person deployed.[18]

This means that practitioners should carefully select qualified employees for these tasks and sufficiently supervise their staff, especially if there are any signs of neglectful behaviour, and document such supervision.

To protect themselves, practitioners should document their own compliance with their duty of diligent inspection, and to include in any employment or service agreements a clause enforcing documenting the agreed activities and their regular inspections. Documenting such activities is key to showing that the landowner or contractor were not negligent in fulfilling their duty of care and, therefore, that their liability is mitigated.

It is also advisable to have comprehensive third-party insurance in place (if available); ideally one covering damage caused by acts under a contract.

As a last note, practitioners should know that contractual liability still applies where, for instance, it is an employee or contractor guiding a tour. This means that the practitioners, as landowner / manager, will be responsible for any fault by the persons of whose services they avail themselves to fulfil their obligations under the rules of contractual liability.[19] Contractual liability applies even if the practitioner has exercised the required care when selecting and supervising the employee/contractor.

Example 11

A land manager orders his employees to dig a pond with heavy machinery in a forest area. Because of the digging, a large rock accidentally falls, hitting a walker.

Because it involves heavy machinery, this activity is not considered a typical forest risk, given its dangerous nature. Assessing liability depends on whether the land manager and their employees took all the precautions to warn passersby of the ongoing works.

Among the actions the team could take are putting up signs warning of the ongoing works and associated risks (e.g. risk of rock fall), fencing-off the area, or even restricting a larger surrounding area to avoid the public entering the work site. One additional measure, if the risk justified it, would be to close the entire area for as long as necessary until the area was safe to the public again.

If the employees have not taken all necessary steps to protect visitors from dangers caused by the heavy machinery, the land manager may still be liable for these actions. The land manager can exclude his liability if they can prove that the employees were carefully selected and diligently instructed. It is recommended to document both procedures.

End Notes:

1. Most notably Section 823 (1) of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*) and in relation to neighbouring land Section 906 (2) of the German Civil Code. The main principle of the *Verkehrssicherungspflicht* ("duty of care"), i.e. the duty that anyone creating or controlling a source of danger must take the necessary and reasonable precautions to protect others from harm, is derived from Section 823 of the German Civil Code through court cases.
2. In particular, Section 14 of the German Forestry Act (*Bundeswaldgesetz, BWaldG*). In addition, German federal states have enacted different forestry laws which may apply and further specify rules for the use of forest and open landscapes.
3. In particular, Sections 59 and 60 of the German Nature Conversation Act (*Bundesnaturschutzgesetz, BNatSchG*).
4. Section 59 of the German Nature Conservation Act and Section 14 of the Germany Forestry Act.
5. Section 254 of the German Civil Code.
6. Section 2 (1) of the German Forestry Act. For the purposes of the law, a "forest" is any area covered with plants that can typically be found in forests. Forests also include clear-cut or depleted areas, forest paths, forest division and security strips, forest areas and clearings, forest meadows, game grazing areas, timber storage areas and other areas connected to and serving the forest.
7. Section 59 of the German Nature Conversation Act.
8. Section 14 (1) of the Forestry Act; Section 59 of the German Nature Conversation Act.
9. Specifics of exemptions can range from fire protection of forests or making sure third parties are not subject to dangers. However, the specific exemptions can differ between German states, as state forestry acts apply to such exemptions rather than German federal law.
10. Section 60 of the German Nature Conversation Act and Section 14 of the Forestry Act.
11. Section 14 of the Forestry Act.
12. For an explanation of the duty of care (*Verkehrssicherungspflicht*) see endnote 1.
13. Whilst rare, the Regional Court of Saarbrücken in 2010 held that if e.g. after a storm event there is a concrete danger that a tree will fall onto a forest path, the owner must promptly act; also, he may have to carry out special inspections in connection with storm events (LG Saarbrücken, 3 March 2010, 12 O 271/06).
14. See previous endnote. On appeal the German Federal Court of Justice (*Bundesgerichtshof, BGH*) decided that a forest owner can generally not be expected to carry out tree inspections. However, the court indicated that the owner may be expected to carry out inspections of frequently used forest paths after a storm (2 October 2012, VI ZR 311/11).
15. In particular due to Sections 836 to 838 of the German Civil Code.
16. Section 278 of the German Civil Code.
17. The details of the designation as well as the competent authorities are regulated in the Roads Acts at federal as well as state level. For most roads in Germany, the designation as public falls in the competence of the federal states. At state level, the road construction authority is generally the authority responsible for designating public roads. The designation of a road as public must generally be made public, e.g. in the official gazette of a municipality or in a local newspaper. What roads are public may also be ascertained from maps.
18. Section 831 of the German Civil Code.
19. Section 278 of the German Civil Code.

Contact Us

More information about rewilding and the issues addressed in this guidance note is available on The Lifescape Project and Rewilding Europe websites.

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This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.