

LIABILITY FOR DEFECTIVE PRODUCTS AND SERVICES: THE NETHERLANDS

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II A 3

1 Introduction

The primary aim of this contribution is to provide the reader with an overview of the current state of the law in the Netherlands with regard to products liability.¹ While doing so, this part of liability law is, at least to a certain extent, contrasted with the rules governing the liability of service providers. The main reason for this approach is that there appears to be a growing tendency to cross the border between these two areas within liability law, in order to learn about possible solutions for (more or less) common problems. Whether or not this tendency is indeed present in the Netherlands, and whether or not there is something to be learned from developments in services liability, are questions that need to be answered. In section 7 below, an attempt will be made to do just that.

In the preceding sections, we will first deal with the rules governing liability for defective products (section 2) and for services (section 3), followed by a discussion on the major sources of the law, the past and future developments and the policy issues that are at stake (section 4). The focus in section 5 is on the institutional and procedural environment surrounding these areas of liability law. The frequency of settlements and litigation and other aspects relating to 'the law in action', such as insurance schemes, are dealt with in section 6.

2 The basic rules governing liability for defective products

2.1 *Contract or tort, strict liability or negligence?*

In the Netherlands, products liability is usually approached from the perspective of tort law (artt. 6:162 and/or 6:185 ff. of the Dutch Civil Code, *Burgerlijk Wetboek*, hereafter referred to as BW). Contract law could in principle be invoked² (especially art. 7:17 BW), even in concert with tort law, but this is hardly ever the case.³ The reason is that usually in this type of case, there is a personal injury:

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1. In accordance with the intended purpose of the general reporter on this topic, this contribution, being one of several European contributions, does not primarily focus on the liability based on the European Directive mentioned below (*infra*, II.1).
2. Cf. standing case law. See for instance HR 26 March 1920, NJ 1920, 576 (Surinamese mailman); HR 19 February 1993, NJ 1994, 290 with note CJHB (Municipality of Groningen/Heirs of Zuidema). See also *infra*, III.1.

whenever such is the case, a contractual fault also constitutes a tort under general tort law.⁴ Since the contractual chain usually needs to be 'stretched out' to be able to put in a products liability claim under contract law, it is both easier and safer to make use of tort law instead of contract law. Furthermore, art. 7:24 BW stipulates that if a good is sold by a professional to a consumer and the defect falls under the scope of artt. 6:185 ff. BW, it is not the seller but (solely) the producer that is liable, unless the seller knew or should have known the defect, guaranteed the absence of the defect, or the claim consists of material damage which cannot be claimed under the products liability regulations because the damage is less than the minimum amount of 500 Euro.⁵

Art. 6:162 BW constitutes the basis for a claim for products liability under *general* tort law. This basic tort rule is one of negligence. Under the EC directive on products liability⁶ (hereafter: the Directive), implemented in artt. 6:185 ff. BW, the basic rule, if also applicable,⁷ is (or, at least, is thought to be) one of strict liability.⁸ This has been questioned, however, on the basis of case law of the European Court of Justice (hereafter referred to as ECJ), which seems to have introduced an element of fault into the Directive.⁹ In general, products liability is considered to have combined elements of both fault-based liability and strict liability.¹⁰ Even though art. 6:162 BW generally constitutes a negligence-based liability, the same applies to products liability under the general tort law regime.¹¹ However, one's position in this respect also depends on the specific definition of strict liability that one embraces.¹²

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3. Cf. Schut (1997), p. 124.
 4. See HR 3 December 1999, NJ 2000, 235 with note PAS (Pratt & Whitney/Franssen); Schut (1997), p. 124; Asser-Hartkamp III, nos. 8 and 201; Giesen (2001), p. 203-204.
 5. Cf. art. 7:24 para. 2 BW. Note that if the contract is a sales contract, but does not constitute a *consumer* sale, the exclusion of the seller's liability does not apply. In other words: the buyer who is *not* a consumer, is better protected than the buyer who *is* a consumer. The provision of art. 7:24 para. 2 BW is criticised in literature. Cf. Asser-Hijma, no. 445 with references; Hartlief/Tjittes (2001), p. 1464; Dommering-van Rongen (2000), p. 93-94.
 6. Directive 85/374/EEG, OJ EC L 210/29. Hereafter, we will not refer to the articles of the Directive as such but to the Dutch articles implementing the Directive in the Netherlands, *i.e.*, artt. 6:185-193 BW.
 7. Both rules can usually be invoked at the same time, but the Directive liability (which does not affect the right to sue under the existing national laws, see art. 6:193 BW) seems to have a more restricted scope of application, see Dommering-van Rongen (2000), p. 3-4 and p. 31.
 8. See recently ECJ 10 May 2001, C-203/99 (Veefald), EuZW 2001, 378 with note Geiger, para. 15, and Report (2001), p. 5.
 9. ECJ 23 May 1997, C-300/95 (Commission/UK), Jur. 1997, p. I-2649, NJ 1998, 522, and Giesen (2001), p. 194 and p. 200-201, where the issue whether or not the Directive liability is (still) a strict liability is discussed.
 10. See Dommering-van Rongen (2000), p. 31 and 36; Dommering-van Rongen (1999), p. 135-136, and in general on this issue for example Cane (1999), p. 85-86; Howells (1998), p. 452-454; Van Dam (2000), nos. 1002-1004.
 11. An early case in negligence leading to a rather strict liability is Hof Amsterdam 27 June 1957, NJ 1958, 104 (Ford/Den Ouden). See also Hof Den Bosch 18 January 1995, TvC 1995, 207 (W./Hero), and Hof Amsterdam 27 August 1998, VR 1999, 67 (Stiefensand/Vos), at 4.8, as well as Schut (1997), p. 126.
 12. See *infra*, III.1.

2.2 *The notion of a defective product*

According to art. 6:186 BW (the Directive liability), a product is defective if it does not offer the safety that a person is entitled to expect, taking into account all the circumstances of the case at hand, in particular the presentation of the product, the expected use of the product, and the time the product was put into circulation.

In 1989, the Dutch Supreme Court, the *Hoge Raad* (hereafter referred to as HR) ruled that a product is defective under art. 6:162 BW¹³ if it does not offer the safety a consumer/user is entitled to expect, given the circumstances of the case.¹⁴ In later cases, the HR stated that the element of wrongfulness vis-à-vis the user is present if a product is put into circulation that causes damage when it is used in a normal fashion and for the purpose for which it was intended.¹⁵ In *Dupont/Hermans*,¹⁶ an explicit reference was made to the first case, and since the standard used in the case decided in 1989 very closely resembles the Directive standard (entailing the consumer expectation test), the HR effectively united the standard under general tort law and that under the Directive,¹⁷ whereas under older case law, a form of the risk/utility test seemed to prevail.¹⁸

In legal literature, a distinction is made between the well-known categories of design defects, manufacturing defects, and inadequate warnings or instructions, but in case law on products liability, this distinction has so far been without legal consequences.¹⁹

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13. This concerns tort law. In contract law, case law is (also) very strict. A contractual defect is present when the good delivered does not meet the standard agreed to in the contract (e.g., the buyer of a new car can expect the oil system to be in good working order, see Rb. Alkmaar 30 December 1999, NJ 2000, 728 (Vlaar/Polderman)). Liability is then given, unless the seller can rightfully claim that the damage is not accountable to him (*toerekenbaar*). Even if there is no subjective fault, this accountability of the seller can still be present, however, based on the norms in society (*verkeersopvattingen*). For instance, even if the seller did not know and should not have known of the defect of an industrially made product, the damage is to be born by him. There are only very specific exceptions to this general rule. See HR 27 April 2001, RvdW 2001, 96 (Oerlemans Agro/Driessen).
 14. HR 30 June 1989, NJ 1990, 652 with note CJHB (Halcion).
 15. See HR 6 December 1996, NJ 1997, 219 (DuPont/Hermans), confirmed in HR 22 October 1999, NJ 2000, 159 (Koolhaas/Rockwool). In Koolhaas/Rockwool, the HR decided that the duty to warn even includes the user/buyer of the end-product and not just the manufacturer using the product as a component. Sieburgh (2001), p. 593, considers this to be a stricter criterion than the one that is used under the Directive; Barendrecht/Duyvensz (2000), p. 121, also see this as a usually more narrow criterion.
 16. HR 6 December 1996, NJ 1997, 219 (DuPont/Hermans).
 17. See on this 'spill-over'-effect Van Gerven (2001). See also Hof Leeuwarden 18 March 1998, NJ 1998, 867 (Tetra Werke/Kuiper); Spier (1996), p. 239; Bloembergen, case note under HR 22 October 1999, NJ 2000, 159 (Koolhaas/Rockwool), para. 4; Giesen (2001), p. 217, and Dommering-van Rongen (2000), p. 32. The difference between both systems is that in general tort law, subjective fault is also required.
 18. HR 30 June 1989, NJ 1990, 652 with note CJHB (Halcion); Dommering-van Rongen (1999), p. 140.
 19. Dommering-van Rongen (2000), p. 50. This distinction could become (more) important, though, since the German Supreme Court has decided that the development risk defence is not applicable to manufacturing defects, see BGH 9 May 1995, NJW 1995, 2162, provided of course that the HR would follow the BGH's lead. Cf. Giesen (2001), p. 203; Dommering-van Rongen (2000), p. 40.

2.3 *The parties involved in products liability cases*

In principle, there is no limitation to who may sue (in the sense that, for instance, only buyers of a product have an action under products liability). Injured bystanders are allowed and able to sue under both artt. 6:162 and 6:185 BW, given the fact that both provisions are tort provisions and that their scope, therefore, is not limited by the requirement of a contractual relationship between the aggrieved party and the ‘perpetrator’. Since claims under a contract of sale are rare,²⁰ the question of who may sue is not frequently asked in Dutch law.

Products liability, in general, only rests on the person putting the product into circulation. This rule is accepted under the Directive liability but also under the general tort rule.²¹ Under the regime of the Directive, the ‘producer’ is potentially liable for the damage the product has caused, unless he proves that he did not bring the product on the market (art. 6:185 para. 1 sub a BW). This is different under general tort law where the plaintiff will have to prove that the producer brought the product on the market.²² What exactly falls under the definition of ‘bringing the product on the market’ has, until now, been rather vague, however.²³ Passing something on in the chain of distribution has been used as a definition in this respect.²⁴

The notion of ‘producer’ is a broad one: any party who manufactures a product, a component, or the raw materials thereof is considered to be a producer, and can be held accountable under tort law.²⁵ The same rule applies, as far as liability under the Directive goes, to those presenting themselves as producer by placing their name, trademark, or other distinguishing mark on the product (art. 6:187 para. 2 BW), and to the party that imported the product into the European Economic Area (*i.e.*, into the European Union, Norway, Iceland, or Liechtenstein, cf. art. 6:187 para. 3 BW). Finally, the supplier of the product will be considered to be the producer if it cannot be determined who the producer is, unless the supplier mentions, within a reasonable time, the identity of the person from whom he had bought the product (art. 6:187 para. 4 BW).²⁶ Under general tort law, similar rules most likely will be applied.²⁷ However, the negligence standard applied to a supplier of a product who cannot be considered to be the actual producer of the product itself is less strict.²⁸ The retail seller of a product can be

20. See *supra*, II.1.

21. HR 6 December 1996, NJ 1997, 219 (DuPont/Hermans); Dommering-van Rongen (2000), p. 73

22. Giesen (2001), p. 218, and p. 229.

23. Dommering-van Rongen (2000), p. 73 ff.; *Onrechtmatige Daad* (Stolker), no. 4 at art. 185.

24. Hof Leeuwarden 18 March 1998, NJ 1998, 867 (Tetra Werke/Kuiper); *Onrechtmatige Daad* (Stolker), no. 4.4 at art. 185.

25. HR 22 October 1999, NJ 2000, 159 with note ARB (Koolhaas/Roekwool); Dommering-van Rongen (2000), p. 80 ff.

26. Handing over a copy of a bill will suffice in this respect, see HR 22 September 2000, NJ 2000, 644 (Haagman/VSCI).

27. On the liability of an importer, see Hof Den Bosch 14 January 1997, A&V 1997/6, 158 with note PK (Aerts/Helm).

28. See HR 22 September 2000, NJ 2000, 644 (Haagman/VSCI). The reason is that the usual products liability negligence rule is not applicable in such cases.

held liable under the contract of sale, but, for reasons explained above, this is rare.²⁹

Important in this respect is that according to general tort law, the employer/producer can also be held liable for the wrongful acts of his employees (art. 6:170 BW); the provision is applied equally if liability under the Directive is invoked. Liability under art. 6:170 BW arises under the conditions that the employee acted wrongfully (his act must constitute a tort in itself), that he was indeed a servant working under instructions of the employer (a labour contract suffices here), and that there was a causal connection between the tort of the employee and the instructions provided by the employer. In order to meet the last requirement, the instructions must have been of such a nature that they provided an opportunity to commit the tort. The last two conditions are usually met quite easily.³⁰

2.4 *The burden of proof*

Art. 6:188 BW clearly states that, under the regime of the Directive, the plaintiff will have to prove all the elements of the claim, *i.e.*, the defect, the damage, and the causal connection between those two. Applicability of one of the defences under art. 6:185 under 1 BW is to be proven by the defendant.³¹

In principle, the same division of the burden of proof applies if the action is based on general tort law.³² This certainly holds true when one considers the element of (the existence of) damage.³³ In products liability cases, however, a 'reversal' of the burden of proof is possible (a) with regard to the 'defect' (the element of wrongfulness), (b) with regard to causation, and (c) with regard to the subjective fault.

As for the defect (a), the HR considers that if a plaintiff proves that he opened a bottle, which then exploded, in a normal fashion, that state of affairs would lead to the factual presumption that the damage must have been caused by a defect in the bottle. The producer may rebut this presumption.³⁴ On a more abstract level, it is possible to state the rule deductible from this case as follows: if a party proves that he used the product in a normal fashion, but an unexpected damaging event nevertheless occurred, the product is presumed to have been defective.³⁵

29. See *supra*, II.1.

30. See Hoekzema (2000), p. 49-82; Klaassen (2000), p. 5 ff.

31. On this, see Giesen (2001), p. 195 ff, claiming *inter alia* that a reversal of the burden of proof with regard to the national laws on products liability would still be possible after introduction of the Directive.

32. On the burden of proof in tort law in general, see Giesen (2001), p. 113 ff.

33. Giesen (2001), p. 226.

34. HR 24 December 1993, NJ 1994, 214 (Leebeek/Vrumona). On the basis of this case, it is also possible to presume the causal connection to be present, given that this is a case of *res ipsa loquitur*. For details, see Giesen (2001), p. 228.

35. See Giesen (2001), p. 219-220. Cf. HR 15 March 1996, NJ 1996, 435 (ABR/Kuijt), a case in which the burden of proof with regard to normal use was put on the victim, while, at the same time, the court presumed this normal use to have been present.

In the field of causation (b), a new rule on the burden of proof has gained momentum in recent years. It basically states that whenever a wrongful act creates or increases a certain risk of damage and that specific risk actually materialises, the causal link has been established, unless the wrongdoer can prove that taking preventive measures would not have prevented the damage from occurring.³⁶ The HR has never declared that rule to be applicable or not in the area of products liability, but its scope is broad enough to encompass this field, certainly if a duty to warn has been breached.³⁷ One should at least be aware of the possibility that the same rule, which is in fact applied in cases of services liability,³⁸ might be applied in cases of products liability.

With regard to subjective fault (c), it should be noted that this element is still a condition for liability under general tort law.³⁹ but that, on the other hand, fault may be presumed if the wrongfulness has been established and needs to be disproved by the defendant, thereby effectively reversing the burden of proof.⁴⁰

To conclude, in the case of an exploding bottle (*Leebeek/Vrumona*),⁴¹ the HR has made clear that in order to escape liability, the defendant must prove that: a) the defect was not present prior to the marketing of the product; b) the defect could not have been discovered at an earlier date; and c) the product was not used in accordance with its intended use. Finally, if the defendant argues that there was (some form of) contributory negligence on the part of the plaintiff, he needs to prove that statement as well.⁴²

2.5 *Damage recoverable in products liability cases*

The Directive regime contains a provision on the forms or types of damage that can and cannot be claimed from a producer. According to art. 6:190 BW, the

36. This so-called 'omkeringsregel' was first used in the mid 1970's in cases of traffic accident and accidents at workplaces, and was widened in its scope of application in the *Dicky Trading II*-case (HR 26 January 1996, NJ 1996, 607 with note WMK). See Van Dam (2000), no. 810; Giesen (2001), p. 116 ff, and HR 19 January 2001, RvdW 2001, 34 (Ter Hofte/Oude Monnik Motors)

37. See Giesen (2001), p. 228. Contrary to this rule (but too old to still be considered to reflect the law in this respect) is the decision of Hof Den Bosch 13 November 1979, NJ 1980, 370 (Beatrix/Van Weleveld).

38. See the *Dicky Trading II*-case (HR 26 January 1996, NJ 1996, 607 with note WMK), a case on the liability of a notary, and, critically, Giesen (2001), p. 116-119; Giesen (1999), p. 66 ff.

39. The role of fault in other areas is almost extinct, but not with regard to products liability, see Giesen (2001), p. 233, with further references, and for instance HR 25 March 1966, NJ 1966, 279 with note GJS (Moffenkit) and HR 22 October 1999, NJ 2000, 159 with note ARB (Koolhaas/Rockwool).

40. Giesen (2001), p. 232-233, mentions several opinions on the status of the law in this respect. All opinions (at least) place more than the usual evidential burden on the defendant. The discussion focuses on whether there is a reversal of the burden of proof (based on HR 2 February 1973, NJ 1973, 315 with note HB (Leaking water bottle I), applied in Hof Den Bosch 18 January 1995, TvC 1995, 207 (W./Hero)), as Giesen thinks, or a factual presumption of fault, see for instance Hof Den Bosch 16 April 1974, NJ 1974, 357 (Maaslandgas/De Marco), or only an obligation for a defendant to supply the plaintiff with sources and materials with which he can try to start proving his claim (based on HR 6 December 1996, NJ 1997, 219 (DuPont/Hermans); see also Barendrecht/Duyvensz (2000), p. 118).

41. HR 24 December 1993, NJ 1994, 214 (Leebeek/Vrumona). See also Spier (1996), p. 240-241.

42. See Giesen (2001), p. 219-220, and p. 234-235.

plaintiff can claim damages in case of death or personal injury,⁴³ and for damage to property other than the product itself, intended for use in a private setting and exceeding the amount of 500 Euro. Neither damage relating to the defective product itself or to products used in a professional setting,⁴⁴ nor pure economic loss⁴⁵ are recoverable under the Directive.

Under general tort law, the rules on compensation for damage are laid down in artt. 6:95-110 BW. Damage that should be compensated for (whenever it has been determined that there is a right to damages) includes physical and economic loss (loss suffered and profits not gained), and other disadvantages, such as immaterial losses.⁴⁶ In principle, all losses suffered should be fully reimbursed,⁴⁷ irrespective of the type of injury that occurred. There are thus no specific rules limiting compensation according to the type of injury in products liability cases. This means that not only physical harm (personal injury) and damage to property (either to the defective product or to other goods) is recoverable under Dutch law, but also pure economic loss.⁴⁸

All kinds of damages that have been recognised under Dutch law are thus also available in products liability cases, at least if the claim is based on general tort law. This excludes punitive damages since Dutch law does not recognise this form of damages.⁴⁹ Damages for non-pecuniary losses (pain and suffering) are, with certain restrictions, recoverable (art. 6:106 BW).⁵⁰ This is also relevant for the Directive liability, since this liability regime left the question as to the recoverability of damages for pain and suffering to the national systems, and still does.⁵¹ Under Dutch law, such losses therefore are in principle recoverable.

With regard to the amount of damages that may be claimed, no such thing as a cap or limitation exists as yet in the Netherlands.⁵² The possibility provided by the Directive (in art. 16) of instituting such a cap or limit for products liability cases has not been followed. Art. 6:110 BW does recognise the possibility of installing by Royal Decree a limit on the amount of damages that can be recovered, but that possibility has not been used so far. One should realise,

43. Further details are laid down in the general tort law on the obligation to pay damages, most notably in artt. 6:107 and 6:108 BW.

44. Dommering-van Rongen (2000), p. 135 ff. and p. 143.

45. Cane (1999), p. 85.

46. See artt. 6:95, 96 and 106 BW.

47. See Asser-Hartkamp I, no. 415.

48. Since articles 6:95-110 BW apply to contractual and tortious claims alike, the same would apply if, by way of exception, the claim were to be based on contract law. See Barendrecht/Duyvensz (2000), p. 135 ff., and especially p. 139-140, and Barendrecht (1998), p. 115 ff., on pure economic loss under Dutch law in general, and p. 123-124, on products liability. It is believed, however, that compensation of loss due to personal injury will be granted more easily than loss due to property damage. see Spier (1996), p. 242-243.

49. Although the question whether punitive damages should be accepted under Dutch law is discussed in doctrinal works, the general view is that such should not be the case. See for instance Dommering-van Rongen (2000), p. 200.

50. On calculating the amount of these damages, see *infra*, VI.2.

51. See art. 9 of the Directive; Westerdijk (1995), p. 45; Dommering-van Rongen (2000), p. 135 and p. 137; Green Paper Products liability (1999), p. 30; ECJ 10 May 2001, C-203/99 (Veedfald), EuZW 2001, 378 with note Geiger, paras. 29 and 32.

52. Leaving aside the franchise of 500 Euro for damage to property used in a private setting. See above and *supra*, II.1.

however, that the court does have the discretionary power, to limit an award in a specific case on the basis of equity and reasonableness (see art. 6:109 BW) if it feels that granting the full amount of damages that would normally be recoverable, would lead to unacceptable consequences, given the nature of the liability, the legal relationship between the parties, and their mutual financial capacities. The court can only lower the award to the level at which insurance is or should have been available.⁵³ The HR has warned lower courts to be very cautious when using this power,⁵⁴ so it has not (yet) gained much popularity.

ECJ case law also superimposes a duty on courts to act cautiously when limiting or deducting damages. In the *Veedefald*-case,⁵⁵ the ECJ made clear that, although the precise interpretation and meaning of the term 'damages' has been left to the national courts and legislators, the Directive does entail the duty to secure a reasonable and full reimbursement of the damage (both personal injury and property damage) caused by a defective product, since the national laws may not interfere with the useful effect of the Directive. This means that a member State may not limit the categories of recoverable (material) damages.

2.6 Possible defences

Most of the major defences with regard to the Directive liability are listed in art. 6:185 para 1 sub a to f BW, and include a) the producer did not put the product into circulation;⁵⁶ b) the defect did not exist at the time the product was put into circulation; c) the product was neither produced nor spread for economic purposes, nor was it produced or spread within the producer's professional activity; d) the defect is due to compliance with mandatory governmental regulations; e) the defect could not have been discovered at the time the product was put on the market, given the state of science and technical knowledge at that time. A last defence, (f), applicable to manufacturers of raw materials and components only, is that the defect was due to the design of the product of which that part forms a component, or that the defect is due to the instructions given by the producer of the end-product. The development risk defence is laid down in sub e) mentioned above. The Netherlands did not opt, as was offered by the Directive, to exclude this defence. Another important defence is probably that the defect occurred after the product was put on the market (sub b), which defence may especially be of interest to those 'producers' that only manufactured a component or the raw materials of the defective product.⁵⁷

53. See Dommering-van Rongen (2000), p. 146.

54. See HR 28 May 1999, NJ 1999, 510 (G./H.).

55. ECJ 10 May 2001, C-203/99 (*Veedefald*), EuZW 2001, 378 with note Geiger, paras. 27-29.

56. On that defence, see ECJ 10 May 2001, C-203/99 (*Veedefald*), EuZW 2001, 378 with note Geiger, paras. 16 ff., the ECJ stating that if a (medical) product is used during the provision of a (medical) service, it does not matter for the purposes of a product being put into circulation whether the product was made by a third person, by the service provider or by an organisation linked to that provider. To put it briefly: if it is used for a certain service, the product is put into circulation.

57. These parties are considered to be producers under art. 6:185 para. 2 BW, see *supra*, II.3.

Contributory (or: comparative) negligence can also be a defence, at least partially.⁵⁸ However, since under general tort law a producer is required to count on a certain degree of carelessness on the part of the user of a product,⁵⁹ this defence is usually not very successful. This would then lead the claimant to use general tort law, which – in this perspective – would be stricter. Mention should also be made of the limitation and extinction periods of 3 and 10 years (art. 6:191 BW). *Force majeure*, an Act of God, is usually not seen as a defence under the Directive.⁶⁰

All these rather usual defences are, in principle, also available under art. 6:162 BW, although the limitation period is (much) longer (5 or even 20 years, cf. art. 3:310 BW). The main role is played, under both general tort law as the Directive, by the development risk defence, sometimes also known as the state-of-the-art-defence (although that refers to the standard on deciding whether there was a defect).⁶¹ According to the ECJ, the standard of that defence is an objective one (subjective knowledge of a particular producer is not sufficient), and it is one that refers to the most advanced level of knowledge available at the time the product came into circulation.⁶²

3 The basic rules governing liability for services

3.1 *Strict liability or negligence, contract or tort?*

The distinction between 'strict liability' and negligence based liability is not a very fortunate one to be used in comparative law, since the terminology is not always used in the same manner in different legal systems.⁶³ From a Dutch perspective, liability for services would be considered a negligence-based liability. However, it should be noted that where the *contractual* position between the provider of a service and the client is concerned, the client only has to prove a breach of the standard of care. According to art. 6:75 BW, if the service provider's non-performance⁶⁴ has been established, it is up to the provider to prove that the non-performance can *not* be attributed to him. The provider will be held liable not only

58. See art. 6:185 para. 2 and, in general, art. 6:101 BW. An example from case law is Rb. Alkmaar 30 December 1999, NJ 2000, 728 (Vlaar/Polderman), where this defence was turned down by the court (the court ruling that the owner of a car is not obliged to have his car checked on a regular basis by a dealer serving the client's specific type of car).

59. See HR 2 February 1973, NJ 1973, 315 with note HB (Leaking water bottle I).

60. Dommering-van Rongen (2000), p. 41; *Onrechtmatige Daad* (Stolker), no. 2 at art. 185. These defences must be interpreted narrowly, see ECJ 10 May 2001, C-203/99 (Veedfald), EuZW 2001, 378 with note Geiger, para. 15.

61. See Dommering-van Rongen (2000), p. 38.

62. See ECJ 23 May 1997, C-300/95 (Commission/UK), Jur. 1997, p. I-2649, NJ 1998, 522, and Dommering-van Rongen (2000), p. 40. The District court (*Rechtbank*) of Amsterdam seems to use a less stringent standard, however. See Rb. Amsterdam 3 February 1999, NJ 1999, 621 (S. Sanquin), and Giesen (2001), p. 203. On the use of the development risk defence under general tort law, see Rb. Haarlem 18 February 1992, NJ 1993, 521 (Konsumenten Kontakt/Forbo).

63. See also *supra*, II.1.

64. Like the Principles of European Contract Law (see art. 1:301 (4) PECL), the notion of non-performance includes any failure to perform a contractual obligation, whether by performing late, defectively, or not at all. Cf. Asser-Hartkamp II, no. 307.

when he was at fault, but also when the non-performance can be attributed to him by 'common opinion'. If the claim is of a tortious nature, the client will need to establish that the breach of the standard of care can be attributed to the provider,⁶⁵ but it should be noted again that attribution of the tortious act to the provider on the basis of 'common opinion' is possible under art. 6:162 para. 3 BW. Therefore, neither in a contractual nor in a tortious setting is 'fault' absolutely necessary when considering whether the provider is liable. Having said that, it should be noted that, in the ordinary course of events, the establishment of a breach of the standard of care does also imply (at least objectively) faulty behaviour on the part of the provider of the service.⁶⁶

The general rule on the standard of care is embodied in art. 7:402 BW. It states that the provider of the service, in the performance of his activities, must comply with the 'care of a good provider', whereas art. 6:28 BW provides that the quality of the service has to be of 'average good quality'.⁶⁷ For *professional* providers of services, a slightly different expression is used in practice. According to this expression, it must be determined whether or not a reasonably skilled and reasonably acting professional would have acted differently in the given circumstances.⁶⁸ If the professional is to be seen as a *specialist*, an even higher degree of competence may be expected: the criterion then is whether a reasonably skilled and reasonably acting specialist would have acted differently.⁶⁹

Dutch law does not have a system of '*non-cumul*'.⁷⁰ Therefore, a claim against the provider of a service may be based on either tort law or, if a contractual relation exists between the provider of a service and the aggrieved party, on contract law. Contractual limitations of liability are normally deemed to apply equally to tort-based claims,⁷¹ whereas statutory provisions aiming to protect a certain type of client (for instance, consumers) or to protect all clients apply regardless of the basis of the claim. The criterion to establish whether the provider has breached his standard of care is the same:⁷² did the provider of the service act in the same manner as would a reasonably competent and reasonably acting

65. This burden of proof is reversed on a rather large scale however, see Asser-Hartkamp III, no. 77; Giesen (2001), p. 114-115.

66. Giesen (2001), p. 242.

67. Cf. Barendrecht/Van den Akker (1999), no. 349.

68. HR 26 April 1991, NJ 1991, 455 (Benjaddi/Neve), standing case law. Cf. also Giesen (1999), p. 13-14.

69. HR 9 November 1990, NJ 1991, 26 (Speeckaert/Gradener). The standard of care is also influenced by disciplinary rules set by boards of professionals. See further Michiels van Kessenich-Hoogendam (1995), no. 25.

70. Cf. standing case law. See for instance HR 26 March 1920, NJ 1920, 576 (Surinamese mailman); HR 19 February 1993, NJ 1994, 290 with note CJHB (Municipality of Groningen/Heirs of Zuidema). See also *supra*, II.1.

71. See for a – much criticised – exception to that point of view HR 19 February 1993, NJ 1994, 290 with note CJHB (Municipality of Groningen/Erven Zuidema), in which case the HR had some trouble not to have to overturn an Appellate Court's decision to that extent, arguing that the interpretation of the scope of an exemption clause is up to the lower courts and that the Appellate Court's interpretation was 'not incomprehensible' in the specifics of this case, the HR explicitly limiting his ruling to the tortious act at hand which had, as the Appellate Court stated, 'nothing to do' with any contractual obligation between the parties.

72. Cf. HR 2 April 1982, NJ 1983, 367 (Smael and Bierbrouwerij De Ridder/Mr. M. Moskowitz)

provider of such a service?⁷³ Any damage that may be seen as the materialisation of a risk that arose as a consequence of the breach of the standard of care is presumed to have been caused by that breach, so that the burden of proof shifts towards the provider of the service. This is true when liability is based on contract, as well as when it is based on tort.⁷⁴

Yet, in practice, whenever a contractual link exists, the claim will be primarily based on contract law. The contractual approach is favoured in practice because of the simple fact that the burden of proof for the client is slightly better in a contractual setting, since he need not establish that the breach of the standard of care can be attributed to the provider of the service.⁷⁵ Therefore, in practice, tort-based claims only appear when a contractual link between the injured party and the provider is missing or uncertain, or as a subsidiary cause of action. In other words, a tort-based claim usually occurs if the person sustaining damage as a consequence of the breach of the standard of care is not the contractual counterpart of the provider of the service, but a third party. Liability of the provider towards such third parties depends on whether the norm that was violated by the provider was (also) intended to defend a third party's interests. Relevant to this are the nature of the interests involved, and the fact that the provider knew or should have realised that a third party's interests were at stake. Such will often be the case when the provider is entrusted with the execution of a service of public interest and/or when the third party may rely on the provider taking his interests into account when executing the service.⁷⁶

3.2 *Special rules for particular kinds of services*

General rules on the contract for services (*overeenkomst van opdracht*) can be found in Book 7 (Specific contracts), Title 7 (Services), Section 1 (Services in general, artt. 7:400-7:413 BW). The rules on the *overeenkomst van opdracht* are of a rather rudimentary nature, and only apply if the contract is neither a contract for work (such as construction contracts or contracts to repair or maintain goods), nor a contract for the storage, transportation and expedition of people and/or goods or for the publication of books and articles, art. 7:400 para. 1 BW provides. Furthermore, art. 7:400 para. 2 BW provides that, with the exception of a few rules on consumer protection, the rules in Section 1 only apply when their non-applicability does not follow from a statutory provision, the content or nature of the contract for services, a juridical act (e.g., another contract), or custom. The general rules on the *overeenkomst van opdracht* are consequently regarded as very soft default rules.⁷⁷

73. Cf. HR 9 November 1990, NJ 1991, 26 (Speeckaert/Gradener), a tortuous claim, and HR 20 September 1996, NJ 1996, 747 (Beurskens/B. notarissen), a contractual claim.

74. See HR 26 January 1996, NJ 1996, 607 (Dicky Trading II) and *supra*, II.4.

75. However, since the establishment of a breach of the standard of care at least objectively implies faulty behaviour on the part of the provider of the service, even in a tortuous claim this proof is hardly ever problematic.

76. Cf. Van den Akker (2001), p. 160-173.

77. Cf. Pitlo-Croes/Du Perron (1995), p. 224 ff. ; Loos (1996), p. 134. Yet, art. 7:413 BW provides that the parties may not, to the detriment of a consumer-client, derogate from the client's right to terminate the contract without being obliged to pay damages and without having to pay more

Title 7 (Services) of Book 7 BW also contains more concrete rules for some specific services. The rules on the contract of mandate (*lastgevingsovereenkomst*) (Section 2, artt. 7:414-424 BW) apply whenever the provider undertakes to conclude one or more juridical acts (e.g., a contract). Section 3 (artt. 7:425-427 BW) on the *bemiddelingsovereenkomst* (contract for mediating services) applies when the provider undertakes to assist the client in the conclusion of one or more contracts with third parties. Section 4 (*agentuurovereenkomst*, artt. 7:428-445 BW) constitutes the Dutch implementation of the EC-directive on commercial agency.⁷⁸ Similarly, title 7A (*reisovereenkomst*, artt. 7:500-513) constitutes the implementation of the EC-directive on package travel,⁷⁹ whereas the EC-directive on distance selling of goods and services⁸⁰ has been regulated in Title 1, Section 9A (artt. 7:46a-46j BW). At present, a bill to implement the e-commerce-directive⁸¹ – which includes rules on liability for the services of Internet access providers, service providers, and intermediates – is being prepared. The contract for work is still regulated in Book 7A (artt. 7A:1639-1651 BW), which means that the old BW of 1838 is still in force for these contracts. A bill to modernise the law on this type of services⁸² was sent to Parliament in 1993,⁸³ but has not yet come into force. Finally, in Book 8 of the Civil Code, transportation law has been codified, mainly based on international treaties such as *CMR*.⁸⁴

The most interesting regulation is that of the contract for medical services (*behandelingsovereenkomst*), regulated in Title 7, Section 5 (artt. 7:446-468). Medical services include, among other things, the services of physicians, hospitals, and those of dentists.⁸⁵ The contract for medical services is conceived as a *species* of the general contract for services, which implies that the general rules of Title 7, Section 1, apply unless they are being derogated from in Section 5.⁸⁶ The contract for medical services is defined as a contract between a professional provider of medical services and a client regarding the provision of medical services to 'the person of the client or that of somebody else'.⁸⁷ The person to

than a reasonable price if the contract is terminated before the provider has completed his work.

78. Directive 86/653/EEC, OJ EC 1986, L382/17.
 79. Directive 90/314/EEC, OJ EC 1990, L 158/59.
 80. Directive 97/7/EC, OJ EC 1997, L 144/19. See on the directive and the implementation thereof Loos (2001).
 81. Directive 2000/31/EC, OJ EC 2000, L 178/1.
 82. See *infra*, III.3.
 83. *Kamerstukken II*, 1992/93, 23.095, nos. 1-2.
 84. Geneva Treaty of 19 May 1956 on the international transportation of goods by road, *Tractatenblad* 1957, 84.
 85. Cf. art. 7:446 para. 2 BW. Where the services provided do not fall within the scope of the definition in art. 7:446 para. 2 BW, the rules on treatment could be applied by way of analogy whenever this is deemed appropriate. Such would, for instance, be the case for paramedical treatment if the rules on treatment do not directly apply. Cf. Sluyters/Biesart (1995), p. 6. Most rules could, at least in theory, also be applied to the treatment of animals.
 86. Cf. implicitly art. 7:468 BW, which lists some provisions in Section 1 from which the parties may not derogate to the detriment of the patient.
 87. Art. 7:446 para. 1 BW. With the expression 'the person of the client or that of somebody else' is meant that medical services relating to both mental and physical care are covered by the provisions of Title 7, Section 5. From the expression also follows that the client, *i.e.*, the health provider's contractual counterpart, need not be the patient. Or, in other words, when the patient neither concluded the contract in person, nor was he represented by somebody, he is not bound

whom the services are to be provided – who, therefore, need not be the client – is referred to as the patient. Section 5 attributes rights to the patient and, to some extent, also to the client; the obligation to remunerate the services rests solely with the client.⁸⁸

With regard to the specific details of this regulation, some articles are worth mentioning. Firstly, art. 7:448 BW requires the provider of a medical service to inform – if requested, in writing – the patient of the research to be undertaken, the treatment that is proposed, and the developments regarding the diagnosis, the treatment, and the medical condition of the patient. Furthermore, the provider needs the patient's consent for a treatment (art. 7:450 BW). This provision is intended to lead to *informed consent* for any treatment.⁸⁹ Art. 7:451 BW requires the provider of the service to keep records; according to art. 7:456 BW, the patient is entitled to review these records, unless a third party's privacy is at stake. A therapeutic exception to the right to review the records does not exist.⁹⁰ Art. 7:460 BW states that a provider of medical services may only terminate the contract for important reasons. Rather spectacular is the so-called 'central liability' of the hospital on whose premises the medical services are being performed. Art. 7:462 BW provides that the hospital – or any institution which is equal to a hospital under paragraph 2 – that is not the contractual counterpart of the patient, is, nevertheless, liable for breach of contract as if it were a party to that contract. In practice, this means that the patient may always sue the hospital, and need not be bothered with the question whether the person that actually performed the service is employed by the hospital (in which case the hospital is the contractual counterpart) or that that person operated on the basis of an independent contract with the hospital (in which case the contract was concluded with that person himself). Art. 7:463 BW provides that neither the provider of the service, nor the hospital that is liable under art. 7:462 BW may limit or exclude liability. Finally, art. 7:468 BW states that the parties may not derogate to the detriment of the patient from the rules on the contract for medical services, nor from some of the provisions of Section 1.

3.3 *Liability for services seems to be pursuing an independent course...*

At the time of the codifications of the 19th and 20th century, services were fundamentally less important than they are at present. It was felt that there was no need for specific regulation in this area. Long term contracts, which form an important subcategory among service contracts, have only started to emerge in the course of the 20th century, especially since the end of World War II. The national codifications, therefore, contain hardly any provisions regarding such contracts. Consequentially, each time a new service contract was developed, rules were

by the contract for medical services, which implies he is not liable to pay the remuneration to which the health provider is entitled. To that extent indeed art. 7:461 BW, by way of exception referring to the client in stead of to the patient.

88. Cf. art. 7:461 BW.

89. Yet, as follows from art. 7:449 BW, the patient is allowed to decline information.

90. Cf. Sluyters/Biesaat (1995), p. 93-94; Van Wijmen (1996), p. 170; Van Neer-Van den Broek (1998), p. 382.

'invented' on an *ad hoc* basis, while the legislator, courts and legal literature were usually blind to similar developments in other services. As a consequence, neither at the national nor at the European level does a common and coherent framework for services exist.⁹¹

Nevertheless, services, and subsequently the law(s) of services, have become ever more important. Nowadays, at least in Dutch law, liability for services seems to be of greater importance than products liability,⁹² and is at the centre of legal practice and doctrine. The number of cases in which professional providers of traditional services are being held liable for failure to perform the service (correctly) or for failure to inform, warn, or advise the client or patient has significantly risen over the years.⁹³ Breach of a duty to inform appears to have become an almost independent source of liability for providers of services. Breach of the standard of care is usually hard to prove for a client or patient, but the courts tend to distribute the burden of proof differently when duties to inform are supposedly breached. Since the professional is charged with a duty to substantiate his claim (by supplying information on all the factual aspects of the claim) that he has given the information to which the client or patient was entitled, it has become easier for the plaintiff to prove his claim.⁹⁴

It should be noted, however, that the notion of 'services' is not a fixed one. Art. 7:400 BW defines the *overeenkomst van opdracht* (contract for services) as any contract in which a party undertakes to execute work outside of a labour contract, and not constituting the creation of a good of a physical nature, nor the storage, transport, or expedition of people and/or goods or the publication of books and articles.⁹⁵ Yet, others are of the opinion that 'services' should be perceived as an overarching term that covers both intellectual services and services that would traditionally be considered contracts for work.⁹⁶ This broader, more modern notion of services would then, for instance, include construction (building) law.⁹⁷

4 Sources of the law, developments in the law and policy issues

4.1 *The major sources of law*

Products liability is based on the articles laid down in the Dutch Civil Code, especially on art. 6:162 BW, but since that is a very general rule, intended to cover the whole of tort law, case law is without a doubt at least as important as,

91. Cf. Loos (2000), p. 452.

92. See also *infra*, IV.5.

93. Cf. Giesen (1999), p. 7-8.

94. Cf. Giesen (1999), p. 21-24. Especially in medical cases, this is standing case law since HR 20 November 1987, NJ 1988, 500 with note WLH (Timmer/Deutman). See recently HR 7 September 2001, RvdW 2001, 143 (M./Van D.).

95. See *supra*, III.2. Yet, the *change* of a good, though not literally covered by the definition of the contract for work, usually is considered to be governed by those rules, cf. Asser-Kortmann, no. 24.

96. Loos (2000), p. 452 ff; Asser-Kortmann, no. 37.

97. For the purpose of this contribution, we have, however, chosen to focus primarily on professional services and not to pay much attention to contracts for work.

if not more important than the statutory rule. All particularities of products liability are created and used in case law. The creation of a European products liability law has not really altered this, although those rules (artt. 6:185-193 BW) have given the courts something on which to base their decisions, sometimes even if the European regime is not directly applicable.

With the implementation of Book 7, Title 7, Section 1 (Services in general), the basic rule for *services liability* may also be found in the Dutch Civil Code (in art. 7:401 BW). However, as was the case before the introduction of this Section, the core of services liability is to be found in case law. A minor exception is to be made for the commercial agency contracts (Section 4, artt. 7:428-445 BW, which form the Dutch implementation of the EC-directive on commercial agency)⁹⁸ and travel contracts (title 7A, artt. 7:500-513 BW, which form the implementation of the EC-directive on package travel).⁹⁹

More substantively regulated is the contract for medical services, which has been regulated in Book 7, Title 7, Section 5 (artt. 7:446-468 BW).¹⁰⁰ This does, however, not mean that case law has become any less important in this area than it is in other areas.

Case law has made these statutory rules on liability for products and services 'fit for purpose' in the sense that these rules have been worked out into the detailed level needed in practise by courts, most notably the HR. Academic authority does not seem to have any direct impact on the development of these more detailed rules. Doctrinal works are hardly ever cited by the HR or by the lower courts. However, they are likely to have an indirect impact, since doctrinal views are discussed rather thoroughly in the conclusions of the *Advocate-General*, who delivers an advice in a specific case to be dealt with by the HR. The conclusions of the Advocate-General often have a persuasive influence on both the HR's decision and on the interpretation thereof in legal practice and science, especially if the HR follows the Advocate-General's view.

4.2 *Developments and trends in the (recent) past*

General tort law on *products liability* has not yet gone (and probably will not go) so far as to introduce a strict liability instead of a negligence liability outside the area of application of the European Directive, but liability has tended to become more strict than under the normal negligence standard as used in other areas of tort law in the last few decades. In the area of general tort law, there are no specific statutory rules for particular groups of plaintiffs, such as, for example, rules aimed at protecting consumers. However, if one of the parties to the action is a consumer, this could influence the strictness of the negligence standard as applied by the court in the specific circumstances. In any case, it seems that in products liability, more is expected of a producer, even though the same negligence standard is used.

98. Directive 86/653/EEC, OJ EC 1986, L382/17.

99. Directive 90/314/EEC, OJ EC 1990, L 158/59.

100. See *supra*, III.2.

An example of this trend can be found in the case of *Koolhaas/Rockwool*. The HR decided that when the producer of a certain fabric changes the structure of the fabric, he must not only inform the buyers of that fabric, who use the fabric to make certain goods, but also the buyers of *those* goods.¹⁰¹ Another example of the tendency towards a stricter standard regards the proving of a claim. In that respect, the plaintiff receives help from the courts. How far this helping hand reaches (whether it constitutes a complete reversal of the burden of proof – and if so, with regard to what elements of the claim – or only constitutes a limited rule on the use of presumptions) has not yet been made totally clear by the HR,¹⁰² and the literature is divided on the subject.¹⁰³ However, what is clear is that at least some of the relevant facts need to be proved by the defendant, and that fact in itself already makes liability stricter.¹⁰⁴ An example in this respect concerns the question as to the time the defect occurred. According to the Directive, the producer is required to prove that the product was not yet defective at the time it was put on the market. Under general tort law, the client used to have to prove that the defect existed before the product was put on the market. However, nowadays, even under general tort law, the producer is required to prove that the product was not defective when it was put on the market.¹⁰⁵

These developments should be contrasted with the path taken by liability based on the Directive. This form of liability seems to have moved towards a (more) fault orientated liability, leaving some of its strict liability features behind.¹⁰⁶ The net result would be that the two systems have grown towards each other. This is not at all strange, of course, since both liability systems have to operate within the same system of (tort) law, regardless of its (European) origins, and both are laid down in the same Code.¹⁰⁷

A similar trend towards stricter liability may be noticed with regard to *services liability*. Breach of the standard of care is determined on the basis of an objective criterion: has the provider acted as a reasonably competent provider of

101. HR 22 October 1999, NJ 2000, 159 with note ARB (*Koolhaas/Rockwool*).

102. To be precise: the case of HR 24 December 1993, NJ 1994, 214 (*Leebeek/Vrumona*) seems to point toward the use of presumptions with regard to the proof of the existence of a defect; the *Dicky Trading II*-case (HR 26 January 1996, NJ 1996, 607 with note WMK) seems to help the plaintiff with causation; and with regard to the subjective fault of the defendant, there is some discussion on whether there is a reversal of the burden of proof (based on HR 2 February 1973, NJ 1973, 315 with note HB (*Leaking water bottle I*) or whether there is only an obligation for a defendant to supply the plaintiff with materials with which he can try to start proving his claim (based on HR 6 December 1996, NJ 1997, 219 (*DuPont/Hermans*)). On this, see *supra*, II.4.

103. Giesen (2001), p. 218-220 (considering the element of wrongfulness), p. 227-229 (on causation) and p. 232-233 (with regard to the element of subjective fault), with further references, and Dommering-van Rongen (2000), p. 3 and 34.

104. See, for instance, HR 24 December 1993, NJ 1994, 214 (*Leebeek/Vrumona*), and on the increase of 'strictness' of liability rules in relation to changes in the rules on burden of proof, Giesen (2001), p. 466-467 en 468-470. Another example of more 'strictness' through the law of evidence is to be found with regard to causation, see the *Dev*-case dealt with below.

105. See Giesen (2001), p. 202 and p. 235, based on HR 24 December 1993, NJ 1994, 214 (*Leebeek/Vrumona*). An example of the opposite (old) solution is Hof Leeuwarden 21 December 1994, TvC 1995, 122 (*Zee/Batavus*).

106. See *supra*, II.1.

107. Cf. Hondius (1996), p. 329, claiming that cross-fertilisation will be easier if both sets of rules are integrated (in one Code).

that service would have acted in the circumstances of the case?¹⁰⁸ If such a breach is established, the resulting non-performance or tortuous act is – almost by definition – attributed to the provider on the basis of either fault or common opinion. The similarity to developments in the field of products liability is even stronger with regard to the proof of a claim.¹⁰⁹

Furthermore, there is currently a general trend to be found in Dutch liability (or at least: tort) law, at least in the case law of the HR, towards a greater protection of (personal injury) victims of ‘wrongful’ acts.¹¹⁰ This protection of victims could be stated in terms of consumer protection, since both basically cover the same (potential) group of victims. This ‘anti-personal injury’-development is not confined to products liability, but one of the major examples of this tendency does involve products liability concerning a medical product. In the so-called *Des*-case,¹¹¹ named after the drug by that name that was claimed to be defective¹¹² several victims sued several producers of the drug. Leaving the question of wrongfulness aside for the time being, the first issue that was raised concerned the question as to whether the claimants should sue all of the (old) producers of *Des* to be able to rely, as they wanted to, on the rule of alternative liability as laid down in art. 6:99 BW, reversing the burden of proof on the element of causation.¹¹³ The problem was that the claimants couldn’t do this because not all producers were still in business or traceable. The HR decided that it was not necessary to sue every producer, and that each of them could be held liable in full.

A second issue in that case was that, since (the mothers of) the victims could not prove whose drug was used, the claimants were not able to say which producer had caused what damage to which victim (the producers all sold an identical product). The HR decided that, since the right to damages should not be lost because of the mere fact that the claimants could not state whose medicine they had used, the defendants, *i.e.*, the producers, would have to prove that the damage was not due to the use of *Des* manufactured by them. The burden of proof with regard to the origin of the *Des*, therefore, rested with the manufacturers. At the end of the day (if we disregard the question as to whether the producers acted wrongfully), any of the victims of *Des* could call upon any (and

108. Cf. HR 9 November 1990, NJ 1991, 26 (Speeckaert/Gradener); HR 20 September 1996, NJ 1996, 747 (Beurskens/B. notarissen), and *supra*, III.1.

109. The *Dicky Trading II*-case, cited *supra*, II.4., is a case in which a claim was made against a notary. See further Giesen (1999), p. 66 ff.

110. See Hartlief/Tjittes (2001), p. 1473.

111. See HR 9 October 1992, NJ 1994, 535 with note CJHB (*Des*), and Asser-Hartkamp I, nos. 441 ff.; Dommering-van Rongen (1999), p. 144-145.

112. The drug caused a rare form of cancer, striking not the mothers taking the drug in the 1960’s to prevent premature childbirth, but instead, and years later, their daughters.

113. The rule basically states that if damage can be the consequence of two or more incidents for each of which a different person is liable and that damage is indeed caused by one of these incidents, all of these persons are obliged to repair the damage, unless the person proves the damage was not the consequence of the incident for which that person himself is liable. The burden of having to prove who actually caused the damage is thus taken away from the claimant. It is paramount, however, that all potential defendants acted unlawfully, see Hof Den Bosch 31 May 1999, KG 1999, 266 (Staat/De Goey), and Asser-Hartkamp I, no. 441a, and probably also that each could have caused the whole damage, see Giesen (2001), p. 352, footnote 315.

only one, if so desired) of the manufacturers of Des that were still in business or traceable, to claim her damages. Each of these manufacturers were jointly and severally liable for the whole of the damage, leaving the producer that is being called upon no alternative but to involve all of his known and traceable co-manufacturers into the proceedings.

As stated above, this consumer protection or victim orientated trend is broader than the area of products liability. The same seems to be going on in tort law in general, most notably with regard to areas such as traffic liability and employer's liability, but also with regard to the issue of causation, the burden of proof, recoverable (forms of) damages, and in the field of services liability. All these developments have made it easier and more rewarding, so it would seem, to sue.

A specific form of consumer protection in *contract law*, and therefore also applicable to the liability of providers of services towards their contractual counterparts, is provided by the legislation on standard contract terms, which was included in the 1992 BW. In standard contract terms used by providers of services, exemption clauses often appear. According to artt. 6:233 sub a and 237 sub f BW, such an exemption clause is presumed to be unfair and thus voidable when it is invoked against a consumer. More specific protection is offered by the regulations on *medical services*, where exemption of liability is not allowed in any situation (art. 7:463 BW). These provisions constitute mandatory law.

4.3 *Influences from abroad?*

The introduction of the European Directive on *products liability* was, and still is,¹¹⁴ of vital importance. After its introduction it has, among other things, been of great influence on the negligence standard used under Dutch national law.¹¹⁵ All in all, it seems to have made products liability law in the Netherlands stricter than it was.¹¹⁶ In this field, the United States rules with regard to products liability have also been of some influence, at least in doctrinal works in which a comparison is often made with that system.¹¹⁷ Along that line, German law seems to have become more and more important, being studied more often in this respect.¹¹⁸

With regard to *services*, it should be noted that the field of transportation and expedition services – which, in the Netherlands, is of significant importance – is

114. Current and future changes in the Directive, of course, need to be implemented in the national laws as well, as was, for instance, recently the case with the extension of the Directive to agricultural products, see Directive 1999/34/EG; Pb EG, L 141/20 and, for the Netherlands, *Kamerstukken II*, 1999/00, 27.051, nos. 1-2 ff., leading to the law of 29 November 2000, *Stb.* 2000, 493.

115. See *supra*, II.2.

116. In this perspective, the directive has had a 'spill-over'-effect. See on that effect Van Gerven (2001).

117. See, for example, Stolker/Westerdijk (1998), who base their claim that liability is getting less strict on that same development, most notably reflected in the American Restatements.

118. It might be of some significance that one of the leading works on products liability in the Netherlands (Dommering-van Rongen (2000)) compares with both the United States and Germany.

almost entirely governed by rules, based on international treaties.¹¹⁹ Like the rules on products liability, the regulations on distance selling, commercial agency, travel contracts, and the draft provisions on e-commerce are all based on European directives.¹²⁰ On a more theoretical level, the non-binding Principles of European Contract Law¹²¹ are becoming – at least in the academic world – more and more influential in the field of contract law and, to a lesser extent, in the field of tort law.

4.4 *Predictable future trends and developments*

Even though general tort law relating to *products* liability seems to be getting stricter as time goes by,¹²² we believe that the European Directive will probably not follow this trend. In Europe the debate on the Directive has recently been taken up again, resulting in a Green Paper and a Report, both issued by the European Commission, on the products liability Directive,¹²³ following a plea for a substantial revision by the European Parliament.¹²⁴ The Green Paper serves two purposes, firstly to seek information to evaluate the regime, and, secondly, to ‘test’ possible reactions to the most sensitive points that might be revised. Since the starting point of the Green Paper is that the balance found in the 1985 Directive needs to be retained, not much action may be expected.¹²⁵

This is affirmed in the Report following the Green Paper.¹²⁶ According to that Report,¹²⁷ it is not necessary to change the rules on proving a claim; introducing market share liability is not desired; the development risk defence generates too little data to say anything about it, as was the case with the prescription period; the franchise amount of 500 Euro seems sufficient and the caps on damages are high enough; an obligation to insure against products liability seems unwanted and unnecessary; product recall needs to be further examined; changing the rule on the liability of suppliers is not needed; an extension of the liability to immovable goods is not deemed necessary, and, apart from the fact that the compensation of

119. For example, the Geneva Treaty of 19 May 1956 on the international transportation of goods by road, *Tractatenblad* 1957, 84.

120. Directive 97/7/EC, OJ EC 1997, L 144/19 on distance selling, Directive 86/653/EEC, OJ 1986, L382/17 on commercial agency, Directive 90/314/EEC, OJ EC 1990, L 158/59 on travel contract, Directive 2000/31/EC, OJ EC 2000, L 178/1 on e-commerce, respectively.

121. Lando/Beale (2000). The same goes for the Unidroit-principles and several other international projects on contract and tort law.

122. See *supra*, IV.2. On the other hand, there is also a growing awareness that the label ‘strict liability’ in this respect does not always point to a real strict liability, see *supra*, II.1 and III.1. However, at least the negligence standard under general tort law has become more demanding for manufacturers.

123. See Green Paper Products liability (1999) and Report (2001).

124. See Report (2001), p. 6, and on the initial debate Frenk (1998), p. 305 ff.

125. Green Paper Products liability (1999), p. 18, after which the (6) principles that need to be retained are summed up. These principles seem to exclude, or at least greatly diminish the chances for almost any kind of reform.

126. Report (2001), p. 13. The Report is the Commission’s official reaction to the comments by several organisations on the Green Paper. See also *Kamerstukken II* 1999/00, 22.112, no. 134, p. 3.

127. Report (2001), p. 14 ff.

immaterial loss needs to be researched further, no changes with regard to damages are foreseen. The Report concludes that experiences with the Directive are still limited, no real problems are apparent, and the balance between the competing interests mentioned earlier needs to be retained. In a word, changing the Directive at this point is not high on the agenda of the Commission.¹²⁸ In our opinion, this suggests that, at the European level, there will probably be a *status quo* for some time.

Since the national laws are also, at least to a certain extent, bound by the state of the law as it was at the time the Directive was introduced (*e.g.*, introducing a new statutory regime on liability for (certain) products is not allowed), the trend on the national level towards more strict standards is not going to continue endlessly.¹²⁹ Apart from that trend, mention should be made of a few small statutory changes in the Dutch version of the Directive regime (*e.g.*, the need to include agricultural products under the regime of the Directive), which have recently been implemented in the Civil Code, most notably in art. 6:187 para. 1 BW. There are however, no imminent statutory (or other) changes planned on the national level that are significant enough to point to a specific direction for the law on products liability in the near future.¹³⁰

As for the field of *services*, mention should be made of a tendency that the liability rules seem to become more and more important and that these rules tend to become stricter as time goes by.¹³¹ In the absence of a harmonised law regulating services on both the European and the national level,¹³² more room for future development of the law seems possible. Yet, given the lack of initiative at both the national and the European level, it does not seem likely that the current trend in the law towards stricter standards will change dramatically in the foreseeable future. A further convergence between the rules on products liability and liability for services seems likely, however.¹³³

4.5 *Policy issues: arguments for liability and criticisms on the current rules*

With regard to *products liability*, the main arguments for (stricter) liability of the producer vis-à-vis the consumer seem to be the following: 1) Although it may be unavoidable, and, therefore, not anyone's fault, that occasionally a bad product leaves the factory, the consequences of this should be borne by the manufacturer

128. Report (2001), p. 30. The Dutch government agrees, see *Kamerstukken II*, 1999/00, 22.112, no. 134, p. 2 and 4.

129. See Dommering-van Rongen (2000), p. 16-17, and Giesen (2001), p. 196-198, with regard to rules on evidence and proof.

130. However, what could become important in the future for providing products and other risky activities, is the so-called precautionary principle, developed in environmental law. The precautionary principle implies that a party has to anticipate on dangers not yet known, in order to prevent damages from occurring. The principle would lead to rather strict standards in negligence with regard to the behaviour expected from, for example, a producer. See, for example, Mazeaud (2001), p. 72 ff, and Bergkamp (2001), p. 91 ff. Whether this principle will indeed settle in tort law, remains to be seen, however.

131. See *supra*, IV.2.

132. See *supra*, under III.3.

133. See *infra*, under VII.

since he is the only party capable of controlling in any way what leaves the factory; the consumer is not able to check products for safety. 2) The consumer is also without control over the situation in the factory; what goes on there is totally within the domain of the manufacturer. 3) That same manufacturer is also the person best able to prevent damage from occurring, and liability might persuade him to do whatever is necessary in that respect. Furthermore, 4) if a product is a source of danger of some sort, the producer should bear the risks of that danger materialising, and 5) the consumer is in need of specific protection. Finally, 6) the manufacturer is the one making a profit. The person that stands to gain from manufacturing a product should also be the one to bear the costs of manufacturing that product. Those costs include paying damages.¹³⁴

In cases where the proof of a products liability claim is troublesome, another important argument could be that 7) the protection that the rule of substantive law (for instance, the negligence standard) is willing to offer, should not go up in smoke only because (part of) the claim is very hard or impossible to prove. In such cases, the rules on (the burden of) proof should be relaxed or altered. The protection that the substantive norm offers should not be lost because of difficulties of proof.¹³⁵

Similar policies underlie the rules on liability for *services*. Specifically characteristic of services that are provided by professionals is the fiduciary nature of the relationship that often exists between the provider and the client or patient. The client or patient turns to the provider of the service because of his own lack of expertise; he is usually unable to ascertain whether or not the service is performed in accordance with his or her best interests and/or the standard of care that may be required.¹³⁶ One may recognise the first and second argument, put forward for products liability, in these considerations. Occasionally, certain interests can only be pursued if specialised providers of services are called in; using their services is mandatory if the client wants to achieve a certain result.¹³⁷ When the provider betrays the trust the client or patient has thus invested in him (whether voluntarily or not), he should bear the consequences thereof. However, since the client or patient can hardly ascertain, let alone prove, that the standard of care has been breached, the substantive rule is in peril of going up in smoke. From these considerations, it follows that the seventh argument put forward with regard to products liability, *i.e.*, preventing that the protection the substantive rule offers goes up in smoke, appears to be predominant in the field of services.¹³⁸ Yet, the idea that if a danger is created by a party, he should bear the consequences of materialisation of that risk, especially if a profit is made as well by exploring the

134. For an overview, see Giesen (2001), p. 238-240, with further references. Mention is also made of the fact that insurance coverage is easily attainable for a producer.

135. See Giesen (2001), p. 239, applying this argument to defend a reversal of the burden of proof with regard to causation after a breach of the producer's duty to warn has been established, and p. 449 ff. in general.

136. Cf. Giesen (2001), p. 246.

137. For instance, the services of a notary are required with regard to the transfer of property of immovable goods, or with regard to the drafting of prenuptial agreements; the services of a solicitor are required with regard to a claim being brought forward before a court, see Giesen (2001), p. 246.

138. Cf. Giesen (1999), p. 69-70 and Giesen (2001), p. 245.

activity in question (nos. 4 and 6), and the fact that the provider of the service is usually in the best position to take precautionary measures to prevent such a risk from materialising (no. 3), also play a role.

Stating, on the basis of the foregoing, that consumer protection (no. 5) is the dominant policy is, in our view, not entirely correct. Certainly, consumer protection is one of the leading policies within the European Union. However, in our view, consumer protection itself is a policy choice that requires justification: the question of *why* consumers should be protected is not answered by stating *that* they should be. However, we believe that the other arguments put forward above do supply the answers needed.

With regard to the criticisms offered, it is remarkable that, according to consumer organisations, the Directive on *products liability* does not go far enough, and should be changed, whereas the producers' lobby argue that the Directive goes far enough, or even too far, as it is.¹³⁹ On the whole, *fundamental* criticism seems to be almost absent in the Netherlands.¹⁴⁰ Effectively, however, the Directive does seem to have failed, at least in the sense that it has not minimised the uses and roles of the different national laws in the area of products liability, with the result that many of the old differences still exist and harmonisation has not been fully attained. The reason for this is probably that the Directive is not all that much more 'consumer friendly' than the national laws (*e.g.*, with regard to the proof of a claim), while the national laws are more familiar to the lawyers dealing with products liability claims, and may even provide better chances of recovery of certain types of damage.¹⁴¹

On the national level, there does not seem to be a major debate going on about products liability. Hence, there are no major criticisms or policy concerns. After the initial rush to devote time and attention to the subject, especially in the 1980's and early 1990's, the subject has been somewhat discarded, so it seems, probably as a consequence of the poor reception and use in practice of (especially the Directive-based) products liability.¹⁴²

With regard to *services liability*, it has been argued that the lack of a common legal framework on both the national and the European level has stood in the way of the development of a Law of Services, and that, as a consequence, 'the' law of services is fragmented and not suitable for harmonisation. On the other hand, one could argue that since there is not much unity even on a national level, it might be wise to start from scratch and to develop, on the basis of a functional analysis of different types of services, a new and unified Law of Services for the whole of the European Community.¹⁴³

There are, as far as we know, no real hard and fast empirical or statistical data available sustaining or denying the claim (and concern) that the current system of liability for *products* and *services* influences prices and competitiveness within Europe. With regard to products liability, the Report following the Green

139. See Arnokouros (2001), p. 14; Report (2001), p. 11.

140. See Hondius (1996), p. 327-328. According to Arnokouros (2001), p. 14, the Directive has met with criticism elsewhere, usually from consumer representatives.

141. Report (2001), p. 8-9; *Kamerstukken II* 1999/00, 22.112, no. 134, p. 3. See also *supra*, II.5.

142. Cf. Hondius (1996), p. 325; Arnokouros (2001), p. 14.

143. Cf. Loos (2000), p. 453-454.

Paper of the European Commission establishes that such a negative influence is indeed absent. The argument is that, at least within Europe, the law of products liability should have no more than a limited influence on competitiveness because the law has been harmonised with the implementation of the Directive, and those rules are also applied to producers from third countries putting their goods on the European market.¹⁴⁴ European producers moving goods to countries with products liability laws akin to the Directive have no problems either. A special case is the United States. Since its laws and practices in this area and the area of tort law in general are quite different, export of goods to the US is undertaken less than it could be, or so it is claimed.¹⁴⁵

5 The institutional and procedural environment

5.1 Institutions: 'courts' and judges

At this moment, at the level of rules on liability law, there are no special rules for special categories of *products* in force in the Netherlands.¹⁴⁶ However, at the level of (legal) requirements that certain products have to meet (such as product safety requirements for food supplies and other products), there are a number of different rules for different products in various laws. Since not respecting these rules will probably constitute a tortious act,¹⁴⁷ these rules are important for liability purposes as well.

The *Keuringsdienst van Waren* (Inspectorate for Health Protection and Veterinary Public Health) is chief among the organisations charged with the enforcement of such requirements. It enforces and promotes compliance with regulations for foodstuffs, consumer goods, and veterinary matters, and is, as such, competent to investigate health hazard situations and consumer complaints regarding, among other things, product safety. It is authorised to give an oral or written warning to a company that has produced an unsafe good, to give that company a fine, or, in exceptional cases, in co-operation with the public prosecutor, to close down the company for a period of time. In cases of direct threats to consumers, the company may be obliged to recall its products, and to warn consumers by issuing a public warning in national and regional newspapers. However, the *Keuringsdienst van Waren* does not provide remedies to injured individuals.

Criminal law only has a limited influence in the area of products liability. If putting a product on the market is to be considered a criminal offence, the tortious nature of that act is automatically established.¹⁴⁸ If a case is prosecuted and both the criminal nature of the act and the accountability of the defendant have been established, the criminal court has the discretionary power to oblige the

144. Report (2001), p. 9. See also *Kamerstukken II 1999/00*, 22.112, no. 134, p. 3.

145. See Report (2001), p. 9-10.

146. See (the Proceedings of Government and Parliament in) *Kamerstukken II 1999/00*, 22.112, no. 134, p. 3.

147. Dommering-van Rongen (2000), p. 63 ff. On the European developments in this area of product safety, see Arnokouros (2001), p. 10 ff.

148. Cf. Asser-Hartkamp III, no. 6.

perpetrator to pay damages to the State on behalf of the victim, art. 36f Criminal Code provides. Upon reception of the money, the State immediately has to pay this to the victim. The award of damages under art. 36f Criminal Code is not meant as a criminal penalty to punish the perpetrator but rather as a 'measure', meaning that inflicting (financial) harm on the perpetrator is not the object of the sanction but rather a by-product.¹⁴⁹ The idea behind this procedure is that the victim need not be forced to go to court himself, neither to establish the ground for liability, nor to claim performance of the monetary obligation if the perpetrator refuses to pay.¹⁵⁰ The award of money under art. 36f Criminal Code does not prevent the victim from subsequently claiming damages before the civil court, although no more will be awarded than the damage he sustained.¹⁵¹

Alternatively, the victim may join the criminal suit against the perpetrator under art. 51a Criminal Procedure Code. Before 1995, such a procedure was only possible if the total sum claimed by the victim did not exceed DFL. 1,500 (680 Euro), in order to prevent cases that were too complex to decide annex to the criminal case. In the 1995 law reform, meant to strengthen the position of victims in criminal proceedings,¹⁵² the DFL 1,500 limit was dropped because it was recognised that the complexity of a civil claim usually does not depend on the amount claimed but on other elements.¹⁵³ However, relative simplicity of the claim is still required.¹⁵⁴ The victim may opt to *partially* join the criminal suit, for instance, by only claiming the material damage in the criminal case and to claim compensation for non-pecuniary loss before the civil court, or by claiming the undisputed damage in the criminal case, and to claim further damages before a civil court.¹⁵⁵

Notwithstanding the foregoing, products liability cases are still primarily decided by civil courts, and in the Dutch legal system, cases are not decided by juries but by judges. Alternative Dispute Tribunals, such as arbitrary courts or *geschillencommissies*, may consist in whole or in part of persons that are not lawyers but do not decide on products liability cases.

The picture is quite different when one looks at liability for *services*. Many cases are decided by courts, but – especially where consumers are involved – alternative dispute resolution has proven to be a good alternative for claims against providers of services.¹⁵⁶ Small claims usually are decided by *geschillencommissies*. In such a *geschillencommissie*, consumer organisations and business sector are equally represented. Cases are usually decided on the basis of 'reasonableness and equity'. A *geschillencommissie* may only assume competence

149. T&C Strafrecht/*Hofstee*, nos 2b and 3 at art. 36f.

150. Which is not uncommon, cf. Hazewinkel-Suringa/Rommelink (1996), p. 652-653.

151. T&C Strafrecht/*Hofstee*, no. 2f at art. 36f.

152. As was the introduction of art. 36f Criminal Code mentioned above, introduced by the same Act of 23 December 1992, Stb. 1993, 29. Both regulations went into force 1 April 1995.

153. Cf. Corstens (1999), p. 79; T&C Strafrecht/*Hofstee*, no. 2c at art. 36f.

154. Cf. art. 361 para. 3 Criminal Procedure Code; see further Corstens (1999), p. 78; T&C Strafvordering/*Van Asbeck*, no. 4 at the Introduction to Title IIIA.

155. Cf. art. 51a para. 3, Criminal Procedure Code; see further Corstens (1999), p. 79; T&C Strafvordering/*Van Asbeck*, no. 4 at art. 51a.

156. See especially Jacobs (1998) and, comparing *geschillencommissies* with arbitration, Loos (2000b).

if the consumer explicitly adheres to its decision.¹⁵⁷ A decision by such a *geschillencommissie* is seen to 'explain' the content of the contract and, as such, becomes a part of the original contract.¹⁵⁸

5.2 Procedures: collective action, discovery proceedings and experts

Class actions, as familiar in the American legal system, do not exist under Dutch law. However, Dutch law does recognise the possibility of *collective action* under art. 3:305 a BW. Under this article, a foundation or association may bring a claim against a party (e.g., a producer or service provider), provided that such claim also protects similar interests of other persons, that the foundation or association, according to its articles of association, is committed to further these interests, and that it could not achieve the desired result through consultation with the defendant. In the proceedings, the wrongfulness of the act committed by the defendant may be established, as well as – on an abstract level, of course – whether there is a causal link with the damage sustained by the victims of the wrongful act. Para. 3, however, explicitly provides that a collective claim for *damages* is not admissible. A group of plaintiffs therefore cannot claim damages as a group (as a legal person, such as a foundation), but can apply for a declaratory ruling that the defendant is liable. To actually receive compensation, all plaintiffs must act on their own (although a combined statement of claim is possible).¹⁵⁹ In effect, the collective action, therefore, may prepare a future claim of an individual plaintiff, leaving to the latter procedure primarily the establishment of the concrete damage sustained.¹⁶⁰

Discovery as it is known in the United States or England does not exist in the Netherlands. Of course, witnesses can be questioned,¹⁶¹ video and sound tapes can be used, etc.,¹⁶² but a general discovery-like procedure to obtain documents from the opposing party to be used in evidence is not known in the Netherlands. To a foreign lawyer, this may have a few (rather striking) consequences. Under Dutch law, for instance, a party is not generally required to volunteer documents that would be damaging to his case. Furthermore, there does not seem to be any general rule obliging either party to produce all documents relating to the proceedings in his possession.¹⁶³ Instead, the parties are basically supposed to do

157. See also art. 6:236 sub n BW, which declares unfair a clause forcing the consumer to turn to such a *geschillencommissie*. In certain areas, especially with regard to the services of building contractors and architects, *arbitration* – often without the possibility to turn to a civil court – is more common. See, with criticism regarding the absence of the possibility to turn to a civil court, Loos (2000b).

158. See artt. 7:900 ff. BW.

159. See Dommering-van Rongen (2000), p. 193 ff.

160. Cf. Dommering-van Rongen (2000), p. 103 ff.

161. Questioning of witnesses takes place in a hearing led by a judge, see artt. 189-213 Rv.. The hearing of a witness can also take place before the real proceedings have commenced, see art. 214 ff. Rv. The judge, the lawyers, and the parties themselves are allowed to ask questions, see art. 205 Rv.

162. Important in this respect is that, under Dutch law, facts can be proved by all means, unless the law expressly states otherwise, see art. 179 para. 1 Rv.

163. There is some discussion on these principles, however, see Giesen (2001), p. 20 ff.

their fact-finding themselves in the pre-trial stages with the court later on, which has some (discretionary) powers in this respect. The parties thus have to find out for themselves whether the opposing party has any relevant materials in his possession.¹⁶⁴

However, the court does have some discretionary powers to force a party to supply both the court and the opponent with documents, even if those documents are damaging to that party's case,¹⁶⁵ the difference with, for instance, the system in the United States is not as great as one might be led to believe. These powers are conferred upon the court by the Code on the Law of Civil Procedure (*Wetboek voor Burgerlijke Rechtsvordering*, hereafter referred to as Rv.), which is currently being revised, for example in art. 19a Rv.¹⁶⁶ Art. 843a Rv. might be relevant in this respect as well. However, effective discovery rights seem to be lacking if one compares the Dutch system with the United States.

With regard to the use of expert opinions, it is important to note that each party can hire his own expert, without consulting the opponent, but whenever that happens, the opposing party will either do the same, so that some sort of a 'battle of the experts' ensues, or the opposing party will, at least, seriously question all the evidence the expert presents. To decide the case at hand, the court will then probably have to call in 'its own' expert, although it is allowed, in principle, to use a report in evidence that was drawn up by an expert hired by only one of the parties.¹⁶⁷ The parties can also call in an expert together, on the basis of an agreement between them, without involving a court. Questioning the results that such an expert obtains in a later stage of the proceedings will be rather difficult. The court will be inclined to highly value the evidence gathered by the expert.¹⁶⁸

In general, at the request of one of the parties or on its own initiative, the court may appoint one or more experts, and ask them questions (orally or in writing) relating to the subject matter of the procedure (art. 221 Rv.).¹⁶⁹ The appointed expert is required by law to be impartial (art. 222 para. 2 Rv.). On the basis of the right to a fair trial,¹⁷⁰ the court will have to consult the parties before using his powers in this respect. Equally important here is that the expert should enable the parties to hand in remarks or requests (art. 223 para. 5 Rv.). An expert can also be brought in before the official procedure has started, see art. 227 Rv.

5.3 *Representation: lawyers and fee arrangements*

In civil courts, as of the level of the District Court, a party may only be represented in court by a lawyer.¹⁷¹ Regarding personal injury cases, there is an

164. On the (im)possibilities of the fact-finding process in the Netherlands, Giesen (2001), p. 17 ff.

165. A party can be forced to supply evidence against his own case, see HR 12 June 1953, NJ 1954, 61 with note DJV (Blood test).

166. See also the broader wording of art. 1.3.4 Rv. (draft).

167. See art. 179 Rv. and Van Dort (2001), p. 32-33. Under the new rules of Civil Procedure, the opposing party will be granted the opportunity to directly question the expert hired (only) by the other party, cf. art. 2.8.46 Rv. (draft). This will probably stimulate the use of party appointed experts, see Van Dort (2001), p. 35.

168. Van Dort (2001), p. 33.

169. See *inter alia* Van Dort (2001), p. 33-34.

170. See art. 6 European Convention on Human Rights.

171. See art. 133 and 137 Rv.

association of lawyers in the Netherlands specialising in the field of personal injury law, the so-called *Vereniging voor letselschade-advocaten* (LSA). Their main area of expertise, given the vast number of cases to be dealt with, is traffic accidents, but the members also work in the field of employer's liability, professional (mostly medical) liability, and products liability. They basically cover the whole of liability law.

The typical fee arrangement for lawyers in the Netherlands is payment on an hourly basis. However, there is discussion about 'no cure, no pay' arrangements. So far, these sorts of arrangements are not allowed in the Netherlands, and the Ministry of Justice is not inclined to change this. Yet, the European and Dutch rules on competition law might be opposed to precluding such arrangements.¹⁷²

6 The reality of litigation and compensation

6.1 *The frequency of settlements and litigation*

Although it is hard to tell without more objective data, the conclusion that settlements play a major role in the area of *products liability* and in tort law in general is, at least in the Netherlands, almost inescapable. A very large percentage of claims – up to 90% – seem to be settled out of court.¹⁷³ For products liability, the following comes to mind. Given the rather vast number of product recalls and given the fact that, before a recall is ordered, the product probably caused damage somewhere, the total amount of litigation for damages is quite low.¹⁷⁴ This would justify the conclusion that most cases are probably sorted out through a settlement before they ever get to court. The same probably applies to the liability of *service providers*.¹⁷⁵ It remains to be seen whether this is entirely true, however, because another important aspect could also be that people in the Netherlands are unwilling to claim damages, especially if one compares to, for example, the United States.¹⁷⁶

The total number of claims – or at least: the number of judicial decisions – on products liability is small.¹⁷⁷ This is probably due to the fact that, as soon as a manufacturer discovers the slightest possible defect in one of his products, a product recall is instituted. In this light, it is hardly surprising that the number of

172. On this ongoing debate, see Dommering-van Rongen (2000), p. 197-198.

173. Cf. Spier (1996), p. 237. Dutch and German insurers mention the 90% of product liability claims that are dealt with out of court, see Report (2001), p. 10. The same Report (2001), p. 13, states however, that systematic statistical data on products liability are on the whole absent. The Dutch government also estimates that 90% of all claims are settled, see *Kamerstukken II 1999/00*, 22.112, no. 134, p. 4. Weterings (1999), p. 109-110, states that around 95% of the claims is settled. He does not specifically deal with products liability, however.

174. See also below.

175. A settlement rate of around 95% is mentioned for medical liability, see Weterings (1999), p. 110, note 7.

176. However, the tendency to claim for losses suffered and to search for possible defendants does seem to grow stronger in the Netherlands these days, cf. *Kamerstukken II 1998/99*, 26.630, nr. 1.

177. Report (1995), p. 2; Dommering-van Rongen (1999), p. 135; Hondius (1996), p. 325; Howells (1998), p. 458; Arnokouros (2001), p. 14; Spier (1996), p. 235 and 237. Groffen (1993), p. 393, expected more suits to be filed, but that has not come true.

actions undertaken in the field of recalls has risen.¹⁷⁸ Without doubt, the most visible consequence of the emergence of products liability in the Netherlands is the rise in advertisements in newspapers calling on consumers to return products because there might be something wrong with them. The fact that the producer is under a legal duty to act (*i.e.*, to warn or to take the product of the market) is generally acknowledged and accepted.¹⁷⁹

The relative lack of products liability claims reaching the courts might also be due to the fact that since the market for many products is usually rather international, most producers tend to take the precautions needed for the most demanding market (which would most probably be the US market). Therefore, they take more precautions than needed according to Dutch law, thus preventing further accidents and claims. It might also be that there is, in Europe in general, a tendency to demand more of manufacturers in the area of product safety than is required in other areas of the law, and manufacturers may have lived up to these high standards.¹⁸⁰ Other explanations might be that social security and insurance benefits provide enough compensation to keep victims from suing manufacturers,¹⁸¹ or that the rules on products liability are clear, which would facilitate negotiations and settlements, thus preventing those claims from going to court.¹⁸² Of course, there is also the practical point that a company might be inclined to give in more easily for fear of losing goodwill if the company's attitude is all too harsh with regard to the handling of claims (*i.e.*, not (fully) compensating damages).¹⁸³ At least with regard to the number of product recalls, the fear of losing some of the goodwill seems to be rather decisive.¹⁸⁴

There is no evidence that the number of lawsuits has risen after the introduction of the European Directive.¹⁸⁵ Maybe an increase in number of lawsuits will follow in the next few years because of the growing attention for claims against tobacco producers¹⁸⁶ – though this will largely depend on the success of the first claims in this area, which are presently being issued – and the fact that a claim for defective agricultural products will be possible from now on.

178. Spier (1996), p. 33; Rosenthal (2001), p. 71; Dommering-van Rongen (2000), p. 98.

179. See Dommering-van Rongen (1999), p. 145, as well as Dommering-van Rongen (2000), p. 97 ff., on the legal basis of such recall duties, and, for instance, Rb. Alkmaar 30 December 1999, NJ 2000, 728 (Vlaar/Polderman), stating that the recall of defective cars (the defect showing up in certain serial numbers) should not be confined to informing the (present day) dealers of that car branch, but should also be aimed at informing all buyers of a car with those serial numbers. See also HR 2 May 1997, NJ 1998, 281 with note MMM (Forbo/Centraal Beheer) stating that not issuing a warning could make the producer liable. More reluctant towards accepting recall duties is Spier (1996), p. 244-245.

180. See Report (2001), p. 11.

181. See *infra*, VI.3, and *Kamerstukken II 1999/00*, 22.112, no. 134, p. 4. A hint in that direction might also be that, as is claimed, insurance premiums for producers went up 15% after the introduction of the Directive, see Groffen (1993), p. 392.

182. Cf. Amokouros (2001), p. 14.

183. Cf. Report (2001), p. 10.

184. See Spier (1996), p. 244.

185. Cf. Spier (1996), p. 33; Dommering-van Rongen (2000), p. 202-203. See also the remarks of the European Commission, Report (1995), p. 2, and Groffen (1993), p. 393.

186. Cf. Jaarverslag 2000 PIV, p. 5. See on tobacco claims, amongst others, Keirse (2000) and Dommering-van Rongen (2000), p. 115 ff., and Hof Leeuwarden 25 October 2000, NJkort 2000, 98 (Ter Schegget/Niemeijer), dealing with preliminary questions on tobacco liability.

6.2 *The size of awards, especially for non-pecuniary losses*

Art. 6:106 BW provides states that if a victim has sustained physical harm, he is also entitled to compensation for non-pecuniary loss (damages for pain and suffering; *smartengeld*). The amount thereof is to be established by the (lower) courts on the basis of equity.¹⁸⁷ In determining what amount is to be awarded, all circumstances need to be taken into account.¹⁸⁸ In a case decided in 1992, the HR stated the following are especially relevant here: on the one hand, the nature of the liability,¹⁸⁹ and on the other hand the nature, duration and intensity of the pain, the suffering and the loss of 'joy of life' sustained by the patient which follow from the act on which the liability is based.¹⁹⁰ The court must further take notice of the amount awarded by other courts in comparable cases, including the highest amounts awarded, taking into account the inflation rate since these cases were decided. The court may also take into account developments regarding the amounts of compensation in other countries, albeit that such developments may not be decisive for the amounts to be awarded in the Netherlands.¹⁹¹ In practice, courts, lawyers, and insurance companies use the *Smartengeldbundel* as their point of reference. The *Smartengeldbundel* is published every three years and contains a listing of amounts of compensation for non-pecuniary damages awarded by courts over the years.¹⁹² Generally, the level of compensation for non-pecuniary loss awarded is not all that high,¹⁹³ with claims not exceeding DFL 250,000 (113,445 Euro) for the more severe cases.¹⁹⁴ The highest amount was awarded in 1992 in a case of (wrongful) contamination with the HIV-virus; the amount awarded was DFL 300,000 (136,134 Euro).¹⁹⁵ There is not really a trend towards higher awards,¹⁹⁶ at least not if one makes allowance for the fact that awards rise to compensate for inflation.¹⁹⁷

187. The HR does not touch upon the amount of compensation that is awarded for non-pecuniary losses by the lower courts, see HR 8 July 1992, NJ 1992, 770 (AMC/O.), and HR 17 November 2000, NJ 2001, 215 with note ARB (Druijff/B.C.E. Bouw).

188. Cf. HR 17 November 2000, NJ 2001, 215 with note ARB (Druijff/B.C.E. Bouw).

189. For instance: tortious or contractual liability, fault-based or strict liability, or the specific type of liability (employer's liability, traffic liability, products liability or services liability).

190. Cf. HR 8 July 1992, NJ 1992, 770 (AMC/O.). To that extent also HR 17 November 2000, NJ 2001, 215 with note ARB (Druijff/B.C.E. Bouw), a case in which the liability of a building company towards his wounded employee was invoked. See also Lindenbergh (1999), p. 131-132.

191. Cf. HR 17 November 2000, NJ 2001, 215 with note ARB (Druijff/B.C.E. Bouw).

192. Cf. Weterings (1999), p. 93. The latest (14th) edition was published in 2000 by ANWB, The Hague (ed.: M. Jansen). The alternative formula used by the Association of Insurance Companies (*Verbond van Verzekeraars*), dating back to 1984, is not generally accepted, and appears not to meet the justified interests of the victim. Still, in practice it is used, especially when the *Smartengeldbundel* only contains a few rulings on a specific type of cases. Such is, for instance, the case with temporary, small injuries (claims below DFL 1,500, *i.e.*, below 681 Euro). Cf. Weterings (1999), p. 93-94.

193. Cf. Weterings (1999), p. 92.

194. Cf. Lindenbergh (1999), p. 129 ff.

195. HR 8 July 1992, NJ 1992, 770 (AMC/O.). Cf. Lindenbergh (1999), p. 129 and 133.

196. Dommering-van Rongen (2000), p. 203. See also Groffen (1993), p. 393.

197. From HR 17 November 2000, NJ 2001, 215 with note ARB (Druijff/B.C.E. Bouw), it becomes clear that the court must take the inflation rate into account when comparing an earlier case with the present claim.

6.3 *Liability and insurance*

Considering *loss of income* due to personal injury and first party insurance, we must note that the level of benefits under different forms of social security, *i.e.*, employees insurance (insurances for employees employed in the Netherlands) and national insurance (mandatory insurances for the entirety of persons living in the Netherlands), is diminishing in the Netherlands, but is still rather generous compared to other countries.¹⁹⁸ People suffering personal injury will receive sick pay (70% of the last-earned wages) during the first year of their sickness, based on the *Ziektewet* (Sickness Benefits Act) and art. 7:629 BW.¹⁹⁹ After that period, if still sick, an employee will receive a benefit under the *WAO* (Disablement Insurance Act) or, occasionally, welfare based on the *Algemene Bijstandswet* (National Welfare Act). A lot of people have taken out a supplementary (first party) insurance to receive a higher percentage of their last salary when they have to fall back on the *WAO*. On account of this system, personal injuries (due to whatever cause) usually do not lead to an extreme loss in earnings for the victim. Loss due to unemployment, which could in the end also be a result of an accident, is covered by the *WW* (Unemployment Insurance Act), the law on unemployment benefits.

With regard to *medical expenses*, these are usually covered by a (first party) health insurance that is either taken out on a private basis (above a certain minimum wage) or on the basis of the *Ziekenfondswet* (Public Health Insurance Act). This insurance is not specifically aimed at sickness due to unlawful behaviour but covers those situations as well.

⁵ Damage to *property* is quite often covered by an *inboedelverzekering*,²⁰⁰ an insurance aimed at insuring against the risk a loss of property from one's house, due to theft or fire, and the like. This is also a first party insurance. As a result, most damages in products liability cases are covered by first party insurance, except maybe for the cost of a product recall (pure economic loss) and the loss of (a company's) goodwill. Liability insurance might be available for those kinds of damage, however.²⁰¹

In contrast, most damages resulting from faulty services, being mostly *pure economic losses*, are not covered by a first party insurance, except for medical liability leading to personal injury. This might indeed explain why liability of service providers such as notaries, accountants, and lawyers is a bigger issue in case law than products liability; people have to sue for reimbursement of their pure economic loss due to the fault of a service provider because no first party insurance covers these losses.

A counter indication against this educated guess might be found, however, if we take a look at damages for *pain and suffering*. This kind of damage would seem to be rather common in products liability cases but, with the exception of

198. And highly important, since more than 50% of the damages (personal injury and death) suffered in the Netherlands is covered by social security, according to Vranken (1991), p. 414.

199. In practice, the amount is usually contractually supplemented by the employer up to 100 % of the normal wages.

200. Cf. Vranken (1991), p. 414.

201. See below.

medical services, not in service liability cases, and it is not covered by any average first party insurance. This might be an indication that people would also want to sue manufacturers, at least for their damages in pain and suffering, but apparently, this is not the case. An explication given in parliamentary proceedings is that suing (mainly) for pain and suffering may not be seen as worthwhile by victims.²⁰²

Virtually all professional providers of services are insured against liability (towards third parties). Companies manufacturing and selling products, even if they are relatively small, have all taken out liability insurance as well. The so-called AVB (Liability Insurance for Companies), which is very common in the Netherlands, in general also covers products liability. Whether the costs of a product recall, a form of pure economic loss, are also covered by this AVB is uncertain.²⁰³

So far, direct action against the liability insurer of the wrongdoer is quite rare under Dutch law. The possibility of such an action exists if the case involves a traffic or hunting accident.²⁰⁴ However, in the near future, something akin to a direct action, although not completely the same, will become a general possibility for a victim of a tort if the case involves death or personal injury. Therefore, for products liability, and for some forms of professional liability, this action will become relevant. Art. 7:17.2.9c BW (draft) will introduce this action in the Civil Code.²⁰⁵ As stated, this is not a proper direct action, but its workings are similar.²⁰⁶ It is too early to tell whether this type of action will be used, but the chances of just that happening are relatively high, given the advantages.

With regard to recourse, first party insurers paying for lost earnings, damaged goods, and medical expenses of the victim will try to get compensated (and exercise their right to recourse) if the amounts are large enough, and almost always do so if a company is the wrongdoer.²⁰⁷ They will then turn to (the insurer of) the person that acted unlawfully, especially if there is a liability insurer on that side, which is usually the case. Mention should be made, however, that such recourse is generally not possible if the claim is based on art. 6:185 BW. The rule of art. 6:197 BW (the Provisional Rights of Recourse Scheme, stating the temporary but still valid rule on the absence of a right of recourse) forbids recourse by the first-party insurers if the claim is based on art. 6:185 BW.²⁰⁸

202. Cf. *Kamerstukken II* 1999/00, 22.112, no. 134, p. 4. On other reasons for lack of claims, see *supra*, VI.1.

203. Dommering-van Rongen (2000), p. 104; Groffen (1993), p. 392.

204. See art. 6 para. 1 of the WAM (the Motor Liability Insurance Act) and art. 12b para. 1 of the *Jachtwet* (the Hunting Act).

205. See the Parliamentary works introducing the new Law on Insurance Contracts, being integrated in the BW, at *Kamerstukken II*, 1999/00, 19.529, no. 5, p. 6-7 (the proposal), and p. 32-41 (comments from the government on the proposed rule).

206. The difference being that while under a direct action the insurer cannot raise vis-à-vis the victim those defences it might have against its contractual counterpart (*i.e.*, the tortfeasor), such as a defence of suspension of coverage, this will be possible under the new insurance scheme to be enacted in art. 7:17.2.9c BW (draft).

207. According to Vranken (1991), p. 414, this does not happen very often, only in 0.5% of the cases.

208. *Kamerstukken II* 1999/00, 22.112, no. 134, p. 4; Van Dam (2000), no. 1306; Dommering-van Rongen (1999), p. 137; Report (2001), p. 11. The reason for introducing this rule was the fear that allowing recourse next to the introduction in 1992 of several strict liabilities, such as art. 6:185 BW, would lead to too many claims for too high amounts.

Claiming on the basis of art. 6:162 BW, however, is a possibility to get recourse anyway.

The liability insurer of the defendant has no one to turn to, except in a case involving several possible defendants and insurers. In these cases, the first party insurers will probably have called upon those other possible defendants as well if the claim is big enough. If the liability insurer of the person acting unlawfully has paid the claimant directly (for instance for pain and suffering), and suspects there is another possible defendant, he will try to get this party (or his insurer) to pay part of the damage.

6.4 *Publicity on products liability claims*

Some big stories dealing with defective products draw a lot of attention, such as the *Planta*-affaire, the *Exota*-affaire, the famous *Des*-case, and, more recently, claims against the tobacco industry.²⁰⁹ For the most part, however, products liability does not really seem to draw a lot of attention in the Netherlands. Politicians, as always, only take an interest in products liability in those cases where exposure to publicity is high,²¹⁰ trying to reap some political benefits. Consumer groups tend to be more and more permanently interested and are rather alert to signs of mishaps. Their active involvement in dangers arising from defective products is probably one of the reasons why product recall has gained so much importance over the years.²¹¹

7 **Convergence between products liability and liability of service providers?**

A question not covered so far but indeed interesting and lurking in the background of the topic under discussion, is whether there is a trend towards greater harmony between products liability and liability for services. Such a trend could be brought about if service providers' liability moved into the direction of products liability, where the demands are higher and standards are stricter. Yet, at least in theory, it could also be brought about by a change in the approach to products liability, moving closer toward the liability accepted for providers of services.

Indeed, some trends are noticeable, especially in doctrinal works, which lead us to believe that there is a growing convergence between products liability and liability for defective services.²¹² Most notable are the similarities in the area of duties to inform. Van den Akker²¹³ argues that the work of a notary public and an accountant is in a way comparable to putting a product on the market: in both

209. Dommering-van Rongen (1999), p. 135; Dommering-van Rongen (2000), p. 202.

210. Such as those mentioned before.

211. See *supra*, VI.1.

212. The convergence meant here is not confined to the Netherlands, see, for instance, Cane (1999), p. 86-87, wondering why the rules for defective products should be different from those for defective services and claiming that the borderline between products and services is not clear, and the references in Giesen (2001), p. 231, note 267.

213. Van den Akker (2001), p. 164.

cases, they have to live up to the standard of offering as much 'security' as can reasonably be expected. She thus uses the products liability argument to justify a greater responsibility – and therefore stricter liability – for service providers.

Dealing with a service provider's duty to examine, Barendrecht and Van den Akker²¹⁴ conclude that this duty is far more established for producers than for service providers. A producer needs to produce evidence that the scientific and technical knowledge at a certain point in time was such that the defect could not have been discovered. his duty to examine the existing situation goes further than that of a service provider, at least as far as personal injury situations go. Yet, the authors argue that it could very well be that, given this state of affairs, service providers will have to deal with more demanding duties in the future.

Giesen argues, that when dealing with the burden of proof, the duties to inform resting on a service provider are not all that different from those same duties resting on a producer. He concludes, therefore, that the rule that places the burden of proof on the service provider when dealing with causation after a duty to inform has been violated could and should also be used when dealing with broken duties to inform resting on a producer.²¹⁵ He argues that a rule from the area of service providers should be transplanted to the area of products liability. To be sure, this does not entail a relaxation of the standards for products liability since this would lead to a reversal of the burden of proof.

In his case note under *Koolhaas/Rockwool*, Bloembergen²¹⁶ also stresses the similarities between the negligence standard in products liability cases and that in cases of liability of service providers. This possible convergence between products liability and liability of service providers has also been dealt with, although more implicitly, by Dommering-van Rongen.²¹⁷ She treats it as a demarcation issue since products involve a strict liability regime whereas services do not (fault-based liability). Therefore, an important question is what constitutes a product and what does not.²¹⁸ Stressing the line of demarcation between the two, she seems to deny any trend towards convergence of standards.

All in all, the signs of greater convergence are there, but they are not all that strong yet. A far stronger sign could be given by the European Commission if she were to decide to extend the products liability Directive towards services. Just now, a proposal to that extent appears to be under consideration.²¹⁹ Support for adopting such a solution might be found in the rather vast number of similarities that were uncovered when comparing the major policies underlying the rules on liability of service providers and producers of goods.²²⁰ As for now, any definite conclusions cannot be drawn yet.

214. Barendrecht/Van den Akker (1999), no. 414.

215. Giesen (2001), p. 228 and p. 231, with further references in note 267, and p. 239, note 328.

216. Bloembergen, note under HR 22 October 1999, NJ 2000, 159 (*Koolhaas/Rockwool*), para. 5.

217. Dommering-van Rongen (2000), p. 131 ff.

218. On this, see ECJ 10 May 2001, C-203/99 (*Veedfald*), EuZW 2001, 378 with note Geiger, para. 12: for liability under the Directive, there should be a defective product (being used during the performance of a service), and not a defective service as such.

219. See Arnokouros (2001), p. 14. However, in the end he does not expect any action to be undertaken, see *ibid.*, p. 15. See also *supra*, IV.4.

220. See *supra*, IV.5.

8 Conclusion

Following the trend in products liability cases or not, it is sure is that the liability of service providers has in a sense 'grown up'. The area has gained more, although not nearly enough, attractive force for researchers in the last couple of years, and the rules have developed enormously. This development, which was foreseeable given the importance of services in the current day and age,²²¹ has largely aimed at achieving greater protection for customers.²²² We have seen a similar development in products liability in the past. At this point in time, the trend in products liability seems to be that the development of the rules has reached stand-still, with a slight tendency to wind back towards rules that are less consumer-oriented (elements of fault liability seem to emerge). It remains to be seen whether this analysis is entirely correct and whether the same will happen with regard to services.

221. On the development of liability of service providers in a European context, see Loos (2000), p. 452 ff.

222. Cf. Arnokouros (2001), p. 15, who places the debate on services in the realm of the products liability debate.

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HR 20 November 1987, NJ 1988, 500 with note WLH (Timmer/Deutman)

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HR 24 December 1993, NJ 1994, 214 (Leebeek/Vrumona)

HR 26 January 1996, NJ 1996, 607 with note WMK (Dicky Trading II)

HR 15 March 1996, NJ 1996, 435 (ABR/Kuijt)

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HR 6 December 1996, NJ 1997, 219 (DuPont/Hermans)

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Hof Leeuwarden 21 December 1994, TvC 1995, 122 (Zee/Batavus)

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