

Produzentenhaftung

Ergänzbare Handbuch zur gesamten Produkthaftpflicht
für die juristische Praxis sowie für Hersteller, Händler,
Importeure und Exporteure mit Erläuterungen und
den einschlägigen Vorschriften und Entscheidungen
im nationalen, supranationalen und internationalen Bereich

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Bibliografische Information der Deutschen Nationalbibliothek
Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

Wellere Informationen zu diesem Titel finden Sie im Internet unter
[ESV.info/ 978 3 503 01849 9](http://ESV.info/9783503018499)

ISBN 978 3 503 01849 9
ISSN 0934-3261

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www.ESV.info

Satz und Druck: Meta Systems, Wustermark

The State of the Art of Product Liability in the Netherlands

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A. Introduction

The aim of this contribution is to provide the reader with a broad overview of product liability law in the Netherlands. In the Netherlands products liability – understood basically as the liability of manufacturers/suppliers of

products in respect of death, personal injuries and damage to property – is usually approached from the perspective of tort law (art. 6:162 and/or 6:185 ff. of the Dutch Civil Code, *Burgerlijk Wetboek*, hereafter referred to as BW). Of course, general contract law could in principle be invoked² (especially art. 7:17 BW, dealing with non-conformity of sold goods), even in concert with tort law, but in practise this is hardly ever the case.³ The reason for this is that in product liability cases usually, there is personal injury of some sort and whenever such is the case, a contractual fault also constitutes a tort under general tort law.⁴ This leads to the same amount of damages being awarded under both regimes. 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 art. 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 EUR.⁵ Given the fact that it is both easier to bring a claim under tort law and in some cases even impossible to bring a claim under on the basis of non-conformity, there is a clear preference these days for tort claims with regards to product liability. We will therefore primarily focus on tort law in this contribution.

Art. 6:162 BW constitutes the basis for a claim for products liability under general Dutch tort law. This basic tort rule is one of negligence in the sense of subjective fault.

Under the EC Directive on products liability⁶ (hereafter: the Directive), a separate product liability regime has been implemented in art. 6:185–193

² 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*).

³ Cf. G.H.A. Schut, *Onrechtmatige daad*, 5e druk (Deventer: Tjeenk Willink, 1997), p. 124; A.J. Verheij, *Onrechtmatige daad*, Monografie Privaatrecht, 7e druk (Deventer: Kluwer, 2015), p. 4; A.S. Hartkamp, C.H. Sieburgh, Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht. *Verbintenissenrecht*. Deel III. *De verbintenissen uit de wet*, 14e druk, (Tjeenk Willink: Deventer, 2015), nr. 257–259

⁴ See HR 3 December 1999, NJ 2000, 235 with note PAS (Pratt & Whitney/Franssen); G.H.A. Schut, *Onrechtmatige daad*, 5e druk (Deventer: Tjeenk Willink, 1997), p. 124; I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: Bju, 2001), p. 203–204. See also G.H.A. Schut, *Productaansprakelijkheid* (Zwolle: Tjeenk Willink, 1974), nr. 127, at p. 228, and p. 215 on the interplay between contract and tort.

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 was criticised in literature. Cf. T. Hartlief & R-J Tjittes "Kroniek van het vermogensrecht" NJB 2001, p. 1464; L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 93–94. See also A.L.M. Keirse, "Richtlijn 1985/374/EG inzake de aansprakelijkheid voor producten met gebreken", in: A.S. Hartkamp (e a.), *De invloed van het Europese recht op het Nederlandse privaatrecht*, Deventer: Kluwer 2014, p. 63–64.

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.

BW. The Directive leaves any remedies at the time of implementation of the Directive intact, including general tort actions on the basis of art. 6:162 BW. It is important to make a clear distinction between the so called Directive product liability regime (Chapter B) and product liability under general tort law (Chapter C). Although, as we will see below, both regimes have converged to a large extent, important differences still remain between the two.

But before we deal with that we would first like to focus on the requirement of subjective fault in product liability cases (section I), the reality of product liability litigation in the Netherlands (section II) and the current public interest in product liability (section III).

I. Strict liability or negligence (in the sense of subjective fault)?

The distinction between the general tort law regime and the Directive regime is particularly relevant since the Directive regime offers (or at least, is thought to offer) strict liability⁷ as opposed to the *general* tort regime which requires negligence in the sense of subjective fault.⁸ Art. 6:162 BW constitutes the basis for product liability claim under *general* Dutch tort law while Art. 6:185 and further BW contain the Dutch implementation of the EC directive on products liability (hereafter the Directive or the Directive regime).⁹ This distinction could be becoming less relevant because, as we will see below (chapter D section I), the Dutch Supreme Court, the *Hoge Raad* (hereafter also referred to as Supreme Court or HR), has gone a long way to merging both liability regimes into one concept.

The strict liability background of the Directive has been questioned, however, in the Netherlands as elsewhere, 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.¹⁰ In general, products liability is considered to have combined elements of both fault-based liability and strict liability.¹¹ Even though art. 6:162 BW generally constitutes a subjective

⁷ See ECJ 10 May 2001, C-203/99 (Veedfald), EuZW 2001, 378 with note Geiger, para. 15, and Commissie van de Europese Gemeenschappen, Verslag van de Commissie over de toepassing van Richtlijn 85/374 inzake de aansprakelijkheid voor producten met gebreken, COM (2000) 893 def. (Brussel: 2001), p. 5.

⁸ 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 L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 3-4 and p. 31; also see Chapter C section III.

⁹ 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.

¹⁰ ECJ 23 May 1997, C-300/95 (Commission/UK), Jur. 1997, p. I-2649, NJ 1998, 522, and I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 194 and p. 200-201, where the issue whether or not the Directive liability is (still) a strict liability is discussed.

¹¹ See L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 31 and 36; L. Dommering-van Rongen "Product liability in the Netherlands: a European perspective" in E. Hondius (Ed.), *Modern Trends in Tort Law, Dutch and Japanese Law Compared* (The Hague/London/Boston: Kluwer Law International, 1999) p. 135-136, and in general on this issue for example e.g. C.C. van Dam, *Aansprakelijkheidsrecht, Een grensoverschrijdend handboek*, (Den Haag: BJu, 2000), nos. 1002-1004.

fault-based liability the same combination of fault and strict liability elements seems to apply to products liability under the general tort law regime.¹² However, one's position in this respect also depends on the specific definition of strict liability that one embraces.

Of course this line in the case law immediately denotes not only the importance of EU regulations on national law but also the significance of case law in general in the development of Dutch private (and tort) law. The Supreme Court is widely recognized as actually shaping or forming, and not merely finding the law when it decides cases. It is now viewed as one of the law-makers in the Netherlands and its legitimacy in doing so is not seriously questioned anymore.¹³

II. The reality of product liability litigation in the Netherlands

We would now like to focus on some observations regarding the reality of product liability litigation and compensation in the Netherlands. As regards the types of products involved in litigation it is hard to come to any definite conclusions since there have been relatively few court cases in the Netherlands. All these cases are merely 'incidents', in the sense that they did not spawn a wide range of similar cases with regards to liability for that specific type of product.

As regards the frequency of settlements and litigation, we observe that the total number of claims – or at least: the number of judicial decisions – on products liability is relatively small.¹⁴ This is most likely 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

¹² An early case in negligence leading to a rather strict form of subjective fault 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 (Steffensand/Vos), at 4.8, as well as G.H.A. Schut, *Onrechtmatige daad*, 5e druk (Deventer: Tjeenk Willink, 1997), p. 126.

¹³ See for instance I. Giesen, H.N. Schelhaas "Samenwerking bij rechtsvorming" AA 2006, p. 159–172, with further references.

¹⁴ Commissie van de Europese Gemeenschappen, *Eerste verslag over de toepassing van de Richtlijn van de raad betreffende de onderlinge aanpassing van de wettelijke en bestuursrechtelijke bepalingen der Lidstaten inzake de aansprakelijkheid voor producten met gebreken*, (85/374 EEG), COM (95) 617 def. (Brussel: 1995), p. 2; L. Dommering-van Rongen "Product liability in the Netherlands: a European perspective" in E. Hondius (Ed.), *Modern Trends in Tort Law, Dutch and Japanese Law Compared* (The Hague/London/Boston: Kluwer Law International, 1999) p. 135–145, p. 135; E.H. Hondius "Productaansprakelijkheid: de voordelen van een dualistische rechtsorde" AA 1996, 5, p. 325; G.I. Arnokouros "Product safety and product liability in Europe: A time for revision", TvC 2001, p. 14; J. Spier & A.T. Bolt (m.m.v. O.A. Haazen), *De uitdijende reikwijdte van de aansprakelijkheid uit onrechtmatige daad*. Handelingen NJV, 1996-I (Zwolle: Tjeenk Willink, 1996), p. 235 and 237. K.J. Groffen "The Netherlands" in D. Campbell (ed.), *International Product Liability* (London: Lloyd's of London Press, 1993), p. 393, expected more suits to be filed, but that has not come true.

that the number of actions undertaken in the field of recalls has risen.¹⁵ 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.¹⁶ Furthermore, settlements play a major role in the area of products liability as well as in tort law in general. Up to 90% of claims seem to be settled out of court.¹⁷

Given the rather vast number of product recalls and given the fact that a recall is usually the result of the product causing damage to a fair amount of its users, the total amount of litigation for damages is quite low. This would justify the conclusion that most cases are probably sorted out through a settlement before they ever get to court. It remains to be seen whether this is entirely true, however, because another important aspect could be that peo-

¹⁵ J. Spier & A.T. Bolt (m.m.v. O.A. Haazen), *De uitdijende reikwijdte van de aansprakelijkheid uit onrechtmatige daad*. Handelingen NJV, 1996-I (Zwolle: Tjeenk Willink, 1996), p. 33; U. Rosenthal "Veiligheidsniveaus: over menselijke fouten, het systeem en nieuwe zondebokken" in E.R. Muller & C.J.J.M. Stolker (red.), *Ramp en recht* (Den Haag: Bju, 2001), p. 71; L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 98. See also C.E. Drion, *Product recall*, NJB 2016, p. 2665, and the advice to the HR by Verkade before HR 12 August 2005, JA 2005/92 note Van Doorn (Meko/A.), at nr. 5.35, stating that recalls were already being issued around 1960.

¹⁶ See generally P. Kuipers "Aansprakelijkheid voor 'terughaalschade' en waarschuwingsplichten van de producent bij (mogelijke) product recall" AV&S 2001, p. 99-111; Chr. F. Kroes "Product recall" AV&S 2004, p. 166-175; L. Dommering-van Rongen "Product liability in the Netherlands: a European perspective" in E. Hondius (Ed.), *Modern Trends in Tort Law, Dutch and Japanese Law Compared* (The Hague/London/Boston: Kluwer Law International, 1999) p. 135-145, p. 145, as well as L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 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 J. Spier & A.T. Bolt (m.m.v. O.A. Haazen), *De uitdijende reikwijdte van de aansprakelijkheid uit onrechtmatige daad*. Handelingen NJV, 1996-I (Zwolle: Tjeenk Willink, 1996), p. 244-245.

¹⁷ Cf. J. Spier & A.T. Bolt (m.m.v. O.A. Haazen), *De uitdijende reikwijdte van de aansprakelijkheid uit onrechtmatige daad*. Handelingen NJV, 1996-I (Zwolle: Tjeenk Willink, 1996), p. 237. Dutch and German insurers mention the 90% of product liability claims that are dealt with out of court, see Commissie van de Europese Gemeenschappen, *Verslag van de Commissie over de toepassing van Richtlijn 85/374 inzake de aansprakelijkheid voor producten met gebreken*, COM (2000) 893 def. (Brussel: 2001), p. 10. The same: Commissie van de Europese Gemeenschappen, *Verslag van de Commissie over de toepassing van Richtlijn 85/374 inzake de aansprakelijkheid voor producten met gebreken*, COM (2000) 893 def. (Brussel: 2001), p. 13, states however, that systematic statistical data on products liability are absent. The Dutch government also estimates that 90% of all claims are settled, see *Kamerstukken II* 1999/00, 22.112, no. 134, p. 4. W.C.T. Weterings, *Vergoeding van letselschade en transactiekosten* (Deventer: Tjeenk Willink, 1999), p. 109-110, states that around 95% of the claims are settled. He does not specifically deal with products liability, however.

ple in the Netherlands are relatively unwilling to claim damages, especially if one compares this to, for example, the United States.¹⁸

Another factor in the lack of product liability litigation in the Netherlands might be the fact that the market for many products are usually rather international and that most producers tend to take the precautions needed for the most demanding market (which would most probably be the US market). These producers therefore take more precautions than needed according to Dutch law or European regulations, thus preventing (more) 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.¹⁹ Given the focus on product safety in Europe this would seem a likely explanation.

Other explanations might be that social security and insurance benefits provide enough compensation to keep victims from suing manufacturers,²⁰ or that the rules on products liability are clear, which would facilitate negotiations and settlements, thus preventing those claims from going to court.²¹ 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).²² At least with regard to the number of product recalls, the fear of losing goodwill seems to be rather decisive.²³

¹⁸ However, the tendency to claim for losses suffered and to search for possible defendants does seem to grow stronger in the Netherlands, as elsewhere, cf. *Kamerstukken II 1998/99*, 26.630, nr. 1.

¹⁹ See Commissie van de Europese Gemeenschappen, Verslag van de Commissie over de toepassing van Richtlijn 85/374 inzake de aansprakelijkheid voor producten met gebreken, COM (2000) 893 def. (Brussel: 2001), p. 11, and C.J.M. van Doorn, W.H. van Boom "Productaansprakelijkheid en productveiligheid" TvC 2004, p. 100-106 on aspects of product safety. In the Netherlands, the European Directive of December 3rd, 2001 (Pb. EG L 11) on product safety was implemented in the 'Warenwet', see Stb. (*Staatsblad*) 2005, 491 and 590.

²⁰ *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 K.J. Groffen "The Netherlands" in D. Campbell (ed.), *International Product Liability* (London: Lloyd's of London Press, 1993), p. 392.

²¹ Cf. G.I. Amokouros "Product safety and product liability in Europe: A time for revision", TvC 2001, p. 10-15, p. 14.

²² Cf. Commissie van de Europese Gemeenschappen, Verslag van de Commissie over de toepassing van Richtlijn 85/374 inzake de aansprakelijkheid voor producten met gebreken, COM (2000) 893 def. (Brussel: 2001), p. 10.

²³ See J. Spier & A.T. Bolt (m.m.v. O.A. Haazen), *De uitdijende reikwijdte van de aansprakelijkheid uit onrechtmatige daad*. Handelingen NJV, 1996-I [Zwolle: Tjeenk Willink, 1996], p. 244.

There is no evidence that the number of lawsuits has risen after the introduction of the European Directive.²⁴ Even the growing attention for claims against tobacco producers²⁵ has not generated a lot of litigation, but this was mostly due to the lack of success for these claims (see: chapter B section IV.8). The fact that a claim for defective agricultural products has been possible from 2005 onwards (liability in relation to GMO's), has not had any effect either. It is also remarkable that, whereas the presence of an important number of Q-fever patients in 2013 drew a lot of public and media attention, claims for compensation against goat farmers were not very successful so far.²⁶

III. Public interest in product liability

Since the 1960s, issues of products liability have started to gain more attention, mainly as a result of some major product liability affairs. Schut has described the reasons for this rather sudden development as follows. First, between 1960 and 1962 the prescription to and use of the drug called (in the Netherlands) Softenon (elsewhere known as Thalidomide) by pregnant women lead to many cases of severe disabilities for their babies. The second big and well reported case which sparked public interest was the so-called Planta case. A brand of butter was believed to cause headaches and itches amongst its users, the butter had to be withdrawn from the market. The uproar in society after both of these tragic incidents lead to an increase in thinking about products, the dangers they can bring about and the legal

²⁴ Cf. J. Spier & A.T. Bolt (m.m.v. O.A. Haazen), *De uitdijende reikwijdte van de aansprakelijkheid uit onrechtmatige daad*. Handelingen NJV, 1996-I (Zwolle: Tjeenk Willink, 1996), p. 33; L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 202-203. See also the remarks of the European Commission, Commissie van de Europese Gemeenschappen, *Eerste verslag over de toepassing van de Richtlijn van de raad betreffende de onderlinge aanpassing van de wettelijke en bestuursrechtelijke bepalingen der Lidstaten inzake de aansprakelijkheid voor producten met gebreken*, (85/374 EEG), COM (95) 617 def. (Brussel: 1995), p. 2, and K.J. Groffen "The Netherlands" in D. Campbell (ed.), *International Product Liability* (London: Lloyd's of London Press, 1993), p. 393.

²⁵ Cf. Stichting Personenschade Instituut van Verzekeraars PIV, *Jaarverslag 2000* (Den Haag: 2001), p. 5. See on tobacco claims, amongst others, A.L.M. Keirse "Rokers hebben er tabak van!" AA 2000, p. 252-259 and p. 424-434; L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 115 ff.; I. Giesen, *Sommige procespartijen zijn 'more equal than others'. De macht van de tabaksindustrie en de Nederlandse rechtspleging*, in: N. Doornbos (e.a.) (red.), *Rechtspraak van buiten. Liber Amicorum Prof. dr. J.F. Bruinsma*, (Deventer: Kluwer, 2010), p. 19-28, as well as Rb. Amsterdam 17 December 2008, NJ 2009, 311 (Römer/BAT) (denying the claim against the tobacco industry) and Hof Leeuwarden 25 October 2000, NJ kort 2000, 98 (Ter Schegget/Niemeijer) (dealing with preliminary questions on tobacco liability only). So far, in the Netherlands only the asbestos litigation has massively changed the thresholds for access to compensation for (asbestos) victims, with respect to prescription rules (access to courts), duty of care, causation issues and the discovery of new forms of damage (e.g. pleural plaques and the fear of contracting asbestos diseases). See in general E. de Kezel, *Asbest, gezondheid en veiligheid* (Antwerpen: Intersentia, 2013).

²⁶ I. Haazen, "Q-koorts in Nederland: wie is aansprakelijk voor de gezondheidsschade?", NTBR 2011, 57.

implications thereof. Interesting is however that these incidents did not lead to any published case law.²⁷

In the 80s and 90s the *Exota*-affaire, the famous *Des*-case, and claims against the tobacco industry drew a lot of public attention.²⁸ More recently the massive number of claims against insurance companies in light of the financial crisis, which were framed in product liability terminology have found themselves in the centre of attention.²⁹ For the most part however, products liability does not really seem to draw a lot of interest from the general public in the Netherlands. Politicians, as always, only take an interest in products liability in those cases where exposure to publicity is high, trying to reap some political benefits. Consumer groups however 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 much importance over the years.

B. The Directive product liability regime: strict liability

I. Introduction

As mentioned before, a distinction must be made between a product liability claim based on general tort law (art. 6:162 BW) and liability which is based on the Directive product liability regime (art. 6:185 BW and following). In this chapter we will be dealing with the latter.

Under the directive regime, a producer is liable when he has:

- Brought a product into circulation;
- This product has caused damages;
- As a result of being defective.

Below we will be going more in depth into the different rules and definitions which are relevant when establishing liability under the Directive regime. In section II of this chapter we will be discussing what falls under the Directive regime definitions of a product (section II.2) and a producer (section II.3). We will subsequently be moving to the varying requirements for liability. Section III explains when a product can be considered as being brought into circulation while section IV does the same for the requirement of defec-

²⁷ None of the incidents mentioned lead to published case law, although damages were supplied to the victims. See further on the handling of these events G.H.A. Schut, *Productenaansprakelijkheid* (Zwolle: Tjeenk Willink, 1974), nr. 21 and 51.

²⁸ In the 1980's and 1990's, the problems with the drug *Des* received a lot of attention. This did lead to case law, see HR 9 October 1992, NJ 1994, 535 with note C/JHB (*Des*) and section II.3.1 below. The *Exota*-affaire was about the danger of exploding *exota*-bottles, which received a lot of media attention. See also L. Dommering-van Rongen "Product liability in the Netherlands: a European perspective" in E. Hondius (Ed.), *Modern Trends in Tort Law, Dutch and Japanese Law Compared (The Hague/London/Boston: Kluwer Law International, 1999)* p. 135-145, p. 135; L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 202.

²⁹ See A.Ch.H. Franken, "Financieel productaansprakelijkheid?", *AV&S* 2012, 4; A.Ch.H. Franken, "Productaansprakelijkheid in concernverband", *AV&S* 2010, 8; A.Ch.H. Franken, "Actualiteiten Productaansprakelijkheid 2002-2008", *AV&S* 2009, 26. See also O.A. Haazen, "Financiële productaansprakelijkheid: Amerikaanse toestanden", *NJ* 2011, 86 afl. 37 p. 2507-2510.

tiveness. In section V we explain what types of damages are recoverable under the Directive regime. Sections VI and VII deal with the more general evidentiary rules of causation and proof which will be applicable under the Directive regime. In section VIII we lastly deal with the possible defences against liability which are available to the producer of a product.

II. Definitions in the Directive regime

1. Introduction

Article 6:187 BW gives a definition for the terms 'product' and 'producer' as used in the Dutch implementation of the Directive product liability Regime. These two definitions define to a large extent the scope of the Directive regime. One should keep in mind that damages which fall outside the scope of the Directive regime may still be recoverable under the general tort regime or under the breach of contract law.

In section II.2 we will be discussing what products fall under the Directive regime definition of a product, section II.3 deals with the parties who can be defined as the producer(s) of such products.

2. Product

Under the Dutch implementation of the Directive regime a product must be a movable 'corporeal object' (art. 6:187 para 1 BW).³⁰ 'Corporeal objects' are objects which can be subject to human control according to art. 3:2 BW. Land, plants, buildings and works durable united with the land are considered to be immovable (art. 3:3 para 1 BW), together with immaterial products such as shares, these objects will never fall under the Directive definition of a product. According to article 3:3 para 2 BW, all objects which are not immovable are movable, the Directive regime may therefore be applicable to all objects which do not fall under the definition of article 3:3 para 1 BW. Examples of products which fall under the Directive definition of a product are equipment, inventory, drugs and IV-fluids. After separation from the human body, blood is also considered to be a product. The same goes for (frozen) sperm, egg cells and human organs.³¹

The term 'product' does not solely refer to the final product sold to the consumer but also encompasses parts and raw materials used in the final product (art. 6:187 para 2 BW). Product liability under the directive regime therefore does not cease to exist because a certain faulty product ceases to exist as an individual object after processing or incorporation in another product.

Electricity also explicitly falls under the directive regime definition of a product (art. 6:187 para 1 BW). Electricity needed to be explicitly named in article 6:187 BW because it is technically not a corporeal object.³² Under certain circumstances, electricity can therefore be a faulty product, Liability howev-

³⁰ Article 6:187 para 1 BW.

³¹ E.H. Hondius, 'Produktenaansprakelijkheid in het ziekenhuis', TvGR 1990, p. 421; C.J.J.M. Stolker, 'Aansprakelijkheid voor bloedproducten en bloedtransfusies', NJB 1995, p. 686 en 688; C.J.J.M. Stolker, Groene Serie Onrechtmatige daad, art. 185, aant. 6.

³² Kamerstukken II 1985/86, 19636, nr. 6, p. 25 (MvA).

er does not encompass situations in which the damage is the result of some post-production event such as a lightning strike.³³ It is possible that even the interruption of the supply of electricity might be classified as a defect.³⁴ Gas and water can both be products which fall under the Dutch implementation of the Directive. An example of gas being defective might be pressure fluctuations in the delivered gas.³⁵

Does software fall under the directive regime definition of a product? This seems to be a question which will need to be answered by the ECJ.³⁶ Dommering-van Rongen makes a distinction between, on the one hand, products in which the software is secondary to the actual product and on the other hand situations in which the information in the software is the main product. The first situation would most likely fall under the definition of a product.³⁷

In cases where the information is the main product, the carrier of that information (such as a CD or an USB-stick) is simply a way of transferring that information and there can therefore be more doubt as to whether this can be defined as an corporeal object and therefore a product under the Dutch implementation of the directive regime. Such doubts will be even more pronounced in the recently emerging practise of 'digital distribution' where a physical carrier for the information is no longer used and the software is received completely via an internet connection. Westerdijk notes that this distinction might not be valid anymore, at least not for the Netherlands, given a recent Supreme Court case regarding defective imaging software (HR 27 April 2012, Computerrecht 2012/154 (*Beeldbrigade/Hulskamp*), with note from R.J.J. Westerdijk):³⁸

De Beeldbrigade is a producer of television shows and purchased from the defendant the Imagescan-system which included an unlimited license for the Imagescan software, the appropriate carriers for the software and necessary equipment. After the purchase the software is found to not be compatible with the operating system of De Beeldbrigade, the defendant is subsequently held liable for damages as a result of a breach of contract. The discussion centres around the question whether the purchase of the imaging software can qualify as the purchase of a good as meant in article 7:1 BW and therefore whether the period of limitation of article 7:23 para 2 BW was applicable. Goods as meant in article 7:1 BW must, just as under the Directive regime, be corporeal object as meant in article 3:2 BW but can, contrary to the Directive regime, also be property rights (article 7:47 BW).

³³ Kamerstukken I 1989/90, 19636, nr. 162b, p. 2 (MvA).

³⁴ See: Verkade/Van Sint Truiden/Maessen, D.W.F. Verkade, M.Ph. van Sint Truiden, J.F.C. Maessen, Product in gebreke, Alphen aan de Rijn: Samsom 1990, p. 45; L. Dommering-van Rongen, Productaansprakelijkheid (diss. Utrecht), Deventer: Kluwer 1991, p. 91; Dommering-van Rongen, Productaansprakelijkheid, Een rechtsvergelijkend overzicht, Deventer: Kluwer 2000, p. 123. The opposite however has also been argued: L. Dommering-van Rongen, Productaansprakelijkheid (diss. Utrecht), Deventer: Kluwer 1991, p. 91.

³⁵ L. Dommering-van Rongen, Productaansprakelijkheid (diss. Utrecht), Deventer: Kluwer 1991, p. 92.

³⁶ Kamerstukken II 1985/86, 19636, nr. 13, p. 5 (Letter from the Minister of Justice).

³⁷ L. Dommering-van Rongen, Productaansprakelijkheid (diss. Utrecht), Deventer: Kluwer 1991, p. 94.

³⁸ HR 27 April 2012, Computerrecht 2012/154 (*Beeldbrigade/Hulskamp*) With note from R.J.J. Westerdijk.

In its judgement the Supreme Court finds the purchase of goods section of the BW applicable to the purchase of a standardized software package such as the Imagescan software. The Supreme Court explicitly does not pass judgement on the corporeal nature of software. It merely answers whether the period of limitation as found in the purchase of goods section of the BW should be applied to the purchase of a standardised software package. In its decision the Supreme Court finds decisive that according to article 7:47 BW, the purchase of goods section is not only applicable to corporeal objects but to all goods as meant in article 3:1 BW (including property rights). An unlimited license for a standardized software package in essence provides the buyer with an individualized product over which he has complete control. The Supreme Court also finds this interpretation favourable because the applicability of the purchase of goods law will provide a buyer with additional (consumer) protection. The final argument is that article 7:46d para 4 BW³⁹ – which deals with consumer protection in respect of distance contracts – is explicitly applicable to the purchase of software. This article was added into the purchase of goods section of the BW without first broadening the scope of this section, according to the Supreme Court, the purchase of goods section must therefore be applicable to all agreements to purchase standardized software.⁴⁰

Westerdijk⁴¹ has argued that software should be classified as a corporeal object as meant in article 3:2 BW but admits that the Supreme Court does not seem to have gone that far in the *Beeldbrigade*-case.⁴² This judgement will therefore not be of direct consequence to the classification of software under the Directive regime. This judgement does however show that the Supreme Court is willing to stretch some concepts as to find consumer protection measures applicable to the purchase of software.

In response to a question from the European Parliament the European Commission confirmed that software in its opinion falls under the Directive definition of a product.⁴³ Whether the ECJ will rule in a similar fashion however remains to be seen.

An airplane also falls under the Directive regime definition of a product. When an airplane producer is held liable on the basis of the Directive regime, the liability limitation of the Treaty of Warsaw will not be applicable.⁴⁴

³⁹ Implementation of Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts.

⁴⁰ It should be noted that the Supreme Court explicitly does not limit her reasoning to software which is transferred through some kind of physical carrier but also explicitly includes downloaded software, this is in line with the much earlier German *Abzahlungskauf* case, BGH 18 oktober 1989, NJW 1990/320 (*Abzahlungskauf*); this viewpoint is however not in line with the opinions Dommering-van Rongen or the minister of justice, see: NV II, *Kamerstukken II* 1999/00, 26861, 5, p. 5–6, and L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991.

⁴¹ R.J.J. Westerdijk, *Productenaansprakelijkheid voor software*, Deventer: Kluwer 1995, p. 192–200.

⁴² HR 27 April 2012, *Computerrecht* 2012/154 (*Beeldbrigade/Hulskamp*) With note from R.J.J. Westerdijk.

⁴³ OJ 1989 volume 32 of 8 May 1989, No C114/42, question No. 706/88; see also R.J.J. Westerdijk, *Productenaansprakelijkheid voor software: beschouwingen over de aansprakelijkheid voor informatieproducten*, Deventer Kluwer, 1995.

⁴⁴ *Kamerstukken II* 1985/86, 19636, nr. 13, p. 6 (Letter from the Minister of Justice).

Even waste products can fall under the definition of a product.⁴⁵ Some authors however do state that the waste must be able to be reused; waste which can only be destroyed will not fall under the Directive definition of a product.⁴⁶ Manure for example is a product which is created after processing (conversion through digestion) and may be sold in a commercial manner. Of course, even the most naïve person cannot expect manure to be completely bacteria free, but the presence of bacteria as contagious as *coxiella burnetii* (the cause of Q-fever), will however for the general public be unexpected and might therefore make the product defective.⁴⁷

Livestock is defined as a corporeal object in the Netherlands and can therefore be a product. The Directive regime might in particular become relevant in the case of infected and sick animals. In the case of animals, the Directive regime functions complementary to article 6:179 BW which deals with liability for damages caused by the animal's own energy (e.g. a horse kicking and damaging a car).⁴⁸

3. Producer

The notion of 'producer' under the Directive regime is a broad one: any party who manufactures a finished product, a component, or the raw materials thereof is considered to be a producer and can be held accountable under the Directive regime.⁴⁹ Article 6:187 BW is constructed in such a way that the producer of the final product cannot defer liability to the producer of a faulty (sub) part if the producer feels the producer of some (sub) part should be the one held accountable.⁵⁰

It will sometimes be difficult to determine whether a producer produces a final product. Of course not every manufacturer in the production chain which makes a small change to a product will fall under the definition. When the link in the production chain adds a substantial part to the product, this link in the distribution chain will fall under the Directive definition of producer.⁵¹ If the product entering the company however only needs to be readied for use, for example by packaging the product or performing some small final assembly, the product entering the company can be viewed as a final product.

⁴⁵ *Kamerstukken II* 1985/86, 19636, nr. 13, p. 6 (Letter from the Minister of Justice).

⁴⁶ L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 109; R.M. Blaauw, *Aansprakelijkheden*, Deventer: Kluwer, 1990, p. 13.

⁴⁷ I. Haazen, 'Q-koorts in Nederland: wie is aansprakelijk voor de gezondheidsschade?', *NTBR* 2011/57.

⁴⁸ HR 24 February 1984, NJ 1984/415 (*Zeug gee!* 113).

⁴⁹ According to the supreme court in: HR 22 October 1999, NJ 2000, 159 with note ARB (*Koolhaas/Rockwool*), it is irrelevant whether the producer which is held liable only produced some component of the final defective product which was sold to a consumer; L. Dommering-van Rongen, *Productaansprakelijkheid*, Een rechtsvergelijkend overzicht (Deventer: Kluwer, 2000), p. 80 ff.

⁵⁰ G. Snijders 'Produktenrecht - drie aspecten in Europees perspectief', Deventer: Kluwer 1990, p. 85.

⁵¹ Dommering-van Rongen, L., *Produktenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 122.

When assembly takes place on the instruction of a third party and the assembler does not himself bring the product into circulation, the assembling party will not fall under the Directive definition of producer.⁵²

As far as liability under the Directive regime goes, the same liability rules apply to those presenting themselves as the 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). Unlike the retailer of a product, the party who presents himself as a producer, cannot by naming the 'actual' producer escape liability (art. 6:187 para 4 BW). The idea behind this difference is that there will generally be a strong economic connection between the actual producer and his major customers who are presenting themselves as the actual producer of the product. The party who presents himself as the actual producer of the product, will in most cases have dictated and guided the actual production of the product.⁵³ Examples of such non-producers who present themselves as the producer of the product are large stores who sell their own general store brand versions of various products and mail-order companies. Licensees who put their marks on a product will therefore be wise not to create the impression of being the producer of a product.⁵⁴ As far as marks only serve an advertising goal they will not create the impression of being a producer.⁵⁵ Applying a sticker with an adjusted price and the name of the store to a product will for example not create the impression that the store is actually the producer of the product.

Finally, any supplier of the product will be considered to be the producer if it cannot be determined who the producer is, unless the supplier discloses within a reasonable time the identity of the person from whom he has bought the product (art. 6:187 para. 4 BW).⁵⁶ Such a rule makes it impossible for sellers to escape liability by bringing a product into circulation without naming the producer or only naming a producer outside the EU. The supplier will only be classified as a producer when the actual producer cannot be determined. Under Dutch general tort law, similar rules most likely will be applied (see chapter C).⁵⁷ The standard for subjective fault applied to a supplier of a product who cannot be considered to be the actual producer of the product itself, will however be less strict.⁵⁸ The retail seller of a product

⁵² L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 122; Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht*, Deventer: Kluwer 2000, p. 82.

⁵³ *Kamerstukken II 1985/86*, 19636, nr. 6, p. 26 (MvA).

⁵⁴ *Kamerstukken II 1987/88*, 19636, nr. 6, p. 25; More comprehensive: L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 128; L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht*, Deventer: Kluwer 2000, p. 88.

⁵⁵ *Kamerstukken II 1985/86*, 19636, nr. 3, p. 10.

⁵⁶ Handing over a copy of a bill will suffice in this respect, see HR 22 September 2000, NJ 2000, 644 (*Haagman/VSCJ*).

⁵⁷ On the liability of an importer, see Hof Den Bosch 14 January 1997, A&V 1997/6, 158 with note PK (*Aerts/Helm*).

⁵⁸ See HR 22 September 2000, NJ 2000, 644 (*Haagman/VSCJ*). This seems to be in accordance with the Skov case of the ECJ (ECJ 10 January 2006, C-402/03) (a supplier can be held responsible for the producers' fault-based liability but not for his Directive based no-fault liability).

might possible also be held liable under the contract of sale, but, for reasons explained above, this is rare in the Netherlands.⁵⁹

An interesting case on this subject is the ECJ case of 2 December 2009, C-358/08, NJ 2010/210 (*Aventis Pasteur SA/OB*). APMSD (formerly Mérieux UK), in 1992 supplied the vaccine which was administered to OB by the United Kingdom Department of Health, which was, at that time, a wholly-owned subsidiary of APSA (formerly Pasteur Mérieux). The vaccine was defective since it created severe reactions when administered, including a severe infection resulting in brain damage. The question dealt with in this case is whether the subsidiary of the actual producer (APMSD) could be held liable as if it was the producer since it supplied the vaccine. The ECJ notes that:

'under Article 3(3) of Directive 85/374,⁶⁰ where the producer cannot be identified, the supplier of the product is to be treated as the producer, unless he informs the injured person, within a reasonable time, of the identity of the producer or of his own supplier.

That provision should be understood as referring to the situation in which the person injured by the allegedly defective product could not reasonably have identified the producer of that product before exercising his rights against its supplier. If this is the case, the supplier will need to inform the consumer of the identity of the producer.

The mere fact that the supplier of the product in question denies being its producer therefore cannot, where that supplier has failed to couple that denial with information about the identity of the producer or its own supplier, suffice for that supplier to be treated as having informed the injured person of the identity of the producer.

The condition relating to the supply of such information within 'a reasonable time' involves the requirement that the supplier, inform the consumer, on its own initiative and promptly, of the identity of the producer or its own supplier.'

III. Bringing a product into circulation

Under the Dutch implementation of the Directive, products liability, in general, only rests on the person putting the product into circulation. This rule is accepted under the Directive regime but also under the general tort rule.⁶¹ Under the regime of the Directive, the 'producer' is 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). What exactly falls under the definition of 'bringing the product on the market' has remained rather vague, however.⁶² Passing something on in the chain of distribution has been used as a definition in this respect, at least for Dutch general tort law.⁶³ Often this will happen through the sale, delivery or lending of a product.⁶⁴

⁵⁹ See Chapter A.

⁶⁰ Implemented in the Netherlands in article 6:187 para. 4 BW.

⁶¹ HR 6 December 1996, NJ 1997, 219 (*DuPont/Hermans*); L. Dommering-van Rongen, Productaansprakelijkheid, Een rechtsvergelijkend overzicht (Deventer: Kluwer, 2000), p. 73.

⁶² L. Dommering-van Rongen, Productaansprakelijkheid, Een rechtsvergelijkend overzicht (Deventer: Kluwer, 2000), p. 73 ff. On that issue on a European level, see ECJ 9 February 2006, C-127-04; NJ 2006, 401 (*O'Byrne v Sanofi Pasteur*). See also A.Ch.H. Franken, Productaansprakelijkheid in concernverband, AV&S 2010/2, p. 47 ff.

⁶³ Hof Leeuwarden 18 March 1998, NJ 1998, 867 (*Tetra Werke/Kuiper*).

⁶⁴ *Kamerstukken II 1985/86, 19636, nr. 3, p. 8.*

According to the ECJ, a product must be considered as having been put into circulation, when it leaves the production process operated by the producer and enters a marketing process in the form in which it is offered to the public in order to be used or consumed.⁶⁵ Generally, it is not important in that regard that the product is sold directly by the producer to the user or to the consumer or that this sale is carried out as part of a distribution process involving one or more operators or distributors.⁶⁶

When one of the links in the distribution chain is closely connected to the producer, for example because this link is a wholly owned subsidiary of the producer, the court will have to determine whether this close connection means that the subsidiary is actually a part of the production process. A product is therefore not necessarily considered as being brought into circulation by selling the product to a subsidiary in another country.⁶⁷ According to the ECJ it is up to the national courts to decide whether this is the case. Relevant will be whether both entities carry out different production activities with regards to the product and the subsidiary is therefore not merely acting as a distributor or depository of the product.⁶⁸ When for example a wholly owned subsidiary performs the last step in the production of the product, the assembly of the product, the subsidiary will fall under the Directive definition of a producer. The links between the producer and the other entity is in such a case so close that the concept of producer also includes that latter entity, and the transfer of the product from one entity to the other therefore does not amount to putting it into circulation within the meaning of article 6:185 para 1 sub a BW.⁶⁹

The ECJ judgement in *Veedfald/Amtskommunne* gives more insight as to when a product can be considered to not have been brought into circulation. A product has not been put into circulation where a person other than the producer has caused the product to leave the process of manufacturing. Moreover, uses of the product contrary to the producer's intention, for example where the manufacturing process is not yet complete, use for private purposes and similar situations are excluded from the scope of the Direc-

⁶⁵ ECJ judgement of 9 February 2009, C-127/04 (*O'Byrne/Sanofi Pasteur I*), para. 27. This same standard applies if general tort law is invoked, see HR 13 January 2017, ECLI:NL:HR:2017:32.

⁶⁶ ECJ judgement of 9 February 2009, C-127/04 (*O'Byrne/Sanofi Pasteur I*), para. 28.

⁶⁷ ECJ judgement of 9 February 2009, C-127/04 (*O'Byrne/Sanofi Pasteur I*), para. 31.

⁶⁸ C.J.M. van Doorn & S.B. Pape, 'Noot bij ECJ EG 9 Februari 2006, C-127/04, ECJ EG 10 Januari 2006, C-402/03 en HvJ EG 14 maart 2006, C-177/04', TvC 2006/6, p. 209.

⁶⁹ When one of the links in the distribution chain is closely connected to the producer, for example, in the case of a wholly-owned subsidiary of the latter, it is necessary to establish whether it is a consequence of that link that that entity is in reality involved in the manufacturing process of the product concerned. The examination of such a close relationship must not be influenced by the question whether or not distinct legal persons are involved. On the other hand it is of relevance whether those are companies carrying out different production activities or are, on the contrary, companies one of which, i.e. the subsidiary company, acts simply as a distributor or depository for the product manufactured by the parent company. It is for the national courts to establish, having regard to the circumstances of each case and the factual situation of the matter before them, whether the links between the producer and another entity are so close that the concept of producer within the meaning of Articles 7 and 11 of the Directive also includes that latter entity and that the transfer of the product from one to the other of those entities does not amount to putting it into circulation within the meaning of those provisions.

tive.⁷⁰ This exception must be interpreted narrowly and will not quickly lead to exemption from liability.⁷¹

An example of how this requirement might lead to a producer escaping liability is the situation in which the product was brought into circulation as a result of theft.⁷² According to the explanatory memorandum accompanying the law introducing the Directive liability regime, the producer will in such a case escape liability; this is even the case when the product was completely ready to be brought into circulation and it was therefore a mere coincidence that, not the producer, but a third party brought the product into circulation.⁷³

IV. A defective product

1. Introduction

Under the Directive regime 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.⁷⁴ Article 6:186 BW para 1 names three factors which may be taken into account when deciding whether a product is faulty. In particular the presentation of the product, the expected use of the product and the regulations in force at the time of bringing the product into circulation will be relevant. It should be noted that this is not an exhaustive list of factors. The ECJ for example recently stated that the intended purpose, the objective characteristics and properties of the product and the specific requirements of the group of users for whom the product is intended must also be taken into account when determining what safety is to be expected of the product.⁷⁵ Decisive is not what the individual consumer would have expected of the product but what the general public was entitled to expect.

It is not necessary that the product as such, i.e. the product in general, or the entire species of which the product is but one example, is defective.⁷⁶ One may instead determine the defectiveness of a product on a case to case basis.

For practical purposes, defects are often divided in several categories; in section IV.2 we will be detailing the most often used of these categories. Next we will be going into the different circumstances which are relevant when deciding whether a given product is defective, starting in section IV.3 with the presentation of the product and the specific information provided regarding the product. Section IV.4 explains how the price of the product might in some cases be an important circumstance. In section IV.5 we deal with the reasonable to be expected use of a product and how this may influence the (non)defectiveness of a product. In section IV.6 we show that the rules in force at the time of bringing the product into circulation also play

⁷⁰ ECJ judgement of 10 May 2001, C-203/99 (*Veefald/Amtskommune*), para. 16.

⁷¹ ECJ judgement of 10 May 2001, C-203/99 (*Veefald/Amtskommune*), para. 15.

⁷² *Kamerstukken II* 1985/86, 19636, nr. 3, p. 8.

⁷³ *Kamerstukken II* 1985/86, 19636, nr. 6, p. 16 (MvA).

⁷⁴ Also known as the consumer expectation test.

⁷⁵ ECJ judgement of 5 March 2015 in joined Cases C-503/13 and C-504/13 (*Boston Scientific Medizintechnik GmbH/AOK Sachsen-Anhalt, Betriebskrankenkasse RW*), para. 38.

⁷⁶ See HR 4 February 2011, NJ 2011, 69 (*Amlin/Deutz*).

an important role, especially when trying to show that certain precautions could not reasonable have been expected of the producer at that time. In section IV.7 we explain how the improved safety standards of a new product can influence the defectiveness standard applied to an already existing product. Lastly in section IV.8 we explain how products with an inherent danger fit into defectiveness standard of the Directive regime.

2. Types of defects

From a practical standpoint, potential defects are often placed in one of three categories; this is a recurring theme in Dutch product liability literature.⁷⁷ It should however be noted that this division is not of any legal consequence in the Netherlands.⁷⁸ The categories most often used are the following:

- Production defects: defects that are created during the production process which result in some percentage of products being faulty;
- Design defects: defects that result from the design and preparation for production, such defects generally result in an entire series of products being defective;
- Information and presentation defects: defects which result from incorrect or absent information regarding the use of the product;⁷⁹

When judging whether a product is faulty, one must first ascertain whether the design of the product is faulty, and depending on the circumstances of the case, whether the composition and construction of the product are sound. An important question in this regard is whether the producer, when designing the product, might have reasonably expected the damages as produced by the product while the victim did not have any reasonable expectation of such damages.⁸⁰ If both questions can be answered in the affirmative, next must be ascertained whether the producer might have easily avoided the danger by making a reasonable alteration in the design of the product. Not making a reasonable design change can make a product defective.

⁷⁷ C.J.J.M. Stolker, *GS Onrechtmatige daad*, artikel 186 Boek 6 BW, aant. 2; for example also: J.M. van Dunné, 'Verbindenissenrecht Deel 2 Onrechtmatige daad Overige verbindenissen', Deventer: Kluwer 2001, p. 570.

⁷⁸ L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 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 Dutch courts would follow the BGH's lead. Cf. I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 203; L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 40. See also on this case from a Dutch perspective H.N. Schelhaas "Produktaansprakelijkheid en Europees privaatrecht: het ontplofende Duitse mineraalflesje" NTBR 2005, p. 204 e.v. and E.H. Hondius "Produktaansprakelijkheid: de voordelen van een dualistische rechtsorde" AA 1996, 5, p. 324-331.

⁷⁹ The specific duty to warn is becoming more and more important these days see in general on this duty: I. Giesen, *Handle with care!*, Inaugural Lecture Utrecht (Den Haag: BJu, 2005). See in the context of product liability also S.B. Pape, *Warnings and product liability. Lessons learned from cognitive psychology and ergonomics*, (Den Haag: BJu, 2011); S.B. Pape, "Waarschuwing op producten zijn geen veiligheids wondermiddelen. De implicaties ervan voor productaansprakelijkheid", TvC 2012, 5 p. 214-222.

⁸⁰ G. Snijders 'Productenrecht - drie aspecten in Europees perspectief', Deventer: Kluwer 1990, p.93.

With regards to certain products, extensive regulation with regards to the composition and construction of the product is in place. Whether adherence to such regulation will cause the product to no longer be classified as defective will depend on the level of detail of these regulations (see section VII.4); in general one can however state that adherence to mandatory rules will not as such warrant a defence against liability.⁸¹

On the other hand, in the case of non-adherence to regulations which provide for safety rules, liability is often presumed.⁸² Such regulations for example exist with regards to children's toys. In accordance with regulation 2009/48/EG of 18 June 2009, producers of children toys are obligated to analyse and document any dangers to children, particularly taking into account how a child is expected to use the product. Taking into account this type of use, the product may not be dangerous to the user or third parties. The regulation also provides for strict rules regarding production controls and strict rules regarding the use of certain chemicals. Toys connected to food are banned and toys can only be sold together with food products when they are separately packaged. The Children's toys Directive explicitly states that the Directive product liability regime is applicable to any toys that do not comply with the children's toys Directive; the Directive regime might however very well be found applicable when applicability is not explicitly provided for in the instrument.⁸³

3. Presentation and information regarding the product

Article 6:185 para 1 sub a BW explicitly states that the product must be evaluated as a whole, including possible information aspects of the product. Such a presentation or information defect as meant in article 6:186 para 1 sub a BW can, for example, arise from: advertisements for the product, information provided, manuals included and warnings provided for dangers and other negative consequences connected to the use of the product, or lack thereof.⁸⁴ The explanatory notes accompanying the law note that a product can be deemed defective when the producer omitted certain instructions for the use of the product, or failed to warn for risks that are connected to the use of the product.⁸⁵ The quality of the presentation and information regarding a product will therefore have a very large influence on whether a product will be deemed defective.

Information can be provided by the producer as well as the retailer selling the product to the consumer. When information provided by the retailer is affecting the safety or the reasonably to be expected safety of the product, the producer is able to defend against a possible claim by stating that the

⁸¹ L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 214; E. Bauw, *Onrechtmatige daad: aansprakelijkheid voor zaken*, (Mon. BW nr. B47), Deventer: Kluwer 2015, p. 99.

⁸² G. Sniijders 'Productenrecht – drie aspecten in Europees perspectief', Deventer: Kluwer 1990, p.17; B. Vroom-Cramer, *Productinformatie over levensmiddelen – Etiketteringsvraagstukken naar Europees en Nederlands recht* (diss. UvA), 1998; B.J. Beer, 'Warenwet en productveiligheid (kroniek)', *Consumentenrecht Jaarboek 1998*, p. 99.

⁸³ C. J.M. van Doorn en S.B. Pape, 'Kroniek Productaansprakelijkheid en productveiligheid 2005-2008', *TvC 2009*, p. 54.

⁸⁴ Stolker, *GS Onrechtmatige daad*, art. 6:186 BW, aant. 7.

⁸⁵ *Kamerstukken II 1987-1988*, 19636, nr. 6, p. 9 (MvT).

defect was created after bringing the product into circulation (see section VIII.2). If the producer was aware of the incorrect information being circulated by the retailer, the producer has an obligation to take measures or risk liability.⁸⁶

Leaflets inserted (or lack thereof) in the packaging of a product play an important role in this type of defect. Warnings provided to the user may under certain circumstances make an otherwise defective product non-defective; the warning however does need to be very clear about the type of danger and how the danger can be avoided, as was shown in a case before the District Court Middelburg⁸⁷ (*District Court Middelburg 13 July 2005, NJF 2005/310*):

The owner of an agricultural company mixes concrete to be used in a private setting, during the mixing of this concrete the consumer receives severe burn wounds. The delivery note contained a warning stating that concrete was an irritant; the producer viewed this as a sufficient warning. The court rules that given this specific warning it could not have been expected of the user to wear special protective clothing as would normally be required when dealing with concrete. The producer should have included specific warnings regarding the heat produced by setting concrete and the necessity the wear protective clothing. The court, in accordance with article 6:190 BW awards damages for pain and suffering in the amount of 5.000 EUR.

More obvious basic knowledge of the workings of a product may however be assumed to be present; not all dangers therefore require the producer to warn possible customers. See the case of *District Court Maastricht 21 March 2002, LJN AE0776; TvC 2003*:

A plastic bottle of freshly pressed orange juice explodes after being left in the summer heat for five days. In this case the court ruled that the producer had no special obligation to inform its customers of this danger. A reasonable producer of orange juice does not have to expect his product to be left outside under such circumstances. The average consumer must be regarded as being aware of the fact that leaving a bottle of fruit juices outside in the heat without any added conservatives will spoil rather quickly and that as a result of fermentation, pressure will be created within the bottle. An average producer of orange juice may assume their customers are aware of these facts and therefore does not have to provide any specific warnings with regards to this risk.

The information in a user manual accompanying a product is considered to be part of the product; an unclear or erroneous user manual can therefore lead to the product as such being considered faulty. The court of Appeals of Arnhem for example found a catheter used in a hart operation to be faulty because the user manual contained faulty information on its use.⁸⁸

⁸⁶ L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 163; L. Dommering-van Rongen, *Productaansprakelijkheid. Een rechtsvergelijkend overzicht*, Deventer: Kluwer 2000, p. 54.

⁸⁷ L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 163.

⁸⁸ Court of Appeal Arnhem 9 July 2002, NJ 2003, 474.

As time passes, the average user is not entitled to expect the product to be as safe as a brand new product.⁸⁹ As a result of wear, some products will generally become less safe over time; a user who is aware of this fact will generally not be able to claim that the product did not provide the safety that was to be expected. When wear of the product causes the product to be unsafe, the producer will always need to inform the user of this danger.⁹⁰ Such a product may however be considered defective where that particular product is subject to an abnormal and unexpected amount of wear.

It should be noted that a seal of approval or other mark on the product do not necessarily imply that the product is without any defects. The same goes for an approval by the competent authorities without which the product is not allowed to be sold on the Dutch market.⁹¹ Such an official approval in particular does not relieve the producer of his obligations under the product liability regime as was shown in the Halcion case (HR 30 June 1989, NJ 1990, 652):

In a case regarding a new sleep drug called Halcion, the producer Upjohn was found to be liable for registering and selling a product which had severe side effects because, the producer did not sufficiently warn users of these side effects. The producer was aware of these side effects in lower doses of 0.25 and 0.50 mg but decided to register and sell a 1 mg version, knowing that the side effects would most likely be more severe at these higher dosages. The court found the lack of sufficient warning accompanying these higher dosages to be particularly decisive in establishing liability. According to the Supreme Court, even if the chances of serious side effects are slim, the package should contain a warning for these side effects. An interesting but unsuccessful defence was sought in the fact that the Halcion drug was registered with all the competent authorities and Upjohn was therefore legally selling Halcion in the Netherlands. According to Upjohn it should only be held liable if it should have been clear to Upjohn that her product should not have been registered. This defence was not accepted by the Supreme Court. A license to sell a product does not relieve a producer of liability for a warning defect.⁹²

4. Price

According to Dommering-van Rongen, the price of a product is a factor in determining whether the product is defective. Of course a product, no matter how cheap, must always offer some basic safety in its use.⁹³ According to Dommering-van Rongen a distinction must be made between design faults, production faults and instruction faults. The price of the product can only be

⁸⁹ L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 182.

⁹⁰ J.H. den Ouden, *Jaarboek Konsumentenrecht*, Deventer 1990, p. 111 and following.

⁹¹ G. Sniijders 'Produktenrecht – drie aspecten in Europees perspectief', Deventer: Kluwer 1990, p. 96.

⁹² HR 30 June 1989, NJ 1990, 652 (*Halcion*); A.T. Bolt & J. Spier, *De uitdijende reikwijdte van de aansprakelijkheid uit onrechtmatige*, Zwolle: W.E.J. Tjeenk Willink 1996, p. 239

⁹³ L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 161; L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht*, Deventer: Kluwer 2000, p. 46.

a relevant factor when there are faults in the design of the product. It has been argued that the average user may expect a less sturdily designed product when the product is very cheap. An average user does not however have to expect more production faults when buying a cheaper product nor does the price of the product release the producer of the obligation to include a manual with relevant safety instructions.⁹⁴

In exactly what way and to what extent the price of a product will be regarded as a relevant factor by a court remains unclear. The price of a product has so far not explicitly been named as a factor in court decisions.

5. Reasonably to be expected use

Article 6:186 sub b BW names the 'reasonably to be expected use' as one of the factors in establishing whether a product is defective.

The reasonably to be expected use might include the incorrect use of a product. In some cases a producer must take into account that the user might not always adhere strictly to the instructions of use. The Supreme Court for example ruled in the previously discussed Halcion case that a producer of sleep drugs must take into account the fact that some patients may take a higher dosage than instructed, unless they are specifically warned of the dangers involved with taking such a high dosage.⁹⁵ According to the preamble of the Directive, 'misuse' of the product i.e., use not reasonable under the circumstances, must however in any case lead to the absence of liability of the producer.

The producer must inform himself of which group of users will be using the product.⁹⁶ Relevant is the reasonable to be expected use of the 'average user' of the group which the producer must have reasonably understood to be using the product, taking into account the specific uses for which the product was intended.⁹⁷ The reasonable to be expected use might have specific consequences for producers of products which form a risk of harm to a child. Children toys for example are held to strict rules regarding safety to avert any incorrect use of the toy by a child.⁹⁸ This also goes for other products. Producers of detergents for example, who wish to prevent liability claims, would be wise to include safety caps in their bottle design to guard against misuse by a child.⁹⁹

In this regard, it has been argued that research conducted by the producer on how the product is used by its customers might offer an indication on where warnings to its customers are necessary and effective in preventing injury or where other measures need to be taken. A producer who is able to produce such research results might be able to show that the behaviour of

⁹⁴ A.J.O. van Wassenaer van Catwijck, *Productenaansprakelijkheid in Europees verband*, Zwolle 1991, p. 41-42.

⁹⁵ Hof Arnhem 7 July 1987, and follow up: HR 30 June 1989, NJ 1990, 652.

⁹⁶ *Kamerstukken II 1987-1988*, 19636, nr. 6, p. 9 (MvT).

⁹⁷ *Kamerstukken II 1987-1988*, 19636, nr. 6, p. 22 (MvT).

⁹⁸ G. Snijders 'Produktenrecht - drie aspecten in Europees perspectief', Deventer: Kluwer 1990, p. 96.

⁹⁹ G. Snijders 'Produktenrecht - drie aspecten in Europees perspectief', Deventer: Kluwer 1990, p. 97.

the injured party significantly differs from his empirical view of the behaviour of the average user of the product and that the behaviour was therefore not to be expected.¹⁰⁰ In such cases the producer could argue that giving (additional) warnings or instructions could not have been expected of him.

Whether a certain use is reasonably to be expected is therefore not a question of pure subjective expectation on the side of the producer. Article 6:186 para 1 sub b BW objectivizes the reasonable to be expected use by looking at the expectations of the general public.¹⁰¹ Where, with regards to the safety of a specific product, only a certain group of people have any expectations of the product, the expectations of this group will be decisive.¹⁰² That only a limited group had any expectation of the product was (unsuccessfully) used as a defence in the infected blood case (District Court Amsterdam 3 February 1999, NJ 1999, 621):

During an operation a patient was given a blood transfusion; during the next visit of the blood donor to the blood bank it was established that this donor was infected with HIV. As a result of the blood transfusion the plaintiff was also infected with HIV. The plaintiff therefore holds the blood bank which provided the blood to the hospital liable under the Directive regime. The blood bank claims that the product was not defective. The blood was donated in the small window between infection and the infection becoming detectable, the blood bank was therefore unaware of the infection. Furthermore the blood bank claims that the direct clients of the blood bank, hospitals and doctors, are aware of the existence of this window of non-detectability and therefore have no expectation of a 100% safe product. According to the court the expectation of the end consumer is however the most relevant here. The general public expects blood products to be 100% HIV free. The fact that blood transfusions offer a minute chance of HIV infection is not generally known; as such the general public does not and should not have any expectation in this regard.¹⁰³

According to the court, a product with an inherent risk is only not considered faulty in the case of damage which is the unavoidable consequence of using a product and which is generally known amongst the public or is generally accepted to be a risk (see further: section IV.8 on products with an inherent risk).

Although the infected blood was found to be a defective product, the blood bank eventually escaped liability by successfully arguing the risk development defence (see below section VIII.5).

¹⁰⁰ S.B. Pape, 'Productwaarschuwingen: psychologische lessen voor de jurist', in: W.H. van Boom, I. Giesen en A.J. Verheij (red.), *Gedrag en privaatrecht. Over gedragspresumpties en gedragseffecten bij privaatrechtelijke leerstukken*, Den Haag: Boom Juridische Uitgevers 2008, p. 245 e.v.; S.B. Pape, *Warnings and product liability: Lessons learned from cognitive psychology and ergonomics* (diss. Rotterdam), Den Haag: Eleven International Publishing 2011.

¹⁰¹ C.J.J.M. Stolker GS *Onrechtmatige daad*, artikel 186 Boek 6 BW, aant. 6.

¹⁰² *Kamerstukken II 1987-1988*, 19636, nr. 3, p. 27 (MvT); also: L. Dommering-van Rongen, *Productaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 156; Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht*, Deventer: Kluwer 2000, p. 43.

¹⁰³ Rb. Amsterdam 3 February 1999, NJ 1999, 621 (*Infected blood*).

A case in which the producer (unsuccessfully) claimed that the defect was caused by behaviour of the consumer which was not reasonable to be expected, was a case involving fireworks. This case makes it clear that a dangerous product is not automatically defective. Such a product is however held to strict safety standards. According to the Court of Appeal Leeuwarden, especially in the case of an inherently dangerous product, erroneous use by the consumer must be anticipated by the producer (Court of Appeal Leeuwarden 8 February 2011, LJN BQ0194; JA 2011/87 (Evuco Fireworks)):

Evuco, a fireworks retailer, brought an imported Chinese fireworks pack on the Dutch market containing the so called 'sky dancer'. During new-years, a sky dancer was lit in front of a crowd. Some fragment of one of the exploding parts of the 'sky dancer' hit the claimant in the right eye and caused permanent loss of sight. The claimant is now holding Evuco liable for his injury claiming that the sold fireworks were defective. The court in first instance finds that the fireworks must be deemed defective when one of the parts explodes below 5 metres from the ground, it is determined that this was the case. As a defence Evuco claimed that the user damaged the 'Sky Dancer' fireworks by pinning it between some rocks, this was not normally to be expected use according to the producer and therefore the product must not be deemed defective. This defence is rejected by the court in first instance; the judgement is upheld on Appeal. According to the court of Appeals, erroneous use that is reasonably to be expected, should be taken into account by the producer as meant in article 6:186 para 1 sub b and can therefore not lead to exoneration.

6. Rules at the time of bringing a product into circulation

Article 186 para 1 sub c BW makes a reference to the point in time of bringing the product into circulation. Whether a product must be considered as being defective, must be judged by the reasonable expectations of safety at the time of bringing the product into circulation. The reasonable expectation of safety is often explicated in the safety norms in existence at the time. This 'state of the art' defence refers to faults that were known at the time of introduction of the product but were considered to be acceptable or were not even considered to be faults at all. Later developments are what made the product to be considered unsafe. This defence must not be confused with the risk development defence dealt with below (see section VIII.5).

Negative effects of a product might have been judged in a different light at the time of bringing the product into circulation. Examples often given are that of the seat belt or layered glass which have only recently become a standard safety feature in cars.¹⁰⁴ Judging the safety of such cars must not be done using safety norms which have been developed after the product was brought on the market.

7. The introduction of an improved product

Article 186 para 2 BW determines that a product cannot be considered faulty, solely because after bringing the product into circulation a new and better

¹⁰⁴ L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 181; L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht*, Deventer: Kluwer 2000, p. 45.

product was introduced. This rule can be viewed as an extension of the rule discussed in the previous section; a defective product must be judged using the norms and rules in existence at the time of bringing the product into circulation.¹⁰⁵ The term 'an improved product' is understood to be a product which is safer in the sense that it complies with later developed, more stringent safety norms.¹⁰⁶

Important is the word "solely". Not the sole fact that a better product was afterwards brought into circulation makes the first product faulty. However, when a significantly safer product is brought to the market, it is quite possible that (taking the fact into account that the less safe product is still sold in an unchanged form), the "old" product will from that point on have to be considered faulty.¹⁰⁷

One of the factors in determining the defectiveness of a product is how difficult it is for the producer to fix safety issues by taking precautionary measures or to make a change in the design or fabrication of the product. Because of this rule, the fact that a safer product is available could be of influence when determining whether a product is defective. Of course it is not true that the safest product available sets a benchmark which every other product needs to meet. This has to be weighed against the seriousness of the possible damage and or frequency with which this damage might occur. According to some authors, the availability of a safer product can under such circumstances influence the determination of defectiveness of a product.¹⁰⁸

One may however not deduce from the text of para 2 that when a better product is introduced at the same time, all less safe products must be automatically considered unsafe.¹⁰⁹ This introduction of a safer product can merely influence the determination of defectiveness by explicating what preventative measures (just as the newer, safer product) the producer could and maybe should have taken.

8. Products with an inherent heightened danger

Certain products bring with them an inherent heightened risk. This needs to be taken into account when determining whether the product is defective. For example, in the case of blood- or sperm products, it has been argued that the average user cannot expect the product to always be completely defect free,¹¹⁰ in some rare cases infections or genetic abnormalities cannot be detected. The specific attributes of the product therefore influence what can be expected of the product with regards to safety. One could argue that such products will only be defective when the specific safety rules in place for that type of product were not followed.¹¹¹

¹⁰⁵ C.J.J.M. Stolker, GS Onrechtmatige daad, artikel 186 Boek 6 BW, aant. 16.

¹⁰⁶ *Kamerstukken II* 1987-1988, 19636, nr. 6, p. 23 (MvA).

¹⁰⁷ C.J.J.M. Stolker in BW-krant jaarboek 1987, p. 106.

¹⁰⁸ C.J.J.M. Stolker, GS Onrechtmatige daad, artikel 186 Boek 6 BW, aant. 9.

¹⁰⁹ L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 183; L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht*, Deventer: Kluwer 2000, p. 48.

¹¹⁰ C.J.J.M. Stolker, GS Onrechtmatige daad, artikel 186 Boek 6 BW, aant. 12.

¹¹¹ A.M.L. Broekhuijsen-Molenaar, *Civielrechtelijke aspecten van kunstmatige inseminatie en draagmoederschap* (diss. Leiden) Deventer 1991, p. 126; similarly: Verkade/Van Sint Truiden/Maessen, D.W.F. Verkade, M.Ph. van Sint Truiden, J.F.C. Maessen, *Product in gebreke*, Alphen aan de Rijn: Samsom 1990, p. 50.

As such, these products are – given their special nature – practically absolved from the risk liability of article 6:185 BW. Risk liability is in fact reduced to a test of due care. The product might however still be considered defective when the producer fails to warn users of a possible unknown infection in the product as we have seen in the Infected Blood case (see section IV.5).¹¹² A producer can therefore also not be held liable for damage caused by inherently dangerous equipment such as x-ray machines and certain prescribed drugs with dangerous side effects for which the user was in advance warned or should otherwise have been aware of.¹¹³

Whether the user was warned of the danger clearly plays a very important role in establishing liability, the question might therefore be raised who is responsible for providing a patient with such information? Possible actors are the producer, the pharmacy and the doctor. Who is obligated to inform the patient will in particular depend on whether the medicine is only provided on a prescription or on the other hand is freely available over the counter.¹¹⁴ The pharmacy will sooner be able to assume that the doctor who prescribed the medication informed his patient of possible dangers in the case of prescription only drugs while such expectations are unfounded when the medication is available over the counter. In that case the duty to inform the patient of possible dangers will sooner be placed on the producer or pharmacy.

Summarizing all these aspects, Kuipers¹¹⁵ comes to the conclusion that a producer of an inherently dangerous product can avoid liability when (a) the (potential) damaging consequences of its use are known amongst the general public and are deemed to be accepted by the public, (b) the producer as much as possible minimized the risks associated with the use of the product and the producer therefore did not bring an unnecessarily dangerous product on the market, and (c) the producer, as far as still useful, warned for the dangers or provided instructions on how to avoid or mitigate the inherent risks.¹¹⁶

Kuipers criteria have recently been put to a test in the first and still only claim against a producer of cigarettes. This claim was rejected, most of the by Kuiper explicated elements were however found in this judgement of

¹¹² A.M.L. Broekhuijsen-Molenaar, *Civielrechtelijke aspecten van kunstmatige inseminatie en draagmoederschap*, 1991, p. 126 e.v.

¹¹³ R.M. Schoonenberg, 'De aansprakelijkheid voor gebrekkige medische hulpmiddelen, stand van zaken', *TvGR* 1987, p. 83

¹¹⁴ M.M. ten Hoopen, 'Een wettelijke informatieplicht voor de openbare apotheker?', *TvGR* 2000, p. 2–18

¹¹⁵ P. Kuipers "De rokers uitgerookt? Over intrinsiek gevaarlijke producten en de producentenaansprakelijkheidsregeling", in: 'Ongebonden Recht Bedrijven', NGB lustrumbundel (70-jarig bestaan) 2000 p. 113–125.

¹¹⁶ A.S. Hartkamp & C.H. Sieburgh, Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6, *Verbintenissenrecht. Deel IV. De verbintenis uit de wet*, Deventer: Kluwer 2015, nr. 264; see more critically: S.D. Lindenbergh, 'Aansprakelijkheid van producenten van rookwaren voor gezondheidsschade', *TVS* 2000/1.

the District Court of Amsterdam 17 December 2008, LJN BG7225; NJ 2009/311.¹¹⁷

In 2005 claimant sues cigarette retailer and producer British American Tobacco (BAT) Exports B.V. and BAT Manufacturing B.V. Claimant smoked different brands of cigarettes from 1957 to 1983. Most likely as a result of smoking claimant develops and is diagnosed with emphysema in 1996, in 2002 and 2004 claimant suffered two separate strokes. According to the claimant the producer must have known that smoking cigarettes is harmful to the health of the user but still failed to warn her for this danger. According to the claimant, the producers advertised for cigarettes while trying to play down the risks associated with smoking. Claimant states to have been unaware of the risks associated with smoking up until 1981.

The court rejects all claims, in part basing its judgement on the fact that the producers did not provide inaccurate information and the dangers associated with smoking were generally known at the time. For the sake of argument the court assumes that the emphysema was indeed caused by the cigarettes produced by the defendants. Even assuming this causal link the court rules that, when beginning to smoke cigarettes, claimant was aware or should have been aware of the dangers associated with smoking and the addictiveness of nicotine since these facts were generally known to the public at the time. Cigarette manufacturers were under these circumstances not obligated to inform their customers of every possible disease and affliction which might be caused by the use of cigarettes. The cigarettes produced by the defendants therefore provided what was to be reasonable expected according to the court.

V. Damages

1. Introduction

Below we will be going more in depth into exactly what damages will be recoverable under the Directive regime (see section: V.2). In section V.3 we explore whether damages under the Dutch Directive regime can be subject to any limitations and in section V.4 we explain how the amount of damages is determined in the Netherlands.

2. Recoverable damages

The Directive regime contains a provision on the types of damages that can and cannot be claimed from a producer. According to art. 6:190 BW, the plaintiff can claim damages in case of death or personal injury¹¹⁸ and damage to property other than the product itself which is intended for use in a private setting. Neither damage relating to the defective product itself nor

¹¹⁷ See for more information regarding tobacco products and product liability: P.A.J. van den Berg, A.L.M. Keirse, 'Juridische aspecten van de productie van tabakswaaren' in: K. Knol e a., 'Tabaksbegruik: gevolgen en bestrijding', Utrecht: LEMMA BV, 2005; A.L.M. Keirse, 'Proportionele aansprakelijkheid bij blootstelling aan asbestvezels en tabak-srook', Tijdschrift voor Vergoeding Personenschade 2006-3, p. 66-75.

¹¹⁸ Further details are laid down in the general tort law on the obligation to pay damages, most notably in art. 6:95 ff, especially 6:107 and 6:108 BW.

to products used in a professional setting,¹¹⁹ nor pure economic loss¹²⁰ are recoverable under art. 6:190 BW. Damage to the faulty product itself will however generally be recoverable under the general breach of contract regime (6:74 BW and following).¹²¹

With regards to property damage in a private setting a threshold of 500 euro is in place. This franchise is not applicable to damages as a result of death or personal injury. According to the Dutch implementation of this threshold the entire amount of damage of an individual becomes recoverable when the total sum of damages which are the result of the product malfunctioning, is greater than 500 euro.¹²² The 500 EUR threshold is therefore not subtracted from the total amount of recoverable damages.¹²³ When the total amount of damages stays below the 500 EUR threshold, the damages will still be recoverable from the seller of the product under the breach of contract regime (art. 7:24 lid 2 BW).

With regards to the limitation to damages suffered within the private setting one must first of all keep in mind that it is only relevant whether the damaged object is meant to be used and is actually used in a private setting; whether the damage causing (defective) product is meant to be used in a private setting is irrelevant.

There is a difference of opinion in Dutch literature on how the limitation to damages within the private setting must be interpreted. On the one hand Van Boom and Van Doorn adhere to a broad definition in which goods that would normally not be found within for example a living room,¹²⁴ might be considered as being used in a private setting when in fact these goods are used as such.¹²⁵ On the other hand the government seems to be adhering to a more narrow definition. At the time of introduction of the Directive regime, the minister was asked whether damages to a delivery van as a result of a faulty tire which was actually being used in a private setting, would be recoverable under the Directive regime. According to the minister, such damages would presumably not be categorized as falling within the private setting and would therefore not be recoverable under the Directive re-

¹¹⁹ L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 135 ff, and p. 143.

¹²⁰ Cf. P. Cane, *Atiyah's Accidents, Compensation and the Law*, 6th ed. (London: Butterworths, 1999), p. 85.

¹²¹ C.J.J.M. Stolker, *GS Onrechtmatige daad, artikel 190 Boek 6 BW, aant. 9*.

¹²² Asser/Hartkamp & Sieburgh, 6-IV *De verbintenis uit de wet*, Kluwer: Deventer 2015, nr. 267.

¹²³ Greece, Germany, Denmark, Luxembourg and Portugal have however implemented a so called 'discount-franchise' in which the 500 euro is subtracted from the total amount recoverable under the Directive regime, see: L. Dommering-van Rongen, *Productaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 261 and *Kamerstukken II* 1987-1988, 19636, nr. 3, p. 11 (MvT).

¹²⁴ One might think of professional medical equipment used to care for a sick family member.

¹²⁵ C.J.M. van Doorn en S.B. Pape, 'Productaansprakelijkheid en productveiligheid', in: E.H. Hondius en G.J. Rijken (red.), *Handboek Consumentenrecht – Een overzicht van de rechtspositie van de consument*, Zutphen: Uitgeverij Paris 2011, p. 381-382

gime.¹²⁶ What exactly will be considered to be in the private setting will be left to the judiciary and must be decided upon on a case by case basis.¹²⁷

With regards to the term 'damages' and the question as to what may qualify as damages, it remains unclear whether national law will be decisive or whether a more autonomous interpretation is required.¹²⁸ Van Wassenae¹²⁹ notes that the Directive does not contain a reference to national law on the matter of damage resulting from physical injury or damage to property, an autonomous definition should therefore be adhered to. Dommering-van Rongen also prefers a more autonomous interpretation and notes that as a result of this interpretation a larger group of injured persons will most likely be able to recover damages as opposed to an interpretation based on national law.¹³⁰ The Government however disagreed with this assertion.¹³¹

As a result of the *Veedfald*-case much uncertainty still exists on this subject.¹³² In this case of 10 May 2001, Case C-203/99 (*Veedfald*), the ECJ was asked if the Directive imposes any obligation on member states to define damages in a certain way. According to the ECJ, although it is left to the national legislatures to determine the precise content of the term damage, nevertheless, save for non-material damage whose reparation is governed solely by national law, full and proper compensation for persons injured by a defective product must be available in the case of death and personal injury, or damage to property other than the product itself. Application of national rules *may not impair the effectiveness of the Directive* and the national court must interpret its national law in the light of the wording and the purpose of the Directive. A member State cannot therefore restrict the types of material damage, resulting from death or personal injury, or from damage to or destruction of an item of property, which are to be made good.¹³³

In light of the *Veedfald* judgement some authors have again argued that the application of the Dutch national articles on damages would lead to a too

¹²⁶ *Kamerstukken II 1987-1988, 19636, nr. 6, p. 27 (MvA).*

¹²⁷ G.M.F. Slijders, *Productenrecht. Drie aspecten in Europees perspectief*, Kluwer: Deventer, p. 82.

¹²⁸ A.J.O. van Wassenae van Catwijck, *Productenaansprakelijkheid*, 2e druk, Zwolle, 1991, p. 50 promotes an autonomous European interpretation as do H. Cousy and H. Claasen in, *Productenaansprakelijkheid en Verzekering, Vijfde Leuvense Verzekeringdagen*, Antwerpen/Apeldoorn, 1986; J. Barendrecht in 'Produktenaansprekelijkheid: Europees burgerlijk recht? Preadvies voor de vereniging voor burgerlijk recht, Lelystad 1987, p. 33, also assumes that the Directive regime definition of damages is an autonomous one; differently: H. Koch, *Internationale Produkthaftung und Grenzen der Rechtsangleichung durch die EG-Richtlinie*, ZHR 1988/6, p. 544 and S. Whitakker, *The EEC Products Liability Directive in Yearbook of European Law*, London, Oxford University Press, 1985, p. 273.

¹²⁹ A.J.O. van Wassenae van Catwijck, *Productenaansprakelijkheid*, 2e druk, Zwolle, 1991, p. 50

¹³⁰ L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 249.

¹³¹ *Kamerstukken II 1987-1988, 19636, nr. 6, p. 27 (MvT).*

¹³² Asser/Hartkamp & Sieburgh, 6-IV De verbintenis uit de wet, Kluwer: Deventer 2011, nr. 268; also: L. Dommering-van Rongen, 'Productaansprakelijkheid ziekenhuis voor gebrekkige infusievloeistof, NTBR 2001/9, p. 474.

¹³³ Asser/Hartkamp & Sieburgh, 6-IV De verbintenis uit de wet, Kluwer: Deventer 2011, nr. 268.

restrictive definition of damages and a more autonomous directive interpretation would therefore be preferable.¹³⁴ It has been argued that article 6:190 BW should be interpreted as defining damages in a way in which all damages suffered as a result of personal injury or property damage are to be compensated.¹³⁵

In the Netherlands, article 6:108 BW limits the specific parties who are able to sue for damages as a result of death to, the husband/wife or registered partner, the underage child, other relatives of the deceased when they were wholly or partially financially supported by the deceased and persons who lived together with the deceased in a family setting when they were wholly or partially financially supported by the deceased. According to article 6:108 para 2 BW, funeral arrangement costs will also be recoverable in case of death.

It is clear that under the Directive regime the costs of medical treatment and all other expenses related to the process of recovery as well as any detrimental effects to the person's employment situation as a result of the injury, will be recoverable.¹³⁶ In case of personal injury, only the injured person will generally have a right to claim damages. A third party will however be able to claim costs made for the benefit of the injured party which are not insurance costs. A requirement is however that these costs would have been recoverable when these costs would have been made by the injured party instead of the third party (article 6:107 BW).

When thinking of personal injury, one should keep in mind that the Directive regime definition of personal injury is a very broad one. Even changes in one's body which would normally not be characterized as personal injury but are the result of a defective product, may fall under the Directive regime definition of personal injury as was shown by the *Implanon*-case.

In a procedure before the Court of Appeal 's-Hertogenbosch regarding the contraception device Implanon, the question was raised whether pregnancy can be considered personal injury.¹³⁷ Producer Organon argued that the Directive regime was not applicable because a pregnancy as a result of failing contraception cannot be considered personal injury. The Court of Appeal rejects this argument stating that the term personal injury does not only include wounds but also other breaches of physical integrity. A pregnancy carries with it a heightened risk of complications and brings about changes in a woman's body which are unwanted, in particular affecting fertility. According to the court of Appeals this constitutes a breach of physical integrity and therefore falls under the definition of physical harm.¹³⁸

¹³⁴ C.J.J.M. Stolker, *GS Onrechtmatige daad*, artikel 190 Boek 6 BW, aant. 5.

¹³⁵ Asser/Hartkamp & Sieburgh 6-IV* 2011/268.

¹³⁶ *Kamerstukken II* 1987-1988, 19636, nr. 6, p. 17 (MvT).

¹³⁷ Dutch Court of Appeals 's-Hertogenbosch 28 August 2007, LJN BB2385; JA 2007/163J; JGR 2007/44.

¹³⁸ See more in depth: A.J. Van, 'De aansprakelijkheid voor gebrekkige medische hulpmiddelen - Implanon revisited', TVP 2011, p. 44.

The Directive left the question as to the recoverability of non-material damages (damages for pain and suffering; *smartengeld*) to the national systems.¹³⁹ According to the minister, national laws will be decisive in defining non-material damages and when determining to what extent compensation of such damages is possible.¹⁴⁰ The ECJ ruled similarly in the *Veefald* judgement discussed above.¹⁴¹ Art. 6:106 BW provides that if a victim has sustained physical harm, he is also entitled to compensation for non-pecuniary loss. In a decision of the Court of Appeal 's-Hertogenbosch from 2009¹⁴², it was further confirmed that under article 6:190 BW no compensation for non-pecuniary losses can be awarded in cases where there is no physical harm sustained by the consumer (i.e. post-traumatic stress disorder as a result of an exploding car whilst the consumer was some distance from the car).

In the case of property damage, not only the value reduction of the damaged property can be claimed, but also other indirect damages which are the result of this initial damage (art 6:96 BW). When a product for example caused damage to the consumer's computer, not only the value reduction which the computer has suffered as a result of the product (i.e. repair or replacement of the computer) may be awarded but also the costs of renting a replacement machine may be claimed.¹⁴³

As mentioned, the Directive liability regime is limited in its applicability to damages sustained to property other than the defective product ('property damages'). Damages sustained to the faulty product itself will not be awarded under the Directive regime since such damages typically fall within the sphere of the seller-buyer relationship. Such damages are suffered as a result of a breach of contract and are recoverable as such ('transactional damages').

It will not always be easy to distinguish between transactional damages and property damages, in particular in cases where the sold product consists of several 'final' products. Dommering-van Rongen is of the opinion that damages caused by a part of the product to the product of which it is a part, can fall under the Directive regime definition of damages on the basis of article 6:185 BW.¹⁴⁴ Her argument is that this follows from the formulation of article 2 of the Directive, according to this article a 'product' means all movables even if incorporated into another.

¹³⁹ See art. 9 of the Directive; R.J.J. Westerdijk, *Produktenaansprakelijkheid voor software*, Ph.D. diss. VU (Deventer: Kluwer, 1995), p. 45; L. Dommering-van Rongen, *Productaansprakelijkheid. Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 135 and p. 137; Commissie van de Europese Gemeenschappen, *Groenboek Wettelijk aansprakelijkheid voor producten met gebreken*, COM (1999) 396 def. (Brussel: 1999), p. 30; ECJ 10 May 2001, C-203/99 (*Veefald*), EuZW 2001, 378 with note Geiger, paras. 29 and 32.

¹⁴⁰ *Kamerstukken II* 1985/86, 19636, nr. 9, p. 12 (Note after the Final report).

¹⁴¹ See further: L. Dommering-van Rongen, *Productaansprakelijkheid ziekenhuis voor gebrekkige infusievloeistof*, NTBR 2001/9.

¹⁴² Court of Appeals 's-Hertogenbosch 1 September 2009, ECLI-NL:GHSHE:2009:BJ7299.

¹⁴³ L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 256.

¹⁴⁴ L. Dommering-van Rongen, *Productaansprakelijkheid. Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 143.

3. Limitations on damages

With regard to the amount of damages that may be claimed, no such thing as a cap or limitation exists in the Netherlands.¹⁴⁵ The possibility provided by the Directive (in art. 16) of instituting such a cap or limit for product 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 only once been used so far (on companies providing safety services at airports after 9/11, since their insurance possibilities were absent).

One should realise, 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 the financial situation of both parties. The court can only lower the award to the level at which insurance is or should have been available.¹⁴⁶ The Supreme Court has warned lower courts to be very cautious when using this power,¹⁴⁷ 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 *Veefald*-case,¹⁴⁸ 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 amount of recoverable (material) damages in specific categories and this could therefore limit the extent to which a court can limit awards on the basis of article 6:109 BW.

4. Determining the amount of damages

The amount of non-pecuniary damages is to be established by the (lower) courts on the basis of equity.¹⁴⁹ In determining what amount is to be awarded, all circumstances need to be taken into account.¹⁵⁰ In a case decided in 1992, the Supreme Court stated the following are especially relevant: the nature of the liability,¹⁵¹ the nature, duration and intensity of the pain, the

¹⁴⁵ Leaving aside the franchise of 500 EUR for damage to property used in a private setting. See above.

¹⁴⁶ See art 6:109 BW para 2; L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 146.

¹⁴⁷ See HR 28 May 1999, NJ 1999, 510 (G/H.).

¹⁴⁸ ECJ 10 May 2001, C-203/99 (*Veefald*). EuZW 2001, 378 with note Geiger, paras. 27–29.

¹⁴⁹ 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*).

¹⁵⁰ Cf. HR 17 November 2000, NJ 2001, 215 with note ARB (*Druijff/B.C.E. Bouw*).

¹⁵¹ 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).

suffering and the loss of 'joy of life' sustained by the patient which followed from the act on which the liability is based.¹⁵² 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, although such developments may not be decisive for the amounts to be awarded in the Netherlands.¹⁵³

In practice, courts, lawyers, and insurance companies use the *Smartengeldbundel* as their point of reference. The *Smartengeldbundel* is (now) published every year (with online updates) and contains a listing of amounts of compensation for non-pecuniary damages awarded by courts in certain types of cases over the years.¹⁵⁴ Generally, the level of compensation for non-pecuniary loss awarded is not all that high in the Netherlands, with claims not exceeding DFL 250,000 (113,445 EUR) for the more severe cases.¹⁵⁵ The highest amount was awarded in 1992 in a case of (wrongful) contamination with the HIV-virus; the amount awarded was then DFL 300,000 (136,134 EUR).¹⁵⁶ There is no real trend towards higher awards discernible in case law;¹⁵⁷ at least not if one makes allowance for the fact that awards rise to compensate for inflation.¹⁵⁸

Recently several authors have started criticising the perceived stagnation in the development of the amount of pecuniary damages awarded in the Netherlands.¹⁵⁹ Some even claim that the amounts awarded have not even

¹⁵² Cf. HR 8 July 1992, NJ 1992, 770 (AMC/O.). To that extent also HR 17 November 2000, NJ 2001, 215 with note ARB (*Druif/B.C.E. Bouw*), a case in which the liability of a building company towards his wounded employee was invoked. See also S.D. Lindenbergh "De hoogte van het smartengeld in Nederland; een verkenning van de top" VR 1999, p. 131–132.

¹⁵³ Cf. HR 17 November 2000, NJ 2001, 215 with note ARB (*Druif/B.C.E. Bouw*).

¹⁵⁴ Cf. W.C.T. Weterings, *Vergoeding van letselschade en transactiekosten* (Deventer: Tjeenk Willink, 1999), p. 93–94. The latest (20th) edition is published in 2015 by ANWB, The Hague.

¹⁵⁵ Many authors are complaining about the amounts of compensation for example: Cf. S.D. Lindenbergh "De hoogte van het smartengeld in Nederland; een verkenning van de top" VR 1999, p. 129 ff.; T. Hartlief, 'Een steen in stilstaand water', NJB 2014 (34), p. 2287; N. Frenk, 'De waarde van smartengeld', VRA 2013/92.

¹⁵⁶ HR 8 July 1992, NJ 1992, 770 (AMC/O.). Cf. S.D. Lindenbergh "De hoogte van het smartengeld in Nederland; een verkenning van de top" VR 1999, p. 129 and 133; T. Hartlief, 'Een steen in stilstaand water', NJB 2014 (34), p. 2287.

¹⁵⁷ L. Dommering-van Rongen, *Productaansprakelijkheid. Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 203. See also K.J. Groffen "The Netherlands" in D. Campbell (ed.), *International Product Liability* (London: Lloyd's of London Press, 1993), p. 393, and the literature mentioned above.

¹⁵⁸ From HR 17 November 2000, NJ 2001, 215 with note ARB (*Druif/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.

¹⁵⁹ N. Frenk, *De waarde van smartengeld. Stagnerende smartengeldbedragen: enkele inleidende observaties*, VRA 2013/92; L.T. Visscher, *QALY-tijd in de vaststelling van smartengeld bij letsel?*, TVP 2013/4; J.J. de Bosch Kemper, 'Smartengeld in perspectief', in: M. Jansen & N. Frenk (red.), *Smartengeld, uitspraken van de Nederlandse rechter over de vergoeding van immateriële schade* (17e druk), Den Haag: ANWB 2009, p. 6–8. en S.D. Lindenbergh, *Smartengeld tien jaar later*, Kluwer: Deventer, 2008, p. 75–76.

risen enough to compensate for inflation as required. Looking at the amounts awarded in the countries surrounding the Netherlands, they argue that a push for higher awards should be made in the Netherlands.¹⁶⁰

VI. Causation

On the injured party rests the obligation to furnish and prove the fact that there is a causal link between the defect and the damage suffered. This is the default rule, the judge is however able to apply certain burden of proof mitigating constructions. In some cases a technical (statutory) norm or some other legal obligation is ignored by a producer. When these rules exist with the aim of preventing injuries, these rules are ignored and an injury against which the rule was meant to protect materialises, the causal connection between the defect and the damage caused is assumed to exist. This rule has come to be known as the 'reversal rule'.¹⁶¹ The producer who ignored such a rule and wants to avoid liability will need to furnish and prove facts which make it likely that the damage may have had a different cause.¹⁶²

It should be noted that the Supreme Court has never declared the reversal-rule (which constitutes a factual presumption, not a reversal of the burden of proof) to be applicable in the area of products liability, and its widespread use in the late 1990's and early 2000's has been put to a halt, but in our opinion its scope is (still) broad enough to encompass this field, because we are usually dealing with violations of so-called 'safety rules' (legal norms aimed at protection against physical harm).¹⁶³

¹⁶⁰ N. Frenk, De waarde van smartengeld, Stagnerende smartengeldbedragen: enkele inleidende observaties, VRA 2013/92; L.T. Visscher, QALY-tijd in de vaststelling van smartengeld bij letsel?, TVP 2013/4

¹⁶¹ This so-called 'reversal rule' 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 C.C. van Dam, Aansprakelijkheidsrecht, Een grensoverschrijdend handboek (Den Haag: BJu, 2000), no. 810; I. Giesen, Bewijs en aansprakelijkheid (Den Haag: BJu, 2001), p. 116 ff; I. Giesen, 'De aantrekkingskracht van Loreley. Over opkomst en ondergang (?) van de "omkeringsregel"', in: T. Hartlief & S.D. Lindenberg, Tien penne streken over personenschade, The Hague: Sdu 2009, p. 69-86. The rule and its applicability is still not entirely settled; L. Dommering-van Rongen, Productenaansprakelijkheid (diss. Utrecht), Deventer: Kluwer 1991, p. 292; L. Dommering-van Rongen, Productaansprakelijkheid, Een rechtsvergelijkend overzicht, Deventer: Kluwer 2000, p. 153.

¹⁶² L. Dommering-van Rongen, Productaansprakelijkheid, Een rechtsvergelijkend overzicht, Deventer: Kluwer 2000, p. 154.

¹⁶³ See I. Giesen, Bewijs en aansprakelijkheid (Den Haag: BJu, 2001), p. 228; I. Giesen, 'De aantrekkingskracht van Loreley. Over opkomst en ondergang (?) van de "omkeringsregel"', in: T. Hartlief & S.D. Lindenberg, Tien penne streken over personenschade, The Hague: Sdu 2009, p. 69-86. Contrary to this rule (but too old to still be considered to reflect the law in this respect) is the products liability decision of Hof Den Bosch 13 November 1979, NJ 1980, 370 (*Beatrix/Van Weleveld*). The rule (rather: presumption) on causation as explained here is still not entirely developed, so it is not possible to give a definite answer to the question whether it can be used in products liability cases. The Appellate Court at Arnhem decided at one point that the 'omkeringsregel' could not be applied to a products liability case because in that case the demands for applying the rule were not met (Hof Arnhem 28 October 2003, NJ 2005, 305 (*Koolhaas/Rockwool*)). The Supreme Court turned down the Appeal (HR 13 May 2005, C04/076 (*Koolhaas e.a./Rockwool*)) without deciding on the merits. The District court of Leeuwarden however did use the reversal rule as can be seen below.

The reversal rule is however not the only burden of proof mitigating rule to be found in Dutch law with regards to causality. In certain other cases, other victim friendly rules regarding burden of proof will be applied, the application of which will generally lead to the risk of non-persuasion of the judge to be transferred to the defendant; for example, as a result of the judge adopting a presumption of fact. There are three rules which are the most relevant in the product liability sphere:¹⁶⁴

- a) When a (written or unwritten) norm is violated because of which the risk for a certain kind of injury is increased and such a risk materializes, the causal link between the defect and the damages suffered is assumed to exist. On the defendant then rests the obligation to furnish and proof facts to the contrary ('reversal-rule');
- b) A judge can under certain circumstances and on the basis of a preliminary opinion on the evidence, adopt the assumption of an *conditio sine qua non* link between the defect and the damages, notwithstanding evidence to the contrary;
- c) A special rule exists for cases where the damage is caused by several different individuals who all caused some amount of damage; when it cannot be established which individual is responsible for what part of the damages, article 6:99 BW provides for a reversal of the burden of proof with regards to the causal link between the defect and the damages.

In 2002 the Supreme Court decided that when applying the 'reversal rule', the defendant, in rebutting this assumption, can suffice with putting forward evidence which would make it plausible that the damage could also have been caused without the acts of the defendant which are currently presumed to have caused the damage.¹⁶⁵

An example of the reversal rule being applied in a product liability case can be found in the previously discussed *Evuco*-judgement regarding faulty fireworks (District Court of Leeuwarden 24 January 2007, LJN AZ7289; NJF 2007/189):

Evuco, a fireworks retailer, brought an imported Chinese fireworks pack on the Dutch market containing the so called "Sky Dancer". The court establishes that the sky dancer fireworks were not in compliance with safety regulations because one of its parts exploded below 5 meters. During new-years, a person lit the "Sky Dancer" in front of friends. Moments after the "Sky Dancer" exploded, a woman suffered damage to one of her eyes. The court adopts the presumption that the fireworks which were lit moments before the women suffered injuries to her eye, were in fact the fireworks that actually caused that damage and these fireworks were the "Sky Dancer" sold by Evuco. Evuco is offered to provide evidence to the contrary. The court states that when a wrongful act creates a risk of injury and this risk materialises, the causal link between the wrongful act and the injury can in principle be

¹⁶⁴ R.J.B. Boonekamp, in: A.R. Bloembergen (red.), *Schadevergoeding*, art 98 aant. 13, Deventer: Kluwer.

¹⁶⁵ HR 29 November 2002, NJ 2004/304 en 305, m.nt. W.D.H. Asser; also HR 13 July 2007, LJN BA4200; RvdW 2007/705; more in depth: G.M.F. Sijnders, 'Productenaansprakelijkheid, twintig jaren later', in: Bierbooms e.a. (red.), *Aspecten van aansprakelijkheid*, Den Haag: BJU 2005, p. 249 ff.

presumed. Since the court established that the Sky dancer fireworks were defective (it exploded too close to the ground) and the damage was sustained moments after this explosion, the causal link between the defectiveness and the injuries sustained is in principle assumed to exist. This assumption is however subject to possible evidence to the contrary which may be provided by the defendant. This judgement was upheld on Appeal.¹⁶⁶

Under certain circumstances a consumer might have difficulty proving a causal link between the defect and the damages because the producer of the product is difficult to identify. In such cases it is clear that damages have been suffered as a result of some defective product, uncertain is however who the producer of that product is.

Such a situation might for example arise when more than one manufacturer is responsible for the damages suffered because more than one entity can be classified as the producer as meant in article 6:187 para 2 BW. One might think of the situation in which damage was caused by a defective product which consists of multiple parts produced by several manufacturers. In such a case all the different producers are jointly and severally liable (article 6:189 BW and section II.3).

Secondly we might think of the situation in which more than one producer brought a similar defective product into circulation but it remains unclear exactly which individual product (and therefore what producer) caused what amount of damage. A solution for this difficulty in proving a causal link can be found in article 6:99 BW. This article provides for a reversal of the burden of proof in cases of alternative causality: when the damage is the result of two or more events, for each of which a different person would be liable and it is determined that the damage is the result of at least one of these events, the obligation to pay for the damages rests on every one of these otherwise liable persons. The risk of uncertainty regarding a causal link is therefore placed on the producer in such cases. Such a producer is only able to escape liability when he manages to prove that the damages are not caused by an event for which he is to blame (i.e. caused by a product he produced).¹⁶⁷

Questions have been raised as to the compatibility of article 6:99 BW and article 6:188 BW (article 4 of the Directive).¹⁶⁸ According to article 13 of the Directive, the Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when the Directive is notified. Or, as most people read it, existing laws and rules on product liability are left as they were. But, the ECJ thought somewhat different and gave the article a quite far-reaching meaning. In three cases decided on the same day, partly dealing with the same topic and partly exact copies of each other,¹⁶⁹ the ECJ first decided that it followed from the Directive and the

¹⁶⁶ Court of Appeals Leeuwarden 8 februari 2011, LJN BQ0194; JA 2011/87 (*Evuco Fireworks*).

¹⁶⁷ See further: R.J.B. Boonekamp, in: A.R. Bloembergen (red.), *Schadevergoeding*, art 99 aant. 22, Deventer: Kluwer.

¹⁶⁸ A.J.O. van Wassenauer van Catwijck, *Productenaansprakelijkheid*, 2e druk, Zwolle, 1991, p. 771-778; R.M. Blaauw, 'Aansprakelijkheden', NGB, p. 10.

¹⁶⁹ ECJ 25 April 2002, C-183/00, [2002] ECR I-3901 (*María Victoria González Sánchez v Medicina Asturiana SA*); ECJ 25 April 2002, C-52/00, [2002] ECR I-3827 (*Commission v France*), and ECJ 25 April 2002, C-154/00, [2002] ECR I-3879 (*Commission v Greece*).

legal basis for that Directive that a total harmonisation was meant to be enacted by the Products Liability Directive for those topics that the Directive dealt with.¹⁷⁰ Thus, France was sanctioned for not enacting the Directive properly (ignoring the 500 EUR franchise; changing the development risk defence and making the distributor liable in the same manner as the producer) just as Greece (no franchise introduced). Given these decisions, the only safe introduction of the Directive into one's own law would be to enact a literal translation. There's not much room to manoeuvre.

Furthermore, it was decided in these cases that art. 13 of the Directive cannot be interpreted as giving the Member States the possibility of maintaining a general system of product liability different from that provided for in the Directive. The Court says also:¹⁷¹

31. *The reference in Article 13 of the Directive to the rights which an injured person may rely on under the rules of the law of contractual or non-contractual liability must be interpreted as meaning that the system of rules put in place by the Directive, which in Article 4 enables the victim to seek compensation where he proves damage, the defect in the product and the causal link between that defect and the damage, does not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects.*
32. *Likewise the reference in Article 13 to the rights which an injured person may rely on under a special liability system existing at the time when the Directive was notified must be construed, as is clear from the third clause of the 13th recital thereto, as referring to a specific scheme limited to a given sector of production (see judgments of today in Case C-52/00 Commission v France [2002] ECR I-0000, paragraphs 13 to 23, and Case C-154/00 Commission v Greece [2002] ECR I-0000, paragraphs 9 to 19).*
33. *Conversely, a system of producer liability founded on the same basis as that put in place by the Directive and not limited to a given sector of production does not come within any of the systems of liability referred to in Article 13 of the Directive. That provision cannot therefore be relied on in such a case in order to justify the maintenance in force of national provisions affording greater protection than those of the Directive.*
34. *The reply to the question raised must therefore be that Article 13 of the Directive must be interpreted as meaning that the rights conferred under the legislation of a Member State on the victims of damage caused by a defective product under a general system of liability having the same basis as that put in place by the Directive may be limited or restricted as a result of the Directive's transposition into the domestic law of that State.*

Given this case law one must conclude that enacting a rule that is more profitable for victims, for instance a rule that would relieve the victim from part of the burden of proof (e.g. art. 6:99 BW on alternative causation) is no longer possible for "damage caused by a defective product under a general

¹⁷⁰ This is confirmed in ECJ 10 January 2006, C-402/03 (*Skov*). See also A.L.M. Keirse, "Richtlijn 1985/374/EG inzake de aansprakelijkheid voor producten met gebreken", in: A.S. Hartkamp (e.a.), *De invloed van het Europese recht op het Nederlandse privaatrecht*, Deventer: Kluwer 2014, p. 48.

¹⁷¹ ECJ 25 April 2002, C-183/00, [2002] ECR I-3901 (*María Victoria González Sánchez v Medicina Asturiana SA*).

system of liability having the same basis as that put in place by the Directive" (i.e., a risk based liability).¹⁷²

The *DES*-case discussed below has been the only time in which article 6:99 BW has been discussed in a product liability setting. The court of appeal in the proceedings leading up to the Supreme Court case stated that the principle contained in article 6:99 BW was already applied under the 'old' law, applying this principle was therefore in any case not contrary to any European law.¹⁷³ The Supreme Court however explicitly left the question as to the compatibility of article 6:99 BW and article 6:188 BW open in her verdict seeing as she was only asked to apply 'old' law. According to the Supreme Court, article 6:99 BW is applicable to product liability cases before the 1 of November 1990. No court therefore, has so far passed a judgement on the compatibility of article 6:99 BW and articles 6:188 BW. See the Supreme Court case of 9 October 1992, NJ 1994/535, m.nt. C.J.H. Brunner (*DES*):

In the so-called *Des*-case, named after the drug by that name which was claimed to be defective, 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, on the rule of alternative liability as laid down in art. 6:99 BW. The problem was that the claimants couldn't do this because not all producers were still in business or traceable. The Supreme Court decided that it was not necessary to sue every producer, and that each producer sued 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 Supreme Court 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 that particular manufacturer. The victims did however need to furnish and proof the following facts: (a) that the defending companies in the relevant period brought the faulty drug into circulation and is liable because of an error made in bringing the product into circulation, (b) that there are more producers that in the relevant period also sold the faulty drug and are also liable for an error made in bringing the drug into circulation and (c) that claimants suffered damages as a result of the use of the faulty drug but that it is impossible to determine what particular producer produced the used drugs.

The burden of proof with regard to the origin of the *Des*, therefore, rested with the manufacturers. At the end of the day (if one disregards the question as to whether the producers acted wrongfully), any of the victims of *Des* could call upon any (and only one, if so desired) of the manufacturers of *Des* that were still in business or traceable, to claim her full damages. Each of these manufacturers were jointly and severally liable for the whole of the

¹⁷² That the difference between fault and no-fault liability is decisive was confirmed in ECJ 10 January 2006, C-402/03 (*Skov*).

¹⁷³ Court of Appeal Amsterdam 22 November 1990, TMA 1991/2, p. 36.

damage, leaving the producer that was being called upon no alternative but to involve all of his known and traceable co-manufacturers into the proceedings.

When the damage is the result of cooperation in a group of producers, all producers are also jointly and severally liable, this time on the basis of article 6:166 BW. Of no relevance is which one of the producers exactly caused the damages. Such a situation will however be a very rare occurrence.¹⁷⁴

VII. Proof

As regards 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.¹⁷⁵ Article 6:188 BW aims to protect the producer by preventing a reversal of the burden of proof with regards to the elements of fault, damages and causality.¹⁷⁶ Because the Directive regime is one of strict liability, the injured party will not have to prove negligence in the sense of subjective fault on the side of the producer, nor will the producer be able to avail himself of liability by proving a *force majeure*.¹⁷⁷

According to several authors,¹⁷⁸ article 6:188 BW only provides the main rule, exceptions are therefore possible. Under the Directive, member states are free to apply their own burden of proof mitigating rules. Judgements regarding a burden of proof mitigating rule relating to non- (Directive) product liability claims can therefore also be relevant to the burden of proof rules under the Directive liability regime.¹⁷⁹ For the Netherlands, most relevant are the reversal of the burden of proof with regards to the causal link (see section VI), the *ipsa loquitur*-rule with regards to the existence of a defect and causal link between the fault and the damages and the reversal of the burden of proof on grounds of reasonableness and fairness as found in article 150 Rv.¹⁸⁰

¹⁷⁴ C.J.J.M. Stolker, GS Onrechtmatige daad, artikel 188 Boek 6 BW, aant. 8.

¹⁷⁵ On this, see Rb. Amsterdam 8 July 2005, JA 2005/82 (A./Merial), and I. Giesen, Bewijs en aansprakelijkheid (Den Haag: BJu, 2001), p. 195 ff, claiming *inter alia* that a reversal of the burden of proof with regard to the national rules on products liability would still be possible after introduction of the Directive. As to causation, this form of reasoning was accepted in Rb. Den Bosch 15 June 2005, JA 2005/69 (A./Organon Nederland) but in light of the more recent case law of the ECJ, see above section VI, this proposition hardly seems defensible anymore.

¹⁷⁶ Kamerstukken II 1985/86, 19636, nr. 13, p. 2 (Letter from the Minister of Justice).

¹⁷⁷ Kamerstukken II 1987-1988, 19636, nr. 3, p. 8 (MvT); L. Dommering-van Rongen, Productaansprakelijkheid, Een rechtsvergelijkend overzicht (Deventer: Kluwer, 2000), p. 41.

¹⁷⁸ Kamerstukken II 1985/86, 19636, nr. 17, p. 3 (Letter from the Minister of Justice); L. Dommering-van Rongen, Productenaansprakelijkheid (diss. Utrecht), Deventer: Kluwer 1991, p. 287; L. Dommering-van Rongen, Productaansprakelijkheid, Een rechtsvergelijkend overzicht, Deventer: Kluwer 2000, p. 178; H.J. Kullman, Aktuelle Rechtsfragen der Produkthaftpflicht, RWS-Skript 153, Köln, 1988; to G.M.F. Sniijders, Productenrecht. Drie aspecten in Europees perspectief, Deventer: Kluwer 1990.

¹⁷⁹ C.J.J.M. Stolker, GS Onrechtmatige daad, artikel 188 Boek 6 BW, aant. 4.

¹⁸⁰ Asser/Hartkamp & Sieburgh 6-IV* 2011/269; I. Giesen, Bewijs en aansprakelijkheid (Den Haag: BJu, 2001), p. 195.

For example, although the burden of proof rests on the claiming party, the judge is still able to, after the claiming party sufficiently explained his statements, order the other party to provide evidence which the claiming party cannot, but the producer is able to provide (for example production and testing data).¹⁸¹

In a product liability setting the *ipsa loquitur*-rule can be formulated as follows: when the injured party argues convincingly that he used the product in a normal fashion and the product still caused damages, this would indicate to a court that the product was faulty, the producer would then need to argue convincingly that the opposite was the case.¹⁸² The *ipsa loquitur*-rule was applied by the Supreme Court in a case regarding an exploding bottle of carbonated drink¹⁸³ (HR 24 December 1993, NJ 1994, 214 (Leebeek/Vrumona)):

In a bar the plaintiff opened a bottle of Pepsi Cola without applying extraordinary force. Without warning the neck of the bottle broke off, as a result of which the plaintiff suffered serious injuries to his left arm which required medical attention. Both the court in first instance as well as the court on Appeal, rejected the claim on the basis of not putting enough evidence forward to establish the fact that the product was faulty. According to the Supreme Court however, the plaintiff argued convincingly that he used the product in a normal fashion and the product nevertheless caused damages. According to the Supreme Court these facts would need to lead a court to assume that the product is defective, of course subject to proof to the contrary by the producer.¹⁸⁴

The Supreme Court made it 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 as well.

Even a reversal of the burden of proof with regards to the product being faulty is possible under exceptional circumstances as was shown in a case before the Court of Appeals Leeuwarden. In this case the injured party sent the product back to the manufacturer for inspection; the product went missing while in the hands of the producer.¹⁸⁵ See Court of Appeals Leeuwarden 21 December 1994, TvC 1995, p. 122-124.¹⁸⁶

¹⁸¹ According to G.M.F. Sijnders, *Productenrecht. Drie aspecten in Europees perspectief*, Deventer: Kluwer 1990, p. 80.

¹⁸² L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 288; L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht*, Deventer: Kluwer 2000, p. 48; A.J.O. van Wassenae van Catwijk, *Productenaansprakelijkheid*, 2e druk, Zwolle, 1991, p. 81.

¹⁸³ HR 24 December 1993, NJ 1994, 214 (*Leebeek/Vrumona*). See also J. Spier & A.T. Bolt (m.m.v. O.A. Haazen), *De uitdijende reikwijdte van de aansprakelijkheid uit onrechtmatige daad. Handelingen NJV, 1996-I* (Zwolle: Tjeenk Willink, 1996), p. 240-241.

¹⁸⁴ See I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 219-220, and p. 234-235.

¹⁸⁵ *Agreeing*: G.M.F. Sijnders, *Productenrecht. Drie aspecten in Europees perspectief*, Deventer: Kluwer 1990, p. 80.

¹⁸⁶ It should be noted that in this case the court applies old law but at the same time applied the Directive regime criteria for a fault (article 6:186 BW).

The front part of a bicycle frame breaks off while biking which is the result of a fabrication defect. The product therefore did not deliver the safety which the average consumer would be entitled to expect. This would seem to be a clear cut case; the proceedings none the less took 7 years to complete, mostly as a result of problems with evidence. After investigating the broken bike frame, the producer, Batavus, lost or destroyed the bike frame. As a result of this mishandling of evidence, the court of Appeals assumed that the product was defective and placed the burden of proof with regards to the non-defectiveness of the bicycle on Batavus, without requiring any further evidence with regards to the defectiveness of the product from the injured party.

According to Van Wassenaer, an additional reason for the court to adopt such a far reaching reversal of the burden of proof was the fact that Batavus issued a recall of the entire product series to which the bike belonged.¹⁸⁷

Although the *Implanon*-case did not provide for judgement on any fundamental matters, it did emphasize that the previously discussed situations are exceptions to the main rule of article 6:188 BW. In this case the District court ruled in favour of the plaintiff by adopting an assumption of fact regarding the defectiveness of the product.¹⁸⁸ This assumption was however overthrown on Appeal (*Court of Appeal 's-Hertogenbosch 28 August 2007, LJN BB2385, JA 2007/163 (Implanon)*):

Implanon is an anti-conception device in the shape of a little rod which gives off hormones. The rod needs to be implanted in the arm of a woman. Despite being implanted with the Implanon device, the 15 women claiming in this case have become pregnant. After becoming aware of their pregnancies the Implanon device was no longer detected in the bodies of the women. The women held the producer of the Implanon device, Organon, and the doctors who implanted the device, liable for damages suffered as a result of the pregnancy. Article 6:99 BW was not found to be applicable because it could not be determined that both defendants had actually erred with regards to the product. The court in first instance however, on the basis of reasonableness and fairness, still adopted the assumption that the product was defective; mainly taking into account the difficult task of proving who exactly caused the damages and the fact that the women were consumers.

According to the court of Appeal, an exception to the default rules of article 6:188 BW and 150 Rv is only possible in exceptional circumstances. The sole fact that on the side of the women there exists difficulty in proofing the required facts does not justify adopting the assumption that the product was defective; the same goes for the fact that the women in relation to Organon are consumers. By the fact that the Directive regime is a strict liability regime, the women are – because of their position as a consumer – already placed in a favourable position with regards to proof; according to the court on Appeal, assuming that the product was defective must therefore remain the exception.

Contrary to the ruling of the court in first instance, the court on Appeal finds that assuming that the product was defective is not possible here because

¹⁸⁷ A.J.O. van Wassenaer van Catwijck, *Productenaansprakelijkheid in Europees verband*, Zwolle 1991, p. 81, 82.

¹⁸⁸ District Court 's-Hertogenbosch 26 March 2008, JGR 2008/39.

the circumstances of the case do not clearly point in one single direction. Important in this regard is that the women claim that the damages are caused by either incorrectly implanting the device, in that case the doctor would be liable, or by the defectiveness of the device, in which case Organon would be liable; the women did however not show that the device was incorrectly implanted nor did they show that the device was defective in any way, they merely claimed that that was the case. The women therefore did not show that any of the defendants erred in such a way as to possibly create a malfunctioning product. The women therefore did not bring forth any evidence which would lead a court to assume the defectiveness of the product.

VIII. Defences

1. Introduction

Article 6:185 BW explicitly names six defences, five of which will be discussed in this section. The defence of not having brought the product into circulation (article 6:185 sub a BW) was discussed in section II.

Because the Directive regime is a system of strict liability, the producer will not be able to avoid liability by proving that he cannot be blamed (in the subjective sense) for the defective product. For the same reason proving a force majeure will not relieve him of liability.¹⁸⁹ As was discussed in section VII, the producer always has the burden of proof with regards to the facts constituting a defence.¹⁹⁰

Firstly we will be discussing how the producer may avoid liability by proving that the product was originally not defective (section VIII.2). The producer will furthermore be able to avail himself of liability by claiming that the product was produced in a non-commercial manner, this defence is dealt with in section VIII.3. When producing or designing the product, the producer may have been bound by mandatory rules of law which may provide a valid defence which is discussed in section VIII.4. Next we will be dealing with the risk development defence in section VIII.5. In section VIII.6 we explore under what circumstances a parts producer may avail himself of liability when his part was not the cause of the defect. In section VIII.7 and VIII.8 we explain under what circumstances contributory negligence and contributory negligence of a third party may or may not constitute a defence under the Directive regime. Lastly, in section VIII.9 we deal with the prescription and limitation of the right to action under Dutch law.

2. The product was originally not defective

Article 6:185 para 1 sub b provides that the producer can defend against a product liability claim by proving that the product was not faulty at the time of bringing the product into circulation or that the defect was created at a later time. This defence contains a dichotomy. First of all it speaks of the product not being faulty and on the other hand the article speaks of the later

¹⁸⁹ *Kamerstukken II* 1987-1988, 19636, nr. 3, p. 8 (MvT); Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht*, Deventer: Kluwer 2000, p. 41.

¹⁹⁰ HR 24 december 1993, NJ 1994/214 (*Leebeek/Vrumona*).

creation of the defect. The reason behind this second option for the producer is to lighten the burden of proof of the producer.¹⁹¹ Proving that a later event caused the defect is a relatively easy task compared to proving that the defect was not present at the time of bringing the product into circulation. By demanding of the producer that he 'make a plausible case' for the required facts, it is furthermore made clear that a not too heavy burden of proof rests on the producer.¹⁹²

This defence could be applicable in the case of a product which spoils after being brought into circulation, for example as a result of incorrect handling by the customer (e.g. ignoring instructions to keep the product cool) or in the case of a defect created because of the product coming into contact with a certain substance. Lastly this defence could also be applicable in a situation where the defect is the result of an alteration in the composition or construction of the product which was made on the instruction of or by the user.¹⁹³ In a case before the District Court of Zutphen this defence was used to escape liability because the defect was created by incorrect installation by a third party (District Court of Zutphen 7 July 2007, LJN BA5773, JA 2007/112):

Plaintiff lights the gas heater in the caravan of a friend. The gas heater explodes causing permanent injury to the plaintiff as a result of flying shards of glass. The caravan was purchased by the friend of the plaintiff in a camping center, it was however produced by Nijbo. Dru produced the gas heater which exploded. After the explosion an employee of Dru investigated the incident and found that the gas heater was installed incorrectly and that this incorrect installation is in fact is what caused the explosion. In particular the circulation hood was found to be too large which prevented sufficient circulation of air. Plaintiff holds Nijbo as the producer of the end product (the caravan) liable for damages resulting from the explosion. Nijbo states that it cannot be held accountable because it did not install the gas heater, the court interprets this as an article 6:185 para 1 sub b BW defence. According to the court, Nijbo substantiated its claim that it did not install the gas heater; the court therefore assumes that the caravan was not faulty at the time of bringing the caravan into circulation. Nijbo can therefore not be held liable for the explosion.

3. Non-commercial production

The defence of article 6:185 para 1 sub c limits the applicability of the Directive regime to producers acting in a professional or commercial capacity. The defence excludes non-commercial products from the scope of the Directive regime. A producer who invokes this defence must meet two requirements: (a) the product was neither manufactured by the producer for sale or any form of distribution for economic purposes and (b) not manufactured or dis-

¹⁹¹ *Kamerstukken II 1987-1988*, 19636, nr. 6, p. 17 (MvA); L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 204; L. Dommering-van Rongen, *Productaansprakelijkheid*, Een rechtsvergelijkend overzicht, Deventer: Kluwer 2000, p. 79.

¹⁹² *Kamerstukken II 1987-1988*, 19636, nr. 3, p. 8 (MvT).

¹⁹³ G.M.F. Snijders, *Productenrecht*, Drie aspecten in Europees perspectief, Deventer: Kluwer 1990, p. 100.

tributed by him in the conduct of his profession or business.¹⁹⁴ According to the government, the term 'business' also includes public-sector companies.¹⁹⁵

The first requirement refers to the aim of production (with or without an economical goal), while the second requirement refers to the capacity of the producer (acting in the conduct of his profession or business). One might for example think of a charitable organization selling homemade food or a person who invites his neighbours to try out a homemade cake.¹⁹⁶

ECJ judgement of 10 May 2001, C-203/99, (*Veedfald/Aarhus Amtskommune*):

In a case between Veedfald and the Aarhus Amtskommune the liability consequences of a faulty injection fluid used by a hospital was in discussion. In Denmark medical expenses are paid from public funds. The question raised in this case is whether this can still be considered commercial production. The ECJ in para 21 of its judgement responds as follows:

'As to that point, the fact that products are manufactured for a specific medical service for which the patient does not pay directly but which is financed from public funds maintained out of taxpayers' contributions cannot detract from the economic and business character of that manufacture. The activity in question is not a charitable one which could therefore be covered by the exemption from liability provided for in Article 7(c) of the Directive. Besides, the Amtskommune itself admitted at the hearing that, in similar circumstances, a private hospital would undoubtedly be liable for the defectiveness of the product pursuant to the provisions of the Directive.'

It should be noted that blood products are considered to be produced in commercial production, even though blood banks and hospitals in the Netherlands are non-profit organizations.¹⁹⁷ They therefore will not be able to make use of the protection offered by article 6:185 para 1 sub c BW. This means that blood banks and others who, in a professional and or economical capacity process blood products, are liable for bringing infected blood into circulation, even if they cannot be blamed in any way whatsoever.¹⁹⁸

4. Following mandatory rules

Article 6:185 sub d gives the producer the option to defend against liability by proving that the information provided for the product or the design and manufacturing of the product was dictated by certain mandatory rules of law. Many producers reading article 6:185 sub d incorrectly assume that they

¹⁹⁴ *Kamerstukken II* 1987-1988, 19636, nr. 13, p. 4, (Letter of the Minister).

¹⁹⁵ *Kamerstukken II* 1987-1988, 19636, nr. 3, p. 8 (MvT).

¹⁹⁶ L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 211; L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht*, Deventer: Kluwer, 2000, p. 78.

¹⁹⁷ Stolker, 'Aansprakelijkheid voor bloedproducten en bloedtransfusies', *NJB* mei 1995, p. 68; ECJ judgement of 10 May 2001, C-203/99, (*Veedfald/Aarhus Amtskommune*); *Kamerstukken II* 1987-1988, 19636, nr. 13, p. 40, (Letter of the Minister).

¹⁹⁸ C.J.J.M. Stolker, 'Aansprakelijkheid voor bloedproducten en bloedtransfusies', *NJB* mei 1995, p. 685; also: Court of Amsterdam 3 February 1999, *NJ* 1999, 621 (*Infected blood*).

can escape liability by strictly adhering to all the legal quality requirements and regulations.¹⁹⁹ In reality the term "mandatory rules" is given a very narrow interpretation. A rule is only mandatory when it leaves the producer hardly any freedom when determining the composition and construction of a product. As with all of the in article 6:185 BW named defences, it will be up to the producer to prove that the rule is a mandatory one.²⁰⁰

Insufficient will be to show that mandatory laws only set minimum rules to be adhered to or allow for the use of a variety of substances or procedures.²⁰¹ Proving that the product was brought to market with permission of the relevant authorities will also be insufficient. The producer will have to show that the design and composition were completely bound by mandatory provisions.²⁰²

Examples of mandatory rules of law are hard to find in Dutch law. One example is the regulation regarding infant food²⁰³ in which detailed rules can be found which much be adhered to completely.²⁰⁴ Secondly it has been argued in Dutch literature that it will be quite difficult to hold tobacco producers liable for the labelling of their packaging since their packaging is highly regulated.²⁰⁵ On the other hand, the rules requiring that drugs are registered with the relevant authorities cannot be used as mandatory provisions which could relieve a producer of liability.²⁰⁶

Successfully proving that the producer was following mandatory rules of law does not always completely free the producer of all liability. If the requirements of article 6:162 BW are met (see chapter C), liability is still possible via this alternative route. It is also possible that the government acted wrongfully by issuing the regulation on which the producer based the composition or specific construction of the product. In such cases the government can be held liable on the basis of the general tort regime.²⁰⁷

5. Risk development defence

In the case of the risk development defence, the producer can defend against liability by proving that, taking the state of science and technology at the time of the introduction of the product into consideration, it was impossible to discover the fault in the product (article 6:185 sub e BW).²⁰⁸ The risk

¹⁹⁹ G. Sijnders 'Productenrecht - drie aspecten in Europees perspectief', Deventer: Kluwer 1990, p.101.

²⁰⁰ *Kamerstukken II* 1987-1988, 19636, nr. 13, p. 8 (Letter of the Minister); also: G.M.F. Sijnders, *productveiligheid en aansprakelijkheid*, diss. Utrecht 1987, p. 235-236.

²⁰¹ L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 215; Verkade/Van Sint Truiden/Maessen, D.W.F. Verkade, M.Ph. van Sint Truiden, J.F.C. Maessen, *Product in gebreke*, Alphen aan de Rijn: Samsom 1990, p. 60.

²⁰² *Kamerstukken II* 1987-1988, 19636, nr. 13, p. 4, (Letter of the Minister).

²⁰³ *Regeling zuigelingenvoeding (Warenwet) van 8 juli 1987*, Stcrt. 1987/136.

²⁰⁴ *Kamerstukken II* 1985/86, 19636, nr. 13, p. 8 (Letter from the Minister of Justice).

²⁰⁵ L. Dommering-van Rongen, 'Roken moet mogen, maar wie betaalt de schade?', in 'consument zonder grenzen', Kluwer, Deventer: 1996, p. 253.

²⁰⁶ *Kamerstukken II* 1985/86, 19636, nr. 6, p. 17 (MvA); C.J.J.M. Stolker, *GS Onrechtmatige daad, artikel 185 Boek 6 BW*, aant. 7.1.

²⁰⁷ *Kamerstukken II* 1985/86, 19636, nr. 13, p. 8 (Letter from the Minister of Justice).

²⁰⁸ ECJ judgement of 29 May 1998, C-300/95, (*Commission/UK*) Stolker, *GS Onrechtmatige daad*, art. 6:186 BW, aant. 7.

development defence therefore refers to defects that, at the time of bringing the product into circulation, were already present in the product but were impossible to detect.

From the moment the Directive was first created there has been a difference of opinion regarding the interpretation of the risk development defence. Clear is that the producer who wants to avail himself of liability using the risk development defence must meet very difficult requirements.²⁰⁹ In Dutch literature there is a broad consensus that the risk development defence must be interpreted narrowly;²¹⁰ opinions on exactly how narrow differ however from author to author.

Stolker takes the most extreme position when stating that the defect must have been absolutely undetectable. Unimportant is whether the knowledge was difficult to obtain, relevant is whether the information was obtainable through further investigation. This means that when someone somewhere on earth is able to retrieve relevant results from an investigation, it was apparently possible to discover the defect according to Stolker.²¹¹

Less strict are Verkade, Van Sint Truiden and Maessen, who find it reasonable that the producer is obligated to inform himself through all accessible relevant domestic and international publications.²¹²

A judgement of the ECJ in 1997 gave insight into this subject. The procedure was brought by the Commission against the UK regarding its implementation of the Directive.²¹³ According to the Commission the criteria of the Directive is an objective one whilst the UK's implementation contained a subjective one.

The ECJ does not find the criterion implemented by the UK to be a subjective one and therefore not contrary to EU law. The ECJ however uses this opportunity to interpret the term "state of scientific and technical knowledge" used in the Directive. This term does not refer to certain safety norms and customary industrial practices in the sector in which the producer is active, but to the state of science and technology including the most advanced level available at the time of bringing the product into circulation. The defence does not refer to knowledge actually present with the producer but to knowledge he should have had.

ECJ 29 May 1997, C-300/95, Jur. 1997, p. I-2649 (Commission/United Kingdom):

²⁰⁹ *Kamerstukken II 1985/86, 19636, nr. 18, p. 28 (MvA).*

²¹⁰ J. Knottenbelt, *Productenaansprakelijkheid*, diss. Rotterdam 1990, p. 50; L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 237; L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht*, Deventer: Kluwer 2000, p. 51; D.P. Young, *Jaarboek Consumentenrecht*, 1992, p. 69; H. Duintjer Tebbens, *De Europese richtlijn productenaansprakelijkheid*, *NJB* 1986, blz. 372; C.J.J.M. Stolker, *Vijf argumenten tegen het ontwikkelingsrisicoverweer*, *NJB* 1989, p. 647.

²¹¹ C.J.J.M. Stolker, *Vijf argumenten tegen het ontwikkelingsrisicoverweer*, *NJB* 1989, p. 647.

²¹² D.W.F. Verkade, M.Ph. van Sint Truiden, J.F.C. Maessen, *Product in gebreke*, Alphen aan de Rijn: Samsom 1990, p. 77.

²¹³ *ECJ 29 May 1997, C-300/95, Jur. 1997, p. I-2649 (Commission/United Kingdom).*

"29. It follows that, in order to have a defence under Article 7(e) of the Directive (or article 6:185 sub e BW), the producer of a defective product must prove that the objective state of scientific and technical knowledge, including the most advanced level of such knowledge, at the time when the product in question was put into circulation was not such as to enable the existence of the defect to be discovered. Further, in order for the relevant scientific and technical knowledge to be successfully pleaded as against the producer, that knowledge must have been accessible at the time when the product in question was put into circulation. On this last point, Article 7(e) of the Directive, contrary to what the Commission seems to consider, raises difficulties of interpretation which, in the event of litigation, the national courts will have to resolve, having recourse, if necessary, to Article 177 of the EC Treaty."

The more lenient authors state that the criteria entails that the defect could not reasonably have been discovered. This line can be found in the previously discusses judgement by the District Court of Amsterdam regarding infected blood²¹⁴ (District Court of Amsterdam 3 February 1999, NJ 1999/621):

As discussed before, in this case a blood bank had broad HIV infected blood into circulation. The blood was taken from the donor in the small window between infection and the infection becoming detectable. After the first following check-up the donor was found to be infected, after this determination, the previously donated blood was retested several times, also using the new HIV-1 RNA test, these tests provided varying results. The conclusion was that the test results were dubious. The plaintiff eventually turned out to have been infected with HIV from this infected blood. In essence two questions were dealt with in this case, whether the infected blood was defective in the sense of article 6:186 BW, and whether the blood bank can defend against the claim using the state of the art defence.

Regarding the state of the art defence, the blood bank claimed that, given the state of science and technology at the time of bringing the blood into circulation, it was impossible to detect HIV infected blood in the small window of time just after infection. In judging this defence the central discussion was on whether the blood bank should, instead of the regular HIV-1/2-screeningtest, have used the HIV-1 RNA test which was still in an experimental stage. This test was complicated, not approved nor validated and a German tests report showed the test to not be as far developed as to recommend full implementation of the test. After extensively discussing the different aspects of this test, the court concludes that, given the state of science and technology at the time of bringing the infected blood into circulation, it was for the blood bank practically impossible to use the HIV-1 RNA test; this could therefore not have been expected of her. The blood bank therefore acted in accordance with the scientific and technological knowledge in existence at the time, the defence was therefore successful. The judgement was not appealed.

6. Non-faulty component

Not just the producer of a final product but also the producer of parts and materials used in the product can fall under the Directive regime definition

²¹⁴ District Court of Amsterdam 3 February 1999, NJ 1999/621 (*infected blood*).

of a producer (article 6:187 para 2 BW). Article 6:186 sub f BW does however limit the liability of producers who produce parts and materials used in the final product (further: part producers) when the defect is caused by the design of the product of which the part or materials are a part, or when the defect is caused by instructions provided for by the final product producer. When a parts producer successfully argues this defence, not the parts producer but the producer of the final product in which his part or material was incorporated will be held liable.²¹⁵ The primary rule under the Directive regime is therefore liability of the final product producer for the entire product.

The non-faulty component defence in fact consists of two separate defences. First of all liability can be avoided when the defect is caused by a fault in the design of the final product as opposed to a fault in the part produced by the parts producer. The fault is in the way the producer of the end product used the part or material produced by the part producer and not in the part itself. Secondly liability can be avoided when the fault lies in the instructions given by the producer of the final product. The way that the part or material was produced is in this case the cause of the defect; the parts producer can nonetheless not be held liable because the fault here still lies with the producer of the final product.

It should be noted that the producer/supplier of defective building materials will in most cases not be able to rely on the here discussed defence since the final product will in most cases be an immovable object (e.g. a house) and therefore will not fall under the scope of the Directive regime.²¹⁶

7. Contributory negligence

The strictness of the liability regime can be reduced or, under certain circumstances, even be completely lifted when the damage was caused by a defect as well as negligence by the injured party or a person for whom the injured party is responsible (article 6:185 para 2 BW). The injured party might for example be responsible for the actions of an agent or a subordinate.²¹⁷

A relevant circumstance might be the irresponsible way the product was used by the injured party. A motorist who keeps on driving with a defective braking system, even after discovering this defect might for example be faced with having to pay (a part of) his own damages.²¹⁸

The Directive article corresponding to article 6:185 BW (article 8 para 2), leaves the interpretation of the term 'contributing negligence' to the national systems. Courts will therefore use the in national law developed concept of a contributing negligence.²¹⁹ In the Netherlands this means that article 6:101

²¹⁵ L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 240; L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht*, Deventer: Kluwer 2000, p. 84.

²¹⁶ *Kamerstukken II 1985/86*, 19636, nr. 6, p. 24 (MvA).

²¹⁷ G. Snijders 'Produktenrecht - drie aspecten in Europees perspectief', Deventer: Kluwer 1990, p.106.

²¹⁸ *Kamerstukken II 1985/86*, 19636, nr. 18, p. 21 (MvA).

²¹⁹ *Kamerstukken II 1987-1988*, 19636, nr. 3, p. 27 (MvT); *Kamerstukken II 1985/86*, 19636, nr. 18, p. 21 (MvA).

BW will be applied; according to this article each party will be liability in accordance with the amount that each party contributed to the circumstances which caused the damages. When applying this rule of reciprocal causality a weighing of, on the one hand the duty of the producer to bring a safe product into circulation and, on the other hand the seriousness of the contributing negligence, will have to take place. One must however keep in mind that the reprehensibility of the producer's behaviour is not so much relevant here; one must instead look at the seriousness of the defect, as in to what extent the defect contributed to the circumstances which led to the damages.²²⁰

On top of this division of liability, article 6:101 BW provides for an equitable correction which can lead to a division of liability which differs from the division under reciprocal causality. This equitable correction can be applied when a deviation from the main rule is demanded by fairness, particularly taking into account the differing seriousness of the errors made by both parties, although other circumstances can also be taken into account. It is even possible that the producer is completely relieved of the obligation to pay for damages because of this correction.²²¹

In several judgements of the Supreme Court regarding liability of motorists (article 185 WVW), the Supreme Court provided extra protection to children and other non-motorists when a contributory negligence defence was argued. It is quite possible that these judgements will be applied *mutatis mutandis* to cases of contributory negligence of children in product liability cases, there is however no case law on this point yet.²²²

8. Contributing negligence by a third party

Article 6:185 para 3 states that the liability of the producer is not diminished when the damage is the result of both a defect and an act of a third party. A third party is in this context understood to mean, all persons who fall outside of the control of the injured party, as well as outside the control of the producer. Regarding the term 'act', one must think of active behaviour as well as a failure to act.²²³ The producer can for example not escape liability by claiming that the defect should have been noticed by some third party.

Snijders gives another example. During a traffic accident, a bicycle driver and a car driver both sustain injuries. The cause of the accident is the insufficient braking of the car which in turn was caused by a defect in the brakes – a defect as meant in article 6:186 BW – which had been known to the car driver for some time; the car driver however decided to keep on driving in the car. When the manufacturer of the car is held liable under the Directive

²²⁰ L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 314.

²²¹ R.M. Blaauw, in M.J.G.C. Raaijmakers c.s. (red.), *aansprakelijkheden*, Deventer 1990, p. 8; J. Knottenbelt, *Hoofdstukken Productaansprakelijkheid*, Zwolle: Tjeenk Willink 1991, p. 125.

²²² J. Knottenbelt, *Produktenaansprakelijkheid*, diss. Rotterdam 1990, p. 96; L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 319-320; A.J.O. van Wassenaer van Catwijck, *Productenaansprakelijkheid*, 2e druk, Zwolle, 1991, p. 63.

²²³ *Kamerstukken II 1985/86*, 19636, nr. 6, p. 22 (MvA).

regime by the bicycle driver for bringing a defective product into circulation, the producer cannot escape liability by claiming that a third party (the car driver), was negligent by knowingly using a defective car.²²⁴

Contributing negligence by persons for whom the injured party is responsible will however lead to the applicability of article 6:185 para 2 BW and article 6:101 BW and therefore to a possible reduction in liability for the producer.²²⁵

9. Prescription and limitation of the right to action

In accordance with article 191 para 1 BW, the injured party must file his claim within 3 years of becoming aware – or given the circumstances, must have become aware – of the damage, the fault in the product and the identity of the producer.²²⁶ The claim to reparations expires 10 years after the product was brought into circulation (article 6:191 para 2 BW). The limitation period under the Directive regime is shorter than the limitation period of 5 years under the general tort regime. This period will start the day after becoming aware of the damage and the person responsible for the damage. Under the general tort regime the claim to reparations expires after 20 years of the damage causing event (article 3:310 para 1 BW). In the general tort regime, an even longer period of expiration exists for damage which is the result of air, water or soil pollution (i.e. asbestos), such claims only expire after 30 years of the damage causing event (article 3:310 para 2 BW). When the damages are the result of physical injury or death a limitation period of 5 years starting the after becoming aware of the damages and the responsible person, will be applicable (article 3:310 para 5 BW). Nothing limits an injured party to file a claim under the general tort regime of article 6:162 BW after the Directive right to action has expired but subjective fault would of course need to be proven in such cases.

The period of limitation commences on the day following the day on which the injured party becomes aware or must have become aware of the above named facts. If the injured party fails to do so, his right to institute an action against the producer will expire (article 6:191 para 1 BW).

It is not necessary to be aware of the exact amount and extent of the damages, decisive is the knowledge of the existence of some kind of damage.²²⁷ When the damage is created some time after the damage causing event, the period of limitation will commence at this later time. This is however only the case for damage that is not the expected future consequence of the damage causing event.²²⁸ Decisive therefore will be whether the injured party

²²⁴ G. Snijders 'Produktenrecht – drie aspecten in Europees perspectief', Deventer: Kluwer 1990, p. 106.

²²⁵ L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 322; L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht*, Deventer: Kluwer 2000, p. 166; A.J.O. van Wassenaer van Catwijck, *Productenaansprakelijkheid*, 2e druk, Zwolle, 1991, p. 61.

²²⁶ *Kamerstukken II 1985/86*, 19636, nr. 6, p. 28 (MvA).

²²⁷ *Kamerstukken II 1987-1988*, 19636, nr. 6, p. 28 (MvA).

²²⁸ A.S. Hartkamp & C.H. Sieburgh, Mr. C. Assers *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht*, 6. Verbintenissenrecht. Deel II, De verbintenis in het algemeen, Deventer: Kluwer 2013, nr. 412.

determined or could have determined that the damage is connected to a defect in the product.²²⁹ The injured party however does not have a duty to investigate, according to Dommering-van Rongen.²³⁰ She argues that article 6:191 BW should not be interpreted broadly and it should therefore not be assumed too readily that the injured party was aware of information which would lead to the assumption that the damages are connected to a defect.²³¹

As mentioned, the claim itself expires after 10 years; this period starts on the day following the day on which the faulty product was put into circulation. A producer can therefore be sure that he will not be held liable under the Directive regime for a given type of defective product after 10 years of bringing the last of those products into circulation. As to what is to be understood as bringing a product into circulation, see section I. Using the moment on which the product was put into circulation as the start of the period of expiration can lead to unexpected consequences for the consumer because the purchase of the product by the consumer does not necessarily have to constitute bringing the product into circulation. A consumer can for example buy a product which has been brought into circulation 9 years ago and will therefore only have 1 year before his possible claim under the Directive regime expires.²³² Transferring a product to a subsidiary which is part of the retail process will however not always lead to the product being considered as being brought into circulation and therefore the commencement of the period of expiration, as we have seen before.²³³

In the case of multiple producers, the period of 10 years will commence separately for every individual producer. For example, the term with regards to a supplier of raw production materials will start from the moment these raw materials have been brought into circulation, the period with regards to the end consumer product in which these raw materials have been used will however start on the moment this final product has been put into circulation.²³⁴

Interruption or suspension of the limitation period is possible through a written notification in which the injured party, in unequivocal wording, reserves the right to claim for damages (article 3:317 BW). The period of expiration of the claim in article 6:191 para 2 can however not be interrupted or suspended.²³⁵ If legal proceedings have been instigated before the expiration of the claim, the passing of the 10 year mark will not lead to the claim expiring.²³⁶ The burden of proof with regards to the commencement of the period of limitations lies with the producer.²³⁷

²²⁹ *Kamerstukken II 1987–1988*, 19636, nr. 6, p. 28 (MvA).

²³⁰ L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 330.

²³¹ L. Dommering-van Rongen, *Productaansprakelijkheid*, Deventer: Kluwer 2000, p. 172.

²³² C.J.J.M. Stolker, *GS Onrechtmatige daad*, artikel 191 Boek 6 BW, aant. 6.

²³³ ECJ 9 Februari 2006, C-127/04, NJ 2006/401, m.nt. Mok (O'Byrne/Sanofi Pasteur).

²³⁴ *Kamerstukken II 1987–1988*, 19636, nr. 6, p. 29 (MvA) and L. Dommering-van Rongen, *Productaansprakelijkheid*, Deventer: Kluwer 2000, p. 173; differently: A.J.O. van Wasenseaer van Catwijck, *Productenaansprakelijkheid*, 2e druk, Zwolle, 1991, p. 70.

²³⁵ *Kamerstukken II 1987–1988*, 19636, nr. 6, p. 29 (MvA).

²³⁶ *Kamerstukken II 1987–1988*, 19636, nr. 6, p. 29 (MvA).

²³⁷ L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 331.

C. General tort as a basis for product liability: subjective fault

1. Introduction

The Directive liability regime²³⁸ explicitly leaves any at the time of introduction of the Directive already existing remedies intact (see article 6:193 BW). This means that an injured party may also base her claim on the general tort regime (article 6:162 BW). Many of the concepts used to establish liability under both regimes have for the most part been merged, leaving some minor differences between both regimes which we will be discussing in this chapter. Many of the rules discussed under the previous chapter will therefore be equally applicable in the general tort regime.

Although an action based on article 6:162 BW, parallel to an action based on the Directive regime (article 6:185 BW) is possible,²³⁹ in most cases a claim will be based on general tort law only when an action based on the Directive regime is impossible; for example when the right to action under the Directive regime has expired (see chapter B, section VIII.9).²⁴⁰ One can also think of products which do not fall under the definition of article 6:187 BW (see chapter B, section II) or situations in which the damages do not fall under the definition of article 6:190 BW (non-private property damage and immaterial damage without physical injury; see: chapter B, section V).²⁴¹ General tort law will lastly be relevant for products which have been brought into circulation before the entry into force of the Directive regime.²⁴²

It should be noted that, in some ways, the reach of the general tort regime is more limited compared to the Directive regime. Unlike a claim based on the Directive regime where a retailer can be held liable when he does not in a timely manner disclose the identity of the actual producer,²⁴³ under the general tort regime liability of parties who are not the actual producer (of some part)²⁴⁴ of the product will not be possible.²⁴⁵ Resellers who are also importing the product into the European Union do however need to be cautious when putting the product on the European market. When the product

²³⁸ Referring to articles 6:185 BW and following, this regime is discussed in the chapter B.

²³⁹ L. Dommering-van Rongen, *Productaansprakelijkheid*, Deventer: Kluwer 2000, p. 31.

²⁴⁰ See for example HR 1 October 1993, NJ 1995/182 (*Leaking Waterbottle III*), in this case an action was instituted 24 years after the fact.

²⁴¹ L. Dommering-van Rongen, *Productaansprakelijkheid*, Een rechtsvergelijkend overzicht (Deventer: Kluwer, 2000), p. 31; ECJ 10 January 2006, NJ 2006, 286 (*M.R. Mok*).

²⁴² The law introducing the Directive regime came into force on the 1 of November 1990 according to Royal Decree of 9 October 1990, stb. 1990,690; The importance of this category of cases is constantly diminishing since any claim based on the Directive regime will expire after 20 years of the damage causing event.

²⁴³ See Chapter B Section II.3.

²⁴⁴ Part producers can under the general tort regime also be held liable, for example: HR 22 Oktober 1999, NJ 2000, 159 (*Koolhaas c.s./Rockwool*).

²⁴⁵ HR 22 September 2000, NJ 2000, 644 (*Haagen/Vaessen*).

is found to be defective they can, unlike a non-importing reseller, also be held liable under the general tort regime.²⁴⁶

To establish a tort under the general tort regime one will have to prove some sort of wrongful act on the side of the producer, this requirement is dealt with in section II. This wrongful act then needs to be imputed to the producer, generally through some form of subjective fault which we will be dealing with in section III. After discussing these requirements for establishing a tort, we will be discussing the division of the burden of proof regarding causation in section IV and other more general evidentiary rules in section V. Lastly we will be dealing with the differences in the amount and types of damages recoverable under both regimes in section VI and the possible defences under the general tort regime in section VII.

As we will see below, most of the general rules and systems discussed in Chapter B will also be applicable under the general tort regime. We have, for the most part, chosen not repeat those rules in this chapter. When a deviation of the main rule discussed in Chapter B is not discussed in this chapter, it can be assumed that the same rule is applicable under the general tort regime.

II. Wrongfulness art. 6:162 para 2

1. Introduction

When establishing a tort, the first requirement is that there is some sort of wrongful conduct. Conduct (or lack thereof) can be considered wrongful when it forms a breach of some duty imposed by law, a rule of unwritten law pertaining to proper social conduct or a violation of someone's rights. Generally speaking, non-adherence to a binding statutory regulation will constitute a wrongful act under article 6:162 BW, the Commodities Act Decree ("*Warenwetbesluit*") would be an example of such a binding regulation.²⁴⁷ In practice, a breach of unwritten law pertaining to proper social conduct will often take the form of some violation of a standard of due care which is expected when a dangerous situation might arise.²⁴⁸ In a product

²⁴⁶ An example of an importer and not the actual producer being found liable for bringing a defective product into circulation can be found in the Helm Supreme Court case relating to toxic chemical used by farmers. The chemical (from somewhere in Russia) had been mixed with another chemical, making it poisonous for the crops it should have protected. The farmers did not sue the persons from whom they had purchased the chemical or the producer of the chemical but the next party in the chain of sales, the importer Helm AG, and they did so with success. Since the use as a chemical to protect the crops against bugs, et cetera, was a normal use for which the product was intended, the chemical did not offer the safety one could have expected. Whether or not the product was in conformity with what was expected between Helm AG and its direct purchasers (the actual supplier of the farmers) is of no relevance. This means a contractual fault earlier in the chain is no prerequisite for a valid tort claim, and that unlike a reseller, an EU importer cannot hide behind the fact that he is not the actual producer, HR 29 November 2002, NJ 2003, 50 (*Helm AG/Aerts c.s.*).

²⁴⁷ H. Heeres, 'Productaansprakelijkheid voor levensmiddelen', Koninklijke Vermande: Den Haag 2005, p. 23.

²⁴⁸ See for example: HR 5 November 1965, NJ 1966/136 (*Basement Hatch*); HR 26 September 2003, NJ 2003/660 (*Waterschap/Royal*); HR 28 June 2013, NJ 2013/365 (*Football playing inmate*).

liability context, this might for example take the form of an obligation to perform sufficient quality controls (see section II.3).²⁴⁹ In the past there has been disagreement as to whether the mere determination that a product is faulty would be sufficient to establish a wrongful act under the general tort regime,²⁵⁰ under the 'old' law the prevailing doctrine was that additional circumstances were required.²⁵¹

A change in thinking regarding this requirement of additional circumstances has however occurred since the Supreme Court in the *Halcion*-case stated that bringing a product into circulation is wrongful under general tort law if the product does not, given the circumstances of the case, offer the safety a consumer/user is entitled to expect.²⁵² The Supreme Court here clearly anticipated the introduction of the Directive regime norm for defectiveness.²⁵³ In the later *Dupont/Hermans*-case the Court furthermore 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.²⁵⁴ The Supreme Court in this case made an explicit reference to the norm used in the *Halcion*-case, showing that the two differently formulated norms are in essence the same.²⁵⁵ This rule was repeated and confirmed in the *Koolhaas/Rockwool*-case.²⁵⁶

The Supreme Court in the *Koolhaas/Rockwool*-case²⁵⁷ even found the here discussed Directive regime norm for wrongfulness applicable to non-con-

²⁴⁹ See for example, HR 2 February 1973, NJ 1973/315, followed by Court of Appeal Amsterdam 1 March 1974, NJ 1974/486 (*leaking water bottle*).

²⁵⁰ L. Dommering-van Rongen, *Productaansprakelijkheid. Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 31.

²⁵¹ The basis for this doctrine was the *Moffenkit*-case: HR 25 March 1966, NJ 1966, 279 (*Moffenkit*), the Supreme Court in this case seemed to find bringing defective product on the market wrongful, not as such, but given the specific circumstances of the case such as the advertisements made by the producer, see also: G.H.A. Schut, *Productenaansprakelijkheid* (Zwolle: Tjeenk Willink, 1974), nr. 128.

²⁵² HR 30 June 1989, NJ 1990/652 (*Halcion*).

²⁵³ Before the *Halcion*-case, Snijders already pointed to the fact that the Directive regime definition for a defective product in essence contained a wrongfulness standard. G.M.F. Snijders, 'Productaansprakelijkheid: gebrekkigheid en (on)zorgvuldigheid', NJB 1984, p. 480; G.M.F. Snijders, *Productveiligheid en aansprakelijkheid* (diss. 1987), Serie Consument en Recht nr. 2.

²⁵⁴ HR 6 December 1996, NJ 1997, 219 (*DuPont/Hermans*).

²⁵⁵ A.L.M. Keirse, 'Richtlijn 1985/374/EG inzake de aansprakelijkheid voor producten met gebreken' in A.S. Hartkamp et al., 'De Invloed van het Europese recht op het Nederlandse privaatrecht', Deel II, Kluwer 2014, p. 61; Mr. C. Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 4. Verbintenissenrecht. Deel IV. De verbintenissen uit de wet, Deventer: Kluwer 2015, nr. 259.

²⁵⁶ 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. C.H. Sieburgh "Wat beweegt de buitencontractuele aansprakelijkheid omstreeks 2000" WPNR 6450 (2001), p. 593, considers this to be a stricter criterion than the one that is used under the Directive, J.M. Barendrecht & J.H. Duyvensz "Productenaansprakelijkheid tegenover niet-consumenten" WPNR 6390/6391 (2000), p. 117-123 and p. 135-142, p. 121, also see this as a usually more narrow criterion; the same norm is repeated in HR 22 September 2000, NJ 2000, 644 (*Haagman/Vaessen*).

²⁵⁷ HR 22 Oktober 1999, NJ 2000, 159 (*Koolhaas c.s./Rockwool*).

sumer cases and producers of semi-finished products.²⁵⁸ Under the general tort regime, the same wrongfulness standard is therefore applicable, irrespective of whether the claiming party is a consumer.²⁵⁹

Whether the product did not offer the safety which was to be expected must, just as under the Directive regime, be determined using the commonly held opinions in existence at the time of bringing the product into circulation.²⁶⁰ When designing his product, a producer will also need to take into account potential misuse of the product by the user.²⁶¹

As stated, this standard of wrongfulness under the general tort law regime in practice much resembles the standard for liability under the Directive regime. The Supreme Court here (more or less) united the standard for wrongfulness under general tort law with the standard under the Directive regime.²⁶² The same circumstances will therefore play a role under both regimes when establishing the existence of a wrongful act.²⁶³ This would then seem to be in line with what the ECJ would like the situation to be, interpreting the Directive, as they did, as a form of maximum harmonisation for the issues covered by the Directive.²⁶⁴ For more information on the wrongfulness standard used under both regimes, we refer to chapter B, section III.

Below we will be going more in depth into some specific forms of wrongful conduct. In section II.2 we discuss under what circumstances a producer might, after the product was brought into circulation, have an obligation of due care to warn for a recently discovered danger associated with the prod-

²⁵⁸ Rockwool here produced a product which was sold as a semi-finished product, the product was incorporated by a third party into potting soil and subsequently sold to the claimant, there was therefore no direct relationship between Rockwool and the claimant.

²⁵⁹ L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 32; the Supreme Court here again explicitly references the earlier case HR 6 December 1996, NJ 1997, 219 (*DuPont/Hermans*), showing that the same wrongfulness standard is applicable here.

²⁶⁰ HR 25 November 2005, NJ 2009, 103 with comment from I. Giesen.

²⁶¹ HR 2 February 1973, NJ 2000, 315 (leaking water bottle).

²⁶² See on this 'spill-over'-effect W. van Gerven "A Common Law for Europe: The Future Meeting the Past?" ERPL 2001, volume 4. See also Hof Leeuwarden 18 March 1998, NJ 1998, 867 (*Tetra Werke/Kuiper*); J. Spier & A.T. Bolt (m m.v. O.A. Haazen), *De Uitdijende reikwijdte van de aansprakelijkheid uit onrechtmatige daad*. Handelingen NJV, 1996-I (Zwolle: Tjeenk Willink, 1996), p. 239; Bloembergen, case note under HR 22 October 1999, NJ 2000, 159 (*Koolhaas/Rockwool*), para. 4; I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 217, and L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 32. The difference between both systems is that in general tort law, subjective fault is also required, see below.

²⁶³ Annotation of Bloembergen under HR 22 Oktober 1999, NJ 2000, 159 (*Koolhaas/Rockwool*); JM. Barendrecht, JH. Duyvensz, *Productenaansprakelijkheid tegenover niet-consumenten*, WPNR 6390 (2000), p. 120-121.

²⁶⁴ See ECJ 25 April 2002, C-52/00, [2002] ECR I-3827 (*Commission v France*); ECJ 25 April 2002, C-154/00, [2002] ECR I-3879 (*Commission v Greece*); ECJ 25 April 2002, C-183/00, [2002] ECR I-3901 (*María Victoria González Sánchez v Medicina Asturiana SA*), and ECJ 10 January 2006, C-402/03 (*Skov*). See also A.L.M. Keirse, "Richtlijn 1985/374/EG inzake de aansprakelijkheid voor producten met gebroken", in: A.S. Hartkamp (e a.), *De invloed van het Europese recht op het Nederlandse privaatrecht*, Deventer: Kluwer 2014, p. 40-49, especially p. 48.

uct or even an obligation to recall the product. In section II.3 we will subsequently be dealing with any possible investigation duties the producer might have before bringing the product on the market.

2. Obligation to warn and product recall

Besides acting contrary to a statutory regulation or by bringing a defective product into circulation, wrongfulness can also be established because of additional circumstances, such as not fulfilling an obligation to warn or inform the user of certain dangers after the product was brought into circulation.²⁶⁵

Examples of producers noticing they might have such an obligation are found quite often when reading Dutch newspapers; these papers constantly report on public warnings issued by producers regarding possibly dangerous products.²⁶⁶ Often these producers offer to buy back the product from the consumer.

The obligations to warn or recall a product cannot arise from the Directive regime because the Directive regime only offers liability for the bringing into circulation of a dangerous product and not the keeping in circulation of dangerous products. The Directive regime therefore does not contain any provisions regarding liability for failing to institute warnings or product recalls.²⁶⁷ The fact that the Directive regime was lacking on this point was noted in the Netherlands during the implementation phase of the Directive regime.²⁶⁸ Damages sustained by private parties will therefore need to be recovered using the general tort regime of article 6:162 BW.²⁶⁹

Liability for not issuing a warning or product recall where one was needed will be of particular use when the defectiveness of the product cannot lead to liability, for example when, at the time of bringing the product into circulation, the defect was not and could not be discovered. The producer would in such a case be able to avail himself of product liability by claiming that

²⁶⁵ Such an obligation will, under the general tort regime, be relevant mainly as on obligation in cases where the dangerousness of the product was discovered after the product was brought into circulation. In such cases, the producer will be able to avail himself of liability because of the risk development defence (discussed in chapter B, section VIII.5); he therefore did not bring a defective product on the market. When the dangerousness of the product is discovered after it was brought on the market, the producer may however still have additional obligations such as warning for the recently discovered dangerousness of the product or even recalling the product.

²⁶⁶ L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 97; L. Dommering-van Rongen, *Productaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 171; P.M. Storm, 'Product Recall, het terugroepen van gevaarlijke producten (oratie Nijenrode)', Deventer: Kluwer 1985; District Court Haarlem 18 Februari 1992, NJ 1993, 521; C.E. Drion, 'Product recall', *NJB* 2016, p. 2665.

²⁶⁷ Since the implementation of Directive 2001/95/EC on General Product Safety, the government has however gained the ability to force a product recall through administrative fines and even criminal prosecution (implemented in the Netherlands in article 21 *Warenwet*).

²⁶⁸ *Kamerstukken II* 1985/86, 19636, nr. 6, p. 12 (MvA).

²⁶⁹ P. Kuipers, 'Aansprakelijkheid voor "terug-haalschade" en waarschuwingsplichten van de producent bij (mogelijke) product recall', *AV&S* 2001, p. 99-111 and F. Kroes, 'product recall', *AV&S* 2004, p. 166-175.

the defect could only now be discovered as a result of recent advancements in science and technology.²⁷⁰ If however the damages resulting from the defect could have been limited or entirely prevented by (timely) warnings or a product recall, the producer who chooses not to act will still be liable under article 6:162 BW.

According to the Supreme Court, a duty to warn users of a dangerous product may in some cases exist; this is especially true when the dangerousness of the product has been acknowledged by the government.²⁷¹ The limits of this duty to warn have not been made completely clear.²⁷² Whether a duty to warn exists at all will depend on the specific circumstances of the case. Most likely this duty will be assumed when the product in general is shown to be defective at the moment of it being brought into circulation, irrespective of any subjective fault on the side of the producer and especially where there is a real danger of the defective product causing damage.²⁷³ The Supreme Court has so far not (yet) ruled on whether not issuing a product recall can be wrongful.²⁷⁴ However, given the option for the government to force a product recall,²⁷⁵ many authors state that liability based on article 6:162 BW will be possible.²⁷⁶ Also, not warning for the dangers of a product after it was brought into circulation has been shown to be wrongful under certain circumstances.²⁷⁷

In the *Eternit*-case, cement plates containing asbestos were brought into circulation, these plates were installed in the home of the claimant. During construction works the claimant was exposed to the asbestos in these plates and subsequently developed lung cancer. The claimant states that the producer should have warned her that, without taking sufficient precautions, working with the cement plates would be dangerous. According to the Supreme Court, from the moment when knowledge of the dangerousness of the product exists in the surroundings of the producer, the producer must also be considered to have been aware of these dangers and accordingly such a producer must be held to a higher standard of due care, pertaining in particular to the interests of the persons who are in close proximity to where the asbestos is being worked with. Exactly what measures can be expected of a producer to satisfying his duty of care, will depend in particu-

²⁷⁰ See Chapter B para VIII.5 on the risk development defence, this defence is equally applicable under the general tort regime, see Chapter C, section VII.

²⁷¹ HR 2 May 1997, NJ 1998, 281 (*Centraal Beheer/Forbo*).

²⁷² See J. Spier discussing the *Centraal Beheer/Forbo*-case in A&V 1997/4.

²⁷³ J. Spier et al, 'Verbindenissen uit de wet en schadevergoeding', Deventer: Kluwer 2015, nr. 153.

²⁷⁴ The *Forbo*-judgement (HR 2 May 1997, NJ 1998, 281) comes close to the here discussed situation but does not clearly state that a manufacturer can be held liable when he erroneously did not institute a product recall.

²⁷⁵ Article 21 para 2 Warenwet.

²⁷⁶ See authors named by P. Kuipers, 'Aansprakelijkheid voor "terug-haalschade" en waarschuwingsplichten van de producent bij (mogelijke) product recall', AV&S 2001; Also C.J.M. van Doorn, S.B. Pape, 'Productaansprakelijkheid en productveiligheid'. In: E.H. Hondius, G.J. Rijken, 'Handboek Consumentenrecht' 4 Druk, Uitgeverij Paris: 2015; J. Spier et al, 'Verbindenissen uit de wet en schadevergoeding', Deventer: Kluwer 2015, nr. 153.

²⁷⁷ HR 25 November 2005, NJ 2009, 103, (*Eternit/H.*) m.nt. Giesen; see also: A. Franken, 'Actuaiteiten Productaansprakelijkheid 2002-2008', AV&S 2009, 26.

lar on the specific knowledge and insights available at the time. Relevant will be how certain it was at the time that exposure to asbestos would lead to (serious) negative health effects. According to the court the knowledge of the dangerousness of asbestos was readily available in the year 1971, Eternit must have therefore been aware of this fact and selling asbestos containing plates without warning of the danger associated with working with asbestos was therefore wrongful. It should be noted that the Supreme Court here accepts the existence of a duty to warn, before the product is brought into circulation, the case can however serve as an analogous argument for the existence of a duty to warn users, even if the knowledge of the dangerousness of the product was only acquired by the producer after the product was brought into circulation.

3. Investigation duties

Whether the bringing into circulation of a dangerous product constitutes a wrongful act under article 6:162 BW will often depend on whether the producer took the precautions that could have been expected of him with the aim of preventing damage caused by the product.²⁷⁸ The producer may for example have an obligation to investigate whether there are any unforeseen and unwanted dangers associated with the use of a product before bringing it into circulation. Such dangers which, when discovered, might lead to an obligation to notify the user.

Because the defectiveness criterion of article 6:185 BW is also applicable under the general tort regime, investigation duties established under this article, for example in case law, will also be applicable under the general tort regime (see chapter B, section VIII.5).²⁷⁹

Under the general tort regime, a clear investigation duty for end product and part producers who introduce a new or improved product was established by the Supreme Court in the *Rockwool*-case.²⁸⁰ Rockwool, the producer of 'steenwol', sold 'steenwol' as a semi-finished product to producers of potting soil. The 'steenwol' was subsequently incorporated into the potting soil produced by the final product producer and sold to producers of varying kinds of crops. In its advertisements, Rockwool directly targets these final users, including Koolhaas c.s. who produces Yucca plants. At a certain point in time, Rockwool changed the composition of its 'steenwol' from 'tweewol' to 'zeswol'; this change caused damage to the Yucca plants produced by Koolhaas c.s. Rockwool is subsequently held accountable.

The Supreme Court stated that, in general, a producer who brings a product into circulation will have to take all measures that can be expected of a producer acting with due care to prevent that product from causing damage. Furthermore the producer will need to inform himself of the consequences an improvement to the product will have for how suitable the product is for its most obvious uses. Given that the obligation to furnish facts is placed on

²⁷⁸ J. Spier, *Verbintenissen uit de wet en schadevergoeding*, Deventer: Kluwer 2012, nr. 151.

²⁷⁹ L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 35.

²⁸⁰ HR 22 Oktober 1999, NJ 2000, 159 (*Koolhaas c.s./Rockwool*).

the producer, the producer will need to furnish facts regarding the efforts he took to inform himself thereof.²⁸¹

The Supreme Court in the *Rockwool*-case ruled that a part producer who changes the composition of his product will have to perform extensive testing and publish the results or alternatively he will need to recommend an alternative application of the product; if he chooses not to do so he can not suffice with informing his direct client (the end product producer) of the change in his product. At the very least he will need to make sure that the final users (clients of the end product producer) are informed of the change in composition of the product.

Besides investigating the consequences of a deliberate change in his product, a producer may also have an obligation to investigate less deliberate defects, such as manufacturing defects, as was shown in the *leaking water bottle*-case.²⁸² A hot leaking water bottle was placed in the crib of an infant and as the water bottle leaked this led to severe burn wounds. The Supreme Court dismissed the statement that it was not possible to perform enough quality checks to catch a defect as was present here. According to the Supreme Court, the defendant did not argue convincingly that there were absolutely no measures that could have been taken which could have prevented water bottles with this specific defect from being produced and/or brought into circulation.

Given this strict obligation for producers to check for defects, performing random inspections of only a percentage of the products produced might not always be sufficient to avoid liability. For example in a case before the Court of Appeal in Amsterdam a desk chair was found to be defective because the chair fell apart as a result of an incorrect weld. This judgement was not altered by the fact that the producer performed quality checks on a percentage of the desk chairs produced. In this case the producer's efforts were found to be insufficient because the producer did not take all available measure to prevent a defective product being brought into circulation.²⁸³

III. Negligence in the sense of subjective fault (art. 6:162 para 3 BW)

As mentioned in chapter A, section I, unlike a claim under the Directive regime (article 6:185 BW), a claim under general tort law will, in accordance with article 6:162 BW para 3, require negligence in the sense of subjective fault on the side of the defendant. The action must be imputed to the producer as a result of his subjective fault or alternatively on the basis of a specific legal rule or a generally accepted principle. Especially the proof of the element of subjective fault might pose a challenge to the plaintiff because he will not have information on the design of the production process, the materials used in the product, how well the machinery is maintained, what quali-

²⁸¹ L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 34.

²⁸² HR 2 February 1973, NJ 1973, 315 (*Hot waterbottle*).

²⁸³ Court of Appeal Amsterdam 27 August 1998, VR 1999, 67 (*Office chair*).

ty checks are performed by the producer, etc.²⁸⁴ Generally, it will therefore be difficult if not impossible for the plaintiff to show that the producer could have avoided the creation of the defect or the bringing into circulation of the defective product.

Case law has however significantly lightened the burden of proof for the plaintiff by introducing assumptions of fact, by moving to a more objective definition of subjective fault and lastly by application of the *res ipsa loquitur* rule.²⁸⁵ A general rule regarding the reversal of the burden of proof has so far not been formulated in Dutch law.²⁸⁶ However, as we will see below, when the existence of a defect has been established, subjective fault tends to be assumed. For example, according to the Supreme Court in the *Du Pont/Hermans*-case, in product liability cases, the nature of the tort requires the element of subjective fault to be investigated using facts and circumstances asserted by the producer.²⁸⁷ In other words, with regard to product liability cases, the obligation to furnish facts is placed on the producer when it comes to the element of subjective fault.²⁸⁸ It should however be noted that, unlike the situation in Germany,²⁸⁹ this does not entail a full reversal of the burden of proof because the risk of non-persuasion is not placed on the producer.²⁹⁰

When can a defect be imputed to a subjective fault of the producer? It is useful to distinguish between the different types of defects when answering this question.²⁹¹ Fabrication defects are the result of the producer not having the production process under his complete control. These kinds of defects therefore occur within the sphere of responsibility of the producer and will generally be imputed to a subjective fault of the producer.²⁹²

In the case of information and instruction defects the product as such does not necessarily have to be defective, it is the additional circumstance of incorrect information or the absence of correct information which makes the product as a whole defective. When the product poses a clear and direct

²⁸⁴ C.J.J.M. Stolker, *GS Onrechtmatige daad*, afdeling 3 Boek 6 BW, aant. 31; A.S. Hartkamp & C.H. Sieburgh, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel VI. De verbintenis uit de wet*, Deventer: Kluwer 2015, nr. 258.

²⁸⁵ C.J.J.M. Stolker, *GS Onrechtmatige daad*, afdeling 3 Boek 6 BW, aant. 31; see also: HR 2 February 1973, NJ 1973/315 (*Lekkende kruik I*) and HR 1 October 1993, NJ 1995/182 (*Lekkende kruik III*); HR 25 March 1966, LJN AC4642; NJ 1966/279 (*Mollenkitt*), HR 24 December 1993, NJ 1994/214 (*Pepsi Cola*) and HR 20 Oktober 2000, NJ 2001, 118.

²⁸⁶ A.S. Hartkamp & C.H. Sieburgh, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 4. Verbintenissenrecht. Deel III. De verbintenis uit de wet*, Deventer: Kluwer 2015, nr. 77; I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: B.Ju, 2001), p. 233.

²⁸⁷ HR 6 December 1996, NJ 1997, 219 (*Du Pont/Hermans*).

²⁸⁸ HR 6 December 1996, NJ 1997, 219 (*Du Pont/Hermans*); L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 34.

²⁸⁹ BGH 25 Oktober 1988, NJW 1989, 707.

²⁹⁰ L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 3.

²⁹¹ L. Dommering-van Rongen, *Productaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 143.

²⁹² L. Dommering-van Rongen, *Productaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 75.

danger as a result of the (absence of) information provided, subjective fault will in most cases be fairly clear. When this is not the case, additional circumstances will need to be furnished and possibly proven.²⁹³ Such additional circumstances might be found in certain claims made in commercials for the product.²⁹⁴

In the case of design defects the whole concept of the product is unsound. The producer is confronted with the claim that he should have produced the product in some other shape or form. The determination that the product was defective in such cases often means that the producer was negligent. Usually the decision as to the subjective fault of the producer is therefore not a difficult one in such cases. When the producer made a conscious decision as to the form of the product, the defence that he was not aware of the consequences of his choice is usually cut short by assuming an obligation to stay informed of developments in technology and science.²⁹⁵ This last point can be succinctly illustrated using the *Janssen/Nefabas*²⁹⁶ Supreme Court case.

In this case a worker held his employer liable for damages as a result of working with asbestos for multiple years. The employer was given the obligation to research what dangers the substances which were to be processed by his employees will have for said employees. The employer must furthermore, in a timely manner, inform himself of any additional information which may be relevant to his obligation to provide a safe work environment. The employer will have to show that he informed himself of such fact, for example by consulting experts in the field or by showing why such research could not have been expected of him. The Supreme Court here puts a heavy burden of proof and obligation to furnish facts on the employer. The obligation to furnish facts can be so difficult to fulfil that most employers and producers will fail; in practise this would often come down to a system of strict liability. According to Dommering-van Rongen, the meaning of this judgement for product liability cases is therefore that the difference between liability based on article 6:185 BW and article 6:162 BW with regards to the proof of subjective fault has presumably become very small.²⁹⁷

IV. Causation

All recoverable (see article 6:95 BW and following) damages which are in a causal connection with the damage causing event will be recoverable under the general tort regime (see: article 6:98 BW). Under the general tort regime, damages are therefore not limited to the types of damages named in article 6:190 BW. Under both regimes, the main rule applicable is that the legal

²⁹³ J.M. van Dunné, 'Verbintenissenrecht Deel 2, Onrechtmatige daad Overige verbintenissen', Kluwer: Deventer 2001, p. 571.

²⁹⁴ J.M. van Dunné, 'Verbintenissenrecht Deel 2, Onrechtmatige daad Overige verbintenissen', Kluwer: Deventer 2001, p. 576; see for example: HR 25 March 1966, NJ 1966,279 (*moffenkit*).

²⁹⁵ L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 75.

²⁹⁶ HR 6 April 1990, NJ 1990, 573 (*Janssen/Nefabas*).

²⁹⁷ L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 75.

burden of proof regarding the causal connection is placed on the claimant.²⁹⁸ The burden of proof mitigating rules with regard to causation that are applicable under the Directive regime will however also be applicable under the general tort regime which in practise significantly lightens the burden of proof that rests on the claimant. For more specific information on burden of proof mitigating rules relating to causation, we refer to chapter B, section VI.

In Chapter B, section VI we discussed that it is unclear whether article 6:99 BW will be applicable under the Directive regime. Such uncertainty of course does not exist with regard to the general tort regime. The system of alternative causality contained in article 6:99 BW will generally be applicable under the general tort regime.²⁹⁹

V. Proof

In principle, the same division of the burden of proof applies under the Directive regime as under general tort law, we therefore refer to chapter B, section VI and VII. In this section we limit ourselves to restating a few of the main evidentiary rules we discussed in chapter B and addressing the differences between the Directive regime and the general tort regime when it comes to burden of proof mitigating rules.³⁰⁰ Just as under the Directive regime, the party who asserts certain facts will carry the burden of proof with regards to these facts (article 150 Rv).³⁰¹ The injured party will have to furnish facts regarding the existence of a damage causing defective product and the existence and amount of the damages.³⁰² If these facts are disputed by the producer, the claimant will also need to prove these facts.³⁰³

Regarding the establishment of the defectiveness of a product, the previously (in Chapter B, section VII) discussed rule formulated in the *Leebeek/Vrumona*-case³⁰⁴ will be applicable in cases based on article 6:162 BW.³⁰⁵ According to this rule, to escape liability, the producer will need to 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;
- c) and the product was not used in accordance with its intended use.

²⁹⁸ I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 227; I. Giesen, (2009). *The Burden of Proof and other Procedural Devices in Tort Law*. In H. Kozoil & B.C. Steiniger (Eds.), *European Tort Law 2008* (pp. 49–67) (18 p.). Wien/New York: Springer.

²⁹⁹ Supreme Court 9 October 1992, NJ 1994/535, m.nt. C.J.H. Brunner; AA 1993, p. 123, m nt. Hijma (*DES*).

³⁰⁰ On the burden of proof in tort law in general, see I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 113 ff.

³⁰¹ I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 226.

³⁰² R.R.M. de Moor, *De wet van 13 september 1990* (Stb, 1990, 487) ter implementatie van de Europese richtlijn in zake de aansprakelijkheid voor produkten met gebreken, in: R.R.M. de Moor (e.a.) (red.), 'Product en aansprakelijkheid', Lelystad 1991; I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 18.

³⁰³ J. Spier et al, 'Verbintenissen uit de wet en schadevergoeding', Deventer: Kluwer 2015, nr. 152.

³⁰⁴ HR 24 December 1993, NJ 1994, 214 (*Leebeek/Vrumona*).

³⁰⁵ J. Spier et al, 'Verbintenissen uit de wet en schadevergoeding', Deventer: Kluwer 2015, nr. 152.

As mentioned before, the Supreme Court in the *Leebeek/Vrumona*-case ruled that when a bottle of soda is opened in a normal fashion and the neck of the bottle breaks, this would lead a court to assume a defect and place the risk of non-persuasion on the producer of the bottle. The producer will then need to prove that the bottle was in fact not defective. In other words, when normal use of a product is proven and the product still causes damage, the risk of non-persuasion shifts to the producer. Proof as to what specific defect is present in the product is in such cases no longer necessary. Sufficient is to prove that the fault does not lie in some action of the defendant.³⁰⁶

It is important to note that in product liability cases based on general tort law, an adoption of a presumption is also possible with regard to the element of subjective fault.³⁰⁷ In fact, subjective fault will generally be assumed if the wrongfulness (in other words, a defect) has been established; this then needs to be disproven by the defendant. For example in the *Leaking water bottle*-case³⁰⁸ the Supreme Court found the relevant question to be whether the defect was not attributable to a subjective fault of the defendant. Since the existence of a defect was established, the fact that the producer was negligent was assumed; the defendant would now need to make a likely case for the fact that no subjective fault was present on his part. Many authors have argued that this in essence constitutes a reversal of the burden of proof.³⁰⁹ The defendant is however helped by the Supreme Court because he is only required to make a plausible case for the absence of subjective fault on his part.³¹⁰ When providing evidence to the contrary, the producer can suffice with furnishing facts and proof regarding which measures he took to prevent the defect from occurring, or alternatively, why he could not have taken those measures.³¹¹

The victim friendly rule discussed here will most likely not, at least not in the same form, be applicable to damage sustained by a party acting in a

³⁰⁶ I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 219.

³⁰⁷ The role of fault in other areas is almost extinct, cf. A.J. Verheij, *Onrechtmatige daad. Monografie Privaatrecht*, 7e druk (Deventer: Kluwer, 2015), p. 48. but not with regard to products liability, see I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 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*). See also G.H.A. Schut, *Productenaansprakelijkheid* (Zwolle: Tjeenk Wilink, 1974), nr. 131 and 43 (on proof).

³⁰⁸ HR 2 February 1973, NJ 1973, 315 (*Hot Waterbottle*).

³⁰⁹ I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 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*), 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 the 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 J.M. Barendrecht & J.H. Duyvensz “Productenaansprakelijkheid tegenover niet-consumenten” WPNR 6390/6391 (2000), p. 117–123).

³¹⁰ J.M. van Dunne, ‘Verbintenissenrecht Deel 2, Onrechtmatige daad Overige verbintenissen’, Deventer 2001, p. 483.

³¹¹ See section II.2.

commercial or business capacity.³¹² In such cases the defendant will generally only need to offer a reasoned statement as to why there was no subjective fault on his part.³¹³

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.³¹⁴

VI. Damages and other remedies

Under general tort law, as well as under the Directive regime, the rules on compensation for damages are laid down in art. 6:95-110 BW. Damage that should be compensated for (whenever it has been determined that there is a right to damages) include damages for physical injury and economic loss (loss suffered and profits not gained) and other disadvantages, such as immaterial losses.³¹⁵ In principle, all losses suffered should be fully reimbursed, 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 based on the general tort regime. This means that, as opposed to damages under the Directive regime, not only physical harm (personal injury) and damage to property (either to the defective product or to other goods) is recoverable under Dutch general tort law, but also pure economic loss.³¹⁶

Under general tort law damages can therefore also consist of costs made because of the risk of some future actual damage. For example, costs made for towing a broken down car which came to a halt in the middle of the road. This car forms a hazard because it creates a risk of collision, the removal of the car will be necessary to avoid this risk. Under the Directive regime, the costs associated with towing the car will not be recoverable because no accident has actually occurred, the damage is purely economic. These damages will however be recoverable under the general tort regime.³¹⁷ It should be

³¹² J. Spier, 'De uitdijende reikwijdte van de aansprakelijkheid uit onrechtmatige daad, preadvies voor de NJV 1996, Zwolle 1996; J. Spier et al, 'Verbintenissen uit de wet en schadevergoeding', Deventer: Kluwer 2015, nr. 152.

³¹³ HR 6 December 1996, NJ 1997, 219 (*Du Pont/Hermans*).

³¹⁴ I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 218, and p. 229.

³¹⁵ See artt. 6:95, 96 and 106 BW.

³¹⁶ 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 J.M. Barendrecht & J.H. Duyvensz "Productenaansprakelijkheid tegenover niet-consumenten" WPNR 6390/6391 (2000), p. 117-123 and p. 135-142, p. 135 ff., and especially p. 139-140, and J.M. Barendrecht "Pure economic loss in the Netherlands" in E.H. Hondius (ed.), *Netherlands Reports to the Fifteenth International Congress of Comparative Law* (Intersentia: Antwerpen/Groningen, 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 J. Spier & A.T. Bolt (m.m.v. O.A. Haazen), *De uitdijende reikwijdte van de aansprakelijkheid uit onrechtmatige daad*. Handelingen NJV, 1996-1 (Zwolle: Tjeenk Willink, 1996), p. 242-243.

³¹⁷ L. Dommering-van Rongen, *Productenaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 268.

noted that Dutch law does not recognise punitive damages.³¹⁸ Damages for non-pecuniary losses (pain and suffering) are however, with certain restrictions, recoverable (art. 6:106 BW).³¹⁹

VII. Defences

The Directive regime (in article 6:185 BW) contains several defences to a possible liability claim. How relevant are these defences within the general tort regime? In any case, under the general tort law, the producer will carry the burden of proof with regard to a defence.³²⁰

Under the general tort regime, similarly to the Directive regime, what is wrongful is the bringing into circulation of a defective product. The defence of article 6:185 BW para 1 sub a (the product was not brought into circulation by the defendant) will therefore be equally applicable under the general tort regime.

When the defect is caused by some event after the product was brought into circulation, the defect is not caused while in the sphere of influence of the producer and can therefore not be imputed to an action or subjective fault of the producer. The defence of article 6:185 para 1 sub b BW (the product was originally not defective) is an evidentiary rule which will therefore also be applicable under article 6:162 BW. Under the general tort regime, the producer may however, as opposed to under the Directive regime, be held liable for not fulfilling a duty of due care after the product was brought into circulation. As we have seen in section II.2, this may entail an obligation to warn users of the dangers of a product which has already been brought into circulation.

The exception of non-commercial production contained in article 6:185 para 1 sub c will come into play when considering whether the wrongful action can be imputed to the producer. When the defect cannot be imputed on the basis of subjective fault, a judge will be able to take into account the fact that the product was not produced in an economic capacity when deciding whether to impute the wrongful act to the producer on another ground, for example on the basis of generally held opinions.³²¹ When the wrongful act can be imputed on the basis of subjective fault, the fact that the product was not produced in commercial production will however not lead to an exoneration of liability under the general tort regime. In other words, the

³¹⁸ 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 L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 200. This might be changing however, see R.C. Meurkens, *Punitive Damages: The civil Remedy in American Law, Lessons and Caveats for Continental Europe* (Deventer: Kluwer, 2014).

³¹⁹ On how to determine the amount of damages, see above Chapter B, section V.

³²⁰ See: for example HR 6 December 1996, NJ 1997, 219 (*Du pont/Hermans*), para. 3.5 where the Supreme Court explicitly states that the defendant failed furnish facts regarding the defence that he was in fact not the actual producer, also: HR 24 December 1993, NJ 1994, 214 (*Leebeek/Vrumona*) para. 4.2; Rb. Haarlem 18 February 1992, NJ 1993, 521; this includes the defence of contributory negligence (article 6:101 BW).

³²¹ L. Dommering-van Rongen, *Productaansprakelijkheid* (diss. Utrecht), Deventer: Kluwer 1991, p. 76.

exception of non-commercial production will only come into play when there is no subjective fault on the side of the producer.

Following mandatory rules of law (article 6:185 para 1 sub d BW) can also be a defence under article 6:162 para 3 BW since it serves as a justification for the producers actions. Such actions are therefore not negligent.

The risk development defence contained in article 6:185 BW para 1 sub e has been explicitly accepted by the District court Haarlem.³²² According to this court, when according to the current state of technology and science it was not known that the removal of asbestos floor covering provided health risks, the producer cannot be held liable.³²³ However, when information of the dangerousness of the product was generally available at the time, the producer will not be able to avail himself of liability by stating that he was not aware of this information.³²⁴ The risk development defence, in essence, is an elaboration on the defectiveness standard contained in article 6:186 BW and will as such also be applicable under the general tort regime.

As we have seen, most of the exceptions which are applicable under article 6:185 BW of the Directive regime are in essence general evidentiary rules which will therefore also be applicable under the general tort regime. Most of the case law on these Directive exceptions will also be applicable under the general tort regime. For more in depth information on the above discussed defences we therefore refer to Chapter B. Unless otherwise stated, all defences named in section VIII of chapter B are also applicable under the general tort regime; this is particularly true for the contributory negligence defence (section VIII.7), given that this defence finds its basis in articles of Dutch tort law which will naturally also be applicable under the general tort regime.

D. Significant trends and developments?

I. A move towards strict liability under general tort law

Dutch tort law on products liability, has not yet gone (and probably will not go)³²⁵ so far as to introduce a real strict liability instead of a subjective fault based liability outside the area of application of the European Directive, but liability has tended to become more strict, just as and maybe even more than it has become under the normal subjective fault standard as used in other areas of tort law in the last few decades. This seems to be a general trend in liability law. In any case, it seems that in products liability, more is expected of a producer, even though the same standard for subjective fault is used. It should however be noted that recently the first signs have emerged of this

³²² Rb. Haarlem 18 February 1992, NJ 1993, 521.

³²³ It should be noted that when determining the current state of science and technology, one also needs to take into account knowledge gathered outside the Netherlands, see HR 6 April 1990, NJ 1990, 573 nt. Pas (*Janssen/Neftabas*).

³²⁴ HR 25 November 2005, NJ 2009, 103, (*Eternit/H.*) note Giesen.

³²⁵ Of course, the Netherlands is not allowed to introduce a new strict liability regime with regards to product liability, judges can however decide to apply the current rules regarding burden of proof mitigating rules more freely, in practice making the general tort regime liability norm more strict.

trend being brought to a halt.³²⁶ The Supreme Court no longer seems to favour more and more victim protection in liability cases and by extension a move towards more strict liability.

An example of this trend of increasing strictness of the norm for liability can be found in the case of *Koolhaas/Rockwool*. The Supreme Court 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.³²⁷ Another indication of this trend towards a stricter standard regards the proof 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 Supreme Court,³²⁸ and the literature is divided on the subject.³²⁹ 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.³³⁰ For example, 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 victim 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 (art. 6:185 para. 1 sub b).³³¹

The main arguments for a stricter form of 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 since

³²⁶ J. Spier, 'Gedachten over een vastgelopen stelsel', AV&S 2014/6, 2.

³²⁷ HR 22 October 1999, NJ 2000, 159, note Bloembergen (*Koolhaas/Rockwool*).

³²⁸ 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) and the later case law involving the so-called 'omkeringsregel' 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*) 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*)).

³²⁹ I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 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 L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 3 and 34.

³³⁰ 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, I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 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 *Des*-case dealt with below.

³³¹ See I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 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*).

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. 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 financial 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 negative effects of manufacturing that product. Those costs include paying damages.³³² In cases where the proof of a product liability claim is troublesome, another important argument could be that 7) the protection that the rule of substantive law (for instance, the subjective fault standard) is willing to offer, should not be robbed of its potential effects 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.³³³

The trend sketched above 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. The net result would be that the Directive system and Dutch 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.³³⁴

II. More emphasis on victim protection

There seems to be a general trend in Dutch tort law, at least in the case law of the Supreme Court, towards greater protection for (personal injury) victims of 'wrongful' acts.³³⁵ This protection of victims could also be stated in terms of consumer protection, since both basically cover the same (potential) group of victims. For example in a decision of the Court of Appeal in Leeuw-

³³² For an overview, see I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 238-240, with further references. Mention is also made of the fact that insurance coverage is easily attainable for a producer; we understand that some of the arguments named here will not be exclusively applicable to the situation in the Netherlands but might be fueling this trend in other countries as well.

³³³ See I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 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.

³³⁴ Cf. E.H. Hondius "Produktenaansprakelijkheid: de voordelen van een dualistische rechtsorde" AA 1996, 5, p. 329, claiming that cross-fertilisation will be easier if both sets of rules are integrated (in one Code). M.B.M. Loós, *Spontane harmonisatie in het contracten- en consumentenrecht*, Inaugural Lecture Amsterdam (Den Haag: BJu, 2006) shows that this integration also leads to problems of coherence and that this cross-fertilisation is not always present.

³³⁵ See T. Hartlief & R-J Tjittes "Kroniek van het vermogensrecht" NJB 2001, p. 1473. See also C.J.M. van Doorn & S.B. Pape, "Kroniek productaansprakelijkheid en productveiligheid 2005-2008", TvC 2009, 2 p. 50; C.J.M. van Doorn & S.B. Pape, *Noot bij drie uitspraken van HvJ EG, Jurisprudentie aansprakelijkheid 2006*, 4 p. 438-455.

arden³³⁶ the importer of fireworks was held liable for the damage of fireworks exploding before reaching a safe altitude, notwithstanding the claim by the producer that this premature detonation was, at least in part, the result of improper handling of the fireworks by the consumer. This case is indicative of the increasing amount of product liability cases in which the victims are protected, even against their own misuse of the product. This 'protection against 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.

This same consumer protection or victim orientated trend seems to be going on in tort law in general, most notably with regard to areas such as services liability, traffic liability and employer's liability, but also with regard to the issue of subjective fault (which tends to become almost obsolete next to the requirement of unlawfulness),³³⁷ causation, the burden of proof, and recoverable (forms of) damages. All these developments have made it easier and more rewarding, so it would seem, to sue. However, since the national laws in Europe are also, and to an ever increasing extent,³³⁸ 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 strict liability for (certain) products is not allowed), the trend on the national level towards more strict standards is not going to continue endlessly.³³⁹ In fact, the first signs of this trend being brought to a hold by the Supreme Court have recently emerged according to Spier.³⁴⁰

An important trigger for developments within product liability law is the introduction of new technologies and products on the market. Such new technologies poses questions about the content of the law and whether the current system product liability law is well suited to accommodate a safe market introduction of such technologies. In this section we will discuss the relationship between product liability law and two new technologies: nanotechnology and autonomous cars.

III. New products and technologies: the case of nanotechnology

1. Introduction

The introduction of new technologies and products on the market is frequently accompanied by concerns about the potential negative impacts on

³³⁶ Hof Leeuwarden 8 februari 2011, ECLI:NL:GHLEE:2011:BQ0194 (*X/Evuco Vuurwerk*).

³³⁷ In dogmatic terms, after the unlawfulness is given (art. 6:162 para. 2) one needs to see whether there was fault as well (art. 6:162 par. 3). However, both conditions for a tort seem to have merged into one condition of objective misconduct. Subjective fault hardly ever plays a role anymore. This was something that had been going on some time before the new Civil Code was enacted but still the two conditions were put in the BW as separate items. Not everyone agrees that this should be the way to go, however, see C.H. Sieburgh, *Toerekening van een onrechtmatige daad* (diss. Groningen, 2000).

³³⁸ See the ECJ cases on art. 13 of the Directive: ECJ 25 April 2002, C-52/00, [2002] ECR I-3827 (*Commission v France*); ECJ 25 April 2002, C-154/00, [2002] ECR I-3879 (*Commission v Greece*); ECJ 25 April 2002, C-183/00, [2002] ECR I-3901 (*María Victoria González Sánchez v Medicina Asturiana SA*), and ECJ 10 January 2006, C-402/03 (*Skov*).

³³⁹ See L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 16–17, and I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 196–198, with regard to rules on evidence and proof.

³⁴⁰ J. Spier, 'Gedachten over een vastgelopen stelsel', *AV&S* 2014/6, 2.

consumer health. For example, scientists have raised concerns about the *potential* health effects of nanoparticles in consumer products, even though, it is impossible, given the latest scientific insights and scientific techniques, to determine the validity of these indications. In the face of such uncertainties about risks, new responsibility and liability issues arise. Above all, the question is when a producer has to take precautions even if the risks are uncertain, and under which conditions he can held liable for the damages ensuing from a failure to take such precautions. Below we address the abovementioned question. The uncertain risks in the context of nanotechnology will serve as an illustration, but the discussion is also relevant in the context of other new technologies and products, such as robotics and biotechnology.

First, we provide a summary of the uncertain risks of nanoparticles (section III.2). We proceed with a discussion of the precautionary principle within Dutch product liability law (section III.3), and focus on its relevance for the application of the state of the art defence (section III.4) and the Dutch general negligence rule (section III.5). We conclude with some final remarks on governmental policies in relation to the potential risks of nanotechnology. Although these policies do not contain liabilities schemes, they are relevant for the role producers are expected to play in the development of nanotechnology (and other new technologies) in The Netherlands.

2. Uncertain risks of nanotechnology

The uncertain risks in the context of nanotechnology provide a prime illustration of the liability issues that rise with the introduction of new technologies. Nanotechnology refers to the human ability to work with matters at nanoscale. The American National Nanotechnology Institute defines nanotechnology as “the understanding and control of matter at dimension between approximately 1 and 100 nanometers, where unique phenomena enable novel applications. Encompassing nanoscale science, engineering, and technology, nanotechnology involves imaging, measuring, modeling and manipulating matter at this length scale”.³⁴¹ By way of illustration: the diameter of a human hair is, approximately 80.000 nanometers. Nanotechnology leads to the development and application of materials, products, devices, and manufacturing processes with fundamentally new properties. In The Netherlands, nanotechnology is applied in a wide range of products such as cosmetics (sun cream), toys, clothing, food, shoe-spray, health care and medicines, energy, construction and the painting industry.³⁴² The societal and economic future of nanotechnology is promising. The Dutch Institute for Public Health and the Environment found that the amount of nano-products available on the European market increased by a factor 6 between 2007 and 2010.³⁴³

The picture is not only rosy, however. Scientists have considerable concerns about the health effects of exposure to some nanoparticles. The same novel

³⁴¹ National Nanotechnology Initiative <http://www.nano.gov/nanotech-101/what/definition>

³⁴² Dutch Institute for Public Health and the Environment (RIVM), *Assessing health & environmental risks of nanoparticles: Current state of affairs in policy, science and areas of application*, RIVM 2014, p. 10.

³⁴³ Dutch Institute for Public Health and the Environment, *Nanomaterials in Consumer products*, Bilthoven: 2011

properties of nanoparticles that provide benefits for society, might lead to negative effects for human beings and the environment when they are exposed to certain nanoparticles. Most of the concerns are in relation to nanoparticles that are in the air and that can be inhaled, e.g. nanoparticles in shoe spray. However, the scientific knowledge and insights and research techniques currently available do not allow risk scientists to make an adequate risk characterization and assessment. As a consequence, scientists cannot draw any decisive conclusions on, among other things, the toxicity of certain nanoparticles, the possible levels and settings of exposure to nanoparticles and effective ways to deal with nanoparticles and their possible risks.

In this situation one wants to avoid taking precautionary measures for risks that are, as it later might turn out, not present (i.e. a false positive). When a false positive occurs, an operator *himself* bears the cost of unnecessary taken precautions. Moreover, the occurrence of a false positive might negatively impair the development of nanotechnology. On the other hand, one wants to avoid taken no precautions, if it later turns out that there is a risk (i.e. a false negative). The occurrence of a false negative primarily has negative (health) effects for consumers. The one-million-dollar-question, of course, is when a producer legally is obliged to focus on the avoidance of a false negative.³⁴⁴ In the coming years this question might also reach the courts. Especially in the U.S. scholars expect that *nano litigation* will take place in the (near) future.³⁴⁵ Munich Re expects legal procedures in the context of 'general liability, products liability, environmental liability, products recall, directors and officers, errors and omissions, and workers' compensation.'³⁴⁶ To date there have been no legal proceedings in the context of nanotechnology in The Netherlands.

3. The Precautionary principle in Dutch product liability law

The precautionary principle, which is primarily known in international law, primary and secondary European Law and human rights law,³⁴⁷ provides the framework for determining the required standard of care in relation to uncertain risks. There is no generally accepted definition of the precautionary principle, but it can be understood by making a distinction between the negative and the positive element of the principle. Under the negative element a lack of full scientific certainty about a risk, is no valid reason for postponing (cost-effective) measures to manage these risks.³⁴⁸ In its report

³⁴⁴ See more detailed E.R. de Jong, *Voorzorgverplichtingen* (diss. Utrecht), Boomjuridisch 2016, p. 37–51.

³⁴⁵ R.C. Wernette, 'Nanoparticles: New Frontier for Mass-Tort, Class-action Claims', *West-law Journal Asbestos* (33) 2011, afl. 6, p. 465; J.P. Calabrese & S.E. Niehaus, 'Nanotorts on the Horizon: A Jack and Jill Story', 9 *Nanotechnology Law & Business* 2012, afl. 2, p. 162; E.R. Glady, M.G. Garcia & B.H. Moses, 'Nanotechnology Liability: Do we steer or just go along for the ride?', *Jurimetrics: The Journal of Law, Science & Technology* 2012, afl. 3, p. 325.

³⁴⁶ See <http://www.esv.info/SL5789>, p. 3.

³⁴⁷ E.R. de Jong, *Voorzorgverplichtingen* (diss. Utrecht), Boomjuridisch 2016, p. 67.

³⁴⁸ See for instance principle 15 Rio Declaration on Environment and Development: '(...) Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'

'Uncertain Safety' the Dutch Scientific Council for Government Policies added a positive element to this definition and stated that the "vulnerability of people, society and the natural environment demands a *proactive approach* to uncertain risks".³⁴⁹ According to the Council the core of the principle is proactivity in the face of uncertainty, which accordingly means that producers have to actively reduce uncertainties about risks, identify potential risks and take precautions in order to avoid or diminish the possibility of harm.

In its report the Council also recommended the Dutch government to make efforts (if necessary at the European level) to bring (*inter alia*) the strict liabilities in the Dutch civil code in line with this required proactivity, which in the context of product liability primarily implies an adaption of the state of the art defence. Moreover, the council recommended codifying the precautionary principle in the requirements of reasonableness and fairness under art. 3:12 BW and in the Dutch Constitution. The Dutch government, however, did not go along with the proposed legal reform, as it found that the current European and national framework (e.g. the state of the art defence) provided enough incentives for a proactive approach by producers and that tightening up the existing requirements would have a negative impact on innovation.³⁵⁰ Nevertheless, the government accepted the precautionary principle as a guiding principle for the development of policy plans in relation to the risks of new technologies, such as nanotechnology (see section III.4).

To date, the Dutch Supreme Court has not given an explicit ruling on the relevance of the precautionary principle in Dutch product liability law. Nevertheless, as we will discuss below, the principle seems to bear relevance under Dutch product liability law.

4. The Precautionary principle and the state of the art defence

First of all, the state of the art defence (which makes it possible for producers to exonerate themselves from liability for undiscoverable risks) comes into the picture when determining whether a producer can be held liable for the materialization of an uncertain risk. It is, however, unclear how the defence relates to scientific uncertainty and whether the defence applies to situations of uncertain risks.³⁵¹ In particular it is ambiguous what degree of (un)certainly must be attached to the scientific knowledge and insights about the existence of a risk in order to legally qualify a risk as undiscovered and undiscoverable.³⁵² For instance, does the fact that a majority of scientists agrees that exposure to some nanoparticles *might* impose serious health risks,

³⁴⁹ Dutch Scientific Council for Government Policy, *Uncertain Safety*, Amsterdam: University Press 2009, p. 15.

³⁵⁰ *Kamerstukken II 2008/09*, 28089, 23, p. 15.

³⁵¹ H. Cousy, 'The Precautionary Principle: A Status Questionis', *The Geneva Papers on Risk and Insurance* 1996, no. 79, p. 158–169; H. Cousy, 'Risks and Uncertainties in the Law of Tort', in H. Koziol & B.C. Steiniger (eds.), *Tort & Insurance Law, European Tort Law 2006*, Wien/New-York: Springer-Verlag 2008, p. 2–26, p. 23; J. Spier, 'Uncertainties and the state of the art: a legal nightmare', *Journal of Risk Research*, (14) 2011, afl. 4, p. 501–510, p. 503.

³⁵² H. Cousy, 'Risks and Uncertainties in the Law of Tort', in H. Koziol & B.C. Steiniger (eds.), *Tort & Insurance Law, European Tort Law 2006*, Wien/New-York: Springer-Verlag 2008, p. 24.

whilst they also agree that the existence of such risks cannot be ruled out neither be confirmed, make these risks legally discovered risks or not? Next to this, uncertainty about the effectiveness of the available research methods raises questions about the scope of the defence. For instance, in the context of nanotechnology it is uncertain whether the research techniques available are appropriate to identify and characterize the risks at all. This raises the question whether producers should nevertheless apply these research methods and improve the existing research methods, in order to be able to exonerate themselves from liability on the basis of the state of the art defence.

The abovementioned ambiguity ensues from a rather static view on the process of scientific knowledge gathering that underpins the (wording of the) state of the art defence: either the risks are scientifically known and the defence cannot be invoked (the known knowns) or the risks are scientifically unknown (unknown unknowns) and the defence can be invoked. Uncertain risks, however, are placed between those two. Most of the time there is a considerable period of scientific uncertainty about the risks of new technologies, whereas new products are already widely available on the market. In reality the identification and characterizing of risks is a non-linear and incremental process and is not something that can be achieved overnight. For example, in 2010 the OECD stated that of all nanoparticles available on the market, only for a small fraction a risk identification and characterization has been carried out.³⁵³

Precautionary thinking might offer a solution for this problem and might affect the conditions under which producers could exonerate themselves from liability for uncertain risks. If one adheres to the idea of a pro-active approach towards uncertainty and risks, the defence should not be applicable. Excluding uncertain risks from the defence might create an incentive for producers to research, identify and characterize risks of their new products and hence advance the scientific knowledge and insights about these risks. Such a contribution to the reduction of uncertainty could especially be expected from specialized producers and developers, who (normally) have the latest techniques and methods at their disposal. On some occasions, as the asbestos and tobacco history illustrates,³⁵⁴ they even possess more knowledge and insights about the existence and characteristic of risks than is (publicly) available within science. Moreover, in line with the precautionary principle, one could argue that producers should not be allowed to (fully) transfer the research costs to governments, knowledge institutes and, ultimately, taxpayers. Instead it could be argued that producers themselves should bear the costs of the reduction of uncertainties created by their products. Strict liability – e.g. excluding the state of the art defence from the

³⁵³ OECD, List of manufacture nanomaterials and List of Endpoint for Phase one of the Sponsorship programme for the testing of manufactures nanomaterials, OECD 2010; OECD, Environmental, Health and Safety Publications, Series on the Safety of Manufactured Nanomaterials, No. 38, OECD: 2013.

³⁵⁴ N. Oreskes & E.M. Conway, *Merchants of Doubt*, New York: Bloomsbury Press 2010; M. Le Menestrel & J. Rode, 'Why did business not react with precaution to early warnings?', in: EEA, *Late lessons from early warnings: science, precaution, innovation*, Copenhagen: EEA 2013, p. 639-651.

situation of uncertain risks – provides an instrument for such internalization.³⁵⁵

On the other hand, there are also some negative aspects of excluding uncertain risks from the scope of the state of the art defence. It might induce producers to implement research methods which effectiveness are not (yet) proven, which could result in excessive care by producers and, in the end, hinder innovation or increase prices.³⁵⁶ Empirical evidence for these behavioural effects of (the threat of) product liability, however, is not available. Moreover, as Advocate General Tesouro also stresses,³⁵⁷ insurability issues might arise. Due to uncertainty about risks it might be hard to adapt an adequate insurance scheme for such risks.

5. Precaution and the Dutch general negligence rule

Another basis for the incorporation of the precautionary principle in Dutch product liability law, can be found in the general negligence rule of art. 6:162 BW. As has been noted by several Dutch scholars,³⁵⁸ precautionary thinking (i.e. the requirement of a proactive stance towards uncertainty and risks) can be found in case law of the Dutch Supreme Court.

First of all, the *Rockwool/Koolhaas* judgment (dealt with in section II.3) shows precautionary tendencies since it implies an obligation of producers to do research into the potential defect/effects of a new product.³⁵⁹ However, within Dutch literature there is no consensus as to whether the *Rockwool/Koolhaas* ruling also applies to uncertain risks.³⁶⁰ Precautionary thinking can also be found in the asbestos-case of *Eternit/Horsting* (dealt with in section

³⁵⁵ See about the law and economics aspects M. Faure, L. Visscher & F. Weber, *Liability for Unknown Risks – A Law and Economics Perspective*, JETL 2016;7(2), p. 198–228.

³⁵⁶ From the outset, this was an important argument to incorporate the state of the art defence in the product liability Directive. Derde verslag van de Commissie over de toepassing van de richtlijn Productaansprakelijkheid, COM (2006) 496, paragraaf 3.3.

³⁵⁷ ECJ 29 May 1997, C-300/95, [1997] ECR I-2649 (Commission of the EC v. United Kingdom).

³⁵⁸ See on the relation between Dutch tort law and the precautionary principle: W. Th. Braams, 'Dank u, wij zijn al voorzien! De plaats van het voorzorgsbeginsel in het milieuaansprakelijkheidsrecht', AV&S 2002, afl. 6, p. 171–177; L. Bergkamp & J.C. Hanekamp, 'Voorzorgsaansprakelijkheid naar een Post-Normale Jurisprudentie?', AV&S 2003, afl. 4, p. 123–126; E.M. van Orsouw, 'If we could put a man on the moon in 1969 ... Normstelling en bewijs bij 'nieuwe risico's', in: A.L.M. Keirse, E.M. Orsouw & B.T.M. van der Wiel, *Nieuwe risico's, nieuwe claimgebieden*, Den Haag: Sdu Uitgevers 2007, p. 23–35; H. Cousy, 'Risks and Uncertainties in the Law of Tort', in H. Koziol & B.C. Steiniger (eds.), *Tort & Insurance Law, European Tort Law 2006*, Wien/New-York: Springer-Verlag 2008, p. 2–26; J. Spier, 'Het WRR-rapport Onzekere veiligheid: een welkome stap voorwaarts', NJB 2008/1971, p. 2521–2526; A.Ch.H. Franken, 'Het voorzorgsbeginsel in het aansprakelijkheidsrecht', AV&S 2010/25, afl. 5, p. 185–200, C.C. van Dam, 'Taxus revisited. Een kleine taxonomie van het kennisvereiste', MvV 2015, afl. 7–8, p. 229–234; E.R. de Jong, *Voorzorgverplichtingen* (diss. Utrecht), Boomjuridisch 2016.

³⁵⁹ HR 22 October 1999, NJ 2000, 159 (*Koolhaas/Rockwool*).

³⁶⁰ E.M. Voegelzang-Stoute, J.R. Popma, M.V.C. Aalders & J.M. Gaarhuis, *Regulering van onzekere risico's van nanomaterialen: Mogelijkheden en Knelpunten in de Regelgeving op het Gebied van Milieu, Consumentenbescherming en Arbeidsomstandigheden*, Amsterdam: Stem 2010, p. 323 (yes) and A.Ch.H. Franken, 'Het voorzorgsbeginsel in het aansprakelijkheidsrecht', AV&S 2010/25, afl. 5, p. 185–200, p. 192, footnote 73 (No).

II.2).³⁶¹ In line with case law in the context of workers liability for asbestos risks, the Dutch Supreme Court ruled that, even when specific public regulations are lacking or are inadequate, under the general negligence rule producers can be under an obligation to act proactively and prevent asbestos diseases. The Supreme Court held that the required standard of care should be found by examining the societal opinion on how the respective risks should be managed at the time of the behaviour complained of. In that respect we recall that the Dutch government accepts the precautionary principle as a guiding principle for the development of Dutch physical safety policy plans in the context of *inter alia* (the uncertain risks of) nanotechnology. Moreover, within the context of nanotechnology, producers, ngo's and unions are involved in the development of these policy plans and do also emphasize the importance of the precautionary principle in that respect. Together, this provides a strong indication that according to the general opinion within Dutch society, the precautionary principle should be taken into account when dealing with uncertain risks of nanotechnology, and hence in applying the general negligence rule.

Moreover, although the asbestos risks in *Eternit/Horsting* were scientifically known at the time of the risky behaviour, the Supreme Court indicated that a duty to act proactively might also apply to the situation of an uncertain risk. In order to determine whether and which preventive measures have to be taken, one has to look into *inter alia* the level of scientific (un)certainly about the risks and the nature and severity of these risks. Absolute scientific certainty about the risks, especially when the effect of these might be severe, is not needed in order to establish a duty to take precautions. Of course, the level of (un)certainly might influence the assessment as to which precautions should be taken. As Advocate General Verkade points out in his opinion for *Eternit/Horsting*, a producer might be under an obligation to warn against potential risks even if the existence of a risk is not yet scientifically certain.³⁶² This is especially the case when there might be severe health risks.

Lastly, the doctrine of hazardous negligence ('gevaarzetting') is relevant in the context of uncertain risks. Hazardous negligence is allowing a dangerous situation to continue, when there is a legal duty to take precautions. Under this doctrine, which has been developed in Dutch law since the *Kelderluik*-judgment³⁶³, when some conditions are met operators have to show proper circumspection with respect to the interests of others and, more specifically, protect others against an unreasonable possibility of harm that their conduct creates. On the basis of the negligence doctrine, the Dutch Supreme court accepted liability in situations where there was a very small chance of severe

³⁶¹ HR 25 november 2005, ECLI:NL:HR:2005:AT8782, NJ 2009/103, note Giesen (*Eternit/Horsting*).

³⁶² Advocaat-Generaal Verkade, ECLI:NL:PHR:2005:AT8782, nr. 5.44, HR 25 november 2005, ECLI:NL:HR:2005:AT8782, NJ 2009/103, note Giesen (*Eternit/Horsting*).

³⁶³ HR 05 november 1965, ECLI:NL:HR:1965:AB7079, NJ 1966/136, m.nt. G.J. Scholten (*Kelderluik*).

harm.³⁶⁴ Several scholars argue that this norm also applies when the possibility of harm is scientifically uncertain.³⁶⁵

The knowledge and expertise to be expected from the producer about the uncertain risks is an important factor in establishing a standard of care under the general negligence rule. As the Supreme Court repeatedly ruled, a (precautionary) duty to take precaution only exists if an actor has knowledge or should have knowledge about the existence of the (uncertain) risk.³⁶⁶ In the context of product liability, this knowledge requirement will be equated with the state of the art defence, which accordingly means that producers are expected to be familiar with the latest scientific discoveries and insights into the relevant risks in the field. That is: producers are expected to have the knowledge of an expert in the field. It is important to stress that also under the negligence rule a producer cannot be held liable if the risk was scientific unknown and unknowable, at the time in the light of the generally recognized and prevailing best scientific knowledge concerning the uncertain risky behaviour. At a given moment, in the light of the advancements of scientific knowledge, scientific indications of the existence of a risk can be of such a nature that actors are legally not allowed to ignore these indications, even if their validity is scientifically debatable. On the other hand, an actor is not acting negligently if he ignores 'speculation' about the existence of a risk. Thus, when applying the general negligence rule to uncertain risk situations a central issue – and difficulty – is under what conditions an uncertain risk is legally seen as an unknown risk. For a discussion about this issue, see section III.4.

Whereas the state of the art defence is mainly relevant in the context of an obligation to do research into potential risks of new products, the application of the general negligence rule can also result in the obligation to take other precautions, such as warnings, prevent exposure and improve products. In determining which precautions should be taken in a specific uncertain risk situation, one has to balance several factors, such as the seriousness of the potential (risk of) harm involved (as a general rule, more care is expected when the risks are severe), the availability and costs of precautionary measures or alternative methods, the expected effectiveness of the precautionary

³⁶⁴ HR 8 januari 1982, ECLI:NL:HR:1982:AG4306, NJ 1982/614, m.nt. C.J.H. Brunner (*Natronloog*); HR 29 november 2002, ECLI:NL:HR:2002:AE5162, NJ 2003/549, m.nt. J.M.B. Vranken (*Legionellabesmetting*).

³⁶⁵ A-G Verkade, ECLI:NL:PHR:2005:AT8782, nr. 5.44, bij HR 25 november 2005, ECLI:NL:HR:2005:AT8782, NJ 2009/103, note Giesen (*Eternit/Horsting*). Zie ook W. Th. Braams, 'Dank u, wij zijn al voorzien! De plaats van het voorzorgsbeginsel in het milieuaansprakelijkheidsrecht', AV&S 2002, afl. 6, p. 177; Braams 2002, p. 147; J. Spier, 'Het WRR-rapport Onzekere veiligheid: een welkome stap voorwaarts', *NJB* 2008/1971, p. 2523, K.J.O. Jansen, *Informatieplichten. Over kennis en verantwoordelijkheid in contractenrecht en buitencontractueel aansprakelijkheidsrecht* (diss. Leiden), Deventer: Kluwer 2012, p. 377; E.M. van Orsouw, 'If we could put a man on the moon in 1969 ... Normstelling en bewijs bij 'nieuwe risico's', in: A.L.M. Keirse, E.M. Orsouw & B.T.M. van der Wiel, *Nieuwe risico's, nieuwe claimgebieden*, Den Haag: Sdu Uitgevers 2007, p. 25.

³⁶⁶ E.R. de Jong, *Voorzorgverplichtingen* (diss. Utrecht), *Boomjuridisch* 2016, p. 145–155. See in general about this requirement under Dutch law K.J.O. Jansen, *Informatieplichten. Over kennis en verantwoordelijkheid in contractenrecht en buitencontractueel aansprakelijkheidsrecht* (diss. Leiden), Deventer: Kluwer 2012.

measures (it is unlikely that measures whose effectiveness is unproven have to be taken), the behavior of other operators in the (nano) industry and governmental action.³⁶⁷

6. Dutch precautionary policies

As has been noted above, the Dutch government pursues active policymaking in the context of nanotechnology. Although there are no new liability schemes adapted under these policy plans, it is relevant to briefly mention these plans. First because these policy developments also bear relevance in the context of other new technologies; according to the government the policies for nanotechnology provide a blueprint for the development of national risk governance policies in relation to new technologies. Second, because a key element of the Dutch risk governance is 'discursive policy making'.³⁶⁸ This means that stakeholders such as ngo's, policy makers, civilians and industry are involved in the process of policymaking. Moreover, the Dutch government expects that developers of nanotechnology play a forerunner role in the development and implementation of precautionary policies.³⁶⁹ In its opinion, industry is *primarily* responsible for a safe development of nanotechnologies. The precautionary principle serves as the normative foundation for this new line of policymaking.³⁷⁰ According to the Dutch government, the good chances of nanotechnology cannot be realized without addressing the possible bad chances (i.e. the uncertain risks) in a timely fashion. The government aims for a situation in which the possibility of exposure to nanoparticles is negligible.³⁷¹ In order to implement this policy, the government takes or has taken several policy measures, such as research on the identification of unknowns and uncertainties, the distribution of scientific knowledge and insights into nanotechnology related risks into the relevant sectors, behavioral recommendations on how to handle nanoparticles and, lastly, supply operators with specific materials by which they can bring these recommendations into practice.

³⁶⁷ See more in detail E.R. de Jong, *Voorzorgverplichtingen* (diss. Utrecht), Boomjuridisch 2016, p. 157–173; See for the international context: J. Spier, 'Uncertainties and the state of the art: a legal nightmare', *Journal of Risk Research* (14) 2011-4, p. 501–510.

³⁶⁸ A. Klinke & O. Renn, 'A New Approach to Risk Evaluation and Management: Risk-Based, Precaution-Based, and Discourse-Based Strategies', *Risk Analysis* (22) 2002, afl. 6, p. 1071–1094.

³⁶⁹ *Kamerstukken II* 2008/09, 28089, 23; *Kamerstukken II* 2013/14, 28663, 55, p. 11–12; *Kamerstukken II* 2012/13, 29338, 124, p. 1; *Kamerstukken II* 2016/17, 34550 XII, nr. 2118

³⁷⁰ See about policy strategies bases on the precautionary principle: A. Klinke and O. Renn, 'A New Approach to Risk Evaluation and Management: Risk-Based, Precaution-Based, and Discourse-Based Strategies', *Risk Analysis* (22) 2002-6, p. 1071–1094; O. Renn and M. Roco, *White paper on Nanotechnology Risk Governance*, Genève: International Risk Governance Council 2005; O. Renn, *Risk Governance Towards an Integrative Approach*, Genève: International Risk Governance Council 2006; Dutch Scientific Council for Government Policy, *Uncertain Safety*, Amsterdam: University Press 2009; Com 2000 (1), *Communication from the European Commission on the Precautionary Principle*.

³⁷¹ *Kamerstukken* 2009/10, 29338, 93, p. 5; *Kamerstukken II* 2010/11, 29388, 105, p. 2

*IV. New products and technology:
the case of ADAS (autonomous cars)*

1. Introduction

The world is preparing itself for the introduction of the autonomous car. Various companies (not all of which are car manufacturers)³⁷² are currently developing Autonomous Driving Assistance Systems (ADAS), hoping to be the first to eventually bring a fully autonomous car to the market. Similar to several states in the USA, the Netherlands has recently passed legislative changes that make large scale tests of (partially) self-driving cars possible on public roads.³⁷³ The fast pace at which these legislative changes are passed is not without reason, the first fully autonomous car is expected as soon as the year 2018 and governments are racing to create an attractive environment for its arrival.³⁷⁴

The Introduction of the (partially) autonomous car raises several interesting legal questions, mainly in the area of liability law. Automated driving on the one hand provides a promising future of increased road safety. On the other hand, ADAS will (especially shortly after the initial introduction) not be flawless and will at the very least be the cause of some accidents, as became readily apparent already when in 2016 the first accidents occurred. This raises the question as to who will be liable for these incidents. Will liability for traffic accidents, because of existing product liability law, from now on be placed on car and ADAS manufacturers? Can the increased (on average) road safety of autonomous cars be a relevant factor in determining whether the car can be deemed to be defective? Regarding these questions, a lot can and has already been said.³⁷⁵

Below we will be focussing on how product liability may be established with respect to failing ADAS and autonomous cars and therefore how these new systems and products fit into the existing product liability regimes. After shortly revisiting the factors³⁷⁶ which may be relevant when determining whether a product is defective (section IV.2) we see how two of these factors

³⁷² A prominent developer is for example Google, a company previously known mostly for its search engine and mobile phone software, Google currently has a fleet of 48 autonomous test cars which have so far driven more than 1,5 million autonomous kilometers on Californian roads, even though Google has yet to sell its car.

³⁷³ Decree of 15 June 2015 amending the decree to exempt exceptional transports (developing the autonomous car), *Stb. 2015, 248*.

³⁷⁴ S. Gibbs, 'Elon Musk: Tesla cars will be able to cross US with no driver in two years', *The Guardian*, 11 January 2016.

³⁷⁵ Recently for example: K.A.P.C. van Wees, 'Aansprakelijkheidsaspecten van (deels) zelfrijdende auto's', *AV&S 2015/28, 5*; K. de Vey Mestdagh & J. Lubbers, 'Nee hoor, u wilt helemaal niet naar Den Haag ...', *Over de techniek, het recht en de toekomst van de zelfrijdende auto*, *Ars Aequi 2015*, p. 267–280; N.E. Vellinga & W.H. Vellinga, 'Enkele verkeersrechtelijke aspecten van toelating van (deels) zelfrijdende auto's tot het wegverkeer', *VR 2015/35*; A.I. Schreuder, 'Aansprakelijkheid voor 'zelfdenkende' apparatuur', *AV&S 2014/20, 5/6*; N.E. Vellinga, 'De civielrechtelijke aansprakelijkheid voor schade veroorzaakt door een autonome auto', *VR 2014/151*. Zie ook K.A.P.C. van Wees, 'Over intelligente voertuigen, slimme wegen en aansprakelijkheid', *VR 2010*, p. 33–44; K.A.P.C. van Wees, 'Intelligente voertuigen, aansprakelijkheid en veiligheidsregulering (diss. Delft)', *Trail Research School*, 2004.

³⁷⁶ These factors are dealt with in a more comprehensive manner in Chapter B section IV.

apply to autonomous cars (sections IV.3 dealing with the presentation of the product and section IV.4 dealing with the reasonably to be expected use). Lastly we analyse whether the expected positive aspects of self-driving cars may play a role in determining whether the car can be deemed to be defective (section IV.5).

2. Autonomous cars in product liability law

Liability in product liability cases is established because the product does not offer the safety which could have been expected of the product given the specific circumstances of the case. Liability is therefore not based on the existence of subjective fault on the side of the producer but on the lack of objective safety of the product. This element of consumer protection is central to the Directive product liability regime as discussed in chapter B but is also found in the general tort regime (relating to product liability cases) as discussed in chapter C.

Under both regimes, circumstances such as the presentation of the product, the reasonably to be expected use of the product, the reasonable to be expected safety of the product and the point in time of bringing the product into circulation will be particularly relevant when determining whether a product is defective. It should be noted that this is not an exhaustive list, other circumstances can be found to be relevant as well.

3. Presentation of the product

The presentation of the product will be especially relevant when determining whether a product is defective in cases where an entirely new type of product (such as ADAS) is introduced because consumers in such cases do not (yet) have any pre-existing expectations of the product.³⁷⁷ What is expected of the product by the average consumer is therefore in such cases for the most part determined by the information provided by the producer.

The information accompanying the product can be a factor in establishing liability. The producer can for example create a too positive view of the abilities and limitations of the product through advertisements, press releases and other communications. A consumer may as a result, trusting in the ability of the car to drive itself, take his attention away from the road which may lead to a car crash and a subsequent risk of liability for the producer of the car and/or ADAS system.³⁷⁸ A producer of autonomous cars will therefore be wise – when the limitations of the ADAS call for it – not to create the impression in commercials that the user can direct his attention away from the road when using the autonomous driving systems, even if the consumer is later warned not to do so.³⁷⁹

³⁷⁷ See for example: T. M. Gasser e.a., *Rechtsfolgen zunehmender Fahrzeugautomatisierung*, Berichte der Bundesanstalt für Straßenwesen, Heft F 83, 2012, p. 20. As the use of a certain product becomes more common, the risks associated with the use of this product will also become more generally known. The importance of adequate and extensive product information is therefore largest in the initial stages of the introduction of a new type of product.

³⁷⁸ K.A.P.C. van Wees, 'Aansprakelijkheidsaspecten van (deels) zelfrijdende auto's', *AV&S* 2015/28, 5.

³⁷⁹ T. M. Gasser e.a., *Legal consequences of an increase in vehicle automation*, Consolidated final report of the project group, *BAS1-Report F83 (Part 1)*, 2012, p. 21.

In some cases, information provided by the producer, for example in the form of warnings, may avail a producer of liability. However, although adequate instructions and warnings ensure that customers are aware of the limitations of the product, such warnings do not mean that a producer is free to bring an unsafe product into circulation.³⁸⁰ Even with such warnings, the primary duty to design a safe product remains in place. In the case of autonomous cars this requirement may turn out to be especially stringent. Manufacturers may be required to adopt so called 'fail safe' principles, this includes the incorporation of redundant back-up systems when designing their cars. If failsafe's are not in place, the mere fact that the user was warned to always keep his attention on the road and not to completely trust the ADAS, will (most likely) not constitute a defence.

4. Reasonably to be expected use

In product liability cases regarding self-driving cars, one must keep in mind that the producer is expected to anticipate some measure of misuse of the product by the consumer.³⁸¹ Reasonably to be expected use therefore also includes the reasonable to be expected misuse of the product. A producer must keep in mind that users may act carelessly and not adhere to the required safety instructions. Careless users might for example use the product outside the safe operating conditions as indicated by the producer (such as certain types of roads or weather conditions) or the user may not have performed a critical software update. When considering possible misuse, producers must take into account that, generally, cars are used intensively on a daily basis and that this might lead users to not always exercising adequate caution.³⁸² Given this expectation of an inattentive user, coupled with the generally large consequences of failing ADAS, extensive safety measures can be expected from autonomous car manufacturers.

³⁸⁰ S.B. Pape, 'Waarschuwingen op producten zijn geen veiligheidswondermiddelen. De implicaties ervan voor productaansprakelijkheid', Tijdschrift voor consumentenrecht en handelspraktijken 2012, p. 216-224.

³⁸¹ HR 2 February 1973, NJ 73, 315 (Leaking water bottle I); also: S.B. Pape, *Productwaarschuwingen: psychologische lessen voor de jurist*, in W.H. van Boom, I. Giesen en A.J. Verheij (red.), *Gedrag en privaatrecht*, BJU: Den Haag 2008, p. 267. According to the preamble of the Directive, a producer does not have to take into account misuse which is not reasonable to be expected under the circumstances.

³⁸² A recent court case (Court of Appeal Arnhem-Leeuwarden 18 November 2014, ECLI:NL:GHARL:2014:8902, Para. 4.7) can illustrate this point. In this case the cabin of a truck shot loose from the rest of the truck as a result of a failing locking mechanism after the truck collided with the guard rail on the side of the road. As a result of this accident the driver was thrown against the tarmac resulting in a spinal cord lesion. Renault Trucks states that, given the weather conditions at the time, the driving speed at the moment of the accident was way outside of what could be understood as 'normal use' of a truck. According to the court however, the circumstances put forward by Renault Trucks do not support this statement. According to the court: "the drivers" conduct was not so extreme or careless that Renault Trucks as the producer of the truck should not have expected or anticipated such use when determining what safety requirements should apply to her product. A producer such as Renault Trucks may not assume that the users of her product will always be completely attentive and will always take all necessary precautions. According to the court, this is especially true where large safety risks are connected to the failure of a product, such as the locking mechanism of the cabin of a truck."

Regarding the reasonably to be expected use in relation to intelligent vehicle systems, one must also take into account that these systems are meant for the general public, in other words, anyone with a driver's license. Because of this fact the producer cannot use the perfect driver as his standard, he will have to take into account more vulnerable groups of drivers such as persons who seldom drive a car or elderly, this is especially true because the producer might expect the self-driving car to attract these groups in particular. Here lies an important difference with automation in the aviation industry where these systems have been a reality for quite some time. Pilots are specifically selected for their physical and mental capacities; they will be especially suited to deal with stressful situations. Such a selection does not take place when issuing driver's licenses.

5. Does the increased road safety offered by autonomous vehicles influence the applied defectiveness standard?

In the context of product liability for autonomous vehicles, the question is often raised whether certain negative properties of the car should simply be accepted given the large amount of positive aspects of the use of these cars.³⁸³ This question would of course only come up in the case of design defects; when the accident is instead caused by a production defect (such as a defective sensor), little discussion will be possible as to the question of liability because the failure of the car would in such cases be more easily attributable to the producer.³⁸⁴

The real difficulty in designing a perfectly safe autonomous vehicle lies in the fact that existing sensors and detection algorithms all have their limitations; in some ways they are not as sophisticated as the human brain and eye. Object recognition, the detection of certain exceptional situations and recognition of the intentions of other road users still pose significant hurdles to autonomous vehicles. Problematic is that these limitations may, under some exceptional circumstances, lead an autonomous vehicle to cause an accident which could (and should) have been avoided by a human driver.³⁸⁵ Although a self-driving car will, more quickly than a human, be able to react to a dangerous obstruction of the road, an autonomous car may however in some cases not be able to distinguish between an actually dangerous obstruction such as a block of cement and a non-dangerous obstruction such as a newspaper blowing in the wind. Such errors are inherent to the current

³⁸³ Positive aspects such as a large increase in road safety, a decrease in traffic accidents and the potential to increase the efficiency of road travel. See for example: K.A.P.C. van Wees, 'Aansprakelijkheidsaspecten van (deels) zelfrijdende auto's', AV&S 2015, 28 and N.E. Vellinga, 'De civielrechtelijke aansprakelijkheid voor schade veroorzaakt door een autonome auto', VR 2014/151.

³⁸⁴ A.I. Schreuder, Aansprakelijkheid voor 'zelfdenkende' apparatuur, AV&S 2014/20, 5/6; it should be noted that the reverse is also true, because of limitations to human perception, autonomous cars will under certain circumstances be able to perceive more than a human (thick fog for example) and will therefore be able to prevent certain accidents which a human driver would not be able to.

³⁸⁵ A.I. Schreuder, Aansprakelijkheid voor 'zelfdenkende' apparatuur, AV&S 2014/20, 5/6. A special position should be awarded to systems that only activate when the driver of the car is no longer able to, for example when the driver has become unconscious, see: T. M. Gasser o.a., Rechtsfolgen zunehmender Fahrzeugautomatisierung, Berichte der Bundesanstalt für Straßenwesen, Heft F 83, 2012, p. 23.

limits of detection algorithms. In the case of a cement block, an emergency stop may be necessary and justified, in the case of a newspaper, an emergency stop will however be unnecessary and might actually create a dangerous situation because the occupants and other road users are not prepared for the sudden braking. Does this make an autonomous car defective? The same question might be asked for cases in which the car does not (correctly) detect a dangerous object.

Van Wees is of the opinion that both questions should be answered in the affirmative.³⁸⁶ A user (or victim) of an autonomous car will most likely not have to accept that, because of the complex surroundings in which the autonomous car is expected to operate and the current state of science and technology, certain 'detection errors' are unavoidable. Van Wees defines this as 'a deviation from the intended design', meaning a design free of any unexpected malfunctions.³⁸⁷ This view is supported by the previously discussed *Infected Blood* case³⁸⁸ (see Chapter B, section IV.5), as well as a German case relating to an exploding bottle as a result of hairline fractures.³⁸⁹ According to these cases, the fact that certain defects are practically unavoidable and should therefore be expected is not relevant when determining whether a product is defective. What is instead relevant is the expectation of the existence of a defect amongst the general public. This means that, even though the unavoidable existence of a defect is documented and published, the general public may still be unaware of this possible defect and may expect the product to be defect free; it is this last expectation of the consumer which is relevant. From these judgements it can be deduced that the justified expectation of safety does not refer to the actually justified expectation of safety but is instead a normative one.³⁹⁰

The argument that a specific ADAS in general – in other words, statistically speaking – helps prevent accidents from occurring, will therefore in cases such as discussed here be irrelevant.³⁹¹ Knowledge within the technical circles of the limitations of self-driving cars will most likely not determine the expectations of the average consumer. The average consumer will on the contrary, as a result of advertisements of producers and reports of strongly increased road safety, expect the self-driving car to be completely safe and without defect. Any other answer would in essence negate the central premise of the Directive product liability regime: a producer should be liable for damage caused to consumers by a defect in one of his products, even when the failure is not his fault in a subjective sense.

E. Closing

Above we have sketched a development towards a more objective approach of product liability in the Netherlands as well as a trend towards achieving

³⁸⁶ K.A.P.C. van Wees, 'Aansprakelijkheidsaspecten van (deels) zelfrijdende auto's', AV&S 2015/28, 5.

³⁸⁷ The consumer will expect a (practically) completely safe product.

³⁸⁸ District Court Amsterdam 3 February 1999, NJ 1999, 621 (*Infected blood*).

³⁸⁹ BGH 5 mei 1995, BGHZ 129, 353

³⁹⁰ C.C. van Dam, *European Tort Law*, Oxford University Press, 2013, no. 1408-2.

³⁹¹ See: J. M. Anderson e.a., *Autonomous Vehicle Technology, A Guide for Policymakers*, RAND 2014, p.120 en 125–126 and K.A.P.C. van Wees, 'Aansprakelijkheidsaspecten van (deels) zelfrijdende auto's', AV&S 2015/28, 5.

greater protection for customers in products liability law. The arguments for doing so have been listed and seem to be valid. At this point in time, the more general trend in product liability law in the Netherlands seems to be however, that the development of the rules has reached some form of standstill. Not much really interesting case law has emerged in the last couple of years. This is especially due to the case law of the ECJ (which in essence freezes the state of the law as it was around 1985, and that state of affairs was not all too consumer friendly), as well as to the reminder, on the national level, that both wrongfulness and subjective fault need to be present. Be that as it may, the more general conclusion to draw, for better or for worse, is that in practice, products liability is not really a big issue in the Netherlands at this point in time.

Even though the state of the general tort regime was frozen by the introduction of the Directive regime, Dutch case law does seem to have moved the general national tort regime to a more consumer friendly interpretation. In particular, the requirement of subjective fault seems to have significantly diminished in importance because of the advance of burden of proof mitigating rules. In practise, subjective fault is very often simply assumed to exist in consumer product liability cases under the general tort law, making the Directive liability regime and the general tort regime in most respects very similar.

The foregoing position of a standstill might change rapidly in the coming years however, given the technological developments that are approaching and which lead to interesting legal questions. The cases of nanotechnology and autonomous cars serve as examples thereof.