
The development of product liability in the Netherlands

I VO G I E S E N *

I Introduction

The aim of this contribution is to provide the reader with an overview of the development of the law in the Netherlands with regard to product liability.¹ It must be stressed from the outset that, contrary to popular belief some decades ago, this development has not been very significant, either from the point of view of legal history or from a point of view of tort law in general. Much was expected of product liability law, but looking back and stated bluntly, product liability really has not been the most exciting topic in the Netherlands, especially if one only focuses, as the Dutch do, on the aspect of fault.² The line of development of product liability has shown a rise in attention for some short periods, but really nothing more.

In the following section, I will sketch the development (in six phases) of product liability law as I see it (section II(2) at p. 156) while (also) trying to answer some more specific questions in an overview of past and future trends (section II(3) at p. 176), and of sources of change in the law (section II(4) at p. 181). I will end with a very short conclusion (section III at p. 191).

* Ivo Giesen is Professor of Private Law at Utrecht University, the Netherlands. This paper is an adapted and updated version of an article the author wrote with (now) Professor M. B. M. Loos (University of Amsterdam); see I. Giesen and M. B. M. Loos, 'Liability for Defective Products and Services: The Netherlands', in E. H. Hondius and C. Joustra (eds.), *Netherlands Reports to the Sixteenth Congress of the International Academy of Comparative Law/Brisbane 2002* (Intersentiae, Antwerp 2002), pp. 75–113. This contribution was finalised in February 2006.

¹ In accordance with the intended purpose of the project, this contribution does not primarily focus on the liability based on the European Directive mentioned below (see section II(1)). However, dealing with the European Directive will be unavoidable to a great extent. I presume its content to be familiar to the reader.

² In terms of *causation*, the ruling in the famous *Des* case by the Dutch Supreme Court (HR 9 October 1992, NJ 1994, 535 with note CJHB) has managed to arouse legal scholarship and practice, but even there, the arousal was temporary. The case has not led to a major shift in the development of the law in terms of huge amounts of cases having been decided afterwards as being based on that decision.

II The basic stages of the development of liability for defective products

1 Introduction: contract or tort, strict liability or negligence?

Before going into the details of the development stages of product liability in the Netherlands, it seems wise to make it clear that in the Netherlands, product 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 (arts. 6:162 and/or 6:185ff. of the Dutch Civil Code, *Burgerlijk Wetboek*, hereafter referred to as 'BW'). Of course, in principle, general contract law could be invoked³ (especially art. 7:17 BW, dealing with non-conformity of goods sold), even in concert with tort law, but this is hardly ever the case.⁴ The reason is that, usually, in this type of case, there is a personal injury; whenever such is the case, a contractual fault also constitutes a tort under general tort law,⁵ leading to the same damages being awarded. Since the contractual chain usually needs to be 'expanded' to be able to locate a product liability claim within contract law, it is both easier and safer to make use of tort law instead of contract law.

Furthermore, art. 7:24 of the BW stipulates that if goods are sold by a professional to a consumer, and the defect falls under the scope of arts. 6:185ff. of the BW, it is not the seller but (solely) the producer that is liable, unless the seller knew or should have known of the defect, had guaranteed the absence of the defect, or the claim consists of physical damage

³ See, for instance, HR 26 March 1920, NJ 1920, 576 (*Surinamese postman*); HR 19 February 1993, NJ 1994, 290 with note CJHB (*Municipality of Groningen/Heirs of Zuidema*).

⁴ Cf. G. H. A. Schut, *Onrechtmatige daad*, 5th edn (Tjeenk Willink, Deventer 1997), p. 124; A. J. Verheij, *Onrechtmatige daad. Monografie Privaatrecht*, 6th edn (Kluwer, Deventer 2005), p. 4.

⁵ See HR 3 December 1999, NJ 2000, 235 with note PAS (*Pratt and Whitney/Franssen*); Schut, *Onrechtmatige daad*, p. 124; A. S. Hartkamp, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht. Verbintenissenrecht. Deel III. De verbintenis uit de wet*, 12th edn (Tjeenk Willink, Deventer 2006), nos. 8–9 and 201; I. Giesen, 'Bewijs en aansprakelijkheid. Een rechtsvergelijkend onderzoek naar de bewijslast, de bewijsvoeringslast, het bewijsrisico en de bewijsrisico-omkering in het aansprakelijkheidsrecht', Ph.D. dissertation of the University of Tilburg (BJu, The Hague 2001), pp. 203–4. See also G. H. A. Schut, *Productenaansprakelijkheid* (Tjeenk Willink, Zwolle 1974), no. 127 at p. 228, and p. 215 on the interplay between contract and tort.

that cannot be claimed under the product liability regulations because the damage is less than the minimum amount of €500.⁶

Given this preference, these days, for a claim in tort, I will focus primarily on tort law. Indeed, if one approaches the topic from a tort law perspective, art. 6:162 of the BW constitutes the basis for a claim for product liability under *general* Dutch tort law. This basic tort rule is one of negligence.

In legal literature, a distinction is made, as elsewhere, most notably in the US, between the well-known categories of design defects, manufacturing defects and inadequate warnings or instructions,⁷ but in case law on product liability, this distinction has so far been without legal consequences in the Netherlands.⁸

Under the EC Directive on Product Liability⁹ (hereafter 'the Directive'), implemented in arts. 6:185ff. of the BW, the basic rule, if also applicable,¹⁰ is (or, at least, is thought to be) one of strict liability.¹¹ This could be

⁶ Cf. art. 7:24, para. 2 BW. Note that if the contract is a sales contract, but does not constitute a *consumer* sale, the exclusion of the seller's liability does not apply. In other words the buyer who is *not* a consumer is better protected than the buyer who *is* a consumer. The provision of art. 7:24, para. 2 BW is criticised in literature. Cf. Jac. Hijma, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht. Bijzondere overeenkomsten. Deel I. Koop en ruil*, 6th edn (Tjeenk Willink, Deventer 2001), no. 445 with references; T. Hartlief and R. J. Tjittes, 'Kroniek van het vermogensrecht', *NJB* (2001), p. 1464; L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Kluwer, Deventer 2000), pp. 93–4.

⁷ The specific duty to warn is becoming more and more important these days; see below and, in general on this duty, I. Giesen, 'Handle with care!', Inaugural Lecture, Utrecht (BJu, The Hague 2005).

⁸ Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht*, 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 follow the BGH's lead. Cf. Giesen, 'Bewijs en aansprakelijkheid', p. 203; Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht*, p. 40. See also on this case from a Dutch perspective: H. N. Schelhaas, 'Produktaansprakelijkheid en Europees privaatrecht: het ontplofende Duitse mineraalflesje', *NTBR* (2005), pp. 204ff. and E. H. Hondius, 'Produktenaansprakelijkheid: de voordelen van een dualistische rechtsorde', *AA* (1996), pp. 324–31.

⁹ Directive 85/374/EEC, OJ L 210 p. 29. Hereafter, I will not refer to the Articles of the Directive as such, but to the Dutch articles implementing the Directive in the Netherlands, i.e. arts. 6:185–93 BW.

¹⁰ Both rules can usually be invoked at the same time, but the Directive liability (which does not affect the right to sue under the existing national laws; see art. 6:193 BW) seems to have a more restricted scope of application; see Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht*, pp. 3–4 and 31.

¹¹ See Case C-203/99, *Veedfald*, *EuZW* 2001, 378 with note Geiger, para. 15, and European Commission, *Report on the Application of Directive 85/374 on Liability for Defective Products*, COM (2000) 893 Final (Brussels 2001), p. 5.

relevant because, as we will see below (see section 2.6 at p. 166), 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, however, been questioned 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.¹² In general, product liability is considered to have combined elements of both fault-based liability and strict liability.¹³ Even though art. 6:162 of the BW generally constitutes a negligence-based liability, the same combination of fault and strict liability elements seems to apply to product liability under the general tort law regime.¹⁴ However, one's position in this respect also depends on the specific definition of strict liability that one embraces.

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

¹² Case C-300/95, *Commission v. UK* [1997] ECR I-2649, NJ 1998, 522, and Giesen, 'Bewijs en aansprakelijkheid', pp. 194 and 200–1, where the issue as to whether or not the Directive liability is (still) a strict liability is discussed.

¹³ See Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht*, pp. 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* (Kluwer, The Hague/London/Boston 1999) pp. 135–6, and in general on this issue, for example, P. Cane, *Atiyah's Accidents, Compensation and the Law*, 6th edn (Butterworths, London 1999), pp. 85–6; G. Howells, 'Product Liability', in A. Hartkamp et al. (eds.), *Towards a European Civil Code*, 2nd edn (Ars Aequi Libri, Nijmegen 1998), pp. 452–4; C. C. van Dam, *Aansprakelijkheidsrecht, Een grensoverschrijdend handboek* (Bju, The Hague 2000), nos. 1002–4.

¹⁴ An early case in negligence leading to a rather strict form of liability is Hof Amsterdam 27 June 1957, NJ 1958, 104 (*Ford/Den Ouden*). See also Hof Den Bosch 18 January 1995, TvC 1995, 207 (*W/Hero*), and Hof Amsterdam 27 August 1998, VR 1999, 67 (*Steifensand/Vos*) at 4.8, as well as Schut, *Onrechtmatige daad*, p. 126.

provided an opportunity to commit the tort. The first two conditions are usually met quite easily.¹⁵

Of course, this line of case law immediately implies not only the importance of EU regulations for 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 recognised as actually shaping or forming – and not merely finding – the law when it decides cases. It is now viewed as one of the lawmakers in the Netherlands, and its legitimacy in doing so is no longer seriously questioned.¹⁶

2 *The main stages in the development*

2.1 Introduction: six stages

Product liability in the Netherlands is not a very old topic. Before the 1960s, there really was not much of an issue to be dealt with. After 1960, there was some uproar in society with regard to the use of certain products. This led to an increase in thinking about products, the dangers they can bring about and the latter's legal implications.¹⁷ Product liability was 'growing up', and a relatively famous case was decided in 1966. This, however, is not to say that nothing happened before 1960. Thus, the first phase of development I would like to consider will be the period up until 1960. In this period, for instance, the first claim about a defective automobile made its way into the courts and academic writing (in 1957).

The period from 1960 onwards, in which the topic came to life as just described, is then considered to be the second period, which lasts until 1973. A relatively well-known case was decided in that year by the Supreme Court (dealing with a hot-water bottle for babies), while the following year an important book by Schut appeared. These events mark the start of the third phase, which lasted until 1985, the year of the introduction of the EC

¹⁵ See J. W. Hoekzema, 'Kwalitatieve aansprakelijkheid voor ondergeschikten en aansprakelijkheid voor eigen onrechtmatige daad', Ph.D. dissertation, Rijksuniversiteit Groningen (Bju, The Hague 2000), pp. 49–82; C. J. M. Klaassen, 'Schadeveroorzakend handelen in functie', Inaugural Lecture, Universiteit Nijmegen (Tjeenk Willink, Deventer 2000), pp. 5ff.

¹⁶ See, for instance, I. Giesen and H. N. Schelhaas, 'Samenwerking bij rechtsvorming', AA (2006), pp. 169–72, with further references. Influence from doctrinal works has not been at the basis of this development in product liability law. More generally, economic analysis has not yet found its way into the courts in the Netherlands, and not even really into doctrine. Many treat economic analysis with hostility, although it is gaining popularity.

¹⁷ See Schut, *Productenaansprakelijkheid*, no. 120.

Directive. In this third phase, product liability as a distinct area of tort law found its place within private law. It settled, so to speak.

In the next, fourth period, starting in 1985, the EEC Directive was implemented and written about, under the apprehension that a legal 'gold mine' had been found. It continued until the mid 1990s (1996), after which the fifth period, the period of case law on product liability, started. From 2000 onwards, a period of relative settlement commenced: there have been no major developments since then, no big cases or important pieces of legislation, while doctrinal works appear to be less concerned with the topic.

In short, I would initially subdivide Dutch legal development of product liability into six phases: the early stage (until 1960), the development stage (1960–1973), the settling stage (1973–1985), the EEC gold-rush stage (1985–1992), the case law stage (1992–2000) and the settlement stage (2000 onwards).

2.2 The early stage (until 1960)

As stated before, there really was not much of an issue to be dealt with as regards product liability before 1961. Two rather distinctive events (i.e. court decisions) worth mentioning here did, however, occur in that period.¹⁸

In 1933, a case was decided that would nowadays have been seen as a product liability case. A cylinder, part of a welding machine, bought second-hand by the defendant and rented to the employer of the plaintiff, exploded while being used by the plaintiff. The HR decided that the defendant had breached his duty of care under general tort law by supplying others (i.e. the plaintiff's employer) with a cylinder while not having ascertained, or having been able to ascertain, whether or not the cylinder was in good order or was defective (i.e. properly filled). Here, the defendant was not even able to check the quality because he bought the cylinder second-hand.¹⁹ In his case note, Meijers relates this decision to the famous Dutch *Lindenbaum/Cohen* case, in which the Dutch rule on negligence (art. 1401 of the old BW) was widened so as to include

¹⁸ This is not to say that there was no other case law whatsoever; see C. E. C. Jansen and J. H. Duyvensz, 'Productenaansprakelijkheid en voorgeschreven ondeugdelijk materiaal sinds het Moffenkit-arrest', NTBR (2001), p. 403, note 3 for references, and Schut, *Productenaansprakelijkheid*, no. 128. The two cases mentioned here are, however, the most important ones. Presumably, before the 1930s, cases on 'defective products' would most probably have been treated as cases on sales law (between purchaser and seller).

¹⁹ See HR 6 April 1933, NJ 1933, 881 with note Meijers (*Zootjes/Loos*).

the breach of unwritten standards of good conduct within society as unlawful.²⁰

It might seem somewhat surprising that the development of product liability started so late in the Netherlands, given that many of the reasons for taking up product liability in the first place (such as mass production by machines, and selling the goods to consumers who were unaware of possible defects) had been present ever since the start of the industrial revolution. That same industrial revolution led to many profound changes earlier (around 1900) in relation to, for instance, the law on industrial accidents and occupational diseases, and on the rules in relation to workplaces.²¹ I presume that providing protection for the person manufacturing the products in question was then considered more important than concern for third parties subsequently buying or using the products.

A second memorable event was the first claim about a defective automobile in the Netherlands. This case, decided by the Appellate Court of Amsterdam in 1957, was about a Ford automobile whose steering mechanism was defective (due to a fabrication defect while assembling the car from the component parts), the defect not being visible to the user of the car. The court ruled that a manufacturer should make sure that no car leaves its factory and travels in traffic with a fabrication defect that will jeopardise safety to a considerable extent. Of course, it is understandable that those who work with the component in question do not notice such a failure in a mass production process, and it is also understandable that a manufacturer does not double check all component parts delivered to him, but that is a risk that will have to be borne by the manufacturer.²² The court's revelations about the background (failures will be made and overlooked) and the spreading of the resulting risks are especially interesting.

2.3 The development stage (1960–1973)

After 1960, product liability really started becoming an issue. Schut has described the reasons for this rather sudden development as follows. Firstly, between 1960 and 1962, the prescription and use of the drug called (in the Netherlands) Softenon (elsewhere also known as Thalidomide) by

²⁰ See the note accompanying HR 6 April 1933, *ibid.*, which refers to HR 31 January 1919, NJ 1919, 961 (*Lindenbaum/Cohen*).

²¹ Advocated in the Netherlands, amongst others, by the eminent scholar, P. Scholten: 'Schadevergoeding buiten overeenkomst en onrechtmatige daad' Ph.D thesis, Amsterdam 1899.

²² Hof Amsterdam 27 June 1957, NJ 1958, 104 (*Ford/Den Ouden*).

pregnant women led to many cases of severe disabilities in their babies. Next to that, the so-called Planta case got a lot of attention in the media. A brand of butter was believed to cause headaches and itching amongst its users, and the butter had to be withdrawn from the market. The uproar in society after both of these tragic incidents led to an increase in thinking about products, the dangers they can bring about and the legal implications thereof, but not to specific cases on these issues.²³

Some big stories dealing with defective products drew a lot of attention, such as the Softenon and Planta affairs, the Exota affair, the famous *Des* case and, more recently, claims against the tobacco industry.²⁴ For the most part, however, product liability does not really seem to draw a lot of attention in the Netherlands. Politicians, as always, take an interest in product liability only in those cases where exposure to publicity is high,²⁵ trying to reap some political benefits. Consumer groups tend to be more and more permanently interested, and are rather alert to signs of mishaps. Their active involvement with dangers arising from defective products is probably one of the reasons why product recall has gained so much importance over the years.²⁶

Secondly, the development of a new Dutch Civil Code, already underway for some years by then, got to the stage where a draft of an article dealing with the liability of manufacturers (Draft art. 6.3.13 on liability for defective products), making this liability a lot easier to establish, was published, which of course led to legal attention. Thirdly, insurers started treating the risks of products separately from the general risk covered by liability insurance, thus putting attention on product liability.²⁷

Next to these historical landmarks, one could mention that, at this period, the first legal articles on the topic of product liability were published as well.²⁸ Product liability was 'growing up' now. Not unimportantly, a relatively famous case was decided in 1966. A municipality instructed

²³ None of the incidents mentioned led to published case law, although damages were supplied to the victims. See, for further details on the handling of these events, Schut, *Productenaansprakelijkheid*, nos. 21 and 51.

²⁴ In the 1980s and 1990s, 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 CJHB (*Des*), and section II(3.1) below at p. 178. The Exota affair was about the danger of exploding Exota bottles, which received a lot of media attention. See also Dommering-van Rongen, 'Product Liability in the Netherlands', p. 135; L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht*, p. 202.

²⁵ Such as those mentioned before. ²⁶ See section II(2.7) at p. 169.

²⁷ See Schut, *Productenaansprakelijkheid* nos. 120 and 134 on the new Civil Code article.

²⁸ See the list of literature in Schut, *Productenaansprakelijkheid*, no. 119.

a building company, working on a sewer system, to use 'HIM-moffenkit' as a means of connecting the different parts of the sewer pipelines. The municipality decided to use this kit because of publicity materials (supplied by HIM) that they had seen. The building company did so, but as it turned out, the kit did not function properly, leading to leaks. The municipality sued the manufacturer for the cost of repair. The Hoge Raad decided²⁹ that, in the circumstances of the case at hand, the delivery of the inadequate material constituted a tort. Because the municipality had, in reliance on the advertisements of the manufacturer, obliged the builder to use the material in question, it could claim a breach of duty by the manufacturer for not supplying a decent product, especially since this manufacturer could have expected persons like the municipality to be tempted to use their product. The gist of the case was that, until that time, the supplying of *dangerous* products had been considered careless; here, the question was whether putting a *defective* (though not necessarily dangerous) product on the market could be unlawful. The HR decided that putting a defective product on the market is, as such, not unlawful, but it could still be unlawful through other circumstances, such as, for instance, in the case at hand, advertising by the producer.³⁰ The HR thus showed some reluctance as regards widening the area of product liability (other circumstances are needed) but this line in the case law has been subsequently abandoned, widening the scope of liability and robbing the case itself of much of its importance.³¹

Another relevant aspect is that the use that has been made of the product must have been 'regular use'.³² An element of the tort is thus that the use of the product was actually the use that could have been expected by the manufacturer. However, a producer cannot rely on the fact that all users of his product will always take all precautions that could prevent accidents.³³

2.4 The settling stage (1973–1985)

A relatively well-known case on product liability was decided in 1973 by the Supreme Court (dealing with a hot-water bottle for babies), while the important book by Schut on the topic of product liability appeared

²⁹ See HR 25 March 1966, NJ 1966, 279 with note GJS (*Moffenkit*).

³⁰ On the aspect of additional circumstances, see also Schut, *Productenaansprakelijkheid*, no. 128.

³¹ See C. E. C. Jansen and J. H. Duyvensz, 'Productenaansprakelijkheid en voorgeschreven ondeugdelijk materiaal sinds het Moffenkit-arrest', NTBR (2001), p. 403; Giesen, 'Bewijs en aansprakelijkheid', pp. 217–18.

³² Schut, *Productenaansprakelijkheid*, no. 128 at p. 234.

³³ *Ibid.*, no. 129, and HR 2 February 1973, NJ 1973, 315 with note HB (*Leaking water bottle*).

the following year.³⁴ So product liability seemed to be settling as a topic within the broader domain of tort law. The case³⁵ concerned the following facts. A hot-water bottle was placed in the crib of a baby, but it started leaking, leading to severe scald wounds to the baby. The manufacturer of the bottle was sued, and the Hoge Raad held that, with regard to its fault, the court should have investigated whether the bottle led to a danger of such proportion that the bottle should not have been put into circulation, and whether it was more probable than not that it was not the fault of the manufacturer that this did, in fact, happen. Later, the case became relatively important³⁶ because of the possible implications it had for the burden of proof as regards the (subjective) fault of the producer.³⁷ The case was and is read as placing the burden of proof on the producer instead of the victim, in line with what was decided earlier in the *Hühnerpest-Urteil* in Germany.³⁸

As regards the burden of proof, art 6:188 of the 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. The applicability of one of the defences under art. 6:185, para. 1 of the BW is to be proved by the defendant.³⁹ In principle, the same division of the burden of proof applies if the action is based on general tort law.⁴⁰ This certainly holds true when one considers the element of (the existence of) damage.⁴¹ In product liability cases, however, a 'reversal' of the burden of proof is possible: (a) with regard to the 'defect'

³⁴ This refers to Schut, *Productenaansprakelijkheid*, above at note 5.

³⁵ HR 2 February 1973, NJ 1973, 315 with note HB (*Leaking water bottle*).

³⁶ In 1974, Schut, *Productenaansprakelijkheid*, no. 120, did not think of this as a landmark decision.

³⁷ This line of development would be consistent with the line of development of rules on liability law in general that J. M. Barendrecht sketched in his 'De toekomst van het aansprakelijkheidsrecht', in J. M. Barendrecht and E. Bauw (eds.), *Privaatrecht in de 21e eeuw. Aansprakelijkheidsrecht* (Kluwer, Deventer 1999).

³⁸ BGH 28 November 1968, BGHZ 51, 91; NJW 1969, 269, and see above, p. 123.

³⁹ On this, see Rb. Amsterdam 8 July 2005, JA 2005/82 (*A/Merial*), and Giesen, 'Bewijs en aansprakelijkheid', pp. 195ff, claiming inter alia that a reversal of the burden of proof with regard to the national rules on product 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 below, section II(2.7) at p. 168), this proposition hardly seems defensible any more.

⁴⁰ On the burden of proof in tort law in general, see Giesen, 'Bewijs en aansprakelijkheid', pp. 113ff.

⁴¹ Giesen, 'Bewijs en aansprakelijkheid', p. 226.

(the element of wrongfulness); (b) with regard to causation; and (c) with regard to the subjective fault.

As for the defect (a), the HR considers that if a plaintiff proves that he opened a bottle in a normal fashion, which then exploded, that state of affairs would lead to the factual presumption that the damage must have been caused by a defect in the bottle. The producer may rebut this presumption.⁴² On a more abstract level, it is possible to state the rule deducible from this case as follows: if a party proves that he used the product in a normal fashion, but an unexpected damaging event nevertheless occurred, the product is presumed to have been defective.⁴³

In the field of causation (b), a new rule on the burden of proof has gained momentum in recent years. It basically states that whenever a wrongful act creates or increases a certain risk of damage, and that specific risk actually materialises, the causal link has been established, unless the wrongdoer can prove that taking preventive measures would not have prevented the damage from occurring.⁴⁴ The HR has never declared that rule to be applicable in the area of product liability, but, in my opinion, its scope is broad enough to encompass this field, especially if a duty to warn has been breached.⁴⁵ One should at least be aware of the possibility that the same rule, which is, for instance, applied in cases of liability for

⁴² HR 24 December 1993, NJ 1994, 214 (*Leebeek/Vrumona*). On the basis of this case, it is also possible to presume the causal connection to be present, given that this is a case of *res ipsa loquitur*. For details, see Giesen, 'Bewijs en aansprakelijkheid', p. 228.

⁴³ See Giesen, 'Bewijs en aansprakelijkheid', pp. 219–20. Cf. HR 15 March 1996, NJ 1996, 435 (*ABR/Kuijt*), a case in which the burden of proof with regard to normal use was put on the victim, while, at the same time, the court presumed this normal use to have been present.

⁴⁴ This so-called '*omkeringsregel*' was first used in the mid 1970s in cases of traffic accidents and accidents at workplaces, and was widened in its scope of application in the *Dicky Trading II* case (HR 26 January 1996, NJ 1996, 607 with note WMK). See van Dam, *Aansprakelijkheidsrecht, Een grensoverschrijdend handboek*, no. 810; Giesen, 'Bewijs en aansprakelijkheid', pp. 116ff; I. Giesen, *Aansprakelijkheid en toezicht* (Kluwer, Deventer 2005), pp. 204ff. with references to recent case law. The rule and its applicability are still 'under construction'; see below at p. 163.

⁴⁵ See Giesen, 'Bewijs en aansprakelijkheid', p. 228. Contrary to this rule (but too old to still be considered to reflect the law in this respect) is the product liability decision of Hof Den Bosch 13 November 1979, NJ 1980, 370 (*Beatrix/van Weleveld*). The rule on causation is explained here, and the burden of proof is still being developed, so it is not yet possible to give a definite answer to the question of whether it can be used in product liability cases. In a fairly recent decision, the Appellate Court at Arnhem decided that the '*omkeringsregel*' could not be applied to a product 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 HR turned down the appeal (HR 13 May 2005, C04/076 (*Koolhaas e.a./Rockwool*)) without deciding on the merits.

services,⁴⁶ might be applied in cases of product liability. However, since the exact scope of the rule in question has never been precisely limited, and the HR seems to be narrowing this scope, certainty cannot be given in this respect.⁴⁷

With regard to subjective fault (c), it should be noted that this element is still a condition for liability under general tort law,⁴⁸ but that, on the other hand, fault may be presumed if the wrongfulness has been established and needs to be disproved by the defendant, thereby effectively reversing the burden of proof.⁴⁹

To conclude, in the case of an exploding bottle (*Leebeek/Vrumona*),⁵⁰ the HR has made clear that, in order to escape liability, the defendant must prove that: (a) the defect was not present prior to the marketing of the product; (b) the defect could not have been discovered at an earlier date; and (c) the product was not used in accordance with its intended use. Finally, if the defendant argues that there was (some form of) contributory negligence on the part of the plaintiff, he needs to prove this as well.⁵¹

⁴⁶ See the *Dicky Trading II* case (HR 26 January 1996, NJ 1996, 607 with note WMK), a case on the liability of a notary, and, critically, Giesen, 'Bewijs en aansprakelijkheid', pp. 116–19; I. Giesen, *Bewijslastverdeling bij beroepsaansprakelijkheid* (Tjeenk Willink, Deventer 1999), pp. 66ff.

⁴⁷ See Giesen, *Aansprakelijkheid en toezicht*, pp. 204–9. The uncertainty has not been taken away since, but at this moment, I would be tempted to say that the rule has returned to its roots, being a presumption of causation if the breach of a traffic or safety rule has been proven.

⁴⁸ The role of fault in other areas is almost extinct; cf. Verheij, *Onrechtmatige daad. Monografie Privaatrecht*, p. 48, but not with regard to product liability; see Giesen, 'Bewijs en aansprakelijkheid', 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 Schut, *Productenaansprakelijkheid*, nos. 131 and 143 (on proof).

⁴⁹ Giesen, 'Bewijs en aansprakelijkheid', pp. 232–3, 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 and J. H. Duyvensz, 'Productenaansprakelijkheid tegenover niet-consumenten' WPNR 6390/6391 (2000), pp. 117–23).

⁵⁰ HR 24 December 1993, NJ 1994, 214 (*Leebeek/Vrumona*). See also J. Spier and A. T. Bolt (with O.A. Haazen), *De uitdijende reikwijdte van de aansprakelijkheid uit onrechtmatige daad. Handelingen NJV, 1996-I* (Tjeenk Willink, Zwolle 1996), pp. 240–1.

⁵¹ See Giesen, 'Bewijs en aansprakelijkheid', pp. 219–20, and 234–5.

2.5 The EEC gold-rush stage (1985–1996)

According to art. 6:186 of the BW (based on the Directive liability), a product is defective if it does not offer the safety that a person is entitled to expect, taking into account all the circumstances of the case at hand, in particular the presentation of the product, the expected use of the product and the time the product was put into circulation. This rule, as well as the other rules from the Directive, received a lot of attention after the Directive was issued, and while the national legislators were busy implementing it.

To expand a little on the Dutch implementation of the Directive, one could point first to the fact that product liability in general only rests on the person putting the product into circulation. This rule is accepted under the Directive liability, but also under the general tort rule.⁵² 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 put the product on the market (art. 6:185, para. 1(a) of the BW). This is different under general tort law, where the plaintiff will have to prove that the producer put the product on the market.⁵³ However, what exactly falls under the definition of ‘putting the product on the market’ has, until now, been rather vague.⁵⁴ Passing something on in the chain of distribution has been used as a definition in this respect.⁵⁵

The notion of ‘producer’ is a broad one: any party who manufactures a product, a component or the raw materials thereof is considered to be a producer, and can be held accountable under tort law.⁵⁶ The same rule applies, as far as liability under the Directive is concerned, to those presenting themselves as producer by placing their name, trademark or other distinguishing mark on the product (art. 6:187, para. 2 of the 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 of the BW). Finally, the supplier of the product will be considered to be the producer if it cannot be determined who the producer

⁵² HR 6 December 1996, NJ 1997, 219 (*DuPont/Hermans*); Dommering-van Rongen, *Productaansprakelijkheid*, p. 73.

⁵³ Giesen, ‘Bewijs en aansprakelijkheid’, pp. 218 and 229.

⁵⁴ Dommerig-van Rongen, *Productaansprakelijkheid*, pp. 73ff.; C. J. J. M. Stolker, ‘Art. 185–193’, in A. R. Bloembergen (ed.), *Onrechtmatige Daad* (Looseleaf) (Kluwer, Deventer), no. 4 at art. 185.

⁵⁵ Hof Leeuwarden 18 March 1998, NJ 1998, 867 (*Tetra Werke/Kuiper*); Stolker, ‘Art. 185–193’, no. 4.4 at art. 185.

⁵⁶ HR 22 October 1999, NJ 2000, 159 with note ARB (*Koolhaas/Rockwool*); Dommering-van Rongen, *Productaansprakelijkheid*, pp. 80ff.

is, unless the supplier mentions, within a reasonable time, the identity of the person from whom he has bought the product (art. 6:187, para. 4 of the BW).⁵⁷ Under general tort law, similar rules will most likely be applied.⁵⁸ However, the negligence standard applied to a supplier of a product who cannot be considered to be the actual producer of the product itself is less strict.⁵⁹ The retail seller of a product can be held liable under the contract of sale, but, for reasons explained above, this is rare.⁶⁰

However, there were not a lot of cases coming to the courts in those years, so attention was given primarily to the Directive. In legal literature, the issue of product liability was now taken up extensively, leading to several books and even more law journal articles.⁶¹ Scholars thought – at least, with hindsight, that is what it looks like – that the area of product liability was big business. This was what one should be working on if one were to be taken seriously, hence the use of the term ‘gold rush’. Again, with hindsight, this proved to be wrong, because in practice, product liability was not really a big issue (see below at section II(2.7) at p. 168).

Around the time of the implementation of the EC Directive, the *process* of enacting this European set of rules was not considered to be something very special, at least as far as I can recall. This was particularly so because the Directive was seen as a (necessary) political compromise, and thus not specifically as the best law possible. It was something that needed to be done, and it was not expected to offer better protection to claimants/consumers than any national rules already in existence. The question whether harmonisation is needed at all was only raised recently

⁵⁷ Handing over a copy of a bill will suffice in this respect; see HR 22 September 2000, NJ 2000, 644 (*Haagman/VSCI*).

⁵⁸ On the liability of an importer, see Hof Den Bosch 14 January 1997, A&V 1997/6, 158 with note PK (*Aerts/Helm*).

⁵⁹ See HR 22 September 2000, NJ 2000, 644 (*Haagman/VSCI*). This seems to be in accordance with the *Skov* case of the ECJ (ECJ 10 January 2006, Case C-402/03) (a supplier can be held responsible for the producer's fault-based liability, but not for his Directive-based no-fault liability).

⁶⁰ See section II(1) at p. 153.

⁶¹ I will mention a few books: G. M. F. Snijders, *Produktveiligheid en aansprakelijkheid* (Kluwer, Deventer 1987); M. van Empel and H. A. Ritsema, *Aansprakelijkheid voor produkten* (Kluwer, Deventer 1987); H. G. Punt, *Produktenaansprakelijkheid* (Kluwer, Deventer 1988); D. W. F. Verkade, M. Ph. van Sint Truiden and J. C. F. Maassen, *Produkt in gebreke* (Samson H.D. Tjeenk Willink, Alphen aan de Rijn 1990); M. M. P. C. Mandigers, R. R. M. de Moor and C. J. C. M. Oomen, *Produkt en aansprakelijkheid* (Vermande, Lelystad 1991); L. Dommering-van Rongen, *Produktenaansprakelijkheid* (Kluwer, Deventer 1991), and R. J. J. Westerdijk, ‘Produktenaansprakelijkheid voor software’, Ph.D. dissertation, Vrije Universiteit Amsterdam (Kluwer, Deventer 1995).

from a law and economics perspective.⁶² The whole issue of how to deal, on a more general level, with the implementation of European rules into a national codification was not really touched upon in those days, so that debate did not ignite either.

The *results* of this implementation have been special, however, because the Supreme Court has aligned the European and national duties of a producer, as we will see below.

2.6 The case law stage (1996–2000)

The case law stage actually started a little earlier than 1996, because in 1989, the Dutch Supreme Court ruled, in a case on a presumably defective drug (sleeping pills with side effects), that a product is defective under general tort law of art. 6:162 of the BW⁶³ if it does not offer the safety a consumer/user is entitled to expect, given the circumstances of the case.⁶⁴ This case became especially important later on with rulings in subsequent cases; hence the later start of this period.

In these later cases, dating from 1996 and 1999, the HR stated that the element of wrongfulness vis-à-vis the user is present if a product is put into circulation that causes damage when it is used in a normal fashion, and for the purpose for which it was intended.⁶⁵ In the case of *DuPont/Hermans*,⁶⁶ an explicit reference was made to the first mentioned (1989) case, and since the standard used in that case very closely resembles the Directive standard ('a product is defective if it does not offer the safety that a person is entitled to expect, taking into account all the circumstances of the case at hand, in particular the presentation of the product, the expected use of the product, and the time the product was put into circulation'; this entails the consumer expectation test), the Supreme Court

⁶² M. Faure, 'Productaansprakelijkheid in Europa: kritische rechtseconomische reflecties', AV&S (2004), pp. 3–12. The low practical impact of product liability in the Netherlands could be construed as supporting this position (*ibid.*, at pp. 10 and 11).

⁶³ This concerns tort law. In contract law, case law is (also) very strict; see section II(2.7), below.

⁶⁴ HR 30 June 1989, NJ 1990, 652 with note CJHB (*Halcion*).

⁶⁵ See HR 6 December 1996, NJ 1997, 219 (*DuPont/Hermans*), confirmed in HR 22 October 1999, NJ 2000, 159 (*Koolhaas/Rockwool*). In *Koolhaas/Rockwool*, the HR decided that the duty to warn even includes the user/buyer of the end product, and not just the manufacturer using the product as a component. 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 and J. H. Duyvensz, 'Productenaansprakelijkheid tegenover niet-consumenten', WPNR 6390/6391 (2000), pp. 117–23 and 135–42, also see this as a usually more narrow criterion.

⁶⁶ HR 6 December 1996, NJ 1997, 219 (*DuPont/Hermans*).

here (more or less) united the standard for wrongfulness under general tort law and the standard (for liability) under the Directive.⁶⁷ Under the older case law a form of the risk/utility test seemed to prevail.⁶⁸ Of course, with this case law, it also became obvious that the old rule that stated that putting a defective product on the market is as such not unlawful, but can still be unlawful through the presence of other circumstances (such as, for instance, advertising (see section II(2.3) at p. 160)) is no longer valid.

Of course, this line of cases does not mean that both types of claims are totally the same, because, in tort, the 'negligence' (in the narrow sense of 'guilt' or subjective fault) of the wrongdoer still needs to be established next to the element of wrongfulness.⁶⁹ This line of reasoning is somewhat strange, however, because the HR is not so strict in the division of these two elements outside the area of product liability. Wrongfulness and fault are usually taken and judged upon as one, without the courts strictly delimiting both elements.⁷⁰ Furthermore, the burden of proof as regards subjective fault is placed on the producer, almost on a general basis (either as a form of presumption or otherwise; see section II(2.4) at p. 163), while at the same time, subjective fault is judged more and more to an objective standard, even in product liability cases, making the distinction with strict liability (such as the Directive liability) narrower.⁷¹

This unification of standards also means that the relationship between the Directive and national tort law has become a very close one. Of course, the conclusion to be drawn here would then be that the European impact on product liability law has been rather large. 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 total harmonisation.⁷²

⁶⁷ See, on this 'spill-over' effect, W. van Gerven, 'A Common Law for Europe: The Future Meeting the Past?', ERPL (2001). See also Hof Leeuwarden 18 March 1998, NJ 1998, 867 (*Tetra Werke/Kuiper*); Spier and Bolt, *De uitdijende reikwijdte*, p. 239; Bloembergen, case note under HR 22 October 1999, NJ 2000, 159 (*Koolhaas/Rockwool*), para. 4; Giesen, 'Bewijs en aansprakelijkheid', p. 217, and Dommering-van Rongen, *Productaansprakelijkheid*, p. 32. The difference between both systems is that, in general tort law, subjective fault is also required; see below, on this page.

⁶⁸ Dommering-van Rongen, 'Product Liability in the Netherlands', p. 135 at p. 140.

⁶⁹ See HR 2 February 1973, NJ 1973, 315 with note HB (*Leaking water bottle*).

⁷⁰ Verheij, *Onrechtmatige daad*, p. 48.

⁷¹ See Schut, *Productaansprakelijkheid*, no. 131, especially p. 246, and no. 31 on the move towards objectiveness of subjective fault; Verheij, *Onrechtmatige daad*, p. 48, and section III(3.1) at p. 176.

⁷² See Case C-52/00, *Commission v. France* [2002] ECR I-3827; Case C-154/00, *Commission v. Greece* [2002] ECR I-3879; Case C-183/00, *María Victoria González Sánchez/Medicina Asturiana SA* [2002] ECR I-3901, and, recently, Case C-402/03 *Skov AEG v. Bilea Lavprisvarehus A/S* [2006] ECR I-00199.

2.7 The settled stage (2000 onwards)

From 2000 onwards, the period of relative settlement commenced: there have been no revolutionary developments since then, no really big cases⁷³ or important pieces of legislation,⁷⁴ while legal scholars appear to be less concerned with product liability. An important reason for the emergence of this period of settlement seems to be the minor importance product liability has in practice.

Considering the practice relating to product liability, I would like to focus some of the attention on the reality of litigation and compensation. As regards the types of products involved in litigation, it is hard to come to any definite conclusions, since there have been only a few cases in the Netherlands. All these cases are merely 'incidents', some relating to cars, others to pesticides, asbestos or drugs, and they do not point towards a trend of, for instance, drug manufacturers being sued all the time or more than other types of manufacturers.

As regards the frequency of settlements and litigation, the conclusion that settlements play a major role in the area of product liability and in tort law in general is, at least in the Netherlands, almost inescapable, although it is hard to be sure without more objective data. A very large percentage of claims – up to 90 per cent – seem to be settled out of court.⁷⁵ For product liability, the following comes to mind. Given the

⁷³ The more recent Supreme Court cases on product liability are HR 28 January 2005, C03/210 (*Sanquin Bloedvoorziening/X*) and C03/214 (*AZG/X*), dealing with the liability of a blood bank and a hospital for the use of HIV-infected blood products. This led to a decision that has no real significance for product liability law, since the cases were decided merely on technicalities and on the facts, without rulings on topics of broader interest; see also HR 12 August 2005, JA 2005/92 with note van Doorn (*Meko/A*) on the duty to warn, contributory negligence and causation but without really reshaping the law in those respects, and HR 25 November 2005, RvdW 2005, 129 (*Eternit/H*), deciding in an asbestos case that the duty of a producer is tightened if and when the dangers in question have become known. In his preliminary advice to the court, Advocate-General Verkade summarises the state of the law as it stands; see his advice to the HR at no. 4.6.

⁷⁴ Mention could be made of a few small statutory changes in the Dutch version of the Directive regime (e.g. the need to include agricultural products under the regime of the Directive), which were implemented in the Civil Code a few years ago, most notably in art. 6:187, para. 1 BW.

⁷⁵ Cf. Spier and Bolt, *De uitdijende reikwijdte*, p. 237. Dutch and German insurers mention the 90 per cent of product liability claims that are dealt with out of court; see European Commission, *Commission Proposal for the application of Directive 85/374 to Liability for Used Products*, COM (2000) 893 def. (Brussels 2001), 10. That European Commission proposal, on p. 13, states, however, that systematic statistical data on product liability are, on the whole absent. The Dutch government also estimates that 90 per cent of all

rather vast number of product recalls, and given the fact that, before a recall is ordered, the product probably caused damage somewhere, the total amount of litigation for damages is quite low.⁷⁶ This would justify the conclusion that most cases are probably sorted out through a settlement before they ever get to court. The same probably applies to the liability of service providers.⁷⁷ It remains to be seen whether this is entirely true, however, because another important aspect could also be that people in the Netherlands are relatively unwilling to claim damages, especially if one compares this to, for example, the US.⁷⁸

The total number of claims – or, at least, the number of judicial decisions – on product liability is small, as I said.⁷⁹ This is probably due to the fact that as soon as a manufacturer discovers the slightest possible defect in one of his products, a product recall is instituted. In this light, it is hardly surprising that the number of actions undertaken in the field of recalls has risen.⁸⁰ Without doubt, the most visible consequence of the emergence of product 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

claims are settled; see *Kamerstukken II 1999/00*, 22.112, no. 134, p. 4. W. C. T. Weterings, *Vergoeding van letselschade en transactiekosten* (Tjeenk Willink, Deventer 1999), pp. 109–10 states that around 95 per cent of the claims are settled, but he does not specifically deal with product liability.

⁷⁶ See also below.

⁷⁷ A settlement rate of around 95 per cent is mentioned for medical liability; see Weterings, *Vergoeding van letselschade en transactiekosten*, p. 110, note 7.

⁷⁸ However, the tendency to claim for losses suffered and to search for possible defendants does seem to grow stronger in the Netherlands these days; cf. *Kamerstukken II 1998/99*, 26.630, nr. 1.

⁷⁹ European Commission, *First Report on the Application of Council Directive on the Approximation of Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products* (85/374/EEC), COM (95) 617 Final (Brussels 1995), 2; Dommering-van Rongen, 'Product Liability in the Netherlands' p. 135; Hondius 'Produktaansprakelijkheid', p. 325; Howells, 'Product Liability', p. 458; G. I. Arnokouros, 'Product Safety and Product Liability in Europe: A Time for Revision', *TvC* (2001), pp. 14; Spier and Bolt, *De uitdijende reikwijdte*, pp. 235 and 237. K. J. Groffen, 'The Netherlands', in D. Campbell (ed.), *International Product Liability* (Lloyd's of London Press, London 1993), p. 393 expected more suits to be filed, but that has not been the case.

⁸⁰ Spier and Bolt, *De uitdijende reikwijdte*, p. 33; U. Rosenthal, 'Veiligheidsniveaus: over menselijke fouten, het systeem en nieuwe zondebokken', in E. R. Muller and C. J. J. M. Stolker (eds.), *Ramp en recht* (Bju, The Hague 2001), p. 71; Dommering-van Rongen, *Productaansprakelijkheid*, p. 98. See also the advice to the HR by Verkade before HR 12 August 2005, JA 2005/92 with note van Doorn (*Meko/A*) at nr. 5.35, stating that recalls were already being issued by around 1960.

under a legal duty to act (i.e. to warn or to take the product off the market) is generally acknowledged and accepted.⁸¹

The relative lack of product liability claims reaching the courts might also be due to the fact that, since the market for many products is usually rather international, most producers tend to take the precautions needed for the most demanding market (which would most probably be the US market). Therefore, they take more precautions than are 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.⁸² 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,⁸³ or that the rules on product liability that would facilitate negotiations and settlements are clear, thus preventing those claims from going to court.⁸⁴ 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).⁸⁵ At least with regard to the number of product recalls, the fear of losing goodwill seems to be rather decisive.⁸⁶

⁸¹ See, generally, P. Kuipers, 'Aansprakelijkheid voor 'terughaalschade' en waarschuwingsplichten van de producent bij (mogelijke) product recall', AV&S (2001), pp. 99–111; C. F. Kroes, 'Product Recall', AV&S (2004), pp. 166–75; Dommering-van Rongen, 'Product Liability in the Netherlands', p. 145, as well as Dommering-van Rongen, *Productaansprakelijkheid*, pp. 97ff. 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 are Spier and Bolt, *De uitdijende reikwijdte*, pp. 244–5.

⁸² See European Commission, Proposal, above at note 11, p. 11, and C. J. M. van Doorn and W. H. van Boom, 'Productaansprakelijkheid en productveiligheid', TvC (2004), pp. 100–6 on aspects of product safety. In the Netherlands, the European Directive of 3 December 2001 (OJ L 2001 11) on product safety has been implemented in the 'Warenwet'; see *Staatsblad* (2005), pp. 491 and 590.

⁸³ See section II(4.3) at p. 188, and *Kamerstukken II* 1999/00, 22.112, no. 134, p. 4. A hint in that direction might also be that, as is claimed, insurance premiums for producers went up 15 per cent after the introduction of the Directive; see Groffen, 'The Netherlands', p. 392.

⁸⁴ Cf. Arnokouros, 'Product Safety and Product Liability in Europe', pp. 10–15 at 14.

⁸⁵ Cf. European Commission, Proposal, above at note 11, p. 10.

⁸⁶ See Spier and Bolt, *De uitdijende reikwijdte*, p. 244.

There is no evidence that the number of lawsuits has risen after the introduction of the European Directive.⁸⁷ Maybe an increase in the number of lawsuits will follow in the next few years because of the growing attention for claims against tobacco producers⁸⁸ – though this will largely depend on the success of the first claims in this area – and the fact that a claim for defective agricultural products will be possible from now on (liability in relation to genetically modified organisms).

Looking to the size of awards, especially for non-pecuniary losses, Art. 6:106 of the BW provides that if a victim has sustained physical harm, he is also entitled to compensation for non-pecuniary loss (damages for pain and suffering, *smartengeld*), whose amount is to be established by the (lower) courts on the basis of equity.⁸⁹ In determining what amount is to be awarded, all circumstances need to be taken into account.⁹⁰ In a case decided in 1992, the HR stated that the following are especially relevant here: the nature of the liability;⁹¹ the nature, duration and intensity of the pain; and the suffering and the loss of 'joy of life' sustained by the patient that follow from the act on which the liability is based.⁹² 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

⁸⁷ Cf. Spier and Bolt, *De uitdijende reikwijdte*, p. 33; Dommering-van Rongen, *Productaansprakelijkheid*, pp. 202–3. See also the remarks of the European Commission, *First Report on the Application of Council Directive on the Approximation of Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products* (85/374/EEC), COM (95) 617 Final (Brussels 1995), 2, and Groffen, 'The Netherlands', p. 393.

⁸⁸ Cf. Stichting Personenschade Instituut van Verzekeraars PIV, *Jaarverslag 2000* (The Hague 2001), p. 5. See, on tobacco claims, amongst others, A. L. M. Keirse, 'Rokers hebben er tabak van!', AA (2000), pp. 252–9 and pp. 424–34, and Dommering-van Rongen, *Productaansprakelijkheid*, pp. 115ff., and Hof Leeuwarden 25 October 2000, NJkort 2000, 98 (*Ter Schegget/Niemeijer*), dealing with preliminary questions on tobacco liability.

⁸⁹ 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/BCE Bouw*).

⁹⁰ Cf. HR 17 November 2000, *ibid.*

⁹¹ For instance: tortious or contractual liability, fault-based or strict liability, or the specific type of liability (employer's liability, traffic liability, product liability or liability for services).

⁹² Cf. HR 8 July 1992, NJ 1992, 770 (*AMC/O*). To that extent, see also HR 17 November 2000, NJ 2001, 215 with note ARB (*Druijff/BCE Bouw*), a case in which the liability of a building company towards its injured employee was invoked. See also S. D. Lindenbergh, 'De hoogte van het smartengeld in Nederland; een verkenning van de top', VR (1999), pp. 131–2.

also take into account developments regarding the amounts of compensation in other countries, albeit that such developments may not be decisive for the amounts to be awarded in the Netherlands.⁹³ In practice, courts, lawyers and insurance companies use the *Smartengeldbundel* as their point of reference. The *Smartengeldbundel* is published every three years, and contains a listing of amounts of compensation for non-pecuniary damages awarded by courts in certain types of cases over the years.⁹⁴ Generally, the level of compensation for non-pecuniary loss awarded is not all that high,⁹⁵ with claims not exceeding DFL 250,000 (€113,445) for the more severe cases.⁹⁶ The highest amount was awarded in 1992 in a case of (wrongful) contamination with the HIV virus; the amount awarded was DFL 300,000 (€136,134).⁹⁷ There is not really a trend towards higher awards,⁹⁸ at least not if one makes allowance for the fact that awards rise to compensate for inflation.⁹⁹

Remarkably, the most important legal decision in this phase of development on defective products seems to have been a case on general contract law.¹⁰⁰

To elaborate on this, a few words on general contract law, most notably arts. 6:74 and 75 of the BW: a contractual defect is present when the performance does not meet the standard agreed to in the contract (e.g. the buyer of a new car can expect the oil system to be in good working order¹⁰¹). Liability is then imposed, unless the seller can rightfully claim

⁹³ Cf. HR 17 November 2000, NJ 2001, 215 with note ARB (*Druijff/BCE Bouw*).

⁹⁴ Cf. Weterings, *Vergoeding van letselschade en transactiekosten*, p. 93. The sixteenth edition was published in 2006 by ANWB, the Dutch Motorists Association, The Hague (edited by M. Jansen). The alternative formula used by the Association of Insurance Companies (*Verbond van Verzekeraars*), dating back to 1984, has not been generally accepted, and appears not to meet the justified interests of the victim. Still, in practice, it is used, especially when the *Smartengeldbundel* only contains a few rulings on a specific type of case. Such is, for instance, the case with temporary, small injuries (claims below DFL 1,500, i.e. below €681). Cf. Weterings, *Vergoeding van letselschade en transactiekosten*, pp. 93–4.

⁹⁵ Cf. Weterings, *Vergoeding van letselschade en transactiekosten*, p. 92.

⁹⁶ Cf. Lindenbergh, 'De hoogte van het smartengeld in Nederland', pp. 129ff.

⁹⁷ HR 8 July 1992, NJ 1992, 770 (*AMC/O*). Cf. Lindenbergh, 'De hoogte van het smartengeld in Nederland', p. 129 at 133.

⁹⁸ Dommering-van Rongen, *Productaansprakelijkheid*, p. 203. See also Groffen, 'The Netherlands', p. 393.

⁹⁹ From HR 17 November 2000, NJ 2001, 215 with note ARB (*Druijff/BCE Bouw*), it becomes clear that the court must take the inflation rate into account when comparing an earlier case with the present claim.

¹⁰⁰ HR 27 April 2001, NJ 2002, 213 (*Oerlemans Agro/Driessen*).

¹⁰¹ See Rb. Alkmaar 30 December 1999, NJ 2000, 728 (*Vlaar/Polderman*). Of course, sales law (art. 7:17 BW) will also apply in such a case.

that the damage is not accountable to him (*toerekenbaar*). Even if there is no subjective fault, this accountability of the seller can still be present, however, based on the norms in society (*verkeersopvattingen*). To illustrate the extent of this rule on accountability: even if the seller did not know and could not have known of the defect of an industrially made product, the damage is to be borne by him. There are only very specific exceptions to this general rule.¹⁰²

Of course, there have been some cases on product liability in the last years, but the importance of those cases has been relatively minor.¹⁰³ One of the HR cases that did come up dealt with a 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 sued not the persons from whom they had purchased 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 etc. 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 was of no relevance. This means that a contractual fault earlier in the chain is no prerequisite for a valid tort claim.¹⁰⁴ Another important aspect of the case just mentioned is that the HR makes it clear that, contrary to the development dealt with above (see section II(2.6)), there is still¹⁰⁵ a difference between the general tortious liability and the Directive liability, namely that, in tort, the negligence (in the narrow sense of guilt) still needs to be established next to the element of wrongfulness. General tort law on products is not a form of strict liability.¹⁰⁶

Indeed, not even the development in the case law of the ECJ has changed this phase of tranquillity. The ECJ cases on this issue have been noticed

¹⁰² See HR 27 April 2001, NJ 2002, 213 (*Oerlemans Agro/Driessen*).

¹⁰³ See, for instance, from lower courts, Rb. Den Bosch 15 June 2005, JA 2005/69 (*A/Organon Nederland*) and Rb. Amsterdam 8 July 2005, JA 2005/82 (*A/Merial*), both on the burden of proof, and Rb. Middelburg 13 July 2005, JA 2005/104 (*C/V*), a case on the duty to warn. For a further overview of lower court case law, see van Doorn and van Boom, 'Productaansprakelijkheid en productveiligheid', pp. 100–6, dealing with, for instance, cases on an exploding bottle and the use of tampons. See also Hof Arnhem 13 April 2004, NJ 2004, 612 (*Eternit Fabrieken/X*) on the duty to warn for the use of asbestos.

¹⁰⁴ HR 29 November 2002, NJ 2003, 50 (*Helm AG/Aerts c.s.*) at 3.6.3.

¹⁰⁵ The same could be, and was, concluded from HR 2 February 1973, NJ 1973, 315 with note HB (*Leaking water bottle*).

¹⁰⁶ HR 29 November 2002, NJ 2003, 50 (*Helm AG/Aerts c.s.*) at 3.8.2.

and discussed to some extent, but they have not become all that familiar to the practitioner.¹⁰⁷ Of course, everyone knows that the rules on product liability in the Civil Code are European by nature, and those who write on it take this into account, but that is about as far as the European background goes.

It is remarkable that the cases of the ECJ receive so little attention in the Netherlands, since they are highly important for the extent of the Directive liability, the room it leaves for national rules and the interpretation of the rules originating from the Directive. Given the case law as it stands now, the national laws are, at least to a certain extent, bound by the state of the law as it was at the time the Directive was introduced in 1985. This means, for instance, that introducing a new statutory regime on (strict) liability for (certain) products is not allowed.

In this respect, Art. 13 of the Directive deserves full attention. This Article states that the Directive shall not affect any rights that 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 are. But the ECJ thought somewhat differently, and gave the Article a quite far-reaching meaning. In three cases decided on the same day,¹⁰⁸ the ECJ first decided that it followed from the Directive, and the legal basis for that Directive, that a total harmonisation was meant to be enacted by the Product Liability Directive for those topics that the Directive dealt with.¹⁰⁹ Thus, France was sanctioned for not enacting the Directive properly (ignoring the €500 threshold, changing the development risk defence and making the distributor liable in the same manner as the producer), as was Greece (no threshold introduced). Given these decisions, the only safe introduction of the Directive into one's own law would be to enact a literal translation. There is not much room for 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

¹⁰⁷ The ECJ cases I mean are, of course, (the older) Case C-300/95, *Commission v. UK* [1997] ECR I-2649, NJ 1998, 522, and Case C-203/99, *Veedfald*, EuZW 2001, 378 with note Geiger, as well as (the newer) Case C-183/00, *María Victoria González Sánchez/Medicina Asturiana SA* [2002] ECR I-3901, Case C-52/00, *Commission v. France* [2002] ECR I-3827; and Case C-154/00, *Commission v. Greece* [2002] ECR I-3879.

¹⁰⁸ Case C-183/00, *María Victoria González Sánchez/Medicina Asturiana SA* [2002] ECR I-3901; Case C-52/00, *Commission v. France* [2002] ECR I-3827; and Case C-154/00, *Commission v. Greece* [2002] ECR I-3879.

¹⁰⁹ This is confirmed in ECJ 10 January 2006, Case C-402/03 (*Skov*); see above, note 72.

maintaining a general system of product liability different from that provided for in the Directive. The Court also says:¹¹⁰

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.¹¹¹

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 of the BW on alternative causation) is no longer possible for 'damage caused by a defective product under a general system of liability having the same basis as that put in place by the Directive' (i.e. a risk-based liability). For a system not having 'the same basis' as the Directive (i.e. a fault-based liability), it will, however, still be possible to introduce such a provision or another form of increasing a victim's chance of success.¹¹²

¹¹⁰ ECJ 25 April 2002, Case C-183/00, *María Victoria González Sánchez/Medicina Asturiana SA* [2002] ECR I-3901.

¹¹¹ Case C-52/00, *Commission v. France*, [2002] ECR I-3827, paras. 13–23, and Case C-154/00, *Commission v. Greece*, [2002] ECR I-3879, paras. 9–19.

¹¹² That the difference between fault and no-fault liability is decisive was confirmed in ECJ 10 January 2006, Case C-402/03 (*Skov*).

Introducing a rule like the one mentioned (a reversal of the burden of proof) as part of the national general law of negligence might thus still be possible, in my view. Introduction of such a rule would not be possible, however, as part of arts. 6:185ff. of the BW, and not as part of a possible totally new regime of liability (also) dealing with defective products, not based on fault (and thus having the same ground as the Directive).

The problem here is, of course, the difficulty in determining the difference between fault and risk, and then the position a national system, or indeed the Directive, holds in that respect. What is fault-based? What is risk-based? Where does one draw the line?

3 *Overview of developments and trends in the recent past and for the near future*

3.1 In the past

On a general level, Dutch society has undergone the industrial revolution much like the other countries surrounding it. It started from a *laissez-faire*, liberal society, focusing on the individual. Liability is then based on fault, on an individual's making a mistake. Later on, starting around 1900, but most notably after the Second World War, a more social way of thinking emerged. Since then, liability can be a form of strict liability as well. The fact that no one was actually personally to blame is no longer prohibitive for liability. Damage, then, can also be borne by society as a whole or by insurance, making it easier for people to sue one another.¹¹³ Of course, this at best sketchy outline of the development in Dutch society does no justice whatsoever to what actually happened, and the profound influence it had. It serves only as a reminder that these general trends in society also play a part as regards product liability. Along the same lines, the growing specialisation, the change from a rural to an urban society, the growth of the population, the rise of brands and of advertising etc. will also have to be taken into account.

Next to these societal developments, the more legal aspect of the growth of (or the myth of) the claims culture in the Netherlands and elsewhere should be taken into account. For the Netherlands, strong evidence to support the claim that liability is going through the roof is lacking.

National tort law on product liability has not yet gone (and probably will not go) so far as to introduce a real strict liability instead of a negligence

¹¹³ See Schut, *Productenaansprakelijkheid*, nos. 21ff for a general account in relation to product liability.

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 negligence standard as used in other areas of tort law in the last few decades. In the area of general tort law there are no specific statutory rules for particular groups of plaintiffs, such as, for example, rules aimed at protecting consumers. However, if one of the parties to the action is a consumer, this could influence the strictness of the negligence standard as applied by the court in the specific circumstances. In any case, it seems that, in product liability, more is expected of a producer, even though the same negligence standard is used.

An example of this trend can be found in the case of *Koolhaas/Rockwool*. The HR decided that when the producer of a certain fabric changes the structure of the fabric, he must not only inform the buyers of that fabric who use it to make certain goods, but also the buyers of *those* goods.¹¹⁴ Another example is the tendency towards a stricter standard with regard to 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 if it only constitutes a limited rule on the use of presumptions) has not yet been made totally clear by the HR,¹¹⁵ and literature is divided on the subject.¹¹⁶ 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.¹¹⁷

¹¹⁴ HR 22 October 1999, NJ 2000, 159 with note Bloembergen (*Koolhaas/Rockwool*).

¹¹⁵ To be precise, the case of HR 24 December 1993, NJ 1994, 214 (*Leebeek/Vrumona*) seems to point towards 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*)). On this, see section II(2.4) at p. 163.

Giesen, 'Bewijs en aansprakelijkheid', pp. 218–20 (considering the element of wrongfulness), 227–9 (on causation) and 232–3 (with regard to the element of subjective fault), with further references, and Dommering-van Rongen, *Productaansprakelijkheid*, pp. 3 and 34.

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, see Giesen, 'Bewijs en aansprakelijkheid', pp. 466–7 and 468–70. 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 at p. 178.

An example in this respect concerns the question as to the time the defect occurred. According to the Directive, the producer is required to prove that the product was not yet defective at the time it was put on the market. Under general tort law, the client used to have to prove that the defect existed before the product was put on the market. However, nowadays, even under general tort law, the producer is required to prove that the product was not defective when it was put on the market (art. 6:185, para. 1(b) of the BW).¹¹⁸

These developments should be contrasted with the path taken by liability based on the Directive. This form of liability seems to have moved towards a (more) fault-orientated liability, leaving some of its strict liability features behind.¹¹⁹ The net result is that the two systems have grown towards each other. This is not at all strange, of course, since both liability systems have to operate within the same system of (tort) law, regardless of its (European) origins, and both are laid down in the same code.¹²⁰

Furthermore, there is currently a general trend to be found in Dutch tort law, at least in the case law of the HR, towards a greater protection of (personal injury) victims of 'wrongful' acts.¹²¹ This protection of victims could be stated in terms of consumer protection, since both basically cover the same (potential) group of victims. This 'protection against personal injury' development is not confined to product liability, but one of the major examples of this tendency does involve product liability concerning a medical product.

In the *Des* case,¹²² named after the drug of that name that was claimed to be defective,¹²³ several victims sued several producers of the drug. Leaving the question of wrongfulness aside for the time being, the first issue that

¹¹⁸ See Giesen, 'Bewijs en aansprakelijkheid', pp. 202 and 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*).

¹¹⁹ See section II(1) at p. 153.

¹²⁰ Cf. Hondius, 'Produktenaansprakelijkheid', p. 329, claiming that cross-fertilisation will be easier if both sets of rules are integrated into one code. M. B. M. Loos, 'Spontane harmonisatie in het contracten- en consumentenrecht', Inaugural Lecture Amsterdam (Bju, The Hague 2006) shows that this integration also leads to problems of coherence, and that this cross-fertilisation is not always present.

¹²¹ See Hartlief and Tjittes, 'Kroniek van het vermogensrecht', p. 1473.

¹²² See HR 9 October 1992, NJ 1994, 535 with note CJHB (*Des*), and A. S. Hartkamp, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht. Verbintenissenrecht. Deel I. De verbintenis in het algemeen*, 11th edn (Tjeenk Willink, Deventer 2004), nos. 441ff.; Dommering-van Rongen, 'Product Liability in the Netherlands', pp. 144–5.

¹²³ The drug caused a rare form of cancer, striking not the mothers taking the drug in the 1960s to prevent premature childbirth, but instead, and years later, their daughters.

was raised concerned the question of whether the claimants should sue all of the (old) producers of Des to be able to rely, as they wanted to, on the rule of alternative liability as laid down in art. 6:99 of the BW, reversing the burden of proof on the element of causation.¹²⁴ The problem was that the claimants could not do this because not all the producers were still in business or were traceable. The HR decided that it was not necessary to sue every producer, and that each of them could be held liable in full.

A second issue in that case was that, since (the mothers of) the victims could not prove whose drug was used, the claimants were not able to say which producer had caused what damage to which victim (the producers all sold an identical product). The HR decided that, since the right to damages should not be lost because of the mere fact that the claimants could not state whose medicine they had used, the defendants (i.e. the producers) would have to prove that the damage was not due to the use of Des manufactured by them. The burden of proof with regard to the origin of the Des therefore rested with the manufacturers. At the end of the day (if one disregards the question of 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 were traceable, to claim damages. Each of these manufacturers were jointly and severally liable for the whole of the damage, leaving the producer that is being called upon no alternative but to involve all of his known and traceable co-manufacturers in the proceedings.

As stated above, this consumer protection or victim-orientated trend is broader than the area of product liability. The same seems to be happening in tort law in general, most notably with regard to areas such as service 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),¹²⁵ causation, the burden of proof and

¹²⁴ The rule basically states that, if damage can be the consequence of two or more incidents, for each of which a different person is liable, and that damage is indeed caused by one of these incidents, all of these persons are obliged to repair the damage, unless the person proves that the damage was not the consequence of the incident for which that person himself is liable. The burden of having to prove who actually caused the damage is thus taken away from the claimant. It is paramount, however, that all potential defendants acted unlawfully; see Hof Den Bosch 31 May 1999, KG 1999, 266 (*Staat/De Goey*), and Hartkamp, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht*, no. 441a, and probably also that each could have caused the whole damage; see Giesen, 'Bewijs en aansprakelijkheid', p. 352, note 315.

¹²⁵ In dogmatic terms, after the unlawfulness is given (art. 6:162, para. 2 BW), one needs to see whether there was fault as well (art. 6:162, para. 3 BW). However, both conditions for a tort seem to have merged into one condition of objective misconduct. Subjective fault

recoverable (forms of) damages. All these developments have made it easier and more rewarding – so it would seem – to sue.

3.2 Predictable future trends and developments

Even though general tort law relating to product liability seems to be getting stricter as time goes by,¹²⁶ the European Directive will probably not follow this trend. In Europe, the debate on the Directive was taken up again around the turn of the century, resulting in a Green Paper and a Report, both issued by the European Commission, on the Product Liability Directive,¹²⁷ following a plea for a substantial revision by the European Parliament.¹²⁸ The Green Paper serves two purposes: firstly, to seek information to evaluate the regime; and secondly, to ‘test’ possible reactions to the most sensitive points that might be revised. Since the starting point of the Green Paper is that the balance found in the 1985 Directive needs to be retained, not much action was to be expected,¹²⁹ and this has so far proven to be correct. This line of thinking is affirmed in the Report following the Green Paper.¹³⁰

According to that Report,¹³¹ it is not necessary to change the rules on proving a claim; introducing market share liability is not desired; the development risk defence generates too little data to say anything about it, as was the case with the prescription period; the franchise amount of €500 seems sufficient, and the caps on damages are high enough; an obligation to insure against product liability seems unwanted and

hardly ever plays a role anymore. This was something that had been going on for 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’, Ph.D. thesis (Groningen 2000).

¹²⁶ See above at p. 167. On the other hand, there is also a growing awareness that the label ‘strict liability’ in this respect does not always point to a real strict liability. However, at least the negligence standard under general tort law has become more demanding for manufacturers.

¹²⁷ See European Commission, *Green Paper on ‘Liability for Defective Products’*, COM (1999) 396 Final (Brussels 1999), and European Commission, Proposal, above, at note 11.

¹²⁸ See European Commission, Proposal, above, note 11, p. 6, and on the initial debate, N. Frenk, ‘De toekomst van de richtlijn productaansprakelijkheid’, TvC (1998), pp. 305ff.

¹²⁹ European Commission, above at n. 127, p. 18, after which the (six) principles that need to be retained are summed up. These principles seem to exclude – or, at least, greatly diminish – the chances for almost any kind of reform.

¹³⁰ European Commission, Proposal, above, at note 11, p. 13. The Report is the Commission’s official reaction to the comments by several organisations on the Green Paper. See also *Kamerstukken II 1999/00*, 22.112, no. 134, p. 3.

¹³¹ European Commission, Proposal, above, at note 11, pp. 14ff.

unnecessary; product recall needs to be further examined; changing the rule on the liability of suppliers is not needed; an extension of the liability to immovable goods is not deemed necessary; and, apart from the fact that the compensation of immaterial loss needs to be researched further, no changes with regard to damages are foreseen. The Report concludes that experiences with the Directive are still limited, no real problems are apparent, and the balance between the competing interests mentioned earlier needs to be retained. In other words, changing the Directive at this point is not high on the agenda of the Commission.¹³² This suggests that, at the European level, there will probably be a *status quo* for some time.

Since the national laws are also, and to an ever-increasing extent,¹³³ 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 stricter standards is not going to continue endlessly.¹³⁴ There are, however, no imminent statutory (or other) changes planned at a national level that are significant enough to point to a specific direction for the law on product liability in the near future.

However, what could become important in the future for providing products and other risky activities, is the so-called precautionary principle, developed in environmental law. The precautionary principle implies that a party has to anticipate dangers not yet known in order to prevent damages from occurring. The principle would lead to rather strict standards in negligence with regard to the behaviour expected from, for example, a producer.¹³⁵

4 *The major sources of law and of change in the law*

4.1 Who can change the law?

As seen from the sketch of the developments above, the major influence on changes in the law has come from the courts and their case law, although

¹³² Ibid. p. 30. The Dutch government agrees; see *Kamerstukken II*, 1999/00, 22.112, no. 134, pp. 2 and 4.

¹³³ See section II(2.7) above at p. 174, and the ECJ cases on Art. 13 of the Directive cited above at note 72.

¹³⁴ See Dommering-van Rongen, *Productaansprakelijkheid*, pp. 16–17, and Giesen, 'Bewijs en aansprakelijkheid', pp. 196–8, with regard to rules on evidence and proof.

¹³⁵ See, for example, D. Mazeaud, 'Responsabilité civile et précaution', *Responsabilité Civile et Assurances Hors-série* (June) (2001), pp. 72ff, and L. Bergkamp, 'The Precautionary Principle's Relevance to Liability Law', *TMA* (2001), pp. 91ff., and A. Arcuri, 'The Law of Catastrophic Risks', *AA* (2006), pp. 130–9. Whether this principle will indeed settle in tort law remains to be seen.

the EEC Directive has had an impact as well, at least as regards the content of the law. To be more precise, product liability is based on the articles laid down in the Dutch Civil Code, especially on art. 6:162 of the BW, but since that is a very general rule, intended to cover the whole of tort law, case law is, without a doubt, at least as important as, and actually more important than, the statutory rule. All particularities of product liability are created and used in case law. The creation of a European product liability law has not really altered this, although those rules (arts. 6:185–193 of the BW) have given the courts something on which to base their decisions, sometimes even when the European regime is not directly applicable.

Case law has made these statutory rules on liability for products 'fit for purpose' in the sense that these rules have been worked out into the detailed level needed in practice by courts, most notably the HR. Academic authority does not seem to have any direct impact on the development of these more detailed rules. Scholarly works are basically never cited by the HR, or by the lower courts. However, they are likely to have an indirect impact, since the views of legal scholars are discussed rather thoroughly in the conclusions of the Advocate-General, who delivers advice on a specific case to the HR. The conclusions of the Advocate-General often have a persuasive influence on both the HR's decision and on the interpretation thereof in legal practice and science, especially if the HR follows the Advocate-General's view.

Considering the influences from abroad, one thinks first of the introduction of the European Directive on Product Liability, although one might question whether that would count as an instance of *foreign* influence, since the Netherlands is part of the EU, and is thus obliged to enact national rules to introduce these rules. Be that as it may, this Directive was, and still is,¹³⁶ of vital importance. After its introduction, it has, among other things, had a significant influence on the negligence standard used under Dutch national law.¹³⁷ All in all, it seems to have made product liability law in the Netherlands stricter than it was.¹³⁸ In this field, the US rules regarding product liability have also been of some influence, at least in scholarly works in which a comparison is often made with that

¹³⁶ Of course, current and future changes in the Directive need to be implemented in the national laws as well, as was, for instance, the case with the extension of the Directive to agricultural products; see Directive 1999/34/EC, OJ L 141/20, and, for the Netherlands, leading to the law of 29 November 2000, *Staatsblad* (2000), p. 493.

¹³⁷ See section II(2.6) at p. 167.

¹³⁸ In this perspective, the Directive has had a 'spill-over' effect. See, on that effect, van Gerven, 'A Common Law for Europe', and Loos, 'Spontane harmonisatie in het contracten- en consumentenrecht', calling this spontaneous harmonisation.

system.¹³⁹ Along that line, German law seems to have become more and more important, being studied more often in this respect.¹⁴⁰

4.2 Why should one change the law?

Apart from a source eager to change the law, one should only change a legal rule if a sufficiently valid reason for doing so is present. So, in order to see the development of an area of law, one should take a look at what arguments and policy considerations one can think of for that area. What reason could be invoked to try and change the law as it is? What are the policy issues and the arguments for product liability, and, in relation to those reasons for change, what are the criticisms on the current rules?

Firstly, with regard to the criticisms offered on the state of the law on product liability as it is and has been for the last decade, it is noticeable that, according to consumer organisations, the Directive on Product Liability does not go far enough, and should be changed, whereas the producers' lobby argues that the Directive goes far enough, or even too far, as it is.¹⁴¹ On the whole, *fundamental* criticism seems to be almost absent in the Netherlands.¹⁴² However, the Directive does, effectively, appear to have failed, at least in the sense that it has not minimised the uses and roles of the different national laws in the area of product liability, with the result that many of the old differences between legal systems still exist, and harmonisation has not been fully attained.¹⁴³ The reason for this is probably that the Directive is not all that much more 'consumer-friendly' than the national laws (e.g., with regard to the proof of a claim), while the national laws are more familiar to the lawyers dealing with product liability claims, and may even provide better chances of recovery of certain types of damage.¹⁴⁴

¹³⁹ See, for example, C. J. J. M. Stolker and R. J. J. Westerdijk, 'Is productenaansprakelijkheid nog een risicoaansprakelijkheid? Nieuwe ontwikkelingen in het Amerikaanse recht', A&V (1998), pp. 59–65, who base their claim that liability is getting less strict on that same development, most notably reflected in the American *Restatements*.

¹⁴⁰ See, for instance, Schelhaas, 'Produktaansprakelijkheid en Europees privaatrecht', pp. 204ff. It might be of some significance that one of the leading works on product liability in the Netherlands (Dommering-van Rongen, *Productaansprakelijkheid*) compares with both the US and Germany.

¹⁴¹ See Arnokouros, 'Product Safety and Product Liability in Europe', esp. p. 14; European Commission, Proposal, above, at note 11, p. 11.

¹⁴² See Hondius, 'Produktenaansprakelijkheid', pp. 327–8. According to Arnokouros, 'Product Safety and Product Liability in Europe', (esp. p. 14) the Directive has met with criticism elsewhere, usually from consumer representatives.

¹⁴³ Faure, 'Productaansprakelijkheid in Europa', pp. 10 and 11.

¹⁴⁴ European Commission, Proposal, above, at note 11, pp. 8–9; *Kamerstukken II 1999/00*, 22.112, no. 134, p. 3.

As to damages, the Directive regime contains a provision on the forms or types of damage that can and cannot be claimed from a producer. According to art. 6:190 of the BW, the plaintiff can claim damages in case of death or personal injury,¹⁴⁵ and for damage to property other than the product itself, intended for use in a private setting and exceeding the amount of €500. Neither damage relating to the defective product itself or to products used in a professional setting,¹⁴⁶ nor pure economic loss,¹⁴⁷ is recoverable under the Directive.

Under general tort law, the rules on compensation for damage are laid down in arts. 6:95 to 110 of the BW. Damage that falls to be compensated (whenever it has been determined that there is a right to damages) includes physical and economic loss (loss suffered and profits not gained) and other disadvantages, such as non-physical losses.¹⁴⁸ In principle, all losses suffered should be fully reimbursed,¹⁴⁹ irrespective of the type of injury that occurred. There are thus no specific rules limiting compensation according to the type of injury in product liability cases. This means that not only physical harm (personal injury) and damage to property (either to the defective product or to other goods) are recoverable under Dutch law, but also pure economic loss.¹⁵⁰

All kinds of damages that have been recognised under Dutch law are thus also available in product liability cases, at least if the claim is based on general tort law. This excludes punitive damages, since Dutch law does not recognise this form of damages.¹⁵¹ Damages for non-pecuniary losses (pain and suffering) are, with certain restrictions, recoverable (art. 6:106

¹⁴⁵ Further details are laid down in the general tort law on the obligation to pay damages, most notably in arts. 6:95ff., esp. 6:107 and 6:108 BW.

¹⁴⁶ Dommering-van Rongen, *Productaansprakelijkheid*, pp. 135ff. and 143.

¹⁴⁷ Cane, *Atiyah's Accident*, p. 85. ¹⁴⁸ See arts. 6:95, 96 and 106 BW.

¹⁴⁹ See Hartkamp, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht*, no. 415.

¹⁵⁰ Since arts. 6:95–110 BW apply to contractual and tortious claims alike, the same would apply if, by way of exception, the claim were to be based on contract law. See Barendrecht and Duyvensz, 'Productaansprakelijkheid tegenover niet-consumenten', pp. 117–23 and pp. 135–42 at 135ff., and esp. pp. 139–40, 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), pp. 115ff., on pure economic loss under Dutch law in general, and pp. 123–4 on product liability. It is believed, however, that compensation of loss due to personal injury will be granted more easily than loss due to property damage; see Spier and Bolt, *De uitdijende reikwijdte*, pp. 242–3.

¹⁵¹ Although the question of whether punitive damages should be accepted under Dutch law is discussed in the works of legal scholars, the general view is that such should not be the case. See, for instance, Dommering-van Rongen, *Productaansprakelijkheid*, p. 200.

of the BW).¹⁵² This is also relevant for the Directive liability, since this liability regime left the question as to the recoverability of damages for pain and suffering to the national systems, and still does.¹⁵³ Under Dutch law, such losses are therefore, in principle, recoverable.

With regard to the amount of damages that may be claimed, no such thing as a cap or limitation exists as yet in the Netherlands with regard to product liability.¹⁵⁴ The possibility provided by the Directive (in Art. 16) of instituting such a cap or limit for product liability cases has not been followed. Article 6:110 of the BW does recognise the possibility of installing, by Royal Decree, a limit on the amount of damages that can be recovered, but this possibility has only been used once 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 of the BW) if it feels that granting the full amount of damages that would normally be recoverable would lead to unacceptable consequences, given the nature of the liability, the legal relationship between the parties and their mutual financial capacities. The court can lower the award only to the level at which insurance is or should have been available.¹⁵⁵ The HR has warned lower courts to be very cautious when using this power,¹⁵⁶ 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 *Veedfald* case,¹⁵⁷ 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 effectiveness of the Directive. This means that a Member State may not limit the categories of recoverable (physical) damages.

¹⁵² On calculating the amount of these damages, see section II(2.7) at p. 172.

¹⁵³ See Art. 9 of the Directive; Westerdijk, 'Produktaansprakelijkheid voor software', p. 45; Dommering-van Rongen, *Productaansprakelijkheid*, pp. 135 and 137; European Commission, Proposal, above, at note 11, p. 30; Case C-203/99, *Veedfald*, EuZW 2001, 378 with note Geiger, paras. 29 and 32.

¹⁵⁴ Leaving aside the threshold of €500 for damage to property used in a private setting. See above at p. 184.

¹⁵⁵ See Dommering-van Rongen, *Productaansprakelijkheid*, p. 146.

¹⁵⁶ See HR 28 May 1999, NJ 1999, 510 (G/H).

¹⁵⁷ Case C-203/99, *Veedfald*, EuZW 2001, 378 with note Geiger, paras. 27-9.

So, on the national level, there does not appear to be a major debate going on about product liability. Hence, there are no major criticisms or policy concerns. After the initial rush to devote time and attention to the subject, especially in the 1980s and 1990s, the subject has been somewhat discarded, so it seems, probably as a consequence of the poor reception and use in practice of (especially the Directive-based) product liability.¹⁵⁸

There are, as far as I know, no real hard and fast empirical or statistical data available, sustaining or denying the claim (and concern) that the current system of product liability influences prices and competitiveness in Europe, which could be a reason for (European) action.¹⁵⁹ The Report following the Green Paper of the European Commission establishes that such a negative influence is, indeed, absent. Firstly, the argument used to explain this is that, at least within Europe, the law of product liability should have no more than a limited influence on competitiveness, because the law has been harmonised with the implementation of the Directive, and those rules are also applied to producers from third countries putting their goods on the European market.¹⁶⁰ European producers moving goods to countries with product liability laws akin to the Directive have no problems either. A special case is the US. Since its laws and practices in this area, and the area of tort law in general, are quite different, export of goods to the US is undertaken less than it could be, or so it is claimed.¹⁶¹

Secondly, the main arguments for stricter liability of the producer vis-à-vis the consumer seem to be the following: (a) 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 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; (b) the consumer is also without control over the situation in the factory – what goes on there is totally within the domain of the manufacturer and (c) 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.

The arguments advanced above have probably been valid since the production process became a mechanical one, being executed in (large)

¹⁵⁸ Cf. Hondius, 'Produktaansprakelijkheid', p. 325; Arnokouros, 'Product Safety and Product Liability in Europe' esp. p. 14, and section III(2.7) at p. 169.

¹⁵⁹ Faure, 'Productaansprakelijkheid in Europa', pp. 3–12.

¹⁶⁰ European Commission, Proposal, above, at note 11, p. 9. See also *Kamerstukken II* 1999/00, 22.112, no. 134, p. 3.

¹⁶¹ See European Commission, Proposal, above, at note 11, pp. 9–10.

factories, with all the dangers inherent in it. The arguments mentioned below have emerged later in time, probably since the 1960s and the scandals that arose in those days.

Furthermore: (d) if a product is a source of danger of some sort, the producer should bear the risks of that danger materialising; and (e) the consumer is in need of specific protection. Finally, (f) the manufacturer is the one making a profit. The person that stands to gain from manufacturing a product should also be the one to bear the costs of manufacturing that product. Those costs include paying damages.¹⁶²

In cases where the proof of a product liability claim is troublesome, another important argument that has emerged later in time could be that: (g) the protection that the rule of substantive law (for instance, the negligence 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.¹⁶³

Stating, on the basis of the foregoing, that consumer protection (item (e)) is the dominant policy is, in my view, not entirely correct. Certainly, consumer protection is one of the leading policies within the EU and for the Directive liability. However, in my view, consumer protection is, in itself, not *an argument* for a stricter form of liability; rather, it is a *policy choice* in its own right that requires its own (further) justification. Thus, the question of *why* consumers should be protected is not answered by stating *that* they should be. I believe, however, that the other arguments put forward above *do* supply the answer and justification needed here for an extension of consumer protection. The fact that the consumer has no control whatsoever over the product, while the producer does, to some extent, at least have some control, is especially important in this respect.

4.3 The role of insurance in this respect

As always, and, I presume, everywhere, the availability of insurance has a profound impact on tort law and damages awards. Without insurance, liability law, including product liability, would be nowhere at all. However,

¹⁶² For an overview, see Giesen, 'Bewijs en aansprakelijkheid', pp. 238–40, with further references. Mention is also made of the fact that insurance coverage is easily attainable for a producer.

¹⁶³ See Giesen, 'Bewijs en aansprakelijkheid', 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 pp. 449ff. in general.

connecting liability and insurance in a very direct way, so that it would appear that liability is directly founded upon the presence of insurance, is not something that is allowed in the Netherlands. Insurance *covers* liability if liability is imposed; it does not *ground* liability. Be that as it may, the presence of insurance is still highly important, but only in the background, as a sort of hidden policy consideration for a judge when deciding a case, especially when awarding damages. That is not just the case for product liability, but for all forms of liability.

Given this state of affairs, a few words on insurance and social security might be useful here. Considering, firstly, *loss of income* due to personal injury, one must note that the level of benefits under different forms of social security, i.e. employee insurance (insurances for employees employed in the Netherlands) and national insurance (mandatory insurances for the entirety of persons living in the Netherlands) is diminishing in the Netherlands, although it might still be rather generous compared to other countries.¹⁶⁴ People suffering personal injury will receive sick pay (70 per cent of the last-earned wages) during the first year of their sickness, based on the *Ziektewet* (Sickness Benefits Act) and art. 7:629 of the BW.¹⁶⁵ After that period, if still sick, an employee will receive a benefit under the *WAO* (Disablement Insurance Act) or, as of January 2006, its follow-up law, the *WIA*, or, occasionally, welfare based on the *Algemene Bijstandswet* (National Welfare Act).

A lot of people have taken out a supplementary (first party) insurance to receive a higher percentage of their last salary when they have to fall back on the *WIA*. On account of this system, personal injuries (due to whatever cause) do not usually lead to an extreme loss in earnings for the victim. Loss due to unemployment, which could, in the end, also be a result of an accident, is covered by the *WW* (Unemployment Insurance Act), the law on unemployment benefits.

With regard to *medical expenses*, these are usually covered by a (first party) health insurance, which used to be taken out either on a private basis (above a certain minimum wage) or on the basis of the *Ziekenfondswet* (Public Health Insurance Act). These insurances were not specifically aimed at sickness due to unlawful behaviour, but they do cover those

¹⁶⁴ And highly important, since more than 50 per cent of the damages (personal injury and death) suffered in the Netherlands is covered by social security, according to J. B. M. Vranken, 'Einführung in das neue Niederländische Schuldrecht Teil II', (1991) 191 AcP 414.

¹⁶⁵ In practice, the amount is usually contractually supplemented by the employer for up to 100 per cent of the normal wages.

situations as well. A new law was passed by Parliament and entered into force on 1 January 2006 that combines these two (private and public) systems of health insurance into one basic health insurance system, requiring payment of a premium up front, but allowing for a no claim reimbursement if the health system has not been used during a period of time.

Damage to *property* is quite often covered by an *inboedelverzekering*,¹⁶⁶ an insurance aimed at insuring against the risk of a loss of property from one's house, due to theft or fire, and the like. This is also a first party insurance. As a result, most damages in product liability cases are covered by first party insurance, except, maybe, for the cost of a product recall (pure economic loss) and the loss of (a company's) goodwill. Liability insurance might be available for those kinds of damage, however.¹⁶⁷

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

A contraindication against this educated guess might be found, however, if one takes a look at damages for *pain and suffering*. This kind of damage would seem to be rather common in product liability cases, but, with the exception of medical services, not in service liability cases, and it is not covered by an average first party insurance. This might be seen as an indication that people would (also) want to sue manufacturers, at least for their damages in pain and suffering, but apparently this is not the case. An explanation given in parliamentary proceedings is that suing (mainly) for pain and suffering may not be seen as worthwhile by victims.¹⁶⁸

Companies that are manufacturing and selling products, even if they are relatively small, have all taken out liability insurance. The so-called AVB (Liability Insurance for Companies), which is very common in the Netherlands, also covers, in general, product liability. Whether the costs of a product recall, a form of pure economic loss, are also covered by this AVB is uncertain.¹⁶⁹

¹⁶⁶ Cf. Vranken, 'Einführung in das neue Niederländische Schuldrecht Teil II'.

¹⁶⁷ See below.

¹⁶⁸ Cf. *Kamerstukken II* 1999/00, 22.112, no. 134, p. 4.

¹⁶⁹ Dommering-van Rongen, *Productaansprakelijkheid*, p. 104; Groffen, 'The Netherlands', p. 392.

So far, direct action against the liability insurer of the wrongdoer is quite rare under Dutch law. The possibility of such an action exists if the case involves a traffic or hunting accident.¹⁷⁰ However, as of January 2006, something akin to a direct action, although not completely the same, has become a general possibility for a victim of a tort if the case involves death or personal injury. Therefore, for product liability, and for some forms of professional liability, this action will become relevant. Article 7:954 of the BW introduces this action in the Civil Code.¹⁷¹ As stated, this is not a proper direct action, but its workings are similar.¹⁷² It is too early to tell whether this type of action will be used, but the chances of just that happening are relatively high, given the advantages.

With regard to recourse, first party insurers paying for lost earnings, damaged goods and medical expenses of the victim will try to get compensated (and exercise their right to recourse) if the amounts are large enough, and might be eager to do so if a company is the wrongdoer.¹⁷³ They will then turn to (the insurer of) the person that acted unlawfully, especially if there is a liability insurer on that side, which is usually the case. Mention should be made, however, that such a recourse is generally not possible if the claim is based on art. 6:185 of the BW. The rule of art. 6:197 of the BW (the Provisional Rights of Recourse Scheme, stating the temporary but still valid rule on the absence of a right of recourse) forbids recourse by the first party insurers if the claim is based on art. 6:185 of the BW.¹⁷⁴ Claiming on the basis of art. 6:162 of the BW, however, is a possibility for getting recourse anyway.

¹⁷⁰ See art. 6, para. 1 WAM (the Motor Liability Insurance Act) and art. 12b, para. 1 Jachtwet (Hunting Act).

¹⁷¹ See the parliamentary works introducing the new Law on Insurance Contracts being integrated in the BW, at *Kamerstukken II* 1999/00, 19.529, no. 5, pp. 6–7 (the proposal) and pp. 32–41 (comments from the government on the proposed rule).

¹⁷² The difference being that, while under a direct action, the insurer cannot raise vis-à-vis the victim those defences it might have against its contractual counterpart (i.e. the tortfeasor), such as a defence of suspension of coverage; this will be possible under the new insurance scheme to be enacted in art. 7:954 BW.

¹⁷³ According to Vranken, 'Einführung in das neue Niederländische Schuldrecht Teil II', this does not happen very often; only in 0.5 per cent of cases.

¹⁷⁴ *Kamerstukken II* 1999/00, 22.112, no. 134, p. 4; van Dam, *Aansprakelijkheidsrecht, Een grensoverschrijdend handboek*, no. 1306; Dommering-van Rongen, 'Product Liability in the Netherlands', p. 137; European Commission, Proposal, above, at note 11, p. 11. The reason for introducing this rule was the fear that allowing recourse next to the introduction in 1992 of several strict liabilities – such as art. 6:185 BW – would lead to too many claims for amounts that are too high.

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

III Conclusion

We have seen a development towards objectivity as well as towards achieving greater protection for customers in product liability law. The arguments for doing so have been given, and seem to be valid. At this point in time, the trend in product liability seems to be, however, that the development of the rules has reached some form of standstill, with a slight tendency to revert to rules that are a bit less consumer-orientated. This is especially due to the case law of the ECJ (in essence, freezing the state of the law as it was around 1985, and this state of affairs was not all too consumer-friendly), as well as to the recent reminder, on the national level, that both wrongfulness and subjective fault need to be present, but also to the fact that, in practice, product liability is not really a big issue in the Netherlands. This means, of course, that if any movement or development is present, it will be a very slow, almost indiscernible one. It remains to be seen, however, whether this analysis is entirely correct, because the amount of change, or even movement with regard to product liability, is actually not big enough to be able to be more conclusive on what the developments might be. If the history of product liability has taught us something, it is that legal development is incremental at best if case law is the primary source of change.¹⁷⁵

¹⁷⁵ This is especially true if only a few cases come up for decision by the highest court; as is the case in the Netherlands, while at the same time this court considers individual cases to be its only opportunity to actually bring about change. Critically on this, see Giesen and Schelhaas, 'Samenwerking bij rechtsvorming', pp. 159-72.