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Dutch case note

LIESBETH ENNEKING*

> *Whereas animals constituted hazards in rural society, motor vehicles constituted those in motorized society, and defective products and environmental pollution those in industrialized society, it is inaccurate information and a lack of information that constitute hazards in the information society.*[1]

1. Introduction

In the course of the 1980s, foreign-aid donors financially supported an extensive tube-well project in rural Bangladesh, aimed at providing Bangladeshi citizens with easily accessible clean water for agricultural and/or personal use. Over slightly more than a decade, however, the initial success story turned into a nightmare, as it became clear around 1993 that the supposedly clean water from the tube wells contained toxic concentrations of naturally-occurring arsenic. Today, it is estimated that tens of millions of Bangladeshi citizens have been affected by the contaminated water and run the risk of developing a number of arsenic-related health impairments, ranging from skin lesions and pigmentation changes to cancer of the skin, lungs, urinary bladder and kidneys.[2]

1.1 The Facts of the Case

In the early 1990s, the British Overseas Development Agency (ODA) funded a hydro-geological survey of groundwater quality in certain areas of Bangladesh. The survey was carried out by an expert group, the British Geological Survey (BGS), a department of the Natural Environment Research Council (NERC).[3] BGS collected groundwater samples from 150 tube-well sites and analyzed these samples for

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1 C.C. VAN DAM, *Aansprakelijkheidsrecht*, trans. L.E (Boom Juridische Uitgevers, 2000), 301.

2 See, for a more detailed account, A. ATTARAN, 'Will Negligence Law Poison the Well of Foreign Aid? A Case Comment on: *Binod Sutradhar* v. *Natural Environment Research Council*', *Global Jurist Advances* vol. 6, no. 1 (2006): 8–15; P.J. ATKINS, M. MANZURUL HASSAN & C.E. DUNN, 'Toxic Torts: Arsenic Poisoning in Bangladesh and the Legal Geographies of Responsibility', *Transactions of the Institute of British Geographers* 31, no. 3 (2006): 272–273; World Health Organization Fact Sheet No. 210, revised May 2001, <www.who.int/mediacentre/factsheets/fs210/en/> (accessed 3 December 2007).

3 Since BGS and NERC form part of the same organization, reference to the two bodies will be made interchangeably here, as was also done by the Law Lords in *Sutradhar* v. *Natural Environment Research Council* [2006] UKHL 33.

thirty-one major and minor elements. In 1992, it published the results in a technical report entitled '[T]he Hydrochemical Character of the Main Aquifer Units of Central and North-Eastern Bangladesh and Possible Toxicity of Groundwater to Fish and Humans',[4] copies of which were subsequently disseminated to, inter alia, Dacca University, the Bangladesh Agricultural Development Corporation and several non-governmental organizations involved in water resource management. The report established, among other things, that no serious health risks had been found connected to any of the elements examined. Arsenic, however, was not among these elements and did not receive any mention in the report.[5]

Mr Sutradhar, who lives in one of the areas of Bangladesh from which BGS had taken its samples, is one of the many Bangladeshi citizens who have been affected by arsenic in their drinking water. After having drunk tube-well water for some eight years, he developed symptoms associated with arsenic poisoning, which, over the years, have worsened.[6] He filed a claim before an English court against NERC for damages for his injuries, claiming that 'the work underlying the 1992 Report was conducted carelessly in that no adequate tests were carried out to assess the water supply for its fitness for human consumption; and that the Report itself would have led the reader to assume that the water was fit for human consumption'. NERC made applications to the court to strike out the claim or to deliver a summary judgment, on the basis that the claimant had no real prospect of succeeding in the claim as no duty of care was owed by NERC to Mr Sutradhar, there being insufficient proximity between them.[7]

The court of first instance dismissed the applications and stated that the case should be decided on the facts found at trial.[8] This decision was reversed on appeal, however, with the claim being struck out by a 2-to-1 majority.[9] Subsequently, Mr Sutradhar filed an appeal to the House of Lords on the matter. It is this case that the present case note addresses.

1.2 The Legal Issue

The question presented before the House of Lords was whether Mr Sutradhar 'has a reasonable prospect of success in an action against NERC for negligence in issuing a

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[4] British Geological Survey, *Short Term BGS Pilot Project to Assess the Hydrochemical Character of the Main Aquifer Units of Central and North-Eastern Bangladesh and Possible Toxicity of Groundwater to Fish and Humans*, BGS Technical Report WD/92/43R (1992).

[5] See for a more detailed account, *Sutradhar* v. *Natural Environment Research Council* [2006] UKHL 33, ss 7–22; A. ATTARAN, n. 2 above, 8–15.

[6] *Sutradhar* v. *Natural Environment Research Council* [2006] UKHL 33, s. 23.

[7] *Sutradhar* v. *Natural Environment Research Council* [2003] EWCH 1046, ss 1–3.

[8] *Ibid.*, s. 60.

[9] *Sutradhar* v. *Natural Environment Research Council* [2004] EWCA Civ 175, ss 24–25, 59–60, 116–117.

geological report which he says induced the health authorities in Bangladesh not to take steps which would have ensured that his drinking water was not contaminated by arsenic', as a consequence of which he claims to have suffered injury from arsenic poisoning.[10] In a unanimous decision, the Law Lords dismissed Mr Sutradhar's appeal against the Court of Appeal's decision to strike out his claim, on the basis that he 'had no reasonable prospect of satisfying a court that in all the circumstances the NERC owed him a duty of care'.[11]

1.3 The Approach

This case note will deal with the question of the outcome of a similar case before a Dutch court if determined on the basis of Dutch tort law. It should be noted, however, that Dutch legal procedure does not feature the option of striking out a claim at a preliminary stage where the case has no real prospect of succeeding. The only test is whether the claimant has a sufficient interest (*voldoende belang*) in filing the claim (which is normally presumed to be the case).[12] Consequently, this case note will (have to) discuss the prospects that a case such as the Sutradhar case would have in a Dutch civil (tort) procedure on the merits. Since the summary trial of *Sutradhar* v. *NERC* did not allow for extensive fact-finding, the claimant's allegations of primary fact will, for the purposes of this case note, be assumed to be true.

2. Liability on the Basis of Dutch Tort Law

It should be stated at the very outset that Dutch courts have not yet had to decide any case bearing much resemblance to *Sutradhar* v. *NERC*.[13] This does not create insurmountable problems here, however, since the generic Dutch civil law system would allow a Dutch judge deciding a case like *Sutradhar* v. *NERC* to have considerable leeway in developing a new precedent on this novel legal issue. Naturally, in order to satisfy this discretionary margin, the judge would proceed by drawing inspiration from existing and related case law.

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[10] Lord Hoffmann in *Sutradhar* v. *Natural Environment Research Council* [2006] UKHL 33, s. 2.

[11] *Ibid*.

[12] Art. 3:303 BW (Civil Code); H.J. SNIJDERS, M. YNZONIDES & G.J. MEIJER, *Nederlands burgerlijk procesrecht* (W.E.J. Tjeenk Willink, 1997), 48–49.

[13] With respect to the scarcity of existing case law, Barendrecht and Jansen/Van der Lely come to the same conclusion on the related topics of the responsibilities of the advisor, and the duty of care concerning a statement owed by an expert to a third party, respectively: J.M. BARENDRECHT, 'De schimmige status van het advies', *Nederlands Juristenblad*, afl. 29 (27 augustus 1999), 1361–1362; and C.J.H. JANSEN & A.J. VAN DER LELY, '(Buiten)contractuele aansprakelijkheid voor onjuiste mededelingen: een vergelijking van Engels, Duits en Nederlands recht', *Tijdschrift voor vennootschappen, verenigingen en stichtingen*, 1998 nr. (1998/2), 42–48.

2.1 The Applicability of Dutch Tort Law

Before anything can be said about the fate of a case like *Sutradhar* v. *NERC* under Dutch tort law, the preliminary question of whether Dutch tort law would be applicable to such a case should be addressed. On the basis of the Dutch private international law regime that is currently in force, the law applicable to a tort case featuring international aspects is that of the country where the tort has taken place. Whenever *Handlungsort* and *Erfolgsort* are not situated in the same country, the law of the country in which the damage arises will apply.

This means that, on the basis of the current private international law regime, a case like *Sutradhar* v. *NERC* will always have to be judged according to Bangladeshi tort law – even when it can be claimed that the action or omission resulting in the damage has occurred in the Netherlands, as the damage cannot be said to have arisen anywhere but Bangladesh.[14] However, rules of safety and conduct that are in force in the country where the activity giving rise to the damage has taken place – which could be argued to be the Netherlands in such a case – can be taken into account,[15] and in exceptional cases the applicable tort law can be superseded by overriding mandatory rules or *ordre public* of the forum country.[16]

On the basis of the Rome II Regulation, a similar private international law regime will apply in all EU Member States from January 2009 onwards. What is new is that this regulation features a special rule on tort cases giving rise to environmental damage that may arguably apply in a case like *Sutradhar* v. *NERC*. This rule would give the victim the option of choosing the law of the *Handlungsort* as the applicable law.[17]

2.2 General Prerequisites

Although the above shows that it is by no means self-evident that a Dutch judge deciding a case like *Sutradhar* v. *NERC* would do so on the basis of Dutch tort law, for the sake of argument this case note will proceed under the assumption that this would in fact be the case.

For tortious liability to arise, the Dutch general provision on tort requires unlawfulness, imputability, causation and damage to be established. Unlawful acts can arise in the form of a violation of a right and an act or omission breaching a duty imposed by law or a rule of unwritten law pertaining to proper social conduct (i.e., a

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[14] Art. 3, *Wet Conflictenrecht Onrechtmatige Daad* (Unlawful Act (Conflict of Laws) Act).

[15] *Ibid.*, Art. 8.

[16] L. STRIKWERDA, *Inleiding tot het Nederlandse Internationaal Privaatrecht* (Kluwer, 2005), 56–63, 68–72.

[17] For more on this topic, see L. ENNEKING, 'The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation: An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law', *European Review of Private Law* 15, no. 2 (2007).

duty of care or *zorgplicht*). An unlawful act is imputable to the wrongdoer if it is due to his fault or to a cause for which he is accountable by law or pursuant to generally accepted principles.[18] However, there is no obligation to rectify the damage if the standard breached does not serve to protect against damage such as that suffered by the person suffering the loss (this is the element of relativity or *relativiteit*).[19]

Following Lord Hoffman, the author of the leading judgment of the House of Lords, Mr Sutradhar's claim can be said to allege two separate unlawful acts: Firstly, that BGS caused or materially contributed to his illness by failing to draw attention to the presence of arsenic; and secondly, that BGS caused or materially contributed to his illness by issuing a report which represented that his water was safe to drink, thus lulling the Bangladeshi public-health authorities into a false sense of security.[20] The first claim is rephrased by Lord Hoffman as an alleged positive duty to test for arsenic, but under Dutch tort law, this would be dealt with as an omission (*nalaten*). The second claim is identified by Lord Brown of Eaton-Under-Heywood as an alleged negligent misstatement,[21] which seems to fit in with the Dutch case law on professional liability vis-à-vis third parties.

As will become evident from the following discussion, however, a similar strict distinction between these two sources of unlawfulness – both of which pertain to the breach of a duty of care – is not easy to make under Dutch tort law because of the generic character of the Dutch tort system, nor is it strictly necessary.[22]

2.3 Unlawful Conduct: Omissions

The first of the two potentially unlawful acts by BGS as identified by Lord Hoffmann is its alleged omission to test for arsenic.[23] As can be deduced from the aforementioned Dutch general provision on tort law, an omission can in principle be as unlawful as an act. In practice, it is often impossible to make a clear distinction between the two concepts.[24] Liability for an omission usually concerns an (implied) duty to act – if such a duty can be claimed to exist – with respect to risks that have not been created by the alleged tortfeasor, but by the victim itself, a third party, or nature. This duty to act will normally only be taken to exist if the tortfeasor has a

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18 Art. 6:162 BW, ss 1–3.

19 Art. 6:163 BW.

20 *Sutradhar* v. *Natural Environment Research Council* [2006] UKHL 33, ss 24–25.

21 *Ibid.*, s. 46.

22 For more background information on the generic character of several Continental tort codifications, including the Dutch, as opposed to the more piecemeal approach of the common-law tort system, see W.J. ZWALVE, *Common Law & Civil Law* (W.E.J. Tjeenk Willink, 2000), 383–393.

23 In *Sutradhar* v. *Natural Environment Research Council* [2006] UKHL 33, ss 26–28, the idea of a positive duty of care owed by BGS to the government or people of Bangladesh is rejected by Lord Hoffmann.

24 C.C. VAN DAM, n. 1 above, 299–301. For more on liability for nonfeasance, see J. KORTMANN, *Altruism in Private Law* (Oxford: Oxford University Press, 2005), 1–78.

(pre-existing) special relationship with the victim or with the person, object or venue creating the risk, a concept that is rather reminiscent of the English relationship of proximity which played such a fundamental role in *Sutradhar* v. *NERC*.[25]

The most important Dutch case in this respect is the *Broodbezorger* case concerning a bread delivery man who tripped over a length of string that had been stretched across the road. The question arose as to whether two children playing nearby should have warned him of the presence of that string.[26] In *Sutradhar* v. *NERC*, however, such a special relationship cannot be said to have existed between NERC and the Bangladeshi victims or between NERC and the contaminated water.

However, even in the absence of any special relationship, the alleged tortfeasor can be held liable for a so-called pure omission (*zuiver nalaten*), but only under strict conditions. The *Broodbezorger* case dealt with such a pure omission. According to the Dutch Supreme Court (*Hoge Raad*), a legal duty to remove or to warn others about an observed risk where one has no responsibility for its coming into being, can only be assumed where 'the gravity of the danger that this situation poses to others has sunk into the mind of the observer'.[27]

It seems clear that the gravity of the danger posed by arsenic in the Bangladeshi tube-well water had not 'sunk into the mind' of BGS at the time of carrying out the tests, since it may be assumed that it would not have wilfully neglected to test for a substance that it had known to be potentially present in the water in toxic quantities. However, this raises the question of whether the knowledge required for liability on the basis of a pure omission ('the gravity of the danger has sunk into the mind of the observer') should be established on the basis of a subjective or an objective test: Is it about what BGS *knew*, or what it *ought to have known*?

As the *Broodbezorger* case demonstrates, the test has traditionally been a subjective one. In principle, this is still the situation at present, which makes the pure omission a rare exception to the rule of more objective tests in other fields of tort law.[28] It seems, however, that this status quo may be subject to change in cases where special care is required on the part of the potential tortfeasor responsible for omissions, due to his capacities or due to the potential gravity of the damage.

2.4 Unlawful Conduct: Professional Liability vis-à-vis Third Parties

One of the fields of Dutch tort law where such special care may be required is the field of professional liability, which seems to link up with the second of the two

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[25] For the considerations of Lord Hoffmann and Lord Brown on this matter, see *Sutradhar* v. *Natural Environment Research Council* [2006] UKHL 33, ss 32–38 and 47–49, respectively.

[26] HR 22 november 1974, NJ 1975, 149; for a brief description of some Dutch cases pertaining to this special relationship, see I. GIESEN, *Aansprakelijkheid na een nalaten* (Kluwer, 2004), 17–19.

[27] HR 22 november 1974, NJ 1975, 149.

[28] C.C. VAN DAM, n. 1 above, 263.

potentially unlawful acts by BGS as identified by Lord Hoffmann, namely, the alleged negligent misstatement.

Interestingly, in a comment on a 2001 case pertaining to the professional liability of a tax consultant, Professor Snijders raised the question of whether the subjective test which the Dutch Supreme Court had applied in that case was still in keeping with recent case law on professional liability.[29] According to Professor Snijders, this case law has shown a tendency towards objectivity, in the sense that what matters when it comes to liability for omissions by service providers, such as banks, is not just what they were aware of, but what they ought to have been aware of.[30] Professor Snijders states that a service provider, on the basis of the circumstances of the case, is deemed to have a greater responsibility for the interests of the party concerned. As such, a more objective standard will be applied when judging the potential unlawfulness of its conduct.[31]

This means that, regardless of whether the allegedly unlawful behaviour by BGS is construed as an omission (or a duty to act), or as a negligent misstatement, an objective standard can be said to apply to such behaviour. Naturally, this raises the question of what is to be expected of a prudent professional (*zorgvuldig beroepsbeoefenaar*).

Dutch literature and case law reveal a tendency towards holding professionals, such as accountants, lawyers, tax consultants, banks and civil-law notaries, more readily liable for acting in breach of a duty of care towards third parties. This is due to the fact that such professionals are increasingly expected to look after not only the interests of their clients, but, under certain circumstances, those of third parties.[32] In this respect, it is possible that in testing the Bangladeshi tube-well water for, inter alia, elements that could be toxic to humans, BGS, as an expert professional organization, owed a duty of care towards Bangladeshi citizens potentially affected by these elements. Such a duty would include the duty to conduct its testing in a prudent manner and to be aware of potentially affected citizens' interests.

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[29] See s. 4 of the comment by H.J. SNIJDERS on HR 2 februari 2001, NJ 2002, 379.

[30] A clear example to which Snijders refers is HR 9 januari 1998, NJ 1999, 285 (*MeesPierson/Ten Bos*), in which it was decided that a bank had negligently omitted to alert the legal representative of certain minors when the bank was aware or should have been aware that the minors' funds were being invested in defiance of operative investment rules.

[31] The fact that this argument is something of a self-fulfilling prophecy does not necessarily diminish its validity, as case law – certainly Dutch case law – seems, by its very nature, to be filled with such self-fulfilling prophecies and foregone conclusions.

[32] For an extensive exposition of this matter, with a focus on the liability of accountants, lawyers and civil law notaries, see E.J.A.M. VAN DEN AKKER, *Beroepsaansprakelijkheid ten opzichte van derden* (Boom Juridische Uitgevers, 2001). See also C.J.H. JANSEN & A.J. VAN DER LELY, n. 13 above, 46. Compare, for example, HR 23 december 1994, NJ 1996, 627, on the duty of care of a civil law notary vis-à-vis third parties.

2.5 Unlawful Conduct: Foreseeability

A duty of care can only be said to have existed if the potential risk, the presence of toxic quantities of arsenic in the water, ought to have been reasonably foreseeable (objective test) for BGS at the time of carrying out the tests. Therefore, a court deciding what BGS ought to have known will have to decide what a reasonably competent, comparable expert institution with a public role comparable to that of BGS ought to have known and thus ought to have foreseen. In so doing, the court will have to start from the principle that BGS should have possessed the knowledge and capacities required for its public role and the activities in which it engaged.[33] At the same time, however, it cannot be expected to have had knowledge of things that went beyond the science and technology of the day.[34] Nevertheless, it can be required to have applied its expertise in order to investigate the possible presence of arsenic in the water, had there been any indication that this might be the case (*onderzoeksplicht*).[35]

Obviously, the question of what knowledge BGS could reasonably have been expected to have had is, in the end, a question of fact that will have to be resolved in a trial on the merits. Reports of other experts in the same field regarding how, and in particular, when the presence of arsenic in the Bangladeshi tube-well water and nearby water supplies was eventually discovered are bound to be of great importance here.[36] If, on the basis of these factual findings, it can be established that BGS, whether through investigation or not, should indeed have been aware of the risk that potentially toxic quantities of arsenic were or might have been present in the water, it could very well be argued that it had a duty of care towards those Bangladeshi citizens at risk. This duty would encompass further investigation of the matter and/or warning the citizens, or the Bangladeshi government officials responsible for public health, of this risk (*waarschuwingsplicht*).[37]

It follows that, depending on the point in time from which BGS could reasonably have been expected to be aware of the risk, it may have been under a duty to test the water for arsenic (as part of its duty to investigate) and/or under a duty to

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[33] Compare HR 22 april 1994, NJ 1994, 624 (*Taxusstruik*).

[34] For an elaborate discussion of foreseeability, albeit in the context of imputability, see C.C. VAN DAM, n. 1 above, 250–275.

[35] For more on the duty to investigate, see C.C. VAN DAM, n. 1 above, 208–209.

[36] Especially since there seems to have been only a short period of time between the issuing of the report in 1992 and the discovery of toxic concentrations of naturally-occurring arsenic in the tube-well water around 1993, see n. 2 above. According to Lord Hoffmann, 'There is considerable controversy over whether the responsible organisations should have been aware of the danger at an earlier stage', *Sutradhar* v. *Natural Environment Research Council* [2006] UKHL 33, s. 21.

[37] For more on the duty to warn, see C.C. VAN DAM, n. 1 above, 213–215. Compare HR 29 december 1995, NJ 1996, 332 (*Franzetti/Suikerunie*), in which a company was found liable for having failed to inform the Dutch Railways of a dangerous situation at a railway crossing in the vicinity of the company premises.

mention the potential risk in its report as a warning (as part of its duty to warn), even if it was not sure of the extent of the risk.[38]

2.6 Unlawful Conduct: Circumstances of the Case

There are several circumstances in the *Sutradhar* case that point towards a rather demanding knowledge test and a far-reaching duty of care.[39] The first is the fact that BGS is a well-respected, quasi-governmental, expert professional organization. Secondly, the degree of knowledge and expertise that it had or should have had far exceeded that of any of the other parties involved, namely its principal, the Bangladeshi government, and the affected Bangladeshi citizens in particular. Thirdly, the potential damage did not simply involve pure economic loss, as is the case in most instances of liability by professionals towards third parties, but rather actual physical harm, which warrants a stricter duty of care. Finally, the step of including arsenic as an element to be tested for, or at least mentioning the potential risk it posed in the report, would not have put an undue financial burden on BGS.

However, there are also certain circumstances pointing in the opposite direction, such as the fact that the activities engaged in by BGS had a significant societal value. In this regard, consideration should be given to the fact that an excessively strict duty of care in a case like *Sutradhar* v. *NERC* might lead to defensive conduct and, as such, may result in a negative effect on the willingness to provide foreign aid. It should be mentioned here that the question of whether the tests were conducted with or without any financial compensation by the parties benefiting from them, does not affect the existence of a duty of care towards these parties, nor the potential unlawfulness of a breach of such a duty.[40]

Ultimately, it is the court's task to balance all of these factors and to draw a conclusion on the unlawfulness of the behaviour in question. The above analysis demonstrates, however, that it is entirely possible that in a case such as *Sutradhar* v. *NERC* a Dutch court might find that the expert organization had engaged in unlawful behaviour. Whether it would in fact do so is very much dependent on the circumstances of the case.

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[38] See, for a duty to warn in case of an unknown risk, HR 8 januari 1982, NJ 1982, 614 (*Dorpshuis Kamerik*).

[39] The further content of a duty of care in a given case can be established by using the criteria identified by the Dutch Supreme Court in HR 5 november 1965, NJ 1966, 136 (*Kelderluik*), namely, the nature and extent of the potential damage, the likelihood that the damage will arise, the nature of the behaviour and the difficulties involved in taking precautionary measures.

[40] C.C. VAN DAM, n. 1 above, 193, 264.

2.7 The Other Elements of Tortious Liability: Imputability and Relativity

As mentioned above, unlawful behaviour does not in itself constitute a tort under Dutch tort law. The other elements which need to be present in order to establish liability are imputability, relativity, damage and causation.[41]

To satisfy the element of imputability, the unlawful behaviour would have to be due to a fault by BGS.[42] This refers to the person of the alleged transgressor, rather than its behaviour. The question to be answered here is whether, based on its mental and physical abilities, it could or should have been aware of the risk and could or should have done something to avoid it. In this case, this question has already arisen in the discussion on the unlawfulness of the behaviour. The requirement of imputability can therefore be said to have been satisfied.

A similar reasoning could, in principle, be applied to the element of relativity, since the question of whether BGS should have been aware of and should have taken into account the interests of the affected party can also be said to have been answered within the context of the unlawfulness element.[43] However, recent case law indicates that the Dutch Supreme Court is increasingly using relativity as a tool to keep the ever-expanding field of liability in check.[44] This tendency to apply relativity in order to advance legal-political aims makes it hard to predict the success of a defence by BGS which asserts that the unwritten rule of law pertaining to proper social conduct that it allegedly breached does not serve to protect against damage such as that suffered by the Bangladeshi victims.[45]

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[41] In practice, however, the different elements are often not clearly separated: A.J. VERHEIJ, *Onrechtmatige daad* (Deventer, 2005), 106–107.

[42] Art. 6:162 s. 3 BW states that 'A wrongdoer is responsible for the commission of an unlawful act if it is due to his fault or to a cause for which he is accountable by law or pursuant to generally accepted principles'. As the latter two options are not applicable here, the question remains as to whether BGS was at fault.

[43] Similarly: S.D. LINDENBERGH, 'De relativiteit van de toelating als vluchteling', *Ars Aequi* 56 (2007) 10, 778. More on relativity in C.C. VAN DAM, n. 1 above, 169–172.

[44] S.D. LINDENBERGH, n. 43 above, 778–781, 783–784, which includes a reference to J. HIJMA, who describes relativity as a 'graceful way to express legal political considerations' in his comment on HR 7 mei 2004, NJ 2006, 281 (*Duwbak Linda*).

[45] In his comment on the *Duwbak Linda* case, n. 44 above, J. HIJMA states that one of the main reasons for a tactical use of the element of relativity is said to be to prevent a 'cascade of claims' by, in principle, an unlimited number of third parties. A similar argument would undoubtedly play a role in a case like *Sutradhar* v. *NERC*. Note that Lord Brown already mentions that 'the class of potential claimants here ... is the entire population of Bangladesh or at the very least that of the areas tested during the 1992 survey' in *Sutradhar* v. *Natural Environment Research Council* [2006] UKHL 33, s. 48.

2.8 The Other Elements of Tortious Liability: Damage, Causation and the Burden of Proof

It is clear in *Sutradhar* v. *NERC* that a large group of Bangladeshi citizens suffered damage as a result of drinking arsenic-contaminated tube-well water.[46] However, whether and to what extent this damage can be said to have resulted from the alleged unlawful behaviour of BGS remains to be seen. In order to establish liability, the existence of a causal link between the behaviour and the damage, i.e., the primary causation, needs to be proven. This is achieved by applying the *conditio sine qua non* test. It must be demonstrated that the damage would not have arisen if not for the unlawful behaviour in question.[47] In other words, it must be established that Mr Sutradhar would not have suffered from arsenic poisoning, or would have done so to a lesser extent, had BGS identified the risk posed by the arsenic-contaminated tube-well water.

The extent to which the damage can be said to result from a tortious act or omission and should therefore be compensated – namely, the secondary causation – is determined on the basis of whether the damage can reasonably be imputed to the unlawful act (*redelijke toerekening*).[48] The fact that in this case the victims suffered physical harm is of importance, since in such cases the damage is more readily imputed to the tortious behaviour than in cases pertaining to other forms of damage.[49] It is not just the nature of the harm that plays a role here, but also the nature of the liability: Since the risk and the ensuing damage would have been more foreseeable by the tortfeasor, it seems more reasonable to attribute to the tortfeasor a larger part of the ensuing damage. In addition, it is significant that the case pertains to liability concerning a risk that was not created by the tortfeasor itself, but by someone or something else, since this could lead to a more restrictive imputation of damage.[50] Naturally, secondary causation will only come into play once primary causation, as well as the other elements of tortious liability, have been established.

This leads to the question of who bears the burden of proof. Under Dutch tort law, the general rule concerning the burden of proof is that the party claiming

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[46] Whether the physical harm suffered by Mr Sutradhar and the other victims was indeed a result of arsenic poisoning was not the subject of debate in *Sutradhar* v. *Natural Environment Research Council* [2006] UKHL 33.

[47] Art. 6:162 BW states that the tortfeasor is liable for the damage that the victim has suffered *as a result of* the unlawful behaviour (*dientengevolge*). For an account on the *conditio sine qua non* test in the context of an omission by a supervisory body, see I. GIESEN, *Toezicht en aansprakelijkheid* (Kluwer, 2005), 172-174.

[48] Art. 6:98 BW: 'Reparation of damage can only be claimed for damage which is related to the event giving rise to the liability of the obligor, which, also having regard to the nature of the liability and of the damage, can be attributed to him as a result of such event.' Note that this is not the same as imputability for the unlawful behaviour, which was discussed in the foregoing.

[49] See C.C. VAN DAM, n. 1 above, 186–189.

[50] Also on the imputability of the damage. see I. GIESEN, n. 47 above, 175–176.

something must also prove it (*actori incumbit probatio*).[51] There is a line of cases which deal with circumstances in which the burden of proof pertaining to the primary causation can be reversed. However, at present there is very little clarity on this so-called *omkeringsregel*.[52] What can be said with some degree of certainty is that the court is allowed to rely on a presumption in favour of the claimant in cases of a breach of a written or unwritten rule of safety and conduct (*verkeers- en veiligheidsnorm*), meaning a rule that purports to protect the potential victim from physical harm.[53] Consequently, in a case like *Sutradhar* v. *NERC*, the court may decide to lighten the burden of proof as far as the claimant is concerned. It will then be the responsibility of the defendant, NERC, to prove that the chain of causation was broken by a subsequent unlawful action or inaction by a third party, in this case the Bangladeshi government.

If proof of the primary causation remains problematic, however, the doctrine of proportional liability (*proportionele aansprakelijkheid*) may provide a solution.[54] This doctrine allows for a deviation from the traditional 'all or nothing' system whereby full damages can be claimed if the causal link between the unlawful behaviour and the damage can be established, and none can be claimed where there is no established link.[55] Under the doctrine of proportional liability, a certain percentage of the damage can be compensated for, calculated according to the extent of the chance that the damage was caused by a certain event. This applies even if primary causation cannot be established with certainty, as may be the case in *Sutradhar* v. *NERC*.

3. Conclusion

Since, as mentioned earlier, the summary trial of *Sutradhar* v. *NERC* did not allow for extensive fact-finding, a discussion of what might be proven and by whom will be

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[51] Art. 150, Wetboek van Burgerlijke Rechtsvordering (Code of Civil Procedure).

[52] The account given by I. GIESEN, n. 47 above, 167–180, is up to date. A short discussion of this rule by W.H. VAN BOOM & I. GIESEN can also be found in B. WINNIGER et al. (eds), *Digest of European Tort Law – Vol. 1: Essential Cases on Natural Causation* (Springer Wien NewYork, 2007), 120–122.

[53] For an elaborate discussion of proof and liability, see I. GIESEN, *Bewijs en aansprakelijkheid* (Boom Juridische Uitgevers, 2001). For a brief discussion of rules of safety and conduct, see C.C. VAN DAM, n. 1 above, 188–189.

[54] This doctrine was explicitly recognized by the Dutch Supreme Court in HR 31 maart 2006, RvdW 2006, 328 (*Nefalit/Karamus*).

[55] This doctrine has more than once played a pivotal role in cases concerning the professional liability of lawyers who had neglected to file a case on time. In these cases, the difficulty lay in proving what would have happened if the cases would have been filed in a timely fashion: HR 19 januari 2007, NJ 2007, 63 (*Kranendonk et al./Maatschap A Advocaten*) and HR 16 februari 2007, Rvd W 2007, 203 (*Gebroeders Tuin Beheer/Maatschap A en mr. X)*. For a more elaborate discussion of proportional liability, see, for instance, C.J.M. KLAASSEN, 'Proportionele aansprakelijkheid: een goede of kwade kans?', *Nederlands Juristenblad*, nr. 22 (1 juni 2007), 1346–1362.

omitted here. What can be said, however, is that if a case like *Sutradhar* v. *NERC* were decided by a Dutch court on the basis of Dutch tort law (which cannot, as explained above, be taken as a given), there are several obstacles on the road to liability, even if the challenged conduct can be said to have been unlawful. Although, in theory, liability might be established, it is still rather unlikely that a Dutch court considering a case such as *Sutradhar* v. *NERC* would sustain Mr Sutradhar's claim. Rather than using the principle of proximity, as the House of Lords did, a Dutch court might instead use the elements of relativity and causation to find an easy way out of a tricky case too remote from existing case law and with too many potential repercussions.

In the end, all the 'ifs' and 'buts' in the foregoing analysis lead to the inescapable conclusion that if we assume, together with Professor van Dam, that indeed 'it is inaccurate information and a lack of information that constitute hazards in the information society', there is still a great deal of ground to be covered by Dutch tort law.