

Produzentenhaftung

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

Von

Dr. Hans Josef Kullmann
Richter am Bundesgerichtshof a. D.

Prof. Dr. Bernhard Pfister
Universität Bayreuth

Karlheinz Stöhr
Richter am Bundesgerichtshof

Prof. Dr. Gerald Spindler
Universität Göttingen

unter Mitarbeit von

- Dr. Dr. Zoltán BÉRCESI, LL. M., Universität Pécs;
Dr. Jörg BINDING, Rechtsanwalt;
Angela DIEDERICHSEN, Richterin am BGH;
Dr. Florian ENDRÖS, Rechtsanwalt, Avocat;
Dr. Martin HACKENBERG, Rechtsanwalt, Fachanwalt für Steuerrecht;
Dr. Stefanie HARTWIG, Rechtsanwältin;
Dr. Matthias KATZENSTEIN, Richter am OLG Stuttgart;
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Product Liability: the Development in the Netherlands

Prof. Dr. Ivo Giesen & Dr. Evelien de Kezel*

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* Ivo Giesen is Professor of Private Law at Utrecht University and Program Director of the *Utrecht Centre for Accountability and Liability Law* (Ucall) in the Netherlands. Evelien de Kezel is Assistant Professor at Utrecht University and Ucall. This paper is an adapted and updated version of I. Giesen, *The development of products liability in the Netherlands*, in: S. Whittaker (ed.), *The Development of Product liability*, Cambridge University Press: Cambridge 2010, p. 152–191. This contribution was finalized in February 2015.

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A. Introduction

The aim of this contribution is to provide the reader with a broad overview of the development of the law in the Netherlands with regard to products liability.¹ It must be stressed from the outset that this development has not been, contrary to popular belief some decades ago, as interesting from a historical point of view or from a point of view of general tort law as it was anticipated. Indeed, much was expected from product liability law, but looking back, and putting it bluntly, product liability has not been the most exciting topic within tort law in the Netherlands.² The line of development of products liability has shown a rise in attention for some short periods of time, but nothing more really. Most major (general) developments in tort law were instigated from developments in other areas of tort, such as asbestos litigation.

¹ This contribution does not primarily focus on the liability based on the European Directive mentioned below (section B.I.). However, dealing with the European Directive will be unavoidable to a great extent when dealing with Dutch law in this respect. We presume its content to be familiar to the reader.

² In terms of *causation*, the ruling in famous *Des*-case by the Dutch Supreme Court (HR 9 October 1992, NJ 1994, 535 with note CJHB) has managed to arouse legal science and practice, but even there, the arousal was temporarily. 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 based on that decision.

In the following section, we will sketch this development (in six phases) of products liability law, especially the crucial element of (the need to establish and/or liability in the absence of) 'fault' (which will be our main focal point) (section B.II.). Thereafter, we will try to give a short overview of possible future trends regarding product liability (section B.III.). We will end this contribution with a short outlook (section C.).

In doing so, we will elaborate upon the state of the law on certain more specific issues, and in some instances we will deal with these more detailed issues in smaller font size.

B. The basic stages of the development of liability for defective products

I. Introduction: contract or tort, strict liability or negligence?

Before going into the details of the development stages of products liability in the Netherlands, it seems wise to make clear from the outset that in the Netherlands products liability – basically understood as the liability of manufacturers/suppliers of products in respect of death, personal injuries and damage to property – is usually approached from the perspective of tort law (art. 6:162 and/or 6:185 ff. of the Dutch Civil Code, *Burgerlijk Wetboek*, hereafter referred to as BW). Of course, general contract law could in principle be invoked³ (especially art. 7:17 BW, dealing with non-conformity of sold goods), 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 personal injury of some sort and whenever such is the case, a contractual fault also constitutes a tort under general tort law⁵ leading to the same damages being awarded. Since the contractual chain usually needs to be 'stretched out' to be able to put in a products liability claim under contract law, it is both easier and safer to make use of tort law instead of contract law.

Furthermore, art. 7:24 BW stipulates that if a good is sold by a professional to a consumer and the defect falls under the scope of art. 6:185 ff. BW, it is not the seller but (solely) the producer that is liable, unless the seller knew or should have known the defect, guaranteed the absence of the defect, or the claim consists of material damage which cannot be claimed under the products liability regulations because the

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

⁴ Cf. G.H.A. Schut, *Onrechtmatige daad*, 5e druk (Deventer: Tjeenk Willink, 1997), p. 124; A.J. Verheij, *Onrechtmatige daad*. Monografie Privaatrecht, 6e druk (Deventer: Kluwer, 2005), p. 4; A.S. Hartkamp, C.H. Sieburgh, Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht. Verbintenissenrecht. Deel III. De verbintenissen uit de wet, 13e druk, (Tjeenk Willink: Deventer, 2011), nr. 257–259

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

damage is less than the minimum amount of 500 Euro.⁶ Given this preference, these days, for a claim in tort, we will primarily focus on tort law in this contribution.

If one indeed approaches the topic from a tort law perspective, art. 6:162 BW constitutes the basis for a claim for products liability under *general* Dutch tort law. This basic tort rule is one of negligence.

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

Under the EC Directive on products liability⁹ (hereafter: the Directive), implemented in the Netherlands in art. 6:185 and further BW, the basic rule, if also applicable,¹⁰ is (or, at least, is thought to be) one of strict liability.¹¹ This could

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

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 (Den Haag: BJu, 2005). See in the context of product liability also S.B. Pape, *Warnings and product liability. Lessons learned from cognitive psychology and ergonomics*, (Den Haag: BJu, 2011); S.B. Pape, "Waarschuwing op producten zijn geen veiligheids wondermiddelen. De implicaties ervan voor productaansprakelijkheid", *TvC* 2012, 5 p. 214-222.

⁸ L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 50. This distinction could become (more) important, though, since the German Supreme Court has decided that the development risk defence is not applicable to manufacturing defects, see BGH 9 May 1995, NJW 1995, 2162, provided of course that the Dutch courts would follow the BGH's lead. Cf. I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 203; L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 40. See also on this case from a Dutch perspective H.N. Schelhaas "Produktaansprakelijkheid en Europees privaatrecht: het ontplofende Duitse mineraalflesje" *NTBR* 2005, p. 204 e.v. and E.H. Hondius "Produktenaansprakelijkheid: de voordelen van een dualistische rechtsorde" *AA* 1996, p. 324-331.

⁹ Directive 85/374/EEG, OJ EC L 210/29. Hereafter, we will not refer to the articles of the Directive as such but to the Dutch articles implementing the Directive in the Netherlands, *i.e.*, artt. 6:185-193 BW.

¹⁰ Both rules can usually be invoked at the same time, but the Directive liability (which does not affect the right to sue under the existing national laws, see art. 6:193 BW) seems to have a more restricted scope of application, see L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 3-4 and p. 31.

¹¹ See ECJ 10 May 2001, C-203/99 (Veefald), *EuZW* 2001, 378 with note Geiger, para. 15, and Commissie van de Europese Gemeenschappen, *Verslag van de Commissie over de toepassing van Richtlijn 85/374 inzake de aansprakelijkheid voor producten met gebreken*, COM (2000) 893 def. (Brussel: 2001), p. 5.

be relevant because, as we will see below (section B.II.6), the Dutch Supreme Court, the *Hoge Raad* (hereafter also referred to as Supreme Court or HR), has gone a long way to merging both liability regimes into one concept.

The strict liability background of the Directive has been questioned, however, in the Netherlands as elsewhere, on the basis of case law of the European Court of Justice (hereafter referred to as ECJ), which seems to have introduced an element of fault into the Directive.¹² In general, products liability is considered to have combined elements of both fault-based liability and strict liability.¹³ Even though art. 6:162 BW generally constitutes a negligence-based liability the same combination of fault and strict liability elements seems to apply to products 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.

Important in this respect is also that according to general tort law, the employer/producer can also be held liable for the wrongful acts of his employees (art. 6:170 BW); this strict liability provision is applied equally if liability under the Directive is invoked. Liability in art. 6:170 BW arises under the conditions that the employee acted wrongfully (his act must constitute a tort in itself), that he was indeed a servant working under instructions of the employer (a labour contract suffices here), and that there was a causal connection between the tort of the employee and the instructions provided by the employer. In order to meet the last requirement, the instructions must have been of such a nature that they provided an opportunity to commit the tort. The first two conditions are usually met quite easily.¹⁵

Of course this line in the case law immediately denotes not only the importance of EU regulations on national law but also the significance of case law in general in the development of Dutch private (and tort) law. The Supreme Court is widely recognized as actually shaping or forming, and not merely finding the law when it decides cases. It is now viewed as one of the law-makers in the Netherlands and its legitimacy in doing so is not seriously questioned anymore.¹⁶

¹² ECJ 23 May 1997, C-300/95 (Commission/UK), Jur. 1997, p. I-2649, NJ 1998, 522, and I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 194 and p. 200-201, where the issue whether or not the Directive liability is (still) a strict liability is discussed.

¹³ See L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 31 and 36; L. Dommering-van Rongen "Product liability in the Netherlands: a European perspective" in E. Hondius (Ed.), *Modern Trends in Tort Law, Dutch and Japanese Law Compared* (The Hague/London/Boston: Kluwer Law International, 1999) p. 135-136, and in general on this issue for example e.g. C.C. van Dam, *Aansprakelijkheidsrecht, Een grensoverschrijdend handboek* (Den Haag: BJu, 2000), nos. 1002-1004.

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 G.H.A. Schut, *Onrechtmatige daad, 5e druk* (Deventer: Tjeenk Willink, 1997), p. 126.

¹⁵ See J.W. Hoekzema, *Kwalitatieve aansprakelijkheid voor ondergeschikten en aansprakelijkheid voor eigen onrechtmatige daad*, Ph.D. diss. RuG (Den Haag: BJu, 2000), p. 49-82; C.J.M. Klaassen, *Schadeveroorzakend handelen in functie*, Inaugural lecture KUN (Deventer: Tjeenk Willink, 2000), p. 5 ff.

¹⁶ See for instance I. Giesen, H.N. Schelhaas "Samenwerking bij rechtsvorming" AA 2006, p. 159-172, with further references.

II. The main stages in the development of product liability

1. Introduction: six stages

Products liability in the Netherlands is not a very old topic. Before the 1960's, 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 legal implications thereof.¹⁷ Products liability was 'growing up' and a relatively famous case was decided in 1966. This however, is not to say that nothing happened before roughly 1960. Thus, the first phase in the development of the law of product liability in the Netherlands we would like to consider will be the period up and until 1960. In that period for instance the first claim about a defective automobile made its way into the courts (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)¹⁸ while the year after an important book on product liability by Schut appeared. These events then mark the start of the third phase, which lasted until 1985, the year of the introduction of the EC Directive. In this third phase products liability as a distinct area of tort law found its place within private law. It settled, so to speak.

The next, fourth period (starting in 1985) in which the EC Directive was implemented and written on, under the expectation that a legal 'gold mine' had been found. It continued until the mid-nineties (1996), after which the fifth period, the period of case law on products liability, started. From 2000 onwards the (sixth) period of relative ease has commenced: there are no major developments since then, no big cases or important pieces of legislation, while the doctrinal works appear to be less concerned with the topic.

In sum, we would thus subdivide Dutch legal development of products liability in six phases: the early stage (until 1960), the development stage (1960–1973), the settling stage (1973–1985), the EC-gold rush stage (1985–1992), the case law stage (1992–2000), and the easement stage (2000 and onwards). In that last subsection (B.II.7.), we will thus also sketch the latest (absence of major) developments, before turning to some possible future trends in section B.III.

¹⁷ See G.H.A. Schut, *Productenaansprakelijkheid* (Zwolle: Tjeenk Willink, 1974), nr. 120.

¹⁸ HR 2 February 1973, NJ 1973, 315 with note HB (Leaking Water Bottle).

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 1960 or so. Two rather distinctive events, i. e. court decisions, worth mentioning here did however occur in that period.¹⁹

In 1933 a case was decided which would nowadays have been seen as a products 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 Supreme Court decided the defendant had breached its 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.²⁰ In his case note, Meijers relates this decision to the famous Dutch *Lindenbaum/Cohen* case in which the Dutch rule on negligence (Art. 1401 former BW) was widened so as to include the breach of unwritten standards of good conduct within society as unlawful.²¹

It might seem somewhat surprising that the development of products liability started so late in the Netherlands given that many of the reasons for taking up products liability in the first place (such as mass production by machines and selling the goods to consumers unaware of possible defects) had been present ever since the start of the industrial revolution while that same industrial revolution led to many profound changes earlier on (around 1900) in relation to for instance the law on industrial accidents and occupational diseases and on the rules in relation to workplaces.²² Our guess would be that taking care of the protection for person fabricating the products in question was then considered more important than concern for third parties buying or using 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 which 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 takes part in traffic that has a fabrication defect that will jeopardize the safety within traffic to a considerable extent. Of course it is understandable that those who work

¹⁹ That is not to say there was no other case law whatsoever, see C.E.C. Jansen, J.H. Duyvensz "Productenaansprakelijkheid en voorgeschreven ondeugdelijk materiaal sinds het Mollenkit-arrest" NTBR 2001, p. 403, note 3, for references, and G.H.A. Schut, *Productenaansprakelijkheid* (Zwolle: Tjeenk Willink, 1974), nr. 128. The two case mentioned here are however the most important ones.

²⁰ See HR 6 April 1933, NJ 1933, 881 note Meijers (Zootjes/Loos).

²¹ See the note accompanying HR 6 April 1933, NJ 1933, 881 with note EMM (Zootjes/Loos), which refers to HR 31 January 1919, NJ 1919, 961 (*Lindenbaum/Cohen*).

²² Advocated in the Netherlands, amongst others, by the eminent scholar P. Scholten, *Schadevergoeding buiten overeenkomst en onrechtmatige daad* (Amsterdam: Ph.D thesis, 1899).

with the component in question do not notice such a failure in a mass fabrication 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.²³ Especially the courts' revelations on the background (failures will be made and overlooked) and the spreading of the risks thereof are interesting.

3. The development stage (1960–1973)

After 1960, products liability really started becoming an issue. Schut has described the reasons for this rather sudden development as follows. First, between 1960 and 1962 the prescription to and use of the drug called (in the Netherlands) *Softenon* (elsewhere also known as *Thalidomide*) by pregnant women lead to many cases of severe disabilities for 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 itches amongst its users and the butter had to be withdrawn from the market. The uproar in society after both of these tragic incidents lead to an increase in thinking about products, the dangers they can bring about and the legal implications thereof but not to specific cases on these issues.²⁴

Some big stories dealing with defective products draw a lot of attention, such as the *Softenon* and *Planta*-affaire, the *Exota*-affaire, the famous *Des*-case, and claims against the tobacco industry.²⁵ In recent years, there was a lot of attention for the massive number of claims against insurance companies in light of the financial crisis, which were framed in product liability terminology.²⁶ For the most part however, products liability does not really seem to draw a lot of attention in the Netherlands. Politicians, as always, only take an interest in products liability in those cases where exposure to publicity is high,²⁷ trying to reap some political benefits. Consumer groups tend to be more and more permanently interested and are rather alert to signs of mishaps. Their active involvement in dangers arising from defective pro-

²³ Hof Amsterdam 27 June 1957, NJ 1958, 104 (Ford/Den Ouden).

²⁴ None of the incidents mentioned lead to published case law, although damages were supplied to the victims. See further on the handling of these events G.H.A. Schut, *Productenaansprakelijkheid* (Zwolle: Tjeenk Willink, 1974), nr. 21 and 51.

²⁵ In the 1980's and 1990's, the problems with the drug *Des* received a lot of attention. This did lead to case law, see HR 9 October 1992, NJ 1994, 535 with note CJHB (*Des*) and section B.III. below. The *Exota*-affaire was about the danger of exploding *exota*-bottles, which received a lot of media attention. See also L. Dommering-van Rongen "Product liability in the Netherlands: a European perspective" in E. Hondius (Ed.), *Modern Trends in Tort Law, Dutch and Japanese Law Compared* (The Hague/London/Boston: Kluwer Law International, 1999) p. 135–145, p. 135; L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 202.

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

²⁷ Such as those mentioned before.

ducts is probably one of the reasons why product recall has gained so much importance over the years.²⁸

Second, 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: 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 products liability.²⁹

In this respect, it is worth noting that as always and, probably everywhere, the availability of insurance has a profound impact on tort law and damage awards. Without insurance, liability law, including products liability, would be nowhere at all. However, 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 given, it does not *ground* liability. Be that as it may, the presence of insurance is still highly important, but only on 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 products liability but for all forms of liability.

Next to these historical landmarks, one could mention that in those days the first legal articles on the topic of products liability were published as well.³⁰ Products liability was 'growing up' now. Not unimportantly, a relatively famous case was decided in 1966. A municipality instructed a building company, working on a sewer system to use 'HIM-moffenkit' as a means to connect the different parts of the sewer pipelines. The municipality decided to use this kit because of publicity materials supplied by HIM they had seen. The building company did so, but as it turned out, the kit was not functioning properly, leading to leaks. The municipality sued the manufacturer for the cost of repair. The Supreme Court decided³¹ that in the circumstances of the case at hand, the delivery of the inadequate material constituted a tort. Because the municipality has, in reliance on the advertisements of the manufacturer, obliged the builder to use the material in question, it can claim a breach of duty by the manufacturer by 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* (and not also or necessarily dangerous) product on the market could be unlawful. The Supreme Court decided that putting a defective product on the market is as such not unlawful, but it

²⁸ See section B.II.7.

²⁹ See G.H.A. Schut, *Productenaansprakelijkheid* (Zwolle: Tjeenk Willink, 1974), nr. 120 and nr. 134 on the new Civil Code article.

³⁰ See the list of literature in G.H.A. Schut, *Productenaansprakelijkheid* (Zwolle: Tjeenk Willink, 1974), nr. 119.

³¹ See HR 25 March 1966, NJ 1966, 279 with note GJS (Moffenkit).

could still be unlawful through other circumstances, such as, for instance in the case at hand, advertising by the producer.³² The HR thus showed some reluctance as regards widening the area of products liability – other circumstances are needed – but this line in the case law has been abandoned later, widening the scope of liability and robbing the case at hand from much of its importance.³³

Another relevant aspect is that the use that has been made of the product must have been 'regular use'.³⁴ 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.³⁵

4. The settling stage (1973–1985)

A relatively well-known case on products liability was decided in 1973 by the Supreme Court (dealing with a hot-water bottle for babies) while the year after the important book by Schut on the topic of products liability appeared.³⁶ And so, products liability seemed to be settling as a topic within the broader domain of tort law.

The case we referred to was the case of the leaking hot-water bottle.³⁷ It concerned the following facts. A hot-water bottle was placed in the crib of a baby, but it started leaking, leading to severe burn wounds for the baby. The manufacturer of the bottle was sued and the Supreme Court 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 on, the case got to be relatively important³⁸ because of the possible implications it had for the burden of proof as regards the (subjective) fault of the producer.³⁹ The case was and is read as

³² On the aspect of additional circumstances, see also G.H.A. Schut, *Productenaansprakelijkheid* (Zwolle: Tjeenk Willink, 1974), nr. 128.

³³ See C.E.C. Jansen, J.H. Duyvensz "Productenaansprakelijkheid en voorgeschreven ondeugdelijk materiaal sinds het Moffenkit-arrest" NTBR 2001, p. 403; I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 217–218.

³⁴ G.H.A. Schut, *Productenaansprakelijkheid* (Zwolle: Tjeenk Willink, 1974), nr. 128, at p. 234.

³⁵ G.H.A. Schut, *Productenaansprakelijkheid* (Zwolle: Tjeenk Willink, 1974), nr. 129, and HR 2 February 1973, NJ 1973, 315 with note HB (Leaking water bottle).

³⁶ We are referring here to G.H.A. Schut, *Productenaansprakelijkheid* (Zwolle: Tjeenk Willink, 1974).

³⁷ HR 2 February 1973, NJ 1973, 315 with note HB (Leaking Water Bottle).

³⁸ In 1974, G.H.A. Schut, *Productenaansprakelijkheid* (Zwolle: Tjeenk Willink, 1974), nr. 120 did not think of this as a landmark decision.

³⁹ This line of development would be consistent with the line of development of rules on liability law in general that J.M. Barendrecht "De toekomst van het aansprakelijkheidsrecht" in J.M. Barendrecht en E. Bauw (red.), *Privaatrecht in de 21e eeuw. Aansprakelijkheidsrecht* (Deventer: Kluwer 1999) has sketched.

placing the burden of proof on the producer instead of the victim, in line with what was decided earlier on in the famous *Hühnerpest-Urteil* in Germany.⁴⁰

As regards the burden of proof, art 6:188 BW clearly states that, under the regime of the Directive, the plaintiff will have to prove all the elements of the claim, *i. e.*, the defect, the damage, and the causal connection between those two. Applicability of one of the defences under art. 6:185 under 1 BW is to be proven by the defendant.⁴¹

In principle, the same division of the burden of proof applies if the action is based on general tort law.⁴² This certainly holds true when one considers the element of (the existence of) damage.⁴³ In products liability cases based on general tort law, however, a 'reversal' of the burden of proof is possible (a) with regard to the 'defect' (the element of wrongfulness), (b) with regard to causation, and (c) with regard to the subjective fault.

As for the defect (a), the HR considers that if a plaintiff proves that he opened a bottle, which then exploded, in a normal fashion, that state of affairs would lead to the factual presumption that the damage must have been caused by a defect in the bottle. The producer may rebut this presumption.⁴⁴ On a more abstract level, it is possible to state the rule deductible from this case as follows: if a party proves that he used the product in a normal fashion, but an unexpected damaging event nevertheless occurred, the product is presumed to have been defective.⁴⁵

In the field of causation (b), a victim friendly rule on the burden of proof has gained momentum over the last decades. 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.⁴⁶ The Supreme Court has never declared that rule (which constitutes a factual presumption, not a reversal of the burden

⁴⁰ BGH 28 November 1968, BGHZ 51, 91; NJW 1969, 269.

⁴¹ On this, see Rb. Amsterdam 8 July 2005, JA 2005/82 (A./Meriel), and I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 195 ff. claiming *inter alia* that a reversal of the burden of proof with regard to the national rules on products liability would still be possible after introduction of the Directive. As to causation, this form of reasoning was accepted in Rb. Den Bosch 15 June 2005, JA 2005/69 (A./Organon Nederland) but in light of the more recent case law of the ECJ, see below section B.II.7., this proposition hardly seems defensible anymore.

⁴² On the burden of proof in tort law in general, see I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 113 ff.

⁴³ I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 226.

⁴⁴ 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 I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 228.

⁴⁵ See I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 219-220. Cf. HR 15 March 1996, NJ 1996, 435 (ABR/Kuijt), a case in which the burden of proof with regard to normal use was put on the victim, while, at the same time, the court presumed this normal use to have been present.

⁴⁶ This so-called 'omkeringsregel' was first used in the mid 1970's in cases of traffic accidents and accidents at workplaces, and was widened in its scope of application in the

of proof) to be applicable in the area of products liability, and its widespread use in the late 1990's and early 2000's has been put to a halt, but in our opinion its scope is (still) broad enough to encompass this field, because we are usually dealing with violations of so-called 'safety rules' (legal norms aimed at protection against physical harms).⁴⁷ At least, one should be aware of the possibility that the same rule, which was for instance also applied in cases of services liability,⁴⁸ might be applied in cases of products liability. However, since the exact scope of the rule in question never has been precisely defined and the Supreme Court has been narrowing its scope, certainty cannot be given in this respect.⁴⁹ In lieu thereof, more recent case law has accepted several forms of so-called 'proportional liability' which might be applicable in product liability cases if a presumption of fact cannot be accepted.⁵⁰

With regard to subjective fault (c), it should be noted that this element is still a condition for liability under general tort law,⁵¹ but that, on the other hand,

Dicky Trading II-case (HR 26 January 1996, NJ 1996, 607 with note WMK). See C.C. van Dam, *Aansprakelijkheidsrecht, Een grensoverschrijdend handboek* (Den Haag: BJu, 2000), no. 810; I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 116 ff.; I. Giesen, 'De aantrekkingskracht van Loreley. Over opkomst en ondergang (?) van de "omkeringsregel"', in: T. Hartlief & S.D. Lindenberg, *Tien pennenstreken over personenschade*, The Hague: Sdu 2009, p. 69–86. The rule and its applicability is still not entirely settled, see below.

⁴⁷ See I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 228; I. Giesen, 'De aantrekkingskracht van Loreley. Over opkomst en ondergang (?) van de "omkeringsregel"', in: T. Hartlief & S.D. Lindenberg, *Tien pennenstreken over personenschade*, The Hague: Sdu 2009, p. 69–86. Contrary to this rule (but too old to still be considered to reflect the law in this respect) is the products liability decision of Hof Den Bosch 13 November 1979, NJ 1980, 370 (Beatrix/Van Weleveld). The rule (rather: presumption) on causation as explained here is still being developed, so it is not possible to give a definite answer to the question whether it can be used in products liability cases. The Appellate Court at Arnhem decided at one point that the 'omkeringsregel' could not be applied to a products liability case because in that case the demands for applying the rule were not met (Hof Arnhem 28 October 2003, NJ 2005, 305 (Koolhaas/Rockwool)). The Supreme Court turned down the appeal (HR 13 May 2005, C04/076 (Koolhaas e.a./Rockwool)) without deciding on the merits.

⁴⁸ 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, I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 116–119; I. Giesen, *Bewijslastverdeling bij beroepsaansprakelijkheid*, (Deventer: Tjeenk Willink, 1999), p. 66 ff.

⁴⁹ See I. Giesen, *Aansprakelijkheid en toezicht* (Deventer: Kluwer, 2005), p. 204–209; I. Giesen, 'De aantrekkingskracht van Loreley. Over opkomst en ondergang (?) van de "omkeringsregel"', in: T. Hartlief & S.D. Lindenberg, *Tien pennenstreken over personenschade*, The Hague: Sdu 2009, p. 69–86. The uncertainty has not been taken away since, but at this moment we are still tempted to say that the rule is back to its roots, being a presumption of causation if the breach of a traffic or safety rule has been proven.

⁵⁰ We will just refer here to HR 31 March 2006, NJ 2011, 250 with note T.F.E. Tjong Tjin Tai (Nefalit/Karamus); HR 24 December 2010, NJ 2011, 251 with note T.F.E. Tjong Tjin Tai (*Fortis/Bourgonje*), and HR 21 December 2012, NJ 2013, 237 (B. & Deloitte/H. and H.&H.).

⁵¹ The role of fault in other areas is almost extinct, cf. A.J. Verheij, *Onrechtmatige daad. Monografie Privaatrecht*, 6e druk (Deventer: Kluwer, 2005), p. 48, but not with regard

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.⁵²

To conclude, in the case of an exploding bottle (*Leebeek/Vrumona*),⁵³ the HR has made clear that in order to escape liability, the defendant must prove that: a) the defect was not present prior to the marketing of the product; b) the defect could not have been discovered at an earlier date; and c) the product was not used in accordance with its intended use. Finally, if the defendant argues that there was (some form of) contributory negligence on the part of the plaintiff, he needs to prove that as well.⁵⁴

5. The EC-gold rush stage (1985–1996)

According to art. 6:186 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 bit on the Dutch implementation of the Directive, one could point first to the fact that products liability, in general, only rests on the person putting the product into circulation. This rule is accepted under the Directive liability but also under the general tort rule.⁵⁵ Under the regime of the Directive, the 'producer' is potentially liable for the damage the product has caused, unless he proves that he did

to products liability, see I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 233, with further references, and for instance HR 25 March 1966, NJ 1966, 279 with note GJS (Moffenkit) and HR 22 October 1999, NJ 2000, 159 with note ARB (Koolhaas/Rockwool). See also G.H.A. Schut, *Productenaansprakelijkheid* (Zwolle: Tjeenk Willink, 1974), nr. 131 and 43 (on proof).

⁵² I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 232–233, mentions several opinions on the status of the law in this respect. All opinions (at least) place more than the usual evidential burden on the defendant. The discussion focuses on whether there is a reversal of the burden of proof (based on HR 2 February 1973, NJ 1973, 315 with note HB (Leaking water bottle), applied in Hof Den Bosch 18 January 1995, TvC 1995, 207 (W./Hero)), as Giesen thinks, or a factual presumption of fault, see for instance Hof Den Bosch 16 April 1974, NJ 1974, 357 (Maaslandgas/De Marco), or only an obligation for the defendant to supply the plaintiff with sources and materials with which he can try to start proving his claim (based on HR 6 December 1996, NJ 1997, 219 (DuPont/Hermans); see also J.M. Barendrecht & J.H. Duyvensz "Productenaansprakelijkheid tegenover niet-consumenten" WPNR 6390/6391 (2000), p. 117–123).

⁵³ HR 24 December 1993, NJ 1994, 214 (Leebeek/Vrumona). See also J. Spier & A.T. Bolt (m.v.v. O.A. Haazen), *De uitdijende reikwijdte van de aansprakelijkheid uit onrechtmatige daad*. *Handelingen NJV*, 1996-I (Zwolle: Tjeenk Willink, 1996), p. 240–241.

⁵⁴ See I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 219–220, and p. 234–235.

⁵⁵ HR 6 December 1996, NJ 1997, 219 (DuPont/Hermans); L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 73.

not bring the product on the market (art. 6:185 para. 1 sub a BW). This is different under general tort law where the plaintiff will have to prove that the producer brought the product on the market.⁵⁶ What exactly falls under the definition of 'bringing the product on the market' has remained rather vague, however.⁵⁷ Passing something on in the chain of distribution has been used as a definition in this respect, at least for Dutch general tort law.⁵⁸

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.⁵⁹ The same rule applies, as far as liability under the Directive goes, to those presenting themselves as producer by placing their name, trademark or other distinguishing mark on the product (art. 6:187 para. 2 BW), and to the party that imported the product into the European Economic Area (*i.e.*, into the European Union, Norway, Iceland, or Liechtenstein, cf. art. 6:187 para. 3 BW). Finally, the supplier of the product will be considered to be the producer if it cannot be determined who the producer is, unless the supplier mentions, within a reasonable time, the identity of the person from whom he had bought the product (art. 6:187 para. 4 BW).⁶⁰ Under general tort law, similar rules most likely will be applied.⁶¹ 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.⁶² The retail seller of a product can be held liable under the contract of sale, but, for reasons explained above, this is rare.⁶³

There were not a lot of cases coming to the courts in those years however, so attention was given primarily to the Directive. In the legal literature, the issue of products liability was now taken up extensively, leading to several books and even more law journal articles.⁶⁴ Scholars thought – at least with hindsight, that's what it looks like – that the area of products liability was 'big busi-

⁵⁶ I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 218, and p. 229.

⁵⁷ L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 73 ff. On that issue on a European level, see ECJ 9 February 2006, C-127-04.; NJ 2006, 401 (O'Byrne v Sanofi Pasteur). See also A.Ch.H. Franken, *Productaansprakelijkheid in concernverband, AV&S 2010*, p. 47 ff.

⁵⁸ Hof Leeuwarden 18 March 1998, NJ 1998, 867 (Tetra Werke/Kuiper).

⁵⁹ HR 22 October 1999, NJ 2000, 159 with note ARB (Koolhaas/Rockwool); L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 80 ff.

⁶⁰ Handing over a copy of a bill will suffice in this respect, see HR 22 September 2000, NJ 2000, 644 (Haagman/VSCI).

⁶¹ On the liability of an importer, see Hof Den Bosch 14 January 1997, A&V 1997/6, 158 with note PK (Aerts/Helm).

⁶² 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, C-402/03) (a supplier can be held responsible for the producers' fault-based liability but not for his Directive based no-fault liability).

⁶³ See section B.1.

⁶⁴ We will mention a few books: G.M.F. Snijders, *Produktveiligheid en aansprakelijkheid* (Deventer: Kluwer, 1987); M. van Empel, H.A. Ritsema, *Aansprakelijkheid voor produkten* (Deventer: Kluwer, 1987); H.G. Punt, *Produktenaansprakelijkheid* (Deventer: Kluwer, 1988); D.W.F. Verkade, M.Ph. van Sint Truiden, J.C.F. Maassen, *Produkt in gebreke*, (Alphen aan de Rijn: Samson H.D. Tjeenk Willink, 1990); M.M.P.C. Mandigers, R.R.M. de Moor, C.J.C.M. Oomen, *Produkt en aansprakelijkheid* (Lelystad: Vermande, 1991); L. Dommering-van Rongen, *Produktenaansprakelijkheid* (Deventer: Kluwer, 1991) and R.J.J. Westerdijk, *Produktenaansprakelijkheid voor software*, Ph.D. diss. VU (Deventer: Kluwer, 1995).

ness', hence the use of the term 'gold rush'. Again, with hindsight, this proved to be wrong, because in practice, products liability was not really a big issue (see below at section B.II. 7.).

Around the time of the implementation of the EC Directive the *process* of enacting this European set of rules was not considered something to be very special, at least as far as we can recall. This was particularly the case since 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 as to the need for harmonisation, for instance from a law & economics point of view, answered negatively, was only raised afterwards.⁶⁵ 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 a debate did not spark 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.

6. The case law stage (1996–2000)

The case law stage actually started a bit 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 BW⁶⁶ if it does not offer the safety a consumer/user is entitled to expect, given the circumstances of the case.⁶⁷ This case became especially important later on by the court 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.⁶⁸ In the case of *Dupont/Hermans*,⁶⁹ 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

⁶⁵ M. Faure "Productaansprakelijkheid in Europa: kritische rechtseconomische reflecties" AV&S 2004, p. 3–12. The low practical impact of products liability in the Netherlands could be construed as supporting this position (*ibid.*, at p. 10 and 11).

⁶⁶ This concerns tort law. In contract law, case law is (also) very strict, see below section B.II.7.

⁶⁷ HR 30 June 1989, NJ 1990, 652 with note CJHB (Halcion).

⁶⁸ 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 & J.H. Duyvensz "Productaansprakelijkheid tegenover niet-consumenten" WPNR 6390/6391 (2000), p. 117–123 and p. 135–142, p. 121, also see this as a usually more narrow criterion.

⁶⁹ HR 6 December 1996, NJ 1997, 219 (DuPont/Hermans).

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 here (more or less) united the standard for wrongfulness under general tort law with the standard for liability under the Directive.⁷⁰ Under the older case law, a form of the risk/utility test seemed to prevail.⁷¹ 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 B.II.3.), is no longer valid.

To be sure, 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.⁷² This line of reasoning is somewhat strange however, because the Supreme Court is not so strict in the division of these two elements outside the area of products liability. Wrongfulness and fault usually are taken and judged upon as one, without the courts strictly delimiting both elements.⁷³ 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 B.II.4.) while at the same time subjective fault is judged more and more to an objective standard, even in products liability cases, making the distinction with strict liability (such as the Directive liability) less big.⁷⁴

This unification of standards also means 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 products liability law has been

⁷⁰ See on this 'spill-over'-effect W. van Gerven "A Common Law for Europe: The Future Meeting the Past?" ERPL 2001, volume 4. See also Hof Leeuwarden 18 March 1998, NJ 1998, 867 (Tetra Werke/Kuiper); J. Spier & A.T. Bolt (m.m.v. O.A. Haazen), reikwijdte van de aansprakelijkheid uit onrechtmatige daad. *Handelingen NJV*, 1996-I (Zwolle: Tjeenk Willink, 1996), p. 239; Bloembergen, case note under HR 22 October 1999, NJ 2000, 159 (Koolhaas/Rockwool), para. 4; I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 217, and L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 32. The difference between both systems is that in general tort law, subjective fault is also required, see below.

⁷¹ L. Dommering-van Rongen "Product liability in the Netherlands: a European perspective" in E. Hondius (Ed.), *Modern Trends in Tort Law, Dutch and Japanese Law Compared* (The Hague/London/Boston: Kluwer Law International, 1999) p. 135-145, p. 140.

⁷² See HR 2 February 1973, NJ 1973, 315 with note HB (Leaking Water Bottle).

⁷³ A.J. Verheij, *Onrechtmatige daad, Monografie Privaatrecht*, 6e druk (Deventer: Kluwer, 2005), p. 48.

⁷⁴ See G.H.A. Schut, *Productenaansprakelijkheid* (Zwolle: Tjeenk Willink, 1974), nr. 131, especially p. 246, and nr. 31 on the move towards objectiveness of subjective fault, A.J. Verheij, *Onrechtmatige daad, Monografie Privaatrecht*, 6e druk (Deventer: Kluwer, 2005), p. 48, and section B.III, below.

duty to act (*i. e.*, to warn or to take the product off the market) is generally acknowledged and accepted.⁸⁴

The relative lack of products liability claims reaching the courts might also be due to the fact that since the market for many products is usually rather international, most producers tend to take the precautions needed for the most demanding market (which would most probably be the US market). Therefore, they take more precautions than needed according to Dutch law 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.⁸⁵ Focussing 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,⁸⁶ or that the rules on products liability are clear, which would facilitate negotiations and settlements, thus preventing those claims from going to court.⁸⁷ 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).⁸⁸ At least with regard to the number of product recalls, the fear of losing goodwill seems to be rather decisive.⁸⁹

⁸⁴ See generally P. Kuipers "Aansprakelijkheid voor 'terughaalschade' en waarschuwingplichten van de producent bij (mogelijke) product recall" AV&S 2001, p. 99-111; Chr.F. Kroes "Product recall" AV&S 2004, p. 166-175; L. Dommering-van Rongen "Product liability in the Netherlands: a European perspective" in E. Hondius (Ed.), *Modern Trends in Tort Law, Dutch and Japanese Law Compared* (The Hague/London/Boston: Kluwer Law International, 1999) p. 135-145, p. 145, as well as L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 97 ff., on the legal basis of such recall duties, and, for instance, Rb. Alkmaar 30 December 1999, NJ 2000, 728 (Vlaar/Polderman), stating that the recall of defective cars (the defect showing up in certain serial numbers) should not be confined to informing the (present day) dealers of that car branch, but should also be aimed at informing all buyers of a car with those serial numbers. See also HR 2 May 1997, NJ 1998, 281 with note MMM (Forbo/Centraal Beheer) stating that not issuing a warning could make the producer liable. More reluctant towards accepting recall duties is J. Spier & A.T. Bolt (m.m.v. O.A. Haazen), *De uitdijende reikwijdte van de aansprakelijkheid uit onrechtmatige daad*. Handelingen NJV, 1996-I (Zwolle: Tjeenk Willink, 1996), p. 244-245.

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

⁸⁶ See *Kamerstukken II* 1999/00, 22.112, no. 134, p. 4. A hint in that direction might also be that, as is claimed, insurance premiums for producers went up 15% after the introduction of the Directive, see K.J. Groffen "The Netherlands" in D. Campbell (ed.), *International Product Liability* (London: Lloyd's of London Press, 1993), p. 392.

⁸⁷ Cf. G.I. Arnokourous "Product safety and product liability in Europe: A time for revision", TvC 2001, p. 10-15, p. 14.

⁸⁸ Cf. Commissie van de Europese Gemeenschappen, *Verslag van de Commissie over de toepassing van Richtlijn 85/374 inzake de aansprakelijkheid voor producten met gebreken*, COM (2000) 893 def. (Brussel: 2001), p. 10.

⁸⁹ See J. Spier & A.T. Bolt (m.m.v. O.A. Haazen), *De uitdijende reikwijdte van de aansprakelijkheid uit onrechtmatige daad*. Handelingen NJV, 1996-I (Zwolle: Tjeenk Willink, 1996), p. 244.

There is no evidence that the number of lawsuits has risen after the introduction of the European Directive.⁹⁰ Even the growing attention for claims against tobacco producers⁹¹ has not generated a lot of litigation, but that was due to the lack of success for these claims. The fact that a claim for defective agricultural products has been possible from 2005 onwards (liability in relation to GMO's), has not had any effect either. It is also remarkable that, whereas the presence of an important number of Q-fever patients in 2013 drew a lot of public and media attention, claims for compensation against goat farmers were not very successful so far.⁹²

As to the issue of *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 BW, the plaintiff can claim damages in case of death or personal injury,⁹³ and for damage to property other than the product itself, intended for use in a private setting and exceeding the amount of 500 Euro. Neither damage relating to the defective product itself nor to products used in a professional setting,⁹⁴ nor pure economic loss⁹⁵ are recoverable under the Directive.

Under general tort law, the rules on compensation for damage are laid down in art. 6:95–110 BW. Damage that should be compensated for (whenever it has been determined that there is a right to damages) includes physical and economic loss (loss suffered and profits not gained), and other disadvantages, such as immaterial

⁹⁰ Cf. J. Spier & A.T. Bolt (m.m.v. O.A. Haazen), *De uitdijende reikwijdte van de aansprakelijkheid uit onrechtmatige daad*. Handelingen NJV, 1996-I (Zwolle: Tjeenk Willink, 1996), p. 33; L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 202–203. See also the remarks of the European Commission, *Commissie van de Europese Gemeenschappen, Eerste verslag over de toepassing van de Richtlijn van de raad betreffende de onderlinge aanpassing van de wettelijke en bestuursrechtelijke bepalingen der Lidstaten inzake de aansprakelijkheid voor producten met gebreken*, (85/374 EEG), COM (95) 617 def. (Brussel: 1995), p. 2, and K.J. Groffen "The Netherlands" in D. Campbell (ed.), *International Product Liability* (London: Lloyd's of London Press, 1993), p. 393.

⁹¹ Cf. Stichting Personenschade Instituut van Verzekeraars PIV, *Jaarverslag 2000* (Den Haag: 2001), p. 5. See on tobacco claims, amongst others, A.L.M. Keirse "Rokers hebben er tabak van!" AA 2000, p. 252–259 and p. 424–434; L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 115 ff.; I. Giesen, "Sommige procespartijen zijn 'more equal than others'. De macht van de tabaksindustrie en de Nederlandse rechtspleging", in: N. Doornbos (e.a.) (red.), *Rechtspraak van buiten. Liber Amicorum Prof. dr. J.F. Bruinsma*, (Deventer: Kluwer, 2010), p. 19–28, as well as Rb. Amsterdam 17 December 2008, NJ 2009, 311 (Römer/BAT) (denying the claim against the tobacco industry) and Hof Leeuwarden 25 October 2000, NJkort 2000, 98 (Ter Schegget/Niemeijer) (dealing with preliminary questions on tobacco liability only). So far, in the Netherlands only the asbestos litigation has massively changed the thresholds for access to compensation for (asbestos) victims, with respect to prescription rules (access to courts), duty of care, causation issues and the discovery of new forms of damage (e.g. pleural plaques and the fear of contracting asbestos diseases). See in general E. de Kezel, *Asbest, gezondheid en veiligheid* (Antwerpen: Intersentia, 2013).

⁹² I. Haazen, "Q-koorts in Nederland: wie is aansprakelijk voor de gezondheidsschade?", *NTBR* 2011, 57.

⁹³ Further details are laid down in the general tort law on the obligation to pay damages, most notably in art. 6:95 ff., especially 6:107 and 6:108 BW.

⁹⁴ L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 135 ff., and p. 143.

⁹⁵ Cf. P. Cane, *Atiyah's Accidents, Compensation and the Law*, 6th ed. (London: Butterworths, 1999), p. 85.

losses.⁹⁶ In principle, all losses suffered should be fully reimbursed, irrespective of the type of injury that occurred. There are thus no specific rules limiting compensation according to the type of injury in products liability cases. This means that not only physical harm (personal injury) and damage to property (either to the defective product or to other goods) is recoverable under Dutch law, but also pure economic loss.⁹⁷

All kinds of damages that have been recognised under Dutch law are thus also available in products liability cases, at least if the claim is based on general tort law. This excludes punitive damages since Dutch law does not recognise this form of damages.⁹⁸ Damages for non-pecuniary losses (pain and suffering) are, with certain restrictions, recoverable (art. 6:106 BW).⁹⁹ 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.¹⁰⁰ Under Dutch law, such losses therefore are in principle recoverable. However, in a decision of the Court of Appeal 's-Hertogenbosch from 2009¹⁰¹, it was decided that under article 6:190 BW no compensation for non-pecuniary losses can be awarded, in case where there is no physical harm sustained by the consumer.

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 products liability.¹⁰² The possibility provided by the Directive (in art. 16) of instituting such a cap or limit for products liability cases has not been followed. Art. 6:110 BW does recognise the possibility of installing, by Royal Decree, a limit on the amount of damages that can be recovered, but that possibility has only once been used so far (on companies providing safety services at airports after 9/11, since their insurance possibilities were absent). One should realise, however, that the court does have the discretionary power

⁹⁶ See artt. 6:95, 96 and 106 BW.

⁹⁷ Since articles 6:95–110 BW apply to contractual and tortious claims alike, the same would apply if, by way of exception, the claim were to be based on contract law. See J.M. Barendrecht & J.H. Duyvensz "Productenaansprakelijkheid tegenover niet-consumenten" WPNR 6390/6391 (2000), p. 117–123 and p. 135–142, p. 135 ff., and especially p. 139–140, and J.M. Barendrecht "Pure economic loss in the Netherlands" in E.H. Hondius (ed.), *Netherlands Reports to the Fifteenth International Congress of Comparative Law* (Intersentia: Antwerpen/Groningen, 1998) p. 115 ff., on pure economic loss under Dutch law in general, and p. 123–124, on products liability. It is believed, however, that compensation of loss due to personal injury will be granted more easily than loss due to property damage, see J. Spier & A.T. Bolt (m.m.v. O.A. Haazen), *De uitdijende reikwijdte van de aansprakelijkheid uit onrechtmatige daad*. Handelingen NJV, 1996-I (Zwolle: Tjeenk Willink, 1996), p. 242–243.

⁹⁸ Although the question whether punitive damages should be accepted under Dutch law is discussed in doctrinal works, the general view is that such should not be the case. See for instance L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 200. This might be changing however, see R.C. Meurkens, *Punitive Damages: The civil Remedy in American Law, Lessons and Caveats for Continental Europe* (Deventer: Kluwer, 2014).

⁹⁹ On calculating the amount of these damages, see above section B.II.7.

¹⁰⁰ See art. 9 of the Directive; R.J.J. Westerdijk, *Productenaansprakelijkheid voor software*, Ph.D. diss. VU (Deventer: Kluwer, 1995), p. 45; L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 135 and p. 137; Commissie van de Europese Gemeenschappen, *Groenboek Wettelijk aansprakelijkheid voor producten met gebreken*, COM (1999) 396 def. (Brussel: 1999), p. 30; ECJ 10 May 2001, C-203/99 (Veefald), *EuZW* 2001, 378 with note Geiger, paras. 29 and 32.

¹⁰¹ Hof 's-Hertogenbosch 1 September 2009, ECLI:NL:GHSHE:2009:BJ7299.

¹⁰² Leaving aside the franchise of 500 Euro for damage to property used in a private setting. See above.

to limit an award in a specific case on the basis of equity and reasonableness (see art. 6:109 BW) if it feels that granting the full amount of damages that would normally be recoverable, would lead to unacceptable consequences, given the nature of the liability, the legal relationship between the parties, and their mutual financial capacities. The court can only lower the award to the level at which insurance is or should have been available.¹⁰³ The HR has warned lower courts to be very cautious when using this power,¹⁰⁴ 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,¹⁰⁵ the ECJ made clear that, although the precise interpretation and meaning of the term 'damages' has been left to the national courts and legislators, the Directive does entail the duty to secure a reasonable and full reimbursement of the damage (both personal injury and property damage) caused by a defective product, since the national laws may not interfere with the useful effect of the Directive. This means that a member State may not limit the categories of recoverable (material) damages.

Looking to the *size of awards*, especially for non-pecuniary losses, art. 6:106 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*). The amount thereof is to be established by the (lower) courts on the basis of equity.¹⁰⁶ In determining what amount is to be awarded, all circumstances need to be taken into account.¹⁰⁷ In a case decided in 1992, the HR stated the following are especially relevant here: the nature of the liability,¹⁰⁸ the nature, duration and intensity of the pain, the suffering and the loss of 'joy of life' sustained by the patient which follow from the act on which the liability is based.¹⁰⁹ The court must further take notice of the amount awarded by other courts in comparable cases, including the highest amounts awarded, taking into account the inflation rate since these cases were decided. The court may also take into account developments regarding the amounts of compensation in other countries, albeit such developments may not be decisive for the amounts to be awarded in the Netherlands.¹¹⁰ In practice, courts, lawyers and insurance companies use the *Smartengeldbundel* as their point of reference. The *Smartengeldbundel* is (now) published every year (with online updates) and contains a listing of amounts of compensation for non-pecuniary damages awarded by courts in certain types of cases over the years.¹¹¹ Generally, the level of compen-

¹⁰³ See L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 146.

¹⁰⁴ See HR 28 May 1999, NJ 1999, 510 (G./H.).

¹⁰⁵ ECJ 10 May 2001, C-203/99 (*Veedfald*), EuZW 2001, 378 with note Geiger, paras. 27–29.

¹⁰⁶ The HR does not touch upon the amount of compensation that is awarded for non-pecuniary losses by the lower courts, see HR 8 July 1992, NJ 1992, 770 (AMC/O.), and HR 17 November 2000, NJ 2001, 215 with note ARB (Druijff/B.C.E. Bouw).

¹⁰⁷ Cf. HR 17 November 2000, NJ 2001, 215 with note ARB (Druijff/B.C.E. Bouw).

¹⁰⁸ For instance: tortious or contractual liability, fault-based or strict liability, or the specific type of liability (employer's liability, traffic liability, products liability or services liability).

¹⁰⁹ Cf. HR 8 July 1992, NJ 1992, 770 (AMC/O.). To that extent also HR 17 November 2000, NJ 2001, 215 with note ARB (Druijff/B.C.E. Bouw), a case in which the liability of a building company towards his wounded employee was invoked. See also S.D. Lindenbergh "De hoogte van het smartengeld in Nederland; een verkenning van de top" VR 1999, p. 131–132.

¹¹⁰ Cf. HR 17 November 2000, NJ 2001, 215 with note ARB (Druijff/B.C.E. Bouw).

¹¹¹ Cf. W.C.T. Weterings, *Vergoeding van letselschade en transactiekosten* (Deventer: Tjeenk Willink, 1999), p. 93–94. The latest (20th) edition is published in 2015 by ANWB, The Hague.

sation for non-pecuniary loss awarded is not all that high in the Netherlands, with claims not exceeding DFL 250,000 (113,445 Euro) for the more severe cases.¹¹² The highest amount was awarded in 1992 in a case of (wrongful) contamination with the HIV-virus; the amount awarded was then DFL 300,000 (136,134 Euro).¹¹³ There is not even a real trend towards higher awards discernible in case law,¹¹⁴ at least not if one makes allowance for the fact that awards rise to compensate for inflation.¹¹⁵

Remarkably, the most important legal decision in this phase of development on defective products seems to have been a case on general contract law.¹¹⁶

To elaborate on this, a few words on general contract law, most notably art. 6:74, 75 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 order¹¹⁷). Liability is then given, unless the seller can rightfully claim that the damage is not accountable to him (*toerekenbaar*). Even if there is no subjective fault, this accountability of the seller can still be present, however, based on the norms in society (*verkeersopvattingen*). To illustrate the extent of this rule on accountability: even if the seller did not know and should not have known of the defect of an industrially made product, the damage is to be borne by him. There are only very specific exceptions to this general rule.¹¹⁸

Of course there have been some cases on products liability in the years after 2000, but the importance of those cases, as said, has been relatively minor.¹¹⁹

¹¹² Cf. S.D. Lindenbergh "De hoogte van het smartengeld in Nederland; een verkenning van de top" VR 1999, p. 129 ff.; T. Hartlief, 'Een steen in stilstand water', NJB 2014 (34), p. 2287. But many more authors are complaining about the amounts of compensation (being too low).

¹¹³ HR 8 July 1992, NJ 1992, 770 (AMC/O.). Cf. S.D. Lindenbergh "De hoogte van het smartengeld in Nederland; een verkenning van de top" VR 1999, p. 129 and 133; T. Hartlief, 'Een steen in stilstand water', NJB 2014 (34), p. 2287.

¹¹⁴ L. Dommering-van Rongen, *Productaansprakelijkheid*, Een rechtsvergelijkend overzicht (Deventer: Kluwer, 2000), p. 203. See also K.J. Groffen "The Netherlands" in D. Campbell (ed.), *International Product Liability* (London: Lloyd's of London Press, 1993), p. 393, and the literature mentioned above.

¹¹⁵ From HR 17 November 2000, NJ 2001, 215 with note ARB (Druifl/B.C.E. Bouw), it becomes clear that the court must take the inflation rate into account when comparing an earlier case with the present claim.

¹¹⁶ HR 27 April 2001, NJ 2002, 213 (Oerlemans Agro/Driessen). Other cases that reached the HR were handled without a judgment on the merits, see HR 9 June 2006, RvdW 2006, 601 (Bayer Cropscience); HR 29 June 2007, ECLI:NL:HR:2007:BA2923 (Cell-pack), and HR 18 October 2013, RvdW 2013, 1253 (X./LUMC), or dealt only with private international law issues, see HR 4 April 2008, NJ 2008, 202 (Zuid-Chemie/Philippo's Mineralenfabriek), or with the general rules on prescription, see HR 2 December 2011, RvdW 2011, 1495 (Nefalit/Schraa). Cf. also C.J.M. van Doorn & S.B. Pape, "Productaansprakelijkheid en productveiligheid 2009–2013", TvC 2014–2, p. 66 ff.

¹¹⁷ See Rb. Alkmaar 30 December 1999, NJ 2000, 728 (Vlaar/Polderman). Of course sales law (art. 7:17 BW) will in such a case also apply.

¹¹⁸ See HR 27 April 2001, NJ 2002, 213 (Oerlemans Agro/Driessen).

¹¹⁹ See above, at note 116, and 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./Meril) 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 case law, see C.J.M. van Doorn & W.H. van Boom, "Productaansprakelijkheid en productveiligheid", TvC 2004, p. 100–106 dealing with for instance cases on an exploding bottle and the use of tampons, and C.J.M. van Doorn & S.B. Pape, "Productaansprakelijkheid

One of the Supreme Court 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, et cetera, was a normal use for which the product was intended, the chemical did not offer the safety one could have expected. Whether or not the product was in conformity with what was expected between Helm AG and its direct purchasers is of no relevance. This means a contractual fault earlier in the chain is no prerequisite for a valid tort claim.¹²⁰

Another important aspect of this case is that the Supreme Court makes it clear that, contrary to the development dealt with above (section B.II.6.), there is still¹²¹ a difference between the general tort 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 thus not a form of strict liability.¹²²

To be sure, not even the development in the case law of the ECJ has changed this phase of tranquillity. The ECJ cases in point have of course been noticed and discussed, at least to some extent, but they have not become all that familiar to the practitioner, we believe.¹²³ Of course, everyone knows the rules on products liability in the Civil code are European by nature and those who write on it take this into account,¹²⁴ but that's about as far as the European background goes.

It is quite remarkable that the cases of the ECJ received relatively 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

en productveiligheid 2009–2013", TvC 2014–2, p. 66 ff. Cf. also Hof Arnhem 13 April 2004, NJ 2004, 612 (Eternit Fabrieken/X.) on the duty to warn for the use of asbestos.

¹²⁰ HR 29 November 2002, NJ 2003, 50 (Helm AG/Aerts c.s.), at 3. 6. 3.

¹²¹ The same could be and was concluded from HR 2 February 1973, NJ 1973, 315 with note HB (Leaking Water Bottle).

¹²² HR 29 November 2002, NJ 2003, 50 (Helm AG/Aerts c.s.), at 3. 8. 2.

¹²³ The ECJ cases we mean are of course ECJ 23 May 1997, C-300/95 (Commission/UK), Jur. 1997, p. I-2649, NJ 1998, 522; ECJ 10 May 2001, C-203/99 (Veedfald), EuZW 2001, 378 with note Geiger; ECJ 25 April 2002, C-183/00, [2002] ECR I-3901 (María Victoria González Sánchez/Medicina Asturiana SA); ECJ 25 April 2002, C-52/00, [2002] ECR I-3827 (Commission v France); ECJ 25 April 2002, C-154/00, [2002] ECR I-3879 (Commission v Greece); ECJ 10 January 2006, C-402/03, NJ 2006, 286 (Skov); ECJ 14 March 2006, C-177-04 (Commission v France) ECJ 9 February 2006, C-127/04 (O'Byrne v Sanofi Pasteur) and ECJ 2 December 2009, C-358/08 (Aventis Pasteur v O'Byrne); ECJ 4 June 2009, C-285-08; NJ 2009, 537 (Moteurs Leroy Somers v Dalkia France); ECJ 21 December 2011, C-495/10 (CHU Besancon v Dutruieux).

¹²⁴ See especially A.L.M. Keirse, "Richtlijn 1985/374/EG inzake de aansprakelijkheid voor producten met gebreken", in: A.S. Hartkamp (e.a.), De invloed van het Europese recht op het Nederlandse privaatrecht, Deventer: Kluwer 2014, p. 33 e.v.

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 our full attention. This article states that the Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when the Directive is notified. Or, as most people read it, existing laws and rules on product liability are left as they were. But, the ECJ thought somewhat different and gave the article a quite far-reaching meaning. In three cases decided on the same day, partly dealing with the same topic and partly exact copies of each other,¹²⁵ 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 Products Liability Directive for those topics that the Directive dealt with.¹²⁶ Thus, France was sanctioned for not enacting the Directive properly (ignoring the € 500 franchise; changing the development risk defence and making the distributor liable in the same manner as the producer) just as Greece (no franchise introduced). Given these decisions, the only safe introduction of the Directive into one's own law would be to enact a literal translation. There's not much room to manoeuvre.

Furthermore, it was decided in these cases that art. 13 of the Directive cannot be interpreted as giving the Member States the possibility of maintaining a general system of product liability different from that provided for in the Directive. The Court also says:¹²⁷

31. The reference in Article 13 of the Directive to the rights which an injured person may rely on under the rules of the law of contractual or non-contractual liability must be interpreted as meaning that the system of rules put in place by the Directive, which in Article 4 enables the victim to seek compensation where he proves damage, the defect in the product and the causal link between that defect and the damage, does not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects.

32. Likewise the reference in Article 13 to the rights which an injured person may rely on under a special liability system existing at the time when the Directive was notified must be construed, as is clear from the third clause of the 13th recital thereto, as referring to a specific scheme limited to a given sector of production (see judgments of today in Case C-52/00 *Commission v France* [2002] ECR I-0000, paragraphs 13 to 23, and Case C-154/00 *Commission v Greece* [2002] ECR I-0000, paragraphs 9 to 19).

33. Conversely, a system of producer liability founded on the same basis as that put in place by the Directive and not limited to a given sector of production does not come within any of the systems of liability referred to in Article 13 of the Directive. That provision cannot therefore be relied on in such a case in or-

¹²⁵ ECJ 25 April 2002, C-183/00, [2002] ECR I-3901 (*María Victoria González Sánchez v Medicina Asturiana SA*); ECJ 25 April 2002, C-52/00, [2002] ECR I-3827 (*Commission v France*), and ECJ 25 April 2002, C-154/00, [2002] ECR I-3879 (*Commission v Greece*).

¹²⁶ This is confirmed in ECJ 10 January 2006, C-402/03 (*Skov*). See also A.L.M. Keirse, "Richtlijn 1985/374/EG inzake de aansprakelijkheid voor producten met gebreken", in: A.S. Hartkamp (e.a.), *De invloed van het Europese recht op het Nederlandse privaatrecht*, Deventer: Kluwer 2014, p. 48.

¹²⁷ ECJ 25 April 2002, C-183/00, [2002] ECR I-3901 (*María Victoria González Sánchez v Medicina Asturiana SA*).

der to justify the maintenance in force of national provisions affording greater protection than those of the Directive.

34. The reply to the question raised must therefore be that Article 13 of the Directive must be interpreted as meaning that the rights conferred under the legislation of a Member State on the victims of damage caused by a defective product under a general system of liability having the same basis as that put in place by the Directive may be limited or restricted as a result of the Directive's transposition into the domestic law of that State.

Given this case law one must conclude that enacting a rule that is more profitable for victims, for instance a rule that would relieve the victim from part of the burden of proof (e.g. art. 6:99 BW on alternative causation) is no longer possible for "damage caused by a defective product under a general 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 at success.¹²⁸

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 our view. Introduction of such a rule would not be possible however as part of the art. 6:185 ff. 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?

Other product liability cases that reached the Dutch Supreme Court over the last years have not drawn any major attention from anyone.¹²⁹ One last exception might be found in the case in which the Supreme Court decided that in order to ground liability under art. 6:162 BW for a product this has been put on the market, it is not necessary that the product as such, i.e. the product in general, or the entire species of which the product is but one example, is defective in the sense that it causes damage when used normally for its intended purpose.¹³⁰ As this outcome was no real surprise of course, this case is nowhere near being a big, important, and/or possible shocking case.

III. And now what? Possible future trends ...?

What could be the further direction of Dutch law in this respect? What, if anything, does the future hold for product liability law in the Netherlands? One might speculate somewhat on these topical issues by following two general lines of thought: stricter liability and consumer protection.

¹²⁸ That the difference between fault and no-fault liability is decisive was confirmed in ECJ 10 January 2006, C-402/03 (Skov).

¹²⁹ Of course there are plenty of interesting lower court decisions, see on those case e.g. C.J.M. van Doorn & S.B. Pape, "Productaansprakelijkheid en productveiligheid 2009-2013", TvC 2014-2, p. 66 ff.

¹³⁰ See HR 4 February 2011, NJ 2011, 69 (Amlin/Deutz).

First, are we heading towards a stricter liability or not? On a general level, Dutch society has undergone the industrial revolution much like the other countries surrounding it. It started from a laissez-faire type, liberal society, focussing on the individual. Liability is then based on fault, on an individual making a mistake. Later on, starting around 1900, but most notably after World War II, a more social way of thinking has emerged. Liability can since 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 another.¹³¹

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 products 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, et cetera, also will have to be taken into account.

Next to these societal developments, the more legal aspect of the growth (or, the myth of) the claim 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 missing.

National tort law on products liability however, has not yet gone (and probably will not go) so far as to introduce a real strict liability instead of a negligence 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 products 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 the fabric to make certain goods, but also the buyers of those goods.¹³² Another example of the tendency towards a stricter standard regards the proof of a claim. In that respect, the plaintiff receives help from the courts. How far this helping hand reaches (whether it constitutes a complete reversal of the burden of proof – and if so, with regard to what elements of the claim – or only constitutes a limited rule on the use of presumptions) has not yet been made totally clear by the HR,¹³³ and the literature is divided on the

¹³¹ See G.H.A. Schut, *Productenaansprakelijkheid* (Zwolle: Tjeenk Willink, 1974), nr. 21 ff., for a general account in relation to products liability.

¹³² HR 22 October 1999, NJ 2000, 159 note Bloembergen (*Koolhaas/Rockwool*).

¹³³ To be precise: the case of HR 24 December 1993, NJ 1994, 214 (*Leebeck/Vrumona*) seems to point toward the use of presumptions with regard to the proof of the existence of a defect; the *Dicky Trading II*-case (HR 26 January 1996, NJ 1996, 607 with note

subject.¹³⁴ 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.¹³⁵

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 sub b).¹³⁶ The main arguments for a stricter form of liability of the producer vis-à-vis the consumer seem to be the following: 1) Although it may be unavoidable, and, therefore, not anyone's fault, that occasionally a bad product leaves the factory, the consequences of this should be borne by the manufacturer since he is the only party capable of controlling in any way what leaves the factory; the consumer is not able to check products for safety. 2) The consumer is also without control over the situation in the factory; what goes on there is totally within the domain of the manufacturer. 3) That same manufacturer is also the person best able to prevent damage from occurring, and liability might persuade him to do whatever is necessary in that respect. Furthermore, 4) if a product is a source of danger of some sort, the producer should bear the risks of that danger materialising, and 5) the consumer is in need of specific protection. Finally, 6) the manufacturer is the one making a profit. The person that stands to gain from manufacturing a product should also be the one to bear the costs of manufacturing that product. Those costs include paying damages.¹³⁷ In cases where the proof of a products liability claim is troublesome, another important argument could be that 7) the protection that the rule of substantive law (for instance, the negligence standard) is willing to offer, should not 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.¹³⁸

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 II.2.4.

¹³⁴ I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 218–220 (considering the element of wrongfulness), p. 227–229 (on causation) and p. 232–233 (with regard to the element of subjective fault), with further references, and L. Dommering-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 3 and 34.

¹³⁵ See, for instance, HR 24 December 1993, NJ 1994, 214 (Leebeek/Vrumona), and on the increase of 'strictness' of liability rules in relation to changes in the rules on burden of proof, I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 466–467 en 468–470. Another example of more 'strictness' through the law of evidence is to be found with regard to causation, see the *Des*-case dealt with below.

¹³⁶ See I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 202 and p. 235, based on HR 24 December 1993, NJ 1994, 214 (Leebeek/Vrumona). An example of the opposite (old) solution is Hof Leeuwarden 21 December 1994, TvC 1995, 122 (Zee/Batavus).

¹³⁷ For an overview, see I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 238–240, with further references. Mention is also made of the fact that insurance coverage is easily attainable for a producer.

¹³⁸ See I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 239, applying this argument to defend a reversal of the burden of proof with regard to causation

The developments sketched above should be contrasted with the path taken by liability based on the Directive. This form of liability seems to have moved towards a (more) fault-orientated liability, leaving some of its strict liability features behind.¹³⁹ The net result would be that the European and Dutch systems have grown towards each other. This is not at all strange, of course, since both liability systems have to operate within the same system of (tort) law, regardless of its (European) origins, and both are laid down in the same Code.¹⁴⁰

Second, are we moving towards more consumer protection? There seems to be a general trend in Dutch tort law, at least in the case law of the Supreme Court, towards greater protection for (personal injury) victims of 'wrongful' acts.¹⁴¹ This protection of victims could also be stated in terms of consumer protection, since both basically cover the same (potential) group of victims. For example in a decision of the Court of Appeal in Leeuwarden¹⁴² the importer of fireworks was held liable for the damage of fireworks exploding before reaching a safe altitude. This 'protection against personal injury' development is not confined to products liability, but one of the major examples of this tendency does involve products liability concerning a medical product.

In the so-called *Des*-case,¹⁴³ named after the drug by that name that was claimed to be defective¹⁴⁴ several victims sued several producers of the drug. Leaving the question of wrongfulness aside for the time being, the first issue that was raised concerned the question as to whether the claimants should sue all of the (old) producers of *Des* to be able to rely, as they wanted to, on the rule of alternative liability as laid down in art. 6:99 BW, reversing the burden of proof on the element of causation.¹⁴⁵

after a breach of the producer's duty to warn has been established, and p. 449 ff. in general.

¹³⁹ See section B.I.

¹⁴⁰ Cf. E.H. Hondius "Produktenaansprakelijkheid: de voordelen van een dualistische rechtsorde" AA 1996, p. 329, claiming that cross-fertilisation will be easier if both sets of rules are integrated (in one Code). M.B.M. Loos, Spontane harmonisatie in het contracten- en consumentenrecht, Inaugural Lecture Amsterdam (Den Haag: BJu, 2006) shows that this integration also leads to problems of coherence and that this cross-fertilisation is not always present.

¹⁴¹ See T. Hartlief & R-J Tjittes "Kroniek van het vermogensrecht" NJB 2001, p. 1473. See also C.J.M. van Doorn & S.B. Pape, "Kroniek productaansprakelijkheid en productveiligheid 2005-2008", TvC 2009, 2 p.50; C.J.M. van Doorn & S.B. Pape, Noot bij drie uitspraken van HvJ EG, *Jurisprudentie aansprakelijkheid* 2006, 4 p. 438-455.

¹⁴² Hof Leeuwarden 8 februari 2011, ECLI:NL:GHLEE:2011:BQ0194 (X/Evucos Vuurwerk).

¹⁴³ See HR 9 October 1992, NJ 1994, 535 with note CJHB (Des); L. Dommering-van Rongen "Product liability in the Netherlands: a European perspective" in E. Hondius (Ed.), *Modern Trends in Tort Law, Dutch and Japanese Law Compared* (The Hague/London/Boston: Kluwer Law International, 1999) p. 135-145, p. 144-145.

¹⁴⁴ The drug caused a rare form of cancer, striking not the mothers taking the drug in the 1960's to prevent premature childbirth, but instead, and years later, their daughters.

¹⁴⁵ The rule basically states that if damage can be the consequence of two or more incidents for each of which a different person is liable and that damage is indeed caused by one of these incidents, all of these persons are obliged to repair the damage, unless the person proves the damage was not the consequence of the incident for which that person himself is liable. The burden of having to prove who actually caused the da-

The problem was that the claimants couldn't do this because not all producers were still in business or traceable. The HR decided that it was not necessary to sue every producer, and that each of them could be held liable in full.

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

As stated above, this consumer protection or victim orientated trend is broader than the area of products liability. The same seems to be going on in tort law in general, most notably with regard to areas such as services liability, traffic liability and employer's liability, but also with regard to the issue of subjective fault (which tends to become almost obsolete next to the requirement of unlawfulness),¹⁴⁶ causation, the burden of proof, and recoverable (forms of) damages. All these developments have made it easier and more rewarding, so it would seem, to sue. However, since the national laws in Europe are also, and to an ever increasing extent,¹⁴⁷ bound by the state of the law as it was at the time the Directive was introduced (*e. g.*, introducing a new statutory regime on strict liability for (certain) products is not allowed), the trend on the national level towards more strict standards is not going to continue endlessly.¹⁴⁸

mage 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 probably also that each could have caused the whole damage, see I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 352, footnote 315.

¹⁴⁶ In dogmatic terms, after the unlawfulness is given (art. 6:162 para. 2) one needs to see whether there was fault as well (art. 6:162 par. 3). However, both conditions for a tort seem to have merged into one condition of objective misconduct. Subjective fault hardly ever plays a role anymore. This was something that had been going on some time before the new Civil Code was enacted but still the two conditions were put in the BW as separate items. Not everyone agrees that this should be the way to go, however, see C.H. Sieburgh, *Toerekening van een onrechtmatige daad* (Groningen: Ph.D thesis, 2000).

¹⁴⁷ See section B.II.7. above and the ECJ cases on art. 13 of the Directive: ECJ 25 April 2002, C-52/00, [2002] ECR I-3827 (Commission v France); ECJ 25 April 2002, C-154/00, [2002] ECR I-3879 (Commission v Greece); ECJ 25 April 2002, C-183/00, [2002] ECR I-3901 (María Victoria González Sánchez v Medicina Asturiana SA), and ECJ 10 January 2006, C-402/03 (Skov).

¹⁴⁸ See L. Dommerring-van Rongen, *Productaansprakelijkheid, Een rechtsvergelijkend overzicht* (Deventer: Kluwer, 2000), p. 16-17, and I. Giesen, *Bewijs en aansprakelijkheid* (Den Haag: BJu, 2001), p. 196-198, with regard to rules on evidence and proof.

In this respect, one must also keep in mind that in case art. 6:185 BW applies, the consumer must claim compensation from the producer. Under the provision of art. 6:173 BW the owner of the defective product does not bear any responsibility in such circumstances. The damage is thus channeled to the producer. If it turns out that the producer cannot be held liable, for example, because the claim has expired due to the three-year limitation period, or because the producer has filed for bankruptcy the victim cannot direct its action to the owner of the defective product. Likewise, as stated before (section B.I.), art. 7:24 BW stipulates that if a good is sold by a professional to a consumer and the defect falls under the scope of art. 6:185 BW, it is not the seller but (solely) the producer that is liable, unless the seller knew or should have known the defect, and guaranteed the absence of the defect. In case of prescription or bankruptcy, the consumer does not have a right of recourse against the seller.¹⁴⁹

C. Outlook

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

¹⁴⁹ See also A.L.M. Keirse, "Richtlijn 1985/374/EG inzake de aansprakelijkheid voor producten met gebreken", in A.S. Hartkamp (e.a.), *De invloed van het Europese recht op het Nederlandse privaatrecht* (Deventer: Kluwer, 2014), p. 33 e.v.; A.L.M. Keirse, 'Europeanisering van verbintenissenrecht', in: A.L.M. Keirse & P.M. Veder, *Europeanisering van vermogensrecht* (Deventer: Kluwer, 2010).