CHAPTER 16

DUTCH TORT LAW AT THE CROSSROADS: JUDICIAL REGULATION OF HEALTH AND ENVIRONMENTAL RISKS

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https://doi.org/10.1017/9781780686370.017 Published online by Cambridge University Press

16.1. INTRODUCTION

16.1.1. JUDICIAL RISK REGULATION

It is the government's responsibility to protect its citizens against health and environmental risks.[1] Governments have to enact regulations that set out the legal responsibilities of the relevant private actors – such as producers, developers of a technology, employers – with respect to risks. Moreover, these rules should ideally be enacted and enforced before the materialisation of risks.

Lately, the Dutch government has been (legally but also socially) accused of failing in this task. Its response to several risks would have been inadequate, such as the risk of asbestos exposure,[2] (shale) gas extraction,[3] Q fever (bacterial infection associated with cattle),[4] tobacco smoke[5] and greenhouse gas emissions.[6] Also for the future, some scholars – and even the government itself[7] – expect that the government will face difficulties in regulating the risks of new technologies, such as biotechnology and nanotechnology, and hence in protecting citizens against such risks.

As a reaction to these threats from alleged governmental failures, judicial regulation of health and environmental risks is being sought by litigants, and the results are entering the Dutch private law system. Although such risk-regulatory lawsuits might have different claimants, defendants and outcomes, they share three characteristics:[8]

1. they seek to use the private law system to set regulatory standards for risks (i.e. to provide the standard of care for the government or an industrial sector that also has relevance beyond a specific legal dispute);
2. they seek to and/or actually bring about changes in the behaviour and policy of private actors and/or governments in relation to the management of (the consequences of materialised) risks; and
3. they affect the (non-legal) interests of third parties, such as industrial sectors.

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1 E.g. art. 21 of the Dutch Constitution and Arts. 2 and 8 of the European Convention on Human Rights.

2 HR 2 June 2017, ECLI:NL:HR:2017:169.

3 Rb. North Netherlands 1 March 2017, ECLI:NL:RBNNE:2017:715; Onderzoeksraad voor Veiligheid, *Aardbevingsrisico's in Groningen. Onderzoek naar de rol van veiligheid van burgers in de besluitvorming over de gaswinning (1959–2014)* (The Hague 2015).

4 Rb. The Hague 25 January 2017, ECLI:NL:RBDHA:2017:587.

5 HR 10 October 2014, ECLI:NL:HR:2014:2928, *NJ* 2015/12, comm. EA Alkema (*Staat/CAN*); Rb. The Hague 9 November 2015, ECLI:NL:RBDHA:2015:12746.

6 Rb. The Hague 24 June 2014, ECLI:NL:RBDHA:2015:7145. See on this judgment section 16.5.3.

7 See section 16.2.3.

8 See on these aspects AP Morris, B Yandle and A Dorchak, *Regulation by Litigation* (Yale University Press, New Haven 2008), 1; P Luff, 'The Political Economy of Court-Based Regulation' in U Mattei and JD Haskell (eds.), *Research Handbook on Political Economy and Law* (Edward Elgar, Cheltenham 2015), 192.

https://doi.org/10.1017/9781780686370.017 Published online by Cambridge University Press

The complementary role that civil courts currently play in regulating risks can also be seen in three forms.[9]

First, claims for damages against the state and private actors may be sought as a mechanism to redress the negative effects of (alleged) inadequate risk management, including the failure to regulate at all. Such claims have typically failed when brought against the state. For example, in 2013, a Dutch worker whose work had involved asbestos contracted mesothelioma, a cancer caused by exposure to asbestos, and lodged a claim for damages against the Dutch state. According to the worker, the state had failed to regulate asbestos-related risks adequately and to enforce the asbestos-related occupational health and safety standards that had been passed, and that this had led to his condition. The claim was dismissed by the District Court, the Court of Appeal and the Supreme Court.[10] And recently, a claim against the state was brought by citizens who contracted Q fever. They claimed that the state had failed to halt the Q fever epidemic that occurred between 2007 and 2010 and, more specifically, that the state had failed to adequately manage the farms that were infected and to inform citizens about these risks. This claim too was dismissed.[11] As will be discussed below, claims against private actors have had greater success. Claims for damages necessarily involve the breach of a legal obligation, typically in respect of a level of care or safety: such claims will also therefore require a standard to be applied to determine liability. Even in a system of law without official rules of precedent, such a standard has regulatory force.[12] Particularly where a claim is successful, the standard applied to determine success will often have further effects outside the immediate facts, perhaps even being taken up by an industrial sector as a standard for their conduct, especially in order to avoid liability.

Second, judicial risk regulation can take place through injunctions, combined with declaratory relief.[13] Here the main aim of judicial risk regulation is preventing the risks from materialising. A world-famous example is the *Urgenda* decision on failing Dutch climate change policies,[14] but injunctions and/or declaratory relief also have been used to attack alleged governmental failures in relation to, for instance, tobacco risks. These claims have had mixed

9 ER de Jong, 'Rechterlijke risicoregulering bij gezondheids- en milieurisico's' (2015) 10 *AA (Ars Aequi)* 872–881.

10 HR 2 June 2017, ECLI:NL:HR:2017:169.

11 Rb. The Hague 25 January 2017, ECLI:NL:RBDHA:2017:587.

12 See EH Hondius, 'Precedent and the law' in K Boele-Woelki and S van Erp (eds.), *General Reports of the XVIIth Congress of the International Academy of Comparative Law* (Bruylant/Eleven, Brussels/Utrecht 2007), 31–50; B van der Wiel, 'Derdenwerking van rechtelijke uitspraken' (2011) 13 *NJB (Nederlands Juristenblad)* 792–796.

13 J Spier and U Magnus, *Climate Change Remedies* (Eleven International, The Hague 2014); L Enneking and ER de Jong, 'Regulering van onzekere risico's via *public interest litigation*?' (2014) 10 *NJB* 1542–1551.

14 Rb. The Hague 24 June 2014, ECLI:NL:RBDHA:2015:7145.

https://doi.org/10.1017/9781780686370.017 Published online by Cambridge University Press

results: in 2014, the Dutch Supreme Court obliged the Dutch government to enforce the existing ban on smoking in small pubs,[15] but in 2015 an application for a declaration that the influence of the tobacco lobby on Dutch health policy plans was unlawful, and for an injunction to place limits on this influence, was dismissed.[16]

Third and finally, private law can be used as a tool to generate 'non-legal' effects that create incentives for governments or private actors to change their risk-management policies. One example is in the discovery process. During legal proceedings, especially against private actors, evidence might be unearthed which proves poor risk management or the inadequacy of the applicable risk-regulatory framework. Another non-legal outcome is that legal proceedings can have a signalling effect. Media attention to lawsuits stimulates public debate about health and environmental risks and may ultimately lead to more political and societal pressure to adopt new policies. In addition, judicial intervention can provide governments with a legitimate reason to adopt new risk regulations. Often, such regulations may be necessary to protect the public interest in the long term, but in the short term they lack support or face heavy opposition from lobby groups because of their negative economic effects. One should, however, bear in mind that a court's decision might also legitimise inaction.

16.1.2. THE COURTS' ROLE: PROTECTION VERSUS SEPARATION OF POWERS

The rise of judicial risk regulation has met with both enthusiasm and criticism, and led to a scholarly debate on the role of courts in regulating risks. Essentially, this debate on the role of the courts centres around two perspectives.

On the one hand, scholars stress that judicial risk regulation is at odds with the separation of powers between the judicial branch and the legislative branch.[17] In short, it risks judicial decision-making on political issues and creates precedents for judicial 'intervention' in traditional domains of public policy, such as Nato payments and EU membership. This risk is particularly acute when courts engage in risk-regulatory standard-setting on the basis of open norms (e.g. the general negligence rule) in cases against the state. Traditionally, civil law proceedings are about determining the applicable rights and obligations in a specific relationship between two parties. The bipolar nature of tort law proceedings, so the argument goes, is prima facie not suited to policy considerations.

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15 HR 10 October 2014, ECLI:NL:HR:2014:2928, *NJ* 2015/12, comm. EA Alkema (*Staat/CAN*).

16 Rb. The Hague 9 November 2015, ECLI:NL:RBDHA:2015:12746.

17 L Bergkamp, 'A Dutch Court's "Revolutionary" Climate Policy Judgment: The Perversion of Judicial Power, the State's Duties of Care, and Science' (2015) 12 *Journal for European Environmental & Planning Law* 241; R Schutgens, 'Urgenda en de trias' (2015) 33 *NJB* 2270–2277.

On the other hand, courts themselves (as discussed in sections 16.3–16.5) and scholars accept that it is the court's role to enhance the rule of law and offer legal protection to citizens whose health and environmental rights are at stake due to alleged governmental failures.[18] The courts might have more success than the government in tackling risks on this global level by dealing with law, not politics, and by starting with individual claims. Precautionary reasoning serves as a solid foundation for this protective role of the courts. On the substance, the precautionary principle underpins duties of care to proactively act upon (indication of) risks and thus to prevent their materialisation, and from an enforcement perspective the principle justifies judicial enforcement of such duties ex ante through private law remedies.[19] Besides, private law can provide marginalised citizens with an opportunity to contribute to social goods. If they cannot defend their interests in the political process, or influence the government and industry, they can, perhaps as a last resort, ensure they are not forgotten or marginalised.

16.1.3. OUTLINE

This chapter will give an overview of the role of Dutch courts in regulating risks in light of the competing interests of private persons, the state and industry. First, it will address the socio-legal framework in which the call for and debate about judicial risk regulation should be considered (section 16.2). It will be argued that several societal developments empower courts to offer legal protection against risks, and thus favour the active participation of civil courts in the regulation of risk and in redressing or preventing (alleged) government failures. An examination will then be made of how the courts in their case law strike the balance between competing interests and modes of regulation, and hence see their own role in risk-regulatory lawsuits (section 16.3). This will be done with respect to risk-regulatory lawsuits against private actors (section 16.4) and risk-regulatory lawsuits against the government (section 16.5). As will be discussed, the differences in the courts' approach in lawsuits against private actors on the one hand (i.e. progressive) and against the government on the other (i.e. restrictive) can to a great extent be explained by referring to the difference in its underlying risk-reasoning (i.e. bipolar risk-reasoning versus multipolar risk-reasoning). By way of conclusion (section 16.6), the choices for the future of risk regulation will be explored.

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18 J Spier (in cooperation with ER de Jong), *Shaping the Law for Global Crises* (Eleven International, The Hague 2012); R van Gestel and M Loth, 'Urgenda: roekeloze rechtspraak of rechtsvinding 3.0?' (2015) 37 *NJB* 2598–2605.

19 See the Dutch chapter in Part I (Ch. 7).

https://doi.org/10.1017/9781780686370.017 Published online by Cambridge University Press

16.2. SOCIETAL CONTEXT OF JUDICIAL RISK REGULATION

16.2.1. INTRODUCTION

Discussing the societal context in which the debate on judicial risk regulation takes place makes it possible to understand why judicial regulation is in the spotlight now and will continue to be in the future. Moreover, this societal context, which is a combination of circumstances and developments within Dutch society and especially in the political arena, gives insights into the societal expectations of (and perhaps even demands on) the civil courts' role in regulating risks. The following relevant circumstances will be discussed: the paralysis of governmental risk-regulatory processes (section 16.2.2); the shortcomings of traditional command-and-control regulation, and the alternative risk-regulatory role of private law (section 16.2.3); the idea of self-reliance within society and active citizenship (section 16.2.4); and the developments regarding access to court.

16.2.2. GOVERNMENTAL RISK REGULATION LIMITS

Tort law is becoming more attractive for risk regulation because it is an alternative means of dealing with the problems that the government faces in regulating risks. The government might be limited (some would even say paralysed) in regulating health and environmental risks as a consequence of, inter alia:

1. scientific uncertainties about risks;
2. the lack of expertise on the part of the regulator;
3. lengthy regulatory procedures on the international stage;
4. corporate lobbying; and
5. last but certainly not least, economic interests that are impaired by governmental regulation.

Striking in this regard is the fact that the Dutch government has historically tended to neglect the health and environmental interests affected by economically beneficial activities. This is most vividly illustrated in the context of the risks of gas drilling in the north of the Netherlands. To date, the extraction of gas has caused several earthquakes and subsequent damage to houses, risked the life of citizens and led to a deterioration of their living environment in general. In 2015, the Dutch Safety Board investigated the state's decision-making process on gas extraction from 1959 to 2014 and concluded that economic considerations prevailed, and that safety issues were neglected and most of the time even left out

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of the equation.[20] Similar arguments have been made in the context of climate change and asbestos.[21] Indeed, private actors have similarly been too concerned with profit. The case law on asbestos-related risk illustrates that industry neglected health risks for too long even though their existence was already widely known. In these circumstances there is a strong call for intervention through private law. Especially in the context of climate change, leading scholars call for a generous use of injunctions in order to correct allegedly failing climate change policies.[22] It is expected that in the future private law might also be used to attack the alleged government failures in the context of the risks of gas extraction.[23]

As has been stressed in Part I (Ch. 7), the Dutch government accepts and applies, at least on paper, the precautionary principle as the normative foundation of its environmental and health law and policy-making process in relation to new technologies, such as biotechnology and nanotechnology.[24] The state apparently understands that new technologies can only be implemented successfully in society if the potential risks are managed. However, despite the state's good intentions, it still faces considerable difficulties in keeping up with the pace of the globalised market economy, primarily due to scientific uncertainties about the risks and lengthy regulation processes on the international and European stage. As will be discussed in the next section, private law is seen as a complementary risk-regulatory instrument that could be useful in this context. This development is embedded in a broader development in the (European and) Dutch legal system that favours private enforcement and private law as a mechanism to promote the public interest.

16.2.3. SHORTCOMINGS OF COMMAND-AND-CONTROL REGULATION

Closely related to the foregoing is the acknowledgment by the government of the shortcomings of traditional command and control in regulating risks,

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20 Onderzoeksraad voor Veiligheid, above n. 3, 88.

21 E.g. D Gee and M Greenberg, 'Asbestos: from "Magic" to Malevolent Mineral' in P Harremoës, D Gee and M Macgarvin (eds.), *Late Lessons from Early Warnings: the Precautionary Principle 1896–2000* (Publications Office, Luxembourg 2001), 56–58; and H Grassl and B Metz, 'Climate Change: Science and the Precautionary Principle' in P Harremoës, D Gee and M Macgarvin (eds.), ibid, 304–378.

22 J Spier, 'Injunctive Relief: Opportunities and Challenges: Thoughts About a Potentially Promising Legal Vehicle to Stem the Tide' in J Spier and U Magnus (eds.), *Climate Change Remedies: Injunctive Relief and Criminal Law Repsonses* (Eleven International, The Hague 2014), 2–155.

23 See Rb. North Netherlands 1 March 2017, ECLI:NL:RBNNE:2017:715. See section 16.5.3.

24 *Parliamentary Papers II* 2012/13, 29338, 124, 1; *Parliamentary Papers II* 2013/14, 28663, 55, 11–12.

which become especially clear in the context of complex and rapid evolving technologies. In this context, on the basis of precautionary reasoning, the division of labour between the government and industry in making decisions on risk is being changed.[25] A key element of the Dutch government's precautionary reasoning is 'discursive policy-making': all the relevant actors, such as NGOs, policy-makers, citizens and industry, are involved in the policy-making process. A second key element is that, according to the government, private actors are primarily responsible for preventing risks from materialising.[26] In order to put this reasoning into practice, the government is looking for alternative risk-regulatory instruments and here private law enters the scene. Once the drawbacks of traditional command-and-control regulation have been acknowledged, the complementary role of private law in regulating health and environmental risks of new technologies has gained the attention of policy-makers and government advisory bodies.[27] Although in other areas of law, such as competition law,[28] enforcement through private law is becoming more important, concrete policy measures in the context of health and environmental risks have not yet been taken.

16.2.4. SELF-RELIANCE OF SOCIETY

Next, the rise of the political idea of self-reliance of society and active citizenship (*participatie samenleving*) provides a fertile societal soil for judicial participation in risk regulation.[29] This concept, which is actively promoted by the Dutch government, comes down to the idea that citizens have a responsibility in promoting and protecting the public good and public interests. An important element of this thinking is that citizens, either individually or collectively, also have a role in enforcing the law. Private enforcement contributes to a better

25 T Hartlief, 'Privaatrecht in Nood' in ER Muller, T Hartlief, BF Keulen and H Kummeling, *Crises, Rampen en Recht. Preadviezen voor de jaarvergadering van de NJV* (Kluwer, Deventer 2014), 135; Wetenschappelijke Raad voor het Regeringsbeleid (WRR), *Evenwichtskunst* (Amsterdam University Press, Amsterdam 2011).

26 *Parliamentary Papers II* 2008/09, 28089, 23; *Parliamentary Papers II* 2013/14, 28663, 55, 11–12; *Parliamentary Papers II* 2012/13, 29338, 124, 1.

27 See WRR, *Onzekere Veiligheid: Verantwoordelijkheden rond fysieke veiligheid* (Amsterdam University Press, Amsterdam 2008). See also the Dutch Policy Programme *Bewust Omgaan met Veiligheid: Rode Draden* <https://www.rijksoverheid.nl/documenten/rapporten/2014/08/18/bewust-omgaan-met-veiligheid-rode-draden-een-proeve-van-ienm-breed-afwegingskader-veiligheid> accessed 26 February 2017.

28 Council Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1.

29 See P van Houwelingen, A Boele and P Dekker, *Burgermacht op eigen kracht?*, SCP-rapport (2014).

and safer society, so the argument goes.[30] As will be discussed in section 16.2.5, policy and legislative initiatives that support citizens in this respect are in place or in preparation.

In part, this approach is finding fertile ground. Interest groups are apparently increasingly prepared, and have the financial means at their disposal, to initiate legal proceedings and use private law as an instrument to promote the public interest. Illustrative are, inter alia, the Clara Wichmann Proefprocessenfonds, a fund that finances test cases in the context of women's rights,[31] Friends of the Earth Netherlands, which started several administrative and civil proceedings in the context of allegedly poor air-quality standards, and Urgenda (an abbreviation of 'Urgent Agenda'), which won a now-famous climate change lawsuit. Some of these groups are legally trained, such as the two-year pilot Public Interest Litigation Project of the Dutch Section of the International Commission of Jurists. The project explores the possibility of strategic litigation in the field of human rights in the Netherlands and will be evaluated in 2018.[32]

Interestingly, in line with this idea of active citizenship, interest groups also mobilise citizens to initiate legal proceedings themselves or involve them in specific risk-regulatory lawsuits. For instance, in their legal fight against allegedly poor air quality, Friends of the Earth Netherlands developed a 'do-it-yourself package', which gives citizens guidance on how to initiate legal proceedings by themselves.[33] And through a digital forum, Urgenda made it possible for citizens to deliver their input on the writ of summons ('crowd-pleading'). In these cases, one could see the idea of societal self-reliance and active citizenship in practice through private law.

16.2.5. ACCESS TO COURTS

Lastly, developments in relation to access to courts increasingly favour the use of the tort law system as a risk-regulatory mechanism. Besides, these developments make it likely that civil courts will increasingly be asked to play a risk-regulatory role.

First, the government widened access to the civil courts in order to make the private law system effective in addressing, among other things, inadequate risk

30 T Hartlief, 'Handhaving in het aansprakelijkheidsrecht. Op weg naar een betere samenleving?' (2008) 6772 *Weekblad voor Privaatrecht, Notariaat en Registratie* 769–777. See also T Hartlief, above n. 25, 137.

31 See for instance HR 9 April 2010, ECLI:NL:HR:2010:BK4549, *NJ* 2010/388, comm. EA Alkema (*SGP*).

32 NJCM Jaarverslag 2013, 125–127 <https://pilpnjcm.nl/>.

33 See with references ER de Jong, 'Strijd over luchtkwaliteit: de maatschappelijke processen achter risicoregulering' (2016) 2 *Recht der Werkelijkheid* 54–62.

management, especially by industry. For instance, the locus standi rules under article 3:305a CC (Civil Code), which was introduced in 1994, are favourable to interest groups, which makes it relatively easy for them to have a right of access to the civil courts. And, indeed, a study shows that the number of collective actions has increased.[34]

Currently, draft legislation that makes it possible to claim for damages in a collective action is pending. However, in this proposal the standing requirements are made more stringent.[35] Under the proposed bill, if other requirements are met, an interest group is allowed to stand up for the interests of a *narrowly defined* group. The current version of article 3:305a CC requires that the interest group aims 'to protect similar interests of other persons to the extent that its articles promote such interests'. The new requirement is criticised because it would equally apply to a collective action for damages, injunctive and/or declaratory relief. Although the new locus standi requirements might be justified in a collective action for damages – the rationale is to prevent an uncontrolled increase in non-representative and financially driven claim organisations and, ultimately, to prevent a claim culture – they raise problems in the context of public interest litigation. Van Boom[36] and Bauw and van der Linden[37] argue that the proposed changes, in a paradoxical way, undermine the very objective (that is, solving an enforcement deficit) of the collective action procedure in the context of public interest litigation, since in such cases the interest group will face difficulties in meeting the locus standi requirements.[38]

There are still (other) factors that raise barriers to access to court for (potential) victims, such as the opportunity costs of initiating legal proceedings. Nonetheless, in this respect one should call to mind the fact that at least some interest groups have financial means at their disposal to initiate legal proceedings, and the state could choose to support them further, for instance through legal aid. Moreover, the above-mentioned legislative proposal of 2016 on claims for damages in collective actions could have a relaxing effect on this costs aspect as a barrier to initiating legal action.[39] One of the objectives of this bill is to empower citizens to seek redress and compensation for the negative

34 I Tillema, 'Commerciële motieven in privaatrechtelijke collectieve acties: olie op het vuur van de claimcultuur?' (2016) 5 *AA* 337; *Parliamentary Papers II*, 2016/17, 34608, 3, 7.

35 E Bauw and T van der Linden, '"Schone slaapsters". Pleidooi voor een actievere rol van toezichthouders bij collectief schadeverhaal' (2016) 32 *NJB* 2310–2314.

36 See W van Boom, 'Wetsvoorstel richt zwaar geschut op alle collectieve acties' (2017) <https://willemvanboom.blog/2017/02/27/wetsontwerp-collectieve-schadevergoedingsactie/> accessed 4 March 2017.

37 E Bauw and T van der Linden, above n. 35.

38 See more in general on collective actions in the Netherlands, MG Faure, LT Visscher and IN Tzankova, *Collectieve acties. Preadviezen VBR 2015* (Zutphen, Paris 2015).

39 *Parliamentary Papers II*, 2016/17, 34608, 2.

consequences of, primarily, unlawful corporate behaviour, which is especially desirable in relation to large-scale losses, damage spread over a wider number of victims and in procedures against repeat players. In addition, the draft bill takes away the need for separate proceedings (e.g. for assessing the damages) and provides an incentive for industry to reach settlements and, ultimately, to pay for the negative societal consequences of their behaviour.[40] Another important development in relation to the costs of legal proceedings is the experiment on result-oriented agreements (i.e. 'no cure, no pay', similar to 'no win, no fee'), which are prohibited in the Netherlands. This experiment permits lawyers in claims for damages for death or personal injuries to agree with their client that the client only pays the lawyer's fees if damages are indeed awarded.[41] The experiment runs until 2019. Lastly, it is expected that the phenomenon of third-party litigation funding might become relevant in the future and enhance access to courts, especially in situations of large-scale losses.[42] To date, third-party litigation funding is not widespread in the Netherlands and, as a consequence, the negative and positive effects are not yet (completely) identified.[43]

16.3. THE COURTS' STANCE IN RISK-REGULATORY LAWSUITS

In the next section, the courts' approach in risk-regulatory lawsuits against private actors (section 16.4) and the government (section 16.5) will be addressed. An examination will be made of how the courts in their case law strike the balance between the interests mentioned in section 16.1.2 and, hence, how they see their own role in regulating risks. It will be shown that in claims against private actors courts follow a progressive approach, whereas in claims against the government courts follow a restrictive approach. The (differences in the) rationale of the courts' approach will be addressed by referring to the nature of the (implicitly) underlying reasoning. A distinction can be made between what could be said to be *bipolar risk-reasoning* and *multipolar risk-reasoning*. Bipolar risk-reasoning encompasses considerations that relate to the (effects of) allocation of risks (and the costs of prevention) between two parties. In multipolar risk-reasoning, the risk allocation considerations transcend the bipolar relationship between a *risk creator* and a *risk subject* and also encompass issues of risk allocation for other

40 *Parliamentary Papers II*, 2016/17, 34608, 3, 1.

41 *Stcrt*. 2013, 20779, 25 juli 2013, Verordening tot wijziging van de Verordening op de praktijkuitoefening, art. 3 (onderdeel Resultaatgerelateerde Beloning).

42 *Parliamentary Papers II*, 2016/17, 34608, 3, 13.

43 For this reason, the 'no cure, no pay' experiment will only remain applicable between a specific client and its lawyer. *Parliamentary Papers II*, 2013/14, 31753, 65.

parties. While bipolar risk-reasoning is common in private lawsuits, multipolar risk-reasoning is on the rise, but is not without problems.

16.4. RISK-REGULATORY LAWSUITS AGAINST PRIVATE ACTORS

16.4.1. COURTS AS PROTECTORS

In risk-regulatory lawsuits against private actors, courts are prepared to stretch the boundaries of law quite far in order to offer judicial protection against failing industries, particularly when this implies law-making (i.e. regulatory standard-setting) by the courts. In other words, courts have shown willingness to fill the regulatory gaps that originate from inaction on the part of the regulator, and thereby implicitly (and also rightly) assuming it is the courts' role to offer judicial protection.[44] For instance, in the context of asbestos litigation, the Dutch Supreme Court introduced high standards of care, especially in those circumstances where specific public regulations were lacking or were inadequate. On the basis of the general unwritten law rather than specific statutory standards, the Supreme Court accepted that private actors, such as producers and employers, are under the obligation to proactively take measures to prevent asbestos-related diseases. This case law has set a precedent in the Netherlands, but it also reflects a wider trend across other risks in the jurisprudence of the Supreme Court, such as the risk associated with the use of lead paint.[45]

The courts' role as protectors is also illustrated by the high standard that applies in the examination of whether a private actor had or should have had knowledge about risks. Dutch courts set a particularly high standard in that specialised and larger corporations are expected to have the knowledge of an expert in the relevant field.[46] Moreover, defences brought forward by private actors – such as the development risk defence, the state-of-the-art defence and defences related to the costs of taking safety measures – are only honoured in rare situations. Besides, as has been pointed out in Part I (Ch. 7), the protective stance of courts in the context of health risks is illustrated by the fact that courts have watered down legal concepts in a plaintiff-friendly way. A classic technique is to facilitate issues of proof arising from scientific uncertainties about risks,

44 See especially HR 6 April 1990, ECLI:NL:HR:1990:AB9376, *NJ* 1990/573, comm. PA Stein (*Janssen/Nefabas*); HR 25 June 1993, ECLI:NL:HR:1993:AD1907, *NJ* 1993/686, comm. PA Stein (*Cijsouw I*); HR 17 December 2004, ECLI:NL:HR:2004:AR3290, *NJ* 2006/147, comm. CJH Brunner (*Hertel/Van der Lugt*); HR 25 November 2005, ECLI:NL:HR:2005:AT8782, *NJ* 2009/103, comm. I Giesen (*Eternit/Horsting*).

45 HR 7 June 2013, ECLI:NL:HR:2013:BZ1721, *NJ* 2014/99, comm. T Hartlief (*Lansink/Ritsma*).

46 AG Spier, no. 5.6.1, ECLI:NL:PHR:2013:BZ1721, for HR 7 June 2013, ECLI:NL:HR:2013:BZ1721, *NJ* 2014/99, comm. T Hartlief (*Lansink/Ritsma*).

such as the proportionate liability doctrine, which was accepted by the Supreme Court in *Nefalit/Karamus*. The Court reasoned that:

> 'when an employee suffers damage that, considering the possibilities in percentage terms, could have been suffered both because of the wrongful act of his employer and his duty to protect the health of his employees, and because of circumstances that could be attributed to the employee himself, without the possibility of ascertaining how far the damage is a consequence of one of these circumstances, the judge could allow the claim by the employee; however, damages should then be decreased in proportion to (and with a reasoned estimation of) the extent to which the circumstances that increased the damage should be attributed to the plaintiff.'[47]

As the Supreme Court later made clear, if the possibility that the behaviour of the defendant contributed to the damage is too small or too uncertain/ambiguous, the theory cannot be applied. The doctrine has also been accepted in relation to other risks, such as financial risks,[48] although there is discussion about its exact scope.

16.4.2. RATIONALE BEHIND THE PROTECTIVE APPROACH

The protective scope of court intervention can be justified by referring to the characteristics of the risks involved, and thus by a certain form of risk-reasoning. A pre-requisite for the existence of a risk, one could argue, is the risk subject's appearance of vulnerability and an asymmetrical power relationship between the risk subject and the risk creator.[49] In addition, vulnerability and power are considered to be ethical and normative constitutive elements of the existence of responsibility in a certain relationship.[50]

In this respect, information asymmetries between private actors and the risk subject provide a strong justification for judicial protection. Here it is especially relevant that in many cases the private actor, and sometimes even the whole industry to which the private actor belongs, internally had knowledge about the existence and the characteristics of severe risks but did not share this knowledge with the regulator and/or potential victims. Sometimes, industry even contributed to doubt about the reliability and validity of scientific conclusions about a risk,

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47 HR 31 March 2006, ECLI:NL:PHR:2006:AU6092, *NJ* 2011/250, comm. TFE Tjong Tjin Tai (*Karamus/Nefalit*), no. 3.13.

48 HR 24 December 2010, ECLI:NL:HR:2010:BO1799, *NJ* 2001/251, comm. TFE Tjong Tjin Tai (*Fortis/Bourgonje*), no. 3.8; HR 14 December 2012, ECLI:NL:HR:2012:BX8349, *NJ* 2013/236, comm. SD Lindenbergh (*Nationale Nederlanden/S.&L.*).

49 F Ewald, 'The Return of the Crafty Genius: An Outline of a Philosophy of Precaution' (1999) 6 *Connecticut Insurance Law Journal* 47, 75.

50 See F Ewald, above n. 49; H Jonas, *Das Prinzip Verantwortung* (Insel Verlag, Frankfurt am Main 1979).

ultimately in order to block governmental regulation.[51] This fact leads to serious culpability on the part of the party who manufactured this uncertainty and/or held back information about risks. Where present, or perhaps merely where perceived, this provides the courts with good reasons and justifications for issuing potentially far-reaching victim-friendly risk-regulatory judgments.[52] In addition, the dependency of potential risk victims on a private actor, in that victims do not have the knowledge and financial means to manage a risk, in combination with the idea that private actors should not be allowed to fully externalise the negative effects of the risks and uncertainties of their behaviour, provides strong justifications for the courts' willingness to offer legal protection.

For obvious and good reasons, the role of the courts in risk-regulatory lawsuits against private actors have not yet been characterised in respect of its legitimacy. However, this is starting. A former Advocate General, Jaap Spier, argues that courts should be more aware of the regulatory implications and effects of their rulings, including those in risk-regulatory lawsuits against private actors. For instance, in developing the proportionate liability doctrine for asbestos-related risks in a victim-friendly way, he argues, the Supreme Court was not sufficiently aware of the potential economic and financial implications of this doctrine if it were applied to other, similar risks, such as climate change risks, financial risks and the risks of new technologies, such as nanotechnology and biotechnology.[53] In other words, claimant-friendly decisions in a specific lawsuit might not be appropriate elsewhere without thought, risking opening the floodgates of liability or promoting undesirable defensive behaviour to avoid liability. Given the nature and the extent of risks in our modern and globalised society and the number of potential victims, Spier pleads for a somewhat more restrictive approach in claims for damages. There is in fact an irony here, since Spier himself is known for his victim-friendly position and opinions, yet accepting his line of reasoning would imply that the courts should be more restrained in stretching the boundaries of legal concepts in individual cases for damages and thus offer narrower judicial protection.

The kind of reasoning that is being advocated relates to the allocation of the societal side-effects of tort law adjudication in a general sense (that is, multipolar risk-reasoning).[54] However, integrating multipolar risk-reasoning into tort law

51 N Oreskes and EM Conway, *Merchants of Doubt* (Bloomsbury, New York 2010).

52 HR 25 November 2005, ECLI:NL:HR:2005:AT8782, *NJ* 2009/103, comm. I Giesen (*Eternit/Horsting*).

53 J Spier, 'Balancing Acts: How to Cope with Major Catastrophes, particularly the Financial Crisis' (2013) 4 *Journal of European Tort Law* 223. See for more references ER de Jong, 'De alles overziende rechter' in T Hartlief and MG Faure (eds.), *De Spier-bundel. De agenda van het aansprakelijkheidsrecht* (Kluwer, Deventer 2016), 57–60.

54 ER de Jong and T van der Linden, 'Rechtspreken met oog voor macro-effecten?' (2017) 1 *NTBR (Nederlands Tijdschrift voor Burgerlijk Recht)* 4–16.

disputes – that is, to ask courts to explicitly take account of it – raises challenges. Although courts generally have the adjudicative facts[55] that are necessary to decide the specific lawsuit before them, they lack the legislative facts that set out the broader implications of a specific decision and that are needed for multipolar risk-reasoning. One might consider, for instance, information deficits about:

- risk trade-offs that might be created by a specific decision;
- the characteristics of risks to which specific decisions might be applied in the future;
- the potential increase or decrease in claims as a consequence of a specific decision;
- the actual *societal* costs of a specific decision;
- the influence on (and also of) the availability and costs of insurance; and
- the actual effectiveness of a specific decision.

More importantly, a normative framework that guides multipolar risk-reasoning, and thus helps courts to determine *whether at all*, and if so how, a decision on risk allocation between two parties should be influenced by broader risk allocation considerations is currently underdeveloped, if not absent entirely.[56]

There are some weak indications that the Supreme Court is slightly more restrictive in concrete cases – for instance, its rulings in *Fortis/Bourgonje*[57] and *Lansink/Ritsma*[58] suggest that the doctrine of proportionate liability cannot be applied to uncertain risks – but it is too early to see a change of course in the context of private actor liability. However, as will be discussed in the next section, the Supreme Court clearly takes these kinds of policy considerations into account in the context of government liability.

16.5. RISK-REGULATORY LAWSUITS AGAINST THE GOVERNMENT

16.5.1. THE COURTS' COMPETENCY

In risk-regulatory lawsuits against the government, the examination of whether the government acted tortiously (hereafter also referred to as wrongful conduct)

55 J Monahan and L Walker, *Social Science in Law*, 4th ed. (The Foundation Press, Inc., Westbury, NY 1998). See also J Monahan and L Walker, 'A Judges' Guide to Using Social Science' (2007) 43 *Court Review* 156.

56 See for a preliminary effort to develop such a framework, ER de Jong and T van der Linden, above n. 54.

57 HR 24 December 2010, ECLI:NL:HR:2010:BO1799, *NJ* 2011/251, comm. TFE Tjong Tjin Tai.

58 HR 7 June 2013, ECLI:NL:HR:2013:BZ1721, *NJ* 2014/99, comm. T Hartlief (*Lansink/Ritsma*).

https://doi.org/10.1017/9781780686370.017 Published online by Cambridge University Press

is complicated. As a starting point, courts often explicitly acknowledge the tension between the need for judicial protection and the separation of power doctrine. They also accept as a general rule that, although a specific case might have policy implications, that fact does not alter the courts' competency to assess any alleged government failures and, to offer legal protection if the court finds that legal rights of citizens have been infringed and the government acts or has acted wrongfully.[59]

However, even if a court comes to such a conclusion, the remedies at its disposal are limited. In the *Waterpakt* judgment, the Supreme Court held that a civil court is prohibited from issuing an injunction that obliges the legislature to use its legislative powers and hence to make *specific* legislation.[60] It is unclear whether this prohibition also covers an injunction to take away a specific unlawful risky situation if that could only be done by implementing some sort of legislation.[61] Nonetheless, a civil court is allowed to declare that the *government* wrongfully failed to regulate a risk and issue declaratory relief to that effect. Moreover, courts are allowed to award claims for damages for a failure to regulate.

In order to analyse the courts' stance in the examination of the tortiousness of the government's behaviour in cases of alleged governmental failures, one has to make a distinction between several failures, following Van Boom and Giesen's work:[62]

- a failure to regulate, that is, to issue legislation or policies;
- a failure to take specific safety measures;
- a failure to implement general schemes of supervision (general supervision failure); and
- a failure to act upon concrete indications of a violation of standards in an area of law where supervision schemes are in place (concrete supervision failure).

In the following sections, the application of the law by courts in risk-regulatory lawsuits against the government will be addressed. It will be discussed that, generally, courts are reluctant to find unlawful conduct in risk-regulatory lawsuits against the government, especially in cases of alleged failures to regulate.[63] In section 16.5.4, the possible explanations for this restrictive stance are set out.

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59 See for instance Rb. The Hague 24 June 2014, ECLI:NL:RBDHA:2015:7145; Rb. The Hague 25 January 2017, ECLI:NL:RBDHA:2017:587.

60 HR 21 March 2003, ECLI:NL:HR:2003:AE8462, *NJ* 2003/691 (*Waterpakt*).

61 See Rb. The Hague 24 June 2014, ECLI:NL:RBDHA:2015:7145.

62 WH van Boom and I Giesen, 'Civielrechtelijke overheidsaansprakelijkheid voor het niet voorkomen van gezondheidsschade door rampen' (2001) *NJB* 1678–1679.

63 See T Hartlief's comment on HR 9 July 2010, ECLI:NL:HR:2010:BL3262, *NJ* 2015/343 (*Vuurwerkramp Enschede*), no. 7.

https://doi.org/10.1017/9781780686370.017 Published online by Cambridge University Press

16.5.2. GOVERNMENT FAILURES UNDER INTERNATIONAL LAW

In cases on governmental liability, plaintiffs have the best chances to prove unlawful conduct by the government if they can establish the applicability and infringement of provisions of international treaties that provide specific obligations for dealing with a risk.

On the basis of article 93 of the Dutch Constitution, provisions of treaties and of resolutions by international institutions have direct force in the Dutch legal order if they are, by virtue of their contents, binding on all persons.[64] In determining whether a provision is binding, the following considerations have to be taken into account.[65] The first step is an assessment of whether, according to the wording of the provision and its *travaux préparatoires*, the parties intended to deprive the provision of general force. If the answer is affirmative, the provision lacks general force. If the provision *might* have been intended to have general force, the second question is whether the provision is unconditional and sufficiently accurate to function as positive law in the national legal order.[66] In this respect, the clarity of the text of the provision is of importance, and it is also important whether the provision entails a specific obligation for the state to take specific provisional measures or whether it 'merely' contains a general assignment to adapt legislation and regulations in general.

In its ruling on the lawfulness of the exception to the smoking ban for small pubs maintained by the state, the Supreme Court held that Article 8(2) of the WHO Framework Convention on Tobacco Control has direct effect in the Dutch legal order and that the State infringed this article. This article states that:

> 'each Party shall adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places.'

According to the Court, the wording and the objectives of this article – that is, the prevention of death and damage to health as a consequence of exposure to tobacco smoke – make clear that the provision offers protection for anyone who enters a public place and that small pubs are also considered public places. Moreover, the Court held that if these provisions are sufficiently accurate

64 For the law of the European Union and the European Convention on Human Rights, another regime applies.

65 B Toebes, 'Tabakszaak tegen Nederland' (2015) 37 *NJB* 2606–2611.

66 Compare to Cases C-6/90 and C-9/90, *Francovich v. Italy* [1991] ECR I-5357 and Cases C-46/93 and C-48/93, *Brasserie du Pêcheur v. Germany* [1996] ECR I-1029.

https://doi.org/10.1017/9781780686370.017 Published online by Cambridge University Press

and unconditional, the fact that the state has some discretionary power in implementing the international standards does not block its direct applicability.[67] As a consequence of this reasoning, it was possible to attack an alleged failure to comply with concrete obligations that were resting on the State.

However, in the lawsuit on the influence of the tobacco lobby on the Dutch national policies, the WHO Convention was not of any help to the plaintiffs. Here the plaintiffs based their claim on Article 3 of the Convention, which states that:

> 'in setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law'.

The District Court of The Hague held that the intended level of protection of tobacco discouragement policies that is enshrined in this provision, in combination with the margin of appreciation left to the state in implementing it, is too vague and does not offer the court a concrete benchmark for assessing the way in which the state implements tobacco discouragement policies.[68] Hence the provision was devoid of direct effect and an alleged failure of the government to follow a certain policy line was not accepted.

Academic literature[69] has also noted the relevance and potential of the European Convention on Human Rights for examining alleged government failures. The case law of the European Court of Human Rights, in which it accepted that in cases of severe environmental harm resulting from governmental inaction the state has a positive obligation to regulate or take protective measures against risks,[70] could be a solid ground for establishing tortious conduct on the part of the state in relation to health and environmental risks. Gijselaar and De Jong, for instance, argue that most likely this case law also applies to asbestos risks, tobacco risks and climate change risks.[71]

However, despite this far-reaching case law, in the context of alleged government failures these articles have not had, until now, additional value to

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67 HR 10 October 2014, ECLI:NL:HR:2014:2928, *NJ* 2015/12, comm. EA Alkema (*Staat/CAN*) and HR 9 April 2010, ECLI:NL:HR:2010:BK4549, *NJ* 2010/388, comm. EA Alkema (*SGP*).

68 Rb. The Hague 9 November 2015, ECLI:NL:RBDHA:2015:12746.

69 GE van Maanen 'De impact van het EVRM op het privaatrecht. Een grote ver-van-mijn-bedshow?' in GE van Maanen and S Lindenbergh, *EVRM en privaatrecht: is alles van waarde weerloos?*, preadvies Vereniging voor Burgerlijk Recht (Kluwer, Deventer 2011); EC Gijselaar and ER de Jong, 'Overheidsfalen en het EVRM bij ernstige bedreigingen voor de fysieke veiligheid' (2016) 2 *NTBR* 36–45.

70 See i.e. ECHR 30 November 2004, 48939/99 (*Öneryıldız/Turkije*); ECHR 20 March 2008, 15339/02, 21166/02, 11673/02, 15343/02 (*Budayeva e.a./Rusland*); ECHR 24 July 2014, 60908/11, 62110/11, 62129/11, 62312/11, 62338/11 (*Brincat/Malta*).

71 EC Gijselaar and ER de Jong, above n. 69, section 4.

https://doi.org/10.1017/9781780686370.017 Published online by Cambridge University Press

the claimants. In nearly all of the Dutch cases where Articles 2 and 8 ECHR were invoked,[72] the court did not come to the conclusion that there had been an infringement. Such findings were not often based on an explicit reading of the Convention or its implications for the case at hand. According to Van Maanen, courts too easily and without due consideration reject an alleged infringement of a positive obligation under Article 2 and/or 8 ECHR on the grounds of the separation of power doctrine and the discretionary power of the state. This is especially so, Van Maanen argues, in situations of an alleged failure to regulate, whereas these positive obligations (should) limit the state's discretionary power in deciding how to act upon (severe health and environmental) risks.[73] A counterargument would be that in the situations in which the European Court of Human Rights accepted these obligations, they were dealing with exceptional circumstances in which the government did not act at all upon clear indications of severe health and/or environmental risks or did not strike the right balance between economic and health interests. One could argue that this was in any event the case in relation to the Dutch policies on the risks of gas extraction (see below).[74]

16.5.3. GOVERNMENTAL FAILURES UNDER NATIONAL LAW

The Dutch Civil Code does not contain specific rules on the liability of the government in tort. Therefore, in risk-regulatory lawsuits against the government, the general provisions on liability in the Civil Code, and especially the unwritten general negligence rule of article 6:162 section 2 CC, are the most important grounds for a tort claim. Although on the basis of unwritten law the Supreme Court imposed high standards of care for the industry, the general picture in assessing the government's conduct in the context of governmental failures on the basis of the general negligence rule is one of restraint. Several claims have been dismissed, such as claims in the context of Q fever, deaths connected to asbestos, and the above-mentioned claim on the influence of the tobacco lobby on governmental policies.[75] Hartlief even stressed that although it goes too far to speak of a de facto governmental immunity, liability will only be accepted in exceptional cases in which the government went far over the line.[76]

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72 Rb. The Hague 25 January 2017, ECLI:NL:RBDHA:2017:587, no. 5.9; Hof The Hague 12 January 2016, ECLI:NL:GHDHA:2016:25; see also HR 9 July 2010, ECLI:NL:HR:2010:BL3262, *NJ* 2015/343, comm. T Hartlief (*Vuurwerkramp Enschede*); HR 2 June 2017, ECLI:NL:HR:2017:169.

73 GE Van Maanen, above n. 69, 51–54.

74 Rb. North Netherlands 1 March 2017, ECLI:NL:RBNNE:2017:715.

75 Hof The Hague 12 January 2016, ECLI:NL:GHDHA:2016:25; Rb. The Hague 25 January 2017, ECLI:NL:RBDHA:2017:587; Rb. The Hague 9 November 2015, ECLI:NL:RBDHA:2015:12746.

76 T Hartlief, above n. 25, 167.

https://doi.org/10.1017/9781780686370.017 Published online by Cambridge University Press

Courts often reiterate the general rule of the *Kelderluik* factor that the mere (that is, unqualified) likelihood of a risk does not as such make the government's behaviour tortious[77] and they allow governmental agencies great discretionary power, especially in cases were damages are claimed (see also section 16.5.4).[78] Moreover, the relativity requirement (that is, the requirement that the norm that is invoked by the injured party protects/aims to protect the specific interests that are allegedly invoked) is often a barrier to a successful claim against the government.

The net result is that government liability for an alleged governmental failure is hard, if not impossible, to establish. Here courts follow, although without referring to it, Van Boom and Giesen's argument that there should be less room for accepting liability for a failure to regulate and to implement supervision structures in general, whereas liability for a failure to take enforcement actions upon concrete indications of wrongful behaviour by industry could be accepted more easily. Although the assessment of an alleged failure to regulate is to a large extent a factual question and embedded in the specific circumstances of the risk problem, the general picture is one of restraint. This is especially so when there is regulation in place and/or some safety measures have been taken, but where it is argued that the level of protection of this regulation is too low, which was the case in the claims related to asbestos risks and Q fever risks. As has been addressed above, some commentators argue that this approach is incompatible with the European Convention on Human Rights.

A recent exception to the above, and perhaps a situation where the government indeed went far over the line, is a ruling of the District Court of North Netherlands. On the basis of article 6:162 CC, the Court held that, after a severe earthquake in 2012 and the subsequent advice of the mining supervision authority to reduce the intensity of gas extraction, the state unlawfully failed to protect its citizens from the real mental and physical threats that were brought about by the extraction of gas and the subsequent earthquakes. The claim for damages against the state was, however, dismissed on causation grounds.

Another important exception to the foregoing is the *Urgenda* ruling of the District Court of The Hague. In that extraordinary case, the Court derived the state's obligation to reduce its greenhouse gas emissions by 25% before 2020 from the general negligence rule and held that the Dutch climate change policy is in

[77] See for instance HR 9 July 2010, ECLI:NL:HR:2010:BL3262, NJ 2015/343, comm. T Hartlief (*Vuurwerkramp Enschede*), no. 3.5; Rb. The Hague 25 January 2017, ECLI:NL:RBDHA:2017:587, no. 5.9.

[78] HR 17 December 2010, ECLI:NL:HR:2010:BN6236, *NJ* 2012/155, comm. T Hartlief (*Wilnis*); HR 30 November 2012, ECLI:NL:HR:2012:BX7487, *NJ* 2012/689 *(Dordtse paalrot*); HR 12 July 2013, ECLI:NL:HR:2013:102, *RvdW* 2013/955 (*Plakoksel*); HR 9 May 2014, ECLI:NL:HR:2014:1091, *RvdW* 2014/691 (*Fietsersbrug over de Dommel*); HR 4 April 2014, ECLI:NL:HR:2014:831, *NJ* 2014/368 (*Reaal/Deventer*).

breach of the doctrine of hazardous negligence. The outcome of this case could, inter alia, be justified by the fact that the Court based its verdict on generally accepted rules and principles of unwritten law that are developed under the general negligence rule, for instance in relation to asbestos risks. Seen from this angle, the Court 'just' applied the law as it is and hence was justified in offering judicial protection. The fact that the verdict clearly has policy implications does not change this position.[79] Moreover, in reaching this verdict, international climate treaties and human rights treaties were also of importance. Although the international treaties that were invoked were not directly applicable, in construing the duty of care of the state the Court held that these treaties provide an informational background for its assessment. Consequently, the principles and obligations enshrined in these laws have a 'reflex effect' in national law and thus give guidance on the application of the negligence rule.[80] A major point of criticism of *Urgenda* is that the general negligence rule and the general rules that are applicable under this rule[81] have been developed for bipolar relationships between two parties; the rule, however, is too vague for examining wrongfulness that also affects the interests of third parties and transcends the bipolar nature of reasoning in traditional tort lawsuits. That is, the rule is too vague for multipolar risk-reasoning. For this reason, the state's duty of care cannot be derived from the negligence rule. It is expected that this point will be crucial in the proceedings on appeal, which are currently pending.

16.5.4. RATIONALE BEHIND THE RESTRICTIVE APPROACH

There are several explanations for the above-described reluctance of courts to uphold a claim (for damages) against the government in the context of alleged governmental failures.

According to Hartlief, the most important reasons for this restrictive approach are the exceptional position of the government and the fear that ex post facto, with the benefit of hindsight, more stringent standards would be accepted than those that would have been accepted ex ante.[82] Moreover, the fact that the government is – most often – not the main wrongdoer in any real sense explains the courts' reluctance and also the difference between the way courts handle risk-regulatory lawsuits against private actors and against the government. For instance, some scholars accept the doctrine that a victim first has to sue the

79 Rb. The Hague 24 June 2014, ECLI:NL:RBDHA:2015:7145, paras. 4.94–4.102 of the judgment.
80 Ibid, para. 4.43. In the tobacco lobby case, the District Court rejected this reflex effect because the relevant provisions did not contain a clear and concrete assessment framework.
81 L Bergkamp, above n. 17; R Schutgens, above n. 17.
82 See T Hartlief's comment on HR 9 July 2010, ECLI:NL:HR:2010:BL3262, *NJ* 2015/343 (*Vuurwerkramp Enschede*).

https://doi.org/10.1017/9781780686370.017 Published online by Cambridge University Press

primary tortfeasor before he or she should have a successful claim against the government.[83] For victims, the actual effects of this argument could have tragic consequences: legal proceedings against the state are mostly prompted by the fact that the primary tortfeasor does not exist anymore or is not solvent.

Above all, the insight that governmental liability has macro-consequences is an important explanation for the courts' restrictive approach.[84] Although courts do not always explicitly refer to it, the potential economic consequences (damages ultimately have to be paid by taxpayers) of redressing governmental failures and the fact that liability influences other policy domains make courts reluctant. In other words, multipolar risk-reasoning dominates actions against the government. When examining wrongfulness, courts take into account the financial means of the governmental agency and allow them a wide range of discretionary power, especially when the liability is based on general liability clauses. In addition, civil courts generally lack the tools to gather the information that is needed to assess the policy implications of a specific ruling: often the parties to the proceedings simply do not bring forward the information needed. This lack of knowledge, or the fear of the risk of it, might also be an explanation for the courts' reluctance to uphold claims against the government.

However, under some circumstances policy considerations bear less weight, for instance when clear and applicable (human rights) standards are involved and infringed. A striking, but also exceptional, example in this regard is a Supreme Court case on the massacre in Srebrenica. Relatives of one of the victims successfully claimed damages for the failure of the Dutch battalion of the United Nations (Dutchbat) to maintain the safe area around the Bosnian town of Srebrenica; the result of that failure was the massacre of male Muslims by the Bosnian Serbs on 13 July 1995. Here the state made the argument that allowing the claim would undermine its willingness to engage in future peace operations, and hence might lead to a less safe world. The Court dismissed this argument because, even if there had been enough evidence to this effect, it does not justify an infringement of the human rights that were at stake.[85]

16.6. PRIVATE LAW AT THE CROSSROADS

When assessing the role of Dutch courts in risk regulation, one could take one of two perspectives: a perspective related to the separation of powers doctrine, which generally favours a restrictive approach to judicial risk regulation, and

83 See J Spier's comment on HR 7 October 2016, ECLI:NL:HR:2016:2283, *NJ* 2017/73, no. 7.

84 J Spier, 'Gedachten over een vastgelopen stelsel' (2014) 2 *Aansprakelijkheid Verzekering & Schade*.

85 HR 6 September 2013, ECLI:NL:HR:2013:BZ9228, *NJ* 2015/276, comm. NJ Schrijver, no. 3.18.3; see also Hof The Hague, 27 June 2017, ECLI:NL:GHDHA:2017:1761.

the perspective of the courts' role in offering judicial protection, which favours a progressive stance in risk-regulatory lawsuits.

In the context of risk-regulatory lawsuits against private actors, courts do indeed fill the regulatory gaps that originate from governmental inaction and follow a progressive (that is, victim-friendly) approach. In such cases, the courts engage in bipolar risk-reasoning and are not reluctant to recognise and redress the effects of inadequate risk management by private actors. Only recently has this progressive course been analysed in respect of its regulatory effects and the tenability of this course from a multipolar risk-reasoning perspective; however, overall this course is generally accepted. In cases against the government, courts acknowledge their competency in (offering judicial protection in) risk-regulatory lawsuits against the government, even if these lawsuits might have policy implications. However, in specific cases against the government, the courts are rather reluctant to uphold a claim, due inter alia to the societal consequences of upholding a claim against the government. Hence, here one observes that, alongside considerations related to the separation of power doctrine, multipolar risk-reasoning leads to a (more) restrictive approach.

Combining these two insights, the crossroads at which private law currently stands when it comes to the issue of judicial risk regulation becomes clear. Whereas society expects a progressive judicial course in regulating risks, the courts, especially when it comes to directly regulating risks by initiating proceedings against the government, follow a restrictive approach. However, given the increasing societal attention and call for judicial risk regulation, it is only a matter of time before citizens and interest groups will try to change this approach of the courts, especially again in risk-regulatory lawsuits against the government. Paradoxically, due to governmental inaction and political disagreement over the courts' role in regulating risks, it is most likely that in the end it will be up to the courts themselves to determine their role.

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